DRN-4439300

The complaint

Ms W complains about the suitability of the advice she received from Zurich Assurance Ltd (Zurich) in 2000 to take out a free standing additional voluntary contribution (FSAVC) plan. She says she should have been made aware of the in-house options - namely additional voluntary contributions (AVCs) and buying added years, which would have been more suitable for her circumstances.

What happened

In 2000, while she was employed as a teacher and a member of the Teacher's Pension scheme (TPS), Ms W met with Zurich to discuss how she could best make additional pension provision. Zurich recommended that she take out an FSAVC plan with net monthly contributions of £35 – which would increase each year in line with the average earnings index.

In July 2023, using a representative, Ms W complained about the earlier advice she'd been given. She said the recommendation to take out an FSAVC plan was unsuitable, and she hadn't been made aware of the in-house alternatives or been referred to her employer to obtain details of those alternatives. She wanted to be put back into the position she would now be in had she paid into the in-house AVC arrangement.

Zurich didn't uphold the complaint. It said it was satisfied that its adviser followed the guidelines in place at the time and made Ms W aware of the in-house AVC arrangements and the generic differences between the two schemes. So it was satisfied that the recommendation of an FSAVC plan was suitable in the circumstances.

Ms W didn't accept that outcome, so she brought her complaint to us where one of our investigators looked into the matter. He thought the complaint should be upheld, making the following points in support of his assessment:

- He first considered a regulatory update from 1996, known as RU20, to look at the rules in force at the time and whether Zurich had met them. He noted Zurich referred to a booklet entitled, "*Topping up your Occupational Scheme Benefits- your choice",* which it said set out the generic differences between the schemes. He thought the booklet did draw Ms W's attention to the in-house scheme and set out some of the differences – but he didn't think the difference in charges was made clear enough. So he didn't think the booklet met the regulatory requirements at the time.
- He also wasn't persuaded that simply providing the booklet to Ms W would have met the requirements.
- He thought there needed to be evidence of a robust conversation during which the differences between the schemes were discussed – especially the difference in charges. He thought the adviser ought to have noted within the sales file that such a discussion had taken place.
- He thought the evidence he'd seen suggested that Ms W was unlikely to change careers, so was likely to continue her TPS membership long term and could have

paid into the in-house schemes.

- It wasn't clear what "privacy" Ms W wanted from her employer. But he thought the in-house scheme offered some privacy as it wasn't run by the employer, and he noted that in any case Zurich would have had to tell Ms W's employer when she started her FSAVC plan. So he wasn't persuaded by these as "reasons" for Ms W being prepared to accept the likely higher charges of an FSAVC plan.
- He thought that if Ms W had been made more fully aware of the in-house schemes she would have opted for that course of action. But he didn't think, based on the costs involved, that she would have chosen to purchase 'added years' and thought she would have chosen the in-house AVC scheme. He set out the redress recommendation on that basis.

Zurich did not agree. It said there was undeniable evidence that Ms W had been made aware of the in-house AVC option. It also thought that its "topping up" booklet, which had to be issued to a client in advance of an adviser presenting their recommendation, would have prompted Ms W to consider the in-house options with its likely lower charges. And it considered that Ms W's insistence that she didn't wish her employer to be aware of the additional provision she wished to make, meant that an FSAVC plan was the most suitable way of achieving that requirement.

The investigator said he wasn't persuaded to change his view. He thought Zurich's adviser ought to have challenged Ms W's comments about her understanding of her employers' additional pension provisions. He also said that Zurich's "*topping up your OPS benefits*" booklet didn't, in his view, met the regulatory standards at the time.

So the complaint was referred to an ombudsman – and it's been passed to me to review.

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.

And having done so I've reached the same conclusion as the investigator. I'll set out my findings below.

The adviser was at the time working as an Appointed Representative for Zurich, so I have considered what was fair and reasonable at the time and what is likely to have happened when Ms W took out the FSAVC plan in 2000. I've also considered what was expected of the adviser as they were a tied appointed representative of Zurich and could only offer products from that one provider and couldn't advise on any other products – including the in-house options that were available through Ms W's employer. So I've begun by looking at the regulatory position for tied advisers at the time.

The regulatory position

Before May 1996 the regulator required company representatives to exercise due skill, care and diligence in dealing fairly with investors.
In relation to FSAVC sales this meant knowing that in-house AVC options existed and explaining the generic benefits of these options as well as highlighting the benefits of their own FSAVC plan.

But in May 1996 the regulator issued a regulatory update called "RU20" which set out the procedures it expected product providers to follow, although this wasn't new guidance but restating what was already in place. The update said that a tied adviser shouldn't recommend their own company's FSAVC until they had:

- drawn the client's attention to the in-house scheme alternative.
- discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article)
- directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.

