DRN-4239611

The complaint

Mrs B complains that the compensation Liverpool Victoria Financial Services Limited ("LVFS") has offered to her, in respect of some advice she was given in 1997 about making additional pension contributions, is insufficient.

What happened

Mrs B has been assisted in making this complaint by a claims management company. But in this decision, for ease, I will generally refer to all communication as if it has been with, and from, Mrs B herself.

I issued a provisional decision on this complaint in June 2023. In that decision I explained why I thought the complaint should be upheld and what LVFS needed to do in order to put things right. Both parties have received a copy of the provisional decision but, for completeness, I include some extracts from it below. In my decision I said;

> *Mrs B is a teacher, and a member of her occupational pension scheme ("OPS"). In 1997 she met with LVFS to discuss making additional contributions to supplement her pension savings. LVFS recommended that Mrs B should start to pay free-standing additional voluntary contributions ("FSAVCs"). Mrs B accepted that advice, and opened an new pension plan with LVFS.*
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> *In 2004 Mrs B had a further meeting with LVFS. The notes from the time suggest that Mrs B had told LVFS that she was concerned her FSAVC plan would no longer meet her needs at retirement. LVFS says that Mrs B wanted a capital lump sum instead. So it recommended that she cease her FSAVC payments and instead make monthly payments to an endowment plan. Mrs B ultimately decided to reject that advice and continued making her FSAVC payments instead.*
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> *In 2022 Mrs B complained to LVFS about the advice she'd been given in 1997. She said that the information she received was insufficient, and with better information she'd have made additional contributions to her OPS instead. LVFS accepted her complaint since it said that it was unable to evidence that Mrs B had been given enough information when the FSAVC was sold. It said that it thought she would have instead purchased "added years" from the OPS if she had been better informed. So it offered to pay Mrs B some compensation.*
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> *But LVFS pointed out that Mrs B had received some further advice in 2004. It said that advice had clearly set out all the options that Mrs B had to make additional contributions to her OPS. So LVFS said that it thought it would be reasonable to cap its compensation offer at the time of the further advice. Mrs B was unhappy with the application of that cap, so she brought her complaint to us.*
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> *The initial advice was provided by LVFS in 1997. So the relevant regulatory guidance was contained in the May 1996 Regulatory Update 20 ('RU20'), which was produced by the Personal Investment Authority, one of the predecessors of the current regulator – the Financial Conduct Authority. RU20 gave guidance on the procedures*

for advising clients on the relative merits of FSAVCs and AVCs provided by occupational pension schemes. 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 to LVFS.

For tied advisers, RU 20 indicated that before selling an FSAVC advisers should:

- *draw the client'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); and*
- *direct the client to his employer, or to the OPS, for more information on the in-house option.*

Among the features referred to in the article was that charges under in-house AVC's would usually be lower. In particular the article 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*

The regulator indicated that it would expect the advice file to have documentary evidence demonstrating that the procedures in the update had been followed.

So LVFS needed to make Mrs B aware of the in-house AVC and to discuss the generic features of the in-house options and of the FSAVC. The key difference I would've expected LVFS to discuss with Mrs B would be the likelihood of lower charges for the in-house AVC. I would also expect Mrs B to have been directed to her employer and/or occupational pension scheme trustee to obtain more information on her in-house options.

As I said earlier, LVFS has said that it cannot reasonably conclude that these requirements were met. It advised Mrs B to take its FSAVC plan and so she might not have been given sufficient opportunity to consider the other options offered by the OPS. LVFS has quite rightly offered Mrs B compensation on the basis that, with more information, she would likely have started to purchase added years benefits from the OPS.

In 2004, LVFS gave Mrs B some further advice. It says that it thinks that advice was compliant with the regulatory requirements at the time. Those requirements, in terms of making additional pension provision, were the same as I've set out above.

The information that LVFS recorded at the time of that advice suggested that the advice Mrs B had requested it to provide had changed since 1997. In 2004 Mrs B asked LVFS to look at ways in which she could generate a capital lump sum when she decided to stop teaching, whereas in 1997 she had asked for advice regarding increasing the income she would receive in retirement.

