

complaint

Mrs G's complaint is about her personal pension plan and the advice she was given by Legal & General Assurance Society Limited ('Legal & General') to contract-out of the State Earnings Related Pension Scheme ('SERPS'). In particular, she has concerns about the sales process.

background

I issued a provisional decision on 24 February 2016, in which I explained I was minded to partially uphold Mrs G's complaint. My provisional decision is attached and forms part of this decision now. I invited the parties to provide comments.

Mrs G said, in summary:

- Legal & General did several things wrong and this amounted to malpractice rather than just a lack of care and attention as I'd described it.
- She continues to disagree with Legal & General about a face-to-face meeting having taken place. She considers that it's significant that no meeting took place, because without a meeting, there was no consideration of her circumstances, no advice and no recommendation. So rather than a lack of care and attention in their record keeping, Mrs G concludes that she was misrepresented and someone had lied to mislead.
- The whole sales process appears to have taken place on one day, and that contradicts Legal & General's assertion that it was a timely, well-considered advisory process.
- She's also unhappy about the way Legal & General handled her complaint. Legal & General sent her a questionnaire to complete. Before she'd had a chance to complete it, and only six working days later, Legal & General issued its final response letter to her on the basis that she hadn't returned the questionnaire. She'd requested a call back, and written to Legal & General following its final response letter. However, she received no call back and no further investigation had been undertaken. She considers Legal & General's behaviour not only disappointing, but negligent.
- Due to the extremely flawed sales process, she had been denied the correct advice by which to make important choices, and life changing decisions in her pension planning.
- My provisional decision and the award I'd proposed didn't sufficiently reflect the serious impact of Legal & General's actions.

Legal & General also disagreed with my provisional decision. It said, in summary:

- The initial complaint Mrs G raised was about the suitability of the advice to contract out of SERPS. So it welcomed my findings that this advice was suitable and that Mrs G hasn't suffered any financial loss as a result of this advice.
- Mrs G had never complained to Legal & General about the information collected at the point of sale, nor had she raised this with the ombudsman service when referring her complaint. It therefore found it hard to accept my assertion that Mrs G had suffered "...a considerable amount of upset..." and "...genuine distress and worry..." regarding what it considered to be non-material disputed information collected by its adviser at the time.
- It considered that my proposed award was "*clearly out of step*" with other awards made and with the information provided on our website about how our service views the award of appropriate levels of 'Trouble and Upset' payments.

In the light of Legal & General's comments, I asked our adjudicator to provide it with a copy of Mrs G's letter replying to its final response to her complaint. In this letter, Mrs G clearly raised concerns about the information collected at the point of sale, apparently having first learnt of such matters on receiving Legal & General's final response. It didn't appear to me that Legal & General had responded to Mrs G's further concerns.

I also asked the adjudicator to explain that although Mrs G's complaint form hadn't referred to wishing to complain about the sales process, she did confirm this formed part of her complaint in later correspondence with our adjudicator. As the adjudicator hadn't addressed this part of her complaint when reaching his assessment on suitability, Mrs G had asked me to look at this as part of her appeal against the conclusions our adjudicator had reached.

Legal & General confirmed it didn't wish to provide further comments.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint, including the parties' further submissions. Having done so, I've not been persuaded to change my views as set out in my provisional decision. I therefore intend to partially uphold Mrs G's complaint, for the reasons previously explained. I don't intend to repeat those reasons here, but will comment on a few new matters arising from the parties' responses to my provisional decision.

I'll start by addressing the comments made by Legal & General.

I'd like to clarify that I didn't make findings in my provisional decision that the advice Mrs G received was *suitable* and that she *hadn't suffered any financial loss as a result of the advice*. I said that based on Mrs G's circumstances at the time, contracting-out of SERPS was *not unsuitable* for her. I made no comment on whether she'd suffered any financial loss. I think it possible that she will have suffered financial loss, as she may have been better off staying contracted-in to SERPS. I just don't consider that it would be fair and reasonable to hold Legal & General responsible for any financial loss she may have suffered, because I've found that the advice given to Mrs G to contract-out of SERPS wasn't unsuitable based on her personal circumstances, and industry expectations of long-term personal pension growth at the time.

