DRN-4367111

The complaint

Mr M has complained to Wesleyan Assurance Society that he was mis-sold a personal pension, when he should have been advised to buy added years in the NHS Pension Scheme (NHSPS).

Mr M is being assisted with his complaint by a claims management company. For ease, I'llrefer to all representations as being made by Mr M.

What happened

Mr M met with an adviser from Wesleyan in 2005. The paperwork completed at the time of the sale recorded the following:

- Mr M was 39 years old, married and employed by the NHS.
- He was a member of the NHSPS and was expected to attain 37 years' service to age 60, and 42 years to age 65.
- His superannuable earnings were recorded as £84,342. And he had non-superannuable earnings of £15,619. Mr M also had private income of £2000.

In terms of Mr M's retirement planning needs the notes on the Personal Financial Questionnaire (PFQ) recorded that he wanted to build up retirement benefits against his private income only.

A copy of the Financial Planning Report was sent to Mr M on 25 August 2005. This set out the adviser's recommendation that Mr M take out a Wesleyan Personal Pension plan. The report said:

"*We have discussed your need for retirement provision and you have told me that your objective is to build up additional income for retirement based upon your private income only as you would like to retire early at age 60 with an income that reflects your total earnings rather than NHS pensionable earnings. There are several things you can do to increase your retirement provision, including increasing contributions to personal pensions, AVCs and savings vehicles.*

Our discussion highlighted a number of issues to consider in choosing a retirement savings vehicle for you, including: the fact that you were looking to build up retirement provisions based upon your private income and separate from your NHS.

Taking account of all your circumstances, I have recommended a Wesleyan Personal Pension Plan. I believe this product best meets your needs because it provides a tax efficient flexible savings vehicle that can be utilised at your chosen retirement age…"

Mr M accepted the recommendation and the personal pension was set up with a retirement age of 60.

In October 2022, Mr M complained to Wesleyan about the advice he'd received to take out the personal pension. In summary he said the pension was not suitable for his needs, the full risks and implications of the product were not fully explained. And he said he was unaware of the higher charges involved with this type of plan. Mr M said the recommendation should have been for him to purchase added years in the NHSPS. And he was not provided with a full or descriptive comparison of the benefits between the in-house scheme and the personal pension.

Wesleyan reviewed the complaint and was satisfied that the Personal Pension was suitable for Mr M at the time it was sold. It said it had been sold to provide an income in relation to his private income.

Mr M didn't agree with Wesleyan's findings so he referred his complaint to our service for review.

One of our investigators review the complaint but didn't think the advice to Mr M was unsuitable. In summary, this was because the investigator thought that Mr M wanted to build up retirement provision based solely on his private earnings. So the in-house alternatives didn't apply.

Mr M's representative didn't accept the investigator's findings. In summary it said:

- Mr M's NHSPS retirement date at the time of the sale was age 60, early retirement was not relevant.

- Wesleyan had a duty of care under the FSA's Principles, in particular Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly. Therefore, it considers the adviser had an obligation to point out all options that Mr M had open at that time, including purchasing added years with his excess available income from all sources.

- HMRC looks at the total pension contributions from all sources in a financial year, and whether the source of funds to contribute to a pension came from the client's private earnings, or his NHS earnings, there was no difference in the net effect regarding tax relief.

- The Wesleyan adviser totally omitted any mention of the added years alternative, despite his obligation under Principle No. 6 of the FCA handbook.

- The most suitable advice was to decide on how much Mr M wished to contribute to a pension and calculate how much of this could be used to purchase added years, and the balance could fund either a personal pension or an in house AVC. The adviser was negligent in withholding this information as an option and most likely did so because, putting the maximum premium into a personal pension was in Wesleyan's best interests and not the clients. So, the adviser did not put Mr M in a position to enable him to make an informed choice.

- Regarding the investigator's assessment that the client wanted "to build up retirement benefits against his private income only", Mr M says that his plan was to have an addition to his basic NHS pension and added years would have been a good option but were not discussed.

I issued my provisional decision on the complaint in September 2023. I said that, subject to any further comments, I was intending to uphold the complaint because I didn't think Wesleyan's advice had been suitable.

Mr M accepted my provisional decision. Wesleyan didn't provide any further comments**.**

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.

Having done so, I'm still of the view the complaint should be upheld. As such, in the absence of any further comments, I've repeated below what I said in my provisional decision.

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 Mr M 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.

<u>The relevant rules</u>

The regulator's rules at the time of advice in 2005 required financial advisers to take reasonable steps to ensure their advice was suitable. The regulator's handbook, 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 pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
  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.

In additional, further guidance was set out in the COB section of the regulator's handbook. In particular, COB 5 set out the rules for advising and selling, and COB 5.3.13 G (4) also set out guidance that should have been taken into account when assessing the suitability of a personal recommendation. Of particular relevance here was the guidance requiring advisers selling a pension - when there were in-house alternatives available - to undertake a comparison between the personal pension, stakeholder and the in-house AVC option.

Prior to the introduction of COB, tied advisers, such as the adviser that sold the plan to Mr M, were usually required to follow LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation) rules. These rules were then adopted by the PIA (Personal Investment Authority) when it took over.