In 2004 LVFS advised Mrs B to stop making her FSAVC payments since those would be unlikely to generate the capital lump sum that she was seeking. Instead it *recommended that Mrs B should start paying into an endowment policy that would provide her with a lump sum when she reached 55 years of age. But in this decision I don't think I need to consider whether that advice was appropriate. As I've said, ultimately Mrs B decided to reject that advice and continued making her FSAVC payments.*

So what I need to decide is whether the additional information Mrs B was given in 2004 was sufficient to correct any failings that had happened seven years earlier. If, as LVFS suggests, that was the case, then I think it would be reasonable for LVFS to cap the compensation it has offered to Mrs B in relation to the 1997 advice at that point. But, as I will now go on to explain, I don't think that the 2004 advice was sufficient to limit the compensation that LVFS need to pay.

It doesn't seem to me that, as part of its advice in 2004, LVFS gave any indication to Mrs B that something might have gone wrong in 1997. It didn't tell Mrs B that she had been making additional pension contributions in a manner that might not have been in her best interests. The only reason that it recommended Mrs B should change the way in which she was saving for retirement was because of a change in how she wanted her savings to support her once she stopped working. She had changed from seeking additional income during her retirement, to seeking a capital lump sum at the start of her retirement.

And I think it is important that this was the basis upon which the advice was given to Mrs B in 2004. LVFS was no longer suggesting that she might want to compare the benefits of its FSAVC plan with additional contribution options being offered by the OPS such as AVCs or added years. Neither of those options, nor her existing FSAVC plan, would meet her stated need at that time for a capital lump sum when she reached 55 years of age.

I have no way of knowing how pressing a need that really was for Mrs B, or whether it was simply documented by the advisor in order to support the recommendation that was being made to take an endowment plan. But Mrs B didn't implement the recommendation, so that must cast some doubts on whether it was something that she really wanted at that time.

It does seem, from the advice report that was produced on 2004, that the information given to Mrs B might have met the regulator's expectations for the sale of a FSAVC plan. It appears that Mrs B was directed to compare a FSAVC plan against what could be offered by her OPS. But I'm not persuaded that was sufficient, against the background of the advice that was actually being provided to Mrs B. The OPS didn't offer a comparable alternative to the endowment plan she was advised to take. So there would have been little incentive for Mrs B to undertake the sort of research with the OPS that might have been appropriate had she been advised to take, or even continue, her FSAVC plan.

So I don't think that it would be reasonable to conclude that the discussions Mrs B had with LVFS in 2004 might have caused her to reconsider the advice she'd been given seven years earlier. At that time there is no evidence she was directed to consider whether the options offered by the OPS would be more suitable for her circumstances. And I don't think that the discussions in 2004, about meeting an entirely different financial need, might have made her think she needed to recheck a decision she'd previously made.

So I currently think that LVFS should determine whether its advice in 1997 has caused Mrs B to lose out, and if so pay her fair compensation for the entire period to the date of any final decision along these lines.

I invited both parties to provide us with any further comments or evidence in response to my provisional decision. Mrs B has said she is happy with my provisional findings. But she has raised an objection to the way I have said the compensation should be calculated. LVFS doesn't agree with my provisional findings and has made some additional comments. Although I am only summarising here what each party has said I want to reassure them both that I have read, and carefully considered, their entire responses.

Mrs B has said that she thinks it would be fairer for the compensation to simply reflect an extension of the compensation that was originally offered, based on the same assumptions, rather than a new calculation using updated market information. She says that it seems unfair that the compensation she might receive now will most likely be less than she would have been paid if the complaint had been settled in the way I'm directing when it was first made.

LVFS says that it thinks two separate discussions took place in 2004. It says it seems its advisor discussed both the endowment plan, and Mrs B's options to make additional pension contributions. It says that LVFS shouldn't be held responsible for Mrs B's lack of action in following its recommendation in 2004.

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.

As I explained in my provisional decision, in deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mrs B and by LVFS. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

And I repeat my reflections on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

I've thought carefully about the submissions that have been provided by Mrs B and by LVFS. But those submissions haven't caused me to change my mind about the conclusions that I set out in my provisional decision. But I would like to take this opportunity to provide some additional explanation of those findings.

