DRN-3945476

Financial Ombudsman Service

The complaint

Mr K complains that a business Wesleyan Assurance Society (Wesleyan) is responsible for, provided unsuitable advice to take out a Stakeholder pension. He says instead he should've been advised to look at his options within his employer's scheme and take out Added Years.

What happened

I set out the background to this complaint and my findings in my provisional decision of 25 January. Both parties have accepted my decision but for reference I have included the background and findings below – which forms part of this decision.

'In 2004 Mr K met with an adviser and it was recommended he take out a Stakeholder pension and contribute £300 a month which was the maximum he could contribute at the time due to regulatory limits. A waiver of contribution with a monthly premium of £7.38 was also taken out.

The report produced at the time by the adviser said "You confirmed that, at this time, you wished our discussions strictly limited to the provision of additional pension funding. Consequently, I have given advice in this area only, and I have not taken account of any wider financial planning needs which you may have'.

Mr K's provided evidence to show that his private earnings at the time were £6,541 in 03/04 whereas his main employment was £63,214 for the same time period.

Mr K said he recently spoke to a colleague who'd told him he'd had a complaint upheld stating Added Years should've been recommended. And this is what led Mr K to complain after he looked into his own situation.

Our investigator looked into matters and thought the complaint should be upheld. He said that Mr K went for pension advice as he wished to make additional provision, but the adviser focused only on his private earnings whereas Mr K had advantageous options with his employer's scheme. He said the adviser should've established these options and had he done so, a suitable recommendation given Mr K's circumstances would've been to take out Added Years.

Wesleyan responded to say it disagreed. It said whilst the report referred to future pension provision, it's clear the advice was targeted specifically towards Mr K's self-employed earnings only. So Mr K would've been able to query the NHS provision or why it was not included in the report.

The investigator responded to say the simple answer to that, is if Mr K wasn't informed of all of his options how would he know to query other sources.

What I've provisionally 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.

Legislation at the time required financial advisers to take reasonable steps to ensure their advice was suitable. COB set out the principles that should apply when giving advice such as:

- *A firm must conduct its business with due skill, care and diligence.*

- *A firm must pay due regard to the interests of its customers and treat them fairly.*
- *A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.*

Furthermore, there was specific rules for sales where in-house alternatives were also available.

IFAs were usually required to follow the FIMBRA rules. The Personal Investment Authority (PIA - a predecessor of the Financial Conduct Authority) adopted the FIMBRA rules when it took over.

In 1988, FIMBRA said that an adviser should:

- *Not make a recommendation unless it believed, having carried out reasonable care in forming its belief, that no transaction in any other such investment (of which it ought reasonably to be aware) would be likely to secure the objectives of the consumer more advantageously, and*
- *Take reasonable care to include in any recommendation to a person, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.*

The Personal Investment Authority released update 20 in May 1996. This reiterated what FIMBRA already expected, that the IFA should establish what in-house alternatives to the FSAVC were available and discuss the specific differences between them when making their recommendation.

It said this discussion should include:

- *The difference in charges and expenses between the FSAVC and AVC*
- *The choice of investments*
- *The availability of Added Years and the number of years that could be purchased*
- *The degree of personal control and privacy*
- *The age at which benefits could be taken*
- *The degree of portability on changing jobs or becoming self-employed*

The introduction to the update also referred to the lower charges under an in-house AVC in general terms. It said:

> *'Charges under in-scheme AVCs will usually be lower than those under FSAVCs, reflecting economies of scale, rebated commission or a contribution to administration expenses by the employer. Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefits to the client.'*

When this sale took place in 2004, FSAVC's had been usurped by Personal Pensions so very few continued to be sold but the above still applies to the Stakeholder pension which essentially took the place of the FSAVC in this context.

The advice occurred approximately 18 years ago and unfortunately some of the documentary evidence is no longer available. It appears from what we do have that Wesleyan did carry out a fact-find although it is has since been lost. The evidence shows the adviser wasn't tied to Wesleyan products and so could advise on the whole market.

Once the adviser had gathered information about Mr K, it would've been identified that Mr K had an Occupational Pension Scheme (OPS) that he was part of with the NHS. And the adviser would've known that Mr K could add to his OPS provision through an in-house AVC or Added Years.

It was agreed the advice would only be in relation to additional pension funding at the start of the report (as set out in the background).

The report went on to say ' You are eligible to contribute to a Stakeholder Pension Plan, approved by the Inland Revenue, because you are self-employed'

And

'The above plan is in relation to your self-employed earnings and in the tax year ended 2003/04 your profits were less than £18000.00 and the maximum of £300.00 per month has been applied for.'

And

'During our meeting, I explained to you that you could arrange your Stakeholder Pension directly with one of the providers designated by your employer:

- *You can do so without advice or with limited advice from the provider in respect of that scheme only.*
- *The charges are relatively low.*
- *The charges do not allow for payment for independent financial advice*
- *We cannot offer you advice or service in connection with these schemes.*

I also explained that in choosing Professional Affinity Group Services ***(now Wesleyan):***

- *You benefit from our initial and ongoing advice and service in connection with your Stakeholder Pension.*
- *Your plan charges will be higher in order to pay for our advice and services but they will still be within the 1% per annum Stakeholder cap.*

You confirmed that you wished to use our services'

It's clear the advice didn't meet the rules and guidance set out above. Little to no information was given about the in-house options.

