DRN-3650925

The complaint

Mr N has complained about the advice he received in 1996 to take out a Free Standing Additional Voluntary Contributions (FSAVC) plan. The advice was provided by Medical Sickness Society Financial Consultants, which is now known as Wesleyan Assurance Society.

Mr N is being represented in his complaint by a third party.

What happened

Mr N met with an adviser from Wesleyan in 1996. The fact find completed at the time confirmed that Mr N was 33 years old, divorced and working as a senior registrar. He was a member of his employer's occupational pension scheme (OPS), having joined in 1985 and he was expected to accumulate 37 years' service by his normal retirement age of 60. The fact find also recorded that maximising his pension and retiring early were very important priorities for Mr N. And he was noted as wanting to retire early at 55-60.

The adviser recommended Mr N take an income protection policy, along with an FSAVC contributing £300 per month. The reason for the FSVAC recommendation was noted as "*wishes to have option to retire at @55, but will be far short of required pension income*…"

Mr N accepted the adviser's recommendations. The FSAVC application was completed, confirming the fund was to be invested in the with-profits fund. It again confirmed the retirement age of 55, with the number of years accumulated in the OPS reduced to 32 to reflect retirement at age 55. The plan commenced in April 1996.

In 2006, Mr N had a further review with Wesleyan. The fact find completed at this time confirmed that Mr N was married, employed and was a member of the same OPS but that he'd had a 5 year break in service, having returned to work in June 2003. It also confirmed that he was now only expected to accumulate 31 years' service to age 60 and 36 years to age 65. His proposed retirement age was recorded as 60. There was a notes box on the fact find document in which the adviser set out the parameters used for the added years calculation. It recorded that Mr N was on the higher end of the pay scale. And it said as his wife had her own fully funded pension, Mr N didn't think she would require further spouses pension increases. Mr N's attitude to risk was recorded as medium.

The financial planning report from this time suggests a discussion took place around added years, and these are what the adviser recommended. However, Mr N didn't like the idea of a fixed contract to normal retirement age or that the contribution amount would increase automatically depending on salary increases, giving him no control over contribution amounts. The report also listed Mr N's current pension plans with Wesleyan, those being the FSAVC which started 1996, and two personal pensions which started in 1998 and 2003. It wasn't possible to increase contributions to the FSAVC as it was now a closed fund so the adviser recommended Mr N increase his contributions to the 2003 personal pension plan. Mr N accepted this recommendation.

Following advice from an independent financial adviser in 2010, Mr N transferred his FSAVC to another provider.

In 2020, Mr N complained to Wesleyan about the sale of his FSAVC plan. Wesleyan reviewed the complaint but wasn't satisfied Mr N had been made aware of the in-house options he had for topping up his OPS in 1996 when the FSAVC was sold. As Mr N wished to retire early it thought he would have chosen to contribute to the in-house AVC arrangement instead of choosing to buy added years. And it said although the adviser had recommended added years in 2006, it again thought the correct advice would have been to increase his contributions to the in-house AVC, had he been a member from 1996. So Wesleyan said it was upholding the complaint and it offered to carry out a charges only calculation in line with the FSAVC review methodology.

Mr N was unhappy with Wesleyan's offer so he referred his complaint to our service. One of our investigators reviewed the complaint and agreed with the outcome Wesleyan had reached.

Mr N didn't agree with the investigator. In summary his representative said:

- It's been suggested that Mr N purchasing Added Years from 1996 is partly with the benefit of hindsight. That's not the case. Mr N joined his employer in 1985 when he was 22 years old (very nearly 23). At the time of being mis-sold the FSAVC, he'd been employed for 10.5 years. This is clearly a significant amount of time and would indicate that he was extremely happy in his job and not planning to leave. It is also a known fact that consumers who purchase any additional years' service at a younger age benefit greatly from this as they will have purchased the benefit when their salary was at a lower level. The cost for Mr N to purchase 1 added year in 1996 would have started at 0.81% of his £28,000 salary to age 60. And it was likely he would have remained in this occupation until retirement, with above average salary increases. Mr N's attitude to risk was recorded as safe so had the risk free, guaranteed added years option been discussed in any way at all, on the balance of probabilities, he would have chosen them. The overriding factor for Mr N starting the FSAVC seems to have been early retirement. But Mr N's normal retirement age was more than 25 years away so it's unlikely he had much certainty over his plans. And prior to June 1999, any AVC or FSAVC benefit had to be taken at the same time as benefits being drawn from the main OPS.
- In 2006, Mr N was 10 years older, and his salary had increased. The cost to purchase 1 added year at this point started at 1.39% of his salary. Despite the increased cost, added years were seen by the adviser as the natural choice. However, it is clear that by this time that Mr N had amassed considerable retirement provision and he discounted them. But just because he discounted added years in 2006, doesn't mean he would have done the same in 1996. If the adviser in 2006 saw added years as the natural choice, then on the balance of probabilities, they would have been that same natural choice in 1996.

