DRN-4915456

Financial Ombudsman Service

The complaint

Mr D complains about the suitability of the advice he received from Zurich Assurance Ltd (Zurich) to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan.

Mr D took out his FSAVC plan with a predecessor business of Zurich. But it is responsible for the complaint.

Mr D is represented in his complaint by a claims management company. But I'll only refer to him in my decision.

What happened

In 1990, Mr D had been a member of his employer's Occupational Pension Scheme (OPS) for 18 years. He wanted to increase his retirement savings. So he took advice on this from a tied adviser at Zurich.

The adviser completed a fact find on Mr D in March 1990. It noted the following:

- Mr D was employed earning a basic salary of £14,400 plus bonuses.
- He owned a house with a mortgage.
- His OPS had a Scheme Retirement Age of 60.
- He was divorced with no children.
- He had a budget of up to £25 each month for further pension savings.
- He had £2,000 in savings and £400 in shares. He was paying £50 each month into a share save scheme through his employer.
- His attitude to investment risk was recorded as very cautious.
- Mr D wanted an annual income of £12,000 in retirement.

The adviser recommended that Mr D start an FSAVC with Zurich. And that he invested it 70% into the Managed fund, 15% into the Equity fund and 15% into the European fund. Mr D started the recommended FSAVC on 1 April 1990.

I understand that Mr D increased his contributions to the FSAVC to £80 each month in 1994 without advice.

Mr D briefly stopped contributing to his FSAVC plan in early 1998, during a short period when he no longer worked for his employer.

Mr D took further advice from Zurich on 11 May 1998. A fact find was completed on that date which noted the following.

- Mr D was now married with one child.
- He'd returned to his employer. He was now in a different section of its OPS than the one he'd been in before he left.
- He had around £86K in savings and investments and owned his own home with a mortgage.
- He had a budget of £92 each month.
- His employer offered an in-house AVC scheme through a third-party provider. The Scheme Retirement Age for this was 60.
- Mr D wanted to retire at age 55.

The adviser made a handwritten note on the fact find as follows:

"*Pension fund value given. So re-instatement at original monthly contribution. Discussed Occupational AVC v FSAVC differences.*

Discussed clients pension objectives and his view of his promotion plan particularly regarding earlier retirement than [employer name] pension scheme.

[Mr D] has now joined [employer name] pension scheme in force now and his previous [employer name] pension scheme projections remain as when they were given to him when he left (and re-joined) (a break of 2 months). [Mr D] achieved the promotion and position he wanted by leaving [employer name] and re-joining.

[Mr D] decided to recommence his [FSAVC] in preference to the in-house AVC for privacy from employer, ongoing financial and pensions advice, earlier retirement and an existing fund value."

Zurich issued a Recommendation Letter to Mr D dated 11 May 1998. This stated that the adviser had provided him with a copy of the booklet '*Topping Up your Occupational Pension Scheme Benefits –Your Choice*'.

This booklet stated that enhanced terms might've been agreed between Mr D's employer and the provider of the in-house AVC scheme, and that this could lead to reduced charges. But it went on to state: "*although over the life of the plan these [charges] may even out*".

The Recommendation Letter stated that the adviser had recommended the FSAVC for the following reasons:

"[The FSAVC] already has a fund value and privacy from employer. Pension all remuneration. Retire earlier than age set by employer."

And noted that the term had been set to age 55 to enable Mr D to retire before his Scheme Retirement Age of 60.

I understand that Mr D stopped contributions to his FSAVC in March 2000. And that he then transferred his funds to another provider in July 2008. Mr D said he hadn't been aware he might have a cause for complaint about the advice until he saw an advert for his CMC on social media in January 2024.

Mr D complained to Zurich about the advice, through his CMC, on 30 January 2024.

Zurich issued its final response to the complaint on 23 February 2024. It didn't think it'd done anything wrong. It said that its 1998 records showed that the adviser had made Mr D aware of the benefits provided by his employer's in-house AVC arrangements. And that he'd received booklets in November 1997 and May 1998 which explained the generic differences between those and an FSAVC. Zurich also said that the booklet had advised Mr D to contact his employer to find out more about the in-house arrangements.

Zurich also said that it was clear that discussions took place between Mr D and his adviser about the in house AVC arrangements and FSAVCs. It also felt that the evidence showed that Mr D had been provided with enough documentation during the May 1998 discussions for him to understand the differences between his employers in-house AVC options and the Zurich FSAVC plan. It felt that Mr D had carefully considered his options at this point, and had chosen to restart the payments to his FSAVC plan.

