DRN-4355942

The complaint

Mr C's complaint is about the advice he was given by WPS ADVISORY Ltd to transfer his defined benefit occupational pension scheme to a SIPP (Self-Invested Personal Pension). Mr C complains the advice to transfer was unsuitable, wasn't in his best interests and has caused him a financial loss.

What happened

I issued a provisional decision on this complaint on 21 August 2023. The background and circumstances to the complaint and the reasons why I wasn't minded to make an award to Mr C were set out in that decision. I've copied the relevant parts of it below and it forms part of this final decision.

Provisional Decision

Mr C's complaint was considered by one of our investigators. She sent her assessment of the complaint to both parties on 11 April 2022. The background and circumstances to the complaint were set out in her assessment. However to recap, in November 2019 Mr C spoke to WPS ADVISORY Ltd (which I will refer to as WPS) about transferring his pension. He was interested in accessing his pension because he wanted to go into retirement debt-free.

WPS completed a fact find analysis to establish Mr C's circumstances and financial objectives. Following an assessment of Mr C's attitude to risk and discussions with the adviser it was agreed his risk appetite was cautious.

WPS sent Mr C a suitability report dated 20 January 2020. WPS recommended Mr C transfer his defined benefits to a SIPP and invest using a discretionary fund management service.

WPS noted Mr C had the following objectives, which formed the basis of its reasons for recommending the transfer:

- *He wanted to clear his outstanding mortgage of £58,000, towards which he was paying £1,500 a month. Mr C had already accessed around £35,000 of tax-free cash from another pension to pay off some of his mortgage.*
- *He also wanted to pay off his credit card debt, which came to £27,000 in total, and towards which he was making £150 monthly payments.*
- *Mr C wanted to take a flexible income in retirement and to have more flexible and higher death benefits.*

Mr C agreed to the transfer. Shortly after a sum of approximately £189,000 was transferred to the SIPP.

Mr C complained to WPS about the advice he'd been given through a representative in July 2022. WPS didn't uphold his complaint, and it was referred to us.

Our investigator thought that the complaint should be upheld. She said, in summary, that the *benefits Mr C had accrued in the defined benefit scheme offered a guaranteed income for life and formed a significant part of his total pension provision. She said at the time of the advice Mr C had other pensions which she understood were defined contribution schemes, which had a combined total value of around £346,000.*

The investigator referred to the Financial Conduct Authority's Conduct of Business Sourcebook (COBS) and Rule 19.1.6 which provided:

"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."

The investigator said the transfer value comparator figure was £262,066. This compared to the transfer value provided of £188,942. She said Mr C needed to achieve significant additional growth on the transfer value to match the same level of benefits if intending to draw benefits at the scheme's normal retirement age.

The investigator said the investment return (critical yield) required to match the defined benefit scheme at retirement at age 65 was around 6.5% per year, on the basis that Mr C took tax-free cash at that age. The relevant discount rate (which she thought provided a useful indication of what growth rates would have been considered reasonably achievable for a typical investor at the time) closest to when the advice was given published by the Financial Ombudsman Service for the period before 1 October 2017 was 2.7% per year. She said that for further comparison the regulator's upper projection rate at the time was 8%, the middle projection 5%, and the lower projection rate 2% per year.

The investigator said as well as Mr C's attitude to risk, it was also important to consider capacity for loss. She noted Mr C had other defined contribution pension funds valued at about £346,000, and she thought Mr C therefore had capacity to absorb potential investment losses on this transfer.

The investigator said she'd thought Mr C was likely to receive benefits of a substantially lower overall value than the defined benefits scheme at retirement as a result of investing in line with his low attitude to risk and given all the circumstances. So on this basis alone she didn't think transferring appeared to have been in Mr C's best interests; Mr C was unlikely to improve on the benefits he was entitled to from the defined benefits scheme. She said whilst Mr C had a considerable capacity for loss, his other pension provision wasn't guaranteed.

The investigator went on to consider whether there were other good reasons for transferring. She noted Mr C wanted to take benefits early and use tax-free cash to pay off his mortgage and credit card debt. Mr C had already accessed the tax-free cash from one of his other pensions to pay off some of his mortgage. And at the time of the advice Mr C still had around £58,000 outstanding on it.

