

The complaint

Ms K complains that Utmost Life and Pensions Limited (Utmost) mis-sold her a Free Standing Additional Voluntary Contribution (FSAVC) plan to top up her pension benefits but failed to make her aware of the in-house alternative and she suffered losses as a consequence.

Ms K is represented by her financial adviser, but I will just refer to her except where necessary.

What happened

Ms K was a member of the University Superannuation Scheme (USS), joining this in 1982. She was advised to take out a FSAVC policy (the plan) by Equitable Life (now Utmost) in November 1991. She made contributions until 2000, increasing these on a regular basis. Ms K retired in 2010 at age 60 and took benefits from the plan in 2013. She says when the advice was given, Equitable Life didn't make her aware of the in-house alternatives offered by the USS as required under the financial regulations in place at the time. And that this may have caused her losses.

With the help of her financial adviser Ms K complained to Utmost. It said it thought the complaint had been made too late and it didn't need to consider it. Ms K referred her complaint to our service. Our investigator thought we could consider the complaint and Utmost agreed.

Our investigator then looked into the complaint, and she decided to uphold it.

She said the financial regulations at the time required that advisers act with due care and skill and should:

"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."

She said occupational schemes offered in-house alternatives that might offer advantages over FSAVCs. Typically, these were an AVC arrangement, which might benefit from subsidised costs, or the option to purchase added years of service in the pension scheme, which offered guaranteed benefits. She said whilst the adviser couldn't have offered advice on these alternatives, Ms K's attention should have been drawn to them. And as there was no evidence it had been, Utmost hadn't met its regulatory obligations.

Our investigator said considering the circumstances at the time, if Ms K had been told about alternatives, she was likely to have preferred AVC's over added years. In part because added years were seen as being relatively expensive and inflexible compared to AVC's. She said as the in-house AVC was likely to have lower charges than the FSAVC and therefore be

better value, Ms K would have opted for the in-house AVC. She said Utmost should undertake calculations to establish whether Ms K had suffered losses as a consequence.

Ms K didn't agree. She said she would have purchased added years. Because, as a cautious investor with no other risk-based investments, the guaranteed benefits provided by added years would have been a natural choice for her. She said based on the costs from a similar pension scheme, added years were affordable as she'd paid significant and increasing contributions to the FSAVC plan.

Utmost also disagreed. It said the USS had now confirmed that it didn't offer an in-house AVC until 1993, so Ms K couldn't have joined it when the advice was given. It said as our investigator had said Ms K would have favoured AVC's over added years, it followed that the advice to take out the FSAVC had been suitable.

Our investigator said Utmost hadn't met its obligations at the time as Ms K should have been made aware of the alternative even if this was only added years. She said the cost of one added year for the similar Teachers' Pension Scheme was 1.08% of salary per year to retirement age. And this was affordable given the contributions paid to the FSAVC. Our investigator said this affordability, with the likelihood of her remaining in the same occupation, the lack of risk and the superior tax-free cash position would have led Ms K to opt for added years. Our investigator said to put Ms K back in the position she should be in, Utmost should undertake a loss calculation on an added years basis in line with the regulators FSAVC review guidance and pay any compensation due.

Utmost didn't agree. It asked that specific costs for added years in the USS be obtained. It said as Ms K had stopped paying contributions to the FSAVC at age 50 and it wasn't aware she'd made additional pension provision since, which indicated she didn't have the commitment required for added years.

The USS confirmed added years costs at the time would have been 0.77% of Ms K's salary for one added year. Ms K confirmed she'd stopped paying contributions as she became concerned about Equitable Life's financial position in 2000. And after this she'd paid other pension contributions based on separate earnings. Our investigator said the lower-than-expected cost of added years with the USS made these more affordable still. And that Ms K had stopped contributions to the FSAVC for a valid reason. And the subsequent additional pension saving made, showed she would have been committed to added years. Our investigator said Utmost should undertake a loss calculation on an added years basis and pay Ms K £300 for the distress and inconvenience that had been caused.

