DRN-4377367

The complaint

Mrs E is unhappy that Mercer Ltd (or a predecessor business of Mercer) advised her to take out a Free Standing Additional Voluntary Contribution (FSAVC) policy, which was unsuitable for her needs, and failed to advise her of more appropriate and/or cheaper options.

What happened

Mrs E started working as a teacher in 1975 and had been contributing to her Occupational Pension Scheme (OPS) since then. In 1991, when aged 37 years, she wanted to increase her retirement provision, and so approached a financial advisor who worked for a business, subsequently acquired by Mercer Ltd. For ease of understanding, I'll refer to Mercer throughout this decision.

Mercer's advisor recommended Mrs E take out an FSAVC policy with Norwich Union (now Aviva). She paid £64.67 per month into the plan between May 1991 and March 1997, increasing to £66.97 per month until payments ceased in December 1999.

In November 1998, Mrs E also took out a further policy, this time an Additional Voluntary Contribution (AVC) policy with Prudential. She paid monthly contributions of £112.00 into this plan between January 1999 and December 1999.

In 2011, Mrs E started taking benefits from both policies. From the FSAVC, Mrs E took £3,725.55 in tax free cash (TFC), with the remaining sum of £11,173.65 used to purchase an annuity with another provider. From the AVC policy, she took £519.15 in TFC, with the remaining sum of £1,557.45 used to purchase a further annuity with the same provider.

In November 2022, Mrs E became aware, having seen media adverts at the time, that she may have a cause for complaint about the recommendation she was given by Mercer to take out the FSAVC, so (with the assistance of her representative – for ease of reference, I'll refer only to Mrs E in this decision) she complained to them. In summary, Mrs E said:

- Mercer's advisor didn't accurately assess her attitude to risk (ATR).
- Because Mrs E was likely to remain in her current teaching role, there was no reason for her to take out a 'portable' FSAVC.
- The advisor didn't consider the benefits of an AVC scheme at the time of the advice.
- The advisor didn't alert Mrs E to the difference in charges between an FSAVC and AVC.
- There is no evidence other, more suitable alternatives were discussed. Had they been, Mrs E would likely have chosen to contribute to an AVC option.

Mercer responded, making the following points:

- Due to the passage of time (the advice was provided 32 years ago), they were unable to uncover the original sales documentation. They noted too that Mrs E had also been unable to provide any documentation from the time.
- At the time of the advice, the advisor should have pointed out that AVC's were available as well as FSAVC's, that AVC's were likely to provide better value for money, and recommended Mrs E consider the in-house AVC that would have been available.

- Mercer could not “say with absolute certainty” the advisor would have done this as he would have been expected to do, and the likelihood was that Mrs E chose an FSAVC because of its’ flexibility and potential for higher benefits.
- Accordingly, Mercer were unable to conclude that Mrs E’s advice was unsuitable, and so rejected her complaint.
- Regardless, Mercer felt the complaint had been brought too late under the Financial Conduct Authority’s (FCA) DISP Rules. They believed Mrs E would likely have been aware by 1999 (or should have been aware), when she purchased the AVC product, that she had cause for complaint about the 1991 FSAVC advice.
- And, even disregarding that date, she should have been aware in 2011 when she started taking benefits from both policies – on the basis she’d have taken advice about cashing in the policies, which would have led to her being made aware that the FSAVC advice and sale may not have been suitable for her in 1991.

Unhappy with this, Mrs E brought her complaint to this Service. One of our Investigators felt Mrs E wasn’t out of time to bring her complaint to us, and that it was one we were able to consider under the DISP Rules. That being the case, he went on to consider the merits, of Mrs E’s complaint, concluding Mercer shouldn’t have advised Mrs E to take out the FSAVC in 1991. He felt they should have advised her to take out a cheaper (in terms of charges) AVC instead. He set out a method of redress, based on putting Mrs E back in the position (as much as possible) she would have been in, had she taken out an AVC in 1991 instead.

