DRN-3197627

The complaint

Mr R says Sun Life Assurance Company of Canada (U.K.) Limited (SLoC) invested his pension contributions in funds that didn't match his attitude to risk (ATR). He says this has caused him financial detriment.

Mr R is represented by Etico Group Limited (Etico).

What happened

In bringing a complaint on behalf of Mr R, I start by noting that Etico raised concerns about three pension policies he had with SLoC. Two of these related to plans established with funds from an occupational pension scheme (OPS) he'd been a member of. These are the subject of a separate complaint.

This decision focuses on the personal pension plan that Mr R set-up in April 1990 into which he would make monthly contributions. For the purposes of clarity, that plan reference includes the following digits ***-***652-*4.

SLoC has confirmed that in April 1990 Mr R met with its adviser to talk about his finances. His main objective was to consider his pension arrangements. The fact-find and recommendation report completed by the adviser at the time recorded his circumstances, objectives and ATR.

Mr R was advised to start a personal pension plan. It was agreed to begin with a gross monthly contribution of £20, which was invested in four different funds. In July 1991, his contributions increased to around £32 per month. And in December 1994, Mr R secured employment and his employer took on the monthly contributions to his pension plan and increased these to £50.

On 3 May 2002, Mr R transferred his pension to AIG Life (UK).

In July 2020 Etico complained to SLoC on behalf of Mr R about what had happened in 1990. It said the funds he ended up putting his pension contributions into weren't appropriate for his risk appetite.

SLoC issued its final response letter in August 2020. It said:

"I have considered all of the information carefully and I believe this plan was suitable and [am] unable to uphold the complaint. This is because the documents completed when you started this plan showed you wanted to make further pension provisions and as you were self-employed there would be no occupational pension scheme available for you to join through an employer. Therefore as you did not have the alternative of contributing to a pension scheme with your employer and as you wanted to save for your retirement, I believe that starting a personal pension plan was a good option to save for your future."

Etico was unhappy with the response. It said SLoC's review had been about the general suitability of a personal pension for Mr R. It had no disagreement with the importance of setting up a pension plan at the time because he'd been self-employed. But it didn't think the issue of investment choice had been addressed, so it brought the case to this Service.

The Investigator considered the evidence and upheld Mr R's complaint. He thought the funds he'd been invested in were beyond his risk appetite. SLoC disagreed and so the case has been passed to me to review afresh and to provide 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.

The events complained about happened in 1990. Memories can and do fade. And it's perhaps inevitable given the passage of a third of a century that I don't have perfect information to review. I'm also mindful of the dynamic regulatory position over that time. The way things must be done today isn't necessarily the way things could be done 32 years ago.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr R 's complaint. I'll explain why.

On review of SLoC's final response letter to Mr R, it acknowledges its adviser would've provided him with recommendations to take out the pension plan. So, I've proceeded on that basis.

At the time of the advice, SLoC's predecessor was a member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). Its code placed certain requirement on advisers, including that they:

- Exercised due skill, care and diligence and deal fairly with investors.
- Gave 'best advice', including giving the investor all relevant information and using best endeavours to enable the investor to understand the nature of any risks involved.
- Should have regard, in particular, to the investor's financial position generally, to any rights they may have under SERPS and to use best endeavours to ensure that only those contracts which are suited to that investor were recommended.

I've kept these regulatory requirements in mind when considering Mr R 's case.

I can't know what was discussed between the adviser and Mr R over 30 years ago. I don't know what was covered, in how much depth or in what way. However, there are some documents available from the time. These include the fact-find and an application to open a SLoC personal pension.

The fact-find recorded the following about Mr R's circumstances, objectives and attitude to risk:

- Mr R was aged 22 and a non-smoker. He was self-employed and earning £10,000 as a Will Drafter.
- He wanted to retire at 55. He wanted to start saving for his pension and had an available monthly budget for this of up to £25.
- Mr R didn't have significant savings. He had no investments. He owned his own property and there was an outstanding mortgage of approximately £26,000.
- His attitude to investment risk was recorded as '3'. The spectrum was from 1 (lower, but secure growth) to 5 (higher growth or loss potential).
- Mr R was a member of an occupational pension scheme (OPS) with a former employer, where he'd accrued some deferred benefits.

