DRN-3374790

The complaint

Ms S complains about advice given by Sun Life Assurance Company of Canada (UK) Limited (Sun Life, formerly Lincoln) to take out a Free Standing Additional Voluntary Contributions (FSAVC) plan in 1997. Ms S says she should have been informed that she would be better off taking out added years or an Additional Voluntary Contributions (AVC) plan through her occupational pension scheme.

Ms S says she wasn't properly advised of the differences between the schemes and if she had been, she would have chosen added years as she didn't wish to take any risk with her pension.

What happened

Ms S was a member of an occupational pension scheme (OPS) . She had been with her employer since 1993 and was looking to increase her pension contributions.

Ms S met with a tied adviser for Sun Life in 1997. She was recommended a FSAVC plan. She took out the plan in April 1997 and made contributions until 2011 when the value of the plan was transferred to a new provider.

In 2019 a claims management company (CMC) complained to Sun Life on Ms S's behalf. It said Ms S shouldn't have been recommended a FSAVC plan and should have been advised to buy added years through her employer's scheme. The CMC said the risks, implications, and alternatives in relation to the FSAVC were not fully and properly explained to Ms S. It said Ms S was unaware of the higher charges for this type of scheme and was never provided with a full or descriptive comparison of benefits between the in-house scheme and this policy.

It also complained that the sale hadn't been previously reviewed by Sun Life.

Sun Life didn't uphold Ms S's complaint. It said this sale was not covered by the regulator's review of FSAVC plans.

Sun Life said that its adviser had explained the generic differences between the FSAVC and the AVC plans. Sun Life also said its adviser referred to a document which set out those differences, including the difference in charges and that it specifically referred to added years.

It said the recommended plan was suitable as Ms S had required flexibility, portability, and the option to vary her retirement age. Sun Life also said Ms S had been provided with an illustration which showed the potential projected returns for the plan.

The CMC disagreed. In summary it said Sun Life had not supplied any evidence to confirm that the sale of the plan had been included in the regulator's FSAVC Review of May 2000. It said that review was targeted at this type of sale where the consumer had the option of purchasing added years.

The CMC said Ms S didn't have a genuine desire to retire early, she wasn't a job mover with poor prospects in earnings and she didn't require anonymity. So, the FSAVC plan wasn't suitable for her. It said Sun Life hadn't addressed the complaint which was that Ms S should have been advised to purchase added years in her scheme.

The CMC said the evidence supplied by Sun Life only referred to the in-house AVC arrangement and no evidence had been provided to demonstrate that the true nature of added years had been explained. It also said the documentation provided demonstrated the advice was not compliant as it only referred to the in-house AVC and didn't give a full written explanation in respect of the added years option.

The CMC also said Sun Life had made an incorrect assumption that Ms S's scheme would have discussed added years with her whereas the pensions department in her scheme was strictly not allowed to provide any advice to Ms S.

Sun Life said that this sale was not included in the FSAVC review as only schemes that provided 'employer subsidised' IHAVC/added years benefits were obliged to be included, and those schemes were set out in Annex A of the guidance. It said neither added years nor money purchase schemes were subsidised in any way by Ms S's employer– with all costs borne by the member.

It noted the guidelines referred to by the CMC and said those related to sales that took place before May 1996. It said the regulator's guidelines at the time the plan was sold in 1997 set out the following requirements for businesses:

1. The generic differences between the In-House AVC scheme and the FSAVC were discussed.
2. The client's attention was drawn to the in-house scheme alternative; and
3. The client was directed to his employer, or the scheme trustees, for more information on the in-house scheme option.

Sun Life said the documentation demonstrated that Ms S was made aware of the generic differences between the In House AVC (IHAVC) and the FSAVC, and that the advisor had referred her to her employer's IHAVC for a thorough understanding of the differences. Therefore, it said she would have been aware of the IHAVC with her employer and the options available in that scheme, including added years if available.

It said the generic differences the adviser discussed with her would have included points such as charges normally being lower in the IHAVC and Ms S being responsible for paying all of the charges in the FSAVC.

