

The complaint

Ms P has complained about advice she received from Wesleyan Assurance Society to transfer her additional voluntary contribution (AVC) to a Flexi-Access Drawdown (FAD) plan.

What happened

In July 2017 Ms P met with an adviser from Wesleyan as she wanted advice regarding her AVC plan that was held with a provider I'll refer to as Firm P.

The documents from the time of the sale recorded the following about Ms P's circumstances:

- Ms P was divorced with no financial dependents.
- She was retiring in August 2017, and had applied to take her Teacher's Pension (TP) from that date
- She was hoping to work as a tutor thereafter, which would boost her retirement income – but she couldn't speculate on what that income might be
- Ms P needed income in retirement of £17,000 gross per annum. Her TP would provide an income of £8,882. So, she had an income shortfall of around £660 per month
- She had around seven years before reaching state pension age at 66, and needed to bridge her income shortfall
- Ms P had AVC's with Firm P worth around £95,808. This would provide tax free cash (TFC) of just under £24,000, and she'd receive TFC of £26,646 from the TP
- She had a stocks and shares ISA worth £46,875 and savings of £19,500
- Having completed an attitude to risk (ATR) questionnaire, it had been established that Ms P's ATR was moderate

A suitability letter, dated 12 September 2017, set out the adviser's recommendation that Ms P transfer her AVC to a Wesleyan personal pension plan and access the FAD option. The aim of this was so Ms P could take the tax free element from the AVC and use this to provide a source of flexible tax free income to bridge the income shortfall she had. After taking the TFC the recommendation was for the remaining fund to be invested in the with-profits fund, which had an annual management charge of 1% per annum. The suitability letter also explained that there was an initial advice charge of £2,874 to meet the cost of the recommendation and setting up the plan. And a fee of 0.5% per annum would be deducted from the fund to pay for the ongoing advice service.

Ms P accepted the recommendation and Firm P's AVC was transferred to a Wesleyan FAD plan in November 2017. By which time the transfer value had increased to £99,071.83.

In 2021, Ms P raised a complaint with Wesleyan about the handling of her FAD plan. This was dealt with as a separate matter by this service. However, in the course of our investigations into that complaint, Ms P raised concerns about the sale of her FAD as she hadn't required access to her tax free cash. And she didn't agree with the reasons for the transfer. She also didn't think the advice had been properly explained.

Wesleyan reviewed the complaint but didn't uphold it. In summary Wesleyan said:

- the FAD was the most suitable product to provide Ms P with a tax free lump sum. So it met her objectives.
- The full benefits were explained to Ms P
- Ms P contacted Wesleyan to confirm that she did not immediately need access the tax free cash and she was informed that she had 12 months to enter a FAD without any further charges being applied, but after 12 months there would be further charges. Wesleyan said Ms P was happy with this.

As Ms P remained unhappy the complaint was considered by one of our investigators who concluded the advice was unsuitable. To put things right the investigator suggested Wesleyan complete a loss assessment comparing the value of the FAD plan with a notional value of what Ms P's Firm P AVC would have been worth if it hadn't been transferred.

Wesleyan didn't accept the investigator findings. It provided further information to support its stance that the advice to transfer was suitable as it was in line with Ms P's objectives. Included in its further submissions was a file note dated 6 October 2017, confirming that Ms P had been in contact and no longer required her tax free cash but that she still wanted to go ahead with the transfer.

The complaint has been passed to me to reach a final decision on this matter. Your text here

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 deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Ms P and Wesleyan. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to have happened.

Having reviewed all the information on file, I'm upholding this complaint for broadly the same reasons as our investigator. I've set out my reasoning for this below.

Wesleyan recorded Ms P's objectives in the suitability letter as requiring TFC to top up the shortfall in her income. I know Ms P says that she has only recently seen a copy of the suitability letter that Wesleyan says was issued in 2017. Like our investigator, I think on balance it was probably issued at that time and that it's more likely than not that Ms P received this. Although I can appreciate that she may not now recall receiving it. And I note that Ms P has queried the content of this report. For a start she says that she didn't require TFC as she was expecting a voluntary redundancy payment from her employer. And I note she has provided a copy of her bank statement which shows this payment being received in her account in September 2017. She's also explained that she was told that it was best to

leave 100% of the fund intact to allow it to grow and that the performance of the fund would far outweigh the management charges on it.

While I don't doubt what Ms P has said here, I'm basing my assessment on what Wesleyan has noted down in the suitability letter as Ms P's objectives. This is what its advice was based on. And I note that Ms P enquired with Firm P about the possibility of taking her benefits but wasn't able to do so without taking advice, hence her contact with Wesleyan. So while her objectives may have changed, I think it's likely that she initially wanted advice on accessing her TFC.

