DRN-4008477

The complaint

Mr M complained that he was advised by an Appointed Representative of Lincoln (for which Sun Life Assurance Company of Canada (U.K.) Ltd. ("SLoC") now has regulatory responsibility) to take out two Free-Standing Additional Voluntary Contribution (FSAVC) pension plans and should've been advised to take out in-house Additional Voluntary Contribution (AVC) plans instead. He believes he has lost out financially and would like to be compensated.

What happened

Mr M Met with an Appointed Representative of Lincoln in September 1995. The file recorded that he was aged 28, single and working for a bank, which he had joined around age 17. His risk profile was recorded as 4/5 and he wanted to retire early so would need to make additional pension savings to allow him to do so. The adviser recorded that Mr M was "aware that his employers offer an "in-house" AVC scheme, but prefers the FSAVC." Mr M accepted the recommendation to set up a new Lincoln FSAVC.

Later, in November 1997, Mr M spoke with another Lincoln representative. This time it was recorded that he wanted to retire on full benefits at age 55. The "reasons why" letter said "Having been referred to your employer you are aware of the availability of in-house AVCs & their preferential costs, but value the choice, portability & flexibility of a free-standing arrangement. Other generic differences discussed & understood." He was advised to take out another FSAVC plan, and again accepted the recommendation.

In October 2021 Mr M complained, through his representative, that both FSAVCs were mis-sold. They said, among other things, that alternatives had not been considered and Mr M had not been referred to his company scheme for full details of their options so that he could make an informed choice.

SLoC partially upheld the complaint. They said that the adviser hadn't done enough to meet the requirements in place at the time of the 1995 advice. But that in 1997 Mr M had been referred to his company scheme, generic differences had been discussed and understood and the preferential costs of the in-house AVC had been highlighted. So in 1997, Mr M was, or ought to have been, aware of the advantages of the AVC route and chose the FSAVC. So SLoC limited the compensation on offer to the difference in costs between the FSAVC and the AVC from the start of the 1995 plan to the time of the second piece of advice.

Mr M (via his representatives) did not accept that response. They said that both sales were unsuitable and, if the 1995 advice had been done correctly, there would have been no meeting in 1997. So capping the compensation at the time of the 1997 advice was not justified.

The case was referred to this service and after gathering information our investigator's opinion was that SLoC's offer was fair. Our investigator agreed that the adviser had met the requirements in force at the time for the 1997 recommendation, so it was reasonable to cap the compensation at that date, when he was fully informed.

Mr M and his representatives did not agree so the case was passed to me for a final 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.

Although the events in this complaint date from many years ago, and might normally be time barred for that reason, in this case SLoC have given their consent for the complaint to be considered despite the time that has elapsed. So this is a complaint that I can consider.

Mr M was advised by tied advisers who could only advise on Lincoln products. They were not required to carry out a detailed comparison of the in-house options and FSAVC, nor could they advise Mr M to take out anything but Lincoln products. For FSAVC advice tied advisers had to:

- Draw the customer's attention to the in-house alternatives
- Discuss generic differences
- Direct the customer to their employer or the pension scheme for more information

The most important generic difference was that the AVC was likely to cost less (and therefore produce higher net returns) than an FSAVC due to economies of scale and potential employer subsidy.

SLoC have provided the files from both pieces of advice, including the profile/fact find and contemporaneous notes/ 'reasons why'.

I don't think the requirements were met for the 1995 advice. Although the file does refer to the in-house option, the note that served as the reasons why letter at that time, said only that Mr M was "aware that his employers offer an "in-house" scheme but prefers the FSAVC." This does not meet the requirements because it does not make it clear that the charges on the FSAVC are likely to be higher; there is no evidence of any discussion of the generic differences; nor was Mr M directed to contact his employer or the pension scheme to find out more. I don't need to labour the point – both parties agree that the 1995 sale fell short of what was expected.

As a result I don't think Mr M was able to make an informed decision about whether the FSAVC or the AVC was right for him in 1995.

But the documentation from the 1997 advice goes further. It says "Having been referred to your employer you are aware of the availability of in-house AVCs & their preferential costs, but value the choice, portability & flexibility of a free-standing arrangement. Other generic differences discussed & understood. In the unlikely event of working to 60 with [Mr M's employer] there would be overfunding & you are aware that any excess would be returned less tax."

So, this time, Mr M was directed to his employer/scheme to find out more; he was told that the AVC had preferential costs; and there is evidence that the other generic differences were discussed and understood. So I think that, in 1997, the adviser met the requirements and Mr M was able to make an informed decision.

The note also showed that, because of Mr M's potential length of service, it was possible that he would overfund his pension. I think that this shows that 'added years' was considered but discounted.

Mr M's representatives say that he should have been advised to take the in-house AVC or to buy added years. But Mr M's advisers were tied and could only recommend the Lincoln products.

Once the adviser had referred him to his scheme/employer it was his decision whether to explore this or not.

So I am satisfied the 1997 adviser met the requirements by providing Mr M with the information needed to make an informed choice and he chose to continue with the FSAVC.

Mr M's representative takes the view that, had the 1995 advice been done 'correctly' then Mr M would have taken out the in-house AVC. This also meant that the 1997 advice would not have taken place, they said, because Mr M would not have had a relationship with the business.

But when Mr M was told about the preferential costs of the AVC in 1997 and was referred to the scheme for more information he chose to take out the FSAVC. From the information on both files there doesn't seem to be any material difference to Mr M's personal or financial circumstances between 1995 and 1997, so I can't see any compelling reason why he would not have made the same choice in 1995 as he did in 1997. And in any case, Mr M didn't have a relationship with Lincoln in 1995 when he approached them for advice the first time. So I don't agree with his representatives' analysis on this point.

I think that Mr M may well have chosen the FSAVC in 1995 if he had been given the right information by his adviser. But because he was not given that information, I think it is fair for SLoC to honour its offer in relation to that sale.

But I also agree with SLoC that, by 1997, Mr M had been given the correct information. He had been signposted to his employer as the regulations required, and he had been told about the preferential costs. At this time he would have become aware that there was a lower cost option available, and if he had been in any doubt he could have raised it at the time. Since Mr M did not do so, I think that it is fair for SLoC to cap the calculation of compensation at the date of the 1997 advice.

Therefore I find that, although the 1995 advice was not compliant, SLoC have acted fairly in how they have handled Mr M's complaint.

Putting things right

I'm satisfied with SLoC's approach to performing a loss assessment for the first FSAVC plan for the period up to 20 November 1997, when Mr M ought reasonably to have been aware of what he needed to know about the in-house options.

SLoC have said that the compensation is to be calculated on a 'Charges' basis and I think that this is fair because, as explained above, the added years option was unlikely to be appropriate. So a comparison with the charges of the in-house AVC is fair. If SLoC has already done its loss assessment and paid any compensation due to Mr M, there is nothing further for it to do. Otherwise, SLoC must undertake a redress calculation in accordance with the regulator's FSAVC review guidance in relation to the first policy for the period up to 20 November 1997.

My final decision

For the reasons given above I uphold Mr M's complaint. Sun Life Assurance Company of Canada (U.K.) Ltd must put things right for Mr M by following the steps above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 15 September 2023.

Martin Catherwood
Ombudsman