

The complaint

Mr P complains about the advice Wesleyan Financial Services Ltd gave to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Professional representatives have helped Mr P to bring this complaint. But, for ease of reading I will refer to the representatives' comments as being Mr P's.

What happened

Mr P initially approached Wesleyan for advice about his pension options in 1992. Progress from there on was intermittent. By 1994, when Wesleyan gave Mr P advice, it had noted that: Mr P was 28 years old, single and in good health; he was a deferred member of his former employer's DB scheme and had a "*normal*" attitude to risk (selected from three options of adventurous, normal or cautious). His DB scheme had a cash equivalent transfer value of £1,554, which was estimated to pay Mr P a pension at age 65 of £4,542 a year.

In October 1994 Wesleyan recommended that Mr P should transfer his DB funds into a personal pension. It set out its reasons for that in writing the following month. Its report said that Mr P needed a yearly investment return (critical yield) of 10.9% in order to match the benefits from his DB scheme. It said that after discussing this with Wesleyan Mr P felt the investment return was reasonable but understood that if it was lower then he would receive less than the sum guaranteed by the DB scheme.

Mr P went ahead with the transfer and in March 1995 a revalued sum of almost £1,624 was paid into his newly set up personal pension.

In 2021, after seeing an advert from professional representatives, Mr P complained to Wesleyan about the suitability of its advice. In short he said he didn't think it was in his best interests to have transferred out of his DB scheme.

Wesleyan replied. It said it had pointed out the risks of transferring when it gave Mr P its suitability report in 1994. It said if he was unsure of any issues, he could have raised those at that point.

Mr P brought his complaint to us. Wesleyan then objected to us looking into it. It argued that Mr P had brought his complaint out of time. That's because our rules say that a complaint must be brought to us either within six years of the events being complained about, or if outside of that time-frame, within three years of when the individual ought reasonably to have known they had cause for complaint.

One of our investigators looked into whether or not we had the authority to consider this complaint. He felt that we had. He noted that Mr P had no reason to doubt that Wesleyan was acting in his best interests when it gave its advice in 1994. So that wouldn't have given him cause to complain at that point. And Mr P had told us that he only became aware he might have had cause for complaint after seeing an advert from his representatives in 2021. He then made his complaint shortly after. So, our investigator was satisfied that the

complaint was brought within three years of when Mr P ought reasonably to know that he had cause for complaint. The investigator invited Wesleyan to make any further comments it wished to on that point. It didn't make any further submissions.

Our investigator went on to consider the merits of Mr P's complaint. Having done so the investigator thought it should be upheld. He recommended that Wesleyan compensate Mr P for any losses he might have suffered as a result of Wesleyan's unsuitable advice.

Wesleyan didn't reply to our investigator's assessment of the complaint, so it's been passed to me to make a final decision.

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.

Can we look at this complaint?

Before commenting on the merits of Mr P's complaint, I think it would help to say upfront that I agree with our investigator's view that Mr P brought it to us in time. While the events complained about are clearly outside of the six year time-frame for bringing a complaint, our rules allow us to look into the merits of a complaint where a consumer raises it within three years of when he ought reasonably to have become aware of it. And, in this case, I'm satisfied that Mr P was unaware that he had cause for complaint until 2021. So, as he complained shortly after, he's made his complaint within the timeframe specified by our rules. That means we have the authority to consider it.

Did Wesleyan give Mr P suitable advice?

While considering this question I've taken into account 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. And 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.

Wesleyan gave its advice in 1994. At that time the relevant regulator was the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). The rules set by LAUTRO in relation to selling practices would therefore have applied. In short these required Wesleyan to exercise due skill, care and diligence, deal fairly with Mr P, consider his position and relevant circumstances and not advise him to enter into a contract unless it thought doing so was in his best interests.

Having considered this and the evidence in this case, I've decided to uphold the complaint for broadly the same reasons our investigator gave.

