DRN-4572027

The complaint

Mrs M's representative complains that Utmost Life and Pensions Limited incorrectly advised her to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan, rather than join the cheaper, in-house Additional Voluntary Contribution (AVC) scheme.

Mrs M would now like Utmost to see if she's lost out financially because of their advice and recompense her accordingly.

What happened

In November 1996, Mrs M, who was 48 years old at the time, met with an adviser from Utmost to discuss her retirement planning needs. At the time, she was working as a teacher and wanted to look at options that would allow her to retire early from work. Utmost's adviser issued a suitability letter on 25 November 1996, recommending that Mrs M take out a FSAVC plan, paying £150 net per month into a with profits fund.

In May 1999, Mrs M took early retirement from teaching and started drawing the benefits from her occupational final salary scheme, and at the same time, she also took her benefits from the FSAVC via an annuity.

In January 2023, Mrs M decided to formally complain to Utmost through her representative after seeing an advert (in April 2022) suggesting that consumers who had taken out a FSAVC in the 1990s may have been misadvised. In summary, she said that she didn't believe Utmost's advice in 1996 was suitable for her because not enough was done to draw her attention to the differences between the in-house AVC scheme that she was foregoing and the FSAVC.

After reviewing Mrs M's complaint, Utmost concluded that they were satisfied they'd done nothing wrong. They also said, in summary, that the advice they'd provided was well reasoned and suitable for Mrs M's circumstances at the time. They went on to say that given she wished to retire early and was thinking of leaving the teaching profession, the FSAVC gave her the portability to move her plan as she moved employers.

Mrs M was unhappy with Utmost's response, so she referred her complaint to this service. In summary, she repeated the same concerns, those were primarily that the FSAVC was unsuitable for her and that not enough was done to highlight the differences in charges between the in-house and external plan that she ultimately ended up with.

Given the issue being complained about was more than six years ago, our Investigator contacted Utmost to establish if they consented to this service considering Mrs M's complaint. Utmost responded saying, in summary, that they felt the complaint had been raised out of time and as such, they didn't consent to Mrs M's complaint being considered.

After considering the chain of events, our Investigator considered that the complaint had been raised within three years of when Mrs M ought to have known that there was a problem so this was a case that this service could consider. In addition, he went on to then consider the complaint points that Mrs M had raised. The Investigator concluded that Utmost hadn't treated Mrs M fairly because they didn't believe that Utmost had followed the regulator's rules at the time.

Utmost, however, disagreed with our Investigator's findings. In summary, they said that as their adviser had provided Mrs M with a leaflet that set out the key differences between the FSAVC and AVC, they'd met their regulatory obligations and as such, demonstrated that Mrs M had been placed in an informed position before proceeding with the recommendation. They also felt that given Mrs M's circumstances at the time, the FSAVC was a more compelling proposition for her in light of her wish to retire early, and even when taking account of the charges, Utmost felt that Mrs M would have purchased the FSAVC over the AVC regardless of the difference in costs.

Our Investigator was not persuaded to change his view as he didn't believe that Utmost had presented any new arguments that he'd not already considered or responded to. Utmost then asked the Investigator to pass the case to an Ombudsman to review that outcome.

After carefully considering the complaint, I issued a provisional decision on this case as, whilst I was minded to uphold Mrs M's complaint, I decided to do so for different reasons to that of the Investigator.

<u>What I said in my provisional decision:</u>

I have considered all of the evidence and arguments provided to decide what's fair and reasonable in the circumstances of this complaint.

The purpose of my decision isn't to address every single point raised. My role is to consider the evidence presented by Mrs M and Utmost in order to reach what I think is an independent, fair and reasonable decision based on the facts of the case. In deciding what's fair and reasonable, I must consider the relevant law, regulation and best industry practice, but it is for me to decide, based on the available information that I've been given, what's more likely than not to have happened. And, having done so, I'm upholding Mrs M's complaint and I'll explain why below.

<u>Jurisdiction</u>

Before I go on to explain the reasons behind my decision, I will address Utmost's view that Mrs M's complaint should be time-barred because, they say, she has raised her concerns outside of the timescales allowed for this service to be able to look into her complaint.

