

## **complaint**

Mrs M's complaint has been brought by a claims management company ("the CMC") on her behalf. The CMC says The Prudential Assurance Company Limited ("Prudential") gave Mrs M unsuitable advice to make Free-Standing Additional Voluntary Contributions (FSAVCs) into a pension policy with it. The CMC says, given Mrs M's circumstances, she should have been advised to use the money to buy added years' service in her occupational pension scheme, rather make FSAVCs.

## **background**

Mrs M became employed full time in the NHS as a nurse in 1998. Before that she'd worked in the NHS as an employee and on temporary contracts. She had a personal pension with Prudential and had, in the past, accrued some years of service within the NHS occupational pension scheme. In 1998 she re-joined the NHS scheme rather than continue to pay into her personal pension.

Mrs M was given the advice subject to complaint in 1999. At this time she was 49 years old, was married and had two financial dependants who she expected to be dependent on her for another five years. She was living in tied accommodation related to her husband's job and was earning a total of around £22,000. She was recorded as having a "very cautious" attitude to risk, and her objective was to increase her retirement income. Prudential recommend she make FSAVCs into a policy with it to achieve that objective.

The FSAVC was set up with monthly net contributions of £162.18. That was the maximum Mrs M could contribute under pension tax rules at the time. The contributions were to be used to buy units in Prudential's with-profits fund. In 2010, when she retired, Mrs M transferred the money held in the fund (around £30,000) to another provider.

Prudential did not uphold Mr M's complaint. It said, in summary:

- The adviser gave Mrs M a leaflet that went into a lot of detail about the relative merits of the FSAVCs and in-house Additional Voluntary Contributions (AVCs).
- Added years was a potential alternative way of saving for retirement. This might have been offered by Mrs M's employer and was a very different type of arrangement. This type of retirement planning is often more expensive, provides family benefits that are not always required and is quite inflexible, so it did not see it as a natural choice for Mrs M.
- It cannot find any evidence to suggest the FSAVC plan was mis-sold in any way. At the time this FSAVC plan would have given Mrs M a tax efficient means of saving towards her retirement. There was tax relief on her contributions and the fund growth had tax benefits.

Our investigator did not think the complaint should be upheld. He said, in summary:

- He was not sure if Prudential discussed the added years option with Mrs M in 1999, but he didn't think she would've acted differently if she was aware of the added years option at this time.

- Added years would likely have been a much more expensive option for Mrs M than the FSAVC. He thought the cost would have seemed too high for Mrs M.
- It was fair to say Mrs M would have been a reasonably low risk investor. Her contributions to the FSAVC were paid into a 'with profits' fund which was considered a relatively low risk investment so he thought it met her circumstances at the time of the sale.
- With hindsight, added years may look like the best option but in 1999 investment returns and annuity rates were much higher than they are now, and it wasn't generally anticipated that the economic climate would change in the way that it has.
- Prudential had provided him with a copy of a factsheet called *Additional Voluntary Contributions – Some Important Features* and a copy of the recommendation summary that was sent to Mrs M in January 1999. That set out the features of the FSAVC, including the difference between it and an in-house scheme. So he thought Mrs M was given enough information to decide whether or not she felt one of the in-house options would have been better suited to her needs.

The CMC did not accept this view. It said, in summary:

- When Mrs M was sold the FSAVC in 1999, she was aged 49. With the normal retirement age of 60 in mind, this meant she had 11 years to retirement. The cost of purchasing one added year would have been approximately 1.85% of her salary.
- It is totally implausible to say that added years were more expensive. Mrs M was paying the maximum 9% of her salary into the FSAVC. So affordability appears to be irrelevant in this case.
- Its calculations show that, given that Mrs M has contributed 9% of her salary for the remaining 11 years of her employment, she could have purchased in excess of 4.5 years additional service. Had this option been discussed, with a relatively short period to retirement, Mrs M would have undoubtedly seen the massive benefit.
- We need to consider Mrs M's age –younger consumers are more likely to be early leavers and so less likely to benefit from added years. Mrs M joined her occupational pension scheme in 1998 when she was 48 years old and she had previously been employed on temporary and part time contracts, accruing 8 years' service. Mrs M was very clearly happy in her job and did not have any intention of leaving the NHS.
- Future job prospects should also be taken into consideration within this case. Mrs M had trained to qualify as a nurse. At age 49, it seems very unlikely that she would have a desire to change her career. On the balance of probabilities, she would have remained with the NHS as a trained nurse. In fact, this is exactly what happened.
- Mrs M was not likely to see the large salary increases that some doctors saw within the NHS, but it should be noted that she contributed the maximum 9% of her salary to the FSAVC and continued to do this up until retirement.
- It has been recorded that Mrs M's attitude to risk was very cautious. Its understanding is that added years are normally more suitable for consumers who usually adopt a risk averse approach to investing. It follows that for Mrs M, with only

