DRN-3242501

The complaint

Mr M complains about the suitability of the advice he received from Sun Life Assurance Company of Canada (U.K) Limited (SunLife) to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan in 1997. He says he would have chosen one of the in-house options if he'd been made aware of them. He also complains that Sun Life ought to have included his plan in its review of FSAVC sales.

What happened

Mr M was a member of the NHS pension scheme. In 1997 he met with Sun Life to discuss how to make up the shortfall in his service within the scheme. He agreed to take out an FSAVC plan with a net monthly contribution of £100. He subsequently stopped making contributions in October 2011 and transferred the benefits to another provider.

Mr M has also confirmed that in 2007 he started the process of purchasing an additional two 'added years' of service in his pension scheme.

But in November 2019 Mr M, using a representative, complained that the FSAVC plan had been mis sold. `He said he hadn't been made aware of the higher charges applied to this kind of plan and thought he should have been advised to use the in-house alternatives – particularly 'added years'.

Sun Life didn't uphold the complaint. It made the following points:

- It believed its adviser would have discussed the 'generic differences' document – which was part of its standard advice process and would have made Mr M aware of the difference in costs.
- The FSAVC mis selling review only obliged Occupational Pension Schemes with employer subsidised in-house options to be included. The NHS scheme wasn't subsidised as all the costs were borne by the member.
- It set out the regulators updated guidance from 1996 which explained the obligations of tied advisers when advising on FSAVC plans. It believed it had made Mr M aware of the generic differences between FSAVCs and AVCs and had referred him to his employer for further information about the in-house options.

Mr M didn't agree with the outcome and brought his complaint to us, where one of our investigators looked into the matter. She said the complaint shouldn't be upheld because she was satisfied Sun Life had discussed the generic differences between AVCs and FSAVCs with Mr M.
She also thought Sun Life had acted reasonably by not including Mr M's plan within its FSAVC review as the NHS pension scheme wasn't one of those required to be included.

Mr M's representative didn't agree making the following points:

- It wasn't satisfied that Mr M was given enough information at the point of sale to make an informed choice.
- There was no evidence of an adequately *detailed* suitability report.

- It didn't seem that the reasons Sun Life set out confirming its advice were in line with the reasons our technical help desk had confirmed were valid reasons for recommending a FSAVC plan.
- The recommendation favoured FSAVCs and didn't mention 'added years' or that it was a 'risk free' alternative.
- It said that Sun Life had reached its conclusion on what it thought the adviser *would have done* but thought it was more likely that all the generic differences weren't *actually* fully explained by the adviser.
- 'Added years' wasn't discussed at any point during the sales process by Sun Life, and we hadn't subsequently considered it as an alternative within our assessment of the case.

The representative said that if the investigator wasn't persuaded to change her view then the complaint should be referred to an ombudsman. So it was passed to me for a review.

My provisional decision

In my provisional decision I took a different view to that of the investigator and thought the complaint should be upheld. I said that Sun Life should undertake a redress calculation in accordance with the regulator's FSAVC review guidance – making the following points in support of my findings:

- In 1996 the regulator issued the regulatory update "RU20", which set out updated guidance for advisers – tied and independent, when recommending FSAVC plans. I thought Sun Life's adviser had satisfied two of the three requirements when providing his advice, but hadn't recorded any discussion of the differences between the in-house schemes and FSAVC plan – although he had referred to a generic document called "*a comparison of in-house AVCs and free standing AVCs",* which Sun Life said was part of its standard sales process.
- I thought the content of the document met the requirements of RU20, but as Mr M hadn't signed the relevant section of the document I wasn't satisfied that the adviser had demonstrated that he did discuss the generic differences between the schemes – particularly as Sun Life relied on the fact that the document had been discussed to support its position.
- I didn't think references to a discussion of "generic differences" was sufficient proof of the differences that should have been discussed – especially the lower charges of in-house AVCs.
- I had also considered whether Mr M would have purchased 'added years' in 1997 as he subsequently did in 2007. I thought, on balance, it was likely Mr M would have thought the cost of 'added years' was high compared with in-house AVCs. But I also noted that Sun Life said it had referred Mr M to his employer to understand the differences between the schemes. I thought this meant he would either had approached the employer and discovered that 'added years' were an expensive option, or didn't approach the employer in which case he wouldn't have been aware of 'added years' as an option at that time.
- Overall, I wasn't persuaded that Mr M would have chosen 'added years' as an option. But I did think he would have chosen in-house AVCs – with their lower costs, if he'd been made fully aware of the difference in costs between the schemes.

Responses to the provisional decision

Mr M wanted me to reconsider my view on whether he would have taken out 'added years' as an alternative to either in-house or free standing AVC's. He said I hadn't been aware that he worked abroad from 1990 to 1992 – thereby adding three years shortfall to his service by the time he met with Sun Life. He said this meant that by age 60 he could only have achieved a maximum of 28 years' service in the NHS scheme.

Sun Life didn't provide any substantive response to my provisional decision findings.

