complaint

Mr C's complaint is about A J Bell Management Limited (A J Bell) changing its SIPP charging structure but not agreeing to waive its transfer-out charges if he wanted to leave the product. He considers that it has acted unfairly particularly in respect of the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999.

background

A J Bell wrote to Mr C in November 2013 saying that it was making changes to the charging structure of his SIPP. This was a result of rules introduced following the regulator's (the Financial Services Authority at the time) Retail Distribution Review. The annual fee on Mr C's SIPP was to increase from £50 per year to £300.

The complaint was investigated by one of our adjudicators. He wrote to Mr C saying that he didn't think that the complaint should be upheld. In summary he said:

- A J Bell had agreed to an FSA Undertaking in 2006 which was incorporated into its SIPPs' terms and conditions. These changes included the requirement for specifying the reasons for making future changes to the terms and conditions, which would include any varying of charges; the need to give advanced notice of 30 days before implementing a change; giving consumers 90 days from when the firm notified them of an increase in charges to exit the contract at the existing charge rate; or allowing consumers to exit the contract freely if the reason for varying the charge was not specified in the contract – in which case it would waive its exit fee.

- He considered that A J Bell had acted in accordance with the FSA undertaking that it had agreed. Sufficient notice had been given about a valid change. And Mr C had been able to transfer out at the existing charge rate.

Mr C didn't agree with the adjudicator's opinion. He said, in summary, that although he acknowledged that the firm had a valid reason to change the charges, the office of Fair Trading (OFT) guidance about UTCCRs said this wasn't enough in itself to be fair. He referred to the OFT guidance saying:

"Any kind of variation clause may in principle be fair if consumers are free to escape its effects by ending the contract. To be genuinely free to cancel, they must not be left worse for having entered the contract, whether by experiencing financial loss (for example, forfeiture of a prepayment) or serious inconvenience, or any adverse consequence."

And in the footnote:

"Note the absence of a 'valid reasons' route to fairness. The OFT does not consider that use of 'valid reasons' normally justifies price increases…"

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so I have reached the same conclusion as the adjudicator, and largely for the same reasons.

The FCA's guidance said:

"Our interpretation of the Regulations and in particular the indicative terms of schedule 2 is that terms which allow a firm to unilaterally vary the terms of its contract are less likely to be unfair if:

(1) There is a valid reason which is specified in the contract; or
(2) For variations to interest rates or other charges, the term provides that the variation will be for a "valid reason" (which is not specified in the contract) and the contract provides for the firm to give the consumer notice at the earliest opportunity…and the consumer is free to dissolve the contract immediately; or
(3) For a contract of indeterminate duration, the contract provides for the firm to give the consumer reasonable notice in advance of making the change and the consumer is free to dissolve the contract".

In Mr C's case I consider that there was a valid reason which is specified in the contract – so (1) above applied.

But it appears that Mr C accepts that A J Bell had a 'valid reason' for altering the charges. And he was able to transfer out of the SIPP within the relevant period at the existing fee. However Mr C has referred to the OFT guidance and says that, even though there was a 'valid reason', he should be able to dissolve the contract without financial loss or adverse consequences – that the firm should waive its exit fee.

Neither the FCA or the OFT (or ourselves) can make a definitive ruling on the issue of unfairness – only a court can do that. My role is to decide what I think is fair and reasonable in the particular circumstances of Mr C's case. In doing so I need to take into account the relevant law, guidance and industry standards.

The FCA (FSA as it was) and the OFT have a 'concordat' (agreement), such that the FCA (FSA) is responsible for enforcing the Regulations where contracts fall within its jurisdiction – that is for those firms that it authorises and regulates. They have regard to each other's guidance. But both only publish *guidance*. Whilst the OFT guidance provides examples of terms that *may* be fair, each case has to be considered in its own specific context and circumstances. And I am mindful that it is the FCA that is A J Bell's regulator here.

The FCA (FSA) has said that in considering whether a term is fair it should step back and consider whether each party to a contract would have thought the term fair from the others' perspective at the time that the contract was formed. Emphasis is also placed on the context of the term; both in relation to the contract as a whole and in relation to its impact on the customer.

In this case the FSA specifically considered the SIPP's terms and this resulted in the firm agreeing to the Undertaking in 2006. And in my view if Mr C had been told the contract contained a clause that allowed him to exit the contract at the existing charge rate (with appropriate notice) if charges were increased for 'valid reasons' at the outset, I think it unlikely that he would have thought this unfair. In saying this I have taken into account the nature of the product generally and that the charges to exit aren't significant in that context. And I don't think the charges are disproportionate.

So there was a 'valid reason' for the amendment as provided for in the terms. And a reasonable notice period was given so that Mr C could transfer out of the SIPP at the existing fee and avoid the new increased charges.

Overall, I don't think that the firm has acted unfairly by not agreeing to waive the existing exit fees/charges. And the FSA looked specifically at these terms in 2006 and agreed the undertaking as explained above. So in all these circumstances, I'm not persuaded that Mr C's complaint should succeed.

my final decision

My final decision is that I do not uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr C to let me know whether she accepts or rejects my decision before 24 September 2015.

David Ashley
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