Utmost said if the payment of redress was deemed appropriate, a £300 payment for distress and inconvenience wasn't fair because Ms K had only become aware of a possible problem when she spoke to her financial adviser.

As Utmost doesn't agree, it has come to me to decide.

My provisional decision

I issued my provision decision on 31 August 2023, I explained the reasons why I was planning to uphold the complaint. I said:

I've considered all the available evidence and arguments to decide (provisionally) what's fair and reasonable in the circumstances of this complaint. Having done so, I'm not planning to

uphold the complaint, because I don't think it's likely Ms K has suffered a loss as consequence of any omission by Utmost. I know my decision will disappoint Ms K, so I'll explain why I have come to it.

I need to be fair to both Ms K and Utmost in coming to my decision. It can't demonstrate it told her about in-house alternatives to the FSAVC as it needed to do at the time. If it didn't, this may have disadvantaged her and possibly led to a financial loss. But for me to decide what's fair it is necessary for me to consider what I think Ms K would have done if she'd been made aware there were in-house alternatives. Our investigator felt that Ms K would have opted for added years but having carefully considered all the evidence and factors at the time of the advice I don't think it is reasonable to conclude that.

As the events complained about took place many years ago there is very little contemporaneous evidence about what happened. Where the evidence is incomplete, inconclusive, or contradictory, I reach my conclusions on the balance of probabilities. That is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances at the time the advice was given. Because assessments made now about what someone may have done many years ago are inevitably influenced by hindsight.

Various factors would have influenced the decision over the best way to make additional pension savings on top of someone's occupational scheme. From around 1989 there was usually a direct alternative to a FSAVC in the form of an in-house AVC offered by the occupational scheme. Similar to FSAVCs these often benefited from lower costs and charges, broadly making the in-house AVC the logical choice. Unless there were other factors, important to the individual, that made the FSAVC option more attractive. That isn't the case here as the USS didn't introduce an in-house AVC until 1993, meaning the only alternative was added years, which operate on a different basis.

I think the decision between the FSAVC and added years would have been finely balanced, and it's possible to make arguments in favour of both options. That is particularly the case with the benefit of hindsight. As I think it's fair to say that greater value is now placed on final salary pension benefits than was the case previously, in part because financial circumstances have changed significantly over the last 30 years or so.

Added years provided guaranteed benefits linked to future earnings, so risk adverse investors and those in secure occupations they might expect to remain in until retirement might favour added years. They also allowed for the payment of tax-free cash, which at the time, AVC's didn't. I accept these factors might have been attractive to Ms K. But at the same time added years were generally considered to be an expensive and inflexible option that required an ongoing commitment until the normal retirement age of the pension scheme. With AVC's (including FSAVC's) offering more flexibility to stop or reduce contributions if circumstances changed.

Lack of affordability was often an issue with added years, but that doesn't appear relevant here. Instead, it seems that Ms K wouldn't have been able to contribute as much towards added years as she did to the FSAVC. She had around 33 years potential service to normal retirement age in the USS, so could have funded around seven added years. Which would have provided the maximum allowable pension benefits from the scheme.

But, when compared to the FSAVC option, added years would have appeared relatively expensive. With the illustrations provided by Equitable Life forecasting a higher level of retirement benefit for the same level of contribution. That's because at the time AVC illustrations used future growth rates as high as 13% per annum, which is now seen as a very high rate of return. In comparison the cost of added years was generally calculated in a

conservative manner to reduce the possibility of any liability falling back on the employer or pension scheme itself.

It's also important to note that whilst added years were guaranteed the actual amount of benefit payable was dependent on what Ms K's final salary would be at retirement at age 65. So, some estimate of this would be required. And comparison would show quite substantial annual increases in salary would be required to match the projected benefits under the FSAVC from the same level of contribution.

Ms K chose to pay close to the maximum contribution she was allowed to under tax rules at the time and maintained this going forward as her earnings increased. As noted, these contributions exceeded the cost of buying added years. It usually wasn't possible to purchase extra added years to make up for benefits that would be lost due to having fewer years of service in the event of any early retirement. But this was possible through AVCs.

