

The complaint

Mrs C complains that Sesame Limited (Sesame) gave her unsuitable advice to start a Free Standing Additional Voluntary Contribution (FSAVC) plan. She thinks she would've been better advised making additional contributions into the in-house arrangements linked to her Occupational Pension Scheme (OPS).

What happened

In late 1996, Mrs C contacted Sesame about adding to her pension savings. At the time of the advice, Mrs C was earning around £8,000. She was in good health. She said she had a low appetite for risk. And that she wanted to supplement her OPS.

At the time of the advice, Mrs C was aged 28. She was a member of an OPS which didn't require member contributions. She'd been a member of her OPS since June 1987. It had a normal pension age of 60.

A "Personal Financial Analysis" was carried out around the time of the advice. Mrs C signed this on 9 December 1996. This stated the following about Mrs C:

- She was married with one dependant child.
- Her greatest priority was family security.
- She owned her own house with a mortgage.
- She didn't have an AVC or FSAVC plan. But she had a personal pension plan which she used to contract out.

The adviser obtained an FSAVC illustration for Mrs C dated 16 December 1996. This showed what the benefits from an FSAVC might be at age 60 if she contributed £39.47 each month until then and invested those contributions in the managed fund.

Sesame recommended that Mrs C started an FSAVC plan. Mrs C accepted the advice and completed an application form on 16 December 1996. The application form stated that her estimated earnings for the current tax year were £7,657.90. She started to contribute £30 each month, or £39.47 after tax relief, from 1 January 1997 until 2019. She chose a selected retirement age of 55.

Mrs C's adviser wrote to her on 8 January 1997. The letter explained what actions had been agreed after the recent financial review.

The letter stated:

"As you work for [employer's name] you are fortunate to have a non-contributory Occupational Pension Scheme, the benefits of which are based on your final salary. The maximum benefit that can be taken from the fund is based on 40 years service, this would take you to age 60 and as it is your wish to retire between the ages of 50 and 55 there is going to be a shortfall in benefits at that time.

One way of addressing this shortfall is a Free Standing Additional Voluntary Contribution Scheme (FSAVC). You are limited to the amount being paid in to 15% of net relevant earnings less any personal contributions to the employer's scheme. An alternative way of making up the pension shortfall would be the [employer's] Additional Voluntary scheme, which is limited in fund choice and of course is not capable of being moved to another scheme should you move jobs."

Later on, the letter stated that Mrs C had decided on the FSAVC and had chosen to invest in the Stewardship Fund, which was an ethical fund. I understand that the plan was solely invested in the Stewardship fund throughout.

Mrs C stopped working for the employer which provided the OPS on 31 December 2019. She decided to wait until she reached age 60 to take the benefits from the OPS. She transferred the FSAVC to another personal pension when it matured in December 2022.

Mrs C said that in January 2023 she saw an advert on social media relating to the potential mis-selling of FSAVCs to members of OPSs like hers. She complained to Sesame about the suitability of the advice to start the FSAVC in November 2023.

Sesame issued its final response to the complaint on 8 February 2024. It said it couldn't consider the merits of the complaint because Mrs C had brought it out of time.

Our investigator didn't agree that the complaint had been brought out of time. He didn't agree that Mrs C ought reasonably to have become aware that she had cause for complaint when she stopped contributions to her FSAVC in May 2019. He was persuaded that she'd first become aware that she had cause to complain about the suitability of the advice to start the FSAVC when she'd seen an advert on social media in January 2023. He therefore went on to consider the merits of the complaint.

Our investigator felt that the adviser should've investigated and then set out the likely difference in charges between the FSAVC and in-house options over the term of the plan. He felt that if he'd done so, he should've simply recommended the in-house AVC, as it was likely to have had lower charges than the FSAVC. Our investigator said that Sesame hadn't mentioned added years or that the FSAVC's charges would most likely be higher than in-house AVC charges.

Although our investigator issued both a jurisdiction view and a merits view at the same time, Sesame asked me to fully investigate the jurisdiction of this complaint before considering its merits. It acknowledged that Mrs C had said she'd stopped contributions to her FSAVC in 2019 to reduce her outgoings as she prepared to leave work. But it felt that she'd clearly said that she'd been concerned about the financial performance of her plan in 2019. And didn't feel confident in putting any more money into it. Sesame felt that this was clear evidence of Mrs C having cause for concern at that time. As she hadn't complained within three years of the date she stopped contributions, it felt the complaint had been made out of time.

I issued a provisional decision on 4 July 2024 which solely focussed on whether this complaint was one this service could consider. It said:

Why I can look into this complaint

The rules say that I can't consider a complaint made more than six years after the event complained of, 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 the business consents.

These rules are known as the Dispute Resolution rules (DISP). DISP 2.8.2R is the relevant

rule here and can be found online in the Dispute Resolution section of the FCA's handbook.

Here, Sesame doesn't consent to us considering this complaint.

I've considered the evidence and having done so I'm satisfied that this complaint has been made within the time limits. I don't agree with Sesame that Mrs C should've had awareness there might be an issue when she decided to stop paying contributions into her FSAVC in 2019.