Zurich further said that the adviser had noted in the 1998 fact find that she'd discussed the differences between the in-house AVC and FSAVC, as well as Mr D's objective to retire earlier than his OPS allowed.

Unhappy, Mr D brought his complaint to this service, through his CMC, on 2 April 2024. He felt that Zurich hadn't addressed the original sale in April 1990. And that it was simply relying on the fact that it'd issued a "topping up" booklet to reject his complaint.

Zurich didn't seek to time bar the complaint and gave this service its permission to consider it. It felt it'd addressed the original 1990 advice, as it considered that Mr D hadn't raised a complaint in 1998 about the 1990 advice despite the discussions that had clearly taken place in 1998. It felt this showed that Mr D had understood the options available to him in 1990. And that the recommendation had been suitable for him.

Our investigator felt that the complaint should be upheld. He made the following points:

- He felt that although Mr D had been made aware of the in-house options in 1998, there was no evidence that this had been done in any great detail. He said that the Recommendation Letter hadn't made it clear that the in-house options were likely to be cheaper. He also said there were no notes on the fact find from 1990 to evidence that this had been discussed. Our investigator said that the adviser had a responsibility to make sure that all options were discussed in a fair and balanced manner so that Mr D was in a fully informed position before deciding what to do.

- He also felt that although the adviser had obtained some information about Mr D, and provided him with the topping up booklet, that booklet hadn't presented the options in a balanced way. He felt the wording in the booklet hadn't made it clear that the charges from the FSAVC would likely be higher than those on the in-house AVC.

- Our investigator felt that if all of the information had been presented in a fair and balanced way, Mr D would've chosen an in-house option. But he didn't think, based on the costs involved and his existing service in his OPS, that Mr D would've chosen to purchase added years. He thought he would've chosen the in-house AVC scheme. He set out his redress recommendation on that basis.

Zurich didn't agree with our investigator. It said it was disappointed that while our investigator had noted that different standards were expected by the regulator in 1990 and 1998, he hadn't commented on any of the information documented in the fact find. It felt this held the "standard" as it was in 1998.

Zurich said that when the FSAVC started in 1990 it'd been governed under the LAUTRO

Code of Conduct. It said that this generally considered that the customer's attention should've been drawn to the existence of the in-house options. It felt there was clear evidence in the fact find that the existence of the in-house scheme was identified and no reason to doubt that it hadn't been discussed at some level.

Zurich also said that when Mr D had decided to recommence his FSAVC contributions in 1998, the revised rules explained that the adviser should draw the customer's attention to the in-house option, discuss the differences in generic terms and point the customer in the direction of his employer or scheme trustee for more specific information on the in-house option. And, if this process was followed there was no need for a specific comparison. It said it was satisfied that its adviser had followed this process.

Our investigator still felt that the adviser's notes about what was discussed at the time of the advice didn't make it clear that Mr D had been told that the in-house AVC would've been cheaper than the FSAVC.

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 consider the advice was unsuitable. I'll explain the reasons for my decision.

The crux of this complaint is whether or not Zurich met the regulatory requirements at the time of the advice. So I first considered what those requirements were.

I understand that the adviser was at the time working as an Appointed Representative or tied adviser for Zurich. Tied advisers could only offer products from one provider, and weren't allowed to sell products from any other provider.

Therefore, as the provider of the in-house AVC was often a competing provider, tied advisers wouldn't typically have investigated whether the in-house options were better than the FSAVC – they weren't allowed to. But they were usually required to follow the rules set in 1988 – called LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation).

The regulatory position

At the time of the 1990 advice, the LAUTRO rules set out that an adviser should:

- Maintain high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors.

- Have regard to the consumer's financial position generally and to any rights they may have under an OPS and give the consumer all information relevant to their dealings with the representative in question.

In relation to FSAVC sales this meant knowing that in-house AVC options existed and explaining the generic benefits of those options as well as highlighting the benefits of their own FSAVC plan.

The generic benefits of the in-house options would include:

- Money purchase AVCs could potentially offer lower charges than the FSAVC.
- “Added years” might’ve been available under an OPS.
- The consumer’s employer might match or top-up the amount the consumer paid into either in-house option

The successor regulatory scheme to LAUTRO codified the requirements for advisers to follow in May 1996. This was contained in Regulatory Update 20.