The investigator said if Mr C had taken tax-free cash from the defined benefits scheme he would have been entitled to a lump sum of £27,470 and a reduced pension of £4,120 a year. If Mr C transferred to a personal pension he would be entitled to a lump sum of around £47,000 immediately.

The investigator said the Suitability Report recorded Mr C wanted a monthly income of £1,500 in retirement. And at the time of the advice Mr C was paying £1,200 towards his mortgage each month. Mr C had retired, so the mortgage payments formed a significant part *of his monthly outgoings. She noted Mr C's representative had said Mr C had previously re-mortgaged and he wasn't at risk of defaulting. The investigator noted Mr C had two uncrystallised pensions with a combined value of around £256,000. The investigator said she hadn't seen evidence that other options had been discussed with Mr C, such as re-mortgaging again, taking tax-free cash from the defined benefits scheme to reduce the debt while preserving the valuable guaranteed benefits, or using the other pensions to manage his debts.*

The investigator said that overall she wasn't persuaded that transferring the pension in order to get a higher tax-free sum was suitable for Mr C, as this meant he lost his only source of guaranteed income. She said she thought if clearing the mortgage was of utmost importance to Mr C he could have done this using his other pension funds.

The investigator went onto consider the significance of death benefits to the advice to transfer. She acknowledged that the lump sum death benefits on offer from the personal pension were likely an attractive feature for Mr C. However she said the pension was primarily intended to provide an income throughout retirement, rather than act as a type of life plan. She didn't think the adviser did enough to explore to what extent Mr C was willing to accept a lower retirement income in exchange for death benefits paid as a lump sum. She said it was also important to note that the level of death benefits available depended on how much remained in the pension when Mr C passed away. The investigator didn't think the different way death benefits would be available from the personal pension justified the likely lower benefits Mr C would be receiving during retirement.

To sum up, the investigator didn't think the advice to transfer was suitable. She said Mr C already had other pension arrangements which could have been used to meet his objectives, rather than losing the valuable guaranteed benefits the defined benefit scheme provided. The investigator said WPS had failed to demonstrate there was a compelling need that meant transferring was in Mr C's best interests and to justify giving up the guaranteed, risk-free benefits.

WPS didn't agree with the investigator's findings. It provided further evidence and arguments that I considered in making my decision below.

What I've provisionally 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.

WPS has provided some more recent information which I think changes Mr C's financial position from that understood by the investigator. I've therefore issued a provisional decision to give the parties an opportunity to provide further evidence and arguments.

WPS has said Mr C's initial complaint, made through a representative, was an allegation of negligence and contained a number of false statements. It said, in summary, that the complaint wasn't properly defined and that it wasn't possible for it to understand what was negligent about the advice. It said the investigator had decided for herself what the complaint was about.
The Ombudsman Scheme is intended to deal with complaints in an informal manner. We have an inquisitorial remit and complainants don't have to precisely define their complaint as they'd need to do in bringing legal action in court; we are able to look more widely at the correspondence to determine the scope of the complaint made. This is consistent with the court's findings in Full Circle Asset Management Ltd V Financial Ombudsman Service Ltd and others (2017).

I've considered the complaint letter dated 19 July 2022. It said, amongst other things, that Mr C had been advised to transfer his defined benefits pension to a SIPP, claimed that the advice was negligent and that Mr C had lost out financially as a result.

It made a number of points about Mr C's circumstances and said they "demonstrate how unsuitable [Mr C] is for a SIPP and how negligent the advice received was, as he has no knowledge of investments meaning he would not be able to make the best financial choices for his retirement fund nor did he have the capital to cover any losses." The letter went on to outline what it considered were the various failing in the advice and advice process. And the COBS rules it considered had been breached, including COBS 9.2.1R – it said "It is clear that the advice provided and pension investment to which Mr C was transferred was not suitable as he would have benefitted more from leaving his pension with his previous provider."

I accept that some of what was said was inaccurate. However I think it was clear that, at heart, the complaint was about the suitability of the advice given to transfer. I'm not persuaded that the complaint is frivolous or vexation and should be dismissed.

If WPS wasn't sure about the nature of the complaint it should have been alerted to it when it received the investigator's assessment dated 11 April 2022. WPS then had the opportunity to present its side of the story and respond to the investigator's findings. Both parties are told the findings of our initial investigation and given the opportunity to provide any further evidence or arguments. I'm satisfied WPS has had ample opportunity to provide its side of the story, and I've considered all the evidence and arguments it's presented in making this decision.

