

The complaint

Mrs M complains that an appointed representative of TenetConnect Services Limited ('Tenet') mis-sold her a Free-Standing Additional Voluntary Contribution (FSAVC) policy in 1992.

What happened

In October 1992 Mrs M received advice from an appointed representative of the M&E Network Limited (now known as Tenet). It recommended an FSAVC with Axa Equity and Law to make level contributions of £40 per month (gross) invested in the with-profits fund.

At the time Mrs M was aged 41, married and working in the education sector. Her salary was £20,400. She had been a member of a public sector pension scheme since August 1974. The scheme received 5% of her earnings and her normal retirement age under the scheme was 60. The policy attracted a service charge of £3 per month.

In August 1993 Mrs M was advised to pay an additional £40 (gross) per month split between the with-profits and equity funds, and increasing in line with National Average Earnings (minimum 5%pa). By this point her contributions to the public sector scheme had increased to 6% and her salary was £20,949.

Mrs M believes that the following year, she had a financial review of her retirement planning with a new adviser. They recommended that she take out a further FSAVC with Scottish Widows. In fact, the information from Scottish Widows suggests that policy was taken out before the Axa one, in November 1989.

In February 1999 Mrs M ceased contributions to both FSAVCs due to their unaffordability. She took early retirement from the public sector scheme at age 57 in 2008. At her 60th birthday in June 2011 Mrs M arranged for a tax-free cash sum and annuity to be bought from the proceeds of the Axa (now Aviva) FSAVC. The same thing happened with her Scottish Widows FSAVC.

Mrs M complained in September 2021, after seeing a social media advert about mis-sold FSAVCs and contacting her claims management company. Tenet initially said that her complaint was time-barred, but one of my colleagues issued a decision on 2 May 2023 concluding that it was brought to Tenet in time.

The complaint was passed to one of our investigators to consider the merits. Tenet has explained it has no documentation from the time of sale other than what it could obtain from Aviva, and a questionnaire it asked Mrs M to complete. Our investigator considered this evidence and thought the complaint should be upheld. In summary, he said:

- The adviser should have understood the benefits of all of the options available to Mrs M for increasing her pension benefits alongside the public sector scheme, and recommended the most suitable of those options.
- It would be fair to expect that an in-house AVC would have offered lower costs compared with the Equity & Law FSAVC, as is typically the case. The FSAVC was noted as having a service charge of £3 per month.

- Buying an in-house AVC would have given Mrs M the same flexibility to invest on a money purchase basis separate to the defined benefits provided under her public sector scheme, and to vary or stop her contributions as needed.
- Mrs M was in a job she was likely to remain in until retirement, so the benefit of having an FSAVC fund which could be 'ported' to a new occupational scheme is unlikely to have held more appeal to her than a potential saving in charges.
- Tenet was required to take this into account in order to provide suitable advice, and as there was no evidence that it did, the advice given to Mrs M was unsuitable for her circumstances.

Tenet didn't agree with the investigator, but it didn't provide any further comments on the merits of the complaint. It has been preoccupied by trying to obtain evidence of any advice a subsequent adviser gave Mrs M when she converted her Aviva policy to an annuity in 2011. This had originally formed part of the basis on which it considered the complaint was brought too late, but which my colleague hadn't found persuasive in her jurisdiction decision.

The investigator contacted Mrs M's subsequent adviser. Although it could find evidence of giving her some advice on other investments – some of which mentioned in passing that she had FSAVCs – it didn't have a record of advising her to buy the annuity. The investigator relayed this information to Tenet, reiterating that there was no evidence that the new adviser told Mrs M that she had cause for complaint against Tenet at the time.

Tenet didn't accept what the investigator said. It knew that Mrs M had confirmed to Aviva that she'd received advice from the new adviser at the time she bought her annuities. So it insisted further evidence must exist. It made no other comments.

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.

I've firstly considered Tenet's further concerns that this complaint was still brought out of time. I agree fully with my colleague's reasoning in her jurisdiction decision of 2 May 2023. As she explained in relation to Mrs M taking benefits from the FSAVC in 2011, there was nothing to suggest that the new adviser reviewed the original advice provided by Tenet, nor would it have been expected to. If, as my colleague accepted at the time, Mrs M had sought advice from that firm on how to access her benefits, that was first and foremost the advice she was expected to receive.

