DRN-5124418

The complaint

Mrs M complains that Zurich Assurance Limited (Zurich) then trading as Allied Dunbar misadvised her to take out a Free Standing Additional Voluntary Contribution pension plan (FSAVC), causing losses. She wants to be put back in the position she should have been in.

Mrs M is represented in her complaint by a claims management company (CMC) but for ease I will just refer to Mrs M except where necessary in this decision.

What happened

Mrs M says Zurich advised her to take out a FSAVC with it in November 1996 to make additional pension savings on top of the Teachers' Pension Scheme (the TPS). The initial contribution was £39.47 per month and Mrs M paid contributions until April 2011. In 2022 she transferred the plan to another pension provider. In 2024 Mrs M says she saw an advert for her CMC which alerted her to the possibility that Zurich's advice might not have been suitable for her. She raised a complaint with Zurich through her CMC in July 2024. In summary Mrs M said she should have been given more information about the in-house AVC available from the TPS (the TAVC) option. As this was likely to have had lower charges than the FSAVC and she would have chosen it instead and may have suffered losses as a result.

Zurich didn't accept the complaint. It said its advice had satisfied regulatory requirements at the time. And in any case it didn't need to consider Mrs M's complaint as it had been made too late. It said Mrs M had six years to bring the complaint from the point the plan was sold to her. Or three years since she knew or reasonably should have known she had grounds for complaint if later. It said it was more than six years since the plan had been taken out in 1996. And it said she should have known she had grounds for complaint, by 2001 at the latest.

Zurich said her adviser had provided her with a booklet called *"Topping up your occupational scheme benefits – your choice"* (the booklet) in 1996. This set out features of the FSAVC contract and the differences to a typical in-house AVC. And it said it had then sent Mrs M a letter and updated version of the booklet in May 2001. This gave additional details of in-house options including that these were likely to have lower charges than the FSAVC and might provide higher benefits. Zurich said the covering letter drew attention to this and advised Mrs M she could contact it to arrange a review or if she had any queries. It said this information should have alerted Mrs M to any concerns about the advice she'd received in 1996, but instead she'd chosen to continue contributions to the plan.

Mrs M referred her complaint to our service and our investigator looked into it. She thought it was a complaint our service could consider and that it should be upheld.

Our investigator said our service could consider the complaint because she didn't agree that issuing a generic letter and booklet several years after the advice had been given would have reasonably made Mrs M aware there were grounds for complaint in 2001. She said the letter appeared to have been sent to Mrs M in isolation and the letter's primary aim seemed to be to note that the information in the booklet had been updated, not that there was an issue with the advice given in 1996, which wasn't referred to. She said the letter specifically referenced two revisions to the booklet. The first related to the possibility that an employer might agree to match a contribution paid to an in-house AVC. The second related to charges and outlined that an employer would often meet or subsidise in-house AVC charges, which *"could potentially lead to higher retirement benefits"* and that charges were *"usually lower"* than a FSAVC, *"particularly in the early years, although over the life of the plan these may even out."*

Our investigator said this wouldn't have alerted Mrs M to a potential problem, with the second wording quoted undermining the potential impact around charges within the same sentence. As the statement that charges *"may even out"* implied there might not be any difference overall. And in the booklet itself the section on charges said these weren't the only thing to consider and set out other factors in detail, further undermining any importance that might have been placed on the charges. So, it was plausible that Mrs M hadn't discovered she had cause to complain until speaking with her CMC in 2024 and she had complained with three years of then.

Our investigator said having considered the evidence available she thought the complaint should be upheld. She said as a tied adviser Zurich's adviser could only recommend Zurich's own plans. But the regulatory rules at the time required a tied adviser to take *"proper account of the interest of the investor"* and to consider their financial position generally including *"any rights they may have under an occupational scheme and to give the customer all information relevant*". She said in May 1996 the then regulator, the Personal Investment Authority issued Regulatory Update 20 (RU20), setting out specific requirements for advisers in respect of FSAVC sales. With tied advisers required to;

- draw the consumers attention to the in-house alternative
- discuss the generic differences between the two routes - taking account, among other things, of the features described in RU20
- direct the consumer to his employer, or pension scheme for more information on the in-house option.