I'm satisfied that Mrs G did raise concerns with Legal & General, after learning its sale records contained inaccurate information about her personal circumstances. I've seen no evidence Legal & General responded to her concerns, or considered whether its final response should be reviewed in the light of new information. I'm also satisfied this did form part of her complaint to this service.

I don't consider my proposed award to be out of step. I think if Legal & General was to put itself in Mrs G's shoes, it would recognise that Mrs G has just cause to be worried and upset by both the inaccurate information held about her on file, and Legal & General's lack of concern or apology for it. It's understandable that in such circumstances Mrs G would be unable to have faith that she had been suitably advised. I also don't agree that it is 'non-material disputed information'. The sales adviser had recorded that Mrs G was making a 5% contribution to a contracted-in occupational pension scheme. In fact, Mrs G wasn't participating in an occupational pension scheme, and the one available to her was contracted-out. Such information is absolutely material to an assessment of whether contracting-out of SERPS via a personal pension is suitable advice.

Turning now to Mrs G's response to my provisional decision, I'll start by saying that I've agreed with her to a significant extent regarding the errors recorded on the sales documentation held by Legal & General. We may use different terms to describe it, but in my provisional decision I explained that I intended to uphold part of her complaint because of the impact on her of learning that incorrect information had been recorded.

Mrs G has mentioned that it appears the whole sales process took place in one day, and essentially says that without a meeting having taken place, she can't have had her circumstances considered, or received advice or recommendations. It's possible that this is the case. But I also have to take into consideration that Mrs G doesn't appear to have expressed

any concern about the sales process at the time. And there's no question that she knew that she'd signed up to a personal pension with Legal & General in order to contract-out of SERPS. Her recollection is that she'd spoken to an adviser on the phone. It's likely that she would've given him correct information about her circumstances during their phone conversation. So I don't think I should necessarily conclude that she didn't receive any advice at the time, or that it was necessarily incorrect advice at the time it was given.

I share her concerns about the way Legal & General handled her complaint to them in 2014. It doesn't appear that its representatives addressed their minds either to the impact on her of finding out that its records were materially inaccurate, or to the need to address these points to explain why it made no difference to the outcome of her complaint.

Where I differ with Mrs G is that I don't agree that, *because of* flaws in the sales process, Mrs G has suffered a financial loss. This is because I think that the outcome would've been the same if Mrs G had met with a Legal & General representative face-to-face, and that representative had correctly recorded her details on file. I think in those circumstances she would still have had the personal pension recommended to her, because it would have been considered suitable for her at the time. So she would still be in the position she's in today.

I know Mrs G disagrees with this, as she believes she would have opted to join her employer's occupational pension scheme instead. But I must also take into consideration that this option had been available to her for a number of years before she set up the SERPS rebate-only personal pension, and she hadn't chosen to join. And the reason she gave for this was affordability. As such, I think it most likely that, even if Legal & General had recommended she join her occupational pension scheme, Mrs G would've decided this wasn't an affordable option at the time. It was several years later that she did join her occupational scheme, when it had become affordable to her.

For this reason, I don't consider it fair and reasonable to hold Legal & General responsible for any financial loss to Mrs G as a result of not joining her occupational scheme earlier.

my final decision

I partially uphold Mrs G's complaint. My decision is that Legal & General Assurance Society Limited should pay Mrs G £400 for the distress and worry caused to her by its flawed sales process.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 25 April 2016.