Sun Life said it believed the 'Generic Differences' document was discussed during the sales process. It said that document would have shown Ms S that charges on In-House AVCs are usually significantly lower than on an FSAVC as the employer may meet all of the set up and administration costs, and that often there would be no initial charges. It also said that document would have shown that in some schemes, such as Ms S's scheme, AVCs can be used to buy an extra period of service in the pension scheme, known as added years.

Ms S's representative disagreed with Sun Life and referred her complaint to our service.

Our investigator considered the complaint and initially felt that the adviser hadn't sufficiently explained the differences between the different types of plans, so she thought the recommendation wasn't suitable. The investigator felt that Ms S was unlikely to move roles so didn't require portability. She also noted the Ms S had subsequently purchased added years.

However, on further consideration the investigator took into account that as a tied adviser, the adviser couldn't advise Ms S as to whether she should take out an AVC plan or buy added years. The adviser's role was to explain the general differences between those options and the FSAVC, and direct Ms S to her scheme for further information. The investigator was satisfied that the adviser had explained the general differences as recorded on the reasons why letter issued at the time of sale. She also was satisfied on balance that a leaflet, which set out the differences between those options, had been discussed and provided to Ms S at that time.

So, the investigator concluded that the adviser had made Ms S aware that there were other options and had provided Ms S with sufficient information about those options and referred her to her scheme, in line with the requirements at that time.

Ms S's representative disagreed. It noted the reasons why document referred to by the investigator wasn't a separate letter sent to Ms S, but an additional section at the end of the fact find. It pointed out *only* the adviser had signed the document and Ms S had confirmed she had never seen it before.

The CMC said it had asked Ms S about the generic differences document and she'd said she had never received that document and there had been no discussion in relation to any in-house option.

Ms S had also pointed out that the reasons why document didn't refer to added years. Ms S had said she would never have viewed an in-house option in her scheme as riskier than an outside AVC scheme.

The CMC referred to two documents which it said were the only documents actually provided to Ms S by the adviser, and that it said gave no explanation of the differences between the options available to Ms S.

The CMC also said the fact the leaflet wasn't expressly mentioned by the adviser in Sun Life's documentation demonstrated on balance that it wasn't provided to Ms S.

As no agreement could be reached the complaint was referred to me for review.

I issued a provisional decision which I concluded that the complaint should be upheld and redress should be calculated on the basis of a comparison with the lower costs that would have been incurred, if Ms S had taken out an AVC plan, and that it should be carried out in accordance with the regulator's FSAVC review guidance.

The following represents an extract from my provisional decision, and forms part of this final decision.

<u>What I've provisionally decided – and why</u>

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

To recap, Ms S met with an adviser in 1997. She was in her late 30s and had worked in her role for about four years.

A financial planning profile and a reasons why document were completed at that time. Those documents set out Ms S's circumstances and objectives and the profile document was signed by Ms S. Those documents recorded that Ms S was looking to increase her pension contributions and it was noted that she had joined the company pension scheme "late" and was looking to make up the shortfall. Her annual income was £45,000 and her existing pension contribution was nine percent of her salary.

It is not disputed that Ms S wanted to increase her pension contributions. The issue here is whether the adviser complied with the requirements at the time when providing the recommendation to take out an FSAVC and whether that recommendation was therefore suitable to achieve Ms S's objective.

Ms S's representative says she should've been recommended added years with her occupational pension scheme rather than a FSAVC. She says Ms S would have been financially much better off if she had bought added years and she didn't need the flexibility or portability of an FSAVC.

Sun Life points out that the adviser was a tied adviser so he couldn't recommend an AVC or added years. He could only recommend its pension products.

So, I think it is important to look at what was required from a tied adviser at that time.

Requirements of tied adviser

The tied adviser couldn't recommend products from other providers but was required to:

1. *Draw Ms S's attention to the in-house alternative*
2. *Discuss the generic differences between the two routes*
3. *Direct Ms S to her employer or the OPS for more information on the in-house option.*

Ms S's representative says the adviser didn't do this and if the adviser had explained the differences, including the difference in costs between the options, and the greater certainty provided by the added years option, Ms S would have chosen added years.

