DRN-4506419

Financial Ombudsman Service

The complaint

Mr M complains about advice provided by Pension Works Limited (PWL) to transfer his defined benefit occupational pension (DB) scheme to a personal pension. Mr M says the advice was unsuitable and has caused financial loss.

What happened

Mr M contacted PWL in March 2017 to discuss his retirement planning. A fact find was completed. An assessment of Mr M's attitude to risk showed he was lowest medium (4 out of 10). PWL issued a suitability report on 4 April 2017 recommending that Mr M transfer the value of his benefits in the DB scheme to a personal pension. Mr M accepted the recommendation and the transfer went ahead.

Through his representative, Mr M complained about the advice in early 2023. PWL didn't uphold the complaint. It was referred to us. One of our investigators considered it. She issued her view on 2 November 2023 upholding the complaint. For the reasons she gave she didn't think the transfer was in Mr M's best interests. Amongst other things she said:

- The benefits Mr M had accrued in the DB scheme offered a guaranteed income for life and would form a significant part of his total pension provision. Mr M had a low capacity for loss and the security of the guaranteed benefits offered by the DB scheme would've been very important to him.
- The investigator referred to COBS (Conduct of Business Sourcebook) 19.6.1G (which I've set out below).
- By transferring, Mr M was likely to receive benefits of substantially lower overall value than the DB scheme would've provided.
- PWL's cashflow modelling showed that if he took income of £1,000 pm his fund would last until he was 89 years old but that assumed growth of 6.2% pa. The figures hadn't been stress tested to see how much would be left if Mr M drew more or his fund value fell.
- Aside from financial viability the investigator considered flexibility, death benefits and that some or all of the DB scheme benefits appeared surplus to Mr M's requirements. But she didn't think transferring was justified by any of those factors.
- She'd considered if Mr M would've gone ahead anyway and if PWL had advised against. But she hadn't seen anything to say Mr M would've insisted on transferring.
- She set out how PWL needed to put things right for Mr M.

Mr M didn't have anything further to add. PWL made further comments. I've summarised PWL's main points:

- Mr M's complaint arose out of 'fishing exercise' by his representative, a complaints management company (CMC), who'd made a Data Subject Access Request (DSAR) to obtain a copy of PWL's file and had then sought to undermine the advice given and fabricate a complaint.
- Mr M was confident his state pension was sufficient to live on during retirement. Although the DB scheme was a significant part of his pension provision at the time,

Mr M wanted flexible access to the DB scheme and could afford that after drawing an immediate tax free lump sum.

- He wouldn't be relying on the DB scheme to meet his income needs in retirement and so the transfer was within an acceptable tolerance based on Mr M's capacity to suffer any losses. There was nothing to support what the investigator had said about the guaranteed benefits offered by the DB scheme being important to Mr M and the contemporaneous evidence pointed to the contrary. Mr M didn't need to protect the value of the DB pension. He wanted to spend a significant proportion immediately and he drew down significant sums over the following years. He also purchased a property which has likely increased in value and he's saved immediate and future holiday and housing costs.
- The investigator, when considering financial viability, had compared the critical yield applicable to a joint life annuity with all benefits taken as pension income which isn't relevant to Mr M's actual circumstances. The financial viability assessment was irrelevant anyway as Mr M had no intention of seeking to match the DB scheme benefits. He was unable to access those benefits for at least another five years and he wanted immediate access to fund his holiday and retirement home purchase. He also required ad hoc access to the residual funds and not a regular income and he's taken the funds in that way.
- The cashflow modelling carried out by PWL included withdrawals of £500 pm and £600 pm. The lowest withdrawals model showed the fund value would increase each year and the fund wouldn't run out. If withdrawals of £600 pm were made the fund would last until Mr M reached around 100. He was clearly informed as to how differing levels of withdrawals would affect his long term retirement income.
- The investigator had tried to rely on the 'discount' rates. But, as the investigator had acknowledged, businesses weren't required to refer to those. The actual fund recommended hadn't been considered. The discount rates didn't bear any resemblance to the provider's or the regulator's projection rates.
- Although Mr M had said he'd be working until age 60, he wanted to purchase a property in Tenerife immediately to enjoy the benefit of holidays and get the property ready for his retirement five years later. His plans were documented in the meeting notes for the first meeting. Which also record that Mr M understood the risks but wanted to proceed for the reasons set out.
- Mr M's objective couldn't have been achieved whilst remaining in the DB scheme. He didn't indicate he was prepared to defer purchasing the property and he didn't need to do so as PWL demonstrated it was an affordable transaction for him at the time. The suitability report showed that other options were explored but discounted.
- Death benefits weren't the primary reason for recommending the transfer but were a key consideration in the overall advice process and Mr M's decision to proceed. He had a 15 year old daughter who he was supporting at the time and he had a high risk occupation. The suitability report did highlight the death benefits available from the DB scheme. Mr M's daughter would've been entitled to a minimal short term dependent's income until she finished education. There was no guarantee Mr M's partner would be entitled to a pension as she and Mr M weren't married.
- The DB scheme wasn't Mr M's only pension provision – he had his state pension and PWL expected him to retain the bulk of the transferred funds to meet the gap between age 60, when Mr M intended to retire, and his state pension being paid.
- The causation argument hadn't been considered. Mr M would've proceeded with the transfer anyway and regardless of the advice he received at the time.

