

The complaint

Mrs M complains about the advice she received from The Prudential Assurance Company Limited in 1998 to open a Free-Standing Additional Voluntary Contribution (FSAVC) pension plan. She says she should have been advised to contribute to the most suitable in-house Additional Voluntary Contribution (AVC) scheme instead.

What happened

In 1998 Mrs M met with a representative from Scottish Amicable (now Prudential).

At that time, Prudential completed a personal financial review which recorded information about her circumstances. Amongst other things it noted;

- Mrs M had been employed as a teacher for seven and a half years and was a member of their pension scheme.
- She was married with an expected retirement age of 60.
- She had a balanced attitude to investment risk. And a disposable income of around £200 a month.

Following the review Prudential recommended Mrs M open a FSAVC with them and contribute £100 a month towards her plan.

Mrs M complained to Prudential in 2022. In summary she said the FSAVC wasn't suitable for her. She said if she'd been advised correctly, she'd have contributed to the most suitable in-house AVC scheme instead.

In response Prudential said Ms M would have been provided with literature when she joined her occupational pension scheme about different ways to contribute. They said their adviser wasn't able to give advice about the employer's in-house options but the documentation from the time shows that in-house options were discussed.

Prudential went on to say Mrs M's funds were invested in line with her attitude to investment risk which was categorised as 'balanced' at the time.

Mrs M remained unhappy with Prudential's response and so brought her complaint to our service.

I sent Mrs M and Prudential a provisional decision on this complaint. In it I explained that I didn't think Prudential had followed the regulators guidance at the time. I thought that if they had, Mrs M was likely to have purchase the in-house AVC instead of an FSAVC. I've copied the relevant extracts from my provisional decision below.

My provisional decision

"In reaching my findings I've taken into account relevant law and regulations, regulator's

rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. Of particular note I've considered the Regulatory Update 20 (RU20) sent by the Personal Investment Authority (PIA) in May 1996.

Having done so, I'm minded to uphold this complaint. I'll explain why.

The advice was given by a representative of Prudential, so they were a tied adviser. And in RU20 the PIA said that before selling an FSAVC tied advisers should:

- Draw the consumer's attention to the in-house alternative*
- Discuss the generic differences between the two routes '(taking account, among other things, of the features described in this article)'*
- Direct the consumer to their employer or the occupational pension scheme for more information on the in-house option*

RU20 also referred to the lower charges under an in-house AVC in general terms. It said:

'Charges under in-scheme AVCs will usually be lower than those under FSAVCs, reflecting economies of scale, rebated commission or a contribution to administration expenses by the employer. Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefits to the client.'

I wasn't present at the meetings between Mrs M and the adviser in 1998 so I don't know exactly what was said. The recommendation letter from Prudential didn't contain much detail either. However, the relevant part says;

2. In-house and Added Years AVC Schemes

a. We discussed the advantages and disadvantages of making Additional Voluntary Contributions to your company scheme or taking a separate Free Standing Additional Voluntary Contribution. You are aware that there may be the possibility of buying past years or having added year options within the company scheme, however you are particularly attracted to the flexibility of a Free Standing Additional Voluntary Contribution. This flexibility includes portability and wider investment choice, together with the option of taking the benefits from this Free Standing AVC early, if you left your current employment, whereas you could not with an AVC. The charges within this plan may be greater than under your company scheme. You can obtain more information on your company scheme from your Employers or Scheme Trustees.

Although Prudential didn't have to investigate whether the in-house options were better than the FSAVC as they were a tied adviser, they needed to discuss the generic benefits of them, pointing out the key areas as I've mentioned above.

The PIA had made it clear in RU20 that the difference in charges between AVC's and FSAVCs were likely to 'exert the greatest impact' on which route was better for the client. So in my view, discussions about the differences in the two routes needed sufficient focus on the fact that charges were likely to be lower in an in-house AVC. And the effect of the charges in both routes needed to be discussed.

While Prudential recorded that the 'advantages and disadvantages' of making AVC's and FSAVCs were discussed. I don't think that demonstrates that the effects of charges in both routes were sufficiently explained.

*The wording Prudential used should have clearly demonstrated that the in-house option was 'likely' to be more cost effective. But instead Prudential said (with my emphasis) 'The charges within this plan **may** be greater than under your company scheme.'*

I think Prudential's use of the word 'may' instead of 'likely' was likely to unfairly influence Mrs M into taking out the FSAVC rather than investigating the in-house AVC herself. And the PIA had warned that 'Care should be taken not to make inaccurate or unfair criticisms of the in-scheme AVC.'

In using the wording as they did, I don't think Prudential acted fairly or in line with the regulator's expectations at the time. So, I'm minded to uphold this complaint for that reason.

Of course, I have to consider whether Mrs M would have gone ahead with opening the FSAVC anyway.

As the regulator noted, the in-house AVC was likely to have lower charges. And I think that was likely to have the greatest impact on whether Mrs M chose the in-house option. But Prudential noted that the advice to open an FSAVC was also given on the basis that Mrs M wanted flexibility in portability and investment choice as well as being able to take the benefits early.

However, Mrs M was in a profession where she was likely to remain for her career. So, I don't think portability was truly important for Mrs M at the time. Likewise, I've seen no evidence Mrs M was an experienced investor or had any particular interest in where her funds were invested. Once opened the FSAVC was invested in mainstream funds, and I think it's likely similar funds would have been available in the in-house AVC. So, the FSAVC offered a flexibility of investments I don't think Mrs M truly needed.

