DRN-4104727

Financial Ombudsman Service

The complaint

Dr R complains that he was mis-sold a Free-Standing Additional Voluntary Contribution (FSAVC) plan in 1997 by an appointed representative of TenetConnect Limited (TCL) when he should've been advised to purchase "added years" from his NHS Pension Scheme.

In this complaint Dr R is represented by a claims management company, but for clarity I'll refer to all actions and correspondence as being made by Dr R himself.

What happened

Dr R joined the NHS Pension Scheme when he took up employment in 1996. He was 29 years and 6 months old at the time.

In January 1997 Dr R received pension planning advice from TCL. He was advised to make a monthly gross contribution of £75 into an FSAVC, and these commenced on 1 February 1997 (plan number ending 0412). At the time of the advice Dr R was receiving an annual salary of £21,000 and making a contribution of 6% of his salary into the NHS Pension Scheme.

On 16 February 1998 Dr R signed an application form to increase his gross monthly FSAVC contributions to £103.90 (supplementary plan number ending 9589). At this time his annual salary was £27,000.

On 31 July 2007 Dr R purchased an additional four years of pensionable service from his employer. This increased his pension contribution by 4.6% of his pensionable salary, payable until he reached 60 years old.

On 26 January 2021 Dr R, via his representative, complained to TCL that his FSAVC plans (0412 and 9589) were mis-sold, as the full risks, implications and alternatives were not explained to him, and he hadn't been provided with a comparison of the relevant in-house options available through his employment.

In its final response to his complaint, TCL upheld Dr R's complaint about plan 0412. It offered a refund of the additional charges Dr R had made over what he would've had to make under the in-house AVC scheme. However, TCL said it had seen no evidence that it had been responsible for the advice to take out the top-up plan 9589, and as such had not considered this aspect of the complaint.

Unhappy with this response Dr R complained to our service on 4 November 2021. He said that TCL comparing the charges was unfair, and that the correct advice at the time would have been for him to have bought added years. So the loss calculation should be completed on an added years basis.

On 17 March 2022 Dr R's FSAVC became paid up as he no longer wished to contribute to it.

On 31 March 2022 Dr R asked our service to also consider the circumstances of the purchase of plan 9589 as TCL had denied responsibility for advising on this.

Having considered all the circumstances, our Investigator thought Dr R's complaint should be upheld, and that TCL should undertake a loss calculation on the basis that Dr R ought to have been advised to purchase added years to the same value as his contributions to the FSAVC plan. And on balance, our Investigator thought it likely that TCL had been responsible for the advice in 1998 for plan 9589, so the loss calculation should take into account both plans.

TCL responded by saying it thought Dr R's complaint should be time-barred under the Regulator's rules. It thought this because as Dr R had bought added years in 2007, so he ought to have been aware at this point that there may be cause for concern about the original advice. And as he hadn't complained within three years of 2007, he'd made his complaint too late.

But our Investigator didn't agree. He thought, in summary, that the 2007 mailing received by Dr R from the NHS, which prompted him to purchase the four added years, hadn't included any comparison with the benefits or cost over an FSAVC. So, our Investigator wasn't satisfied that awareness of an added years arrangement in 2007 meant that Dr R ought to have had a wider awareness that this arrangement was more suitable for him than the FSAVC. And this was supported by the fact that Dr R had continued contributing to the FSAVC alongside his additional occupational pension contributions.

But TCL didn't agree and asked for our Service's jurisdiction over the complaint to be considered by an Ombudsman, so the complaint was passed to me.

I reviewed all of the available evidence and thought that the complaint was made in time so was one our Service was able to consider. I set out in an email my initial thoughts as to why the complaint had been made in time, and informed TCL that on this basis I would proceed to consider the merits of Dr R's complaints. I invited it to submit any further information or arguments. But TCL didn't agree with my position regarding our jurisdiction. It maintained that it thought that the literature (which is no longer available) which would've accompanied the sale of the added years to Dr R in 2007 probably would have included information about the alternatives available. So this would've given Dr R reason to consider his FSAVC as potentially a wrong option.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Can we consider this complaint?

The rules under which the Financial Ombudsman Service operates are set out in the DISP section of the FCA Handbook. DISP 2.8R deals with whether a complaint has been made in time.

DISP 2.8.2 R states, as far as is relevant here:

> *The ombudsman service cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(2) more than:*
> *(a) Six years after the event complained of; or, (if later)*
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> *…*

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or

…
(5) the respondent has consented to the Ombudsman considering the complaint…

In this case, the initial advice was given in 1997. The complaint was referred to our service in 2021, which is more than six years after the advice. So, the issue I have to decide is whether Dr R ought reasonably to have known he had cause to complain more than three years before he did. And for clarity, for the purposes of the three-year part of the rule, *ought reasonably to have known* doesn't mean Dr R needed to know that the FSAVC was unsuitable, be that because the alternative in-house options were cheaper or, for another reason, more suitable; he just needed to have an idea that something might be wrong.