The "article" mentioned above included discussion of the tax treatment of contributions and benefits, employers being willing to match or top-up benefits, and the ability to provide additional life cover. It also referred to the lower charges under an in-house scheme in general terms noting that, "*charges under the scheme 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 benefit to the client.*"

So the guidance – which wasn't new guidance as such, made it clear that of all the factors which needed to be discussed about the differences between AVCs and FSAVCs, the lower charging structure of an in-house AVC was the most important difference.

The suitability report and fact find

Zurich completed a fact find document on 26 April 2000 setting out Ms W's personal situation and circumstances at the time. This identified that Ms W was a member of the TPS and wanted to increase her pension provision so that she could retire at age 60. A suitability report was then issued which set out Zurich's recommendation to begin contributions to an FSAVC plan.

This report entitled "*reasons for recommendation*" said:

"We have considered whether it would be more appropriate for you to contribute to the scheme offered by your employer rather than to invest in the AVC Pension Account. However you wish to invest in a free standing scheme because..."

So although the report mentioned the in-house schemes it didn't explain what they were or make any reference to the regulatory requirements that were set out above. And based on the report alone I can't reasonably say Zurich acted according to those requirements. There was no reference to charges usually being lower with the in-house AVC scheme, nor did it direct Ms W to her employer for more information about those options.

But Zurich's report did explain that "*I have provided you with and fully discussed the booklet 'Topping up your Occupational Scheme Benefits - your Choice' which sets out the benefits and features of the AVC Pension Account and those typically available under employers' in-house AVC schemes. You have advised me that you understand the choices available to you and have had the opportunity to seek more information from your employer."*

Zurich says this booklet, which had to be provided before an application could be finalised, was intended to provide the information required under the RU20 requirements and would then form the basis of any discussions around those points when a further meeting was held with the adviser. So I've looked very carefully at the booklet to see if it does indeed satisfy those requirements.

Firstly, I note that the suitability letter says that the adviser had provided and discussed the booklet, but it's not entirely clear that this was before the meeting. So, I can't discount the possibility that Ms W wasn't directed to her employer in advance of completing an application as Zurich says she ought to have been. But of greater concern is that the fact find document, an illustration, and the FSAVC plan application form were all completed on the same day (26 April 2000) as confirmed by the adviser in their *diary of events* on the front page of the fact find.

A suitability report was then issued - dated 27 April 2000 - which was the following day. This would suggest that there wasn't sufficient time to provide the "*Topping up your Occupational Scheme Benefits - your Choice"* booklet and for Ms W to approach her employer for information about the in-house options before an application was made. And because the adviser wasn't required to record when they had provided the booklet within the *diary of events,* nor was Ms W required to sign anything to say she had received and read the booklet - it's unclear exactly when during the process it would have been issued.

Of course I can't discount that the adviser recorded incorrect dates on their event diary, or that they provided the booklet earlier in the process - although I haven't been provided with any evidence to suggest an earlier contact. But in any case, I wouldn't have expected the booklet to have been provided before a fact find was completed as the adviser wouldn't have known about Ms W's needs and goals before then.

The adviser did state that "*I have provided you with and fully discussed the booklet"* within the suitability report but I'm not persuaded, based on the timeline of events, that this would have been completed in time to give Ms W sufficient opportunity to approach her employer or to fully digest and understand the entire contents of the booklet.

But even if I am wrong in my assumption of when the booklet might have provided to Ms W and what opportunity this gave her, I've gone on to consider the contents of the booklet.

The booklet does set out that there are two schemes available to Ms W – notably the in-house AVC and FSAVC. It notes the possibility of AVC contributions being matched or some other form of subsidy. It also talks about the tax efficiency of the schemes explaining that in-house schemes benefit from immediate tax relief as the contributions are deducted from salary. So I think those regulatory requirements were met. But as I've said previously RU20 confirmed that, "*of all the differences between the two routes, this (the charges) is likely to exert the greatest impact on which route would offer the greater benefit to the client.*" So I've looked carefully at what information the booklet contained about charges.

The booklet said, "*with a (Zurich) AVC Pension Account, your Financial Adviser will provide you with a personal illustration giving details of the benefits included and the cost of those benefits. The illustration shows the effect of our charges.*

The costs associated with setting-up and administering an in-house AVC are often met by the employer, or your employer may have agreed enhanced terms with the insurance company, in the form of reduced charges. This could potentially lead to higher retirement benefits than under an FSAVC offering a similar investment fund.

The charges levied on contributions to an in-house AVC are usually lower than those charges under the (Zurich) pension account, particularly in the early years, although over the life of the plan these may even out. However, you should not look at the level of charges in isolation. You should consider carefully other factors which are contained in this booklet…. before deciding which plan is right for you."

