DRN-4276487

The complaint

Mrs R complains about advice she was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme to a type of personal pension plan arrangement. She says the advice, which was provided in 2000, was unsuitable for her and believes this has caused a financial loss.

Sun Life Assurance Company of Canada (U.K.) Limited is now responsible for answering this complaint. To keep things simple therefore, I'll refer mainly to "Sun Life" when referring to the responsible business.

What happened

At the time, Mrs R was a deferred member of her OPS, having been employed previously in the 1990s and accrued a number of years' worth of benefits. Sun Life's recommendation was to transfer away from her deferred DB scheme. Mrs R's circumstances of the time showed:

- She was aged 36, married and with one dependent child. She was in good health
- Mrs R was by then employed in a new role earning £10,632 per year, with further income of £2,038 per year. She had by then joined a new public sector DB scheme with her new employer which isn't the subject of any complaint.
- She had mortgage of around £25,500 with 13 years left to run on a property worth around £40,000.
- The final cash equivalent transfer value (CETV) of Mrs R's DB pension was around £10,073. This was transferred to a personal pension plan in July 2000.
- The normal retirement age (NRA) of the DB scheme in Mrs R's case was 2029, which was 65 years.

I issued a jurisdiction decision on 26 July 2023 saying I thought the complaint *was* one we could look in to.

One of our investigators has also looked into the merits of Mrs R's complaint and said they think we should uphold it. Sun Life hasn't agreed with this. So, because the complaint hasn't been resolved informally, I've been asked to make an ombudsman's 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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And 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.

The applicable rules, regulations and requirements

The advice was provided by Sun Life in 2000. Based on the information I've seen I understand the advising business was more likely to have been a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), rather than the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA).

Nevertheless, as of 2000 Sun Life was regulated by the Personal Investment Authority (PIA). When the PIA took responsibility for LAUTRO and FIMBRA businesses in 1994, it adopted the LAUTRO and FIMBRA rules. And so, these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise *'due skill, care and diligence'* and *'deal fairly with investors'*. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- *Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or*

- *Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.*

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

Examples of the key FIMBRA rules are set out, although not limited to, those below

> *Rule 4.2.1 required an adviser to take reasonable steps to obtain relevant information concerning a client's personal and financial circumstances in order to provide investment services.*
>
> *Rule 4.3.1 required FIMBRA members to take all reasonable steps to satisfy themselves that the client understood the risks involved in a transaction.*
>
> *Rule 4.4.1 required members to establish, based on their knowledge of the client and 'any other relevant information which ought reasonably to be known' to them, which types of investment that were the most suitable for them.*

I've used all the information we have to consider whether transferring away from the DB scheme was suitable and in Mrs R's best interests.

I don't think it was, so I'm upholding her complaint.

Financial viability

To demonstrate the financial comparisons between her current DB scheme and transferring out to a personal pension arrangement, Sun Life referred in its final response letter about this complaint to a 'critical yield' rate. The critical yield is the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same benefits as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension arrangement could achieve the necessary investment growth for a transfer-out to become financially viable.

Sun Life hasn't been able to show me the full suitability report or transfer analysis from the period, the implication being neither are available after the passage of time. But in its final response letter to Mrs R's complaint, it said the critical yield required to match Mrs R's DB scheme benefits was 8.24%. But there was no mention of whether this was a result of taking all the benefits in a pension form, or if taking a reduced pension and tax-free lump-sum. There was also no mention of whether the critical yield was being applied for an NRA of 65, or a different age. Sun Life's critical yield figure is therefore of limited value.

The advice was given during the period when the Financial Ombudsman Service was publishing discount rates on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

In Mrs R's case, our investigator said the relevant discount rate closest to when the advice was given was only 6.9% (for a retirement at age 60). However, as I've said, I think it's more likely the NRA of the scheme was 65, even if Mrs R might have wanted to retire earlier. For a retirement at 65, the discount rate was 7.1%, with some 28 years left to retirement. This is still well below the critical yield figure I've set out above and so it implies that exceeding the critical yield was not probable in these circumstances.

I've also kept in mind that the regulator's upper projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate was 5%. In its final response letter, Sun Life said these projected growth assumptions from the regulator meant matching the critical yield was possible. But I don't agree with this. Sun Life gives no explanation or context as to why reaching a sustained growth rate close to the critical yield was likely. As I've said, the middle rate assumption was only 7% and Sun Life itself says Mrs R had a moderate attitude to risk.

However, I've seen no evidence to suggest Mrs R did have a moderate attitude to risk. All the evidence points to her having no investments of this nature and no past investment experience to draw upon. She also appeared to have very little capacity for loss. In any event, both the middle growth assumption and the discount rate implied growth of below 8.24%. As our investigator explained, Mrs R would have had to have seen her investments outgrow the critical yield, year-on-year for over 28 years, to make transferring viable from a financial perspective. In my view, there would be little point in transferring away from a DB scheme to achieve benefits of a lower overall value upon retiring. There would also be little value in transferring even to obtain similar financial benefits. And these scenarios are what Mrs R faced as a consequence of this advice to irreversibly leave her DB scheme.

