DRN-3396074

Financial Ombudsman Service

The complaint

Ms M has complained about advice she received in 1993 to take out a Free Standing Additional Voluntary Contributions (FSAVC) plan. The advice was provided by BMA Services, which is now the responsibility of Wesleyan Assurance Limited.

Ms M is being assisted with her complaint by a claims management company. For ease of reading the decision I'll refer to all representations as being provided by Ms M.

What happened

Ms M met with an adviser from BMA in 1993. BMA were an Independent Financial Adviser that provided financial advice to British Medical Association members, such as Ms M.

The fact find completed at the time confirmed that Ms M was working full time as a Senior Registrar, earning £24,084 per annum and she was a member of the NHS Pension Scheme and had an expected retirement age of 60. The paperwork also noted that she was considering added years at that time.

Following a review of Ms M's circumstances, the adviser issued a recommendation letter. The letter set out the options Ms M had for topping up her NHS pension, including an explanation of the in-house options. But ultimately the adviser recommended that she start contributing £80 per month (gross) to an FSAVC. Ms M accepted the adviser's recommendation and the FSAVC plan started in December 1993.

Shortly after starting the FSAVC plan Ms M had a break in her NHS employment from October 1994 until June 1997. However, she continued to contribute to the FSAVC plan until 1996. A single premium was also paid in March 1997 and contributions restarted in May 1998, again paying £80 per month.

Ms M re-joined the NHS pension scheme in July 1997 and she transferred in 2 years and 22 days service from another occupational pension scheme. She also contracted to buy 4 years 228 days added years from April 1999.

In 2019 Ms M complained to Wesleyan about the advice she received from BMA. Wesleyan upheld the complaint and confirmed that it would be passing Ms M's file to its actuaries for a loss assessment to be completed on the basis that she would have chosen to buy added years in the NHS Pension Scheme had the FSAVC not been mis-sold.

In 2021 Wesleyan wrote to Ms M again to confirm the outcome of its loss assessment. It offered her a cash payment of £6,353.16. However, its letter confirmed that the loss assessment had been completed on the basis of Ms M contributing to the in-house money purchase additional voluntary contribution (AVC) arrangement.

Ms M queried this with Wesleyan and it was confirmed that after the initial complaint response had been issued, a quality check had been completed on Ms M's case and it hadn't agreed with the initial decision to uphold the complaint on an added years basis. This was because Wesleyan was satisfied there was clear evidence that the added years option had been discussed.

Ms M was unhappy with the offer put forward by Wesleyan so the complaint was referred to our service for consideration.

One of our investigators reviewed the complaint and agreed that it should be upheld on the basis that Ms M would have contributed to the in-house AVC arrangement. The investigator was satisfied that the added years option had been explained during the sale.

Ms M didn't agree with the investigator. She said that the wording of the reasons why letter was skewed away from added years. So although she was made aware of added years, she wasn't informed in a balanced way and wasn't able to make an informed decision.

The complaint has been passed to me to decide.

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.

At the time of advice BMA was acting as an independent financial adviser and was required to follow the rules of FIMBRA (Financial Intermediaries, Managers and Brokers Regulatory Association). The advisor was expected to have compared what the in-house options and what the FSAVC had to offer. This meant the adviser should have gone further than a tied adviser by looking at the in-house options and the FSAVC and positively recommending the suitable option. So, the adviser should have actively made a recommendation that was in Ms M's best interest.

As Wesleyan hasn't been able to determine that this was done it has upheld the complaint. Although initially saying that it thought Ms M would have taken added years if she'd been suitably advised, it's since changed its stance and now believes she would have joined the in-house AVC arrangement. I think the way it communicated this change of position to Ms M could have been better and I've addressed this further on in my decision. But I've first thought about what Ms M would have done, had she been suitably advised.

I acknowledge what Ms M has said about the skewed explanation of added years. However, I don't think what the adviser said in the suitability letter was necessarily mis-leading. The vast majority of added years arrangements, including public sector arrangements like the NHS, are not intentionally subsidised by the employer. This means added years cost more to the member than gaining a 'normal' year of service under the occupational scheme. So added years were often considered an expensive option when viewed against the same contribution being paid to a money purchase plan, given the very high investment returns envisaged at the time.

The initial advice was provided in late 1993, so the earliest an added years contract could have started was from Ms M's next birthday, in April 1994. However, Ms M only remained in employment until October 1994. It's not clear if she knew she would be leaving the NHS when she met with the adviser in 1993. However, regardless of whether this was known at that time, I think it's unlikely that by April 1994, Ms M would have wanted to commit to a fixed contract, particularly if she was not sure if she would be in that employment until retirement. As it was, the contract would only have been in place for a matter of months. So I think on balance, had Ms M been suitably advised, she would have wanted a plan that offered more flexibility than the added years arrangement.

Ms M re-joined employment with the NHS in June 1997 and from May 1998 she restarted contributions to the FSAVC. It's not clear if a further meeting was held with an adviser at this time or if Ms M made her own arrangements for her contributions to restart. But I'm conscious that by April 1998, Ms M started her own added years contract, whilst still contributing to the FSAVC. So even if she received advice in May 1998, and the adviser had recommended that she take added years, the earliest the contract would have started would have been from April 1998, at the same time as Ms M contracted to buy added years.

So given this, I think on balance Ms M would have more likely chosen to have joined an AVC arrangement as this enabled her to maximise her retirement provision by contracting to buy added years as well as contributing to a money purchase arrangement.

However, rather than paying to an FSAVC I think it's likely that she would have chosen the in-house AVC arrangement. This is because, generally speaking, people are better off making in-house AVC's (as opposed to FSAVCs) as the charges tend to be lower than those associated with FSAVCs. But there's no evidence that Ms M was made aware of the likely lower charges and had she been, I think she would have chosen the in-house arrangement.

Prior to 2006 when the pension simplification rules were introduced, there were limits on how much individuals could contribute to their pension arrangements. However, Wesleyan has upheld the complaint on the basis that Ms M would have been able to contribute to the in-house AVC arrangement. So I don't intend to comment further on this aspect. Overall, I think its offer to compare the charges between the FSAVC and the in house AVC is fair.

Turning now to how Wesleyan dealt with its change in stance from initially upholding Ms M's case on the basis that she would have bought added years and then changing this position and instructing its actuaries to carry out a charges only calculation. As I understand it, it was only after Ms M raised this matter with Wesleyan that an explanation for the change was provided. I think Wesleyan ought to have contacted Ms M when it first decided that it had reached the incorrect outcome and was changing the redress methodology. Instead, for over a year Ms M was led to believe that her complaint was being upheld in full and that redress would be paid on an added years basis. I therefore think Wesleyan should pay Ms M £150 for the inconvenience this has caused.

Putting things right

Wesleyan should rerun its redress calculation to bring it up to date. This should be done 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, Wesleyan 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 Ms M'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 Ms M 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 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.

And Wesleyan should pay Ms M £150 for the distress and inconvenience caused as a result of the redress methodology changing and its failure to notify Ms M of this before issuing its revised offer.

My final decision

For the reasons explained, I uphold this complaint and direct Wesleyan Assurance Society pay redress as set out above. It should also pay Ms M £150 for distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 14 March 2023.

Lorna Goulding
Ombudsman