DRN-4587368

The complaint

Mrs N has complained that the advice she received from Bank of Scotland plc trading as Halifax ('Halifax') to purchase a Stakeholder pension, rather than make additional contributions to her occupational pension, was unsuitable and has caused financial loss.

Mrs N is being represented in this complaint however for ease of reference I have only referred to Mrs N throughout the decision below.

What happened

In May 2006 Mrs N received advice from Halifax which resulted in Mrs N purchasing a stakeholder pension.

This advice was based on a fact-find which confirmed:

- Mrs N was aged 42, married, with two children.
- Mrs N was a self-employed dentist with a planned retirement age of 60.
- Income was noted as £80,000 a year (£5,000 per month) with Mrs N holding around £16,000 in cash savings jointly with her husband.
- Mrs N also had a Halifax personal pension which commenced in 1999 with a current fund value of around £900.

A pension illustration was produced on 15 May 2006. This showed the contribution level, the underlying investment funds, and what the pension may provide in retirement based on continued premiums and assumed fund growth rates.

The illustration also confirmed that the maximum fund charge was 1.45% for the first 10 years with this reducing after that date. The illustration did not give a percentage for the charge after 10 years although the costs quoted indicate a 1% charge after 10 years.

The Halifax advice was documented in their suitability letter dated 18 May 2006. This confirmed that:

- Mrs N had monthly income of around £5,000 with a disposable income of £1,200 each month.
- Mrs N was targeting a retirement income of around £10,000 with a retirement at age 60.
- To meet this target Mrs N would need to contribute £768 per month however the policy was to be set up with a monthly contribution of £150.
- Mrs N's attitude to risk ('ATR') was confirmed as Cautious Medium.
- A stakeholder pension was recommended with the premiums to be invested into the UK

FTSE All Share Index Tracking fund and the International Growth fund with a 70:30 split.

The letter confirmed that the advice was considered suitable on the basis that it allowed pension benefits to be accrued in a tax efficient way, that premiums were flexible and could be adjusted to suit Mrs N's circumstances, with those premiums being invested in line with Mrs N's ATR.

Having been made aware that the advice may not have been suitable, Mrs N registered a complaint with Halifax in January 2023.

Halifax issued a response to the complaint in February 2023. Whilst Mrs N was recorded as self-employed this accepted that Halifax should have been aware Mrs N did have access to an occupational pension and that there was no mention of this within the advice file.

Whilst Mrs N had the option to purchase added years within her occupational defined benefit ('DB') scheme Halifax said these would have been expensive and would have been inflexible, as such Halifax stated they did not believe Mrs N would have proceeded with this option even if it had been discussed.

Regarding the stakeholder pension itself Halifax stated that it was invested at an appropriate risk level and that the charges had been fully explained at the time, with the product illustration and key features document putting Mrs N into a fully informed position before the advice was accepted.

Overall, Halifax concluded there wouldn't have been any change to the eventual advice.

Unhappy with the response Mrs N forwarded her complaint to this service in April 2023.

Whilst the complaint was being investigated at this service Halifax additionally noted that the Stakeholder pension had low charges and as such there would not have been a big difference in the cost comparison with the in-house money purchase AVC option.

Our investigator looked into things and concluded that the advice was unsuitable.

Whilst Mrs N did have the option to purchase added years within her occupational DB scheme these would have been expensive and inflexible, as such our investigator did not believe Mrs N would have taken this option. However, Mrs N's employer also had an in-house defined contribution ('DC') AVC scheme. Here Mrs N could control the level of premium and make changes to this over time. As such, given this DC scheme would likely have had lower charges than the stakeholder scheme recommended by Halifax, the investigator stated that Mrs N would have taken this option had it been discussed at the time.

Halifax did not agree and noted that Mrs N had made use of the flexibility offered by the stakeholder several times since advice (including taking benefits at a different time to her main employer scheme), that the employer AVC scheme had ceased in 2009, and again noted that the stakeholder scheme had low charges.

Our investigator was not minded to change their outcome and as such the case was passed to me for a final decision.

I issued a provisional decision which stated:

"Legislation at the time required financial advisers to take reasonable steps to ensure their advice was suitable.

