DRN-4210526

The complaint

Mr W complains, through a representative, about the advice he received in 1999 from Zurich Assurance Ltd (trading as Allied Dunbar Assurance) to start a Free-Standing Additional Voluntary Contributions (FSAVC) plan.

Although Mr W is represented in this complaint, for ease of reading I will generally refer to all of complainant's representations as being made by Mr W.

What happened

Mr W was a member of a final salary occupational pension scheme (OPS). In January 1999 he met with Zurich to discuss making additional provision for his retirement. A "fact find" was completed showing Mr W's circumstances at the time were as follows:

- he was 52 years old and expected to retire at 65;
- married with two dependent children;
- employed earning around £35,400 per year; and
- joined his employer's final salary occupational pension scheme (OPS) in 1996 and also began making contributions of around 5% of his salary to an additional voluntary contribution (AVC) plan through his employer. The scheme retirement age was 65.
- Mr W also had a paid-up FSAVC plan.

Zurich recommended that Mr W take out its FSAVC plan and invest 100% in its Managed Fund. The recommendation document produced at the time says under the "Notes or Calculations" section:

> 1) *Occupational scheme info enclosed*
> 2) *AVC info enclosed*
> 3) *Other paid-up arr. info enclosed*

The "Reasons Why" section of the recommendation states:

> *Benefit from regular advice on pension planning*
> *pension all remuneration*
> *flexibility to incr. reduce or stop contrib.*
> *flexibility if changing employer*

This document also indicates that Mr W was provided with a copy of a booklet titled "Topping up your Occupational Pension Scheme Benefits" on 29 January 1999.

Mr W accepted the advice to take out the Zurich FSAVC plan at a subsequent meeting in February 1999. Mr W started contributing £288.16 per month to the plan from 1 March 1999 and he took his pension benefits in 2013.

In January 2023 Mr W complained to Zurich that it had failed to provide him a suitable recommendation in 1999. In short, he said that Zurich didn't comply with the regulator's requirements by failing to provide sufficient information about the differences between the in-house AVC and FSAVC plans. He also said that Zurich was mistaken about how much he could have contributed to the in-house arrangement.

Zurich didn't agree and said that it had complied with the regulatory guidelines in place at the time the FSAVC plan was sold. Specifically, it noted that it was required to point out that the charges which apply to in-house schemes are generally lower than an FSAVC arrangement and said that specific reference was made to this in the "Topping up" booklet provided to Mr W at the time of advice.

Dissatisfied with this response, Mr W brought his complaint to this service for an independent assessment. One of our investigators looked into things and concluded that the information Zurich provided Mr W about the likely differences in costs between the AVC and FSAVC plans wasn't sufficient to meet the regulatory guidelines. And, since he thought that cost was likely to have been a key factor in Mr W's decision, his view was that Zurich's advice wasn't suitable for Mr W. So he asked Zurich to put things right.

Zurich didn't agree and reiterated why it believed the advice met the regulatory requirements in place and explained that it was suitable because it met his objectives at the time, including benefitting from regular pension planning advice, the ability to pension all his remuneration, the ability to increase, reduce or stop his payments and flexibility to change employers.

The investigator considered this but wasn't minded to change his view so the complaint has been referred to me for a final decision.

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.

Having done so, I agree with the investigator and for the same reasons he's explained.

When considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

It is my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

In order to decide this complaint, I need to consider whether Zurich complied with the applicable regulatory guidance in place at the time of the advice. And if there were any failings, whether this made a difference. In particular, would Mr W have still taken out the FSAVC plan?

The advice was provided by Zurich in 1999. So the relevant regulatory guidance was contained in the May 1996 Regulatory Update 20 (RU20), which was produced by the Personal Investment Authority (PIA), one of the predecessors to the current regulator – the FCA. RU20 gave guidance on the procedures for advising clients on the relative merits of FSAVC and in-house AVC plans. The guidance set out different requirements depending on whether the adviser was an independent financial adviser or a 'tied' adviser – one who is employed by, or contracted to, one organisation and can only recommend and sell that organisation's products. In this case the adviser was tied.

