DRN-4400359

The complaint

Mr S complains about the advice he received 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.

The advice was given by a business for which Zurich Assurance Ltd has since become responsible for answering complaints. So, for ease of reading this decision, I'll just refer to Zurich throughout.

Mr S is being represented by a professional third party but again for ease of reading this decision I'll largely refer to representations as being made by Mr S.

What happened

Mr S was in touch with Zurich in early 1998. Notes from the time recorded that insurance and retirement income were the objectives that were to be discussed.

Zurich completed a fact-find with Mr S in February 1998 to gather information about his circumstances and objectives. The fact find said Mr S was 29, married, and had two young children. He was employed and was about to start a new job the following month. He and Mrs S owned their own home with a mortgage due to run for approximately another 18 years. Their income was recorded as exceeding their outgoings. And Mr S was a member of his current employers DB pension scheme.

Zurich noted that Mr S may like to retire at age 60 and if he were "retiring today" would like an income of £25,000 per year. The fact-find said though that no advice was to be given regarding pensions at that time.

In September 1998, Zurich wrote to the DB pension scheme trustees for information about Mr S' benefits. The benefits had a cash equivalent transfer value ('CETV') of £10,478.

On 20 October 1998, Zurich wrote to Mr S and said it recommended he transfer his benefits from the DB scheme to a personal pension with it. It said the two reasons for this recommendation were that Mr S was prepared to give up the guarantees provided by the former scheme, and it thought the rate of growth required each year in order to provide the same benefits as his DB scheme at the normal retirement age of 65 (known as the critical yield) was likely to be achieved. This was quoted as 9.4%. It included a copy of transfer value comparison where this critical yield was calculated. This also said that the DB scheme was estimated to provide an annual pension of around £9,500 at the normal retirement age.

Mr S signed applications on 27 October 1998 to proceed with the transfer.

Mr S complained to Zurich in 2023 about the advice. He said he had initially approached Zurich for advice about other products, not to discuss his DB scheme, and he hadn't wanted to take any risk with his pension. But Zurich had discussed the DB scheme with him and then advised him to transfer. Mr S thought that advice was unsuitable as he'd lost guaranteed pension benefits and he had no reason to transfer his benefits at that time, not least given how far away from retirement he was.

Zurich didn't uphold Mr S's complaint. It said it had obtained information about his deferred benefits and confirmed he'd have to achieve a return of 9.4% per year to retirement to replace these with equivalent benefits. Zurich said Mr S had signed a declaration saying he understood this and an application to apply to transfer. So, it was satisfied it had analysed the transfer, set this out to Mr S and he had chosen to go ahead with the transfer.

Mr S referred his complaint to the Financial Ombudsman Service. Zurich confirmed, when it provided its file, that it consented to our service investigating the complaint.

One of our Investigator's considered the complaint and thought it should be upheld. He couldn't see that Zurich had assessed Mr S' attitude to risk but in any event, he didn't think Mr S was likely to improve on the benefits his DB scheme provided by transferring. He also thought this pension was likely to be valuable to Mr S as it appeared to be his only retirement provision at the time of the advice. And he didn't think Zurich had demonstrated any other reason for transferring that meant it was in Mr S' best interests. So, he thought Zurich should compensate Mr S for any loss the transfer had caused, in line with the regulator's methodology for addressing unsuitable DB transfer advice.

Zurich disagreed. It said Mr S had a 'balanced' attitude to risk and had begun contributing to another pension after changing employer. And Zurich repeated it had undertaken the relevant analysis and Mr S had signed to agree to the transfer, after this analysis was shared with him. So, it thought it had acted correctly.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. 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.

Zurich has said suitable analysis was carried out and shared with Mr S and he decided to proceed. And has suggested because of this it thinks the recommendation was correct and it has done what was required of it. But a transfer analysis being completed is not on its own enough to say that the advice given was suitable. And the letter to Mr S Zurich sent was clear that it recommended a transfer. So, it was advising him to go ahead.

The advice was given in October 1998. At that time, the business that gave the advice, now Zurich, was regulated by the Personal Investment Authority ('PIA'). In 1994, the PIA assumed responsibility for businesses previously regulated by the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA') and the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). The PIA adopted the FIMBRA and LAUTRO rules. Based on the information I've seen I believe the LAUTRO rules are most likely to have applied to the advising business here, at the time of the advice – not least because it was recommending a pension it provided.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise "due skill, care and diligence" and "deal fairly with investors". Paragraph 6 of the Code of Conduct required advisers to give "best advice", which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor. But none of this went as far as meaning that the adviser could just sell the least unsuitable contract from within the provider's range.