The update, which had been issued before the 1998 advice, said that a tied adviser shouldn’t recommend their own company’s FSAVC until they had:

- drawn the consumer’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 consumer to their employer, or to the scheme trustees, for more information on the in-scheme option.

RU20 required a tied adviser to specifically reference the lower charges usually applicable to an in-house AVC scheme. It stated:

“*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*.”

In other words, the same principles applied before May 1996 and after, or for the 1990 advice and the 1998 advice. The generic differences of the AVCs and FSAVCs should’ve been explained to Mr D. It was known by advisers the charges under the in-house AVCs were likely to be cheaper.

With this regulatory background in mind, I’ve considered what happened in the particular circumstances of Mr D’s complaint.

The 1990 advice

There is very little documentary evidence available about the 1990 advice. And I’m not persuaded from what has been provided that the adviser met the LAUTRO requirements at the time. However, I’ve considered what Zurich has said about the 1998 advice.

The 1998 advice

Zurich felt that there was clear evidence in the fact find that the in-house scheme had been identified, and therefore felt that it must’ve been discussed at the time.

It also felt that, given the in-house options had been covered in 1998, this showed that the differences had been discussed in generic terms. It felt that Mr D had been directed to his employer or scheme trustee for more specific information on the in-house option. It therefore felt that its adviser had met the regulatory requirements in 1998.

Zurich also said that as Mr D had decided to restart his FSAVC contributions in 1998, rather than make a complaint about the 1990 advice, that too must’ve been compliant.

I agree with Zurich that the “*Topping up your Occupational Scheme benefits – Your choice”* booklet Mr D was given at the time of the 1998 advice, alongside the fact that the in-house AVC option was noted in the fact find, evidenced that the adviser drew Mr D’s attention to the in-house alternative at that time. I also agree that the booklet noted that Mr D could approach his employer for more information about the in-house options. But I don’t agree that the evidence shows that the adviser sufficiently discussed the differences between the two routes in generic terms.

I say this because, while I’m satisfied that the fact find and the booklet noted certain generic differences, I’m not satisfied that the adviser did enough to ensure that Mr D was fully informed that the in-house AVC scheme was likely to be cheaper. I’ll explain why, by looking in detail at the booklet.

The “Topping up your Occupational Scheme benefits – Your choice” booklet

Mr D’s CMC felt that the booklet didn’t adequately provide a clear explanation of the charges. And that it was at times mis-leading. It felt that Zurich should’ve made Mr D aware of the likelihood of lower charges in the in-house AVC.

The CMC said that although the booklet stated that the charges levied on contributions to an in-house AVC might be lower than those charged under the FSAVC, the information it provided was inconsistent. It said that at one point the booklet implied that while the charges levied on contributions to an in-house AVC were usually lower than those charged under the FSAVC, particularly in the early years, over the life of the plan these charges might even out. It therefore felt that the booklet hadn’t been enough to comply with the regulatory requirements at the time. And that a full in-depth discussion should also have taken place.

Zurich felt the booklet its adviser had given Mr D in 1998 had drawn attention to the differences between the FSAVC and the in-house options. It said that it introduced the booklet as a result of the rule changes since 1990. It also said that the adviser was required to make a point during the fact find to ask whether the customer knew about the in-house scheme, how it was invested and whether it offered matching or added years. And was then required to make a note of the reply on the fact find. It said this had been done in this case. And that it’d been further confirmed in the Recommendation Letter.

Zurich noted that its adviser had specifically noted on the fact find that she’d “*discussed occupational AVC v FSAVC differences.”* It felt this proved that the in-house option was discussed. As such, it felt that Mr D was clearly aware of the other options available to him. And that he hadn’t simply been given the booklet to read.

While I acknowledge that the 1998 fact find noted both that Mr D could join his in-house AVC scheme, and that the differences between that in-house scheme and the FSAVC had been discussed, I’m not persuaded that the adviser made it clear, as she was required to do under the requirements of the regulations at the time, that charges under the in-house AVC would likely be lower than the FSAVC.

Having carefully considered the contents of the booklet, I’m also not persuaded that its contents made it clear that charges under the in-house AVC would likely be lower.

