DRN-4674057

The complaint

Ms G complains that Wesleyan Assurance Society (Wesleyan) gave her unsuitable advice in relation to making additional contributions to her pension.

Wesleyan merged with the business – business M – which originally gave Ms G the 1995 advice. So I'll only refer to Wesleyan in my decision.

Ms G is represented in her complaint by a claims management company (CMC). But I'll only refer to her in my decision.

What happened

Ms G was a member of an occupational pension scheme (OPS) that had a normal retirement age of 60. In 1995 she met with Wesleyan to discuss making additional pension contributions.

There's no paperwork available from the time of the 1995 sale but it's known that at the time of the meeting, Ms G was aged 35. She'd been a member of her OPS for 12 years, with a 5 month break in service, and wasn't considering leaving her profession. Her estimated earnings at the time were £35,175 each year. A shortfall was identified at her chosen retirement age of 60. Following the 1995 meeting, Ms G took out a Free Standing Additional Voluntary Contribution (FSAVC) plan.

In 1999, Ms G had a further meeting with Wesleyan following some changes to her circumstances - she was now married and only working four days a week. Wesleyan says that in that meeting it asked further questions of Ms G to ensure her understanding of her retirement planning options. Its meeting note from the time records that Ms G was told about the differences between the FSAVC plan and making additional voluntary contributions (AVCs) to her OPS. Wesleyan advised Ms G at that time to increase the contributions she was making to her FSAVC plan. And she followed that advice and started a second FSAVC plan.

I understand that Ms G retired in November 2018 and started to take her retirement benefits from her OPS when she turned 60 a few months later.

At a further review meeting with Wesleyan in 2002, the adviser noted Ms G wanted to retire early at age 55. He explained that there would be a significant actuarial reduction to her OPS benefits if she took them early. And recommended she start a new plan that would provide a lump sum that could be used between age 55 and 60. Ms G agreed to set up this plan in 2002.

In July 2023 Ms G complained to Wesleyan through her CMC about the advice she'd been given. She felt that the FSAVC she'd taken out in 1995 wasn't suitable for her needs and that she'd suffered a loss as a result.

Wesleyan issued its final response to the complaint in July 2023. It didn't uphold it. It felt that the recommendation letter from the 1999 meeting showed that the adviser had explored various options with Ms G, including those available through her OPS. Wesleyan also felt that Ms G had stated within the questionnaire she'd completed that she'd been provided with a document called "*AVC and FSAVC*", as well as a cost comparison.

Wesleyan thought that Ms G had made her complaint too late. If felt she ought to have known after the 1999 advice that her FSAVC had been mis-sold. So it told her it wasn't willing to consider her complaint any further, and that it thought that meant this wasn't a complaint this service could look at either.

Unhappy, Ms G brought her complaint to this service through her CMC. It didn't think that the adviser had discussed her alternative options with her in 1995, or the differences between them. It also said that it was important to remember that Ms G's complaint was about being mis-sold the FSAVC, not whether she was aware of the alternative product. It felt that there was nothing in the December 1999 recommendation letter that would draw the attention of Ms G to the fact that the FSAVC may have been mis sold.

Our investigator felt the complaint was one this service could consider. After Wesleyan asked for a referral, an Ombudsman also decided that the complaint had been made in time. The Ombudsman felt Ms G had only become aware she had cause to complain when she discussed her situation with her CMC around the time she made her complaint. He said he hadn't seen anything to make him think that she ought reasonably to have known before then that she had reason to complain about the advice Wesleyan had given her in 1995.

Our investigator then considered the merits of Ms G's complaint. He felt that as there was no information available from the 1995 sale, there was no evidence Wesleyan did make Ms G aware of the in-house AVC or the added years options. He felt that if it had effectively explained the in-house options, Ms G was likely to have investigated and opted to contribute into her in-house AVC, because of the lower charges and similar funds available when compared with the FSAVC plan.

Our investigator felt that although the adviser had made a comparison between the various options available to Ms G, there was no information available to show those results or what Wesleyan had told her about her options. So he wasn't persuaded that Wesleyan had provided the information Ms G required to make an informed decision. He also felt that the evidence provided about the 2002 meeting failed to show that the adviser had discussed the alternative in-house options with Ms G, which he felt he should've done. Overall, he didn't think there was any evidence that Wesleyan had made Ms G aware of the costs involved with each option. And specifically that the in-house AVC option could potentially offer lower charges than the FSAVC plan.

