DRN-4353020

## The complaint

Miss B complains Zurich Assurance Ltd mis-sold her a Free Standing Additional Voluntary Contribution ('FSAVC') plan in 1991 and gave her unsuitable advice in 1999 to increase her contributions to that plan.

Miss B is represented here by a claims management company ('CMC'), but for ease I'll only refer to Miss B.

## What happened

Miss B was a member of the Teachers Pension Scheme ('TPS'). In 1991 she met with a business Zurich later became responsible for and took out an FSAVC plan in order to top up her pension benefits. Miss B met again with Zurich in late 1998 and early 1999, following which she increased her contributions to her FSAVC plan.

In 2002, Miss B stopped contributing to her FSAVC plan as she says she moved area and job, which reduced her income. Miss B says she didn't contribute to anything else instead. Miss B's FSAVC plan remains invested.

In 2022, Miss B complained to Zurich that its 1991 advice to buy an FSAVC plan was unsuitable as it didn't discuss the in-house alternatives with her.

Zurich thought Miss B had complained too late under the time limit rules, because it was more than six years after the 1991 advice, and more than three years after it had given her information in 1998 and 1999 that ought reasonably to have made her aware she had cause for complaint about the 1991 advice.

Specifically, Zurich said the booklet it gave Miss B in 1998 explained the differences between FSAVCs and in-house arrangements which normally meant in-house AVCs were a better choice, and discussed added years. As a tied adviser, Zurich could only advise on the options available with Zurich, but the booklet directed Miss B to contact her employer for more information about its in-house options so Miss B could consider what was best for her. Zurich said it gave Miss B time to do this, and that Zurich's record of its following meeting with Miss B showed it had explained to Miss B the advantages of joining one of her employer's in-house arrangements and that she was eligible for in-house AVCs. But Miss B had decided to increase her FSAVC contributions for the flexibility to stop and start her contributions.

Miss B came to our Service. She thought she'd complained in time, as she became aware there was a problem with Zurich's advice when she saw her CMCs advert in May 2022. She said that if Zurich had given her enough information in 1998/1999 to realise there was a problem with the 1991 advice, she wouldn't have increased her FSAVC contributions. Zurich hadn't told her in 1991 or in 1998/1999 about the cost comparison implications between in-house AVCs and FSAVCs. If it had, she wouldn't have chosen an FSAVC plan given it offered less value for money.

Our Investigator thought Miss B had complained about the 1991 advice too late, as it was more than six years since the advice was given, and more than three years since she ought reasonably to have been aware she had cause for complaint about it.

Miss B disagreed. In summary, she thought neither the 1991 nor the 1999 advice complied with the regulator's requirements for tied advisers. That if the 1991 advice had been compliant, she'd have chosen added years and not an FSAVC plan, so likely wouldn't have met Zurich in 1998/1999. And the 1999 advice wasn't compliant, so it shouldn't be used to time bar her complaint about the 1991 advice. Because providing a booklet wasn't enough, Zurich also needed to have discussed the particular impact of charges with Miss B. And the booklet was misleading in any case, as it suggested the lower charges for an in-house AVC could even out over the plan's life to leave no overall difference, and it should have used stronger wording than charges 'may' be lower. Miss B thought none of the information Zurich gave her in 1998/1999 ought reasonably to have made her aware she had cause for complaint about the 1991 advice. Miss B pointed to other decisions made by Ombudsmen at our Service in separate complaints which she thought supported her complaint.

But our Investigator still thought Mis B's complaint had been brought too late. As agreement couldn't be reached, it came to me for a decision. After considering the evidence and arguments, I told both parties I thought Miss B's complaint about Zurich's 1991 advice to buy an FSAVC plan had been brought too late and that her complaint about its 1999 advice to increase her FSAVC plan contributions shouldn't be upheld.