The advice focused on Mr K's private earnings which only made up a small proportion of his funds that could be used to provide additional pension funding. If Mr K was only looking for advice about additional pension funding from his private earnings, I'd have expected the adviser to note that Mr K had in-house options but for what would have to be very compelling reasons, didn't wish to discuss that further. However, there is nothing to suggest this occurred.

The adviser should've told Mr K he could make additional contributions via Added Years or the in-house AVC and he also should've told Mr K that the in-house AVC was a cheaper alternative to the Stakeholder (purchased with advice or through the NHS approved non-advised Stakeholder plans). Wesleyan may argue he couldn't because these earnings came from his self-employed work which wasn't pensionable with the NHS. But these earnings were only a very small proportion of Mr K's annual income and he had plenty of room within the NHS schemes to make additional contributions. Instead Mr K could've used his NHS earnings to make additional pension contributions and used his private earnings to cover whatever that proportion of his NHS earnings were being used for. It's worth noting that the adviser couldn't charge any commission for advice given to contribute to the in-house options.

So I don't think the advice met the requirements of the time. There is no evidence to suggest the adviser explored all of Mr K's options to provide a suitable recommendation.

I have to consider what Mr K would've done had he been fully informed and been given suitable advice. Ultimately, it is very hard to now determine what Mr K would've done 18 years ago had he been informed of all his options, so I've had to make a number of presumptions based on the balance of probabilities given the limited information we do have.

Mr K's said he would've taken out Added Years if he'd been told about this option and our investigator agreed. But I'm not satisfied on the balance of probabilities that this is what Mr K would've done at the time. Alongside Added Years - Mr K would've also had the option of increasing his contributions into the NHS scheme through its in-house AVC. The NHS had negotiated special arrangements with no commission and so this would've been a cheaper alternative to the Stakeholder and Added Years.

We know from many other similar cases that in 2008 the NHS withdrew the Added Years option. And in 2007 it had written to all its employees who this affected to let them know this was their last chance to opt for Added Years before it was withdrawn.

Mr K would've been made aware of this option, but he didn't take it up. I think this is a likely indication of what Mr K would've done in 2004. It's only three years after and so I think some relevance can be drawn from that. And it points to not wishing to put additional funds towards his retirement on top of what he already had in place.

I appreciate the fact Mr K was already making contributions to the Stakeholder could've affected his thinking, but it was within his choice to stop contributions to the Stakeholder and opt instead for Added Years, or contribute to both if he'd wished to make further additional pension provision.

However, Added Years are expensive, and this is usually why employees choose not to take up this option. From our knowledge of previous cases it seems the NHS gave members information about how many Added Years they could purchase and how much this would cost. It looks like Mr K had scope for an additional ten years and from the information we've been provided the cost to Mr K would've been around 9% of his NHS earnings a year.

At the time of advice, 9% a year of Mr K's NHS earnings would be approximately £6,000 - though this would rise with salary increases and he would be committed to pay this until his normal retirement date. Whereas Mr K agreed to pay £3,600 a year to the Stakeholder.

Based on what we've been told about Mr K's circumstances at the time I'm not persuaded Added Years would've appealed to him in 2004 when the advice was given. I say this because as I've said above, Added Years were expensive in comparison to other options. And Mr K has told us that at the time he had little in the way of savings, and he had two mortgages in place. This alongside the fact he didn't take out Added Years three years later, leads me to believe he likely wouldn't have been prepared to meet this cost then - if he'd also been informed of cheaper alternatives towards saving for his retirement such as the in- house AVC.

Had Mr K been presented with all the information to make an informed decision he would've received projections of future benefits at the regulators set rates of growth, which likely would've shown (at the medium and higher growth rate) the in-house AVC matching and outperforming the Added Years benefit at a lower cost.

The amounts involved to pay for Added Years would eat into any salary increases he received in the future and the in-house AVC at the time had the potential, with good returns, to match the benefit of Added Years with much less expenditure. So it's difficult to conclude that Mr K would've been prepared to almost double his additional pension funding expense, given his circumstances and the other cheaper options available.

Whilst the Stakeholder did have some advantages over the In-house scheme, I think fully informed the lower cost option of the in-house AVC would've been preferred by Mr K.

Conclusion

Unfortunately, either down to poor advice or poor recording of that advice, we don't know with *any certainty what Mr K would've done with all his options set out clearly to him. Nor is it clear why a Stakeholder only coming from his private earnings was recommended. But I think based on the balance of probabilities, fully informed Mr K would've chosen instead to put contributions towards the in-house AVC.*

Whether Mr K would've contributed more had his NHS earnings been considered is another very difficult question to answer but based on what we know of his circumstances at the time and what he did after; I'm not persuaded to say he would've made further additional contributions on top of the £300 a month he was making into the Stakeholder. For the purpose of the below calculation Wesleyan should also add the £7.38 a month paid for the waiver of premium.'

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 both parties have accepted the findings of my provisional decision (as set out above), I see no reason to depart from those findings.

In response to the provisional decision, Mr K informed us that he has previously exceeded his tapered allowances with regards to his NHS pension and he received large tax bills. He believes any compensation funds added to his pension plans will have the same effect and incur further tax losses. So Wesleyan should take account of this - as I set out in the putting things right section of my provisional decision (and repeated below).

Mr K has also asked for a copy of the calculations which I think is fair.

Putting things right

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 (in this case from a Stakeholder plan), 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 (Stakeholder here) 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 K'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 K 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.

Wesleyan should also supply Mr K with a copy of its calculations once they have been carried out.

My final decision

I uphold Mr K's complaint and direct Wesleyan Assurance Society to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 3 March 2023.

Simon Hollingshead
Ombudsman