I say this because there’s a section in the booklet which is headed “Charges”. In respect of an in-house AVC, this says that the employer may have agreed enhanced terms. And this may mean that the charges levied on contributions to an in house AVC are lower than the AVC pension account, particularly in the early years. It goes on to say that over the life of the plan these charges may even out.

Therefore, although I don't doubt that the adviser provided Mr D with the booklet in 1998, I'm not persuaded that he would necessarily have understood that the charges under his in-house AVC would be lower than those under his FSAVC. Given the wording I've referenced above, I think that Mr D could well have been left with the impression that over the life of the plan, charges would've made little difference.

If the booklet had made it unequivocally clear that the charges in an in-house AVC would likely be cheaper, or if there was documentary evidence that the discussion the adviser referenced in the fact find had made that clear, I would've been persuaded that the regulatory requirements had been met. But as neither of those things happened, I can't reasonably agree with Zurich that its adviser met the regulatory requirements at the time of the 1998 advice in respect of charges.

Zurich said that the booklet explored a range of issues and encouraged Mr D to contact his employer. It felt there was no reason to doubt he did so. It said that as he'd then decided to reinstate his FSAVC, this showed that he'd considered his options but still wanted to go ahead for the reasons he gave.

The evidence shows that Zurich completed a fact find document on 11 May 1998. It also issued its Recommendation Letter with the same date.

I'm not persuaded that the booklet did "encourage" Mr D to contact his employer. But I am satisfied that it explained that Mr D could approach his employer for further information. Nor am I persuaded that Mr D did approach his employer, and then made his decision to reinstate his FSAVC after that.

I say this because while I acknowledge that the booklet did state: "*If you want more information about your in-house AVC scheme, please contact your employer who will give you the details you need*", I'm not persuaded that the adviser gave Mr D time to do this before she made her recommendation. The evidence shows that she produced her Recommendation Letter on the same date as she carried out the fact find, leaving no time for Mr D to have sought further information from his employer.

I acknowledge that Zurich said the adviser had also provided Mr D with the booklet in November 1997, but I'm not persuaded that Mr D would've approached Zurich in May 1998 with the content of that booklet fresh in his mind. And I don't consider it likely that he would've remembered he'd been given this booklet at the time that he sought advice in May 1998, given he'd left and re-joined his employer in the meantime.

I next considered the reasons the adviser provided for making her recommendation in 1998, to see whether these could've been enough for that advice to have been suitable, despite the charge differences.

Reasons for 1998 recommendation

The adviser noted on the fact find that Mr D had decided to restart his FSAVC, rather than join his in-house AVC, for the following reasons:

- privacy from his employer,
- to receive ongoing financial and pensions advice,
- to allow for an earlier retirement and an existing fund value.

I don't agree that any of these reasons made the advice suitable. I'll explain why:

- Confidentiality is not strictly maintained by FSAVC plans, as in all cases the product provider must notify the consumer's OPS that its scheme member has an FSAVC. Therefore I'm not persuaded that the FSAVC route would've provided the privacy Zurich said Mr D wanted.

- Mr D could've requested ongoing financial and pensions advice from an adviser regardless of whether he chose to pay into an FSAVC or an in-house AVC arrangement. Therefore I don't consider this made the advice suitable.

- I'm not persuaded that the level of the contributions Mr D was making into his FSAVC would've enabled him to retire at age 55, rather than age 60. And I've not been provided with any evidence that the adviser did any calculations or provided any illustrations to show that they would've enabled this. I also don't consider that the fact that Mr D already had funds in an FSAVC plan made continuing to contribute into it any more beneficial than starting an in-house AVC plan.

In my view the main reason for Mr D choosing the FSAVC plan over the in-house option would've been, based on the information known at the time, which scheme was likely to provide him with greater benefits at retirement.

I'm not persuaded that Mr D would've chosen the in-house added years option, because at the time of advice, this would've likely have looked expensive compared to the projected returns and benefits of the FSAVC. I'm also not persuaded that Mr D needed the additional service. I think that if he'd been made aware that in-house AVCs had significantly lower ongoing charges than the FSAVC, he would've chosen that option. Therefore I uphold the complaint.

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 Mr D'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 Mr D 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.

Where possible, the calculations should be provided to Mr D in a clear, simple format.

My final decision

For the reasons I've given above, I uphold the complaint. Zurich Assurance Ltd must pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 22 October 2024.

Jo Occleshaw
Ombudsman