Instead, I consider that Mrs C first had awareness there might be an issue in January 2023, when she read an article on social media which led her to consider that her FSAVC may have been mis-sold.

I'll explain why I reached this conclusion.

The advice which is being complained about took place in late 1996. This is clearly over six years before the complaint was made. I must therefore consider whether it's more than three years since Mrs C became aware - or ought reasonably to have become aware - that she had cause for complaint. The rules don't say Mrs C needed to be made aware that she could or should complain, only that she ought reasonably to have been aware that she might have cause to complain. This is not the same as saying that she became aware she could complain. But that she became aware she had a reason to complain – or in other words, that there was a potential problem (see below for further clarity on this).

Sesame feels that Mrs C could've complained about the advice at the point that she decided to stop contributing into the FSAVC in May 2019. It said she'd taken this action because she didn't feel confident in putting any more money into the FSAVC.

Sesame said that the last FSAVC statement Mrs C had received before cancelling her contributions had been sent in November 2018. It felt that this statement had contained clear information about what Mrs C could do if she'd had concerns about the plan's performance or suitability. It therefore felt that Mrs C ought reasonably to have become aware that she could complain at this point.

Sesame also felt that because Mrs C had told it she'd carried out her own research into where to transfer her FSAVC funds in December 2022, this showed she had the ability and understanding to research a suitable financial product without seeking financial advice. It therefore felt that it was inconceivable that Mrs C couldn't have carried out simple research in May 2019 to find out if she could raise a complaint about the advice she'd received in 1996 about the FSAVC.

Mrs C's position is that she decided to stop contributing to her FSAVC in May 2019 because she felt the fund "wasn't doing anything". She said that at that time she was trying to get her finances in order because she knew she was about to stop work and would no longer be receiving a salary, therefore it would be difficult to keep up the contributions. Mrs C has provided this service with additional evidence that she made a number of other financial changes around this time in line with her plans to stop work. The evidence also shows that she did stop work at the end of December 2019.

Mrs C said that in December 2022 her FSAVC matured. And that in early January 2023, she saw an advert on social media that led her to believe her FSAVC could've been mis-sold. She felt the advert had probably been generated because she'd been looking into how to invest the matured FSAVC funds.

Mrs C strongly rejects Sesame's suggestion that she should've looked into making a

complaint about the potential mis-sale of her FSAVC in 2019. She said she hadn't been aware at that point that she should've potentially been advised to make additional contributions through her OPS. And that she first became aware of this in January 2023. She said that in May 2019 she didn't have a concern that she could've been given incorrect advice. So she'd had no reason to investigate making a complaint.

Mrs C said she only became aware in January 2023 that it could've been more beneficial for her to have explored the in-house options for additional contributions in her OPS.

Sesame asked Mrs C if she was concerned about the FSAVC in May 2019 when she'd stopped contributing to it. It also asked her why she hadn't complained about the advice at that time.

Mrs C said that she was concerned about the financial performance of the FSAVC in 2019 and didn't feel confident in putting any more money into it. But that she hadn't at this point been aware that she could make a complaint about the potential miss-selling of that type of product. She said she'd only become aware about the potential to complain in January 2023.

I've carefully considered Sesame's point that Mrs C told it that she'd been concerned about the financial performance of her plan in 2019, and therefore didn't feel confident in putting any more money into it. It feels that this is clear evidence of her reasonably having cause for concern at that time. And that Mrs C should've made a complaint in May 2019 when she stopped contributions to the FSAVC. But I don't agree. I'll explain why.

Looking at the evidence I've been provided with, I can see that the November 2018 statement Sesame has referenced showed that the fund value had increased from £17,316.91 on 16 November 2017 to £17,795.25 on 16 November 2018. Although this was only a modest level of growth given the contributions Mrs C was still making, I don't agree that the investment performance was so poor that Mrs C should've become aware that she might have a cause for complaint about the performance at that time. And I'm not persuaded that thinking about whether or not Mrs C should've complained about the investment performance should've then led to her realising she might have a complaint about the suitability of the FSAVC itself.

Instead, I'm more persuaded by Mrs C's testimony, and the evidence she's provided to show that she was, in fact, about to leave work when she stopped contributions in May 2019. I'm satisfied that this shows that Mrs C was making various financial changes in the run up to her stopping work. And that her decision to stop contributions into her FSAVC was simply part of her wider plan to make financial savings where possible.

I agree with our investigator that even if Mrs C had decided to stop contributing to her FSAVC simply because she was unhappy about its performance – which as I've noted above I don't believe that she did – there is no reason to believe that a concern about performance ought reasonably to have made Mrs C aware of a reason to complain about the suitability of the original advice.

It should be remembered that Mrs C's complaint is that the adviser didn't inform her of her alternative in-house options with her OPS at the time of the advice, despite the fact that she always planned to remain in her existing employment until she retired. It isn't about investment performance.

I've seen no evidence of anything that ought reasonably to have triggered awareness in Mrs C that she might have cause to complain about the suitability of the advice until she saw the advert on social media in January 2023. As she raised her complaint within three years of this point, I'm satisfied she made the complaint in time and that our service is able to

consider the merits of her complaint.