Miss B disagreed. In summary, she said my conclusions were inconsistent with decisions made by other Ombudsmen at our Service, and provided details of a decision made by another Ombudsman at our Service in a separate complaint, which she thought further supported her complaint. That the 1999 advice endorsed the 1991 advice, so it was unclear why it should have made Miss B aware the 1991 advice wasn't suitable. That I'd not addressed the quality of the booklet provided to Miss B in 1998 as part of the 1999 advice process. And the evidence didn't show Zurich had discussed with Miss B, in 1998/1999, the difference in charges between AVC and FSAVC plans, which the regulator thought was the most important difference. So Zurich's 1999 advice hadn't followed the regulator's requirements. Therefore, it was unfair to conclude that a complaint about the 1991 advice had been brought too late on the basis the 1999 advice was compliant.

After further consideration of all the available evidence and arguments, I contacted both parties to explain why I now thought Miss B's complaint had been brought in time and that if Miss B had been given all the relevant information during the 1991 advice, she would more likely than not have opted for the in-house AVC option, as opposed to purchasing an FSAVC plan or added years. I said that Zurich should put things right by undertaking a redress calculation and compensating Miss B if this showed a financial loss.

Miss B agreed. But Zurich didn't. It said it hadn't considered the merits of the complaint or commented on what I'd said about that because it still thought the complaint about the 1991 advice was out of time. Zurich thought the 1998 booklet contained enough information to have reasonably made Miss B aware she had cause for complaint, particularly when taken with the further specific discussions she had with Zurich. In particular, Zurich said:

- The booklet did say charges over the life of the plan may even out and other factors needed to be considered, but this was true and did not weaken the booklet's message that in-house AVC charges may be lower.
- It wasn't the purpose of the booklet to give an opinion about what was best for Miss B - that was for the adviser during their discussions with Miss B based on information she provided about her circumstances. And the booklet had said Miss B should contact her

employer for details of the in-house options so she could compare the benefits and options available to her.

- The booklet should have put Miss B on the path to discovery that she had cause for complaint, given it said her employer may have agreed enhanced terms in the form of reduced charges and might possibly match her contributions, highlighting this normally makes the in-house AVC scheme the better choice, and set out the benefits and possibility of buying added years. And Miss B didn't need to have had certain knowledge of a specific cause for complaint, just the sense that something wasn't right.
- Neither Zurich or our Service were present for the discussions between Miss B and the Zurich adviser, so we must consider the available evidence and what's reasonable in light of it.
- There was no requirement for customers to sign fact finds or recommendation reports, and the credibility of these wasn't reduced here because Miss B hadn't signed them. Miss B would have provided the information they contained during discussions with the adviser. And it's unlikely comparisons weren't discussed, particularly since the booklet Zurich gave Miss B a few months earlier said she should contact her employer for information about the in-house options alternatives.

I'm now in a position to make my 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.

Firstly, I acknowledge Miss B has sought to support her complaint by pointing to decisions made by other Ombudsmen at our Service in separate complaints, and is concerned about our Service's consistency in what she sees to be similar or identical complaints. But it remains the case that our Service's approach is to consider the particular circumstances of each individual complaint. And sometimes, the evidence in each complaint is very finely balanced, or perhaps incomplete so that conclusions must be reached on the balance of probabilities. That said, I won't comment on decisions made by other Ombudsmen at our Service, because my role here is to consider Miss B's particular complaint.

Having done so, I'm satisfied Miss B's complaint has been brought within the time limits. The Dispute Resolution (DISP) rules our Service must follow are set out by the regulator, the Financial Conduct Authority. DISP 2.8.2 says that, unless a business consents, our Service cannot consider a complaint if it's been referred to us,

*"more than:*

*(a) six years after the event complained of; or (if later)*

*(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;"*

*"unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R was as a result of exceptional circumstances"*

Miss B's complaint is that Zurich mis-sold her an FSAVC plan in 1991 and then gave her unsuitable advice in 1999 to increase her contributions to that plan. Miss B referred this complaint to our Service in 2023, which is clearly more than six years later. So, Miss B's complaint is out of time under the six-year part of the rule. Therefore, I need to consider the three-year part of the rule.