Venetia Trayhurn
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mrs G's complaint is about her personal pension plan and the advice she was given by Legal & General Assurance Society Limited ('Legal & General') to contract-out of the State Earnings Related Pension Scheme ('SERPS'). In particular, she has concerns about the sales process.

background

A representative of Legal & General recommended that Mrs G contract-out of SERPS in 1989, by setting up a personal pension plan to receive her SERPS rebates.

In 2014, Mrs G complained to Legal & General about this advice. Legal & General didn't uphold her complaint. It said that the advice had been suitable, and that the risks were explained to her at the time. Also, that:

- The documentation provided at the time of the advice explained the terms and conditions of the policy.
- Mrs G was below the 'pivotal age' set by Legal & General at the time of the advice (if below the pivotal age it was calculated that contracting-out of SERPS was likely to be suitable, but if above the pivotal age it was unlikely to be suitable).
- Mrs G's earnings were above the minimum threshold set by Legal & General at the time of the advice (whereas if she'd had earnings below that threshold it was unlikely to be suitable to contract-out of SERPS).

As Mrs G was unhappy with Legal & General's response she brought her complaint to the Financial Ombudsman Service.

The complaint was investigated by one of our adjudicators, who concluded that it shouldn't be upheld. He explained that Mrs G was under the age of 45 at the time of sale, which was the pivotal age set by Legal & General in 1989. He also said that Mrs G's recorded earnings were above the level of earnings that Legal & General had calculated were sufficient to justify the advice to contract-out of SERPS, taking into account the plan charges and investment period. So Mrs G met the two key criteria for a recommendation to contract-out of SERPS.

The adjudicator noted that Mrs G was eligible to join her employer's occupational pension scheme at the time of the advice. But, as Mrs G didn't join the occupational scheme until 1996, he explained that he couldn't assume that the advice given by Legal & General in 1989 affected her decision to join or not join her occupational pension scheme.

After receiving the adjudicator's opinion, Mrs G requested copies of the documentation sent to us by Legal & General. Mrs G then explained to the adjudicator that the information contained in the consultation form was incorrect. Her occupation had been mis-recorded as a secretary; however, she had never worked in this position and was at the time working part-time in a completely different career.

There were two other discrepancies. Legal & General had said that Mrs G met with an adviser in person, whereas Mrs G says this didn't happen. She says that she only spoke with an adviser on the phone, after her husband had met with a Legal & General adviser about setting up his own personal pension. Mrs G noted that her signature wasn't on the consultation form dated 5 April 1989 in which the incorrect information was recorded.

The other important bit of information that was incorrect was that it was recorded that Mrs G was contributing to her employer's contracted-in occupational pension scheme. Whereas Mrs G said she wasn't contributing to an occupational pension scheme at the time. The scheme administrators have since confirmed this, and that the scheme was contracted-out at the time.

The adjudicator asked Mrs G about the reasons for not joining her employer's scheme until 1996. Mrs G explained that, due to personal circumstances, she couldn't have afforded the deductions from her salary if she'd joined her employer's scheme before 1996, by which point her personal circumstances had improved and she was working full-time. Mrs G also said that had she been advised by Legal &

General that she could've directed her SERPS contributions into her employer's scheme and incur no deductions from her salary, she would've done so.

The adjudicator explained to Mrs G that, as far as he was aware, she wouldn't have been able to direct her SERPS contributions to her employer's scheme without contributing to the scheme from her salary as well; employees had the option of full membership, with a percentage of their salary being contributed to the scheme, or not joining at all.

Mrs G asked for her complaint to be reviewed by an ombudsman. In particular, she felt:

- It couldn't be correct that she received suitable advice from the Legal & General representative, when he'd clearly got important details about her circumstances wrong. This has led to her suffering financial loss, concern and worry.
- The advice process was very hurried, indicating a lack of care.
- If the adviser had explained all the benefits of joining her employer's final salary occupational pension scheme, she'd have given serious thought to joining it, rather than setting up the personal pension plan to contract-out of SERPS.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I consider that there are essentially two aspects of Mrs G's complaint. First, there's the question of whether the advice to set up a personal pension plan to contract-out of SERPS was suitable, given her circumstances. Secondly, there's the matter of whether Legal & General did anything wrong in the sales process, and indeed in the way it has handled her complaint now.

