DRN-4296173

The complaint

Mr P complains that he was advised to take out a Free Standing Additional Voluntary Contribution pension (FSAVC) in 1997 by a company now owned by The Royal London Mutual Insurance Society Limited (The Royal). He said it failed to tell him to consider his employers Additional Voluntary Contribution (AVC) scheme which would have been better for him.

What happened

Mr P said in 1997 he was approached by a tied financial adviser (FA) who recommended he take out an FSAVC. He was an inexperienced investor and was not advised to consider his employers AVC scheme and no benefit comparison was provided to compare the FSAVC and AVC, or to consider the option of added years, nor whether he was already paying the highest employee pension contribution that maximised his employer's matching contribution. Investment risk was not discussed. Had he known he would have opted for added years. Instead he paid higher charges for an FSAVC and these charges were not explained.

The Royal said that the sales representative at the time made a record to show he gave Mr P a leaflet giving details of the options available from Mr P's occupational pension scheme (OPS). The notes of the fact find showed this was discussed. There were also notes to show this was discussed on a call. Mr P had signed a product declaration to say the product had not been recommended to him. It didn't uphold the complaint.

My provisional decision

I issued a provisional decision and said the following

I noted that the investigator concluded that Mr. P had brought this complaint within the timescales set out in the rules that apply to this service. As the Royal did not challenge that conclusion, I had not considered it further.

Secondly, I noted that the investigator concluded that added years would not have been available to Mr. P. His representative had accepted that, so I had not considered that option.

I had however considered the substantive part of Mr. P's complaint, which is that he should have been recommended to take his employer AVC and not the FSAVC he was sold.

To make a financial award I must first decide if The Royal did something wrong. The situation was complicated by the fact the Royal says its adviser did not advise on the FSAVC and Mr. P took it out on an execution only basis and it is not therefore responsible for the suitability of the decision he took.

I noted The Royal was not able to provide a suitability report setting out what it did recommend nor to explain why it did not recommend an FSAVC.

The papers said the following

> *The fact find notes say 'spoke to client several weeks ago about AVC in house but*

client prefers to do FSAVC with (old company name) have told client that he could get better benefit for in-house AVC.

Comments AVC's have been discussed with the customer in accordance with GMC 3516 a copy of the leaflet PP.166 has been handed to the customer.

Completion for a product that was not recommended – Product FSAVC

Although I/ we have applied for a product different from any recommended I confirm such product is/ are suitable to my /our needs and within my/ our financial resources

signed by Mr P 26th June 1997

So, the issue of the availability of an employer's AVC was discussed.

Mr. P was recommended to take out a PEP but is recorded as not recommended to take out an FSAVC, but no reasons or details are given.

I considered the leaflet PP.166 that was referred to. It said the following: -

How can you make additional contributions?

You can do this through your company scheme or take up a separate plan by investing your money in a free-standing pension with the providers such as the CIS. Or you can do both. Whatever you decide you need to consider each type carefully.

What a company scheme can offer.

As each company scheme will differ, you should consider:

- *any special features it may have, such as allowing you to buy added pension years. Your employer may even make extra contributions if you take up an AVC.*
- *That AVC's are group arrangements whereby the expenses are generally very competitive*
- *Where AVC's are invested - in the company scheme itself or with an insurer or building Society.*
- *Your employer can provide you with specific details*

I didn't think this wording was as balanced and clear as it could have been. It did not for example expressly say that the charges for AVCs are usually lower. It did not suggest that the employer might pay some or all of the administration costs whereas FSAVC costs are entirely born by the consumer. Nor did it suggest that AVC charges are in many cases lower or the employer may gain a discount not otherwise available to individual consumers.

Instead the wording suggests he should consider the AVC and the sort of questions to ask. Other than saying the 'expenses are generally very competitive' it did not provide much of a nudge or good reasons why the AVC may well be the better option.

Further I noted it did not point out that for higher rate taxpayers (such as Mr P) the additional contributions obtained through Mr P's pay slip would have received tax relief rather Mr P needing to reclaim the additional tax relief at the end of the tax year.

The fact that The Royal had supplied such a leaflet suggested to me that it was attempting to follow requirements set out by the Personal Investment Authority (PIA) that advisers should in short, maintain a high standard of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and take proper account of the interests of investors.

It said advisers should also have regard to the consumer's financial position generally and to any rights under an occupational scheme. The expectations of the PIA after 1996 were codified in regulatory update 20 regarding Additional Voluntary Contributions. This update made clear that charges in an AVC are usually lower and of all the differences '*this is likely to exert the greatest impact on which route would offer the greater benefits'*

For a tied adviser, as I believe was the case here, the update says that:-

A representative should not recommend his own companies 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 into account among other things, of the features described in this article)*
- *direct 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.