Were in-house alternatives discussed with Ms S?

Ms S says the adviser didn't discuss in-house options with her at all. However, I have to take into account that these point of sale discussions took place more than 20 years ago, and

Ms S's complaint was made relatively recently, so there was no particular reason for her to recall them prior to that. And as I wouldn't necessarily expect her to recall a conversation that took place 20 years ago, the fact she doesn't recall it, does not necessarily mean that no discussion of in-house options took place.

Ms S has provided two letters issued to her by the adviser. One is dated 10 March 1997 and the other is an undated document.

Documents provided by Ms S

Both of those documents were prepared by the Sun Life adviser and consider additional areas of advice in addition to the advice provided around FSAVCs.

I note the first document doesn't refer to in-house options although it does refer in favourable terms to Ms S's scheme. In relation to the FSAVCs it says:

"The top-up schemes are designed to help bridge the gap and are the only things left that attract full high rate tax relief i.e. every £100 you put in them only costs you £60 and the government makes up the rest. In addition they grow totally tax free as opposed to bank/building society accounts which lose 40% interest in tax. As the early years are the most important in terms of compound growth it is important to utilise those while your disposable income is probably at its highest. "

However, as it predates the reasons why document dated 10 April 1997, I am not persuaded it demonstrates that in-house options weren't ever discussed with Ms S. It appears to be an introductory letter which covers a number of financial areas.

The additional undated document also refers to the FSAVCs in addition to other financial areas and says:

The top-ups to your superannuation or AVCs are a good idea because you will both have a shortfall in your XX (redacted) pensions and because of the huge tax advantages that the government gives to them. They attract full tax relief i.e. as 40% taxpayers you get 40% of the overall premium paid for you. Every £100 invested effectively costs you only £60 the inland revenue pays the rest. In addition any interest earned is paid free of all tax.

At senior positions, a good starting amount is £100 per month. As I mentioned before with "investments" as opposed to "protection;' we tend to recommend use of the external fund managers such as Schroder, Perpetual, Framlington etc. to look after endowments, avcs and Peps. This is opposed to insurance companies own fund managers because they have historically produced less consistent growth. As with the endowment therefore we will use Lincoln to access the fund managers but we will use different groups to before, to spread the monies about. The effects of compound growth mean the early years are highly significant so it is important to take advantage of that. For the AVC's I have enclosed two forms and highlighted the areas you need to sign."

Again, although there is no mention of in-house options, I don't consider this means they weren't discussed at any time.

A reasons why letter was also issued. Ms S has indicated she was never provided with a copy of it. I consider this is a contemporaneous document prepared and signed by the adviser at the time. It states that they had "fully discussed the generic differences between in house and FSAVCs" and the adviser had referred Ms S to her scheme for "a thorough understanding of the differences."

The purpose of that document was to record what was discussed. So, I am satisfied on balance that the adviser had drawn Ms S's attention to the in-house alternative and referred her to her scheme for more information. By doing so, the tied adviser would have met two of the requirements.

However, although I am satisfied there was some discussion in respect of in-house options, I also have to consider whether sufficient information was provided by the adviser to explain the key differences between the options, in particular the differences in costs. I note the reasons why document only referred to the differences in very general terms.

Were the generic differences between the two routes discussed?

Sun Life has provided a document it says its advisers used at the time. It was entitled "A comparison of In-house AVCs and Free-Standing AVCs" and it set out differences between the options. It had two columns which set out the features and the generic differences between the FSAVC and the in-house options.

I am satisfied from the contents of the document and the way that it was laid out that it was designed to be used by the adviser to assist in explaining the generic differences between the FSAVC and the in-house options.

Comparison of options document

I can see at the top of the "comparison" document it makes it clear that the costs of in-house AVCs are "usually significantly lower than on an FSAVC" and explains why that is the case. It also states in relation to the AVCs that "often there will be no initial charges." This is reiterated on the FSAVC side where it states that the charges of the FSAVC are all borne by the plan holder and are "usually higher."

