

The complaint

Mrs B complains that Plumptree Kilby (PK) gave her unsuitable advice to take out a Free Standing Additional Voluntary Contribution (FSAVC) pension plan in 1992. She thinks it should've advised her to take out one of the in-house options connected to her Occupational Pension Scheme (OPS). And that if she had, she'd now be better off. She'd like to be put back into the position she should've been in had the advice been suitable for her.

Mrs B is represented by a claims management company (CMC) in bringing her complaint. But I'll only refer to her in my decision.

What happened

At the end of July 1992, Mrs B met with a PK adviser as she wanted to build up extra savings for retirement.

The file note from that meeting recorded the following:

- She was married with three daughters. Her husband was retired.
- She was employed full-time. But felt that she would receive a low pension entitlement as she didn't have many years' service
- She was contributing 6% of her salary to her OPS.

The file note said that the adviser had taken Mrs B through her basic state pension and other aspects of her OPS. It said that Mrs B hadn't been aware of the tax relief available on additional voluntary contributions.

The note went on to state:

"Mentioned the in house AVCs and FSAVCs to her. Her attitude to risk is pretty conservative. Therefore suggested we look at a With Profits fund."

It also said:

"Money very tight. Therefore contribution fairly low."

In August 1992, PK advised Mrs B to set up an FSAVC plan. It also advised her to invest in the With Profits fund.

I understand that the adviser who worked with Mrs B was an independent financial adviser (IFA) at the time of the advice. This meant he could offer products from the whole of the market.

Mrs B decided to follow the advice. Her FSAVC plan was originally set up in August 1992 with a normal retirement age of 60. She then temporarily put it on hold for a short while, with contributions eventually starting at the end of 1992.

At the time of the advice, Mrs B was a contributing member of her profession's OPS, which had a normal retirement age of 60. She was aged 53.

Mrs B contributed around £50 a month into the FSAVC plan for just under six years. In October 1998, she took her retirement benefits from the plan. She began receiving an annuity from the FSAVC plan of £35.95 each month. I understand she still receives the same monthly amount.

At the point that the annuity was purchased, the value of Mrs B's FSAVC plan was £6,237.80.

A file note from 9 November 1994 showed that Mrs B had no wish to meet her adviser at that time. And that she didn't want to increase her FSAVC plan contributions, and was happy with performance to date.

I understand that Mrs B called her adviser on 21 August 1998 for the first time in several years. PK's file note stated that she expressed slight dissatisfaction at the proceeds of her FSAVC plan. The adviser told Mrs B that her FSAVC plan had grown her contributions totalling £3,559 to £6,155 over around five years. When Mrs B's husband noted that the rate of monthly income from the plan proceeds would be poor, the adviser explained that annuity rates had fallen significantly in the last five years, and that this would've applied with any FSAVC plan provider. The file note recorded that Mrs B was slightly happier after that.

The adviser also noted on 8 September 1998, on returning from time away, Mrs B hadn't called again.

In August 2023, Mrs B raised a complaint with PK about the advice through her CMC. She felt that the advice she'd received was negligent.

PK issued its final response to the complaint in September 2023. It felt that the complaint had been brought outside of time limits.

Unhappy, Mrs B brought her complaint to this service in September 2023.

Our investigator issued a jurisdiction view on the complaint on 26 January 2024. He felt that the complaint was one this service had the power to consider. He acknowledged that the complaint had been brought in August 2023, which was more than six years after the event being complained about - the advice Mrs B received in August 1992.

Our investigator felt that Mrs B had actually complained to PK during a call in August 1998, when she'd expressed dissatisfaction at the proceeds of her FSAVC. He didn't think PK had treated this as a formal complaint or provided Mrs B with the relevant referral rights. He considered that the "clock had been stopped" on the 'six and three year' time limits. And noted that Mrs B had only recently received referral rights from PK. He therefore concluded that the complaint had been brought in time.

PK didn't agree with our investigator. An Ombudsman reviewed the complaint.

The Ombudsman issued his final decision on the jurisdiction of the complaint on 12 March 2024. He agreed with our investigator that Mrs B had made a complaint about her plan in 1998. And that she'd done so within three years of when she became aware she had cause to complain. Therefore he felt that complaint had been made in time. He also agreed with our investigator that PK didn't appear to have considered the complaint as it should've done.

The Ombudsman was satisfied that the clock had been stopped when PK didn't treat the

1998 complaint correctly. He was therefore satisfied that this service could consider this complaint.

I understand that PK still don't agree with this decision. It asked the Ombudsman to reconsider. But our investigator has confirmed to PK that our position on the jurisdiction of this complaint remains the same. And that we believe the complaint was made in time.

Our investigator issued his view on the merits of the complaint on 31 May 2024. He noted he had limited information from the time of the advice. He considered the rules the IFA had been operating under at the time of the advice. And felt that PK should've advised Mrs B to start an in-house AVC rather than the FSAVC plan.

Our investigator felt that PK should undertake a redress calculation in accordance with the regulator's FSAVC review guidance.