I can't look at all of the complaints referred to me. The rules applying to this service say that I can't look at a complaint made more than six years after the event being complained about – or (if later) more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint. Unless that is, the business being complained about agrees. This is Dispute Resolution rule 2.8.2R(2) – which can be found online in the Financial Conduct Authority's handbook. And in this case, Utmost hasn't agreed to us considering Mrs M's complaint.

Those rules are in place to protect both the consumer and the business. Mrs M referred her complaint to this service in April 2023. So, it's clear that the complaint has been brought more than six years after the event that she is complaining about, which is Utmost's original advice to take out the FSAVC in 1996.

Even though Mrs M complained more than six years after the event that she's now complaining about, this isn't the end of the matter. This is because the DISP rules can potentially provide Mrs M with longer than six years to complain, as long as she complains within three years of when she was aware, or she ought reasonably to have been aware, that she had cause to. So, I've considered when Mrs M was aware, or she ought reasonably to have been aware, that she had cause to complain.

I've thought carefully about whether there were any trigger events that should have helped Mrs M to realise that something may not be right with her pension sooner, leading her to the point at which she ought to have known that she had cause for complaint. Utmost have said that because their adviser provided Mrs M with all of the necessary information she needed in 1996 to make an informed decision, that was the point at which the time limits clock should start from. However, I don't think it's as simple as that and I'll explain why. Mrs M drew the benefits from her FSAVC in 1999, at the same time that she took the pension from her main scheme. As she took her benefits in 1999, Mrs M wouldn't have received any further statements from Utmost or needed to have further appointments with them about the FSAVC plan. So, it seems, the first point at which Mrs M would reasonably have known that there might be a problem with Utmost's advice was when she saw the claims management company's advert in April 2022. As Mrs M complained in January 2023, I'm therefore of the view that she has complained within the time limits set out by the regulator (under the three year leg) and this is a complaint that this service can consider.

<u>Was Utmost's advice to take out a FSAVC suitable?</u>

Given that Utmost advised Mrs M to take out the FSAVC over 20 years ago, I've looked at what rules were in place by the various regulators at that time. The Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) said advisers should have maintained high standards of integrity and fair dealing, whilst exercising due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. It added that businesses should have regard to the consumer's financial position generally and to any rights that they may have under an occupational scheme, and give the consumer all information relevant to their dealings with the representative in question.

The Personal Investment Authority (PIA - a predecessor of the Financial Conduct Authority) initially adopted the LAUTRO rules when it took over from them in 1994. And, in May 1996, five months before Utmost's advice, the PIA issued Regulatory Update 20 (which is sometimes referred to as RU20), codifying the procedures it expected product providers to follow. The PIA was simply restating what was already there, saying that before selling a FSAVC, tied advisers (which in short, means those firms can only recommend the products of the business they're tied to, which in this case is Utmost), should:

- Draw the consumer's attention to the in-house alternative
- Discuss the generic differences between the two routes and explain the likelihood that the charges under the in-house AVC would be lower
- Direct the consumer to their employer or the Occupational Pension Scheme for more information on the in-house option

Even in the more general introduction to the article, RU20, it mentions the tax treatment of contributions and benefits, employers being willing to match or top-up benefits, and the ability to provide additional life cover. The article also refers to the lower charges under an in-house AVC in general terms. It says: *'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.'*

So, taking account of the regulator's rules of the time, the generic differences of AVCs and FSAVCs, along with the lower costs, **should have** been clearly explained to the consumer. I've looked closely at the interactions that Utmost had with Mrs M at the time, along with the records that were provided to her as part of the FSAVC recommendation in 1996. In the suitability letter that Utmost provided to Mrs M (dated 25 November 1996) that set out the reasons for their advice, it states, in summary, that she'd like a flexible pension arrangement should she leave teaching or retire before 60. In addition, the fact-find that Utmost's adviser completed where they recorded details of Mrs M's circumstances at the time, suggested that she had become disillusioned with teaching and it was unlikely she'd stay within her role until normal pension age at 60. So, I can see why Utmost decided to explore additional funding options that might allow Mrs M to leave work ahead of reaching age 60.

Utmost met with Mrs M on 20 November 1996, and at that point their adviser collected her personal and financial information and completed a fact-find with her. In addition, on the same day, Mrs M signed the application form for the new FSAVC. Five days later (on 25 November 1996), Utmost issued a suitability letter to Mrs M setting out the reasons for their recommendation.

