

## The complaint

Miss C complained Sesame Limited (Sesame) gave her unsuitable advice to invest in a Free Standing Additional Voluntary Contribution pension plan (FSAVC).

She would like to be compensated for any financial loss he has suffered.

Miss C is being assisted in his complaint by a complaint management company. For the purposes of simplicity, I shall refer to all correspondence as being between Sesame and Miss C herself.

The advice was provided by a financial adviser whose business was subsequently acquired by Sesame, which is now held responsible for the claim. I shall refer to all communications as being made by Sesame

## What happened

In January 1990, Miss C was a member of the Teacher's occupational pension scheme (OPS). She had been living and working abroad prior to returning to the UK and starting work as a teacher. In January 1994, she met with a financial adviser to discuss her options for increasing her retirement savings.

During this meeting, she completed a fact find, which found that she was 39 years of age, married with three dependent children. It also assessed that she had a '*balanced*' attitude to risk. She was advised to invest £60 per calendar month (pcm) in a FSAVC with a financial services provider rather than either an AVC through her OPS or buying 'added years' in her OPS.

Miss C accepted Sesame's advice and began paying into the FSAVC in February 1994.

Miss C sought further advice from Sesame on 24 February 1999. On 3 March 1999, Sesame sent a suitability letter to Miss C outlining the discussions they had held and the recommendations it made to her. This letter described Miss C's primary objective as being:

*To top-up your [Provider] Free-Standing AVC Plan because, as previously mentioned, your pension provision is somewhat limited.*

It went on to recommend that Miss C increase her monthly contributions to her FSAVC to a total of £100 pcm net of tax.

The suitability letter also discussed the in-house options available to her through her OPS. The option of added years was discussed and discounted, as Miss C indicated she had researched the option herself and decided that:

*The costs even though the advantages can be superior to the "money purchase" option, the cost of purchasing the 'Added Years' is too restrictive.*

It went on to discuss the in-house AVC available to Miss C through her OPS. The letter explained that it wasn't possible to get a '*like-for like*' comparison between the AVC and her

FSAVC, so it made a comparison assuming that premiums would not increase over the term of the policy. On this basis it concluded that the FSAVC was the most '*cost effective*' of the two options.

Miss C subsequently increased her payments into the FSAVC to £100 net pcm, as Sesame had recommended.

Miss C continued to contribute to the FSAVC until February 2002 and subsequently took the accrued benefits from the plan on 20 May 2015.

On 30 August 2023, Miss C complained to Sesame that the advice she had been given was unsuitable for her. Sesame investigated her complaint relating to the advice she had been given in 1999 and responded to it on 18 September 2023. Sesame did not uphold her complaint. It said it considered that Sesame had discussed her options with her in a balanced way and that it had provided her with sufficient information on the charges of both the AVC and FSAVC.

It responded to her complaint about the advice she had received in 1994 on 21 November 2023. It did not uphold this complaint either. It said that it believed that the FSAVC was appropriate for her at the time it was recommended.

Unhappy with these responses, Miss C brought her complaint to this service. Our investigator reviewed the evidence and formed the view that Sesame had not treated Miss C fairly, and it should undertake a financial loss assessment. Sesame was unhappy with this view and so the case has been passed to me to make a 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.

Having done so, I agree with our investigator and uphold this complaint. I shall now explain my reasoning.

In making my decision, I have to be mindful that these events occurred some time ago and the documentary evidence was, as a result, incomplete. Owing to this, I have had to make what I believe are reasonable assumptions about what should have happened and actually did happen.

It's also important to note that the regulations relating to the provision of financial advice have changed over the course of time, so I will consider the regulations that were in force at the time of the events described in this complaint.

There were several elements to the advice, which I shall look at in turn.

The first of these was the advice Miss C was given to transfer take out the FSAVC in 1994 rather than invest into one of the options associated with her OPS i.e. purchasing added years in the main scheme or the in-house AVC.

As Sesame has noted, the regulations in force at the time of this advice were those of the the Financial Intermediaries, Managers and Broker Regulation Association (FIMBRA) rules. Under these rules, an adviser had to

- Know their client.

- Not make a recommendation unless it believed, having carried out reasonable care informing its belief, that no transaction in any such investment, would be likely to secure the objectives of the consumer more advantageously, and
- Take reasonable care to include in any recommendation to a person, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

It's also important to note that it was not a requirement at that time for the adviser to document their recommendation in writing. Consequently, the documentation available from the time of the advice is not as comprehensive as would be the case under the current regulations.

Having said that, I can see that Sesame said:

*I visited Miss C at her request to do so, as she was concerned that there would be a shortfall in her pension provision. After discussing her options, Miss C decided to affect an FSAVC with [provider].*

In its response to Miss C's complaint, Sesame itself noted that the documentation was lacking details about the discussions leading to the recommendation, saying:

*we have no way of confirming what was discussed with you, other than it was recorded on your file that alternatives were discussed with you. If, in 1994, you felt that the options were not discussed with you in a fair and balanced way, we would have expected you to raise this point at the time and ask for further clarification. As you went ahead with the FSAVC, we can only assume that you were satisfied with the recommendation and explanation given.*

While I can see the reasons for Sesame's viewpoint, I take a different view on this. I have considered that Miss C had been living overseas for a long period and was unlikely to be fully aware of what her options for retirement savings would be. I can't be satisfied that she would necessarily be knowledgeable enough at that time to know if the options had been discussed in a fair and balanced way, or indeed if all her options had been explored and discussed adequately.

Turning now to look at the recommendation in 1999 to make further investments into the FSAVC, I need to determine is whether the advice Miss C received from Sesame was suitable for her circumstances, or whether it should instead have recommended another course of action, such as investing more into his OPS through buying an entitlement to additional years or investing into an AVC scheme associated with her OPS.

The regulations had changed by this time and there is significantly more evidence associated with this advice. I can see from the evidence that Miss C had looked at and discounted the option of buying additional years, so I find that Sesame did nothing wrong in not recommending that option. In terms of the comparative benefits of the FSAVC and AVC, I have reviewed the evidence carefully and can see that these were covered in more detail before the recommendation to increase payments to the FSAVC was recommended. I appreciate Sesame's conclusion that a cost comparison shows the FSAVC to be cheaper than the AVC, resulting in a higher fund value at Miss C's planned retirement date. This is, however, the opposite to what I would expect to see in this situation – the in-house AVC option almost always has lower charges than an equivalent FSAVC.

Owing to this, 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 review

was mostly concluded by 2004. I can't see from the evidence that Miss C's policy was ever included in the review or that she was offered the opportunity to have her sale reviewed.

Given this – and the fact that I would have expected Miss C's in-house AVC option to be cheaper than the AVC, I uphold her complaint. Consequently, I think it's appropriate that Sesame carry out a financial loss calculation under the same terms as the FSAVC review.

### **Putting things right**

It is my intention and the aim of this service that any compensation for financial loss should seek to put Miss C back into the position she would have been in were it not for Sesame's error.

To compensate Miss C fairly, Sesame must 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, Sesame 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 C'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 C 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.

Sesame must provide Miss C with a copy of the calculations it has made in a simple, easy to understand format.

### **My final decision**

For the reasons given above, I uphold Miss C's complaint.

Sesame Limited should pay Miss C the sums calculated above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 26 December 2024.

Bill Catchpole

**Ombudsman**