Of course, transferring away could have been justified on other grounds. In my view, Sun Life's rationale for 'other' transfer reasons are somewhat confused. However, I've considered what it has said, nonetheless. I've also thought about other issues that could have affected a decision about whether or not to transfer.

Other potential reasons for the transfer advice

Due to the lack of information available from Sun Life, I've had to rely mainly on what we can still access from Mrs R's DB scheme, what she's told us, and written information she's retained herself from the time of the advice. I've also considered with care everything Sun Life said in its final response letter to Mrs R and what it said in response to our investigator's view.

I've used all these things to fairly assess other likely reasons given for transferring.

- *Did Mrs R need to transfer at all?*

I think one of the most obvious issues in this situation was that Mrs R was only 36 years old and still had over 28 years to go before she reached the NRA of her DB scheme. I think the adviser should have therefore started from the premise that this seemed far too young to be considering transferring out of a scheme that had certain valued benefits and guarantees unless any explicit and positive reasons existed. At just 36, I don't think Mrs R could have yet formed any concrete plans for her retirement as she still had a growing family, a relatively new career and a home to keep. And I can't see that the adviser really took any account of what Mrs R's retirement income requirements might look like from a financial perspective.

In any event, there was simply no reason for Mrs R to transfer away at all. Sun Life has recently said that it had an understanding that Mrs R's DB scheme was closing down. But this isn't recorded from anything I've seen issued at the time; and if the scheme was in financial trouble, I would have expected comprehensive evidence showing this. In fact, if this was the case, I think the adviser would have used this to shorten his workload. By this I mean that this reasoning would have probably been so powerful he would have only needed to explain this clearly once to justify that Mrs R obviously *had* to transfer away.

We've obtained evidence from the DB scheme that there was no such vulnerability in the scheme and I think it's more likely Mrs R's old role, or parts of the company she'd previously been employed with were changing. The scheme still exists today and is paying deferred members and I think Sun Life could have easily checked this. So, to be clear, there is no evidence Mrs R's DB scheme was closing or that she otherwise *needed* to leave her DB scheme.

The notes I've seen from the adviser at the time suggest Mrs R was concerned about the 'performance' of the scheme. It's not clear what she meant by this. But as I've said, Mrs R was not experienced in these types of matters and had little understanding of how a DB scheme worked, as opposed to a money market invested personal pension plan. So, the adviser should have been informing Mrs R that her DB scheme didn't operate in a way that was directly affected by market conditions in the way a defined contribution scheme was. Her scheme was a promise to pay a particular pension at a certain age and this could easily have been explained to her. References were also made to her scheme being "frozen" which I think were inaccurate, unhelpful and potentially worrying for her.

So, in my view, all these things clearly indicate the transfer away wasn't likely to be in her best interests.

- *Were there any other specific objectives in transferring?*

In responding to her complaint, Sun Life makes mention of the adviser having explained some of the transferring objectives to Mrs R. However, as we no longer have any suitability report (or similar) I can't see what these objectives were. Mrs R's wider financial circumstances weren't recorded, or at least kept for us to look at now. For example, there's no evidence her husband's circumstances were considered in any detailed way as part of a potential transfer decision.

I've also considered whether Mrs R would have wanted to personally manage her pension. This isn't mentioned by Sun Life and there's certainly no evidence she had either the desire or capacity to manage these types of funds. I think she would have found the complexity of doing so uncomfortable. On the other hand, Mrs R's existing pension was managed for her, by trustees, and I think this more suited her limited investment knowledge and her wider financial situation.

- *Death benefits*

I can't be sure whether, or the extent to which, death benefits were discussed at the time, But in my view, the death benefits on offer through the existing DB scheme were probably good. For instance, upon death after a retirement, the spouse benefits would have likely provided a pension increasing with the retail prices index (RPI). I've taken this from some of the documents I've seen and also my knowledge of DB schemes in general. If death occurred before retirement – and of course, Mrs R was still only 36 at the time – there was likely a spouse's pension revalued to the date of death, again with RPI, plus a likely benefit between dependent children. In the event of incapacity rather than death, there were other benefits to consider.

These were, in my view, examples of important benefits within the DB scheme. Mrs R was married and these types of benefits were not generally present outside the DB scheme. I think they were likely underplayed during the course of the advice. I think the adviser should have been promoting these to Mrs R and explaining how valuable they were to her and her husband's situation.