The Financial Conduct Authority ('FCA') sets out the principles that businesses should apply when giving advice. At the time this advice was given these principles included:

- *A firm must conduct its business with due skill, care, and diligence.*
- *A firm must pay due regard to the interests of its customers and treat them fairly.*
- *A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.*

In addition, there were specific rules businesses needed to follow where advice was being given to customers who had in-house pension alternatives available. The Personal Investment Authority ('PIA' - a predecessor of the FCA) issued Regulatory Update 20 ('RU20') in May 1996. This stated that before advising a customer to enact a free-standing policy an adviser should:

- *Draw the consumer's attention to the in-house alternative.*
- *Discuss the generic differences between the two routes.*
- *Direct the consumer to his employer or the OPS for more information on the in-house option.*

When this advice was given in 2006, FSAVC policies had been widely replaced by personal pensions. Stakeholder pensions (such as the one recommended by Halifax in this case) are effectively a subset of personal pensions that have minimum standards and features which limit the charges which can be applied to them. Even so, the rules and principles above still applied where a customer had in-house pension options available. As such Halifax had a duty to explore Mrs N's in-house options.

Halifax have already accepted that there was no mention of Mrs N's in-house options within the advice file, and that this is something which their adviser should have considered before recommending the stakeholder pension. As such I must consider what Mrs N would have done had full information and advice been provided by Halifax in 2006.

It is difficult for me to know exactly what Mrs N would have done around 18 years ago had she been fully informed of all her options and therefore I have had to base this decision on the balance of probabilities (what I consider was most likely) based on the information available.

At the time of advice Mrs N had two options in relation to her occupational pension scheme. These were the option to purchase added years within the occupational DB scheme, and the option to make additional contributions to the in-house occupational DC scheme.

Considering firstly the option to purchase added years, I have reached the same conclusion as our investigator and for broadly the same reasons.

Added years can be expensive as the entire cost of each added year falls to the scheme member. In addition, they can be inflexible as once the arrangement is entered into changes can be difficult and take significant time to enact.

In this case, whilst Mrs N did have a significant disposable income a decision was made to make a comparatively modest contribution of £150 each month. As such I do not consider it *unreasonable to conclude that cost was a significant consideration for Mrs N in 2006.*

In addition, flexibility was noted as one of Mrs N's requirements with the added years option being the least flexible solution available at that time.

Overall, in line with the investigators conclusions I do not believe Mrs N would have opted to purchase added years had they been discussed appropriately in 2006.

In considering the other option available to Mrs N – the option to contribute to the in-house DC AVC scheme – I have again reached the same outcome as the investigator and concluded that Mrs N would have chosen this option had appropriate information been provided.

In reaching this conclusion I have considered Halifax's point that the stakeholder pension had low charges. However, these would still have been higher than the employer sponsored AVC scheme. In addition, I do not believe any of Mrs N's other objectives would have caused her to choose the more expensive stakeholder pension.

The in-house AVC scheme would have allowed Mrs N to invest her chosen premium amount into a fund in line with her ATR and would have allowed changes to be made to that contribution at certain intervals.

Whilst I accept that the stakeholder did allow more flexibility than the AVC option, with changes to underlying investments and contribution levels being available at any time, I do not believe there is sufficient detail in the advice file to state that such levels of flexibility were required by Mrs N in 2006.

Whilst Mrs N did subsequently make use of the flexibility offered by the stakeholder pension (including taking several payment holidays from 2011 onwards), I do not believe this is sufficient to conclude Mrs N would have opted for a more expensive pension option some five years prior.

I also note that Mrs N subsequently chose to take benefits from the stakeholder pension and her main occupational scheme at different times, something that Halifax have stated would not have been possible had the in-house option been chosen in 2006. However, at the time advice was given Mrs N was recorded as wanting to retire at age 60, with neither the stakeholder nor occupational scheme being accessed at this age. As such, I consider it reasonable to conclude that Mrs N's requirements changed at some point after advice with no evidence to conclude that this was foreseeable in 2006.

Overall, based on the balance of probabilities, I have concluded a fully informed Mrs N would have opted to put contributions towards the in-house AVC rather than the stakeholder pension."

I went on to provide redress instructions and asked both parties to provide any additional commentary or evidence they wanted me to take into consideration before 26 January 2024.

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.

In response to the provisional decision both Halifax and Mrs N have confirmed they accept the outcome reached. As such, I am not making any changes to it.

The redress instructions below are in line with those included in the provisional decision.

Putting things right

Halifax 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 (in this case from a Stakeholder plan), 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 (Stakeholder here) and AVC to be compared after 1 January 2005, Halifax 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 N'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 N 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 likely income tax rate in retirement - presumed to be 20%.

So, making a notional deduction of 15% overall from the loss adequately reflects this.

Halifax should also supply Mrs N with a copy of its calculations once they have been carried out.

My final decision

As per the rationale above I am upholding this complaint and require Bank of Scotland plc trading as Halifax to calculate and pay redress in line with the instructions above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs N to accept or reject my decision before 27 February 2024.

John Rogowski
Ombudsman