And, if early retirement was contemplated further consideration would need to be given to the actuarial reduction likely to be made to the added years benefits. As these would only have been partially funded, given the commitment to maintain contributions to normal retirement age. Ms K did retire early, and the FSAVC option had allowed additional contributions to be paid.

So, at the time, compared to added years, AVCs were seen as a more flexible option with the potential to provide greater benefits from the same contribution, which strongly influenced many people's choice. The FSAVC route also allowed more in contributions to be paid than to added years. There was investment risk. But the with profits fund used was then seen as a relatively low risk option which could still generate good returns and was commonly recommended to risk adverse investors.

So, Ms K's decision wouldn't have been clear cut and required relatively complex analysis to be undertaken. And Utmost wasn't required to carry out any comparison or advise in favour of one option over the other. That was for Ms K to decide. I can see that she was subsequently quite engaged with the administration of the FSAVC over a number of years. And in her decision to stop contributions due to Equitable Life's well known financial problems in 2000.

I think this indicates that Ms K was or became reasonably well informed about pension matters. And when she did stop contributions to the plan, I think it's likely she considered her overall pension planning at this point. That would have included the option to take a FSAVC out with another company or the in-house alternatives. But when Ms K did make additional pension savings, she didn't choose the guaranteed option of added years. Instead, she preferred to pay contributions against other earnings into a personal pension plan, broadly offering the same type of benefits as the AVC option.

Taking everything together with the FSAVC option seemingly offering more potential benefits than added years for the same cost, I think it is more likely than not that had Ms K considered the alternative available she would have still chosen to proceed with the FSAVC proposed by Utmost at the time. That means I don't think she has suffered a loss as a result of taking out the FSAVC and it wouldn't be fair to tell Utmost to undertake loss redress calculations.

I've also considered whether Ms K has suffered distress and inconvenience over what has happened. I think it would have caused her some concern to be told there might be a problem. But she wasn't aware of any potential concern until many years after she had taken benefits from the FSAVC and didn't need to change her retirement plans because of it. She was also in receipt of professional guidance about the issue and knew at an early stage her

complaint could be referred to our service for an independent decision, limiting any subsequent distress. So, as I don't think Ms K would have decided differently in 1991 it wouldn't be fair to now make an award for compensation.

I asked both parties to come back to me with any further evidence or points they wished to make.

Response to provisional decision

Utmost said it had nothing to add.

Ms K provided a detailed response through her financial adviser:

1. Ms K confirmed she hadn't actually joined the USS until 1988, having worked for The Open University between 1982 and then, which didn't confer membership of the USS. This meant her potential and actual service was shorter than previously considered.
2. Meaning there was more scope to purchase added years with there being around 18 rather than 7 years shortfall in potential service in the USS. And this larger shortfall would have meant Ms K would want to secure the guaranteed benefits offered by added years.
3. The choice of a with profits investment suggests a cautious person but wasn't strongly indicative either way. But the lack of flexibility typical of with profits, undermined any likely flexibility offered by FSAVC's over added years. And that potential flexibility wasn't a key consideration for Ms K at the time.
4. That on many counts added years compared *"very favourably"* given the benefit profile allowing tax free cash and an index linked pension, which when compared to the higher, but non-increasing pension typically illustrated on a FSAVC projection, would seem more attractive. Additionally added years offered better dependent benefits for Ms K's children and in the event of ill health requiring her to retire early.
5. And taken together even if the FSAVC illustration appeared to quote a higher pension when examined in detail added years were a better *"all-round package"*.
6. It wasn't clear that Ms K would have realised the FSAVC was quoting a higher pension, as *"it is very hard to compare the two arrangements"* as benefits weren't projected in the same way, and any decision was *"highly subjective"* particularly for *"a lay person"*. And she wouldn't have been able to *"compare projected benefits in any useful or reliable way."*
7. Ms K wasn't thinking of early retirement when the FSAVC was sold.
8. When Ms K stopped contributions to the FSAVC in 2000, she was already making contributions to a personal pension plan which she continued.
9. It was accepted that the evidence was *"circumstantial"* but factors such as the stability of her career and that her contribution was sufficient to buy a substantial number of added years favoured the guaranteed added year option. And if there was to be benefit of the doubt that should be given to the *"recipient of non-compliant advice"* not Utmost.
10. In respect of the £300 compensation for distress and inconvenience suggested by our investigator, but not considered reasonable by me. Ms K felt this had been largely proposed due to the long delays in Utmost responding to her complaint and the duress that this has caused.