The document also makes specific reference to added years and says " In some schemes AVCs can be used to buy an extra period of service in the pension scheme. These benefits are known as added years and will increase in value in line with increases in earnings."

The document also refers to another perceived advantage of an AVC where it states that "Employers will sometimes match any contributions paid into an AVC with extra contributions into the main scheme" and then confirms on the FSAVC side that it is "most unlikely that an employer will match contributions into any FSAVC."

In addition the document deals with the tax treatment of contributions and indicates that with an AVC "full tax relief is automatic even if the employee is a higher rate tax payer" whereas with the FSAVC the "Higher rate tax payer must claim their extra tax relief through their tax office."

So, I consider that the document made express reference to several advantages of the AVC option including the lower charges and referred to the corresponding negative aspects of the FSAVC. I therefore consider it set out the differences in a balanced way and I also note it made specific reference to added years and gave a broad explanation as to how that option worked.

Was the "comparison" document provided to Ms S, or were its contents explained to her?

Sun Life has said that the wording used in the reasons why letter indicates that the generic differences document was referred to and explained.

Ms S has said she wasn't provided with a copy of that document and the differences weren't explained. Her representative also points out that the document wasn't expressly referred to in the point of sale documentation.

I also note that it wasn't referred to in the two letters issued by Sun Life that have been provided by Ms S.

I can see that the comparison document had a declaration section at the bottom where the adviser was able to sign to indicate that all aspects of the listed features in the document had been fully discussed. There was also a customer declaration which stated:

"I confirm that my adviser has fully explained all the features of In house AVCs and Free Standing AVCs and that I understand the basis of the recommendation made."

Sun Life hasn't provided a copy signed by either the adviser, or Ms S. As both the adviser and Ms S signed the financial profile document, I don't think it would be unrealistic to expect the adviser to have signed the comparison document and to have asked Ms S to sign it as confirmation that this important information had been provided. Particularly, as discussing the generic differences was one of the requirements of a tied adviser at that time. There was simply no reason, if it had been a cornerstone of the conversation with Ms S, that it wouldn't have been signed by both parties.

So, overall, I'm not satisfied on balance that available evidence supports the position that the generic differences were properly discussed so that Ms S was made aware of important differences between the FSAVC and the in-house options such as the difference in costs.

<u>What would Ms S have otherwise done if the generic differences had been discussed?</u>

I have to consider what would have happened here if the generic differences between the FSAVC policy and in-house options had been properly explained to Ms S. Would Ms S still have elected to take out a FSAVC policy, or would she have chosen an AVC plan which generally had lower charges than the FSAVC policy and the potential to build up a retirement fund? Alternatively, would she have elected to go for the added years option which tended to be more expensive but gave a more certain level of benefit?

As I have said, the tied adviser couldn't recommend an in-house option, but Ms S could have pursued this herself with her scheme. The reasons why letter indicates Ms S preferred the FSAVC policy because of the "greater portability and flexibility in terms of fund choice, risk profile and retirement ages."

But I'm not persuaded, given Ms S's profession, that portability was a really important factor for her. I think that the flexibility of fund choice and retirement age would have been attractive but ultimately, I think the difference in costs is likely to have meant she would have preferred the in-house AVC option.

I'm not persuaded that she would have taken out added years. Ms S's representative says she would have chosen the certainty of added years had that option been explained to her. Ms S's representative points out that she took out four added years in 2006.

I have to take into account that the "certainty" provided by added years came at a price. I consider if Ms S had investigated the added years option with her scheme, it was more likely than not, that it would have appeared expensive in comparison with the AVC and the FSAVC, in relation to the returns that might be achieved.

That is because her OPS would have offered the buying of added years at a fixed cost. When deciding the cost, it would have wanted to make sure the scheme could cope with how many people wanted to buy added years. So, it would have used conservative assumptions when working out the cost. I think it is likely therefore that it would have appeared expensive. When comparing the cost of added years against the projected returns on the FSAVC at that time, for example, it meant that with the FSAVC a relatively low contribution could potentially achieve a higher return.

I think as added years would have appeared expensive and Ms S was already paying nine percent of her income in pension contributions, she is unlikely to have chosen this option.