But I'm not persuaded that, even if this information had been given to Ms W in advance of her final meeting, she would have become aware that the charges of the in-house AVC would usually be lower. I say this because, although Zurich does say that "*the charges levied* *on contributions to an in-house AVC are usually lower than those charges under the (Zurich) pension account,* it follows that statement by saying that "*although over the life of the plan these may even out."* I think this part of the warning negates, to some extent, what's been said before and might well have left Ms W with the impression that over the life of the plan, charges would have made little difference.

I don't think the section as a whole is clear in setting out that charges applicable to in-house AVCs would most likely be cheaper than an alternative FSAVC plan. I think the second part of the statement "watered down" its overall effect and I think it would have left Ms W with some doubts about what the cheapest option was. RU20 made it clear that charges would be the biggest factor when considering which scheme offered "the greater benefit" and I think Zurich needed to be clearer that was the case for the in-house scheme.

Looking at the charges section of the booklet in its entirety would seem to suggest the overall effect of charges would most likely be negligible, and because the booklet then said, "*you should not look at the level of charges in isolation. You should consider carefully other factors which are contained in this booklet"* – followed by a list of six other factors on which Zurich provided individual commentary, I think this would have shifted Ms W's focus away from charges and led her to look at those other factors as part of her own decision making process.

In my view, in respect of explaining that in-house AVCs offered lower charges, Zurich's booklet doesn't meet the regulatory requirements. So, I'm not satisfied that the suitability letter and booklet together satisfied the RU20 requirements in this particular case.

The other reasons for the recommendation

Zurich set out its reasons for recommending the FSAVC plan in its suitability report. These were:

- *You want the flexibility to continue contributing to your plan if you leave and join a new employer's scheme.*
- *You do not wish your employer to be aware of the details of the additional pension provision you are making, nor the reasons for your investment.*
- *You want the flexibility under the plan to be able to increase, reduce or stop contributions.*
- *You want to benefit from advice from me on your pension planning.*

Whilst these were not unreasonable factors to take into consideration when deciding what course of action to take, the third and fourth reasons were also available through the in-house scheme. And although the flexibility to continue with an FSAVC plan - even in the event of leaving the scheme - would have been an advantage to some extent, all the evidence would suggest that Ms W had no intention of leaving the profession and indeed had recently applied for a promotion.
There was no suggestion within the fact find that she wasn't going to continue as a teacher over the longer term and remain as a member of the TPS.

With regards to the second reason, I haven't seen any explanation within the fact find of why Ms W didn't want her employer to be aware of the extra pension provision she wanted to make. Although I don't dispute that some discussion around this point would have been undertaken in order for it to be noted as another factor for taking out a FSAVC plan, I note that the "topping up" brochure did confirm that*, "if you decide to contribute to a (Zurich) AVC Pension Account, we will tell the trustees of your occupational scheme that you are contributing…. The Inland Revenue require us to do this*."

So although Zurich said it wouldn't provide any of the detail behind the decision to start FSAVCs, Ms W couldn't expect the full "privacy" that Zurich said she wanted from her employer in the event of taking out a plan. And as there's no reference to which aspect of privacy she was concerned about it's hard to support that particular claim.

But even if I am wrong in my assumption, I don't regard it as being the main driver for why Ms W would want to make some additional pension provision. In my view the main reason for Ms W making her choice would have been, based on the information known at the time, which scheme was likely to provide her with greater benefits at retirement. And I think being aware that in-house AVCs offered a scheme with significant lower ongoing charges would have led Ms W to take that course of action if she'd been fully aware of that benefit.

The added years in-house alternative

I have also considered whether 'added years' would have been a relevant consideration for Ms W in respect of the redress here. That would have been one of two in-house alternatives open to her. But I don't think Ms W would have chosen that option. I say that because at the time of advice, 'added years' would likely have looked expensive compared to the projected returns and benefits of the FSAVC. So, I think it's unlikely that Ms W would have wanted to spend a potentially greater monthly amount to get the same projected benefits from 'added years' as she could have had from an investment backed - money purchase AVC type arrangement.

Ms W initially made net contributions of £35 per month – although this did rise in line with the average earnings index each year. So, I think affordability was an issue for Ms W at that time and I think it's unlikely she would have been prepared to contribute the likely much higher sums required for an 'added years' contract. So, when taken overall, I think Ms W would have chosen an in-house AVC arrangement if she'd been provided with the correct information at the right time, and which clearly set out the significant cost advantage of that arrangement.

Putting things right

Zurich Assurance Ltd 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 Assurance Ltd 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 Ms W'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 Ms W 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 that I've given I uphold Ms W's complaint against Zurich Assurance Ltd. It should carry out a redress calculation as set out above and present that information in a clear and simple manner.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 13 February 2024.

Keith Lawrence
Ombudsman