DRN-4997023

The complaint

Mrs A complains she was mis sold a pension by Canada Life Limited (CL)

What happened

Mrs A said that in early 1988 she was mis sold a Free Standing Additional Voluntary Contribution (FSAVC) policy by a company for which CL was now responsible. In 1991 she increased her contributions to the FSAVC following further advice from CL. At the time she was a member of a public sector defined benefit occupational pension scheme specific to her profession. She said she was not advised to consider the options of taking added years within the pension scheme nor to consider the AVC scheme. At the time she was recently divorced and single with no other income. She would be solely reliant on her own pension at retirement. She was highly risk averse. She intended to remain in her professional employment.

She took early retirement in 1997 and used the money in the FSAVC to buy a level annuity paying around £1,900 per annum. She believes that as a result she has been receiving a lower pension for more than 25 years. She didn't need a free-standing pension as she always intended to remain in the same work until she retired. CL failed to advise her of other options or to compare charges with the in house AVC. Had they done so she would have taken the option that was best for her.

CL said it had acted appropriately. At the time of the initial advice in 1988 it had a duty not to make negligent statements, to advise with reasonable skill and care and to disclose material information. It said it had complied with these requirements. Mrs A was relatively senior so it is reasonable to assume she would have understood the options available to her and this was supported by the fact she sought advice because she was now single and needed additional funding in her pension. It said Mrs A could not have opted to retire early as her occupational scheme had a retirement age of 60. Based on evidence from the time, it was clear she wanted to retire at 55. That meant an FSAVC was the only suitable option at the time. When she increased contributions in 1991 the notes show she believed retiring at 60 was more realistic rather than 55. Mrs A's policy was excluded from the Financial Service Pension review as the advice predated the review time periods. It didn't think the policy was mis-sold. It also noted it did not submit to the jurisdiction of this service for financial advice given before 29 April 1988. As the policy was taken out before this date it did not fall within the jurisdiction of this service.

My provisional decision

I issued a provisional decision in this complaint. I said the following:-

Jurisdiction

Before I considered the merits of the case I needed first to consider whether it was a complaint that this service can deal with. The advice that gave rise to the complaint was in two parts, in 1988 and 1991.

Both parties had accepted that the advice given in 1988 cannot be considered by this service. So I had not considered this further.

The rules governing what this service can consider are set out in Dispute Resolution or DISP rules. These provide that a complaint must be brought broadly within six years after the event complained of or if later three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint.

As it is more than six years since the advice was provided in 1991 I needed to consider the second part of the rules. Mrs A said that she only recently became aware that she might have reason to complain because a friend in similar circumstances had brought a successful claim for the selling of her FSAVC.

I noted that CL argued Mrs A was senior in her role and would have been aware of the AVC options provided by her employer and either ignored them or decided to take an FSAVC anyway.

I had no evidence to show that she was aware of these and I didn't think it was reasonable to assume she would be aware just because she was in a senior role particularly as the profession was not within financial services. But even if I was wrong and she was aware of the existence of the options from her occupational pension scheme, she also needed to be aware that they would most likely be a better means of funding her additional pension and therefore that she had cause for complaint.

Mrs A was in a senior role in her profession and had demonstrated that she took her pension provision seriously. I said that because she proactively took steps to make sure she had adequate pension provision following her divorce. She was clearly capable and proactive.

On balance based on the evidence I thought that had she been aware of the options available from her occupational pension it was unlikely that she would have requested advice from CL. So I didn't think it was reasonable to assume she was aware just because of the seniority of her role.

So on balance my opinion was that she wasn't aware that she had cause for complaint more than three years before this complaint was brought. I could therefore consider the merits of this complaint.

Merits of the complaint

This complaint related to advice provided in 1991. I must therefore take care to consider it in the light of the rules that applied at that time.

The adviser that provided advice to Mrs A was a 'tied adviser'. That meant the adviser could only offer products from the provider they were tied to and were not allowed to sell products from any other provider. This affects what the regulator expected them to do when selling FSAVC's.

The tied adviser would follow the expectation set out in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). CL had confirmed in its most recent

reply that at the time its advisers had regard to these.

This LAUTRO Code of Conduct said advisers should maintain high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. It added they should:

• Have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme, and

• Give the consumer all information relevant to their dealings with the representative in question.

It expected tied advisers to have known in house AVC options would be available and to mention the generic benefit of these. This would include generic benefits such as that AVC's could potentially have lower charges than FSAVCs, added years might be available particularly in the public sector (such as was the case for Mrs A) which offered guaranteed benefits linked to salary that wasn't available via an FSAVC. The adviser was expected to mention these things, to the extent they applied . This was part of dealing fairly. The adviser didn't need to know about the specific occupational scheme. It was expected they would recommend the consumer explore these options before considering whether to take an FSAVC.