However, I think it's important to explain initially that this wasn't a situation where Ms P was simply giving Wesleyan an instruction. She went to Wesleyan for advice and it had to take reasonable steps to ensure that any advice it gave her was suitable. And in providing that advice, it needed to make sure that it didn't just facilitate what Ms P thought she might like to do.

So as noted in the suitability letter, the main objective for the transfer seems to have been for Ms P to access her TFC to top up the shortfall in her income. But I'm conscious that a month before the transfer completed, Wesleyan's records suggest that Ms P contacted it to confirm that she didn't require her TFC at that time. Yet, despite this being the main driver for the recommendation, Wesleyan doesn't appear to have reviewed the suitability of its advice, given that Ms P's main objective had changed. I think it needed to do this, regardless of whether Ms P said that she still wanted to go ahead. It needed to ensure that its recommendation was still suitable, given this change. Yet it appears instead of reviewing the suitability of its advice, Wesleyan submitted the transfer application. The application form was signed by Ms P on 4 October but it doesn't appear to have been submitted by Wesleyan until 9 October. So three days after Ms P had advised Wesleyan that she no longer needed immediate access to the TFC.

I acknowledge the file note suggests that while she won't be taking the TFC immediately, she may well take it within the next 12 months. But I still think Wesleyan needed to review this further in order to satisfy itself that its advice remained suitable.

In any event, I don't think based on what is recorded in the suitability letter that Wesleyan's advice was suitable. Like our investigator said, Ms P appears to have had other assets at her disposal that she could have used to meet her income shortfall needs.

The fact find noted that she had savings of £19,500. And investments totalling £46,875. The adviser noted that Ms P would receive TFC from the TP of £26,646; bringing her total savings and investments to around £93,000, of which around £46,000 was in cash.

Ms P may not have wanted to access these funds at that time but it was the adviser's job to weigh up accessing these funds against transferring and taking TFC. It doesn't appear this happened. And it appears that the suitability letter undervalued the alternative funds Ms P had at her disposal.

Ms P has provided evidence of a redundancy payment of over £26,000 being received in September 2017. She says she had known she was getting this since 2016 and that she made the adviser aware of it. It's not clear why it wasn't noted in the suitability letter. But even without this additional income, Ms P appears to have had sufficient funds at her disposal to meet her income shortfall without accessing her TFC. So this leads me to conclude that, even before Ms P contacted Wesleyan to say she didn't require her TFC, Wesleyan ought to have concluded that it wasn't necessary for Ms P's AVC to be crystallised. The TFC provided by the AVC wasn't needed to meet her shortfall in income, which appears to have been Ms P sole objective for the transfer.

Like our investigator, I've seen no other evidence to suggest that transferring was in Ms P's best interest. The annual management charge on the new arrangement was the same as the AVC. So there was no saving to be made in terms of the new arrangement being cheaper, in fact when the annual ongoing advice fee was included this increased the cost and made it a more expensive arrangement. And the FAD plan was invested in a with-profits fund so annual reviews of the policy would be of little benefit to Ms P. And on top of this, Ms P had to pay 3% of her fund value to cover the cost of advice and the setting up of the plan.

Overall, I can see no clear benefit to Ms P switching to Wesleyan, simply to invest in a similar fund, paying the same AMC. Particularly when it appears that Ms P didn't have a need for her TFC at that time and it wasn't her intention to start drawing down funds. So I think the advice provided to Ms P to transfer was unsuitable.

Putting things right

My aim is that Ms P should be put as closely as possible into the position she would probably now be in if she had been given suitable advice.

I take the view that Ms P would have remained with her previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Ms P's circumstances and objectives when she invested.

What must Wesleyan do?

To compensate Ms P fairly, Wesleyan must:

- Compare the performance of Ms P's investment with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- Wesleyan should also add any interest set out below to the compensation payable.
- Wesleyan should pay into Ms P's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If Wesleyan is unable to pay the total amount into Ms P's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Ms P won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Ms P's actual or expected marginal rate of tax at her selected retirement age.
- For example, if Ms P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Ms P would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Income tax may be payable on any interest paid. If Wesleyan deducts income tax from the interest it should tell Ms P how much has been taken off. Wesleyan should give Ms P a tax deduction certificate in respect of interest if Ms P asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Wesleyan FAD plan	Still exists and liquid	Notional value from previous provider	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Ms P's investment had it remained with the previous provider until the end date. Wesleyan should request that the previous provider calculate this value.

Any withdrawal from the Wesleyan FAD plan should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Wesleyan totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, Wesleyan will need to determine a fair value for Ms P's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Ms P wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the

index is close enough to allow me to use it as a reasonable measure of comparison given Ms P's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Wesleyan should pay the amount calculated as set out above. Wesleyan should provide details of its calculation to Ms P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 22 August 2023.

Lorna Goulding

Ombudsman