The investigator understood that Mr C had an outstanding mortgage of £58,000. And credit card debts of £27,000. She said he had other pension provision – apart from the OPS that was being transferred, of £346,000. And this included two uncrystallised pensions worth in total £256,000 (which was taken from the suitability letter dated 20 January 2020). So she thought Mr C was able to take tax-free cash from these two schemes of around £64,000 and with the tax-free cash available from the defined benefits scheme pay off all the mortgage and credit card debt.

However, my understanding is that Mr C had already taken the tax-free cash from one of these pensions (£35,000) to reduce the mortgage debt down from £90,000 to £58,000. So he only had one other pension to take tax free cash from (so had around £32,000 available rather than £64,000) – plus the tax-free cash that he could have taken direct from the OPS (about £27,000) at the time. In total he therefore had access to about £59,000 tax-free cash if he took benefits from the OPS. The total credit card and mortgage debt was about £85,000.

So Mr C could have taken the tax-free cash of £27,000 from the defined benefit scheme and income of just over £4,000. And along with the tax-free cash available from the other personal pension of around £32,000, repay the credit card debts and part of the mortgage to leave about £26,000 debt. He'd then need to fund this out of income which would be subject to income tax.

Or alternatively, if Mr C transferred the defined benefits to secure the higher tax-free cash of £47,000 and also used the £32,000 from the other personal pension, he could largely pay off the mortgage and credit card debt. The remainder - about £6,000, would then be needed to be funded from income from his personal pensions again subject to income tax.

The key question here is whether a transfer was in Mr C's best interests. It's clear that the adviser had discussions with Mr C about risk, and it was ultimately agreed he wanted to take *a cautious approach to it.*

Given the figures in the pension transfer report, it was clear that it would cost significantly more than the transfer value offered to buy comparable benefits to those offered by the defined benefit scheme. The investigator referred to the figure of £262,000 relative to the transfer value offered of just under £189,000. However that was based on the assumption of Mr C taking all the benefits as an income and no tax-free cash. Assuming he took tax-free cash from the OPS, the comparative figure was £216,743. So still above the £189,000, but not as much.

Given his circumstances and objectives, Mr C was always likely to take tax-free cash to enable him to pay off at least a significant part of his debt, even if that was from the defined benefits scheme. I think that was reasonable in his circumstances and I think the £216,743 was the appropriate comparative figure.

As I've said, Mr C could have used one of his other personal pensions to provide tax-free cash of around £32,000 to pay off the credit card debt – which I think given the likely rate of interest on it would have been a priority – and reduce the mortgage debt. So I think the issue is whether it was reasonable to transfer to obtain the higher tax-free cash from the personal pension in order to pay off a significantly larger proportion of the mortgage debt.

The advantages and disadvantages of doing that will depend on the specific facts of the case. Here Mr C had retired and was relying on his pension income. Whatever he did - even if re-mortgaging – he needed to pay off that debt. As I've said above, Mr C could have taken the benefits from the defined benefits scheme and paid the remaining £26,000 from income - which would be subject to tax. Or if he transferred the higher tax-free cash would leave him with about £6,000 to pay off the mortgage – again from income subject to tax.

I think the contemporaneous evidence shows that Mr C took a lot of comfort from paying off that mortgage debt – or at least the majority of it. That in itself provided a degree of security, in particular from any increases in mortgage rates.

However the main disadvantage of transferring was that Mr C's benefits would likely be lower and subject to ongoing investment risk. And Mr C had said he was a cautious investor. Mr C had other pension provision and was drawing income from one of his other pensions. But apart from the benefits from the defined benefit scheme they were all subject to investment risk and so he already had significant exposure to risk.

Taking all the above into account, my view is that the advice to transfer in itself was reasonable. It provided a materially higher lump sum which enabled Mr C to pay off a significant proportion of his mortgage and debts. That was in line with his objective, and in my view it was a credible objective in the fact that it made financial sense in Mr C's particular circumstances.

However having said that, I recognise that it was highly unlikely that the benefits from the personal pension in drawdown and on an ongoing basis would match the level of benefits from the defined benefits scheme given the investment return on the transfer value was 6.5%. And Mr C had indicated he was a cautious investor.

