

The complaint

Mr H has complained about the advice given by Tuto Money Limited trading as Tuto (Tuto) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr H is being represented in this complaint however for ease of reference I have simply referred to Mr H throughout the decision below.

What happened

Mr H approached Tuto in early 2015 to discuss his pension and retirement needs.

In March 2015 the DB scheme administrators provided Tuto money with some scheme information including a transfer value of around £68,000.

Tuto completed a fact-find to gather information about Mr H's circumstances and objectives and also carried out an assessment of Mr H's attitude to risk, which it deemed to be 'low'.

The fact-find confirmed that Mr H:

- Ran a lettings agency but that he was looking to wind down this business over time, possibly selling it in future.
- He had a business loan, the payments for this were manageable, and this would be repaid as and when the business was sold.
- Mr H was looking to access the pension early to give him scope to semi-retire.
- Mr H was *"not looking to risk his fund on the stock market"*.
- No income was required at that time however Mr H would *"have it as and when needed"*.

On 19 April 2015, Tuto advised Mr H to transfer his pension benefits into a SIPP and invest the proceeds into the Flexible Guarantee Cautions (s2) fund. The suitability report said the reasons for this recommendation were to allow Mr H to access his tax-free cash whilst leaving the rest of the fund intact and invested in line with his attitude to risk. The suitability letter additionally noted that the occupational scheme being transferred was a defined contribution (DC) scheme, not a defined benefit scheme, and as such no valuable guarantees would be lost upon transfer.

Mr H complained about the suitability of the transfer advice in August 2022 believing this had been unsuitable and had caused financial loss. Mr H stated that he only intended to gain more information about his DB scheme and had not initially intended to transfer it, that guarantees were lost upon the transfer, and that the advice exposed him to undue financial risk.

Tuto issued their response to the complaint on 9 December 2022. This said that the complaint was not being upheld. It stated that the pension transferred was not a DB scheme and therefore had no guaranteed benefits which had been lost upon transfer. Based on this, and given Mr H's objectives in 2015, the advice was considered suitable.

Mr H rejected this complaint outcome and referred his complaint to this service.

Upon the case being referred to this service Tuto stated they believed the complaint had been brought too late and as such did not fall within our jurisdiction. Tuto explained that the advice had been given more than six years before the complaint had been made and in addition felt that there had been significant press coverage around pension advice issues which would (or should) have made Mr H aware of any potential issues with his pension more than three years before he complained.

Our investigator looked into the timeline of events and issued findings stating that they considered the complaint had been brought within the appropriate time limits. As such this complaint was one which we could consider further.

Tuto did not confirm whether they agreed with this outcome or not, however, to progress the case the investigator proceeded to assess the merits of the complaint and the suitability of the advice provided to Mr H.

Our investigator subsequently upheld the complaint. As part of the investigation additional information was sought from the ceding occupational pension scheme administrators to establish what type of pension had been transferred. The administrators (Mercer) confirmed that the scheme was a DB scheme. The investigator concluded that the advice was unsuitable with the transfer likely to lead to Mr H being worse off in retirement with there being insufficient justification for the transfer.

Tuto have not provided any response to the findings issued by the investigator and as such the case has been passed to me to make a final decision.

I issued a provisional decision which stated:

"Given there is no definitive response from Tuto confirming their agreement (or otherwise) with the investigator's conclusions about our jurisdiction in this case I have firstly considered the timeline of events detailed above to assess whether Mr H brought his complaint in time.

The rules which set out the time limits we must follow are detailed in the Financial Conduct Handbook under DISP 2.8.2.

Here, it states:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint

having been received.”

The advice given to Mr H was provided in April 2015, more than six years before he registered his complaint. As such, I have focussed on when Mr H became (or ought reasonably to have become) aware there may have been an issue with the advice he received.

Tuto stated within their evidence to this service that there had been significant press coverage around pension advice which ought to have made Mr H aware of any potential issues, however no supporting evidence was provided to show that Mr H had seen or read any such coverage.

