

The complaint

Mr A's representative has complained that, with the assistance of AFH Independent Financial Services Limited (AFH), Mr A unsuitably transferred his defined benefits from his occupational pension scheme (OPS) to a self invested personal pension (SIPP).

The representative has said that, although AFH categorised Mr A as an insistent client who was acting against its advice to not transfer, this was a flawed process and an inaccurate representation of the situation.

What happened

Mr A was a deferred member of a defined benefit OPS and had contributed to it for over 23 years. Prior to seeking advice from AFH, Mr A contacted the scheme administrator to obtain updated plan information. At this point, he was given a cash equivalent transfer value (CETV) of £1,287,394, which was guaranteed until 30 April 2017.

In February 2017, Mr A contacted AFH to look into potentially transferring his defined benefits.

A fact find was completed on 10 February 2017, and it established that Mr A's circumstances were as follows:

- Mr A was 45, married with no financial dependants. He was looking to retire at age 55.
- No health conditions were noted.
- He was employed, earning £143,000 pa.
- His monthly income was recorded as £5,100 pm and outgoings as £3,847 pm.
- He had £15,000 in a joint bank account and £5,000 from a "save as you earn" scheme, but no other investments.
- Mr A and his wife owned their property, which was valued at £430,000, with a remaining mortgage of £230,000 at the time.
- Mr A had no other debts listed.
- His attitude to risk (ATR) was listed as "adventurous" ("4 out of 5" on AFH's scale).
- His capacity for loss wasn't specifically recorded, but AFH noted large differences in income versus expenditure, large cash reserves and around nine "earning years" available before retirement.
- He was recorded as having substantial financial knowledge and experience regarding investing, risk and financial products.
- According to the fact find, Mr A's objectives were to use the Pension Commencement Lump Sum (PCLS) to repay his mortgage, invest the rest of the funds into a SIPP and draw down as and when needed when he retired at age 55.

A suitability report was generated on 16 March 2017. AFH explained that Mr A had three options and listed the advantages and disadvantages of each as follows:

- Retire using the scheme benefits.
- Transfer to a personal scheme.
- Delay the decision.

AFH recommended that Mr A delay his decision to a later date. It said there was no compelling reason for Mr A to transfer away at that time and there was no telling how things would look closer to his chosen retirement date.

Mr A received this report on 27 March 2017 and a meeting was arranged to discuss the points in the report for the following day. On 28 March 2017, Mr A sent an email to AFH explaining that he understood the report, but wanted to proceed with the transfer.

As a transfer was mooted as potentially going ahead against its advice, AFH informed Mr A that the charging structure would change from what had been discussed previously. Mr A would now be charged a 2% (£25,747) facilitation fee (previously discussed as being 1%) and ongoing advice was still 1% (£12,616) of the fund value being transferred.

On 11 April 2017, AFH wrote to Mr A again, emphasizing its position that Mr A should delay making a decision on his pension, and asking him to provide his compelling reasons why he wished the transfer to take place. The email also said that if Mr A wanted to proceed with the transfer, he'd need to sign an indemnity against future claims against AFH. Mr A responded on the same day with his reasons, again confirming he understood the risks associated with the transfer.

Mr A then provided a handwritten letter dated 13 April 2017 explaining that he wanted to proceed with the transfer. In the same letter he indemnified AFH from any future losses as a result of going ahead with the transfer.

He signed an updated agreement on 13 April 2017 confirming the new charging structure. AFH then began the process to facilitate the transfer of his pension to a SIPP, after Mr A provided the letter and agreed to the charges.

AFH had recommended that the funds be transferred to a SIPP. The plan was set up on 28 April 2017 and £1,287,394 was transferred on the same day. A second suitability report was generated on 4 May 2017, again highlighting that AFH didn't recommend a transfer but that, as Mr A insisted it proceed, these were the options it recommended. This was issued on 23 May 2017, after the transfer, but the information in the May 2017 suitability report had been discussed in previous communication between 28 March 2017 and 13 April 2017.