In May 1996, the PIA issued regulatory update 20 (RU20). This reiterated what LAUTRO already expected, that advisers should establish what in-house alternatives were available and discuss the specific differences between them when making their recommendation. The PIA said that before selling an FSAVC tied advisers should:

- Draw the consumer's attention to the in-house alternative
- Discuss the generic differences between the two routes (including that charges under in-scheme AVCs will usually be lower than those under FSAVCs)
  Direct the consumer to their employer or the OPS for more information on the in-house option

While these rules covered the sale of Free Standing Additional Voluntary ((FSAVC) plans, by 2005, FSAVCs had been usurped by Personal pensions. However, I'm satisfied the above applied to the sale of Personal or Stakeholder pensions - which essentially took the place of the FSAVC in this context – where in-house alternatives were available.

Was the advice suitable?

The suitability letter and other available sales paperwork, recorded Mr M's objective as wanting to build up additional retirement provision. It's further noted that he wanted this to be separate from his NHS pension and based on his private income only as he'd like to retire early at the age of 60. So the advice focused on Mr M's private earnings.

However, I've noted that the paperwork suggests Mr M's retirement age within the NHSPS is also age 60. So it doesn't appear Mr M actually had a real objective to retire earlier than he was already expecting to.

In addition, Mr M's private earnings made up a very small proportion of his overall earnings. He was noted as having £2000 private income, against an overall income of over £100,000. And if Mr M was only looking for advice about additional pension funding from his private earnings, I'd have expected the adviser to note that Mr M had in-house options but for what would have to be very compelling reasons, he didn't wish to discuss them further. And without a note to explain why he didn't want to discuss them; I'd have expected the adviser to explain that AVCs were available.

There is nothing to suggest this happened. The only reference to AVCs is in the suitability letter but there is no explanation of what they are and nothing to suggest a discussion had taken place around these.

The adviser should've told Mr M he could make additional contributions via added years or the in-house AVC. And Mr M should have been referred to his employer for further information around these options.

Wesleyan has said the plan was suitable for Mr M because it was taken out based on his private income which wasn't pensionable with the NHS. But as I've said above, these private earnings were only a very small proportion of Mr M's annual income and he had plenty of room within the NHS schemes to make additional contributions. Mr M 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.

While Mr M may have wanted to build up pension provision that was separate to his NHS pension, I would have expected the adviser to have explained that Mr M had in-house alternatives. And I think part of the discussions ought to have covered the fact that while added years may have been directly linked to his NHS pension, the in-house money purchase AVC option was effectively a separate pot that didn't need to be taken at the same time as Mr M's main NHS pension. And the adviser should've told Mr M that the in-house AVC was a cheaper alternative to a Stakeholder or Personal pension plan. I do accept that the adviser wasn't able to advise Mr M to take out one of the in-house options. But they were required to provide Mr M with enough information to enable him to make a fully informed decision about his options.

There is no evidence to suggest the adviser made Mr M aware of all of his options so I don't think the advice was suitable.

What would Mr M have done if he'd received suitable advice?

I have considered what I think Mr M would likely have done, had he been fully informed about his options.

Mr M says he would have bought added years if he'd been told about them. But having reviewed everything available I'm not satisfied, on the balance of probabilities, that this is what Mr M would have done at that time. Instead I think it's more likely that he would have chosen to contribute to the in-house AVC. I've explained why below.

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 they were withdrawn.

It's likely that Mr M would've been made aware of this option, but it seems he didn't take it up. In my view, this is a likely indication of what Mr M would've done in 2005. It was only two years after the advice and so I think some relevance can be drawn from that.

I appreciate Mr M was already making contributions to the personal pension which could've affected his thinking. But it was within his choice to stop contributions to the personal pension 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 chose not to take up this option. My understanding is that the NHS gave members information about how many added years they could purchase and how much they would cost.

It looks like Mr M had scope for around an additional three years and, based on what Mr M chose to pay towards the personal pension, I think it's likely these would have been affordable. But I'm conscious that Mr M's objective in building up his retirement provision was that he wanted something that was separate to his NHS pension. Added years wouldn't have been separate and so they wouldn't have met this objective.

I've also thought about Mr M's attitude to risk - which was recorded as medium - along with his capacity for loss. He was already expected to accumulate 37 years' service within the NHSPS, so not far off the maximum. And given his medium attitude to risk, I think it's likely he would have been prepared to take some investment risk. So overall, based on what I know of Mr M's circumstances and objectives at the time, along with the fact that he didn't buy added years when they were offered by the NHS, I don't think he would've bought added years two years earlier in 2005.

I think if Mr M had been fully informed about the lower cost option of the in-house AVC, which didn't need to be taken at the same time as his main NHS pension, he would have likely chosen this option instead.

Conclusion

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

Putting things right

Although Mr M was sold a personal pension plan and not an FSAVC plan, Wesleyan should undertake a redress calculation, based on the redress methodology set out in 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 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 M'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 M 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 reason explained above, I uphold this complaint and direct Wesleyan Assurance Society.

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