I also note that over the years following advice Mr H took several large withdrawals from his pension to the point that the fund is now entirely exhausted. This however is not considered something which would have given Mr H cause to question the advice he had received.

There is no evidence of any unusually poor investment performance or problems with the pension that would or should have raised concerns with Mr H. Whilst the pension now has no value, this is due to Mr H's withdrawals. As per the investigator's findings, there are several call recordings from the time of these withdrawals within which there is no indication of any concern on Mr H's part.

As such, I have reached the same conclusions as our investigator, the first clear indication that Mr H became aware of any potential issues with the advice given by Tuto was in June 2021, when Mr H saw online advertisements referencing potential pensions mis-selling.

Given the complaint was registered with Tuto in August 2022 – within three years of Mr H becoming aware of a potential issue with the advice he received – this complaint is one which we can consider further.

As such I have gone on to consider the advice received by Mr H.

The first consideration here is whether the pension transferred by Mr H in 2015 was a defined contribution scheme (as per the advice documentation and Tuto's response to the complaint) or a DB pension, as per the complaint registered by Mr H.

All evidence on file supports the conclusion that the pension was a DB pension.

Whilst the pension information provided by the scheme in 2015 could have been clearer, it does note that the scheme is covered by the Pension Protection Fund (PPF). The PPF protects members of DB schemes if the employer becomes insolvent, with defined contribution pensions not being covered.

In addition, the 'Statement of Investment Principles' for the transferred scheme does have a section which includes a description of the scheme which states "The Scheme is a contributory, final-pay scheme".

Finally, I would note that in order to try and clarify this issue our investigator contacted Mercer, the administrators of the transferred scheme for further information. In their response Mercer confirmed that "the scheme is a defined benefit scheme".

As such, in line with the investigators findings I have based my assessment of the advice given to Mr H on the fact that the transferred pension was a DB pension.

In assessing the advice given to Mr H 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 have reached 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 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'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 should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

I've firstly considered the financial viability of the transfer and its impact on Mr H's income in retirement.

Tuto did not carry out a full assessment of the value of the benefits being given up by transferring because their advice was given on the basis that the occupational pension being transferred was a DC scheme rather than a DB scheme.

A transfer value analysis report is required by the regulator when DB pensions are being transferred as it shows how much the transferred fund would need to grow by each year in order to provide the same benefits as the DB scheme. This required growth rate is called the critical yield with this being used as a measure of the likelihood of the transfer providing increased benefits for the policyholder in retirement.

Whilst the suitability letter does document a critical yield figure this appears to have been calculated based on Mr H purchasing an annuity with his transfer value rather than the benefits which would have been provided by the DB scheme. As such it is not an accurate reflection of the value of the benefits lost.

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.

The investment return (critical yield) required to match the annuity which could have been purchased with the transferred funds pension at retirement was quoted as 4.59% per year.

This compares with the discount rate of 4% per year for 5 years until Mr H reached age 65 and as per the investigators findings, even this critical yield figure was unlikely to be achieved by the funds after transfer.

Overall, the financial analysis conducted by Tuto at the time of advice was not based on the correct pension, nor the correct benefits which would be given up upon transfer. In addition, even the analysis which was completed (based on the transferred scheme being a DC pension) also suggests that Mr H was likely to be worse off in retirement as a result of transferring.

As such, Mr H was not put into a fully informed position about what was being transferred or the potential consequences and costs of doing so.

In addition to the financial implications of the transfer I have also considered the additional commentary from 2015 regarding Mr H's wider needs and objectives.

Mr H was documented as wanted to access the tax-free cash element of the pension whilst leaving the remaining funds invested for use later in retirement.

The occupational pension scheme did not provide such flexibility and would have required Mr H to commence his pension income at the same time as tax-free cash was taken.

However, the advice file does not contain sufficient detail in order to establish Mr H's exact needs or objectives. Additional information covering how much tax-free cash Mr H required, current income, planned changes to work levels, and its impact on future income levels would all be needed in order to establish what levels of access to the pension monies would be required in future.