Financial viability

In his complaint Mr P said that Wesleyan had told him he'd be much better off by transferring to a personal pension. And that appears to be his principal motivation for going ahead with the transfer, although Wesleyan's suitability report doesn't say that explicitly.

Wesleyan carried out a transfer value analysis report showing how much Mr P's pension fund would need to grow by (the critical yield) each year in order to provide the same benefits as his DB scheme.

Wesleyan gave its advice during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given.

The critical yield required to match the DB scheme pension at age 65 was 10.9% a year. This compares with the discount rate of 10.7% a year for 37 years to retirement.

For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6%. It's notable that Wesleyan considered Mr P to have a "*normal*" attitude to risk. *Normal* isn't a word often seen in modern risk assessments, but I've taken that to mean it's similar to the more usual terms of *balanced* or *medium* as it is the middle option of three. And, generally an individual investing in line with their middle range attitude to risk might expect to see returns similar to the regulator's middle rate projection, in this case 9%.

I've taken this into account, along with the composition of assets in the discount rate, Mr P's *normal* attitude to risk and also the term to retirement. Given the critical yield was higher than both the discount rate and the regulator's middle projection growth rate, I think Mr P was likely to receive benefits of a materially lower overall value than the DB scheme at retirement.

For this reason alone a transfer out of the DB scheme wasn't in Mr P's best interests. Of course financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. But, while it does make some comparisons between the DB scheme and personal pension for things like death benefits and early retirement, the suitability report doesn't explicitly say which other benefits would make transferring in Mr P's best interests. Neither did Wesleyan say in its complaint response what other benefits Mr P might have enjoyed from transferring to a personal pension so as to make that transfer worthwhile. Instead it's limited its reply to saying that it gave appropriate risk warnings to Mr P at the time of its advice.

However, while Wesleyan did give Mr P some warnings about the loss of guarantees and that he might end up worse off by transferring, I don't think those warnings went far enough. Also simply providing risk warnings doesn't make unsuitable advice suitable. And I don't think there were good reasons to advise Mr P to put his DB benefits at risk by transferring to a personal pension. It follows that I don't think Wesleyan acted in Mr P's best interests.

Summary

I don't doubt that the potential for higher income in retirement would have sounded like an attractive feature to Mr P. But Wesleyan wasn't there to just transact what Mr P might have thought he wanted. The adviser's role was to really understand what Mr P needed and recommend what was in his best interests.

Ultimately, I don't think the advice Wesleyan gave to Mr P was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr P was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. So, I think Wesleyan should have advised Mr P to remain in his DB scheme.

Of course, I have to consider whether Mr P would've gone ahead anyway, against Wesleyan's advice. I've considered this carefully, but I'm not persuaded that Mr P would have insisted on transferring out of the DB scheme, against Wesleyan's advice. I say this because Mr P was an inexperienced investor with a medium attitude to risk. And, as far as I'm aware, at that time he had no other pension provision. So, if Wesleyan had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

Putting things right

On 2 August 2022, the current regulator - the FCA - launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance- <https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr P whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect. He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I'm satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr P.

For clarity, Mr P has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr P's acceptance of the decision.

Wesleyan may wish to contact the Department for Work and Pensions (DWP) to obtain Mr P's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr P's SERPS/S2P entitlement.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Wesleyan to carry out a calculation in line with the updated rules and/or guidance in any event.

If the redress calculation demonstrates a loss, Wesleyan should pay the compensation if possible into Mr P'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, Wesleyan should pay it directly to Mr P as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr P within 90 days of the date Wesleyan receives notification of his acceptance of my final decision. Further, Wesleyan must add interest to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Wesleyan to pay Mr P.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above. In those circumstances, any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Wesleyan Financial Services Ltd to pay Mr P the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Wesleyan Financial Services Ltd to pay Mr P any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Wesleyan Financial Services Ltd to pay Mr P any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Wesleyan pays Mr P the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr P.

If Mr P accepts this decision, the money award becomes binding on Wesleyan Financial Services Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or

reject my decision before 22 March 2023.

Joe Scott
Ombudsman