In October 2020, Mr A moved the majority of his pension (£1,298,546) to a new provider, as he wasn't happy with the performance up to that point.

Mr A raised a complaint against AFH on 5 May 2023 through his representative, saying that the transfer had been unsuitable, and that he'd lost out on guaranteed and index linked increased benefits for life as a result.

AFH responded to his complaint on 27 July 2023. It maintained that the advice was suitable based on Mr A's circumstances and objectives at the time, and that he was considered to be an insistent client due to its recommendation to not transfer.

Dissatisfied with the response, however, Mr A referred the matter to this service.

Having considered the complaint, our investigator thought that it shouldn't be upheld. He said the following in summary:

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests.
- The suitability report AFH sent to Mr A recommended that he not transfer his defined benefits. It provided risk warnings and explained that Mr A could achieve his objectives by remaining in the scheme and taking pension benefits at age 55.
- At the time, the defined benefits represented a large part of Mr A's retirement provisions and so the security of them would have been important. There needed to be a significant chance of improving on these benefits to demonstrate that a transfer was in Mr A's best interests.
- According to the transfer value analysis, the critical yield to match the scheme benefits at age 60 was 6.5% and at age 55, it was 7%. The discount rate to the normal retirement age was 4.1%, and to age 55 this was 3.5%. AFH said that it felt it unlikely that the critical yield could be achieved, and the investigator was satisfied that this was clearly set out in the suitability report.
- AFH also highlighted that it would cost Mr A £394,024 more to buy an annuity at age 55 which would buy the same benefits as would be provided by the scheme.
- AFH also set out the potential lifetime allowance (LTA) charge which Mr A could face if he transferred – of around £200,000.
- There didn't seem to be any reasonable justifications for recommending the transfer. But AFH had acted fairly and in accordance with the regulatory rules and requirements when providing its advice. It gathered the necessary information and rightly concluded that a transfer wasn't suitable for Mr A.
- AFH only agreed to assist Mr A with the transfer once he'd asked to be treated as an insistent client. And it did enough to ensure that Mr A understood that the transfer wasn't in his best interests, and that he understood the potential consequences of proceeding with the transfer.
- In terms of whether Mr A could reasonably have been categorised by AFH as an insistent client, the investigator said that he'd considered the available evidence from the time – and whether this was consistent with Mr A's comments that he was coached on what to say to circumvent the regulatory rules and requirements.
- To be defined as an insistent client, Mr A:
 - Needed to have received a personal recommendation from AFH
 - Would need to want to enter into a transaction which was different from that recommended by AFH.
 - Would want AFH to facilitate that transaction.
- These were conditions which could reasonably be applied to Mr A. He'd received a personal recommendation from AFH which had been quite specific in saying the following:

"In reality it is impossible to say at this time without hindsight, whether retain the scheme pension or transferring is the best decision. Therefore delaying a decision is

in our opinion the correct course of action, giving the opportunity for more certainty around the outcome.”

- AFH had therefore been clear as to its recommendation within the initial suitability report. But Mr A nevertheless said that he wished to proceed, as evidenced by his email of 28 March 2017, which said the following:

“In terms of the report and the recommendations, I do get the outcome but want to strongly emphasise that I want to progress.....for me just to recap I want to go SIPP route and not delay as your report suggests. I understand fully all the risks etc involved but I also understand the advantages of moving to a SIPP now and for me and my personal circumstances this outweighs the benefit of delaying the decision.”

- AFH reiterated its position that the transfer wouldn't be in Mr A's best interests, as follows:

“We are not suggesting that a transfer is not ever a good outcome. We simply believe that taking on investment risk now and in so doing, giving up the right to the scheme pension and the partner's pension, with the guaranteed escalation that goes along with it, on balance does not meet your stated needs and objectives...”

If you are still considering a transfer against our advice then I would ask you to confirm your understanding of the risks raised and your agreement to sign an indemnity against any future claims.”