Our investigator felt that Ms G would've chosen to contribute to her in-house AVC, rather than buy added years, if Wesleyan had done what it should. He said this was because at the time of the advice, anticipated returns for an in-house AVC would've been attractive and that the cost of the added years would've seemed high in comparison.

To put things right, our investigator felt that Wesleyan should put Ms G as close as possible into the position she would've been in if she'd made the same level of contributions to the in-house AVC that she'd made to the FSAVC plan.

Wesleyan didn't agree with our investigator. It felt that its adviser had made Ms G aware of the other options available during the 1999 meeting. It also said that the complaint was about the customer not knowing about the other benefits available, but it felt that the review showed that these were discussed.

As agreement couldn't be reached, the complaint has come to me for a review.

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 going to uphold it, for largely the same reasons as our investigator. I'll explain the reasons for my decision.

While I acknowledge that Wesleyan feels that Ms G's complaint was about her not knowing about the other benefits available, I don't agree. I consider that Ms G has made it clear that her complaint is about the suitability of Wesleyan's advice.

A lot of the information isn't available that we usually take into consideration when trying to determine what someone would've done if the sale had been compliant. Where there's conflicting information about the events complained about and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I first considered the regulatory environment at each of the advice meetings.

What were the rules and expectations before May 1996?

I understand that Ms G's adviser was a tied adviser. This means he was only authorised to provide advice on Wesleyan's own products.

In 1995, the code of conduct the adviser was expected to follow was set by the then regulator, LAUTRO. A representative had to exercise due skill, care and diligence and to deal fairly with investors. This meant that as well as explaining the benefits of the FSAVC plan they were recommending, they needed to have regard of the consumer's financial position generally, and any rights they had under an OPS. Even if they didn't know the specifics of the consumer's actual OPS, it's likely any adviser would be aware of the generic benefits of the in-house option such as:

- AVCs could potentially offer lower charges than the FSAVC
- Added years might have been available under the occupational scheme, but not under a FSAVC.
- The consumer's employer might match or top-up the amount the consumer paid into either in-house option

What were the expectations from tied advisers after May 1996?

In May 1996, so before Wesleyan gave advice to Ms G in 1999, the regulator issued Regulatory Update 20 (RU20) which set out the procedures it expected product providers to follow. It said that a tied adviser like Wesleyan shouldn't recommend its own FSAVC until it had:

- Drawn Ms G's attention to the in-scheme alternative.
- Discussed the differences between the two routes in generic terms (including likely lower charges for AVCs and the possibility of employers being willing to top-up benefits).
- Directed the client to her employer, or to the scheme trustees, for more information

on the in-scheme option.

The guidance also referred to the lower charges under an in-house AVC. It outlined

"*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*."

Due to the lack of sales paperwork available from 1995, it's not possible to know what was discussed when Ms G met with the adviser from Wesleyan. So I don't know what, if anything, she was told about the in-house options she had for topping up her pension.

The sale of the FSAVCs took place almost 30 years ago. And there was also a merger between business M 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 Ms G's case, it means that I have to assume the 1995 sale wasn't compliant and that Ms G wasn't provided with sufficient information to make an informed decision. So I've considered whether Ms G would've done anything differently if she'd been fully informed of all her options.

I considered the information Ms G was given in 1999 and in 2002. If this shows that she was given the correct information, but that she still chose the FSAVC, I could reasonably conclude that she would've done the same thing in 1995.

The 1999 and 2002 advice

In 1999, the adviser was tied to Wesleyan which meant that they wouldn't necessarily have been expected to offer an opinion on whether Ms G should take an in-house option. The adviser was required to provide Ms G with information on her options and then it was really for Ms G to have gone away to make her own enquiries and then her own decision.

The 3 December 1999 recommendation letter stated the adviser had identified a shortfall in Ms G's OPS benefits of 5 years and 4 months at her latest chosen retirement date of 60. It then said:

"*There are three ways of funding this shortfall: the Added Years and Additional Voluntary Contribution Scheme, both run by [the OPS employer name] and a Free Standing Additional Voluntary Contribution Scheme such as the one offered through [Wesleyan]. We discussed the merits of each of the three options and how you could obtain further information*."