I accept that it is possible, as LVFS suggests, that the advisor did discuss both additional pension contributions and the endowment plan with Mrs B in 2004. But as I explained in my provisional decision I think the context of those discussions is very important. LVFS didn't give Mrs B any indication in 2004 that the advice she'd received seven years earlier might have been inappropriate, or that the information she'd been given at that time was insufficient. So, since the recommendation she received from LVFS in 2004 was solely in relation to the endowment plan, I can see no reason why Mrs B might have thought it necessary to revisit the earlier advice.

So whilst LVFS might have told Mrs B about the alternative contribution options offered by the OPS it doesn't seem to me that, in 2004, she had any reason to explore them further. I think the time Mrs B might have needed to have those discussion with the OPS had passed a number of years earlier.

Following the meeting in 2004 Mrs B gave LVFS an indication that she intended to stop making her FSAVC payments. But that wasn't because LVFS had told Mrs B that making those payments had not been in her best interests. It was simply providing her with an alternative way of saving for her retirement that would provide her with a different outcome – a lump sum at retirement rather than an ongoing income. It was for Mrs B, with the benefit of a period of reflection, to decide whether to accept that recommendation. Ultimately she decided that the FSAVC plan remained a better option than the endowment plan to provide for her retirement. But I don't think that allows LVFS to remove its liability for the previous omissions when the plan was first sold.

I set out in my provisional decision how I thought LVFS should put things right for Mrs B. The aim of that redress is to put Mrs B back into the position she would have been, had she instead paid added years contributions to the OPS. Ultimately those contributions would have provided Mrs B with an increased income in her retirement. And so it would be appropriate that compensation is designed to allow her to replace that additional income by purchasing an annuity. Since annuity rates have improved over recent months, the cost of that purchase has fallen. That is clearly to the benefit of LVFS as the lump sum it will need to pay will be smaller. But the value of the replacement annuity Mrs B would be able to purchase would be unaffected. So I think it is right that the compensation I am directing is based on the market conditions now, rather than in the past when LVFS made its first offer to Mrs B. Had she wished to accept that offer she could have done so at the time.

So, in summary, I think that LVFS should determine whether its advice in 1997 has caused Mrs B to lose out, and if so pay her fair compensation for the entire period to the date of this final decision as set out below.

Putting things right

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

LVFS 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 Policy Statement PS22/13 and set out in the regulator's handbook in DISP App 4 on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of acceptance of this final decision. If the redress calculation demonstrates a loss, as explained in PS22/13 and set out in DISP App 4, LVFS should:

- calculate and offer Mrs B redress as a cash lump sum payment,
- explain to Mrs B before starting the redress calculation that:
    - redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest the redress prudently is to use it to augment the current defined contribution pension
- offer to calculate how much of any redress Mrs B receives could be used to augment the pension rather than receiving it all as a cash lump sum,
- if Mrs B accepts LVFS's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mrs B for the calculation, even if she ultimately decides not to have any of the redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs B's end of year tax position.

Redress paid directly to Mrs B as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, LVFS may make a notional deduction to allow for income tax that would otherwise have been paid. Mrs B's likely income tax rate in retirement is presumed to be 20%. However, if Ms B would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

Until these calculations are complete, I do not know the value of any compensation that might be payable. Where I consider that total fair compensation requires payment of an amount that might exceed £170,000, I may only recommend that the business pays the balance.

determination and money award: I require LVFS to pay Mrs B compensation as set out above, up to a maximum of £170,000. The compensation resulting from the loss assessment must where possible be paid to Mrs B within 90 days of the date LVFS receives notification of her acceptance of this final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement for any time, in excess of 90 days, that it takes LVFS to pay Mrs B this compensation.

recommendation: If the amount produced by the calculation of fair compensation following this final decision exceeds £170,000, I also recommend that LVFS pays Mrs B 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 LVFS to pay Mrs B from the date it receives notification of her acceptance of this final decision, as set out above.

If Mrs B accepts my determination, the money award will be binding on LVFS. My recommendation will not be binding on LVFS. Further, it's unlikely that Mrs B can accept my determination and go to court to ask for the balance of the compensation owing to her after the money award has been paid. Mrs B may want to consider getting independent legal advice before deciding whether to accept this final decision.

My final decision

My final decision is that I uphold Mrs B's complaint and direct Liverpool Victoria Financial Services Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 28 August 2023.

Paul Reilly
Ombudsman