DRN-4452668

The complaint

Mrs P complained that Zurich Assurance Ltd (Zurich) has failed to properly compensate her for inappropriate advice it gave her in 1993. Zurich has agreed that the advice was inappropriate and has proposed redress to her. It has, however, limited that redress up until 2010. Mrs P feels that she should be compensated to the present day.

Mrs P is represented in bringing this case by a claims management company. For purposes of simplicity, I shall refer to all correspondence as if it were sent and received by Mrs P.

What happened

I issued my Provisional decision in November 2023, the relevant parts of which are reproduced below and forms part of my decision:

Mrs P joined her employer's Occupational Pension Scheme (OPS) in 1989. In February 1993, she met with a financial adviser employed by Zurich to discuss her financial circumstances and objectives. As a result of their discussions, Mrs P set up a Free-Standing Additional Voluntary Contribution (FSAVC) policy in April 1993.

During the fact find conducted by the adviser, Mrs P stated that Zurich did not draw her attention to the option for her to make an additional voluntary contribution (AVC) plan linked to her OPS instead of the FSAVC. She was consequently unaware of the difference in charges between the two options.

In 2010, Mrs P's employer changed the basis of the OPS it offered, from a defined benefit (final salary) to a defined contribution (money purchase) scheme. Mrs P was enrolled in the new OPS and also started a new additional voluntary contributions policy linked to her OPS. She also continued to make contributions to the Zurich FSAVC in addition to this new AVC.

Mrs P complained to Zurich on 27 April 2022 that the advice she had been given in 1993 to take out the FSAVC was inappropriate. She felt that because Zurich had not compared the features of the FSAVC to those of the AVC associated with her OPS and simply recommended the FSAVC in isolation, she was unaware in 1993 that her option to take out an AVC through her employer ('in-house') would likely have been more financially beneficial to her.

Zurich investigated Mrs P's complaint and responded on 10 October 2022. It accepted that it should have made Mrs P aware of the in-house AVC that was available to her at the time the FSAVC was sold to her. It also accepted that the AVC associated with her OPS would likely have been financially beneficial to Mrs P and that she would have been caused a financial loss by investing in the Zurich FSAVC instead. Given this, Zurich accepted that it should compensate Mrs P for the loss she had suffered on a 'charges' basis because there was no evidence that Mrs P could have purchased added years.

Mrs P considered that Zurich's liability for her loss should apply for the entire duration of her FSAVC policy, up to the present date. Zurich, however, took a different view. In its response to Mrs P's complaint, it said it only considered itself to be liable for the period between when

the policy was originally taken out until 2010, when Mrs P began to make additional voluntary contributions associated with her OPS. Its rationale was that since Mrs P had become aware of the alternative to her Zurich FSAVC when she began making additional payments to her OPS, she had made a conscious choice to continue with both plans rather than dropping the FSAVC in favour of additional contributions to her in-house arrangement. It also considered that if she was not sure of the difference between the FSAVC and her new AVC she could have taken independent financial advice at that point, which she did not. Consequently, it felt that it should not be liable for any financial loss which occurred since 2010.

Mrs P disagreed with Zurich's decision and asked it to reconsider. She felt that for that to be an appropriate decision she would have needed to be aware of the difference in charges between both the FSAVC and the new AVC, which she was not. She also felt that it was not common practice for someone taking advantage of an employer's OPS and associated AVCs to undertake a full pension review with an independent Financial Adviser (IFA).

Zurich disagreed and wrote to Mrs P on 5 December 2022 to repeat its view that it should only be liable for Mrs P's losses up to 30 June 2010.

Unhappy with Zurich's response, Mrs P asked our service to investigate her complaint. Our investigator considered the evidence in this case, before recommending that Zurich should increase its calculation of Mrs P's losses past 2010 and up to the present date.

Zurich disagreed, so the complaint has been passed to me to make a final decision.

Both Mrs P and Zurich responded to my provisional decision. Neither party provided any further significant evidence, so I will now issue my final 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.

In my provisional decision, I stated:

Having reviewed all the evidence in this case, and considering the view of our investigator, I have reached the same conclusion and intend to uphold Mrs P's complaint. I have, however, reached a different conclusion in terms of what I think is fair and reasonable in terms of putting things right, so I think it is fair to explain that to both Mrs P and Zurich and give them the chance to respond before I make my final decision.

Firstly, I think it's important to note that the underlying merits of this complaint are not in dispute. Zurich accepts that it is responsible for providing unsuitable advice to Mrs P in 1993 which may have caused her a financial loss over a number of years. Both Mrs P and Zurich have also agreed the basis upon which the calculation of her loss should be made. This will be on the basis of the higher charges she has incurred. The point to be resolved is when Zurich's liability for compensation should have ended.

Zurich believes that Mrs P should have realised in 2010 that an alternative to the FSAVC it had sold her existed, and that by continuing to make payments into it after that time she was consciously accepting the relatively higher level of charges it incurred. This means it should not have to compensate her for the period since 2010. Mrs P does not accept this, and feels that she should be compensated up until the present day.