TCL have argued that because Dr R was aware of the option of buying added years in 2007, he ought reasonably to have been aware there may have been a problem with the original advice to purchase an FSAVC. So, TCL argued that he had three years from 2007 to make his complaint.

Whilst I can see Dr R had purchased four added years in 2007, I don't agree this was evidence which showed he was aware, or ought reasonably to have been aware of cause for complaint about the 1997 advice. I do not think that simply knowing that an alternative option existed meant that this ought to have led someone to question whether this was a better option than that advised over ten years previously by a qualified professional, or ought to at least have been considered. And whilst I cannot know for certain what extra information, over and above that which I've already seen, was included within the NHS mailing, I think it most likely this was just generic information points about the added years that could be purchased. And this information would not have likely referred to Dr R's specific circumstances. I also think that had Dr R had any doubts about the FSAVC plan in 2007 and had compared this to the added years, he most likely would've ceased his contributions at that point, and bought additional years to the value of his FSAVC contributions. But he didn't, which suggests he thought everything was as it should be.

I'm satisfied, for the reasons set out above, that Dr R most likely only became aware he may have cause to complain about the advice he was given to purchase an FSAVC in 1997, when he was advised this in 2021. And I've not seen anything which leads me to believe that he ought reasonably to have been aware he may have cause to complain before this time. So this complaint is within the jurisdiction of this service and is one that I have a lawful basis to consider the merits of.

Was the FSAVC mis-sold?

TCL have not been able to provide any documentation from the advice or sales process in 1997. The advice was undertaken by an appointed representative of TCL, and although it is unfortunate in this case, given the passage of time it is not unusual for the documentation to no longer exist. Some of the plan's documentation has been obtained from the FSAVC provider. Where there is a lack of evidence, I have based my decision on the balance of probability, or what I thought was most likely to have happened at the time given the evidence I do have.

TCL disputes that it was responsible for the advice process which led to Dr R increasing his contributions to £103.90 in 1998. But having reviewed the policy documents from the provider, I think, on the balance of probability, that it did advise Dr R on this. I think this because although the name of the advising business is missing from the 1998 document unlike the 1997 document, the same adviser has signed both applications as verifying Dr R's salary, and has done so as an Independent Financial Adviser. So I'm satisfied it's likely that TCL was involved in the process and advised Dr R to increase his FSAVC contributions in 1998.

Because TCL has no point of sale documentation it has upheld Dr R's complaint that the FSAVC in 1997 was mis-sold. But it has said that he would've most likely have taken an in-house AVC had he been properly advised. So the deficiencies in the advice process are not disputed here. What needs to be decided is whether Dr R, if he had been properly advised about all his options, would have selected to contribute to an in-house AVC, or would have bought added years.

In order to decide what I think is most likely, I need to consider everything that I know about Dr R's circumstances at the time. I can see from what he and TCL have told me, and from the provider's documentation he was:

- 29 years old and married.
- Employed as a Doctor in the NHS.
- a member of the NHS Pension scheme for one year, and had a normal retirement age of 60.
- only able to accrue about 30 years 6 months normal pensionable service out of a maximum 40 years.

It should be noted that TCL were Independent Financial Advisers, and as such were subject to much more stringent requirements than a tied adviser would've been. A proper and regulatory compliant IFA-led advice process in 1997 would have required TCL to have established what in-house alternatives to the FSAVC were available. And it would have had to discuss the specific differences between them with Dr R when making its recommendation. The regulator stipulated that the discussion should have included the following:

- The difference in charges and expenses between the FSAVC and AVC
- The choice of available investments
- The availability of added years and the number of years that could be purchased
- The degree of personal control and privacy
- The age at which benefits could be taken
- The degree of portability on changing jobs or becoming self-employed.

So in addition to comparing the cost of an FSAVC with the available in house AVC, the adviser was required to have found out how many added years Dr R could've purchased, and advised that these would be paid for as a percentage of his salary. It should also have explained the features of added years which were relevant to Dr R and how they would provide him a guaranteed benefit, as opposed to the FSAVC or AVC where growth was dependent on investment performance.

Dr R was 29 years old and had been in the NHS scheme for one year. The maximum number of years that could be accrued in the scheme for a maximum pension was 40 years. So given Dr R's age when he joined, he was only going to be able to accrue 30 years and 6 months through normal contributions. This is a relatively large shortfall, and one that I think is reasonable to assume, had he been properly advised, he would've been aware could have had a significant impact on his potential retirement income. So I'm satisfied Dr R would have been looking for the most appropriate way to increase his retirement provision.