PK didn't agree with our investigator. It made the following points about the merits of the complaint:

- Mrs B had wanted to build up extra savings for her retirement, but she didn't want to involve her work/employer.
- As she had very little money to spend she wanted complete flexibility. This was because she wasn't certain that she had sufficient monthly cash flow to make an ongoing commitment. But she did feel that £50 each month was affordable.
- It asked the adviser for his recollections of the meeting. It said that despite this meeting being over 36 years ago, the adviser could still clearly remember it. It also felt that the file note from the first meeting on 30 July 1992 showed that the adviser had verbally taken Mrs B through her various pension options. Therefore it completely disagreed with Mrs B's recollections that she wasn't told about any other options.
- It felt that the advice to start an FSAVC plan had been suitable for Mrs B as it didn't involve her work, provided tax relief that wouldn't have been available in non-pension savings, and allowed her to access a low risk fund.
- PK said that it hadn't undertaken direct numerical comparison of charges because Mrs B had discounted any option associated with her work.

As agreement couldn't be reached, the complaint has come to me for a 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.

Having done so, I'm going to uphold it, for largely the same reasons as our investigator. I'll explain the reasons for my decision.

A lot of the information isn't available that we usually take into consideration when trying to determine what someone would've done if the sale had been compliant. Where there's conflicting information about the events complained about and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I first considered the regulatory environment at the time of the advice.

IFAs were usually required to follow the FIMBRA rules. The Personal Investment Authority (PIA - a predecessor of the Financial Conduct Authority) adopted the FIMBRA rules when it took over.

In 1988, FIMBRA said that an adviser 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, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

PF should've found out how all of these issues applied to the FSAVC plan and the various in-house options available to Mrs B at the time. - and anything else that might've been relevant to her situation. This included finding out what funds were available within the in-house AVC.

While I acknowledge that PK's position is that it's adviser gave Mrs B suitable advice because the FSAVC plan he recommended allowed her access to a low-risk fund, I'm not persuaded that the in-house alternative wouldn't have done the same. And I can say for certain that the in-house alternative would've provided the same tax relief as the FSAVC plan

Under the FIMBRA rules, PF would also have needed to explicitly compare what the in-house options and what the FSAVC plan had to offer. So, this meant it should've looked into all the in-house options and then positively recommended the most suitable option. This would then mean that the recommendation it eventually made to Mrs B would be in her best interests.

Mrs B told this service that she didn't remember exactly what had happened at the time of the advice. But she felt that the adviser hadn't made her aware of any other options. She remembered the adviser being persuasive. She also didn't remember being shown any sort of comparison of the FSAVC plan with the in-house options.

PK's position is that the 30 July 1992 file note from the first meeting showed that the adviser had verbally taken Mrs B through her various pension options. I agree that the file note does state: "*Mentioned the in house AVCs and FSAVCs to her.*" But this isn't enough to persuade me that the adviser provided sufficient information about the in-house options to have met the rules at the time.

I'm not satisfied that I've seen sufficient evidence that Mrs B was reasonably made aware of her in-house options. I've also seen no evidence that the difference in likely charges between the FSAVC plan and the in-house AVC was discussed.

I acknowledge that the advice was given many years ago. Therefore it's difficult to remember exactly what happened. However, PK has told this service that it didn't undertake a direct numerical comparison of charges because Mrs B had ruled out any option associated with her work. It also said that a product that was free standing from her work was what appealed to her.

Even if I agreed with PK that Mrs B completely ruled out any of the in-house options – and I'm not persuaded that the evidence shows that she did - I can't reasonably say that PK should've let those options be discarded without looking at the charges first. I say this because if PK had produced a charge comparison, as it was supposed to do, Mrs B might've then changed her mind if the difference in charges was big enough that it became more important to her than flexibility. In any event, an IFA's role isn't simply to rubber stamp what a customer has asked it to arrange on their behalf. Instead, it's to provide advice in the customer's best interests. I'm not satisfied that the adviser was acting in Mrs B's best interests when he didn't persuade her to at least look at comparison figures.

I have also considered PK's further point about why it recommended the FSAVC plan to Mrs B. It said that she had very little money to spend and that she therefore wanted complete flexibility. Based on what PK has said, I agree that this lack of money indicates that an option like added years may not have been appropriate as it probably wouldn't have been affordable. I say this because Mrs B never increased the amount she paid into her FSAVC plan, whereas the purchase of added years would've required increases linked to her salary over time.

However, I don't agree that having a relatively low potential maximum contribution meant that the in-house AVC option should've been ruled out. In fact, as the charges in that arrangement were likely to have been lower than the FSAVC plan charges, Mrs B would've likely made more out of her limited contributions if the in-house AVC had been recommended to her, as a smaller proportion of her contribution would've been used up on charges.

Our investigator asked Mrs B, through her CMC, what she was likely to have done if she had been informed about the in-house options at the time of the advice.

The CMC said that if this had been the case, Mrs B would've investigated the alternative schemes within her OPS and would then have taken the one that would've been more beneficial to her.

Based on what I've seen, I'm persuaded that had PK done what it was supposed to, and explained the difference in charges to Mrs B, she would've decided to investigate her in-house options within her OPS. I say this despite the fact that PK said that Mrs B didn't want her additional retirement savings to be connected to her work.

I think that if she had done so, Mrs B would've decided to take out an in-house AVC. This is because I'm of the view that Mrs B didn't have the flexibility to afford the added years option. Therefore I uphold the complaint.

Putting things right

Plumtree Kilby 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, Plumtree Kilby 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 B'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 B 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.

Where possible, the calculations should be provided to Mrs B in a clear, simple format.

My final decision

For the reasons I've given above, I uphold the complaint. Plumtree Kilby must pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 29 August 2024.

Jo Occleshaw
Ombudsman