DRN-4166358

The complaint

Ms B complained that she was given unsuitable advice to transfer her deferred defined benefit (DB) Occupational Pension Scheme (OPS), to a type of personal pension arrangement recommended to her by a financial adviser.

Whiting Group Limited is responsible for answering this complaint. To keep things consistent, I'll refer mainly to "WGL".

What happened

At the time, Ms B was a deferred member of her OPS, having been employed from the late 1980s until the mid-1990s and she had accrued around 6 years and 165 days' worth of benefits. WGL's recommendation was to transfer away from her deferred DB scheme. This was set out in a suitability report of 3 October 2002 with the final transfers of the scheme taking place in early 2003. Ms B's circumstances of the time showed:

- She was aged 50 and in good health. She was divorced and had two adult children.
- Ms B lived in rented accommodation and owned no property of her own. She had no recorded savings, investments, or other assets. She earned around £19,500 per year which broadly covered her expenditure.
- The cash equivalent transfer value (CETV) of the DB pension was around £48,349. The normal retirement age (NRA) of the scheme was 60.

WGL advised Ms B to transfer out of her DB scheme and invest in two different personal pension arrangements.

The first element comprised a little under half of her overall CETV which WGL said she could use to achieve some of her more immediate financial objectives. The recommendation was that these funds should be placed into an Immediate Vesting Personal Pension which would allow flexible access to a tax-free lump-sum and the purchase of an annuity which would then generate a small annual income. We know she accessed these benefits in 2003.

For the second element – a little more than half the CETV - this was recommended to be invested in a Section 32 plan. Section 32 plans, also known as buyout plans, were a type of individual pension policy. This could allow Ms B's Guaranteed Minimum Pension (GMP) rights to be retained, invested and become available to her at around the age of 60. Ms B's says she accessed these benefits around 2010.

Ms B now thinks the transfer advice was unsuitable for her. She complained to WGL first, in 2022. In response, WGL said it hadn't done anything wrong and was acting on the financial objectives Ms B had at the time. Ms B then referred her case to our Service. One of our investigators looked into the complaint and said it should be upheld.

WGL also said the complaint had been brought too late under the rules we operate by. So I issued a jurisdiction decision in June 2023 saying I thought the complaint *was* one we could look in to. I've therefore gone on to look into the merits of the complaint and it's now come to me for 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.

Presumption of unsuitability

COB 5.3.29G specified the information a business should gather from the consumer and the DB scheme in order to assess suitability, in a similar way to the previous regulator's guidance. Importantly it also said that:

> *"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:*
>
> *(a) start by assuming it will not be suitable, and*
>
> *(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."*

This is known as the 'presumption of unsuitability' and has been renumbered to COBS 19.1.6G in the current FCA rulebook.

I've used all the information we have to consider whether transferring away from the DB scheme was in Ms B's best interests. I don't think it was, so I'm upholding her complaint.

Financial viability

When advising on pension transfers of this nature, there was a requirement by the regulator at the time to produce a transfer analysis to determine a 'critical yield' rate. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same retirement benefits as the DB scheme.

However, as our investigator explained, in Ms B's case, despite issuing its suitability report recommending a transfer out of her DB scheme, there appears to have been no transfer analysis which showed a critical yield. This means Ms B wasn't provided with important information she would have likely wanted to see and which would have helped her make an informed decision about transferring away from her DB scheme.

Whilst we don't have a critical yield to consider in this case, the relevant discount rate closest to when the advice was given was 6.7% if assuming accessing the benefits at the age of 60, her NRA. For comparison, the regulator's upper projection rate at the time was 9%, the middle projection 7%, and the lower projection rate 5% per year. Looking at the regulator's middle growth projection then, Ms B would need to significantly exceed this, year-on-year, to justify transferring away from her guaranteed DB scheme, which contained important and valuable benefits. I agree with our investigator that this would be unlikely. So, I think it could be said, looked at from the perspective of when the time this advice was given, that Ms B would have been likely to receive lower pension benefits in the longer-term as a result of transferring. In this context, the advice was unsuitable.

In Ms B's case, however, this wasn't directly relevant or applicable to *all* her transferred funds as the recommendation was for her to transfer the non-GMP part to an Immediate Vesting Personal Pension. This means she took a tax-free lump sum and then also bought an annuity from which she'd be paid an annual pension and so there was no residual fund to be exposed to any investment risk on around half her total CETV.