11 years to retirement, she would not have wanted to take any risks with her retirement planning.

- In its recommendations Prudential has very simply written that the relative merits of FSAVCs and AVCs were covered. There is nothing to document how it covered this. It also documented that Mrs M chose the FSAVC plan because of the choice of investment. But Mrs M was placed within the with profits fund and never made any fund switches. It is sure we are aware it would not normally be considered good advice to contribute to an FSAVC when there were clearly better options available.

### **first provisional decision**

My first provisional decision was, in summary:

- The available evidence showed Prudential met the regulatory requirements relating to the sale of AVCs and FSAVCs.
- But Prudential's adviser also had a general duty of care to give suitable advice based on Mrs M's circumstances at the time. And, in my view, the advice Prudential gave Mrs M was unsuitable. So I thought it was fair and reasonable to uphold Mrs M's complaint.
- I did not think there was any justification for recommending FSAVCs over the in-house AVCs Mrs M was able to make into her occupational scheme. The AVCs would have had lower charges than the FSAVCs. And there was no evidence to show the FSAVCs were more suited to Mrs M than AVCs.
- However, I did not think Mrs M would or should have used her money to make AVCs into her occupational scheme either. She should have been advised to use the money to buy added years of service. In her circumstances, that was the best thing for her to do.
- So Prudential should have recommended Mrs M use her additional contributions to buy added years of service. And I was satisfied Mrs M would have accepted that advice.

Prudential did not accept this view. It said, in summary:

- Because its representative was a tied agent he was not able to provide advice on any other product than the FSAVC. It was not therefore possible for it to recommend added years. Its duty was to point out that other options were available and this is what it did. It was not required to carry out a detailed comparison of FSAVCs, AVCs and added years.
- The rules applicable to independent financial advisors say such an advisor should have actively investigated the AVC and recommended it, if it was better for the consumer. This does not, however, apply to life assurance companies, such as it.
- The complaint should therefore be reconsidered under the LAUTRO Code of Conduct for life assurance company representatives.

- Previous ombudsman's decisions have confirmed it met the regulatory requirements at the time. It is not clear how this complaint differs to the complaints those decisions related to.
- It would like to challenge the figures quoted by the CMC in respect of the cost of past added years. It has stated that the cost of one added year would have been approximately 1.85% of Mrs M's salary. It would like to see evidence of this as it believes this figure should be higher.
- It agrees it is likely that Mrs M would have stayed in nursing. However, it is possible that she could have returned to a temporary part-time contract or even gone into the private sector of nursing.
- Our own published guidance suggests that consumers that are likely to have relatively low salary increases are less likely to benefit from added years. But I have still suggested Mrs M would have been able to buy significant extra benefit through the added years route. Again it would like to see evidence that buying added years would have been affordable.