Mercer responded, disagreeing with our Investigator’s view. They remained resolute that the complaint had been brought too late for us to consider –- and asked that an Ombudsman review the complaint and issue a decision on the jurisdiction matter. Although Mercer did agree in principle with the methodology used in the redress calculation, in the event it was decided the complaint *had* been brought in time.

Accordingly, Mrs E’s complaint has been passed to me to consider the jurisdiction point, and the merits of the complaint if appropriate.

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 need to begin by considering whether this Service has jurisdiction to look at the merits of Mrs E’s complaint. The Financial Ombudsman Service can’t consider every complaint that’s brought to us. There are rules that we must follow which determine what complaints we can and can’t look into. These are set by the financial regulator, the Financial Conduct Authority (FCA). These rules are called the Dispute Resolution (DISP) Rules and are set out in the FCA’s handbook, which can be found on their website.

The Rules setting out which complaints this Service can and cannot consider can be found at DISP 2.8.2R, the relevant parts of which say as follows:

> “*The Ombudsman cannot consider a complaint if the complainant refers it to [us]:*
>
> *(2) 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 2.8.2R…was as a result of exceptional circumstances…"

So, before I or this Service can consider the merits of Mrs E's complaint against Mercer, I need to be satisfied that the complaint isn't captured by the above Rules. There are two timeframes that are key here. The first is the 'six-year' rule.

The advice Mrs E is complaining about took place in 1991, which is clearly more than six years before she brought her complaint to us. So, her complaint fails under 2.8.2R (2)(a).

However, the 'three-year' rule is more subjective in nature, as it requires me to conclude when I think Mrs E was aware, or importantly "*ought reasonably to have been aware*" that she had a cause for complaint. To consider this, I need to look in detail at the key events between the act complained about (the 1991 advice) and the date Mrs E brought her complaint to us. And put very simply, if I think Mrs E was aware, or *ought reasonably to have been aware* she had a cause for complaint *before* 19 June 2000 (she complained to us on 19 June 2023), then she'll have brought it to us too late, and it will be a complaint we have no power under the FCA's DISP Rules to consider (unless the above exceptions apply).

Chronology of Key events:

Mercer advised Mrs E to set up an FSAVC in 1991. The documentation from the time, which Mercer acknowledge is now very limited, doesn't include any of the documents you'd expect to find when a financial advisor provides advice of this type – there is no risk questionnaire, no 'fact-find' document, and no detailed recommendation letter. As such, there is nothing to confirm what Mrs E was told in 1991 about the existence of other pension options.

In 1998, Mrs E sought further advice and in 1999 took out an in-house AVC policy with another provider. However, this provider has confirmed they too have no documentation relating to the sale of this AVC – no proposal form, or illustrations, or details of the advisor. Mrs E has also said she had no recollection of these events, in 1991 or 1998/9, and can't recall why she chose an FSAVC in 1991, and then an AVC in 1999.

So, similar to 1991, there is no evidence from 1998/9 to show that Mrs E *was* made aware of the benefits of an AVC when compared to an FSAVC – although I think there must have been *some* mention of the different features and benefits of the different options because Mrs E clearly made a conscious choice to start paying into a different type of policy than she already had. And I appreciate Mercer think Mrs E's decision to do this means she must have been aware the FSAVC was less suitable, and that supposed awareness is enough to conclude she ought reasonably to have known she had a cause for complaint about the 1991 FSAVC advice in 1998/9. However, on balance, I disagree.

Echoing a point our Investigator made, I think it's notable Mrs E continued paying into the FSAVC after she started the AVC. These 'dual' payments continued for about one year until both ceased in December 1999. I think it's reasonable to conclude that had Mrs E been made aware in 1998 (when the AVC was advised) that the FSAVC was not suitable for her needs when it was sold, she'd have more likely than not stopped paying into the FSAVC, and instead contributed higher amounts into the new AVC policy. Her decision to continue paying into both *suggests* she had no concerns about the FSAVC at that time or the advice she'd previously received (and that the advice she received in 1998/9 gave her no reason to believe she *may* have a cause for concern about the 1991 advice).