Finally, Prudential said the FSAVC offered the option to take benefits early. But I think that statement was misleading. At that time any benefits from the FSAVC had to be taken at the same time as benefits were being drawn from the main occupational scheme.

If Prudential had given Mrs M suitable advice, I think it's likely she would have investigated and opted for an in-house option instead.

I can't say exactly what Mrs M would have done so I base my decision on what I think is most likely to have happened based on what I do know about in-house schemes at the time.

I understand it's likely the in-house options would have included both in-house AVC's and added years. At the time of the sale projected investment returns for an in-house AVC would have been 6% for lower, 9% for middle and 12% for upper returns. I think the illustrated returns would have been attractive to Mrs M.

In contrast at the time of the advice I think added years would have looked expensive compared to the projected returns and benefits of the AVC. I think it's unlikely Mrs M would have wanted to spend a potentially greater monthly amount to get the same projected benefits from added years as she could have had from the in-house AVC.

Therefore, I conclude that had Prudential acted in line with the regulator's expectations Mrs M would have opted to contribute to an in-house AVC over the FSAVC that she was sold. So, Prudential must put Mrs M as close as possible into the position she would have been in, had she made the same level of contributions to the in-house AVC instead of the FSAVC."

The responses to my provisional decision

Mrs M agreed with my provisional decision and had nothing further to add.

Prudential disagreed with my provisional decision. In summary they said:

- They didn't think the use of the words 'may be' would have been enough to influence Mrs M into choosing the FSAVC over the in-house AVC. They say the wording used still implies there's a chance it would be cheaper, and Mrs M was advised to speak to her scheme for more details.
- There's a previous ombudsman's decision that agreed the information recorded in the financial review was enough to satisfy the requirements at the time. Although in that case they had used the word 'likely' rather than 'may be'.
- Regarding the flexibility and portability of the FSAVC they say that if Mrs M felt they didn't apply, she could have raised that at the time. It's unknown what fund options were available in-house. And if she felt she would remain in the teaching profession for her career, she would have mentioned it at the time. They say it's not uncommon for teachers to change their jobs and careers.

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.

And I've also re-considered my provisional decision in light of the arguments put forward. Having done so, my decision remains the same.

I explained in my provisional decision that the regulatory guidance at the time of the sale of Mrs M's policy made it clear that the generic differences between FSAVCs and the in-house options should be discussed fairly. The guidance demonstrated that advisers knew the charges for in-house AVC's were likely to be cheaper. And those charges were likely to have had the greatest impact on whether a client chose to investigate the in-house options over an FSAVC. So, the discussion needed to be fair and balanced.

I wasn't present at the meetings between Mrs M and Prudential so I can't say what was said. However, there is written evidence from the time which I would expect to be a clear representation of the discussions that were had. And for the reasons I've already explained in my provisional decision, I think the written evidence suggests Mrs M was unfairly influenced not to investigate the in-house options further.

According to Prudential's recommendation, the in house-option 'may' have been cheaper. But in order to meet the expectations of the regulator, Prudential's adviser needed to be clear that it was likely the in-house options would be cheaper. So, I don't think Mrs M was treated fairly in the absence of such a clear and unambiguous explanation.

Prudential gave details of a similar complaint which wasn't upheld. While it's the case that each complaint is assessed on its individual circumstances and merits, I don't think Prudential's submission adds any weight to their argument. As in the case they've quoted, Prudential said the charges in their FSAVC were 'likely' to be higher than the company scheme. So, the ombudsman felt in that case Prudential met their obligations.

Prudential say Mrs M had various fund options in the FSAVC and they are unaware of what fund options were available in the in-house AVC. And that portability was also one of her objectives.

As I said in my provisional decision, I think the effect of charges on her funds is likely to have had the biggest impact on whether or not Mrs M chose an in-house AVC or FSAVC. I've seen no evidence from the time that Mrs M intended on leaving the teaching profession. And she doesn't appear to have had a particular interest in the fund choices she had. Had Mrs M not been unfairly dissuaded from seeking further information on the in-house options through the wording used by Prudential. I think it's likely she would have found a suitable fund in the in-house AVC to invest in.

So, to put things right Prudential must put Mrs M as close as possible into the position she would have been in, had she made the same level of contributions to the in-house AVC instead of the FSAVC.

Putting things right

Prudential should undertake a redress calculation in accordance with the regulator's FSAVC review guidance, incorporating the amendment below to take into account that data for the CAPS 'mixed with property' index isn't available for periods after 1 January 2005.

The FSAVC review guidance wasn't intended to compensate consumers for losses arising solely from poor investment returns in the FSAVC funds, which is why a benchmark index is used to calculate the difference in charges and (if applicable) any loss of employer matching contributions or subsidised benefits.

In our view the FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So where the calculation requires ongoing charges in an investment-based FSAVC and AVC to be compared after 1 January 2005, Prudential should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into Mrs M'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 Mrs M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax-free and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

My final decision is that I uphold this complaint and direct The Prudential Assurance Company Limited to compensate Mrs M as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 7 July 2023.

Timothy Wilkes
Ombudsman