I had seen the notes from the 1991 review. These confirmed that Mrs A intended to continue in her current work until age 55, though 60 now appears more realistic. She wished to continue maximum funding of her pension as she had insufficient years in her pension even to age 60. So it seemed that there were twin drivers for seeking an additional pension – potential early retirement but also maximising her pension has she wouldn't achieve a full pension even at age 60.

In the scrap notes there are references to teaching to age 60, living longer, retiring earlier, higher lifestyle. There are also references to B.S.P (possibly Basic State Pension). There is reference to the accrual rate under the existing scheme as being 80th and that after 40 years the pension would be half of the final salary. It mentions 17 years which was the number of years pension scheme membership Mrs A had in 1991. There is also reference to the 6% contribution which was the then employee contribution to her occupational pension scheme (OPS). The word AVC is included.

It is impossible to know exactly what was said at that meeting as we do not have a full explanation. In such circumstances I must decide on balance based on the evidence presented.

It seems to me that the adviser most likely explained how Mrs A's public sector occupational pension scheme worked and that she would not have a full pension when she retired. Hence the need/option of additional voluntary contributions. The reference to 6% fits with the increase in the contributions to the AVC. At the time HMRC rules limited contributions to 15%. The 1988 notes show the initial level of contribution was set at around 9% of pay. Due to the passage of time an increase was most likely needed to continue on that basis.

But there was no reference to the options to increase the pension via Mrs A's occupational scheme and no reference to the generic benefits that are most likely available nor to the tax treatment which might have benefited Mrs A if she was a higher rate tax payer. Given the code of conduct at the time and that a summary of her decision was written up I think it would have been reasonable to assume the adviser would have mentioned this within the note. But there is no mention. I note that many years have passed since 1991 but the notes appear to be complete. I say that as they include the write up and the scrap note. So I don't think it is reasonable to assume anything is missing. I don't think it is fair and reasonable to assume that the options within the OPS were discussed when there is no evidence in the written papers or from Mrs A's memory that such matters were discussed.

Given that the in house AVC would most likely have been cheaper I thought it was likely Mrs A would have chosen that option rather than the FSAVC.

I had also considered that there was no reference to added years. But I was not persuaded that Mrs A would have taken that option. I say that for several reasons:-

• She was already in her mid 40's when she took out the FSAVC that meant there were only 10 or 15 years to her early retirement or retirement date. That would have meant buying added years would be relatively more expensive as the actuarial calculation of cost would take into account the shorter period of time for investment growth to support the benefits before they came into payment. It is generally accepted that the Government actuaries would use conservative assumptions. As Mrs A only had 9% headroom within the HMRC limits on contributions it seems unlikely she could have made up all of the missing years in her pension via added years, though it is possible she could have opted to make up some.

• The contributions would have increased in line with her salary throughout her working life, something that she didn't opt to do for her FSAVC other than in 1991. So on balance I thought it was more likely she would have opted for the in house AVC and started to contribute £146.25 gross each month to an in-house AVC rather than into her FSAVC plan.

For those reasons I proposed to uphold this complaint.

Putting things right

I intended to require CL to undertake a redress calculation with effect from 15 February 1991, when Mrs A was advised to increase her contributions to the FSAVC plan, 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, CL should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

Mrs A has already taken her FSAVC plan benefits. Therefore, if the calculation demonstrates a loss, the compensation amount should be paid directly to Mrs A 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.

I think it has been very disappointing for Mrs A to discover that she may not have been provided with the information she needed to make the most appropriate decision for her in 1991. She clearly took care to try and protect her future financial position. For that reason and given the number of years that have elapsed I proposed to direct that CL should pay Mrs A £500 for distress and inconvenience.

For the reasons explained above, I intended to uphold Mrs A's complaint. I require Canada Life Limited to take the steps detailed in the "Putting things right" section above.

CL said it had nothing further to add to its previous responses and reluctantly accepted my

provisional decision but said it still did not agree with the decision.

Mrs A said she had no further points to make.

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.

As neither party made any further comments on my decision I have not changed my mind. I remain of the view that this complaint should be upheld for the reasons set out in my provisional decision.

Putting things right

Putting things right

CL should take the steps to put things right as set out in my provisional decision section headed putting things right.

My final decision

I uphold this complaint.

I direct that Canada Life Limited must within 30 days of this service notifying it that Mrs A has accepted this final decision pay Mrs A £500 for distress and inconvenience and such further amount (if any) in respect of financial loss calculated in accordance with the *putting things right* section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 30 September 2024.

Colette Bewley
Ombudsman