

The complaint

Mr W complains that Phoenix Life Limited (Phoenix) mis-sold him a Free Standing Additional Voluntary Contribution (FSAVC) plan, causing him losses. He would like compensation for the losses.

What happened

Mr W worked for the Ministry of Defence. He says around 32 years ago he was approached by a Phoenix adviser about financial planning and his pension arrangements were discussed. The adviser recommended he take out the FSAVC to supplement his employers' pension scheme as it was better to have a spread of investments. Mr W says he was advised to pay contributions for one year and then to take out a second FSAVC the next year. He says it was only many years later having met with former colleagues that he realised he may have been poorly advised to take out the FSAVCs. Mr W complained to Phoenix. It said it would look into it and needed information from his employers' scheme and that it would contact the Armed Forces Pension Scheme (AFPS). As Mr W didn't hear any further, he referred his complaint to our service.

Our investigator contacted Phoenix and asked for its file. Despite reminders over many months Phoenix didn't respond. So, she upheld Mr W's complaint based on the information he'd provided.

Our investigator said it wasn't clear whether it was Phoenix or an independent financial adviser (IFA) that recommended the plan. She said IFAs had to compare any in-house alternatives to the FSAVC and recommend the most suitable option. Whereas an adviser from Phoenix could only recommend its plans but was required to tell Mr W about the in-house alternatives, so he could make his own enquiries. She said if it hadn't done this, the plan had been mis-sold. And it was likely that the FSAVC had higher charges than the in-house AVC arrangement the employer would have offered. And, based on Mr W's evidence she thought he would have chosen the more cost-effective in-house option if he had been told about it.

Our investigator said Phoenix should undertake calculations to compare the charges as set out by the regulator and pay Mr W compensation if this showed a loss.

Mr W accepted our investigators view.

But Phoenix didn't respond. So, 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.

When the complaint came to me, there was still no update from Phoenix. As it wasn't clear whether it had advised Mr W to take the plan out, I thought it was reasonable to contact

Phoenix to see if it had anything to add and to try and progress matters for Mr W. Because, if I upheld the complaint and told Phoenix to liaise with Mr W and undertake calculations and it subsequently said it hadn't advised on the plan or there were other issues this would present difficulties.

Phoenix said it would put together a file, but that it had upheld the complaint and had confirmed this to Mr W. It said it still needed information from him to enable it to contact the AFPS and undertake loss calculations and had been waiting for Mr W to provide this.

This was around eleven months after it had told Mr W it was contacting the pension scheme. Mr W said he'd already provided this information. But we forwarded this to Phoenix and continued to ask for updates. It said the AFPS often took a long time to respond to queries. Mr W then provided a photograph of a payslip from his pension scheme. This was from the Civil Service rather than the AFPS, we sent this to Phoenix and requested updates.

I queried the Civil Service payslip and Mr W confirmed this was from the pension arrangement in question. I made enquiries with both the Civil Service and AFPS to clarify if there was any misunderstanding. Having done so, it seemed likely Phoenix was contacting the wrong pension scheme. We asked it to clarify the matter. In reply it sent a copy of the letter it had sent to the AFPS in May 2023. It said wanted further information from Mr W, which we requested from him and provided.

I asked Phoenix for updates and whether it had clarified which pension scheme was involved. It replied saying it had contacted the AFPS, and as previously advised, response times could be long. I said I remained concerned it wasn't contacting the right pension scheme. Despite reminders and telephone calls it hasn't responded further.

This is clearly highly unsatisfactory, and I think Mr W has been caused considerable inconvenience by these delays, as he has now been waiting around 18 months for Phoenix to progress his complaint. Throughout this time Mr W has expressed his frustration about the delays and lack of engagement from Phoenix. Unfortunately, I can't consider complaints about how a complaint has been handled, as that itself is not a regulated activity. But I certainly think that Phoenix should carefully consider the impact these delays have had on Mr W.

As Phoenix is unwilling to confirm the current situation but has accepted it did advise Mr W to take out one or more FSAVC plans, I've decided to uphold the complaint and issue this final decision in the expectation that this will force it into some proper action.

There has only been Mr W's evidence for me to consider. He says he was advised the FSAVC was the best thing to do, and he wasn't told about the in-house alternatives likely to be available to him. As there is no evidence to the contrary that means the plan or plans were mis-sold. It is likely that the in-house AVC had lower charges than the FSAVC and this could have resulted in losses for Mr W. So, Phoenix must undertake a comparison of charges to establish whether a loss has been suffered and if so, compensation should be paid.

Putting things right

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

If Mr W had more than one FSAVC plan with Phoenix, it must consider all his FSAVC plans with it in undertaking these calculations.

Phoenix 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, Phoenix 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 Mr W'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 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 likely income tax rate in retirement, expected to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Phoenix must undertake these calculations urgently. It should contact Mr W within seven days of our service confirming he accepts my final decision, with a substantive update of its progress and a firm action plan to complete the calculations.

If the calculations show a loss, Phoenix must add interest at 8% per year simple to the loss from the date of the calculation until the date it makes settlement to Mr W.

If Phoenix considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a certificate showing this if Mr W asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Provide Mr W with a simple calculation of how it arrived at the final figures.

Mr W's retirement plans have been disrupted and delayed due to Phoenix's poor advice, causing him distress and inconvenience. It must pay him £250 compensation in respect of this. It must pay this compensation within 14 days of our service telling it Mr W has accepted my final decision. If it pays later than this, it must add interest at 8% per year simple to the compensation amount until the date it makes settlement.

My final decision

My final decision is that I uphold the complaint against Phoenix Life Limited

I direct Phoenix Life Limited to calculate and pay the compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 17 January 2024.

Nigel Bracken
Ombudsman