DRN-5198921

The complaint

Mr W complains that Sesame Limited (Sesame) mis-sold him a Free Standing Additional Voluntary Contribution (FSAVC) pension plan causing him losses. He wants compensation for his losses.

Mr W is represented in his complaint by a claims management company (CMC) but I will just refer to Mr W in this decision, except where necessary.

What happened

Mr W was a member of the Teachers' Pension Scheme (TPS). Sesame, then called DBS, is a network of independent financial advisers (IFA's) referred to as appointed representatives. FSAVC and AVC allow further pension contributions to be made to top up pension benefits under an employer's pension scheme.

Mr W dealt with the Sesame adviser (the adviser) for a number of years, who arranged various products for him. One of these was a FSAVC plan with a provider called Target. In February 1992 due to various issues with Target the adviser recommended Mr W stop paying contributions to that plan and take out a new FSAVC plan with Aviva (then Norwich Union). As it was only possible to contribute to one AVC each tax year, the start of the new plan was arranged to be 10 April 1992, with a contribution of £80 per month before tax relief. Mr W was then 46 years old and had been a teacher for 25 years. His normal retirement age was 65, in 2011 and the FSAVC was set up to the same date. The following year the contribution was increased to £100 before tax relief. Mr W took early retirement in 1996 at age 50 and he purchased an annuity, also with Aviva, with his FSAVC.

In 2023 Mr W says he saw an advert by his CMC about potentially mis-sold FSAVCs. And he says this made him question the advice he'd been given to take out the plan in 1992. The CMC raised a complaint with Sesame, making a number of points. It said Mr W should have been advised to join one of the alternatives available from the TPS, either the in house AVC or the added years option rather than the FSAVC, and this had caused him losses.

Sesame didn't accept the complaint. It said when the advice was given in 1992 the *"regulatory landscape was not as robust as it is today"*, and it wasn't appropriate to retrospectively apply today's standards. It said there was no requirement for recommendations be in writing. It said from the limited evidence available on its file it was clear the adviser knew Mr W well and would have understood his needs enough to make a suitable recommendation. It said given Mr W likely length or service he would have had little scope to buy added years. It said the TPS in house AVC was cheaper but as Mr W had taken the benefits early at age 50 it was likely this was always his intention, and this wouldn't have been possible with the in-house alternatives, as these would have been tied into the TPS retirement age of 65, so the advice wasn't unsuitable.

Mr W referred his complaint to our service and our investigator looked into it, and he said it should be upheld.

Our investigator said the regulatory requirements applying in 1992 required IFA's not to make recommendations if an alternative option would better meet the consumers' needs and to provide the consumer with sufficient information so they could adequately and reasonably decide whether to accept the recommendations made. This meant the adviser needed to identify any in house options available to Mr W and compare these with the FSAVC in order to recommend the FSAVC as being in his best interests. Our investigator said in May 1996 the regulator issued Regulatory Update 20 (RU20) which codified the procedures IFAs were expected to follow by reiterating the existing requirements. RU20 said discussions should include the difference in charges and expenses between the options, investment choices, the availability of added years, the age at which benefits could be taken, and other factors like flexibility, confidentiality and portability should the consumer change job. RU20 also highlighted that in-house options were likely to have lower charges than FSAVC. And that this likely be the most important factor in what the consumer would choose to buy.

Our investigator said from the copy letters the adviser had sent Mr W it didn't appear either in-house AVC's or added year options had been discussed. Or that there had been any discussion of the generic differences between in-house or FSAVC options and other features such as costs. He said it was likely that the TPS in-house AVC would have been cheaper than the FSAVC. And there was nothing to show that Mr W needed a FSAVC for any other reason, such as obtaining greater investment flexibility. So, it was likely that the cheaper in-house option should have been recommended, and the FSAVC had been mis-sold. Our investigator said Sesame should undertake a redress calculation as set out in the regulator's FSAVC review guidance to compare the charges of the FSAVC to the in-house option and it this showed a loss to pay compensation.

Sesame didn't agree and made a number of points. It said Mr W had no scope to buy added years as had he remained in service, he would have received the maximum benefit allowed. It said as there was no suitability report, which wasn't required, it wasn't possible to know what had or hadn't been discussed. It said there was no requirement to detail any fees or charges. It said the regulations at the time required the adviser to take *"reasonable care"* and there was no evidence it hadn't. It said that Mr W had been given a Norwich Union illustration for the plan, which showed charges and projections, which at the time "*was considered sufficient information for the customer to understand the recommendation"*.

Sesame said RU20 added additional requirements and wasn't relevant in 1992. And if anything, RU20 showed that prior to 1996 the regulatory requirements were lighter. But it said even applying the 1996 standard it could be seen that the FSAVC had a wider range of investments, more personal control, was portable and allowed benefits to be accessed *"independent of the main scheme",* which Mr W *"subsequently took advantage of",* at age 50 which *"was not possible from the in-house AVC".* Sesame said it was reasonable to think this had been discussed with Mr W or had been part of the advisers reasoning in recommending the FSAVC. It said overall it was unreasonable to say the advice was unsuitable.

As Sesame doesn't agree 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 am upholding the complaint.