Whilst we only have the file notes from Utmost's meeting with Mrs M on 20 November 1996, what isn't clear is the level of detail that the adviser went into with her about the differences between the FSAVC and in-house AVC option. However, Utmost's file notes state "*fact sheet 17 left with client at meeting*". Fact sheet 17 refers to Utmost's leaflet about the differences between the FSAVC and in-house AVCs. In the suitability letter that Utmost provided to Mrs M, it states '*Please note I left you with Fact Sheet 17 which highlights the difference between an inhouse AVC and a Free-Standing AVC'*. Whilst Utmost have said they believe that demonstrates the in-house AVC option was brought to Mrs M's attention, I'm not persuaded that their adviser went far enough.

Neither Utmost's fact-find or suitability letter demonstrate that their adviser had a conversation with Mrs M about the differences between the two routes and the documentation only states that a leaflet was provided to her. And thinking about the regulator's expectations at the time, Utmost were required to have a discussion with Mrs M to educate her about the key differences between the two pathways. From what I've seen, I've not been persuaded that a discussion took place about the differences or the benefits of the in-house route that Mrs M was giving up. I've taken that view because Utmost's suitability letter to Mrs M is silent about the drawbacks of the FSAVC plan and doesn't provide any insight into the in-house option that Mrs M could have explored further. I think had a discussion taken place with Mrs M about the in-house option, their letter would've more likely than not provided a summary of that conversation – whereas, the letter sent to her only notes the leaflet that she was left with.

It also seems to me that the FSAVC sale was a fait-accompli, given Utmost completed the application form on the same day as their meeting with Mrs M. I say that because even if she had taken their leaflet away to read about the differences, the opportunity to contact her employer to seek out more information was lost because the FSAVC had already been set up by the time that she left the meeting. And, the suitability letter that provided details of the recommendation was received five days later which, as I've already explained, was devoid of any information about the in-house route.

Finally, I've also looked closely at Utmost's leaflet that their adviser states was provided to Mrs M. And, I don't think it's particularly clear about the drawbacks of the FSAVC compared to the in-house scheme – particularly around costs. The section titled 'Expenses' says about the in-house AVC: '*you may well be able to invest on better terms under your employer's scheme than under an FSAVC'*. I think that section is problematic because it doesn't explicitly state that *costs* in an in-house AVC are likely to be cheaper – the reference to better terms could relate to a spectrum of themes. Whilst in the same section the descriptor for the FSAVC states '*charges reflect the higher costs associated with the administration of the individual contracts*' - that doesn't explicitly explain that under a FSAVC option, the consumer is likely to pay more. So, it seems to me that Mrs M wasn't placed in a fully informed position ahead of agreeing to invest in the FSAVC, particularly when they failed to direct Mrs M to contact her employer to seek out further information about the in-house option which the PIA required at the time.

Whilst I appreciate that Mrs M was considering leaving her role at the time and even leaving teaching, that doesn't automatically mean that a FSAVC defaults to being the better option. I say that because given that she wished to retire early, I think it's more likely than not that she would have preferred the greater fund that could've likely been secured by paying lower costs than the portability of the FSAVC scheme. So, I'm therefore upholding Mrs M's complaint and require Utmost to investigate whether she has been financially disadvantaged by investing in the FSAVC. Therefore, Utmost should take the following steps below.

<u>Responses to my provisional decision</u>

After considering my provisional decision, Mrs M's representative explained that they had nothing further to add.

Utmost responded, explaining that whilst they did not agree with the findings of the provisional decision, in order to bring matters to a close, they had undertaken a loss calculation. That calculation, they say, resulted in Mrs M being worse off by £156 as a consequence of their advice. Details of their calculation have been forwarded to Mrs M's representative.

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.

As neither Mrs M, her representatives or Utmost have provided any further information that makes me change my mind, it therefore follows that I have reached the same decision for the same reasons that I set out in my provisional decision. I'm therefore upholding Mrs M's complaint and Utmost must put things right for her in the manner that I've set out below.

Putting things right

Utmost 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, Utmost 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 his 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

I’m upholding the complaint and require Utmost Life and Pensions Limited to put things right for Mrs M in the manner that I’ve 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 19 February 2024.

Simon Fox
Ombudsman