For tied advisers, RU20 specified that:

> *A representative should not recommend his own company's FSAVC until he has:*
>
> - *drawn the client's attention to the in-scheme alternative;*
> - *discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article); and*
> - *directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.*
>
> *When these procedures are followed and documented, it is not necessary for the representative to undertake a full comparison of the in-scheme AVC and his company's FSAVC.*

Among the features referred to in the article were that charges under in-house AVC plans would usually be lower. The regulator also expected the client's advice file to include documentary evidence demonstrating that the requirements of RU20 had been met.

So Zurich needed to make Mr W aware of the in-house AVC plan and discuss the generic features of the in-house option and the FSAVC plan. The key difference I would've expected Zurich to discuss with Mr W would be the likelihood of lower charges for the in-house AVC arrangement. And I would expect Mr W to have been directed to his employer and/or occupational pension scheme trustee to obtain more information on his in-house options.

From the evidence I've been provided from the time of advice, I can't reasonably say that the procedures required by RU20 were followed. There is very little documentation of what, or even whether a discussion took place about the differences between in-house AVC plans and the FSAVC. Zurich points to the "topping up" booklet and the fact Mr W signed a recommendation saying he'd been given it and that he understood his choices. But there's nothing in the recommendation about charges, and nothing about any detailed discussions. So I'm not persuaded I can reasonably say Zurich did enough here.

I don't think simply providing a booklet is enough for Zurich to comply with the regulator's requirements either, as the guidance requires discussion, not just the provision of information. And like our investigator, I think the booklet could be misleading as although it does indicate that charges are usually lower for in-house AVCs than its FSAVC it then goes on to say in the same paragraph that over the life of the plan these may even out. In my view, this implies that there may be no difference in the overall charges, which I don't think is consistent with the guidance requirement.

So I'm not persuaded that Zurich complied with the guidance in relation to the sale of the FSAVC to Mr W.

I now need to decide whether, if Mr W had been appropriately advised, it would've made a difference. Zurich asserts that the advice was suitable for Mr W because of his particular circumstances and objectives. I've carefully considered this, but I don't agree. I will explain.

Mr W's priority at the time of advice was to provide an income in retirement in addition to what would be provided by his OPS. Although the recommendation said that the FSAVC was recommended because Mr W could benefit from ongoing pension planning advice, I'm not persuaded that this was an objective of Mr W's rather than a "nice to have". Even still, I've not seen sufficient evidence to persuade me that ongoing pension advice was actually part of the FSAVC arrangement in any event.

Likewise, Zurich said the FSAVC was appropriate because it gave Mr W the flexibility to change employers. But I've seen nothing in the documentation from the time of the advice which persuades me that Mr W was likely to change employers such that he needed this flexibility.

Furthermore, I can't agree that the FSAVC plan allowed him to contribute more than would be possible in an in-house arrangement. Before April 2006 people could contribute up to 15% of their salary and other pensionable benefits to their OPS, an AVC and an FSAVC combined. So if Mr W was already contributing 5% to his OPS, he could only contribute an additional 10% irrespective of whether it was to an AVC or FSAVC plan. And either plan allowed Mr W to stop, increase or decrease his contributions.

Given that Mr W's priority was to increase his income in retirement and the regulator's view that a critical factor that drove the choice between FSAVCs and AVCs was that the fees were usually lower, I think it is more likely than not that Mr W would've chosen to contribute to the AVC plan if he'd been properly advised. As noted above, I haven't seen anything to suggest that Mr W had any expectation that he was likely to change professions in the future and so be unable to contribute to the AVC.

So I don't think that Zurich did enough to provide Mr W with the information he needed to decide upon its recommendation. And I think that if it had met its responsibilities under the regulations Mr W would most likely have chosen to use the OPS AVC scheme to receive his additional pension contributions. So I uphold Mr W's complaint.

Putting things right

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

Zurich 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, Zurich 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 Mr W'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 Mr W 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 his 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 Mr W's complaint and direct Zurich Assurance Ltd to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 1 September 2023.

Jennifer Wood
Ombudsman