However, everything I've seen brings me to the firm conclusion that Ms B wasn't given enough information to make an informed decision. She wasn't able to make relevant financial comparisons about whether remaining in the DB scheme was more suitable for her or whether the whole transfer venture was even financially viable. The suitability report doesn't really make any case for transferring away from her existing scheme on the basis she might obtain better benefits in the longer-term. The regulator's growth presumptions and the discount rate imply she'd likely be worse off in the longer term as a result of leaving her DB scheme. And from a financial perspective, there would be little point in transferring away from her DB scheme to obtain benefits of a lower overall value. So, considering this aspect on its own, the advice to transfer away wasn't in Ms B's best interests.

Of course, according to WGL, its recommendation that she should transfer out to a personal pension was not based on the financial comparisons with her current DB scheme alone. Rather, WGL said Ms B had different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer was suitable for her, despite likely providing the overall lower benefits I've mentioned above.

I've considered these below.

<u>Other reasons given for the transfer advice</u>

I've used the documentation from WGL at the time to help list some of the themes the recommended transfer-away was based on. Our investigator also highlighted some themes when she issued her view. These were:

- For Ms B to have access to capital to fund a deposit to buy a home
- To use capital to help fund a start-up business
- To supplement her early retirement requirements
- The income from some of her transferred funds would support expenditure and deliver some future savings

It therefore seems the supporting reasons that WGL recommended the transfer out to a personal pension arrangement was for the flexibility it offered to Ms B to achieve these objectives. I have considered all these issues in turn.

- *Buying a home / starting a business*

Although stated on the suitability report as an objective for Ms B at the time, I've noted the concept of buying a home and / or using some capital from her pension to start up a business venture wasn't gone into in any real detail by the adviser. The adviser seems to have been content to note these as financial objectives for Ms B and immediately move on to transacting the transfer for her. I think this was a significant shortcoming.

The practical effect of this was that she would only be able to access a little under half of her total transferred funds within a reasonably quick period to fulfil the above objectives. Her pension fund was already modest, so obtaining less than 50% would clearly mean she'd be accessing relatively low amounts of capital. In this context, it seems to me that funding *both* a house purchase and a business start-up was quite obviously unrealistic given the money Ms B would be able to access straightaway. We know for example, that the tax-free element of this first part would be only around £6,000 after she'd paid fees to the broker. The resultant pension from this element (in annuity) would be around £700 per year (gross) if taken early, at around the age of 51. And the plan was for the remainder element to stay invested within the Section 32 plan until she reached around the age of 60 which was still some time away.

However, in my view, the adviser clearly fell short by not diligently recording the really pertinent details about what her house and business aspirations actually were. Details of the former were certainly not clear. There appears to have been no house purchase even yet identified, no approximate value was evident, nor any indication about the wider funding via a mortgage. Nor did there appear to be any business plan evident associated with a new business venture. There were no details of what the business was, what sector it was in and whether more funding would be needed. There were no details about her potentially devoting her future to a business which might then mean she'd have to give up paid employment.

I completely accept that Ms B may have aspired to either or both of these things. They may even have been aspirations she'd genuinely been thinking about for some time. But the adviser's job here wasn't to simply transact what Ms B thought she wanted. Their job was to fully understand her objectives and to provide professional advice that was in her best interests.

In essence, what I can see from the documentation completed at the time of the transfer, is that these were probably only ideas at the time, rather than formulated or advanced plans. It appears no *specific* mortgage was discussed and whether this might be affordable, nor any specific form of personal or business loan. The adviser just listed a series of other – somewhat random, in my view – financial products which seem completely unconnected with what she apparently wanted to do.

For example, the adviser listed the possibility of a re-mortgage when Ms B didn't appear to have a mortgage in the first place. They also said they'd thought about her obtaining a credit union loan. However, the reasons for this are unclear and it seems to me to have been no more than inserted into the suitability report to provide some appearance that other types of funding had been discussed. But there was no indication here at all that a credit union loan was relevant or whether Ms B would even be able to qualify for one. The adviser also mentioned selling life assurance policies when Ms B clearly had no such cover. In this respect, the suitability report was a very poor document in that it used stock reasoning which bore little relevance to Ms B's situation.

Further to this, not only did Ms B's aspirations seem somewhat unachievable given her financial resources at the time, the adviser also recorded that the capital from the transfer could also help support an early retirement *and* provide additional savings. Given the tax-free lump-sum would be around only £6,000, it's very difficult to see how this could cover a home purchase deposit, fund a business start-up and also kick start her retirement plans. Also, if Ms B was wanting to save, irreversibly transferring from a 'safe' and guaranteed DB scheme would seem a poor way of achieving this. In my view, the adviser therefore proceeded to recommend that she transfer away from her DB scheme on vague plans that were clearly not properly thought through and most likely unachievable.