I appreciate Ms S took out four added years about nine years later, in 2006, but I consider it likely that she would have been in a more stable position by then, with more years of employment and a higher salary as she gained experience in her role.

I also take into account that added years were based on the assumption that the contributions would be paid until retirement age, with increases linked to salary, and that generally there was less flexibility to stop and restart. So, I consider these aspects may well have been less attractive to Ms S. I note she stopped paying contributions into the FSAVC plan in 2011 and transferred its value. In addition, Ms S was intending to retire at 60 years but the reasons why letter recorded that she was interested in flexibility in respect of her retirement age. So, I think the lack of flexibility would also have made added years less attractive as a proposal, at that time.

In addition, although I think Ms S's circumstances were fairly settled at the point of sale, I consider added years would have been more of a fixed commitment for Ms S with increasing contributions linked to her salary for a fixed term. Whereas with an AVC plan Ms S would have been able to make increases over time – when she felt ready to do so. So, I think that was a potential benefit for Ms S.

Accordingly, I think compensation should be calculated on the basis of a comparison with the lower costs that would have been incurred, if Ms S had taken out an AVC plan. I have set out the details later on in this provisional decision.

<u>Attitude to risk</u>

I have also considered whether Ms S wanted to take the risk posed by the funds her FSAVC plan was invested in. Her plan was invested equally in Green Funds and Schroders Sterling Broad Market Bond Funds. The application form for the plan signed by Ms S indicates that she selected adventurous funds.

Sun Life has provided current fund fact sheets for these funds as it doesn't have fact sheets from when the plan was taken out in 1997. It has described them as balanced to aggressive funds.

On the fund fact sheet for the Green Fund there is a section which looks at the type of investor the fund may be appropriate for. It states:

This fund is appropriate for investors who are willing to take above-average risk for the prospect of higher returns. Investors in this fund are prepared to take a greater risk of a decline in value and are prepared for the possibility of losing a large proportion of the money invested.

The fund fact sheet for the Green funds also shows that they are invested wholly in international equities.

The other half of Ms S's contributions were invested in the Schroders Fund. That appears to be made up of both UK fixed interest assets and international fixed interest assets. The objective is described as follows:

"This fund is appropriate for investors who are willing to accept moderate levels of risk for the prospect of slightly higher returns than money deposits and may be wary of investing in the stock market. Investors should note however that this fund can still go down in value as well as up."

Fixed interest funds are generally considered lower risk than equities and so I have to consider the risk posed by the combination of those two funds. I note the combination of funds meant there were different types of assets which I think helped to diversify Ms S's investments in the plan.

Sun Life has said that Ms S was prepared to take the level of risk associated with these funds as her plan was intended to be held over the long term. It also says Ms S chose the funds so it says there must have been some discussion about the different funds and the risks posed. Ms S's representative says she didn't want to take any risks with her pension.

I take into account that this was a top-up plan rather than Ms S' s main pension. She already had an occupational pension scheme which represented the majority of her contributions and posed less risk. So, I think it's likely that Ms S was willing to take more risk with this plan in the hope of achieving something like the level of return set out in the FSAVC illustration.

The contributions were also being made from her disposable income and I note that this plan was intended to be held until a notional retirement date of 60 years. So, it would be held for more than 20 years. On that basis I consider Ms S was willing to take this level of risk over the long term to try to achieve a reasonable return on her contributions and top up her pension.

Overall, I don't consider that the combination of funds posed more risk than Ms S was prepared to take, taking into account her circumstances and objectives.

Fair compensation

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 Ms 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 Ms 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 ***her*** *likely income tax rate in retirement – presumed to be 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.*

Both parties were then given an opportunity to respond with any further representations they may wish to make. Both parties acknowledged and accepted my provisional decision.

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, and noting that both parties have accepted my provisional findings, my decision remains the same as set out in my provisional decision.

Putting things right

Fair compensation

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My final decision

My final decision is that I uphold Ms S's complaint and Sun Life Assurance Company of Canada (UK) Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 28 June 2022.

Julia Chittenden
Ombudsman