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.

And having carefully considered Mr M's further submission about his overall service record within the NHS pension scheme, I see no reason to depart from my provisional findings.

The suitability of Sun Life's advice

In 1996 the regulator produced an update which included the procedures product providers needed to follow in relation to FSAVC plan sales. This update – named RU20 – wasn't new guidance but reaffirmed existing requirements for tied advisers which was to have:

- *drawn the client's attention to the in-house scheme alternative*
- *discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article)*
- *directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.*

In this case Sun Life's suitability report noted whether the adviser did meet those requirements. It said that "*we have discussed the generic differences between in house and FSAVCs and I have referred you on to the superannuation department for a thorough understanding of the differences."* So the adviser did draw Mr M's attention to the in-house alternative and did direct him to his employer for more information on the alternatives. But I don't think the report confirmed sufficient details of a "*discussion of the differences between the two routes".*

But Sun Life said the adviser would have used a separate "*comparison of in-house AVCs and free standing AVCs*" document to confirm those differences – which was part of its sales process at the time. It provided a copy of the document and said the adviser referenced the discussion they would have had in his suitability report.

Having looked carefully at the document I do think it satisfied the RU20 requirements at the time. Particularly with regards to the charges, as it stated that "*charges on money purchase AVCs are usually significantly lower than on a FSAVC as the employer may meet all of the set up and administration costs. Often there will be no initial charges"*
So I would have been satisfied that all three of the requirements for tied advisers – as set out in RU20, would have been met, if I were persuaded the adviser had discussed the *comparison* document.

It's not possible for me to know what was discussed in 1997 as there's no record of the actual conversation that took place. But I have considered that the separate document Sun Life has provided had a section for both Mr M and the adviser to sign to confirm that "*my adviser has fully explained all the features of in house AVCs and FSAVCs and that I understand the basis of the recommendation made".* I haven't been provided with a signed copy of the document and, as Sun Life has relied largely on the fact that the adviser would have discussed the document, I would have expected it to have been signed.

In the absence of a signature I would have therefore expected a much clearer reference to the parts of the document that were discussed to have been included in the suitability report – such as the lower in-house scheme charges for example. But there wasn't any additional reference to those *generic differences* in the report, and as I said previously, without a signed copy of the document or additional notes to explain what was discussed it's difficult to conclude that the adviser met those recommendation requirements outlined in RU20.

Consideration of 'added years' as an alternative

Mr M told us that he'd been working abroad in the early 1990's so the gap in his overall NHS pension scheme service is less than I assumed in my provisional decision. He believes there's good reason to believe he would have chosen 'added years' as an alternative – if he'd been made fully aware of it at the time of the advice.

'Added years' works in a different way to the other AVC type schemes. It makes up "missing" years of service to provide a guaranteed benefit based on a member's final salary. It also makes up other lost benefits such as dependents pensions. But in 1997 the cost of 'added years' would have looked expensive to Mr M compared to the returns and benefits of a FSAVC plan. A mid-range projection as laid out by the regulator would have been 9% at the time, so the FSAVC returns would have seemed generous compared with 'added years' which would have potentially required far greater contributions to provide similar, albeit guaranteed benefits.

But even if my assumptions are wrong, I've taken into account that the suitability report said Sun Life had referred Mr M to his employer to understand the differences between the schemes. If Mr M had taken that course of action he would have learnt about 'added years' and the cost involved. So if he didn't decide to purchase 'added years' then I assume he discounted them on the grounds of expense. And if Mr M didn't refer to his employer he wouldn't have been aware of 'added years', and therefore it would have been unlikely that he would have chosen it as the most appropriate alternative scheme for him.

Mr M has previously referred to the fact that he did take out 'added years' in 2007 to show that he thought it was the most appropriate option for him – given all the information he was aware of at that time. I can understand why Mr M would refer to that event, although I understand the NHS scheme wrote to all members in 2007 to warn of the closure of the 'added years' scheme from April 2008. So, I think on balance that was more likely to be the reason for Mr M purchasing 'added years' in 2007.

And even if Mr M's overall maximum available service was three years less than I previously was made aware of, I don't think that made it more likely he would have taken out 'added years'. I think it would have increased the overall cost of replacing those "missing" years and consequently might have made 'added years' an even more expensive and less attractive alternative when compared to a FSAVC plan illustration.
In my view the issue of 'added years' seeming "*expensive*" when compared to the AVC options would have, on balance, prevented Mr M from choosing that option.

So I think, for the reasons I've already given, that Mr M would have been likely to have chosen the in-house AVC option if he'd been made fully aware of the difference in the costs compared to the FSAVC plan.

Putting things right

Sun Life Assurance Company of Canada (U.K) Limited 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 Assurance Company of Canada (U.K) Limited 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 M’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 M 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

I uphold Mr M’s complaint against Sun Life Assurance Company of Canada (U.K) Limited.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 16 March 2022.

Keith Lawrence
Ombudsman