Our investigator said RU20 referenced areas the regulator expected to be discussed. These included tax treatment, whether employers matched contributions and the typically lower charges under an in-house AVC, where it said,

> *"Charges under in-house 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".*

Our investigator said the recommendation letter sent to Mrs M by Zurich setting out it's advice in 1996 referred to the booklet. And that she wished to provide additional income in retirement. But that the recommendation letter didn't make any reference to charges on in-house AVC's usually being lower and didn't draw Mrs M's attention to this option or refer her to her employer for further information. That meant there was no evidence the likely lower charges had been discussed with Mrs M as required or that the contents of the booklet had been discussed before the plan was set up. Our investigator said even if the booklet had been discussed its contents were misleading as it still implied charges were likely to be similar despite the regulator flagging charges as being the key factor in the choice between an in-house and Free Standing AVC. She said as it was Mrs M's objective to increase her income and the in-house AVC's charges were likely to have been lower she wouldn't have opted for a FSAVC if she'd been given appropriate advice.

Our investigator said Zurich should undertake loss redress calculations as set out in the regulator's FSAVC review guidance and if this showed a loss it should pay it into Mrs M's pension where possible and if not directly to her after making an adjustment for notional tax if necessary.

Zurich didn't agree. It said it disagreed that there was no record of a discussion about charges. It said the evidence showed the adviser had drawn Mrs M's attention to the different options and the regulations more than *"25 years ago"* were different than today and didn't require an *"in depth discussion of charges".* Zurich also said the letter and booklet sent to Mrs M in 2001 were *"clear and easy to understand".* And had specifically drawn her attention to the updated paragraphs and that in-house AVC charges were likely to be lower. And the booklet encouraged Mrs M to contact her employer to find out more about in-house options. It said it was reasonable to assume Mrs M would have considered the letter and booklet and might have contacted her employer and made a *"conscious decision"* to continue with the FSAVC.

As Zurich disagrees it has come to me to decide.

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've decided that our service can consider the complaint and that it should be upheld. I'll explain why.

Why we can consider this complaint

We can't consider every complaint we receive. The complaints we can look into are set down in the rules under which we operate. Our rules are written by the regulator, and flow from legislation, specifically the Financial Services and Markets Act 2000.

The Dispute Resolution (DISP) rules say we:

> *"cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint"*

If a complaint is brought outside these timescales our service can only consider it if either the business consents, or I think something truly prevented it being brought in time.

Zurich gave the advice to take out the FSAVC plan in 1996, this is clearly more than six years ago, and Mrs M is clearly out of time on this part of the rule.

For the second part of the rule, it's important to note that this doesn't require Mrs M to have had certain knowledge of cause for complaint on a specific basis. The sense that something wasn't right might be enough to place an individual on a path to discovery of an actual cause for complaint, if they reasonably acted on that unease, in other words the "ought reasonably to have been aware" part of the rule.

It is generally the case that the in-house TAVC had lower charges than a FSAVC plan. So, for Mrs M to become reasonably aware that she may have had cause to complain that Zurich's advice to take out the FSAVC may have caused her losses something would have needed to trigger her to consider this. And she says that this was when she spoke with her CMC in 2024.

Zurich argues it's letter to Mrs M in May 2001 enclosing an updated version of the booklet it says was initially provided to her in 1996 ought to have made her reasonably aware she had cause for complaint. As the booklet had been updated with further details about in-house AVC options and FSAVCs including information about charges.

Having considered both the letter and the booklet carefully I don't agree. I think this communication was at best confusing and likely to mislead most people receiving it. I don't think it was sufficient to have made Mrs M reasonably aware she had cause to complain for the following reasons:

1. It was a generic letter and booklet. Nothing specifically drew Mrs M's attention that there might be an issue with her plan or the advice she'd been given nearly five years earlier. And the covering letter invites Mrs M to contact Zurich if she had *"any questions arising from this revised booklet*" rather than about the advice she'd been given.

2. Taken together the letter and booklet are confusingly and somewhat contradictory. The booklet does give information about in-house AVCs and FSAVCs. But I think the information, on charges (the key point here), is contradicted by the letter. And I think it highly probable that the one-page letter which appears to confirm what revisions had been made, would be given more consideration than the eight-page booklet.

   The letter says the updated booklet is enclosed and it *"would draw your attention to the following revisions"*. It states *"Page 1 makes the additional reference …"* And quotes the additional wording in full.

   It then says, *"Page 3 refers to*" and quotes the following:

   "The costs associated with setting-up and administering an in-house AVC are often met by the employer, or your employer may have agreed enhanced terms with the insurance company, in the form of reduced charges. This could potentially lead to higher retirement benefits than under an FSAVC offering a similar investment fund. The charges levied on contributions to an in-house AVC are usually lower than those charged under the Allied Dunbar FSAVC Pension Account, particularly in the early years, although over the life of the plan these may even out."