Miss B says she first became aware there might be a problem with Zurich's 1991 and 1999 advice when she saw her CMCs advert in May 2022. But under the three-year part of the rule, I'm required not only to consider when Miss B did become aware she had cause for complaint, but also when she *ought reasonably* to have been aware she had cause for complaint.

Zurich says it gave Miss B sufficient information in 1998/1999 to make her aware of the differences between the FSAVC and her employer's in-house options, so she should have complained within three years of this at the latest.

So in order to consider whether Miss B's complaint has been brought in time, I need to consider whether Miss B was properly informed in 1998/1999 about the important differences between the in-house options and the FSAVC.

It's not disputed that Zurich was a tied adviser here. The rules for tied advisers selling FSAVCs were introduced 1988 by the Life Assurance and Unit Trust Regulatory Organisation ('LAUTRO'). These said advisers should maintain high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. And that firms should have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme, and give the consumer all information relevant to their dealings with the representative in question. So, this means tied advisers like Zurich should have known that 'in-house' AVC options would likely be available to consumers like Miss B.

The rules also said that in addition to highlighting the benefits of the FSAVC, advisers should mention the generic benefits of the in-house options. These generic benefits would include:

- Money purchase AVCs could potentially offer lower charges than the FSAVC.
- The availability of 'Added years' in the OPS.
- That the consumer's employer might match or top-up the amount the consumer paid into either in-house option.

When the Personal Investment Authority ('PIA') took over from LAUTRO it adopted these rules. And in 1996 it issued a policy statement, Regulatory Update 20, which gave guidance on the procedures it expected tied advisers to follow when selling FSAVCs. The PIA said that before selling an FSAVC tied advisers should:

- Draw the consumer's attention to the in-house AVC options.
- Discuss the differences between the FSAVC plan and the in-house options in generic terms, including the likely lower charges of in-house AVC scheme.
- Direct the consumer to her employer or occupational pension scheme trustees for further information about the in-house AVC option.

In particular, 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've considered the 'Topping up your Occupational Pension Scheme Benefits' booklet that Zurich's records show it provided to Miss B on 4 November 1998. Miss B doesn't dispute receiving this booklet, but says it wasn't worded clearly or strongly enough. For its part, Zurich says the booklet should have put Miss B on the path to discovery that she had cause for complaint, given the booklet said her employer may have agreed enhanced terms in the form of reduced charges and might possibly match her contributions, highlighted this normally makes the in-house AVC scheme the better choice, and set out the benefits and possibility of buying added years.

I can see the booklet explained Miss B could top up her TPS pension benefits in different ways, by choosing between an in-house AVC set up by her employer alongside her occupational scheme, and an FSAVC. And it went on to compare these two in general terms. It said that for in-house AVCs:

- *"Your employer may have agreed enhanced terms with the insurance company, in the form of reduced charges. This may mean that the charges levied on contributions to an in-house AVC are lower than those charged under the [FSAVC], particularly in the early years, although over the life of the plan these may even out."* The booklet went on to say the charges shouldn't be looked at in isolation and other factors should be considered, including availability of advice, employer matching contributions and contributions flexibility.
- *"A few employers are prepared to pay additional contributions (which may be subject to a maximum amount) specifically for members who are contributing to an in-house AVC scheme. This normally makes the in-house AVC scheme the better choice."*
- An in-house scheme might offer the option of buying 'added years' of pensionable service.

So, I'm satisfied the booklet drew Miss B's attention to the in-house AVC and added years options. And I agree with Zurich that the booklet also said Miss B should contact her employer for details of the in-house options so she could compare the benefits of all her options. But I don't agree with Zurich that the booklet should have put Miss B on the path to discovery that she had cause for complaint.