So, I’m not persuaded that Mrs E would have been either made aware or was in possession of information that ought reasonably to have made her aware, that she had a cause for complaint when taking out the AVC policy in 1998.

In December 1999, Mrs E stopped paying premiums into both policies. I don’t think anything turns on this – she stopped paying premiums for both policies and didn’t seek an alternative pension product to increase her retirement options.

The final date to consider is when Mrs E decided to take benefits from these policies, in 2011. She engaged a new advisor to advise on her retirement options. Mercer thinks this advisor would likely have alerted her to the unsuitability of the FSAVC. I disagree.

It appears the advisor in question was approached with a view to advising about Mrs E’s imminent retirement plans. Looking at the advisor’s website, there is a bold link to a section dealing in teacher pensions, and in particular an arrangement to provide retirement advice to members who worked in various educational establishments in the immediate locality where Mrs E lived. It’s clear the advisor approached the FSAVC and AVC providers to seek retirement quotes for each policy. And whilst I haven’t seen their advice, it’s clear their advice resulted in Mrs E choosing to take 25% TFC from each of the VC plans, with the balance transferred to a different provider to provide an annuity (rather than Mrs E simply leaving her remaining 75% with the existing providers and purchasing an annuity with them).

Furthermore, the value of the FSAVC fund was nearly eight times larger than the AVC one at that time, and so I don’t think there was anything immediately obvious in these respective values that would or should have raised concerns for Mrs E about the FSAVC advice.

So, given the above, on balance I’m also not persuaded Mrs E was either made aware, or ought reasonably to have been aware, she had cause for complaint when she chose to take her benefits in 2011.

Conclusion on Jurisdiction

Taking all of the above into account, I’m not persuaded that Mrs E was either aware, or ought reasonably to have been aware, that she had cause for complaint about the advice Mercer’s agent provided in 1991 until media coverage in November 2022 alerted her to that possibility. Accordingly, it’s my decision this is a complaint this Service can consider, and so I’ll now look at the merits of Mrs E’s complaint.

Review of the Merits of Mrs E’s complaint

I appreciate Mercer Ltd have said they agree with the redress suggested by our Investigator (should I decide the complaint is within our jurisdiction to consider), although we haven’t heard back from Mrs E to say whether she accepts it or not. Accordingly, I’ll consider the evidence to see if I agree with that outcome/redress.

To do this, I need to begin by looking at what Mercer’s advisor should have done when advising Mrs E. To answer this, I need to look at the relevant guidance that existed at the time.

Independent Financial Advisors were expected to follow the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) rules at the time, which said an advisor 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…sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

Mercer should have thought about how all of the above applied to the FSAVC, and the in-house AVC too (and the potential for 'added years' too). There should have been clear and explicit comparison of the benefits and costs as between the options, leading to a positive recommendation – in the best interests of the consumer – detailing the most suitable option.

It's generally accepted that an AVC policy would have been more financially beneficial than an FSAVC policy, especially in Mrs E's circumstances. Generally, AVC's had smaller fees and costs, meaning more of the premium paid could be used to invest. Also, sometimes an employer may match the amount paid by a consumer, which didn't happen with an FSAVC. Taken together, it's likely a consumer would have been better off in retirement with an AVC. These are the points an advisor should have alerted a consumer to when providing advice.

As I've said, the evidence is limited here, but from what I can see, Mrs E's circumstances at the time of the advice were as follows:

- She was 37 years old and had been working as a teacher for about 16 years.
- Accordingly, based on a retirement age of 60, she still had over 22 years before retiring, accruing (potentially) approximately 38 years of service in her OPS scheme.
- Her salary was just under £18,200 per annum at the time of the advice.

I've also seen that Mrs E was provided with an FSAVC illustration based on investment returns of 8.5% and 13% per annum, showing potential retirement fund values of between £43,800 and £78,600, and full annual pensions of £4,040 and £8,420 respectively (assuming Mrs E continued paying into the fund until her 60th birthday).