   This wording strongly suggests that charges would have made little difference overall. And putting it in the letter clearly gives this statement a high degree of prominence. I think given the previous details about page 1 noted above most readers would conclude this was the revised wording and there might not be any need to read the booklet.

   But this isn't the wording set out in the 2001 booklet provided. This says charges *"may be lower"* rather than *"usually lower"*, which I consider has quite a different meaning. And it omits the "*particularly in the early years, although over the life of the plan these may even out."* part. Which gives a fairer, more balanced view of the likely charging situation than the wording set out in the letter.

It isn't exactly clear where the wording quoted in the letter is from. Zurich has provided a poor-quality copy of a different *"Topping up your …"* booklet with no obvious date on it. Presumably this is what was provided to Mrs M in 1996, it says very little about charges (which I'll return to below) and doesn't contain the wording set out in the May 2001 letter. Either way quoting some "previously" used wording in full without explaining that it is not the new wording in the revised booklet is misleading. And I think any updated information in the booklet was being skewed by this misleading presentation.

3. The booklet is very much "sales" orientated. It empathises possible advantages of FSAVCs whilst providing limited details of in-house options. I think this undermines the importance of the information about the likely charging differential. For example, the section on the additional *"Privacy"* a FSAVC might offer over in house options is longer than the section on charges.

I think having read the 2001 booklet and particularly the letter, Mrs M would have been given no reason to think there was any cause for concern about the advice she'd been provided with. That is confirmed by the fact that she continued to pay contributions to her FSAVC after this. So, I'm satisfied that our service can consider this complaint.

Was the FSAVC mis-sold

Zurich has argued that the advice it provided was compliant with the regulations in place at the time, but I don't agree the evidence available shows this.

The main issue is whether in-house AVC options were properly discussed and considered as required. Zurich says they were largely because the 1996 version of the booklet was provided before the FSAVC was set up as confirmed in the *"Reasons for Recommendation"* letter co-signed by Mrs M.

Zurich's adviser couldn't give advice about the TAVC, but by 1996 the regulator expected tied advisers to discuss the generic differences between any in-house AVC option and the FSAVC alternative, taking into account their features. That would have included referring to the charges of each option and that in-house AVC's were usually cheaper. And to also direct the consumer to their employer to obtain more information on in-house options.

The *"Reasons for Recommendation"* letter provided to Mrs M doesn't discuss the differences between the in-house and FSAVC options. It says the booklet has been provided, which *"sets out the benefits and features"* of the FSAVC *"and those typically available under the employers' in-house scheme".* And that Mrs M had *"advised me that you understand the choices available to you".* It makes no comment at all about charges. Nor does it specifically suggest that Mrs M contact her employer or pension scheme for further details about in house options.

That Zurich felt the need to update and send a copy of an updated booklet with further information in 2001, suggests that earlier versions of the booklet might have been lacking and didn't meet regulatory standards at the time. And from the copy booklet provided by Zurich that certainly seems to be the case. As I've noted this only very briefly mentions charges. It doesn't state that in-house AVC's might have lower charges. It says that for the FSAVC an illustration will be provided *"giving details of the benefits included and the cost of those benefits*" and something similar might be available with an in-house AVC. Overall, the booklet emphasises possible disadvantages of AVC's in my view rather than fairly setting out the features of both options. So, neither the Recommendation letter or booklet discusses the likely difference in charges between the FSAVC and inhouse AVC options despite the Regulator having clearly highlighted this pre-existing requirement as being the key differential influencing a consumer's choice, several months before the advice was given to Mrs M.

Zurich's fact find document doesn't have a section asking about any in-house AVC options which I've seen on later versions its advisers used. And there are no notes on the fact find to say anything was discussed about this at the time. So, the evidence suggests there was no generic discussion, and the booklet Zurich seeks to rely on, is generally inadequate and particularly so in the area of charges.

So, from the evidence available it doesn't appear that Zurich's advice complied with the regulatory requirements at the time. That means the policy was mis-sold. And if Mrs M had been provided with the information she should have been, I think it is more likely than not she would have opted for the in-house AVC alternative over the FSAVC. If that has resulted in a loss for Mrs M it is fair that Zurich puts her as closely as possible back into the position she should have been in but for the poor advice.

Putting things right

Zurich 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 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 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.

This is not a payment of tax to HMRC, but an adjustment to ensure that Mrs M isn't overcompensated.

My final decision

My final decision is that I uphold this complaint against Zurich Assurance Limited.

I direct Zurich Assurance Limited to undertake the loss redress calculation and pay any compensation that may be due as 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 28 May 2025.

Nigel Bracken
Ombudsman