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've decided not to uphold the complaint.

Ms K's adviser makes good points in their response to my provisional decision. I've taken all these into consideration. The points made acknowledge the difficulty in assessing what someone may have done many years ago in a very different financial environment than today.

There are, as noted in my provisional decision, a number of factors which suggest Ms K might have favoured added years. Like her being in a stable profession which she was likely to remain in until retirement, the potential for tax-free cash and possibly dependents pensions. But Ms K and her adviser also identify one of the key difficulties she faced even if the Equitable Life adviser had directed her to check about in-house options.

Which was the complexity of the whole situation and the difficulty in making comparisons at the time. As Ms K adviser has said he doubts *"she would realistically have been in a position to compare projected benefits in any useful or reliable way."* The FSAVC would have seemed the least complex choice of those available.

And not only was Equitable Life not required to advise her on the distinctions and relative pros and cons it wasn't actually authorised to do so. Had Ms K taken independent financial advice that might have been different, but Equitable Life wasn't obliged to suggest she did that. Even if she had the analysis would be highly subjective and based on perceptions at the time. Without the benefit of hindsight over investment returns and annuity rates being much lower than expected, making salary linked benefits increasingly valuable as a result.

It has been confirmed Ms K didn't join the USS scheme until 1988, this was much closer to the time she did take out the FSAVC. It's likely that she was given information about the added years option when she joined the scheme. That had probably slipped her mind a few years later. It's a dry subject and the information might have been a relatively small section in a much larger pack of documents.

But even if she had looked at this information and sought further details about added years quite a complex analysis would be required to get to the bottom of which was the likely better choice. The headline numbers from the FSAVC probably looked superior. Offering, perhaps superficially, more forecast benefit for each pound invested. With the potential of additional benefits if returns were good. For many people that was the deciding factor at the time.

The copy illustrations provided by Utmost do appear to have reflected a level than an increasing annuity which would "flatter" the forecasted pension in a comparison to added years. Although most pension providers could illustrate an increasing pension as well. But these were only forecasts, just like any information on added years would have been, which meant some analysis of likely future earnings was required to make a comparison between the options. The final salary link has of course proved highly valuable, but I think it's fair to say the mainstream perception at the time was that this was less important. Even though parts of the actuarial profession were already forecasting the demise of final salary pensions and reduction in the benefits they would provide, something the USS hasn't been immune from itself.

Ms K recollections haven't been doubted here, but it is only fair to note that no testimony is available from the Equitable Life adviser himself. And at the time there was no requirement for records to be kept about what had or hadn't been said about alternative options. Nor was there a requirement for any of the recommendations to be put in writing. These requirements changed over time and FSAVC providers increasingly referred customers to brochures and marketing materials specifically referring to alternative options, with tick boxes on applications to confirm they'd been made aware.

Taking everything together I still think it was more likely than not that Ms K would have still opted for the FSAVC had she been told that alternatives were available. So, whilst there may have been an error at the time in not mentioning this, I don't think the outcome would have been different. That means I can't uphold this complaint as I don't think Ms K has suffered a loss as a result of any omission by Utmost.

I understand that this is all somewhat unsatisfactory for Ms K. As is my view that a compensation payment for distress and inconvenience isn't fair. That's because if I don't think a complaint should be upheld it is unreasonable to award compensation for inconvenience. Utmost did take a long time to consider this complaint, too long in my view, and that might well have caused distress. But our service doesn't have the power to consider complaints about how complaints have been handled, as this isn't a regulated activity. So, unfortunately, I can't award compensation for this aspect either.

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 20 October 2023.

Nigel Bracken
Ombudsman