Tenet suspects that the adviser went further than this (as some, of course, might) and highlighted to Mrs M that she might have a case for being mis-sold her FSAVC originally. But I would have to be satisfied that this was more likely than not the case. If I was satisfied of this, then as my colleague explained in her decision, Mrs M's complaint would likely have been brought outside both the six and three year time limit set out in DISP 2.8.2R(2) in the regulator's handbook - and we wouldn't be able to look at the merits of the complaint.

On this point, however, I have to remind Tenet that the subject of this complaint is the quality of advice it gave Mrs M on her FSAVC in 1992. *Not* whether her new adviser did a good enough job of suggesting that she should make a complaint against Tenet (the performance of which, incidentally, would not amount to a regulated activity).

There is no firm evidence that Mrs M's new adviser had any specific contact with Mrs M at the time she bought the annuity at all. Judging by the response our investigator received from the new adviser, they appear to have taken over as the servicing agent on her FSAVC as a matter of course when they obtained policy information at some stage in the advice

relationship. Although Mrs M did write on the form when she converted the FSAVC to an annuity that she had been advised by the new adviser, that doesn't of itself make it so.

Indeed, it seems unlikely that Aviva would have been asking Mrs M who gave the advice, if the new adviser had actually arranged the annuity and sent the paperwork to Aviva on her behalf. On balance, I think it's more likely that Mrs M wrote the new adviser's name on this form because, as a matter of fact, they were her adviser at the time in the general sense. I note that £108 of commission was paid to the new adviser as a result of Mrs M doing this, which is unlikely to have been conducive to a substantial piece of advice being provided.

As I remain of the same view as my colleague that the complaint was brought in time, I've gone on to look at the merits of the complaint.

In 1992, independent advisers were bound by the rules of the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA). These said that an adviser should:

- Not make a recommendation unless it believed, having carried out reasonable care in forming its belief, that no transaction in any other such investment (of which it ought reasonably to be aware) would be likely to secure the objectives of the consumer more advantageously, and
- Take reasonable care to include in any recommendation to a person, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

This meant that an independent adviser such as Tenet should have fully explored the FSAVC *and* the various in-house options in terms of their features and cost. They would then have needed to explicitly compare what the in-house options and what the FSAVC had to offer – and recommend the suitable option for Mrs M.

Mrs M was a member of a major public sector pension scheme and all schemes were required to make an AVC option available. It's likely Mrs M's scheme had the option both of buying 'added years' or making money purchase contributions alongside the scheme. I note Mrs M's representative didn't bring the complaint on the basis that Mrs M would have bought added years, and if they did consider this I would have expected them to investigate the cost of this option (if it was available) and explain why they think Mrs M would have chosen it.

From what I can see, Scottish Widows has upheld a separate complaint Mrs M made about its FSAVC policy in January 2022, and offered compensation which doesn't appear to be on an added years basis. Mrs M's representative says that this is the only letter they have and there is no record of that complaint being referred to our service. I take it from this that Mrs M found Scottish Widows' offer acceptable. So, I've taken from all of this that Mrs M and her representative consider that Mrs M would have been better advised to make additional money purchase contributions alongside the public sector scheme.

Despite the limited information we have, I agree with this. There is clear evidence that the FSAVC incurred costs of £3 per month, which amounted to 7.5% of each gross contribution in the first year alone. The bulk arrangements these schemes negotiated with major insurers such as Prudential were known to have significantly discounted costs, which are unlikely to have been as high as this. Although we don't have any evidence of what advice Tenet gave Mrs M, I find it unlikely that she would have wanted to go ahead with the FSAVC if they'd explained there was a cheaper in-house option, as they should have done. And nor do I think they should have advised her to buy the FSAVC. The fact that she went ahead with the FSAVC suggests to me that it was more likely than not mis-sold.

I've taken into account that, according to the information from Scottish Widows and contrary to Mrs M's recollections, she may already have had one FSAVC before Tenet advised her. Even if this is the case, Tenet was expected to provide her with suitable advice. The likelihood, given that Scottish Widows has also offered compensation, is that Mrs M was still unaware of the potential benefits of the in-house AVC at the time Tenet advised her.

Putting things right

In my view, Mrs M should have been advised to join the in house money purchase AVC option, and when given that advice I consider she would likely have followed it. Tenet must therefore 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. The FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So, Tenet 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 Mrs M's likely income tax rate in retirement – which the investigator said was 20% and neither party has disagreed. So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

I uphold Mrs M's complaint and require Tenet to pay her compensation as 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 30 October 2023.

Gideon Moore
Ombudsman