DRN-3779106

The complaint

Mr G complains that some advice given to him in 1990 by Sun Life Assurance Company of Canada (U.K.) Limited ("SLAC") about making pension contributions was unsuitable.

What happened

Mr G met with an advisor employed by Laurentian Life. That firm now forms part of SLAC, so it is SLAC that needs to deal with Mr G's complaint. For ease, in this decision, I will generally refer to the responsible business as SLAC throughout.

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

In 1990 Mr G was aged 22 and in full time employment. SLAC advised Mr G to start a personal retirement plan and he agreed to make monthly contributions of £40. He also accepted SLAC's recommendation to contract out of the State Earnings Related Pension Scheme (SERPS) at the same time. Mr G's monthly contributions were later increased, but he ceased contributing to the plan when he joined his occupational pension scheme in April 1993.

SLAC didn't at first agree with Mr G's complaint. But he later provided evidence to show that the occupational pension scheme he joined in 1993 was available to him at the time the advice was given. So when Mr G's complaint was assessed by one of our investigators, the investigator concluded that SLAC's advice had been inappropriate. He said there was no evidence that SLAC had advised Mr G that he should investigate joining the occupational pension scheme instead of taking its personal retirement plan. He asked SLAC to put things right for Mr G and to pay him £250 for the inconvenience he'd been caused.

SLAC accepted that its advice had been inappropriate and agreed to calculate whether Mr G had lost out. But it didn't think it was reasonable to pay further compensation to Mr G for any inconvenience he'd suffered. Mr G agreed to that part of the redress recommendation being dropped.

SLAC calculated that it needed to pay Mr G the sum of £112,006.48 in order to compensate him for the losses he'd experienced as a result of its inappropriate advice. It said that it thought the compensation could be paid as an augmentation to Mr G's pension savings. Mr G disagreed. He said that HMRC considered payments such as this to be "relievable". And so that meant the payment could only be up to the limits for contributions set by the relevant regulations. He said that his allowable earnings over the past three years did not provide sufficient coverage for a payment of that size.

So, as this 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 G 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 G and by SLAC. 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 what 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.

Mr G has provided evidence that he was entitled to join his occupational pension scheme at the time SLAC advised him to take out its personal retirement plan. And the evidence from the time doesn't provide any suggestion that SLAC advised Mr G to explore the option of joining the occupational scheme. That is a failing, and it seems to me that, if nothing had gone wrong, it is likely that Mr G would have joined the occupational scheme in 1990, rather than three years later.

It appears that SLAC accepts that wrongdoing. And, in line with our investigator's assessment it has agreed to pay compensation to Mr G in order to put things right. But it has been unable to agree the form of that compensation with Mr G. So in this decision I don't need to consider whether something has gone wrong – instead I will give directions on what I think it would be reasonable for SLAC to do in order to put things right.

The disagreement that arises between Mr G and SLAC relates to whether it is possible under the current regulations for the compensation to be added to his pension plan. SLAC says that its understanding is that the compensation would be treated as an augmentation and so not be affected by contribution limits. Mr G says that isn't the case, and the compensation would benefit from tax relief, and so be required to remain within the annual limits. He has provided details to SLAC of his limited income that suggests the amount of compensation SLAC has agreed to pay would breach those contribution limits.

It isn't appropriate for me to provide technical guidance either to Mr G or SLAC about how the relevant taxation rules should be interpreted. Instead, as will be seen in the following section of this final decision, my directions will follow those set out by the investigator. That places the responsibility on SLAC to ensure that the compensation it pays, and the form in which it is paid, doesn't conflict with any existing protection or allowances.

So in resolving this complaint, it is SLAC that is required to adhere to my directions. Should Mr G find that those directions haven't been met (such as compensation being paid in a way that conflicts with allowance limits) he would be able to challenge SLAC's actions either via a new complaint to this Service, or through Court proceedings. I do not intend to make directions at this time about hypothetical interpretations of complex regulations. It would be for Mr G to show, after the compensation has been paid, that he has been adversely affected by the redress method chosen by SLAC, and to then ask the firm to put things right.

I appreciate that Mr G would prefer to receive a cash sum as compensation. But that isn't an option that I would think appropriate here, unless SLAC concluded that it couldn't pay the redress into his pension plan. I have noted that Mr G has now reached 55 years of age, so allowing his access to his pension funds. But using that access to draw the compensation will have implications, both on the amount of income tax he needs to pay, and in creating changes to his Money Purchase Annual Allowance ("MPAA"). If at all possible, it is right that those changes are imposed should he take the compensation as income from his pension, rather than it being received as a lump sum.

Putting things right

SLAC has accepted that the advice it gave to Mr G in March 1990 was unsuitable. My conclusion is that a fair outcome would be for SLAC to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have joined the occupational scheme in 1990.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr G whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published. He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr G. But**,** if the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect SLAC to carry out a calculation in line with the updated rules and/or guidance in any event.

SLAC should undertake a redress calculation in line with the regulator's pension review guidance, as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. SLAC may wish to contact the Department for Work and Pensions (DWP) to obtain Mr G's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of not joining the occupational scheme on Mr G's SERPS/S2P entitlement.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr G'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 G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash 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 G'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 G to accept or reject my decision before 7 December 2022.

Paul Reilly
Ombudsman