The events complained about were many years ago and the evidence available is relatively limited. The rules in place were different as there was no regulatory requirement for advisers to set out recommendations in writing to explain why they were suitable for the client's needs and objectives. However, in 1992 advisers were required to consider the wider picture and not recommend something if there was a superior alternative available. Advisers also needed to provide the consumer with sufficient information for them to reasonably decide whether to accept the recommendation made.

So, when providing advice about FSAVC's the adviser needed to consider the availability of any in-house alternatives under the employer's scheme. And whether these might be preferrable and advise the client accordingly. But there is no information of the advisers file about in-house alternatives, nor any comments about what features the FSAVC had that might make if preferrable. Nor are Mr W's objectives identified despite there being a fact find document. The adviser did write to Mr W about the new FSAVC referring to the objective of increasing AVC contributions. But the letter largely refers to problems at Target Life and that it would be better to invest in a new FSAVC with Norwich Union going forward. With the incentive that the adviser would pay £180 to Mr W once the new plan was set up, so as to avoid the adviser overly benefiting from the problems at Target Life.

Having started the plan in 1992 Mr W then increased the contribution in 1994. There is no fact find or recommendation in respect of this subsequent increase. But other documents suggest that by then DBS and it's appointed representatives were meant to put recommendations in writing. The DBS *"Client Agreement"* under clause 13 headed *"Advice and Instructions"* says,

> *"Any advice given by us or our Appointed Representative shall be in writing, or if given verbally, will be recorded in writing on the clients file."*

I think increasing the contributions to the FSAVC would reasonably require the adviser to at least summarise the relative merits of doing so, but there isn't a copy of any recommendation letter or notes. There is an internal business submission sheet which states that the fact find is up to date, although there isn't one on the file. A document headed *"Client Meeting Report Form"* appears to have been dated 20 January 1994. This further confirms that a fact find has been *"completed/updated".* Under the section headed, *"Details of specific type of contract recommended and why"* is entered, *"Inc to existing FSAVC", "inc"* being a common abbreviation for a premium increment or increase. That isn't an explanation of why the recommendation was made. So, it doesn't appear any record was made of Mr W's needs and objectives or why the FSAVC remained more advantageous than the in-house AVC alternative at this point either.

I agree with Sesame's argument that Mr W's potential service to the TPS retirement age would have meant there was little scope to arrange added years. But I'm not persuaded by the other arguments it has made to justify the sale of the FSAVC. There is no evidence that Mr W required the features offered by FSAVC that might, in some scenarios, offer more choice or flexibility than a typical in-house AVC alternative. I'd expect any objectives or requirements that Mr W might have had around this to be recorded on a fact find document. And as I've noted by 1994 it seems these and the recommendation should have been in writing, but they aren't. Sesame says the Norwich Union FSAVC offered wider investment choice. It has shown no evidence of this although I accept in may have been the case. However, it doesn't appear Mr W made use of any wider investment choice as he invested in the With Profits fund. This was effectively the default investment option under the in-house AVC alternative offered by Prudential at the time. So, perceived investment flexibility wouldn't justify the additional costs and charges it is likely the FSAVC had over the in-house alternative.

Sesame has also said the flexibility to take benefits early and independently of the main TPS under the FSAVC was a benefit that Mr W took advantage of and was likely to have been a consideration when the advice was given. Again, there are no notes about such matters in the adviser's file. And when the advice was given in 1992 it wasn't possible to take FSAVC benefits unless also taking benefits from the main scheme. That rule didn't change until 1999 and Mr W took his benefits in 1996. And if Mr W had been interested in early retirement which might have favoured a FSAVC recommendation, it's also reasonable to expect the retirement date selected for the FSAVC would reflect that. But the FSAVC was set up to age 65, matching the TPS retirement age. Generally, the longer the term of the plan the higher the charges and the commission paid to the adviser would have been, so if there was an intention to retire early setting the plan up to age 65 was poor advice.

There is no evidence that Sesame carried out the necessary discussions and comparisons of the in-house options available with Mr W to give him sufficient information to allow him to reasonably accept the recommendation made, as the regulations required at the time. There is evidence, certainly for the increase in contribution in 1994, that written recommendations should have been provided or at least recorded on the file, but there aren't any. Which again suggests the relevant issues and comparisons weren't considered as I think they should have been. There is no evidence that Mr W needed the potential advantages and FSAVC might offer, such as portability or wider investment choice.

So, taking everything together there is no evidence the regulatory standards were complied with at the time or that Mr W had any specific requirement for a FSAVC. And, because the charges of the in-house AVC were likely to be lower than those of the FSAVC, I think Sesame's adviser should have recommended the in-house alternative, which means I think the FSAVC plan was mis-sold, and I uphold his complaint.

It's possible that Mr W may have suffered losses as a consequence of the poor advice and if so it's fair that he be compensated for that.

Putting things right

My aim in awarding compensation is to put Mr W most closely back into the position he would have been in but for the poor advice.

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 would normally be paid into Mr W's pension plan. But as the plan no longer exists any compensation should be paid directly to Mr W 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 income tax rate in retirement which he has confirmed is 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 Mr W isn't over compensated, and he won't be able to claim anything back from HMRC.

My final decision

My final decision is that I uphold the complaint against Sesame Limited.

I direct Sesame Limited to undertake the redress calculation as set out above and pay any compensation due.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 27 February 2025.

Nigel Bracken
Ombudsman