The investigator considered PWL's further comments but she didn't change her view.

PWL remained unhappy. Amongst other things, PWL maintained Mr M didn't have any complaint until his representative had approached PWL for a copy of their file. PWL also said the TVC (Transfer Value Comparator) was of little relevance when the client was seeking to use funds in a different way to what the DB scheme would've provided. PWL referred to a decision where the ombudsman had said the comparisons given were of limited value as the consumer wanted to retire at age 60. Nevertheless PWL said the point had been covered in the suitability report – it said, given Mr M's relatively cautious attitude to investment risk, it was unlikely the critical yield (9.96% or 8.32% if tax free cash was taken) would be met.

PWL accepted, from a purely financial comparison perspective, transferring away from the DB scheme probably wouldn't be in Mr M's best interests. But PWL said, if all transfers were based on the financial viability test, then virtually none would ever be made. PWL also referred to what an ombudsman in another case had said about financial viability not being the only consideration. Mr M and his partner were determined to purchase the Tenerife property. On the balance of probabilities and based on the contemporaneous evidence, Mr M would've wanted to go ahead with the transfer even if PWL had recommended against.

Further, consumers who want to take benefits in a different shape to those provided by the DB scheme shouldn't be prevented from doing so and PWL shouldn't have stopped Mr M from using the funds as he wanted. PWL referred to what the regulator had said about a transfer being suitable if the consumer wouldn't be relying on their DB scheme to meet their income needs and if they had other sources of retirement income.

PWL also said appropriate consideration hadn't been given to Mr M's actions and causation hadn't been mentioned in the investigator's view. Her later comments – as to why Mr M would've likely accepted clear advice against transferring with an explanation as to why it wasn't in his best interests – were contrary to the contemporaneous evidence. Mr M had also gone against PWL's advice by withdrawing larger ad hoc income payments and eroding his pension savings before he retired. PWL provided a copy of the call and file note from the annual review meeting with Mr M in June 2018. He'd been unemployed since the start of the year but was about to start a new (self employed) role. He'd withdrawn £144,000 from his pension to fund a wedding, static caravan and a house purchase. And he'd recently requested a further £5,000 (which he'd said would be his last withdrawal) to finish refurbishments. He'd made withdrawals to support himself during his period of unemployment – he had no other means to do so and couldn't have accessed his DB scheme benefits.

PWL said, if the investigator wasn't prepared to reconsider, a provisional decision should be issued to allow PWL to address any inconsistencies in the evidence relied on. PWL also said, if the complaint was ultimately upheld by an ombudsman, that an independent valuation of Mr M's property interests should be undertaken and his holiday cost savings be taken into account in any redress awarded as Mr M had clearly benefitted from those factors.

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.

In reaching my decision 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 COBS. The below isn't a comprehensive list of the rules and regulations which applied at the time of the advice but provides useful context for my assessment of PWL's recommendation here.

- PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly;
- COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with

the best interests of its client;
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability;
- COBS 19 which specifically relates to a DB pension transfer.

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.

I can see that PWL feels very strongly about this matter and that the advice to transfer was suitable for Mr M. I've considered everything that's been said although, like the investigator, I've focused on what I see as key so I won't necessarily comment on every point that's been raised.