#### **my second provisional decision**

- The PIA's Regulatory Update in respect of the sale of AVCs and FSAVCs (RU20) was published in 1996. The advice here, in 1999, post-dates that update.
- I had noted Prudential's reference to the LAUTRO Code of Conduct. However, it is my understanding that RU20 was intended to be a clarification of the existing rules. So I am satisfied it is consistent with the requirements of the Code of Conduct.
- Prudential's letter of 15 January 1999, which set out its advice, said that the relative merits of FSAVCs and AVCs had been discussed with Mrs M. It also referred to a leaflet called "AVCs – some important features" which had been given to Mrs M. That leaflet set out the differences between the FSAVC and the AVC in generic terms, including the likely lower charges of in-house AVC schemes. It also explained that information about AVCs will be available from the employer or pension scheme trustees. So it was consistent with the requirements set out in RU20.
- I acknowledged that the leaflet and letter don't specifically mention added years. But I'd not seen any evidence to show Mrs M made any contact with her employer or occupational pension scheme trustees for further information about the in-house AVC option despite the mention of AVCs possibly being cheaper. And, at the time, the projected benefits from added years would not necessarily have looked any better than the money purchase option. So I was not persuaded it would have made any difference had added years been specifically mentioned.
- I remained of the view that there was general duty of care to give suitable advice. But I appreciated this needed to be considered in the context of the limits on what a tied representative could do at the time, and the regulatory rules in place.
- Having reconsidered things on this basis I accepted, on reflection, that it was unfair to say Prudential should have actively recommended added years or have considered the suitability of FSAVCs by reference to the suitability of the other options available to Mrs M. I did not think it fair to say Prudential was required to give

advice on these options – I accepted that is beyond what it was allowed to do at the time and that RU20 did not require it to consider the suitability of these options before giving a recommendation.

- With the above in mind, I was now of the view that it was not fair and reasonable to say Prudential should *not* have recommended FSAVCs, in the circumstances. As Prudential could not give advice on any of the other options, it could not comment on the suitability of those for Mrs M. It could only recommend its own product, and ensure Mrs M was put in the position required by the regulations, to allow her to make an informed choice as to whether to accept its recommendation.
- Given the extent of its obligations at the time, and Mrs M’s recorded objectives, I was satisfied, on reflection, that it was fair and reasonable for Prudential to recommend FSAVCs, having met its obligation to make Mrs M aware of the other options available to her.
- Prudential’s recommendation letter says “I have discussed with you the features of a with-profits fund and we established that this is consistent with a very cautious attitude to risk.” “Very cautious” was the second of four options for attitude to risk, which began with “Capital Security”. It, and the following two options, were defined as follows:

Very cautious:

*In saving or investing to achieve my financial objective over a pre-determined period of time I want the potential of some real capital growth. I understand that to have this potential I need to take a small risk with the capital I invest.*

Cautious:

*In saving or investing to achieve my financial objective over a pre-determined period of time I want the potential of greater real capital growth. I understand that to have this potential I need to take moderate risk with the capital I invest.*

Adventurous:

*In saving or investing to achieve my financial objective over a pre-determined period of time I want the potential of significant real capital growth. I understand that to have this potential I need to take a higher risk with the capital I invest.*

- I thought, despite their titles, these attitudes to risk broadly equated to what might reasonably be described in common terms as “low”, “medium” and “high” attitudes to risk. And it was important to consider the definition itself as much as the title given to that definition. So I thought it fair to say that Mrs M was, broadly speaking, a low risk investor.
- The recommendation of the with-profits fund, in my view, aligned with such an attitude to risk. It was a lower risk fund, to which Mrs M would be making regular contributions.
- Mrs M’s recorded objective was to make further retirement provision, with the aim of achieving an annual income of £15,000 a year in retirement. The recommendation to

invest the maximum amount allowed by HMRC into the FSAVC was not inconsistent with this objective – and of the options that Prudential was able to recommend, it gave her the best chance of achieving this aim, given her attitude to risk.

Prudential accepted my revised findings. The CMC did not. It said, in summary:

- It seems Prudential has persuaded me that any tied representative of any FSAVC provider had no responsibility or duty of care to ensure that the advice they were giving was the most suitable. My findings imply that tied representatives should not discuss added years.
- There are only 3 things to consider. A representative should not recommend his/her own company's FSAVC until he has:
  1. Drawn the client's attention to the in-scheme alternative.
  2. Discussed the difference between the two routes in generic terms.
  3. Directed the client to his/her employer, or to the scheme trustees, for more information on the in-scheme option.
- It appears Prudential has complied with points 1 and 2 on this occasion but has not complied with point 3. It is impossible for it to have done so as the advice and direct debit mandate was all signed on the same day. It follows that it was impossible for the consumer to make an informed decision.
- It may well be correct in that Prudential could not advise on added years, but it very clearly did have a duty of care (as I previously said) to ensure that the advice they were given was the best advice for the consumer.