WGL, in its reply to our investigator's view, offers no real explanation for any of these obvious failures, other than to say Ms B didn't disclose certain information about her personal circumstances. It says she didn't disclose she had a partner, nor did she say her elderly father required caring for. However, these allegations of withholding information don't change the fact that there were obvious and serious omissions in the advice and that basic facts of Ms B's situation were overlooked by the adviser. The adviser's lack of inquisitiveness was, in my view, a good demonstration of failing to act in the best interests of their client.

In short, transferring away for these reasons, as set out on the suitability report, lacked any credibility.

- *Early retirement*

It was also recorded on the suitability report that Ms B had *"early retirement requirements"*. But again, none of this was comprehensively explained on the documentation. It wasn't expanded upon as to why Ms B wanted to retire so early, when this was likely to be, and whether she'd be suffering a drop in her employment income as a result. Like many people, Ms B may well have wanted to retire early, but she was still only 50 years old and apparently in good health. Her financial circumstances of the time simply didn't support retirement any time soon. As I've said, her overall pension provision was modest and she didn't have any savings or investments to fall back on. So, it's unclear how the adviser could have assumed that early retirement was even yet possible in her case, particularly given the multiple uses she seemed to have for the limited pot of money her pension could generate.

These anomalies and financial shortfalls should have prompted the adviser to be more inquisitive and get into the detail of what Ms B could realistically achieve. She was still then working and earning a reasonable income, which seemed to just about cover her expenditures with a small amount left over. So, when Ms B also implied she'd like to complement her current income by using the first part of her transferred pension funds, the adviser should have been asking why she wanted to do this and whether it was really necessary, given the shortfalls this would probably cause in her retirement income later on.

I accept that any additional annual income from part of her pension would no doubt have been welcome for her. But this was only around £700 per year and it would likely be subject to tax unless Ms B resigned from her job or significantly reduced her hours. The adviser should have therefore been considering whether accessing this so early was really required, particularly as it seemed to be leaving her short of retirement income in her older age years. What I mean by this is that by accessing part of her pension so early, all Ms B would be left with would be the GMP element in the Section 32 scheme – and this also was a modest sum.

Therefore, there was clearly an opportunity here for the adviser to point out the obvious to Ms B – that she couldn't really afford to start taking part of her pension so early. This is because it would leave her short in later life. By accessing so early, her intention was to also remove 25% from this first element by way of a tax-free lump sum. And by accessing the remainder as an annual annuity at the age of just 51, this would clearly mean much less income left for her older years.

In my view, all this means that there was no real justification from the adviser as to how this could be in Ms B's best interests. There was no suggestion that her current rented housing was unsuitable and there was no coherent plan to buy a house or fund a business. The adviser seems to have merely accepted what were no more than aspirations, and to have overlooked Ms B's later life financial requirements because there appears to have been no analysis or discussion of what she'd need to live on when she eventually stopped working.

So, I think the advice to transfer from her DB scheme contributed to a more uncertain retirement for Ms B. Within that, I've considered that she would potentially have had access to a state pension. But this wasn't really analysed either as her contribution record wasn't made clear. In any event, this was still over 12 years away in her case (aged 62 years and 3 months) and there's no evidence this would have met all her financial needs.

I've further considered that WGL set out a warning on the suitability report that accessing a pension early could result in a lower income later. But this was only a general warning with no real application to what it meant for Ms B. And of course, in any event, the ultimate recommendation from WGL was still that she should transfer away. Put another way, if WGL was sufficiently robust about the later life shortfall, then its recommendation should have said so – and the advice clearly ought to have been against her transferring.

- *Death benefits*

In this case, I accept the death benefits found in the existing DB scheme were not discussed in any detail although I've noted the issue of loss of these types of benefits could be found in an appendix to the suitability report.

In Ms B's case, the possibility of someone being paid a benefit from the DB scheme if she died might not have seemed important to her. This is because she was divorced and couldn't therefore expect payment to a living spouse, because there was none. Similarly, her children were also unlikely to receive anything from the DB scheme upon her death as this only applied normally to children in full-time education, again this wasn't applicable to her.

Nonetheless, we do know Ms B had a partner. WGL's position on this is that she failed to disclose this fact. I have given this some careful thought; however, I think it's more likely that she wasn't specifically asked. I find it unlikely that Ms B would specifically decide to lie about having a partner as I can think of no credible reasons for her to do so. I therefore find the more plausible scenario is that she just wasn't asked and / or told why this might be relevant.

