DRN-4299379

The complaint

Mr K complains about the advice given by Tuto Money Limited 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.

What happened

Mr K approached Tuto Money in 2017 to discuss his pension and retirement needs.

Tuto Money completed a fact-find to gather information about Mr K's circumstances and objectives. Tuto Money also carried out an assessment of Mr K's attitude to risk, which it initially deemed to be 2/3 out of 10. After discussions with Mr K it moved it up to 4 or lowest medium. It was also recorded that Mr K could tolerate very little to no losses in terms of his pension fund.

On 29 September 2017, Tuto Money advised Mr K to transfer his pension benefits into a personal pension and draw his funds via Flexible Access Drawdown. The suitability report said the reasons for this recommendation were flexibility of income, the ability to meet his short-term and long-term income needs, future tax-free cash could increase as the fund does and any remaining funds could be passed onto his beneficiaries.

Alongside the recommendation to transfer his DB pension of approximately £316,000, Mr K was also advised to transfer a personal pension valued at about £76,000.

Mr K complained via professional representatives on 8 February 2023 to Tuto Money about the suitability of the transfer advice regarding the DB pension because Mr K's circumstances showed that capital preservation was a priority. And in transferring his guaranteed benefits were put at risk.

Tuto Money didn't uphold Mr K's complaint. It said Mr K's key objectives weren't achievable in the scheme and that the advice was suitable. It also said it had run a loss calculation without prejudice and Mr K was better off for having transferred.

Mr K referred his complaint to our service. An investigator upheld the complaint and required Tuto Money to pay compensation. The investigator said that at the time there was no compelling reason to transfer Mr K's DB pension.

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.

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. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). 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.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Tuto Money's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *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.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Tuto Money should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr K's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

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

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. 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 in this case.

Mr K was age 58 at the time of the advice and was recently unemployed as he'd had to give up work to look after his 88 year old mother who was unwell. The critical yield required to match Mr K's benefits at age 65 was 8.69% or 6.31% without a spouse's pension. Mr K wasn't married and had no dependents.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.3% per year for six years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr K's 'lowest medium' attitude to risk and also the term to retirement. There would be little point in Mr K giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 8.69% or 6.31% without a spouses pension which is relevant to Mr K, I think Mr K was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

Tuto Money has provided cashflow models which it says shows Mr K would've been able to meet his needs despite the high critical yields. I've considered these, but Tuto Money's models didn't include a number of factors such as his savings, carer's allowance, expenditure and living arrangements, whether his mother would meet some of the costs, and no projection of expenditure in retirement. Furthermore they relied on growth at 4.14% before retirement and 5% after both of which are higher than the expected growth for someone of a lowest medium profile.

Also, as Tuto Money will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting returns forward, particularly over such a long period of time.

For this reason alone a transfer out of the DB scheme wasn't in Mr K's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Tuto Money has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

Tuto Money recommended the transfer based on two main priorities – to provide a flexible income of around £18,000 and for more flexible death benefits.

Tuto Money said Mr K's income requirement couldn't be met by remaining within the DB scheme. However, given Mr K had said he couldn't afford to lose any of his pension and given his circumstances, I don't think transferring his only source of guaranteed benefits was appropriate.

Mr K had recently stopped working to care for his mother. And he wished to have some income to cover his expenses. Alongside the DB pension, Tuto Money also advised Mr K to switch a personal pension to allow more flexible access.

The pension was worth approximately £76,000 and this would've been sufficient to cover Mr K's expected expenditure for four years. Mr K could then have kept in place his DB pension and safeguarded benefits and could plan around any change in circumstances in that time.

Sadly Mr K's Mum passed away approximately 18 months after the advice was given. And had Mr K took the above action, returning to work could've allowed him to keep his DB pension in place until retirement. Even if he didn't wish to return to work, taking his benefits after his personal pension had been exhausted would've lessened any actuarial reductions. And the likely adverse performance (when compared to staying in the DB scheme) suffered on transfer.

There was another approach that would've met Mr K's income requirements in the short term whilst allowing him to keep his safeguarded benefits in place but available to use flexibly in the future through transfer if required. There was no demonstratable need to transfer the benefits at the time of advice.

Tuto Money didn't consider this course of action and I don't think they've demonstrated that transferring Mr K's DB pension was in his best interests.

Given Mr K's circumstances I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr K to give up his guaranteed benefits then when he didn't know what his needs in retirement would be. If Mr K later had reason to transfer out of his DB scheme he could have done so closer to retirement.

Death benefits

Mr K didn't have a spouse or dependant but had siblings he wished to leave any remaining funds too. So I can see the attraction to moving from the DB scheme to a personal pension in terms of the death benefit options available.

But whilst I appreciate death benefits are important to consumers, and Mr K might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr K about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Tuto Money explored to what extent Mr K was prepared to accept a lower retirement income in exchange for higher death benefits.

Mr K was reliant on this pension for income in retirement and I think this ought to have been emphasised instead of flexibility of death benefits that may not even be realised. Mr K's siblings weren't dependant on him, so I think this was at most a nice to have and should not have been a key reason to recommend transferring safeguarded benefits.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr K.

Summary

Ultimately, I don't think the advice given to Mr K was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr K 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. Mr K could've met his income needs for some years before needing to make a decision on how to use his DB scheme. And in that time his circumstances could've (and did) change. Transferring was an irreversible decision that more likely than not will make Mr K worse off in retirement – something he said he couldn't afford.

So, I think Tuto Money should've advised Mr K to remain in his DB scheme. Of course, I have to consider whether Mr K would've gone ahead anyway, against Tuto Money's advice.

I've considered this carefully, but I'm not persuaded that Mr K would've insisted on transferring out of the DB scheme, against Tuto Money's advice. I say this because Mr K was an inexperienced investor with a lowest medium attitude to risk and this pension accounted for the majority of Mr K's retirement provision. So, if Tuto Money 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've accepted that advice.

In light of the above, I think Tuto Money should compensate Mr K for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr K, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr K would have most likely remained in the occupational pension scheme if suitable advice had been given.

Tuto Money must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, although Mr K has accessed his pension benefits, he's only been able to do because of the unsuitable advice. He's told us that although his mother passed away in April 2019, he'd chosen not to return to work immediately given his ability to draw funds from his pension. He has however started to look for work to ease the pressure on his finances. Had suitable advice been given and Mr K had remained in his DB pension, I don't think he would've taken benefits before his normal retirement age. So the calculation should be made at age 65 as per the standard assumption in the guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr K's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Tuto Money should:

- calculate and offer Mr K redress as a cash lump sum payment,
- explain to Mr K before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr K receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr K accepts Tuto Money's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr K for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr K's end of year tax position.

Redress paid to Mr K as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Tuto Money may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr K's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £190,000, 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 £190,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Tuto Money Limited to pay Mr K the compensation amount as set out in the steps above, up to a maximum of £190,000.

Recommendation: If the compensation amount exceeds £190,000, I also recommend that Tuto Money Limited pays Mr K the balance.

If Mr K accepts this decision, the money award becomes binding on Tuto Money Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr K can accept my decision and go to court to ask for the balance. Mr K 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 K to accept or reject my decision before 10 November 2023.

Simon Hollingshead
Ombudsman