### **my findings**

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have not been persuaded to depart from my second provisional decision.

As I set out in my second provisional decision, the PIA's Regulatory Update in respect of the sale of AVCs and FSAVCs (RU20) was published in 1996. The advice here, in 1999, post-dates that update. So at the time of the advice, in accordance with RU20, the Prudential's adviser was required to:

- draw Mrs M's attention to the in-house AVC scheme
- discuss the differences between the FSAVC plan and the in-house AVC in generic terms, including the likely lower charges of in-house AVC schemes
- direct Mrs M to her employer or occupational pension scheme trustees for further information about the in-house AVC option

It is my understanding that RU20 was intended to be a clarification of the existing rules. So I am satisfied it is consistent with the requirements of the LAUTRO Code of Conduct Prudential has referred to.

I think the points 1 to 3 listed by the CMC essentially paraphrase RU20. I therefore think it is common ground that RU20 sets out the requirements that were relevant to the advice given here.

I remain satisfied that the available evidence shows Prudential met these requirements. It provided Mrs M with a leaflet called "AVCs – some important features" which had been given to Mrs M. That leaflet sets out the differences between the FSAVC and the AVC in generic terms, including the likely lower charges of in-house AVC schemes. It also explains that information about AVCs will be available from the employer or pension scheme trustees. The correspondence from Prudential to Mrs M records that the contents of this leaflet was discussed with Mrs M.

The CMC says the third requirement – described by it as point 3 – was not met by Prudential. But that is not supported by the available evidence. The leaflet Prudential gave to Mrs M included the following:

*"Since 1989 any employer who offers an 'in-house' occupational pension scheme also has to provide an AVC facility, so if you are a member of your employer's pension scheme, you will also be eligible to make contributions to the "in-house" AVC facility. Information on any "in-house" scheme will be available from your employer or pension scheme trustees."*

So I am satisfied Mrs M was directed to her employer or scheme trustees.

The CMC says that Mrs M was given insufficient time to complete any enquiries she wished to make. I appreciate the letter I referred to in my last provisional decision was sent a few days after Mrs M applied for the FSAVC. But the available evidence shows this was the second occasion on which FSAVCs had been discussed with Mrs M. Prudential's file shows that on 1 October 1998 a meeting at Mrs M's home took place, and a form recording the details of the review of her finances which had taken place at that meeting was signed. A letter similar to the 15 January 1999 letter referred to in my last provisional decision was then sent to Mrs M on 2 October 1998. That letter said "I have given you a copy of the leaflet "AVCs – some important features – and have explained the contents to you". So it seems Mrs M was given the leaflet, and had the contents explained to her, a few months before she finally applied for the FSAVC. So I do not think it would be fair and reasonable to say Mrs M was not given sufficient time to consider things.

I acknowledged in my last provisional decision that Prudential's leaflet did not refer specifically to added years. But, as mentioned, it did direct Mrs M to her employer or scheme trustees. And I don't think a specific mention of added years would have led her to contact her employer or scheme trustees when the mention of AVCs potentially being cheaper did not. So I remain of the view that a specific reference to added years is unlikely to have had an impact of Mrs M's actions.

I remain of the view that Prudential's advisor did have a duty to make a suitable recommendation. But, as I explained in my second provisional decision, I think it is important to consider that in the context of the limitations on a tied advisor. Beyond meeting the above requirements, Prudential's advisor could only consider the suitability of Prudential's FSAVC for Mrs M. For the reasons given in my provisional decision, I do think it was fair and reasonable in the circumstances for Prudential to recommend the FSAVC to Mrs M.

In summary, I don't think it would be fair and reasonable to uphold Mrs M's complaint, for the reasons given here and in my second provisional decision. I appreciate this will disappoint Mrs M and the CMC.

**my final decision**

For the reasons given, I do not uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 10 October 2019.

John Pattinson  
**ombudsman**