I say this because in my view, the booklet didn't make clear that the in-house AVC scheme likely had lower charges. Instead, the 'charges' section of the booklet says they 'may' be lower, and this 'may' is further undermined and minimised by the booklet going on to say the charges may even out over the life of the plan and weren't the only factor to consider. I note the later and separate 'employer contributions' section of the booklet says *"A few employers are prepared to pay additional contributions (which may be subject to a maximum amount) specifically for members who are contributing to an in-house AVC scheme. This normally makes the in-house AVC scheme the better choice."* But it doesn't say whether this applied to Miss B, and it suggests that in-house AVCs normally being a better choice is to do with employer contributions rather than charges, as it makes no mention of charges. Given all this, I'm not persuaded the booklet made clear the likely lower charges of in-house AVC scheme.

As Zurich agrees, the booklet isn't personal to Miss B or her circumstances. Nor does it set out an opinion on what option would be most suitable for Miss B. And I'm mindful that Zurich had already given Miss B advice in 1991 that resulted in her buying an FSAVC plan. Bearing all this in mind, I'm not satisfied the 1998 booklet ought reasonably to have made Miss B aware that in-house AVC options might have been more suitable for her in her particular circumstances.

But Zurich argues that as well as providing Miss B with a booklet, it also discussed the difference in in-house AVC and FSAVC charges with her in 1999 – it says it's unlikely it didn't discuss these differences with Miss B, particularly since the booklet it gave her a few months earlier said she should contact her employer for information about the in-house options alternatives. Miss B says there isn't evidence of such a discussion in 1998/1999, so Zurich hadn't followed the regulator's requirements.

As Zurich highlights, neither Zurich or our Service were present in the discussions between its adviser and Miss B. So, I've considered the documentary evidence available. Having done so, I'm not persuaded there's enough evidence for me to conclude Zurich had a discussion with Miss B in 1998/1999 about the differences between in-house AVCs and FSAVCs, including charges.

For the 1999 advice, Zurich completed its initial 'fact find' document on 15 October 1998 and completed its 'fact find update' on 15 February 1999. The initial fact find records details of Miss B's employer's scheme, including that Miss B had the option to buy added years. But this was captured at the very beginning of the 1999 advice process and while this was probably information obtained from Miss B, it doesn't contain anything to suggest that Zurich had a discussion with Miss B that covered the differences between the FSAVC plan and the in-house options, including the likely lower charges of in-house AVC scheme.

On 22 February 1999, Zurich completed a 'recommendations' document. In a section titled 'notes or calculations', this recorded that *"[Miss B] is eligable [sic] to contribute to her company scheme in the form of AVCs."* and went on to list the benefits to her, which included "*Charges are low due to being in a group scheme", "Clients can buy back yrs [sic]", and "Early retirement can be taken, but AVCs income must be taken at the same time as main scheme benefits."*

I'm not persuaded this is sufficient evidence that Zurich more likely than not discussed these points with Miss B. The title of the section these points were recorded in suggests it was a section intended more for the adviser to refer to than a record of a discussion with Miss B. And there's no reference anywhere in the document to a discussion being had with Miss B that covered these points. In addition, while Zurich says it wasn't required to ask Miss B to sign the 'recommendations' document, it's still the case that the document doesn't contain any note by Zurich or any signature or declaration by Miss B to say she'd read the 'recommendations'. And Zurich hasn't provided any evidence to show it provided Miss B with a copy of the 'recommendations' document.

Taking all this into account, I'm not persuaded there's enough evidence for me to be satisfied that during its 1999 advice process, Zurich had a discussion with Miss B that covered the differences between in-house AVCs and FSAVCs, including the charges. Further, I don't think there was anything in the 1999 advice process that ought reasonably to have made Miss B aware she had cause for complaint about either the 1991 or the 1999 advice.

I've thought about whether there is anything else that ought reasonably to have made Miss B aware she had cause for complaint about either the 1991 or the 1999 advice.

Following concerns about mis-selling, the regulator told businesses to carry out a review of some FSAVC plans sold between 29 April 1988 and 15 August 1999. The main aim was to review the plans of consumers who might have lost matching contributions or subsidies that their employer would have paid had an AVC plan been taken out instead. The review was mostly concluded by 2004. I've seen nothing in the evidence provided by Zurich and Miss B to suggest Miss B was invited to have her FSAVC plan reviewed. Therefore, I think it's unlikely a review was carried out. So I don't think that would have acted as a trigger point for starting the three year time limit for this complaint.