So, while Zurich was required to disclose information about risks and consequences of a transfer, it's responsibilities to ensure suitable advice was provided went beyond just producing analysis for Mr S to consider. And, as I'll explain, I don't think a transfer was suitable for Mr S or that Zurich could reasonably have genuinely believed it to be in his best interests.

The objectives in the fact find that was carried out by Zurich several months before the advice said one of the things that Mr S wanted to discuss was "Providing or increasing retirement income". Zurich said the critical yield was 9.4% to match the benefits Mr S could've received from his DB scheme at age 65. And it thought it was likely that this could be achieved. But this was the rate of return required simply to purchase equivalent benefits to those being given up, not to improve on them. And there would be little point in Mr S giving up the guarantees available to him through his DB scheme and taking on the associated risks only to achieve, at best, the same level of benefits outside the scheme. And by transferring Mr S would have to pay annual fees and charges for the personal pension, which would reduce any gains the funds made. And those are not charges he would have had to pay if he didn't transfer.

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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 discount rate at the time of Zurich's letter of recommendation was 7.5% per year for 34 years to retirement – the case if Mr S retired at age 65. For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6%.

I can see that the fact find included a question about investment attitude, with a scale and a box to tick. The scale ranged from cautious to balanced to speculative. This was completed. And Zurich has said Mr S's attitude to risk was balanced. I'm not sure simply ticking this box was a sufficiently robust way of truly determining his attitude to risk. And, although he had started a new job and was contributing to a new pension scheme, his DB scheme made up the majority of his retirement provisions at the time. So, I think these were valuable. I also note that the option selected on the form actually seems to have been between cautious and balanced. Which for an inexperienced investor like Mr S, seems reasonable.

In any event though, even with a 'balanced' attitude to risk, given the discount rates and considering the regulator's standard projection rates I think Mr S was unlikely to be able to consistently achieve growth equivalent to or in excess of the critical yield. And so, I think he was likely to receive pension benefits of a lower value than those he'd have been entitled to under the DB scheme by transferring and investing in line with his attitude to risk. So, I think Zurich's statement that this return was "likely to be achieved" was misleading. And if increasing his retirement income was genuinely one of Mr S' objectives, the transfer was unlikely to achieve this.

The other reason that Zurich recommended a transfer was because Mr S was prepared to give up his guaranteed benefits. But that doesn't mean it was in Mr S' best interests to do so, even if he would build up further retirement provisions before retiring. And again, Zurich was required to provide 'best advice' and not advise him to transfer unless it genuinely believed doing so was in his best interests.

Mr S was only 29 at the time of the advice, so, any thoughts he might've had about what retirement would look like were unlikely to be anything more than aspirational. And I don't think transferring to a personal pension for the potential flexibility this might've offered in comparison to his DB scheme was in his interests at that time.

Mr S's DB scheme provided a spouse's pension, which could've been useful to his family in the event of his death. And I note the other purpose of Mr S taking advice was to put in place protection and insurances, to provide for his family in the event of his death. So, while I note the analysis Zurich provided suggested that death benefits might be improved by a transfer, Mr S seems to have already taken steps to address providing a legacy in what was, in my view, a far more appropriate way.

So overall, I can't see any reason that I think could reasonably have led Zurich to consider that a transfer was genuinely in Mr S' best interests.

Zurich has said Mr S applied to transfer, after it shared its analysis with him. But, notwithstanding that I think its statement, that the growth required to replicate the benefits being given up was achievable, was misleading, from what I can see Mr S was an inexperienced investor. Ultimately, Zurich advised Mr S to transfer. And I think he relied on that advice. If the professional adviser, whose expertise about his finances in general Mr S had sought out, hadn't recommended a transfer and explained that improving on his guaranteed benefits was unlikely I think he'd have accepted that advice. And he would not have transferred away from his DB scheme.

In light of the above, I think Zurich should compensate Mr S 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 Zurich to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr S would have most likely remained in the occupational pension scheme if suitable advice had been given.

Zurich 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 S has not yet retired, and has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the FCA's 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 S'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, Zurich should:

- calculate and offer Mr S redress as a cash lump sum payment,
- explain to Mr S before starting the redress calculation that:
    - the 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 the redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr S receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr S accepts Zurich's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr S for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr S's end of year tax position.

Redress paid to Mr S 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, Zurich 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 S'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 Zurich Assurance Ltd to pay Mr S 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 Zurich Assurance Ltd pays Mr S the balance.

If Mr S accepts this decision, the money award becomes binding on Zurich Assurance Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 4 January 2024.

Ben Stoker
Ombudsman