As explained by the adjudicator, Mrs G was below the pivotal age set by Legal & General in 1989 and her earnings were above the minimum threshold set by the business to justify contracting-out of SERPS. These points are not in dispute.

Mrs G has explained that, for very understandable reasons, she couldn't afford to join her employer's pension scheme until 1996, when her personal circumstances changed and she had started working full-time. I appreciate that she now feels that she would have given serious thought to joining her employer's scheme in 1989 if Legal & General had explained the benefits to her. But putting the benefit of hindsight to one side, I've not been persuaded that she would've taken this option if that's what Legal & General had advised her to do at the time. This is because I think it likely that Mrs G would've been aware of her employer's scheme, and the general benefits of participating in it, prior to arranging to contract-out of SERPS via the Legal & General policy. I think it most likely that, as Mrs G first explained to our adjudicator, at the time her SERPS policy was sold to her, it simply wasn't affordable for her to join her employer's final salary pension scheme.

So, I agree with Legal & General and the adjudicator that, based on Mrs G's circumstances at the time, contracting-out of SERPS was not unsuitable for her.

But I also agree with Mrs G that there clearly were flaws with the sales process. The consultation form contains material inaccuracies. The document incorrectly records Mrs G's occupation. This is relevant as her actual occupation should've alerted the Legal & General adviser to the likely availability of a public sector final salary pension scheme. It should then have been recorded that although eligible, Mrs G had opted not to join the occupational scheme available to her on grounds of affordability. Instead, the consultation form incorrectly recorded that Mrs G was a member of her employer's scheme in 1989. The subsequent 'recommendations section' states the recommendation to contract-out had been given as Mrs G had not already done so, and her employer's scheme was contracted-in – which was also incorrect. So it's entirely understandable that Mrs G has little faith that she was suitably advised.

It's difficult to say what happened at the time that the advice was given to Mrs G, with the event being nearly 27 years ago and the documentation available from the time being very limited. Either the adviser never obtained the correct information about Mrs G's circumstances before recommending the personal pension plan, or he obtained the correct information but incorrectly recorded it – and the reasons for the recommendation – possibly in haste to push the sale through before the end of the tax year.

Either way, the fact is the information held about Mrs G was incorrect, as was the rationale given for recommending the sale. And this could have had serious implications for the advice given to her in 1989. I think it highly unlikely that Mrs G, or her husband, gave Legal & General the incorrect information, so I'm satisfied that the fault most likely lies with the representative of Legal & General.

Discovering the errors made by Legal & General has caused Mrs G a considerable amount of upset, and given her further cause for concern about the advice she received in 1989. Legal & General was invited to consider the impact this has had on Mrs G, and to make an offer to compensate her for the distress she's felt. Disappointingly, it declined to do so.

Despite Legal & General's records showing the sales process was clearly flawed, I don't believe that the advice given to Mrs G to contract-out of SERPS was unsuitable, because her circumstances at the time still met with the criteria for taking out a personal pension to contract-out of SERPS.

However, I take the view that Legal & General has still done something wrong, by recording incorrect information about Mrs G's circumstances, and having an invalid rationale for the recommendation. It does suggest a lack of care and attention was given during the sales process.

I also find that Legal & General's errors have caused Mrs G genuine distress, and worry about whether she received suitable advice. I intend to direct Legal & General to pay Mrs G £400 as compensation for this.

my provisional decision

I'm currently minded to partially uphold Mrs G's complaint. My provisional decision is that Legal & General Assurance Society Limited should pay Mrs G £400 for the distress and worry caused to her by its flawed sales process.

Venetia Trayhurn
ombudsman