DRN-4406835

The complaint

Mrs E has complained about the advice provided by Sun Life Assurance Company of Canada (U.K.) Limited trading as Sun Life Financial of Canada (Sun Life) to purchase a Free Standing Additional Voluntary Contribution pension scheme (FSAVC) rather than take up one of the in-house options provided by her employer.

Mrs E is being represented in this complaint however for ease of reference I have referred to Mrs E throughout the commentary below.

What happened

In 1997, following advice from Sun Life, Mrs E commenced a FSAVC policy. The advice file from October 1997 shows that:

- Mrs E was aged 28 with annual income of £16,000. Monthly income of £950 with expenditure of £760 gave residual income of £190 each month.
- No debts or dependents were noted.
- Mrs E had been a member of her employers occupational defined benefit (DB) pension scheme since August 1994 and had an intended retirement age of 60.
- Mrs E's attitude to risk (ATR) was assessed as 5. The premiums were to be invested into the Managed Fund to match this ATR.
- The regular premium to be paid was confirmed as £77 gross (£59.29 net).
- The notes completed at the time stated that *"Having seen and compared the "In House" A.V.C. and the Free Standing A.V.C. you have elected to effect the Free Standing A.V.C. at this time, as the FSAVC offered flexibility, absence of employer control, possibility of funding for early retirement, and portability should employment change. You are aware that invariably, the in house AVC has a lower charging structure, and ease of administration. You are also aware that this plan is unit linked and that the value of units within can fall as well as rise, and of the automatic increase option incorporated within the plan, which allows to increase premiums annually by either the average earnings index or 10%, whichever is the lower."*

The product illustration produced at the time of advice showed the benefits that may be available at retirement. This illustration assumed growth rates of 6%, 9% and 12% annually over the 31 years 7 months until Mrs E reached age 60. Also identified in this document were the charges applied to this plan and the effect these would have on the possible fund value in years 1-5.

In 2001, without further advice from Sun Life, Mrs E chose to reduce her premium to £39 per month.

In 2006, following a relocation to France, Mrs E chose to cease making payments into the plan and made the policy paid-up.

Having concluded that the advice initially received may have been unsuitable, and with the help of her representatives, Mrs E complained to Sun Life in March 2021.

Sun Life issued their response to the complaint on 25 August 2021. Within this they noted the rules in 1997, when the advice was given, required their adviser to make sure that:

- There must be clear evidence in the Profile/Reasons Why letter that the generic differences between the FSAVCs and the various in-house options were discussed. This discussion must be outlined in the Profile/Reasons Why letter.

- A clear reason for not recommending the in-house option should be given.

- It is not acceptable to state the benefits of the FSAVC without a comparison of the alternative products.

Given the above, and having assessed the paperwork available, Sun Life concluded that they had done what was required of them, the advice was suitable, and as such the complaint was not upheld.

Disagreeing with the response issued by Sun Life, Mrs E forwarded her complaint to this service.

Our investigator looked into things but did not believe the advice provided in 1997 was unsuitable.

Mrs E did not agree. In response to the findings, it was noted that her (now) husband (then partner) had also been advised to purchase an FSAVC scheme by Sun Life in 1994. Further advice had been given on this FSAVC in 1996 and 1997.

Sun Life had accepted the 1994 advice given to Mr E was unsuitable and concluded Mr E would have bought additional years within his occupational DB scheme instead. Had this occurred, Mrs E suggested that Mr E's subsequent 1996 and 1997 advice would not have been needed, and therefore her 1997 advice would also never have occurred, as it was through Mr E that she came to speak to the Sun Life adviser.

Finally, Mrs E noted that the information within her advice documentation about the in-house AVC options was generic and not sufficiently detailed.

Our investigator was not minded to change their findings. The investigator noted our process is to consider each case on its own merits and stated that the advice documentation covering Mrs E was clear that she had been given advice as an individual. Given this, the advice previously given to Mr E was not considered a reason to alter the outcome reached.

Regarding the information included about the in-house AVC options, the investigator re-stated their opinion that Sun Life had met their regulatory obligations.

Mrs E still did not agree. It was detailed that whilst the advice file noted she was single at the time it also noted the same adviser details with the address recorded being the same for Mr E and Mrs E. It was repeated that had Mr E been given suitable advice in 1994, then her 1997 appointment with Sun Life would most likely never have occurred.

As no agreement could be reached, the case was passed to me.

I issued a provisional decision which stated:

"I would firstly like to state my opinion on the points made by Mrs E and her representative on Mr E's advice and its impact on the advice given to Mrs E. Regarding this point, I agree with the stance taken by our investigator.

I accept that that advice was given by the same adviser, and that in 1997 both Mr E and Mrs E were living at the same address. However, the personal profile document was completed for Mrs E as an individual. Advice was given based on her sole circumstances and her sole needs and objectives.

Whilst the advice given to Mr E in 1994 has been accepted as unsuitable, this does not automatically mean the advice given to Mrs E was unsuitable as well.