In addition, I've seen nothing to suggest Miss B was an experienced investor or knowledgeable about pensions and AVCs. Or that she was provided with any other information that ought reasonably to have made her aware she had cause for complaint about the 1991 or the 1999 advice. Miss B says she discovered there might be a problem with Zurich's advice when she saw her CMCs advert in May 2022. Taking everything into account, I'm satisfied this was the first thing that ought reasonably to have made Miss B aware there might be a problem with the advice she'd received from Zurich. Miss B then raised her complaint with Zurich in 2022, less than three years later.

Therefore, I'm satisfied Miss B has brought this complaint in time under the three-year part of the rule. Given this, I've considered the merits of Miss B's complaint about Zurich's advice. And having done so, I'm satisfied this is a complaint that should be upheld.

As I've already explained, I'm not satisfied that Zurich's 1999 advice process included a discussion with Miss B that covered the differences between in-house AVCs and FSAVCs, including the charges.

And I'm not satisfied Zurich had such a discussion during its 1991 advice either. Because there's nothing in the evidence provided to our Service by Zurich in relation to the 1991 advice that suggests Zurich had a discussion with Miss B that covered the differences between in-house AVCs and FSAVCs, including the charges. So I can't reasonably conclude from this that Zurich had the discussions with Miss B that the regulator required it to.

Therefore, I've thought about whether Miss B would most likely have opted for one of the in-house options rather than the FSAVC, if Zurich had complied with the regulator's requirements in 1991. And I think that if the advice given to Miss B in 1991 had been compliant and she'd been provided with information about the likely differences in charges and expenses between the FSAVC and an in-house AVC, then I think it's more likely than not she wouldn't have opted to take out an FSAVC.

I say that because, given what I know of Miss B's circumstances at the time of the 1991 advice, an in-house AVC seems to have been a better option for her. Her sole objective was recorded as *"planning for retirement".* And in-house AVCs usually had lower charges than FSAVCs, meaning more of Miss B's contribution would have been invested into her pension fund for retirement. So I don't think Miss B would have opted for an FSAVC that would cost more and meant less of her contributions went towards her pension fund.

Some occupational pension schemes offered an alternative to AVCs known as added years, where additional contributions could be used to purchase additional years of service in the occupational scheme. And Miss B says she would have opted for added years rather than FSAVCs or AVCs, if Zurich's 1991 advice had complied with the regulator's requirements. I've considered this, but I don't agree.

That because the evidence provided to me by Zurich shows that at the time of the 1991 advice, Miss B was age 29 and had two years' service in the TPS, and that she wanted to retire at age 55. I don't think the amount Miss B was contributing to her FSAVC plan would have been enough to buy the added years she'd need to reach the maximum number of years' service in the TPS. Further, the cost of buying added years is determined by government actuaries, and is based on a set of conservative assumptions. This means added years would have seemed expensive when compared with the potential benefits available from money purchase options like the FSAVC or AVC. And at the time of the sale, it would've been expected that the AVC scheme would produce greater benefits on retirement as investment returns were expected to be high. So I think it's more likely Miss B would've opted to invest in the in-house AVC option, as opposed to buying added years.

For these reasons, I think the 1991 advice was unsuitable and I'm satisfied that if Miss B been given all the relevant information during the 1991 advice, she would more likely than not have opted for the in-house AVC option, as opposed to purchasing an FSAVC plan or added years. It therefore follows that there wouldn't have been an FSAVC plan for her to increase her contributions to in 1999.

**Putting things right**

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 Miss B'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 Miss B 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**

For the reasons set out above, I uphold this complaint and require Zurich Assurance Ltd to pay Miss B the compensation amount as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 13 October 2023.

Ailsa Wiltshire

**Ombudsman**