Looking at the suitability letter from the time, it doesn't appear that there was any in depth analysis or explanation of what income Mr C could have bought using the residual transfer value after taking tax-free cash to buy an annuity. The SIPP illustration suggests he could have brought an annuity paying £5,703 per year. Whist this provided a spouse's pension, it didn't provide for any increases in payment and so wasn't comparable to the pension payable from the defined benefits scheme – that started at £4,100 per year. An annuity on a *comparable basis would have been below the £4,100 per year. The TVAS suggests a figure of £3,071, but that didn't necessarily reflect what was available on the open market at that time. It doesn't appear to me that this option was explored in any great detail.*

I accept that the adviser had discussions with Mr C about being risk averse or taking some risk. And that the yield required to match the annuity figure would have been lower. But I think looking at the overall picture, given Mr C's cautious attitude to risk and that all Mr C's other pension was exposed to investment risk, I think that a blended approach of some guaranteed pension (through the purchase of an annuity) and the remainder exposed to investment risk was the suitable recommendation in the particular circumstances. Mr C could have reduced the withdrawals he was taking from his other personal pension to offset the guaranteed income. So this option provided some guarantees, spouse's benefits, the ability for Mr C to pay off the majority of his debts and I think was more closely aligned to his attitude to risk.

However, having said all that, I think this is a moot point. We asked Mr C's SIPP provider for its current value – which is just over £135,000. Annuity rates have increased significantly since late 2019 early 2020. A fund of £100,000 could currently buy Mr C an annuity of about £6,800 (the same type of annuity as the £5,703). So significantly higher. Mr C could buy a higher annuity that also provided for increases in payment compared to what he would have been able to buy on that basis in January 2020. And taking into account the past annuity payments Mr C would have received if it had bought an annuity around January 2020, he is still currently in a better position financially.

In fact, it might be that Mr C is currently in a better position than he would have been had he taken the defined benefits i.e. he can buy a comparable annuity, and taking past payments into account. However, I say this for information purposes only, as I don't have exact figures. As I've said, I think the transfer away from the defined benefits scheme in itself was suitable in any event, so this isn't material to my decision.

Overall therefore, I'm not persuaded it would be appropriate to make an award to Mr C because he's able to buy an annuity that puts him into a better position than if he'd taken maximum tax-free cash and bought an annuity at the time of the transfer. That position may change in the future and its currently a choice for Mr C to make - whether he wants to swap his flexible benefits and buy the guaranteed but less flexible benefits offered by an annuity. But in the circumstances, I don't think it's appropriate to award Mr C compensation.

My provisional decision

Accordingly, my provisional decision is that I don't make an award to Mr C.

I asked Mr C's representative and WPS to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Mr C's representatives didn't provide any further evidence or arguments.

WPS said it was unclear about the part of the provisional decision where I'd said *'I recognise that it was highly unlikely that the benefits from the personal pension in drawdown and on an ongoing basis would match the level of benefits from the defined benefits scheme given the investment return on the transfer value was 6.5%. And Mr C had indicated he was a cautious investor.'*

It said this appeared to reference use of drawdown going forwards but quoted a critical yield of 6.5%pa. It said this was the yield required if an annuity was purchased at Normal Retirement Date. The generic TVAS document showed the growth required to match scheme benefits using drawdown and which was minimal.

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.

Having done so, I've seen no reason to depart from the findings in my provisional decision not to make an award to Mr C.

The firm is correct in pointing out that the critical yield is that required to purchase an annuity. So it provides an indication of the yield required on the transfer value to provide equivalent benefits of equal value at that time. I think WPS are referring to the cashflow analysis in the TVAS. But these growth figures aren't comparable as they aren't on a like for like basis. Even taking these lower figures into account, I think looking at the overall picture, given Mr C's cautious attitude to risk and that all of Mr C's other pension was exposed to investment risk, a blended approach of some guaranteed pension (through the purchase of an annuity) and the remainder exposed to investment risk was the suitable recommendation in the particular circumstances. But in any event, I'm satisfied this isn't material to the outcome of my decision not to make an award to Mr C.

My final decision

Accordingly, my final decision is that I don't make an award to Mr C.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 20 October 2023.

David Ashley
Ombudsman