DRN-4942736

The complaint

Mrs R complains that UTMOST LIFE AND PENSIONS LIMITED (Utmost) then trading as Reliance Mutual, misadvised her to take out a Free Standing Additional Voluntary Contribution pension plan (FSAVC), causing her losses. She wants to be put back in the position she should have been in.

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

What happened

Mrs R joined the Teachers' Pension Scheme (TPS) in 1996. She already had a personal pension plan (PPP) with Utmost and the rules at the time meant contributions now couldn't be continued to this. She met with an Utmost adviser who recommended she pay £25 per month in contributions to a FSAVC. The reasons why letter dated 9 May 1996 said this was to provide additional pension benefits and *"to spread your investment so that it is not all in your employers pension scheme".* Contributions continued until 2022, when she retired, but no benefits have been taken from the FSAVC.

Mrs R says she subsequently saw an advert from her CMC on social media suggesting the advice to take out a FSAVC might not have been appropriate. She raised a complaint with Utmost through the CMC making several points. Including that the differences between FSAVCs and in-house AVC's hadn't been discussed, particularly that it was likely that the in-house options would be cheaper.

Utmost didn't accept the complaint. It said as Mrs R had chosen to take out the PPP in 1991instead of joining the TPS, so it was likely she was aware of how the scheme operated and the AVC option then. And when she joined the TPS in 1996 literature was provided, which included details of the in-house AVC. It said when the FSAVC started she was provided with an illustration and key features document explaining the plans charges and terms. And notes in the fact find completed by the adviser stated, *"We have discussed the types of AVC and the client wishes to have FSAVC for spread of investment".* It said this document had been provided to Mrs R along with a "*reasons why letter"* which explained why she preferred the FSAVC option. And that she should contact it if any information was incorrect but hadn't. And it said it had provided policy details to Mrs R's independent financial adviser (IFA) in June 2019 and it was reasonable to conclude she reviewed her overall position and the suitability of the policies she had then.

Mrs R referred her complaint to our service. Our investigator said we could consider the complaint and that it should be upheld.

Our investigator said some of Utmost's points suggested the complaint had been made too late, which meant it didn't have to consider it. She said the rules about bringing complaints were that they needed to be raised within six years of the event complained about, or if later, within three years of when the complainant knew or reasonably ought to have known they had grounds for complaint. And she thought Mrs R's complaint had been made in time. Because there was no evidence about what was or wasn't discussed around AVC's in 1991, which was around five years before the FSAVC advice was provided. Or what information Mrs R might have been given in 1996 when she joined the TPS. Nor was there any evidence about what advice the IFA had provided in 2019, but it was likely this had focused on her taking her pension benefits as she was then 60 years old, not what had happened nearly 30 years previously and whether that product was suitable for her.

Our investigator said some evidence from May 1996 when the FSAVC was arranged referred to the in-house AVC option but not that this had been discussed in detail or that the charging advantage it was likely to offer had been highlighted. And investment diversification could have potentially been achieved using the in-house AVC at lower cost. She said the regulator had issued guidance about FSAVC sales in May 1996. Which specifically highlighted the expectation that charges be discussed due to these having the greatest impact on which option to choose. And this guidance reaffirmed pre-existing requirements for advisers to confirm the availability of in-house options, that were likely to be better value and should be considered. She said as there was no evidence this had been discussed the sale wasn't suitable, and had it been discussed it was likely Mrs R would have chosen the in house AVC. Our investigator said Utmost should undertake a charging calculation to compare the costs between the in-house AVC and its FSAVC, and if this showed a loss to pay Mrs R compensation.

Mrs R accepted our investigator's view, but Utmost didn't agree, it said it still considered it was more likely than not that the benefits and charges of both AVC's and FSAVC's were discussed at the time given the references made in the fact find and reasons why letter.

As Utmost 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.

A tied adviser like Utmost's could only give advice on its products and couldn't provide advice about the in-house AVC option. However, the regulations required tied advisers to *"exercise due skill, care and diligence and to deal fairly with investors"*. And,

> *"Have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme, and*
>
> *Give the consumer all information relevant to their dealings with the representative in question."*

So, the adviser needed to consider any in-house options that might be available and discuss these in generic terms, or the advice wouldn't be suitable. Around the time Mrs R took out the FSAVC the financial services regulator issued guidance in Regulatory Update 20 (RU20) about FSAVC sales in May 1996. These weren't new rules and restated the existing requirements. It said;

> *"A representative should not recommend his own company's FSAVC until he has:*
> *- drawn the client's attention to the in-scheme alternative*
> *- discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article); and*
> *- directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option"*

The article referred to mentions various features the regulator clearly expected to be discussed. These included, tax treatment, whether employers would match contributions and the ability to provide additional life assurance cover. It also referred to the typically lower charges under in-house AVCs,

> *"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".*

So, whilst the FSAVC option might have some features of interest to a consumer it was important that the likelihood that it would be a more expensive option was clearly discussed as this could potentially outweigh other perceived advantages. But the notes in the fact find is that *"We have discussed the types of AVC and client wishes to have FSAVC for spread of investment".* That doesn't confirm the actual generic differences had been discussed and there is no reference to the likely charging advantage available from the in-house option, and the reasons why letter makes no reference to charges at all.

Instead, the sole justification for the FSAVC sale is to provide investment diversification from the TPS. But that was something the in-house AVC also did, being a separately invested arrangement run by Prudential, something I'd reasonably expect the adviser to be aware of. Because there is no specific reference to charges in the reasons why letter I think it's more likely than not that these weren't discussed as they should have been and that makes the advice unsuitable, so Mrs R hasn't been treated fairly. And if she'd been advised that in-house costs were likely to be lower and that the investment was already separate to the main TPS, I think she would have opted for the in-house option over the FSAVC. And it that has caused her losses it's fair that Utmost pay compensation.

Putting things right

My aim in awarding compensation is to put Mrs R as closely as possible back into the position she should have been in but for the poor advice.

Utmost 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, Utmost 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 R'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 R 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.

My final decision

My final decision is that I uphold the complaint against UTMOST LIFE AND PENSIONS LIMITED.

I direct UTMOST LIFE AND PENSIONS LIMITED to carry out the calculations et out above and pay any compensation due.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 25 October 2024.

Nigel Bracken
Ombudsman