Consequently, what I need to decide here is whether Mrs P should reasonably have had enough information in 2010 to be able to make a comparison of the difference in features between the FSAVC that Zurich had sold her in 1993 and the AVC associated with her OPS. In particular, whether she should reasonably be considered to have had enough information to be aware that the charges she was paying on the FSAVC were higher than those on her new AVC and that she consciously decided to continue making payments to the FSAVC despite knowing this.

To decide this, I have looked at the policy documents Zurich provided to Mrs P, when she took out the FSAVC, together with the information she was given about her OPS AVC and the information provided to her in her annual benefit statements.

In terms of the information on charges provided to Mrs P by Zurich in the terms and conditions of her FSAVC when she took it out, these were defined clearly in the documents and comprised several elements including annual charges, bid/offer spread on investments, admin charges, indexed policy charges and expense deductions. The first two of these were expressed as percentages and the remainder in absolute terms at a specified date, although these were to be:

adjusted from time to time

and as such be subject to change since the Terms and conditions were first issued to Mrs P.

Recent annual statements from both Zurich and Mrs P's OPS clearly state the amounts paid in charges during the periods of time they cover. Zurich has, however, confirmed that prior to 2021, and in line with FCA guidance that applied at that time, the annual benefits statements it sent to Mrs P did not include details of the charges she had incurred. Given this, I don't find it fair and reasonable to conclude that Mrs P had enough information to compare the costs and charges of the FSAVC and OPS AVC. She could, of course, have contacted Zurich to ask for details of the charges being made on her policy, but I can't see why she would have reasonably felt she needed to, if she had no concerns about the advice she had previously been given to invest in the FSAVC some 17 years earlier.

Zurich's position is that once Mrs P had taken out her OPS AVC she should have realised that her FSAVC was relatively expensive, and that continuing with it was a conscious decision to accept these higher charges.

I've also looked back at the original fact find that was conducted when Mrs P was advised by Zurich to take out the FSAVC in 1993. Following her interview, she had to rate the importance of a number of statements she was given relating to her financial objectives. In this fact find, she only rated two of the sixteen statements as 'very important'. These were:

Retiring early

Providing or increasing retirement income

Given this, I think it's reasonable to conclude that any conscious decision to continue with her FSAVC once she had taken out her OPS AVC was made from the perspective of wanting to increase her retirement savings, particularly as her OPS had changed from a DB to a DC basis around the same time.

Zurich also suggested that another way in which Mrs P may have become aware of the differences in the two policies would be if she had taken advice from an IFA in 2010. Doing this would undoubtedly have made Mrs P aware that the charges in the FSAVC were higher

than those relating to the AVC, and what impact this difference would make over time to the value of her pension.

Mrs P, however, did not take advice from an IFA in 2010, and I find it reasonable to conclude that this would not have been an obvious course of action for her to undertake at that time. Although consulting an IFA at certain points in a person's life, such as when planning for retirement, could be considered good practice, I don't find that not taking such advice could be considered an unreasonable course of action.

In summary, from the information I've been provided with, I don't think there's enough evidence to say Mrs P made a conscious decision to accept any financial loss involved in continuing with the FSAVC from 2010 onwards. Consequently, on balance, I don't think it's fair that Zurich have capped their liability on this basis.

Having said this, I do find that Zurich's liability should be capped, and that this liability should end on 10 October 2022, when Zurich responded to Mrs P's complaint. This is because I find that although Mrs P clearly believed the advice that led to her investment in the FSAVC to be inappropriate by the date of her complaint, there would not have been clarity that the advice she had been given was inappropriate or that the FSAVC was indeed relatively expensive compared to the OPS AVC. From the point that Zurich upheld her complaint, she should have known at this point that a more appropriate course of action than continuing to hold the FSAVC existed, and she should have acted to mitigate her losses at this point.

Putting things right

For the reasons given, I'm satisfied that the complaint should be upheld.

My aim is to put Mrs P back in the position she would have been in, had she begun making payments to the AVC offered alongside her OPS, rather than the Zurich FSAVC.

Zurich should recalculate Mrs P's financial loss arising from the inappropriate advice she was given in 1993, to cover the period from the start of the policy in 1993 to 10 October 2022.

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 my 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 normally be paid into Mrs P's pension plan. In this case, however, Zurich has already indicated that this is not possible. Given this, any compensation amount should be paid directly to Mrs P 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. If Mrs P has reason to believe that her income tax rate is likely to be different to this, she should inform Zurich of this as soon as practicable.

Interest should be added to any compensation due at the rate of 8% simple from the date of this decision until the date of settlement.

My final decision

For the reasons explained above, I uphold the complaint.

My final decision is that Zurich Assurance Ltd should pay the amount calculated and carry out the actions as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 12 December 2023.

Bill Catchpole
Ombudsman