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.

I've first thought about the sale in 1996. Wesleyan accepted that it didn't give Mr N information regarding his in-house options at the time of advice as it was required to do. So all that's left for me to decide is what Mr N would have done, had the FSAVC plan not been mis-sold.

Having thought carefully about this, I think on balance, Mr N would have chosen to contribute to the in-house AVC arrangement. I say this for a number of reasons which I've explained below.

Firstly, while I accept that Mr N's representative thinks that he was too far away from retirement to consider what age he would be retiring, the paperwork does suggest that 55 was what he was aiming for at that time. I'm aware that at the time of the sale the benefits of any AVCs had to be taken at the same time as the scheme benefits. It does appear the adviser took this into consideration as the financial report states that Mr N would likely only accumulate 32 years' service by age 55. So any added years Mr N purchased would have needed to be bought over a shorter period, which would have made the monthly cost of buying them more expensive. That's not to say they would have been unaffordable to Mr N, just that they would have cost more than the 0.81% his representative has suggested.

However, there are other reasons why I think it's unlikely Mr N would have chosen added years in 1996.

Applications for added years couldn't be easily or regularly stopped and re-started whereas a money purchase AVC had an advantage here as the contributions could be amended and stopped. I think this would have been an important factor for Mr N because I note that although he had been employed at the time of the sale for over 10 years, he did go on to take a 5 year break in service. While I don't know if Mr N knew in 1996 that he would be taking this break, I think on balance he would have opted for a scheme that gave him more flexibility. I think this is further supported by his comments in the 2006 sales papers which suggest that he didn't want to be tied to a contract that ran until retirement, where he had no control over contribution amounts.

I'm also conscious that part of the charge for added years went towards providing benefit for a spouses' pension. However, the paperwork records that Mr N was divorced in 1996. So, when viewed in the investment climate of 1996, a potentially more cost-effective option, albeit involving some risk, was for Mr N to contribute towards a money purchase option such as an AVC or FSAVC, where he could have chosen to draw his pension on a single life basis and get potentially more competitive terms.

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. So for the reasons explained, I think if Mr N had been given adequate information during the 1996 sale, he would have chosen to contribute to the in-house AVC arrangement.

I've also thought about the advice Mr N received in 2006. Although the adviser provided a recommendation for him to buy added years, Mr N didn't accept this and instead opted to increase his contributions to one of his existing personal pensions. I understand these personal pensions had been set up previously to accommodate contributions Mr N was making in respect of periods of self-employment.

Mr N's representative has said that by this time Mr N had amassed considerable retirement provision so he discounted added years. But I'm conscious that he did still chose to go ahead and top up his pension provision, despite what he had already amassed. So I think it's unlikely that this was the main reason he discounted added years at that time.

As I've referenced above, the paperwork from this sale suggests that Mr N didn't want to be tied to a contract that ran until retirement, where he had no control over contribution amounts. So I think it's more likely that this was the reason he chose not to go ahead with added years at that point. In addition, the notes suggest that Mr N felt his wife would have adequate retirement provision and so didn't feel that the spouse's benefit was needed. So its likely that he wouldn't have felt an arrangement where part of his contribution went towards providing for a spouse's benefits was good value, in his particular circumstances. However, as I've said above, before recommending that the top up contributions were paid to a personal pension, I would have expected the adviser to have discussed not just the added years arrangement but also the in-house money purchase AVC. It doesn't appear from the paperwork that this happened. Had this happened, Mr N could have compared the charges between the in-house AVC and the personal pension and had the in-house AVC had lower charges, I think it's likely that Mr N would have chosen to contribute to this instead of increasing his contributions to his personal pension.

Putting things right

Wesleyan should compare the charges of the FSAVC and the personal pension (only in respect of contributions eligible to have been directed to the in-house AVC), with those of the in-house AVC. To do this Wesleyan 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/personal pension 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 Mr N'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 Mr N 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 his likely income tax rate in retirement – presumed to be 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.

My final decision

I uphold this complaint. I think the offer put forward by Wesleyan Assurance Society to complete a calculation on a charges only basis is fair.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 23 February 2023.

Lorna Goulding
Ombudsman