Looking at the requirements on the tied adviser at the time of the 1999 advice, I'm satisfied that this shows that Wesleyan had drawn Ms G's attention to the in-scheme alternative, and that it had explained how she could obtain further information. Therefore I consider that the recommendation letter shows that the adviser covered the first and third points of the requirements I've listed above. And I agree with Wesleyan that its adviser did make Ms G aware of the other options available during the 1999 meeting. But I'm not persuaded that it shows that the adviser discussed the differences between the two routes in generic terms (including likely lower charges for AVCs and the possibility of employers being willing to top-up benefits). And this was a requirement at the time.

The 3 December 1999 recommendation letter referred to the adviser having provided Ms G with a booklet: "*You know you want to add to your occupational pension*". I asked Wesleyan to provide me with a copy of that booklet to see if it included enough information to ensure that the second point of the requirements from that time had been covered. I also asked it to provide copies of other documents that the evidence referred to: a Key features document (number 276/749) which the evidence indicated had been provided to Ms G and a document called “AVC or FSAVC” which Ms G said she’d been given in 1999.

Unfortunately, Wesleyan wasn’t able to provide this information. So I haven’t been able to review some of the stated information, even where Ms G herself said she’d received it. As I’m unable to review it, I can’t reasonably say that this missing evidence would’ve shown that the adviser had drawn Ms G’s attention to the likely difference in charges between the in-house option and the FSAVC in 1999.

I also asked Ms G to provide a copy of the “AVC or FSAVC” document she remembered receiving. I additionally asked her to provide the comparison she said Wesleyan had provided at the same time. But she hasn’t been able to do so.

I’ve gone on to consider the April 2023 questionnaire. Ms G’s response to the question: *“Were you given a comparison between the in-house AVC and the FSAVC scheme”* was*:*

“*No - Not until a later review in 1999 when I was given a standard document "AVC or FSAVC" which stated that with the Wesleyan -it is not the case that AVC is always better & returns potentially higher. Then provided a comparison showing Wesleyan FSAVC favourable at both 10 and 20 years*.”

Ms G also said that she didn’t remember the likely difference in charges between the in-house AVC and the FSAVC being discussed.

Having considered Ms G’s responses and the available documentary evidence, I agree with our investigator that there’s no concrete evidence about what was discussed. And I’m not persuaded that the adviser did make it clear to Ms G during the 1999 meeting that the in-house AVC would probably have lower charges than the FSAVC plan.

Looking now at the 2002 advice, this seems to have focussed on Ms G’s need for income between the ages of 55 and 60. And I’ve not seen any evidence that the in-house options were discussed.

Having considered all of the available documentary evidence, I’m not persuaded that the adviser made it clear to Ms G during the 1999 or the 2002 advice that the in-house AVC option would likely be cheaper than the FSAVC plan. Therefore I’m not satisfied that the advice met the regulations at the time. As such, I’m satisfied that the advice was unsuitable.

I’ve gone on to consider which option Ms G would’ve most likely taken if the advice had been suitable.

Added years or in-house AVC

I agree with our investigator, and for broadly the same reasons, that Ms G would’ve chosen to contribute to her in-house AVC, rather than buy added years, if Wesleyan had done what it should.

I say this because at the time of the advice, anticipated returns for an in-house AVC would’ve seemed attractive when compared with the cost of the added years. I also consider that Ms G wouldn’t have wanted to agree to the high and relatively inflexible cost of the added years. I say this because the evidence shows she only increased contributions into her FSAVC plan on one occasion, whereas the added years cost would’ve increased over time with her salary.

In summary, I can't know what was discussed in 1995. But I've not been provided with any evidence that Ms G was given information on the differences between the in-house options and the FSAVC plan in 1995. I'm also not persuaded that she was given information about how the charges between in-house options and the FSAVC plan might differ in either 1999 or 2002. Therefore I uphold the complaint.

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, 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 Ms G'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 Ms G 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 her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

For the reasons I've given above, I uphold the complaint. Wesleyan Assurance Society should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms G to accept or reject my decision before 11 July 2024.

Jo Occleshaw
Ombudsman