DRN-3729465

The complaint

Mr B has complained about the advice he received in 1999 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 B is being represented in his complaint by a third party.

What happened

Mr B met with an adviser from Wesleyan in 1999. There is no paperwork available from the time of the sale but it's known that Mr B was almost 30 years old, employed and was a member of the NHS Pension Scheme having joined when his employment started in 1992.

Following the meeting, Mr B set up two FSVAC plans. One with a regular monthly contribution and another plan with a single contribution. Both plans had a retirement age of 55. These policies were made paid up and were subsequently transferred away from Wesleyan in 2012.

Mr B met with Wesleyan again in 2009. The fact find and suitability letter completed at this time recorded that in 2008 Mr B had purchased 33 months added years in the NHS Pension Scheme. The adviser also recommended that Mr B purchase additional pension in the NHS Scheme and that he commenced additional contributions to his personal pension.

The adviser also noted that two of Mr B's existing plans had a retirement age of 55 so he recommended that these be changed to 60 to fall in line with Mr B's anticipated retirement age.

In 2020, Mr B complained to Wesleyan about the sale of his FSAVC plans. Wesleyan reviewed the complaint but didn't uphold it. In summary it said that as the sales paperwork from the time of the sale wasn't available it couldn't be sure Mr B was made aware of the in-house options he had for topping up his pension provision. But Wesleyan said it was satisfied that Mr B had been made aware of these in 2009. So it thought the complaint had been made too late under the rules that apply.

Mr B didn't agree with Wesleyan so he asked our service to look into matters.
Another ombudsman here decided that the complaint was one we could consider because he thought the complaint had been made in time. So one of our investigators went on to review the merits of the complaint.
As there was no paperwork from the time of sale, the investigator couldn't be satisfied that Wesleyan made Mr B aware of alternatives provided by his occupational scheme. So she went on to consider whether this would have made a difference. The investigator concluded that it would have made a difference; she thought Mr B would most likely have joined the in-house additional voluntary contribution (AVC) arrangement.

Mr B's representative didn't accept the investigator's findings. In summary it said that Wesleyan's lack of sales paperwork is a red flag for a serious compliance breach and the fact that it attempted to time-bar the complaint adds further weight to the compliance records not being as they should be.

The initial level of premium was more than enough to have adequately funded added years and had Mr B been told about the guaranteed and no risk nature of this option, there's no doubt that this would have been his choice, as opposed to the higher charging, riskier option of the FSAVC.

The paperwork for the subsequent review again makes no mention of an in-house AVC. So his representative thinks Wesleyan fundamentally failed in its duty of care. Although the retirement age was initially set at 55, Mr B has said that if he'd been told about added years from outset, the retirement age would not have been a factor in his choices; this is further evidenced by the fact that the retirement age was later increased to age 60. And he says that he would have prioritised funding the contributions to the level needed to obtain the maximum of very lucrative benefits that could have been harvested.

The complaint was passed to me to decide and having reviewed it I agreed with the investigator that the complaint should be upheld. But I thought, if he'd been given adequate information during the sale, Mr B would most likely have opted to purchase added years in the NHS Pension Scheme.

I informed both parties that I was minded to uphold the complaint on this basis. Neither party had anything further to add.

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.

In considering this complaint, I've taken into account the relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

Due to the lack of sales paperwork available from 1999, it's not possible to know what was discussed when Mr B met with the adviser from Wesleyan. So I don't know what, if anything, he was told about the in-house options he had for topping up his pension.

I know Mr B's representative thinks the lack of documentation is a red flag and likely indicates a compliance breach. I don't think that is necessarily the case. The sale of the FSAVCs took place more than 20 years ago and the plans were transferred to another provider in 2012. And there was also a merger between Medical Sickness and Wesleyan. It's not uncommon in situations such as this for the initial sales papers not to be available.

In terms of how this now impacts Mr B's case, it means that I have to assume the sale wasn't compliant and that Mr B wasn't provided with sufficient information to make an informed decision. So I've considered whether Mr B would have done anything differently, if he'd been fully informed of all his options.

Having thought carefully about this, I'm upholding the complaint. I think on balance it's more likely than not that Mr B would have bought added years. I'll explain why.

A lot of the information isn't available that we usually take into consideration when trying to determine what someone would have done if the sale had been compliant. So I'm basing my decision on what we do know.

The adviser was tied to Wesleyan which meant that they wouldn't necessarily have been expected to offer an opinion on whether Mr B *should* buy added years. The adviser was required to provide Mr B with information on his options and then it was really for Mr B to have gone away to make his own enquiries and then his own decision.

At the time of the sale, Mr B was almost 30 years old, employed and was a member of the NHS Pension Scheme having joined when his employment started in 1992.

It appears that following a meeting with a Wesleyan adviser, Mr B set up two FSAVC plans, one with a regular monthly contribution and another plan with a single contribution. At least one of these plans had a retirement age of 55. These policies were made paid up and were subsequently transferred away from Wesleyan in 2012.

Mr B says he contributed £270 per month to the regular premium plan. In order to verify this, our investigator requested the contribution history for the plan but Wesleyan failed to provide this. I don't know Mr B's salary in 1999 when he took the plans out. However, the fact find completed in 2009 recorded his superannuable income at that time as £58,281.

I think it's very likely that he was earning less than this at the time of the sales in 1999. But even based on the 2009 salary, added years would have been more than affordable to him, based on the £270 monthly contribution Mr B says he made to his plans.

In 2008 Mr B did in fact start a contract to buy 33 months added years. Given the date he joined his employer's pension scheme and his scheme retirement age of 60, I think it's most likely this that was the maximum he was able to buy to take him up to full service.

One factor that can sometimes suggest added years may not have been the preferred choice, is when a consumer wishes to retire early. It does appear that Mr B's plans initially had a retirement age of 55. But when he met with Wesleyan again in 2009, the paperwork from this time suggests that the retirement age on his existing plans was incorrect. So the adviser arranged for this to be updated to coincide with his 60th birthday.

In the absence of any other evidence, this suggests to me that Mr B didn't have a fixed plan to retire early. Given this, and the fact that added years were clearly affordable and Mr B's field of employment – recorded in 2009 as dentist - some of the usual arguments as to why an AVC or FSAVC plan might have been suitable don't seem to be relevant. Mr B's job meant that it was likely he would remain with the same employer for most, if not all, of his career.

And given the lack of sales paperwork, I don't know what Mr B's attitude to risk was. He says he wouldn't have wanted to take to a risk with his retirement provisions. And as I've said above, it's evident that added years were more than affordable and he did go on to buy them several years later. So based on what I've seen, I think it's more likely that not that Mr B would have bought added years in 1999 instead of taking the FSAVCs if he'd been given information about them.

Mr B hasn't lost out on the opportunity to buy added years and if he remains a member of his employer's scheme until retirement, he will most likely receive the maximum pension. However, it's likely these added years would have cost slightly more in 2008 than if he'd started the contract in 1999. So I think Wesleyan needs to run a calculation to determine how much extra Mr B has paid as a result of deferring the purchase of added years.

Putting things right

Wesleyan should run a calculation to determine how much extra Mr B will pay for the 33 months added years as a result of deferring the purchase of these from 1999 until 2008.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into Mr B'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 B 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

For the reasons explained, I uphold this complaint and direct Wesleyan Assurance Society to calculate redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 31 March 2023.

Lorna Goulding
Ombudsman