Additionally, I would note here that if the argument put forward by Mrs E and her representatives were accepted, a possible future chain of events would include Mrs E making no further pension provision at all.

If in 1994 Mr E had purchased added years, the 1996 and 1997 appointments may never have occurred, from there it creates the possibility that no meeting between Mrs E and Sun Life would ever have occurred, Mrs E would therefore never have potentially been referred to her employer to discuss in-house options, and as such may never have increased her pension provision at all. As such, rather than any comparison with in-house options, the FSAVC would need to be unwound entirely – as though it had never occurred. However, as above, I have rejected this argument and have agreed with our investigator's stance on this point.

Our investigator was correct to note that we treat each case on its own merits and as such the purpose of this decision is to clarify if the advice given to Mrs E – as the person who received advice as an individual, and who made her own decision on that advice based on the information provided to her at that time by Sun Life – was suitable or not.

Given the above, I have gone on to consider the suitability of the advice given to Mrs E.

Here, I disagree with the outcome reached by our investigator.

The adviser in this case was a tied adviser – one which could only recommend products provided by their employer – Sun Life in this case. In 1997 the relevant regulatory guidance (the May 1996 Regulatory Update 20) stated that 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.*

I have fully considered the content of the advice file and the statement included which states:

"Having seen and compared the "In House" A V C and the Free Standing A.V.C. you have elected to effect the Free Standing A.V.C. at this time, as the FSAVC offered flexibility, absence of employer control, possibility of funding for early retirement, and portability should employment change. You are aware that invariably, the in house AVC has a lower charging structure, and ease of administration."

However, I do not consider this to be sufficient. Whilst I accept that this statement shows Mrs E was made aware of the likely lower charges incurred with the AVC scheme, the reasons documented by the adviser as to why Mrs E was willing to accept this raise concerns about how these options were discussed.

Firstly, in dealing with the flexibility offered by the FSAVC scheme, whilst I appreciate that premiums can be altered at any time within such a scheme, the premiums within the AVC scheme could also be amended periodically as well. I would also note that the charging structure of the FSAVC scheme makes this inflexible, with the charges being weighted towards the early years, making it poor value if premiums are reduced or stopped shortly after policy commencement.

Absence of employer control is also noted as a justification for the higher charges however there is no detail on what control Mrs E was looking to avoid. The monies held within the occupational DB scheme were not controlled by Mrs E's employer (the Local Authority) – rather pension trustees were tasked with running the pension fund for the benefit of members. Whilst there would have been an element of separation between the FSAVC policy and the Mrs E's employer, Sun Life would still have had to inform the occupational DB scheme that Mrs E had commenced the FSAVC scheme.

I also do not place much weight on the possibility of early retirement being a key driver for accepting the higher charges. Increased pension provision generally could be used to allow someone to retire earlier, however this would apply equally to the in-house AVC or added years options available. In 1997 the FSAVC itself would provide benefits that would have to have been taken at the same time as Mrs E took benefits from her main occupational DB scheme, and as such provided no additional flexibility in relation to early access.

Finally, I note portability was given as a reason for accepted the higher charges of the FSAVC scheme. However, I can see no evidence within the file that Mrs E was considering a career change. Mrs E was a teacher, an occupation which takes a significant amount of time to qualify in, and as such is often an occupation people stay in for their entire career. Even if a teacher relocates within the UK, and moves between schools, it is likely that membership of the teacher's pension scheme could continue.

Overall, I consider the reasons given within the file documenting why Mrs E was willing to pay higher charges for the FSAVC scheme to be weak and generic. As such, this raises concerns about how the benefits of the FSAVC policy were explained to Mrs E before the recommendation was accepted. As such I have concluded that Mrs E was not put into a fully informed position regarding the FSAVC scheme, I believe had this been done in 1997, Mrs E would have taken an alternative course of action and chosen to contribute to one of her available in-house options.

Given the above conclusion I have gone on to consider whether Mrs E would have contributed to her in-house AVC scheme or opted to purchase added years within the DB scheme.

Overall, I have concluded that Mrs E would have opted to contribute to the in-house AVC scheme rather than purchase added years through the occupational DB scheme.

Here I would like to note that it is impossible for me to know exactly what Mrs E would have done in 1997 had alternative information been given to her by Sun Life. As such my decision is based on what I consider most likely based on the evidence available and the principles of reasonableness and fairness. To be clear, my decision is based on what Mrs E (receiving advice as an individual) would have chosen in 1997. As I have clarified above, I do not consider the outcome of Mr E's separate issues with Sun Life to be relevant here.

I have carefully considered that at the time of advice Mrs E was young, was well established in her teaching career, had available headroom within her DB scheme, and was working within a profession which many people stay in for their entire working lives. All these factors support the conclusion that Mrs would have chosen the added years option available.

However, whilst there is no evidence of the actual cost of the added years option, my own research, and some commentary from Sun Life on the file, does indicate that the purchase of an added year within the DB scheme would have cost materially more than the £77 premium Mrs E agreed to.