Responses to my provisional decision

Neither Mrs C nor Sesame had any further comments to make on my jurisdiction decision.

As Sesame hadn't made any comments on our investigator's merits view, I asked it if it wanted to make any further comments. It said it had no further comments to make.

I've therefore gone on to consider the merits of this complaint.

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.

In this case, I have received some, but not all, original paperwork from the time of the sale. Mrs C has shared her recollections of the advice but the IFA has not, as Sesame has been unable to obtain his contact details.

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.

What were the rules and expectations from May 1996?

I understand that Mrs C's adviser was an independent financial adviser (IFA). This means he could offer products from the whole of the market.

In May 1996, so before Sesame gave advice to Mrs C, the regulator issued Regulatory Update 20 (RU20) which set out the procedures it expected product providers to follow. It said that an IFA should establish what in-house alternatives to the FSAVC were available and discuss the specific differences between them when making their recommendation. As our investigator noted, it said this discussion should include:

- The difference in charges and expenses between the FSAVC and AVC
- The choice of investments
- The availability of added years and the number of years that could be purchased
- The degree of personal control and privacy
- The age at which benefits could be taken
- The degree of portability on changing jobs or becoming self-employed

RU20 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.”

As our investigator noted, to confirm that a suitable recommendation was made, we'd expect to see evidence that the IFA had investigated and then set out the likely difference in charges between the FSAVC and in-house AVC over the term of the plan. Or, for added years, quantified the likely benefits from added years at retirement and compared these with the FSAVC.

Did the advice meet the expectations?

Having considered the evidence, I'm satisfied that the IFA didn't clearly consider the difference in charges between the FSAVC and the in-house AVC before he recommended the FSAVC to Mrs C. Instead, he focussed on the perceived advantages of the FSAVC over the in-house AVC for Mrs C – that is, the improved fund choice and the ability for Mrs C to move her FSAVC to another scheme if she moved jobs. I say this because this is what the IFA said in his 8 January 1997 letter.

I've seen no evidence that the IFA mentioned added years/additional pension. There's also no documentary evidence that he assessed Mrs C's attitude to risk.

Sesame's position is that the IFA recommended the FSAVC and the Stewardship Fund as it was an ethical fund and that this was in line with Mrs C's preferences. Mrs C's position is that she only chose the Stewardship Fund as that was the one the adviser recommended.

I haven't seen any evidence that Mrs C wanted to invest in an ethical fund above all other considerations. Even if it was the case that Mrs C was interested in investing ethically, I've also not seen any evidence that the in-house options for investments didn't include an ethical fund. Therefore I can't reasonably say that the adviser should've prioritised Mrs C being able to invest in an ethical fund over and above the potential lower charges in the in-house arrangements.

The adviser also recommended the FSAVC due to the perceived advantage of its portability. But Mrs C said that she had no intention of changing jobs at the time of the advice. And that she'd stayed in the same employment until she retired.

I'm not persuaded that the potential for moving the FSAVC was important to Mrs C, given her intention at the time of the advice not to move jobs. Therefore I can't reasonably say that the adviser should've prioritised Mrs C being able to move her FSAVC if she moved jobs over and above the potential lower charges in the in-house arrangements.

The 8 January 1997 recommendation letter stated the adviser had identified a shortfall in Mrs C's OPS benefits at her chosen retirement date of between 50 and 55. It then stated that an FSAVC plan was one way of addressing the shortfall. It did mention that an alternative way to address the shortfall would be the in-house scheme. But it said this had limited fund choice and said it couldn't be moved to another scheme if Mrs C moved jobs. The letter didn't mention any other options, such as the potential for added years or additional pension in the OPS. Nor did it mention potential charging differences.

I'm not persuaded that the adviser made it clear to Mrs C that the in-house AVC option would likely be cheaper than the FSAVC plan. Therefore I'm not satisfied that the advice met the regulations at the time. As such, I'm satisfied that the advice was unsuitable.

I've gone on to consider which option Mrs C would've most likely taken if the advice had been suitable.

Added years or in-house AVC

I agree with our investigator, and for broadly the same reasons, that Mrs C would've chosen to contribute to her in-house AVC, rather than buy added years/additional pension, if Sesame had done what it should.

I say this because at the time of the advice, anticipated returns for an in-house AVC would've seemed attractive when compared with the cost of the added years/additional pension. I also consider that Mrs C wouldn't have wanted to agree to the high and relatively inflexible cost of the added years/additional pension. I say this because the evidence shows she had limited ability to make additional contributions, which she never increased, whereas an added years cost would've increased over time with her salary.

In summary, I can't know what was discussed in late 1996/early 1997. But I've not been provided with any evidence that Mrs C was given suitable information on the differences between the in-house options and the FSAVC plan in 1996. I'm also not persuaded that she was given information about how the charges between in-house options and the FSAVC plan might differ. Therefore I uphold the complaint.

Putting things right

Sesame 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, 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 Mrs 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 Mrs 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.

My final decision

For the reasons I've given above, I uphold the complaint. Sesame Limited should pay the amount calculated as set out above.

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

Jo Occleshaw
Ombudsman