Mr R accepted SLoC's recommendations and signed an application to start a personal pension in April 1990. The adviser recorded that contributions were to be invested in the following funds:

- Aggressive Managed 4 Pension – 50%
- Cautious Managed 2 Pension – 25%
- European Pension – 12%
- 2nd Japan Pension – 13%

Etico said the investments made weren't a match for Mr R's risk appetite. In its final response to him, SLoC said:

"As this is a long-term investment you may have been willing to accept some risk and the funds you have selected are in line with this attitude to risk. You had 38 years until retirement and therefore I believe you would have been prepared to take some risk during that time. The Product Particulars and Terms and Conditions would have made you aware you could switch funds. Your adviser would have provided a factsheet showing the funds available and whether they were low, medium or high risk. As more than 1 fund has been selected I believe some discussion of the funds would have taken place."

I don't think there's any debate between the parties that establishing a personal pension plan was the right thing for Mr R to do. At the time he was self-employed and potentially he had nearly 40 years ahead of him in the workplace. As such, accepting some volatility within his portfolio would've been appropriate. And the risk appetite assessment for Mr R placed him in the middle of the scale, 3 from 5. So he was prepared to take risk to achieve long-term investment returns – a balanced outlook. I think this was about right.

SLoC says Mr R was provided with fact-sheets that would've allowed him to make an informed decision. It also says there would've been a discussion before the investment choices were made. However, this was an advised sale, so the onus was on its adviser to make a positive recommendation. And I think that it's more likely than not this is what's reflected in the application from April 1990.

The problem for SLoC, is Mr R's funds were invested in excess of his risk outlook. From the information on file, I can see 75% of his funds were placed in holdings that were high risk.

At the time of the advice in 1990, Mr R had little investment experience or knowledge of pensions. It was for SLoC to have advised him effectively about how he should proceed. Based on the available evidence I think it failed to do so and as a result he ended up investing in a portfolio of funds that taken together were inappropriate for him.

Putting things right

My aim is to put Mr R as close as reasonably possible to the position he would've been in now if he'd been given suitable advice. I think he would've invested differently. It's not possible to say *precisely* what he would've done, but I'm satisfied that he wanted capital growth and was willing to accept some investment risk.

The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr R's circumstances and risk attitude.

I require Sun Life Assurance Company of Canada (U.K.) Limited to put things right in the following manner:

- Compare the performance of Mr R's investment with that of the benchmark shown below. If the *fair value* (what the investment would've been worth at the end date had it produced a return using the benchmark) is greater than the *actual value* (the actual amount paid from the investment at the end date), there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.
- If there is a loss, SLoC should also pay any interest on it as set out below, to allow for Mr R for being deprived of the use of those funds from the end date.
- SLoC should pay any loss into Mr R's pension plan, to increase its value by the amount of the compensation and any interest. Its payment should allow for the effect of charges and any available tax relief. It shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If SLoC is unable to pay the compensation into Mr R's pension plan, it should pay the amount direct to him. But had it been possible to pay into the plan, it would've provided a taxable income. So, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.
- The *notional* allowance should be calculated using Mr R's actual or expected marginal rate of tax at his selected retirement age. For example, if he's likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr R would've been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
-652-*4	transferred	FTSE UK Private Investors Income Total Return Index	date of investment	date transferred	8% simple per year on any loss from the end date until the date of settlement

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in. And any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

SLoC should also pay Mr R £350 for the distress and inconvenience caused by its failings.

SLoC should provide the details of the calculation to Mr R in a clear, simple format.

Income tax may be payable on any interest paid. If SLoC considers it's required by HM Revenue & Customs (HMRC) to deduct income tax from that interest, it should tell Mr R how much it's taken off. It should also give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC.

Further information

There is guidance on how to carry out calculations available on our website, which can be found by typing 'compensation for investment complaints' into the search bar on our website:www.financial-ombudsman.org.uk.

My final decision

For the reasons I've already set out, I'm upholding Mr R's complaint. I now require Sun Life Assurance Company of Canada (U.K.) Limited to put things right in the way I've outlined

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 31 May 2022
Kevin Williamson
Ombudsman