At the time of the advice in 1997 Dr R was provided an FSAVC illustration of potential investment growth and benefits payable aged 65 using low (6%), medium (9%) and high (12%) growth rates. These, based on total contributions of £31,200 provided estimated benefits at 65 of an additional annual pension of £6,960 (low), £15,100 (medium) and £33,200 (high). But the adviser made an error here in Dr R's normal retirement age (it was 60), so these projections were not truly representative of Dr R's retirement provision and so weren't reliable. So I can see how, given the potential investment growth he was presented with, these would have been an attractive proposition, especially as they also provided certainty in contribution levels, as these would not have to increase over the term of the plan. And it is likely, given that the charges associated with the AVC were probably less that the FSAVC, that the projected growth from the AVC, had this been presented to Dr R, would've been more attractive still.

So there were advantages to the purchase of an AVC over added years. In addition to the potential growth, the AVC would also have allowed Dr R some choice around the investments within his pension. I can see from the provider document that he chose a 'Growth' pension fund – I think this indicates that he was prepared to take some investment risk in order to achieve growth. And he would have been able to pause, increase or decrease his contributions in response to changes in his circumstances. But the purchase of added years did not allow this flexibility – they would be based on a set percentage of his salary up until he reached 60 years old.

However, it is significant that at the time of the advice the NHS pension plan provided defined benefits on retirement. This meant that Dr R's pension would be based on the highest salary he achieved in his last three years of service, and these benefits were guaranteed and not subject to investment volatility.

So, whilst I acknowledge that contributions into an AVC could have given certainty around contribution levels and flexibility should Dr R's circumstances change, I don't think on balance, that this would have been critical to him. I think this because he was starting out in a career in the NHS, and whilst moving employers during the course of a working life is quite common with some employees, this doesn't tend to be the case with doctors. And in all likelihood, Dr R would have expected his salary to rise quite significantly. So, whilst added years may have appeared more expensive at the outset, I don't think affordability would have been a strong consideration for him. I think it more likely that the potential for a valuable guaranteed larger pension from the purchase of added years would have been the most attractive option. And as Dr R was married this would've also meant an increase to the guaranteed spouse's death benefits.

Any additional years purchased would provide guaranteed retirement benefits. Given the fact that Dr R was going to be short of over nine years pensionable service at his retirement, I think it is likely that had he been aware he could purchase additional years, without taking any investment risk to achieve his goal, it is likely that he would have done just that.

Having taken everything into consideration, I think on balance, that had Dr R been suitably advised, he would have purchased added years instead of an FSAVC or AVC. But having satisfied myself of this, I have to consider how many added years Dr R would probably have bought.

Information from the scheme (dated 1998) showed that Dr R would've had to pay an additional 0.72% of his salary for each additional full year purchased. If he had wished to purchase his entire shortfall of 9 years 6 months this would have meant an approximate additional 6.84% of his salary, which would have equated to about £120 per month – considerably more than the £75 gross contributions he made to the FSAVC in 1997.

Because of the passage of time and the lack of sales documentation I cannot know for sure what his level of disposable income was. But I do think it likely that Dr R would've made as large a contribution as he felt affordable at the time, and the only guidance I have is the amount he actually paid into the FSAVC. I think it likely that had he been able to afford more in 1997, his contributions would have reflected that, as indeed they did when he increased them the following year as a result of an increased salary. So I think it likely that Dr R would have purchased added years up to the value of the contributions he made to the FSAVC in 1997 and further in 1998.

Putting things right

A fair and reasonable outcome would be for the business to put Dr R as far as possible, into the position he would now be in but for the unsuitable advice.

TCL must undertake a redress calculation in line with the regulator's FSAVC review methodology on an added years basis. This involves using, in part, the Pension Review methodology as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. The calculation should take into account the fact that Dr R bought four additional added years in 2007, and consider whether he would have received more than this had he bought them in 1997 and 1998 to the value of his FSAVC contributions. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Dr R's acceptance of the decision.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Dr R's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Dr R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I consider that total fair compensation requires payment of an amount that might exceed £160,000 I may only recommend that the business pays the balance.

My final decision

I require TenetConnect Limited to pay redress to Dr R as calculated using the methodology set out above.

Determination and money award: I require TenetConnect Limited to pay Dr R compensation as set out above, up to a maximum of £160,000.

The compensation resulting from the loss assessment must, where possible, be paid to Dr R within 90 days of the date TenetConnect Limited receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes TenetConnect Limited to pay Dr R this compensation.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000 I also recommend that TenetConnect Limited pays Dr R the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes TenetConnect Limited to pay Dr R from the date it receives notification of his acceptance of the decision, as set out above.

If Dr R accepts my determination, the money award is binding on TCL. My recommendation is not binding on TenetConnect Limited. Further, it’s unlikely that Dr R can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Dr R may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Dr R to accept or reject my decision before 26 May 2023.

Chris Riggs
Ombudsman