Overall, this is of only minor relevance in the grand scheme of things. But the death benefits in Ms B's scheme were relatively good and I think she would have considered them to be of great comfort if, for instance, she and her partner were ever considering marrying.

- *Other issues*

I've looked carefully at WGL's final response (28 April 2023) to Ms B's complaint. I think it's fair to say that a substantial part of its position is that Ms B was given a number of warnings about transferring from her DB scheme. I've already mentioned this in the context of her accessing part of her pension early, but the general theme of warnings from WGL is present in many other areas. So here, WGL is essentially saying Ms B was warned about the downsides of leaving a DB scheme and the implication is that she ignored these.

To say this, in my view, is to miss the point. It was WGL that was the regulated party here and it was being paid for financial advice. We know Ms B wasn't experienced in these matters and so it's fair to say she went to WGL very much expecting that she would be given clear and unambiguous advice. The advice WGL ultimately gave her was to transfer away, whether it issued some warnings or not. In any event, most of these were simply generic warnings not specific to Ms B. The loss of retirement income, for example, wasn't applied directly to her own financial affairs or explained in a way that affected her, it was simply general information about common advantages found in DB schemes. And if the adviser had any serious reservations – as they certainly ought to have had – then the overall advice ought to have reflected these. They should have advised Ms B clearly against transferring away.

WGL also said *"the adviser provided alternative options to meet the client's financial objectives"*. Here, WGL says Ms B was told about other ways of raising cash. However, this is clearly not correct. As I've explained the 'alternatives' were no more than a stock list of randomised financial products which bore no relationship with Ms B's own financial situation.

<u>*Summary*</u>

In this decision I've explained why I don't think the advice to transfer away from Ms B's DB scheme was in her best interests. She was giving up a guaranteed, risk-free and increasing income within her current DB scheme.

WGL says its advice was in-depth and fair to Ms B, but I'm afraid I disagree.

From a financial comparison perspective, no real transfer analysis was carried out which allowed her to make reasonable comparisons with her existing scheme and the ones she was being recommended to transfer into. In addition to this, no critical yield was calculated.

Ultimately, I think these failures by WGL left Ms B with less information than she needed to make an informed decision. However, using the regulator's growth assumptions and discount rate I was able to consider whether transferring was financially viable for Ms B. This was a somewhat complex picture because Ms B was recommended to transfer some of her pension to a personal pension plan, and part to a Section 32 plan.

But of course, the onus was on WGL to prove that transferring away was right for her, as the regulator's stance was that such transfers are usually not suitable. WGL failed to show this and I think it's more likely than not that Ms B would have always stood to receive overall lower pension benefits as a result of WGL's advice to leave her existing scheme.

I then considered the other reasons given for the recommendation to transfer away. These were based on an apparent desire to buy a house and also to start a business. But mention was also made of using the extra income to generate savings and to fund an early retirement. However, WGL conflated all these issues. They were clearly unrealistic given the amount of money available to Ms B. WGL simply transacted what Ms B, an uninformed consumer, thought she wanted to do.

As a regulated financial adviser, WGL failed to understand its client and failed to provide basic and obvious challenges to what Ms B aspired to. As a result of these failures, Ms B faces a less certain retirement from a financial perspective.

So, I don't think the advice given to Ms B was suitable. Ms B shouldn't have been advised to transfer out of the scheme just to pay for plans which were not yet costed. I think WGL should have advised Ms B to remain in her DB scheme.

I have considered whether Ms B would have gone ahead anyway, against WGLs advice. But I'm not persuaded that she would have insisted on transferring out of the DB scheme, against advice. I say this because she had no experience of investment risk and no capacity for loss. This pension accounted for the vast majority of Ms B's retirement provision. So, if WGL had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would have accepted that advice.

In light of the above, I think WGL should compensate Ms B for the unsuitable advice, using the regulator's DB pension transfer redress methodology.

Putting things right

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

WGL 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 Ms B is now retired. She took some of her benefits in 2003 and some in around 2010 (as I've explained). In my view, access to the DB pension was facilitated only due to the unsuitable advice provided by WGL. So, compensation should be based on the scheme's normal retirement age of 60, 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 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 Ms B'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, WGL should:

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

Redress paid to Ms B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, WGL 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 Ms B'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 £170,000, 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 £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and I direct Whiting Group Limited to pay Ms B the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Whiting Group Limited pays Ms B the balance. If Ms B accepts this decision, the money award becomes binding on Whiting Group Limited.

My recommendation would not be binding. Further, it's unlikely that Ms B can accept my decision and go to court to ask for the balance. Ms B 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 Ms B to accept or reject my decision before 1 August 2023.

Michael Campbell
Ombudsman