DRN-2819395

The complaint

Mr S complains that, in 1997, Sun Life Assurance Company of Canada (U.K.) Limited ("Sun Life") failed to provide him with appropriate advice and information about making additional contributions to his pension savings.

What happened

Mr S has been assisted in making his complaint by a claims management company. But for ease, in this decision I will generally refer to all communication as having been with, and from, Mr S himself.

Mr S was a member of an occupational pension scheme ("OPS"). In July 1997 he met with Sun Life to discuss making additional provision for his retirement. The information Mr S provided at the time showed that he;

- Was 29 years old.
- Was Single.
- Had a salary of £32,500.
- Had been a member of his occupational pension scheme for around a year.
- Wanted to retire at 55.

Sun Life recommended that Mr S take out its free standing additional voluntary contribution ("FSAVC") plan. Mr S accepted that advice, and started contributing to the FSAVC plan in September 1997.

Mr S complained that Sun Life had failed to provide him with a suitable recommendation in 1997. In particular he says that Sun Life failed to provide him with sufficient information about the additional voluntary contribution ("AVC") options offered by the OPS. Sun Life didn't agree with Mr S's complaint and said that it had followed the regulatory guidelines in place at the time the FSAVC plan was sold.

Mr S's complaint has been assessed by one of our investigators. She didn't think the information that Sun Life had provided to Mr S about the likely differences in costs between the AVC and FSAVC plans was sufficient to meet the regulatory guidelines. And, since she thought that cost was likely to have been a key factor in Mr S's decision, she thought the advice Sun Life had provided was unsuitable. So she asked Sun Life to put things right for Mr S.

Sun Life didn't agree with that assessment. It still thought that the information it had given to Mr S had been sufficient to meet the regulator's requirements. So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr S accepts my decision it is legally binding on both parties.

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 deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr S and by Sun Life. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at the evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

In order to decide this complaint, I need to consider whether Sun Life complied with the applicable regulatory guidance in place at the time of the advice. If it didn't, I then need to decide what difference that made. In particular, would Mr S have directed his additional pension contributions to an AVC arrangement provided by the OPS?

The advice was provided by Sun Life in 1997. So the relevant regulatory guidance was contained in the May 1996 Regulatory Update 20 ('RU20'), which was produced by the Personal Investment Authority, one of the predecessors to the current regulator – the Financial Conduct Authority. RU20 gave guidance on the procedures for advising clients on the relative merits of FSAVCs and AVCs provided by occupational pension schemes. The guidance set out different requirements depending on whether the adviser was an independent financial adviser or a 'tied' adviser – one who is employed by, or contracted to, one organisation and can only recommend and sell that organisation's products. In this case the adviser was tied.

For tied advisers, RU 20 indicated that before selling an FSAVC tied advisers should:

- *draw the client's attention to the in-house alternative;*
- *discuss the generic differences between the two routes (taking account, among other things, of the features described in this article); and*
- *direct the client to his employer, or to the OPS, for more information on the in-house option.*

Among the features referred to in the article were that charges under in-house AVC's would usually be lower. In particular the article said;

> *Charges under in-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*

The regulator indicated that it would expect the advice file to have documentary evidence demonstrating that the procedures in the update had been followed.

So Sun Life needed to make Mr S aware of the in-house AVC and to discuss the generic features of the in-house options and of the FSAVC. The key difference I would've expected Sun Life to discuss with Mr S would be the likelihood of lower charges for the in-house AVC. I would also expect Mr S to have been directed to his employer and/or occupational pension scheme trustee to obtain more information on his in-house options.

From the paperwork provided, I'm not persuaded that I can reasonably conclude that the procedures required by the update were followed.

Sun Life has not provided us with a copy of a formal suitability letter to support its recommendation. However it has provided a copy of a "Reasons Why" document dated 24 July 1997 that says;

> *"you are eligible to contribute an additional 15% of your net into a in-house or a Free Standing AVC (FSAVC). I have referred you to your employer for further information on your company in house scheme having discussed the generic differences between your in-house AVC and a FSAVC. You wish to proceed with a FSAVC due to the following reasons*
> 1. *Open market opt in*
> 2. *One investment risk profile*
> 3. *Funding for early retirement*
> 4. *In the event of changing companies the FSAVC is readily portable"*

The documentation also contains two application forms that Mr S signed. The first form (titled Pensions Increase and Alterations Form) was signed by Mr S on 24 July 1997 and marked as received by Sun Life three days later. But it seems that form was only for use where a FSAVC plan already existed. So Mr S completed a further application form on 6 August 1997.

The documentation provides little detail about any discussion that took place about the differences between in-house AVCs and the FSAVC. And since Mr S signed an application form for the FSAVC on the same day as those discussions it doesn't seem to me that he had any further opportunity to gather the suggested information from his in-house scheme. So I am not persuaded that Sun Life provided Mr S with any real opportunity to compare the costs and benefits of the two schemes.

Sun Life also says that it provided a booklet to Mr S about the FSAVC scheme. But it seems to me that booklet was entirely focussed on the FSAVC option, rather than any comparison with an AVC option – even at a generic level. So that does little to persuade me that the guidance was followed.

There's nothing in the recommendation about charges, and nothing to support a conclusion that any detailed comparison of the two schemes took place. So I'm not persuaded I can reasonably say Sun Life did enough here. I'm not persuaded I should conclude that the guidance was followed.

I now need to decide whether, if Mr S had been appropriately advised, it would've made a difference. In other words, would he have taken out an in-house AVC instead?

I can see from the information provided that Mr S indicated that he wished to retire at 55, and that this would be ten years before his normal pension age in his occupational scheme. Sun Life says that Mr S's reasons for wanting an FSAVC over joining the in-house AVC at his employer were based around retiring earlier than the age set by his employer's scheme and it being portable should he change employer. This may suggest that the recommendation to take out an FSAVC remained suitable, notwithstanding the difference in charges. But Mr S's proposed retirement age was still more than 20 years away – I doubt he would have had much certainty over his plans so far into the future. And I haven't seen anything that makes me think Mr S was considering a change of employer at that time.

Given the regulator's view that the critical factor that drove the choice between FSAVCs and AVCs was that the fees were usually lower, I think it is more likely than not that Mr S would've chosen to contribute to the AVC through his occupational scheme if he'd been properly advised. I haven't seen anything to suggest that Mr S had any expectation that he was likely to change employer in the future such that he would be unable to contribute to an AVC plan.

So I don't think that Sun Life did enough to provide Mr S with the information he needed to decide upon its recommendation. And I think that if it had met its responsibilities under the regulations Mr S would most likely have chosen to use the OPS AVC scheme to receive his additional pension contributions. So I uphold Mr S's complaint and Sun Life needs to put things right.

Putting things right

Sun Life 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, Sun Life 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 S'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 S 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.

My final decision

My final decision is that I uphold Mr S's complaint and direct Sun Life Assurance Company of Canada (U.K.) Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 26 May 2022.

Paul Reilly
Ombudsman