PWL is aggrieved that Mr M has chosen to make a complaint via his representative. But there's no dispute that Mr M was advised by PWL to transfer his DB scheme benefits. He's now, with the assistance of a representative, complained that such advice was unsuitable. I think he's entitled to make that complaint. And, from what I've seen, many professional representatives will make a DSAR as a prelude to formulating a complaint. Despite PWL's comments, I don't see anything wrong with the approach taken although I can of course understand why PWL is disappointed that a client has chosen to complain.

I've considered first if the advice to transfer was suitable. COBS 19.1.6G says:

'*When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best Interests.*'

So the starting assumption for a transfer from a DB scheme is that it will be unsuitable. PWL should've only recommended a transfer PWL could clearly demonstrate that the transfer was in Mr M's best interests.

I don't think PWL disputes that the transfer wasn't financially viable. PWL's suitability report noted that the critical yield – that is by how much Mr M's pension fund would need to grow each year to provide equivalent benefits to those he'd be giving up in the DB scheme – was unlikely to be met. I agree, as Mr M was looking to take tax free cash, the critical yield of 8.32% was the more relevant figure. And he wasn't seeking to match the DB scheme benefits. But factors such as the critical yield will give an indication as to whether the transfer value offered represents good value. PWL quoted what an ombudsman in another complaint said about the relevance or otherwise of the TVC and critical yield. But I'd point out what that ombudsman went on to say immediately afterwards – that the calculations were relevant in the context of giving an indication of how much would be given up by transferring away from the DB scheme.

Mr M may have thought he wouldn't be dependent on the DB scheme and that his state pension would be sufficient to meet his income needs in retirement. PWL has pointed to that as evidence that Mr M didn't regard the guaranteed benefits offered by the DB scheme as important. But, even if that was Mr M's view, the fact of the matter is that the transfer would likely leave him worse off in retirement. It was up to PWL to give suitable advice and bearing in mind the true value of the benefits being given up and that they were guaranteed.

I also think PWL was too ready to accept what Mr M had said about not needing to supplement his state pension income. And PWL's reference to what the regulator has said about the circumstances in which a transfer might be suitable is I think typically more applicable to a consumer who has significant other pension provision. Whereas, even if Mr M didn't think he'd need to rely on the DB scheme in retirement, he only had his state pension to fall back on. I'm not sure Mr M really understood the value of the DB scheme benefits he'd be giving up and if he fully appreciated that transferring in order to access tax free cash would be an irreversible decision which would likely leave him worse off in retirement. And, although he'd said he intended to live in Tenerife where the cost of living was lower, he was still some five years away from retirement and his plans could (and it appears did) change in that period.

But, and leaving aside financial viability, PWL's position is that the transfer was justified by other factors – Mr M's objectives and, in particular, that he wanted to buy a property in Tenerife for holidays and in preparation for his retirement in five years' time. I agree Mr M sought advice from PWL as to how he could achieve that – the note of the initial meeting on 25 October 2017 records that as Mr M's objective, along with why he considered that more important than the guaranteed income the DB scheme would provide.

I of course accept that a consumer's objectives are important and a relevant consideration. COBS 19.6.1G (4) lists the client's intentions as one of the factors a firm should take into account and which can demonstrate suitability. And I accept that PWL was entitled to rely on what Mr M told PWL as to his objectives and priorities. But PWL had to give suitable advice. It wasn't just up to PWL to accept what Mr M said he wanted to do and recommend a way he could achieve that if, overall and in the longer term, it wouldn't be in his best interests.

Death benefits were also mentioned – the suitability report records one of Mr M's objectives was being able to pass his fund on to his chosen beneficiaries on his death. I can see that Mr M may have viewed the death benefits offered by the DB scheme as of limited value. And a lump sum death benefit would've appeared attractive to him. But I don't think it was in his best interests to prioritise potentially more favourable death benefits over his financial security in retirement. Especially as any lump sum which Mr M might be able to pass on would depend on investment returns and how much of the fund remained after withdrawals. I don't think the transfer was justified because of the perceived superior death benefits offered by the personal pension.