There is nothing from the time of the advice about the AVC costs or projections, or the costs/benefits of 'added years'. But I have seen details subsequently provided by the Teachers Pension Scheme, which provides a list of tables that have allowed me to roughly calculate what it would have cost Mrs E to purchase added years at the time of the advice.

As said above, Mrs E had accrued 16 years' worth of service when she received the FSAVC advice. And, at that time, had she continued to work until her 60th birthday, she'd have been able to accrue approximately 38 years of service. Inland Revenue Rules from the time limited the number of added years a person was able to purchase – the number of added years, together the number of years of pensionable service at the age of 60 could not exceed 40 years. So, the maximum number of added years Mrs E *could* have purchased at the time of the advice was two years.

Looking at the tables provided and applying the rates to Mrs E's age/salary at the time, it appears that the annual cost of purchasing those extra two years would have been 1.84% of her salary each month – which at the time would have been approximately £27.90 gross per month. This amount would grow each year as Mrs E's salary grew, as the amount paid would be fixed at that percentage of her salary until her retirement date.

So, the question for me is what do I think Mrs E would most likely have done, based on the limited information available? It appears clear that the cost of purchasing two added years would have been a cheaper option than the one Mrs E chose - £27.90 per month as against

£64.67 per month. So, on the basis of affordability, the added years option would have been the cheapest. And it would have likely taken many years for that premium to increase to the same level as the FSAVC premium, reinforcing its' affordability. Further, added years would have provided certainty – an 'extra' pension which contained guaranteed increases, a proportionate increase in lump sum availability, and death benefits and spousal benefits too.

But against that it's worth noting that Mrs E, assuming she remained in employment until her 60th birthday, would have paid into her OPS for 38 years. In other words, she'd have been able to accrue approximately 95% of the maximum benefits available to her in the OPS, or put another way, making payments to purchase the maximum added years available would only increase her OPS retirement provision by a further 5%.

I'm persuaded, based on what Mrs E *did* do (both in 1991 and 1998), she'd have likely been more attracted to the opportunity to increase her pension provisions (at retirement) beyond that which a full 40 years of OPS contributions would provide. Clearly, she was willing and able to commit to making pension contribution payments far in excess of the 'added years' premium needed. And I'm persuaded that the projections that would (should) have been provided for an AVC in 1991 would have likely seemed far more attractive than those for any added years option.

I say this conscious of the projections that Mrs E was provided for the FSAVC – that if the FSAVC investment value increased at a rate between 8.5% and 13% per annum, this could provide an extra annual pension at retirement of between £4,040 and £8,420. This would likely have been considerably more than the extra pension two 'added years' would have provided. And had projections for an AVC also been provided, it's likely these projections would have been higher, not least because an AVC incurs fewer charges, meaning more of Mrs E's premiums would have been used to invest and grow.

It's difficult to predict, with any degree of certainty, what Mrs E would have done in 1991 had she been given full details of all of her options. The existence of only a very limited amount of any meaningful documentation from the time means I have to base my conclusions on what I think Mrs E is *most* likely to have done. And on that basis, taking all of the above into account, I'm satisfied – had Mercer's advisor provided Mrs E with full details of all her options in 1991 – that she'd have most likely chosen to invest in an AVC, rather than the FSAVC she did invest in. And that being the case, I think Mercer should take steps to place Mrs E back in the position she would have been in (as much as possible), had she invested her premiums into an AVC product instead.

Putting things right

I think that if Mercer had provided Mrs E with the information it should have done in 1991, she would have most likely started making contributions to her employer's AVC scheme rather taking out an FSAVC plan.

So, Mercer 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, Mercer should use the CAPS 'mixed with property' index up to 1January 2005, and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, on the basis it isn't now possible to pay that loss into Mrs E's plan (as it's been used to purchase an annuity), it should be paid directly to Mrs E 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 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'm satisfied this complaint was made in time. And having considered all the evidence available to me, I uphold Mrs E's complaint against Mercer Ltd, and require them to pay Mrs E the compensation amount as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 15 March 2024.

Mark Evans
Ombudsman