Whilst purchasing one 'normal' year within the occupational scheme cost Mrs E 6% of her gross income each year, added years do not benefit from any additional employer contribution with the entire cost of any added years falling to Mrs E.

Whilst Mrs E had a disposable income of £190 each month there is no evidence that Mrs E would have been willing to contribute a higher premium to purchase even one added year within the DB scheme. I have also noted commentary within the file showing Mrs E was potentially looking to purchase a house in the near future. With changes to personal circumstances possible in the near future, it is reasonable to conclude Mrs E gave significant thought to her contribution level in 1997.

In addition to this, the added years option would also have looked expensive when compared to the projected growth rates shown for the in-house AVC scheme. As per the illustration issued for the FSAVC scheme, projected growth rates of 6%, 9% and 12% were standard at that time. Whilst recent investment returns and annuity rates have made DB pensions look extremely attractive, I must consider the circumstances Mrs E would have faced in 1997. At that time investment returns and annuity rates were much higher than they are now, with the lower charges of the in-house AVC scheme making high investment returns look even more achievable.

The 1997 file also shows that Mrs E was willing to take a medium level of risk in order to achieve her retirement goals, a level of risk that could support the choice of AVC scheme over the added years option. Whilst there is no evidence of any other investment experience, I do not consider a medium level of risk inappropriate. The premiums would be invested over an extended timeframe and run alongside the guaranteed benefits being built up within the standard occupational DB scheme.

There were also differences between the ancillary benefits provided by the added years and AVC options that Mrs E would have had to consider. Added years would have increased the future spousal and dependants benefits available under the DB scheme. Whilst the file shows Mrs E was recorded as single in 1997, these circumstances may have changed over time and as such these benefits must be considered. However, I believe these points would have been of secondary importance to Mrs E, with primary focus on ensuring her own retirement benefits were maximised.

Overall, given the comparative cost of the added years option, and the high investment returns that would have been anticipated with the AVC scheme, I have concluded it is the AVC scheme which would have been chosen and as such this should form the basis for the redress calculation."

I asked all parties to provide any additional commentary or evidence they wanted taken into consideration by 17 October 2023.

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.

Sun Life have provided no further evidence or commentary in relation to the provisional decision issued.

Whilst Mrs E accepted the amended outcome and confirmation the advice was considered unsuitable, the method of redress has been challenged with additional commentary submitted asking for this to be re-considered with the FSVC redressed as though added years would have been purchased rather than the in-house A.V.C.

The arguments made in support of this again look to link the advice given to Mrs E in 1997 to the previous advice given to Mr E in 1994. I have already commented on this in the provisional decision above and as such do not intend to repeat this here, however I remain of the opinion that Mrs E received advice in her own right, based on her own circumstances and objectives.

It has been noted that the personal profile was only completed for Mrs E as an individual because a pension can only be held in one name. However, the profile completed also had sections relating to savings accounts, investments, mortgages, and life insurance products, all of which can be held jointly. As such if joint planning was required a joint profile could have been completed.

I remain of the opinion that the individual personal profile supports the fact that Mrs E was receiving advice in her own right, based on her sole requirements at that time. I do not consider it reasonable to conclude that Mrs E would simply have done whatever Mr E had previously done. The fact that Mrs E's decision making specifically related to her own requirements is supported by the fact that when beneficiaries for the FSAVC scheme were named, it was other relatives and not Mr E who were nominated.

Whilst the advice given to Mr E was deemed unsuitable, with redress based on an added years comparison I would additionally note that this was not a decision reached by this service. The unsuitability of the advice and method redress had already been agreed between Mr E and Sun Life, with our investigation focussed on what date the redress calculation should be stopped. As such I do not consider the decision here to contradict that in Mr E's case – the issues considered by the service in each case are different.

Finally, it was noted that whilst Mrs E could not have afforded cost of purchasing the full five additional years available, one added year would have cost 0.61% of gross income. Whilst the exact numbers are not on file, it is clear Mrs E did not have the disposable income necessary to purchase all the added years available, with the 0.61% of gross salary required to purchase one added year equating to £97.60 per month.

However, whilst this premium was within monthly disposable income, as I noted in the provisional decision above, I believe the file supports the fact that considerable consideration was given to the initial premium at the time of advice.

There is no evidence Mrs E would have been willing to contribute a higher premium with commentary on file confirming there were material changes to Mrs E's circumstances possible in the near future.

As such, when faced with a decision between a higher monthly contribution to purchase only one of the five available added years, and the in-house AVC scheme with low charges and high expected growth rates that matched Mrs E's ATR, I remain of the opinion that it is the in-house AVC scheme that would have been chosen.

As such the redress instructions below remain unchanged from those issued in my provisional decision.

Putting things right

Sun Life Assurance Company of Canada (U.K.) Limited trading as Sun Life Financial of Canada (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 Mrs E'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 Mrs E 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 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

I am upholding this complaint and require Sun Life Assurance Company of Canada (U.K.) Limited trading as Sun Life Financial of Canada to calculate and pay redress in line with the instructions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 21 November 2023.

John Rogowski
Ombudsman