- *Other issues*

The investigation of this complaint has, to a degree, been somewhat restricted due to the lack of contemporaneous documentation from the advice sessions(s) which Sun Life has been unable to provide. Whilst I accept the transfer took place over two decades ago, it also followed a substantial Pension Review process which the then regulator directed firms involved in pension transfer advice to carry out. The Pensions Review came about in the mid-1990s and so only a short time before the advice was given in this case. It also followed a period where many concerns had been expressed by the regulator and indeed within the financial industry, of widespread failures when advising clients to transfer away from DB schemes.

In this context, there was a well-known and widespread requirement for proper documentation to be kept indefinitely for obvious reasons. The Pensions Review process lasted several years and placed a heavy burden on firms like Sun Life to go back and review cases where DB transfer advice had been given. So, when Sun Life says now that it can't recover the necessary evidence from the time, this in my view, represents a significant failure.

I've noted that in its final response letter to Mrs R, Sun Life places weight on it having *"…prepared a transfer analysis report to discuss and compare your anticipated rights under your former scheme and our proposed personal pension plan"*. It also says, "*a personal financial profile was completed and this document recorded your personal and financial circumstances, and the recommendation made by the adviser"*. However, what I've seen are somewhat incomplete documents mainly supplied by Mrs R. Sun Life has been able to provide very little and it has not evidently retained a proper recommendation report or transfer analysis. There's also no evidence of the benefits and value of her existing scheme being properly explained to Mrs R, a fact which she remembers as being one of the main failures and points of her complaint.

Summary

In this decision I've explained why I don't think the advice to transfer away from Mrs R's DB scheme was suitable for her or in her best interests.

Sun Life failed to provide us with any meaningful information to support why such a transfer was merited and why it recommended it to Mrs R. Although it provided a summary of what happened during the advice session(s) it had with Mrs R, within a final response letter, Sun Life has basically been unable to supply much of the important transfer rationale, including any suitability report and a comprehensive transfer analysis. What this means is that the key thoughts of the adviser, and his rationale for recommending transferring, aren't clear.

Sun Life began its defence of the complaint by implying Mrs R could have grown the value of her pension outside the DB scheme, to a degree that made transferring financially worthwhile. However, as I've shown, there's simply no credible evidence of this in my view. As all the indications point to her receiving lower rather than higher financial benefits in retirement as a result of transferring away, I don't think the transfer recommendation was suitable from financial comparison grounds.

I also looked at the other potential reasons given for a transfer. However, Sun Life's response to this was incoherent. On one hand it implied that her existing scheme was in trouble and possibly closing down. If this were the case, I'd have expected very clear evidence set out on the relevant records to show this. However, no such evidence existed and we've confirmed with the scheme itself that this wasn't the case.

Sun Life also made several references to Mrs R being given an adequate amount of regulatory information and warnings in the course of the advice. It also said that the transfer process was relatively unhurried and also that she's had over 20 years of statements about her 'new' pension, and therefore, plenty of time to complain. I understand the points being made.

However, it was Sun Life that was the regulated party here. It was being paid for the advice and Mrs R, a person with no pensions or investment knowledge, had every right to expect she'd get reliable and trustworthy advice from someone with relevant experience. She may well have gone into the advice session(s) with some pre-conceived ideas. But Sun Life's job wasn't to just transact what Mrs R may have thought she wanted at the time; the adviser's job was to really understand her circumstances and provide advice that was in her best interests.

Mrs R was giving up a guaranteed, risk-free and increasing income within her current DB scheme. I accept the regulatory requirements were different at the time, but the advice still ought to have been clear enough for Mrs R to make an informed decision and Sun Life has failed to produce this. At just 36 years old, Mrs R was still a relatively young woman in terms of building a pension. There was no credibility in yet saying she ought to transfer and no reason why Mrs R shouldn't have been advised to use the DB pension in the way in which it was originally intended.

So, I don't think the advice given to Mrs R was suitable. I therefore think Sun Life should compensate Mrs R for the unsuitable advice, using the regulator's DB pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs R, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs R would have most likely remained in the occupational pension scheme if suitable advice had been given.

Sun Life must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

Compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs R's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Sun Life should:

- calculate and offer Mrs R redress as a cash lump sum payment,
- explain to Mrs R before starting the redress calculation that:
    - the redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their defined contribution pension
- offer to calculate how much of any redress Mrs R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs R accepts Sun Life's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs R for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs R's end of year tax position.

Redress paid to Mrs R as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Sun Life may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mrs R's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and I now direct Sun Life Assurance Company of Canada (U.K.) Limited to pay Mrs R the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Sun Life Assurance Company of Canada (U.K.) Limited pays Mrs R the balance. If Mrs R accepts this decision, the money award becomes binding on Sun Life Assurance Company of Canada (U.K.) Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs R can accept my decision and go to court to ask for the balance. Mrs R may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 29 August 2023.

Michael Campbell
Ombudsman