This information could then be used to establish if transferring the DB pension, and losing the valuable guarantees it contained, was the only way Mr H could meet his objectives.

Without any of this analysis I cannot state that Mr H was put into a fully information position about his options before deciding to transfer.

If Mr H had been provided with full and accurate information about the benefits that his existing pension would provide, it may have been the case that a decision was made to retain these benefits until age 65 (the scheme's Normal Retirement Age) and either continue to work full time or fund semi-retirement another way.

Even if some level of access to the DB scheme was required it may have been the case that Mr H would have accepted the tax-free cash available from the DB scheme as well as the ongoing guaranteed income it provided, rather than transferring the benefits to the SIPP.

I have considered that Mr H's actions after transfer, with several large withdrawals over a relatively short space of time exhausting the entire fund, would not have been possible had the DB scheme been retained. However, it is unclear whether this level of access was a foreseeable need for Mr H at the time of advice, or whether the access provided by the transfer subsequently changed Mr H's plans and caused the withdrawals.

Overall, with regard to Mr H's needs and objectives at the time of advice, there is insufficient information on file to demonstrate that transferring the pension was his only option at that time. In addition, the fact that the advice was given based on the incorrect conclusion that the pension was a DC scheme means that any decisions made by Mr H at that time cannot be considered to be fully informed, leaving open the real possibility that different decisions would have been made had full information been provided.

As such, I have reached the same overall outcome as our investigator, the advice to transfer is considered unsuitable. Had correct advice been given I believe Mr H would have retained the existing DB scheme.

I have not gone on to consider the suitability of the SIPP recommended by Tuto, nor the underlying investment made into the Flexible Guarantee Cautions (s2) fund, as the pension monies should never have been moved away from the occupational DB scheme and as such the suitability of these investments is irrelevant."

In addition to the above rationale, I asked both Tuto and Mr H to provide any additional commentary or evidence they wanted me to take into consideration before a final decision was issued by 29 November 2023.

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.

Following the issuance of the provisional decision above, Mr H has confirmed he has nothing further to add. Tuto have not provided a response.

Overall, with no further or commentary provided by either party, I remain of the opinion that the outcome detailed above remains fair and reasonable. As such I am not making any changes to it.

The redress instructions below remain unchanged from those outlined in the provisional decision.

Putting things right

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

Tuto Money Limited trading as Tuto, 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, Mr H accessed his tax-free cash immediately after the transfer and took several withdrawals from the pension until the entire fund was exhausted. The advice file contains inconsistencies about Mr H's plans for the tax-free cash and does not provide a specific retirement date.

It is impossible for me to know exactly what Mr H would have done had full and suitable advice been given in 2015, however I have concluded the redress calculation should be completed on the assumption that Mr H would have taken his benefits at 65.

I have carefully considered the fact that the advice documentation notes Mr H was looking to semi-retire in 2015, that tax-free cash was taken immediately after transfer, and that several large withdrawals were taken soon after transfer.

However, as above, Mr H was never put into a fully informed position about the value of the DB scheme, nor the benefits which it could provide. As such, his decision to semi-retire, and his subsequent decisions regarding accessing the transferred funds could not have been fully informed ones.

Given this and factoring in the lack of information on file regarding Mr H's current and future income requirements, I have concluded the redress calculation should be run to the transferred scheme's normal retirement age.

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 H'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 should:

- calculate and offer Mr H redress as a cash lump sum payment,
- explain to Mr H 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 H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts Tuto's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr H 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 H's end of year tax position.

Redress paid directly to Mr H 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 may make a notional deduction to allow for income tax that would otherwise have been paid. Mr H likely income tax rate in retirement is presumed to be 20%. However, if Mr H would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

My final decision

As per the rationale above I am upholding this complaint and require Tuto Money Limited trading as Tuto to complete the redress process outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 1 January 2024.

John Rogowski
Ombudsman