I had also had in mind the regulator requirements that The Royal should communicate with Mr P in a manner that is fair and not misleading.

Based on the guidance and the principles, I didn't think that the leaflet supplied went far enough for the reasons given above. So on balance I didn't think it was clear enough to satisfy those requirements.

I had however considered that The Royal says this was execution only. It said that because it didn't make a recommendation that Mr P should take out an FSAVC. Though I note it went on to provide the only one it could sell as a tied adviser.

It seems to me very unlikely that Mr. P would come up with the idea of an FSAVC himself. We know it was referenced in conversation on two occasions based on the notes in the fact find. He must have reflected on that information in reaching the decision that he did and to that extent he must have relied on it. I said that because based on the evidence this is the information that was available to him when he was making that decision.

It seems clear to me that Mr. P's employer's AVC would most likely have been cheaper than the FSAVC and therefore better for him. There were other good reasons to select an AVC. I say that as I note that Mr. P remained with his then employer for nearly ten years and indeed remained with them for six years after he took out the FSAVC. So, it did not seem that, he had a pattern of frequently changing employers. Further he was a higher rate taxpayer.

Given he did decide to take an FSAVC it didn't seem the information he did receive, was good enough. I said that because I thought The Royal needed to tell him that the in house AVC was likely to be the cheaper option, not just that it might be '*competitive'*. I didn't think giving him a leaflet to nudge him to check was good enough for him to know this.

As he decided to take this option, I thought that on balance he was still more likely than not acting upon the information provided to him by The Royal. So even if Mr. P made his own decision to invest, he was making that decision based on flawed and/or incomplete information provided to him by The Royal.

Had it been made clear that the AVC was likely to be the cheaper option (which the PIA update expressly mentions), on balance having considered all the information, I thought Mr. P would have gone that route.

I thought it was fair and reasonable that I can consider the consequence that Mr P relied on that information and make an award for financial loss and distress and inconvenience.

Financial loss

The purpose of an award for financial loss is to put Mr P as closely as possible back into the position he would have been in but for the error.

The Royal 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, The Royal 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 P'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 P's 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 likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

As Mr P remained with his employer for around six years after he started the FSAVC plan the calculation of loss set out above should be applied only to the investment returns attributable to contributions that he could otherwise have made into his AVC plan. That would mean that contributions made after 31 March 2003 should not be included in this calculation.

I said it would be helpful if before I issue my final decision, Mr P provides copies of his FSAVC plan including current value, investment and contribution history, particularly in the period between the date of opening the FSAVC and 31 March 2003. This is particularly relevant for determining the appropriate period of review for calculating compensation.

Distress and inconvenience

Such an award is to reflect the impact on Mr P not to punish The Royal. I could understand it was frustrating to discover that the AVC option would most likely have been better. But Mr P was not aware of that at the time and it is only since he brought this complaint that it has become an issue. For that reason I think an award of £300 would be fair and reasonable in the circumstances.

I proposed to uphold this complaint and direct that The Royal London Mutual Insurance Society Limited should within 60 days:-

- of this service notifying it that Mr P has accepted my final decision and
- of Mr P completing and returning to The Royal such fact find as it reasonably needs to complete its loss calculations,

pay Mr P

1. £300 for distress and inconvenience and

2. such amount as is calculated in accordance with my section on financial loss as set out above.

3. if The Royal does not make the payments in 1 and 2 above within this time period the amounts payable shall be increased by interest at 8% per annum simple from the date of my final decision to the date of payment to Mr P.

Mr P had nothing to add to my provisional decision.

The Royal did not comment further.

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 there have been no further representations I have not changed my mind.

Putting things right

To put things right The Royal London Mutual Insurance Society Limited should pay compensation on the basis set out in my provisional decision.

My final decision

I uphold this complaint and direct that The Royal London Mutual Insurance Society Limited should within 60 days of the later of:-

- of this service notifying it that Mr P has accepted my final decision and
- of Mr P completing and returning to The Royal such fact find as it reasonably needs to complete its loss calculations,

pay Mr P

1. £300 for distress and inconvenience and

2. such amount as is calculated in accordance with my section on financial loss as set out above.

3. if The Royal London Mutual Insurance Society Limited does not make the payments in 1 and 2 above within this time period the amounts payable shall be increased by interest at 8% per annum simple from the date of my final decision to the date of payment to Mr P.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 10 January 2024.

Colette Bewley
Ombudsman