As to any requirement for flexibility, that seems to centre on Mr M wanting to access a lump sum to purchase a property in Tenerife. I've explained why I don't think the recommendation to transfer was justified because of that. I'd add that, at the time of the advice, Mr M was still working and aside from the tax free cash had no need to access his DB scheme benefits. He was five years away from his intended retirement age and his position could've been considered again closer to the time and when his precise requirements were known.

PWL says it considered and discussed alternatives, as set out in the suitability report. But what that seems to have been from the perspective of meeting Mr M's objective in terms of buying the property in Tenerife. Any alternatives were ruled out on the basis that immediate objective couldn't be met. I don't think things were presented in a balanced way and such that might've led Mr M to consider if achieving his objective was paramount, given what he'd be giving up and the overall impact on his longer term financial position during retirement.

All in all I don't think the advice to transfer was suitable.

As to causation, I don't think it's a foregone conclusion that Mr M would've transferred anyway. In the other case PWL has mentioned, the ombudsman found that the consumer had a very compelling reason to access a lump sum – to buy a property and repay a loan used for the deposit to a family member and transferring his pension and accessing his tax free cash was the only way the consumer could've done that. In that situation, the ombudsman said the consumer would've wanted to transfer, even if advised against.

I'm not convinced that Mr M's situation was quite the same or that his reasons for wanting to transfer were what might properly be termed compelling. Buying a holiday home may have been a plan that Mr M and his partner might've been prepared to revisit or postpone if Mr M had been advised that, giving up the valuable guaranteed benefits the DB scheme offered wasn't in his long term and overall best interests.

I note Mr M didn't use the tax free cash to buy a mobile home in Tenerife. I'm not looking at the matter with the benefit of hindsight. But, given that Mr M's proposed purchase in Tenerife didn't go ahead anyway, that would perhaps suggest his plans weren't advanced and/or fixed. And that, had PWL advised that taking the tax free cash to fund that purchase wouldn't be in his best interests and would compromise his longer term financial position, Mr M would've been prepared to reconsider.

Contrary to what PWL has said, it's clear from the investigator's view that she did consider causation, even if she later added to what she'd said. I agree with the reasons she gave as to why Mr M likely would've reconsidered. He was an inexperienced investor with a relatively low attitude to risk and the DB pension was his entire pension provision, aside from his entitlement to a state pension. Mr M instructed PWL to provide advice and he relied on the advice given. It would be unusual for a client in Mr M's circumstances to be confident enough to make his own financial decisions, especially where that involved going against professional advice. Mr M did have some plans and which entailed transferring. But I'm not convinced that, if PWL had cautioned him against transferring, he'd have ignored that and gone ahead anyway.

And I'm not sure if PWL would've been prepared to facilitate the transfer on an insistent client basis. If not, Mr M would've had to have found another adviser who would've been prepared to undertake the transfer and which might have been problematic. Especially if another adviser had recommended that Mr M didn't transfer.

PWL has pointed to Mr M's drawdowns and spending since he transferred. But PWL has to show that the advice to transfer was in Mr M's best interests at the time – COBS 19.6.1G (3) says it's for a firm to demonstrate, on contemporaneous evidence – that the transfer is suitable. The fact that the transfer went ahead meant Mr M was in a position to access his pension fund and he's done that and spent money as set out above

As I'm in agreement with the investigator and largely for the reasons she gave I don't think it's necessary for me to issue a provisional decision. I agree with the redress she set out and which I've repeated below. It's my understanding that the withdrawals made by Mr M will be taken into account. I don't agree that property values are required or that any adjustment should be made to take into account the notional values of any holidays Mr M has taken.

Putting things right

A fair and reasonable outcome would be for Pension Works Limited to put Mr M, as far as possible, into the position he'd now been in but for the unsuitable advice. I consider he'd likely have remained in the DB scheme.

Pension Works Limited should 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.

For clarity, Mr M has not yet retired, and he has no plans to do so at present. So, compensation should be based on the DB scheme's normal retirement age of 65, as per the usual assumptions in the regulator'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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance.

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

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

Redress paid directly to Mr M 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, Pension Works Limited may make a notional deduction to allow for income tax that would otherwise have been paid.

Mr M's likely income tax rate in retirement is presumed to be 20%. However, if Mr M would've 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

I uphold the complaint. Pension Works Limited must redress Mr M as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 February 2024.

Lesley Stead
Ombudsman