- But Mr A was determined to transfer, saying the following in response:

“I do not wish to defer, I fully understand the risks as mentioned several times in this note and previous ones, I am happy to sign an indemnity against any future claims. I would also like this if possible, to be actioned ASAP as to be within the 3 month period of the [scheme name] letter which I believe expires towards the end of April...”

Your note both today and the previous in-depth reports that I have read and digested fully recommending me to defer has certainly given me thought to consider and has been very thought provoking, however I am still in the space of wanting to proceed immediately.”

- As Mr A had received a recommendation to not transfer, but wanted AFH to facilitate something different, he satisfied the definition of an insistent client. And the available evidence didn't support the position that Mr A had been coached to write what he did.
- In order to proceed in line with the above definition, AFH had to communicate with Mr A:
 - In terms that were clear and not misleading.
 - To demonstrate it hadn't recommended the transaction and that it wasn't in agreement with the recommendation.
 - The reasons why it had disagreed with the recommendation.
 - The risks of Mr A's proposed actions.
 - The reasons why it didn't recommend the transaction.
- On balance, AFH did meet these requirements, especially with its follow up comments to Mr A. As such, it did follow the correct course of action in dealing with Mr A as an insistent client.

- AFH also set out the appropriate risk warnings which were relevant to Mr A's situation, but also explained the issues relating to the critical yields, the security of the defined benefit scheme which Mr A would be relinquishing, along with the possible advantages of the death benefits in retirement from the OPS. These were couched as being reasons as to why a transfer might not be in Mr A's best interests.
- Overall, Mr A met the regulator's definition of an insistent client, and AFH treated him fairly in that regard, following the proper steps. AFH also clearly set out its rationale as to why it disagreed with Mr A's decision to proceed.
- It was also important to note that, at the time of the advice, it was established that Mr A would need around £35,000 pa from his pension arrangements at age 55, and that at low levels of performance this would last into his late 80s. Mr A had, however, told the investigator that he envisaged needing £50,000 pa from age 55, which would mean that his pension would only last into his early 70s with the same projected level of fund growth.
- It would have been impossible for AFH to know how Mr A's income needs might change over the years, but this served to underline the suitability of the recommendation to take no action at the time of the advice and wait.

Mr A's representative disagreed, however, saying the following in summary:

- In the initial meeting between Mr A and AFH, the adviser said that the recommendation would probably be to defer or decline, but that there were ways around this.
- After the advice to not transfer was given, a further meeting was held and the adviser dictated what Mr A should write on the insistent client documentation the investigator had seen – and which didn't seem to be in the words of a layperson.
- Mr A was coached and pushed down the route of an insistent client. The adviser needed to act in Mr A's best interests, but the action here fell far below those expected and required. Given that the insistent client letter was one which was given to Mr A to write and sign, it couldn't be correct to say that Mr A was truly an insistent client and that the guidance from the FCA from February 2016 had been followed.
- If Mr A truly wished to proceed as an insistent client after the report recommending against the transfer, matters should have been clearly explained to him in layman's terms.
- Mr A had told AFH that he had no investment experience, other than a company share scheme. The fact that the critical yield was, in the words of the adviser, "challenging", indicated that significant risk would need to be taken with the portfolio to improve on the scheme benefits. These weren't risks which Mr A wished to take and would require an investment strategy unsuited to him.
- This should have been clearly explained to Mr A, and the fact that it wasn't referenced in the insistent client letter made it clear that this wasn't on Mr A's mind. The adviser should have made it clear to Mr A that the transfer route would have meant that he'd need to make decisions outside of his comfort zone and risk profile.

- The approach taken here meant that Mr A was effectively insisting on doing something that he'd expressed he didn't wish to do. This was nonsensical and shouldn't have been allowed.
- To categorise Mr A as an insistent client on the basis that he still wished to proceed without clearly recording his own understanding and acceptance of the risks involved was flawed.

As agreement couldn't be reached on the matter, it's been referred to me for review.

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.

And having done so, I've reached similar conclusions to those set out by the investigator, and for broadly the same reasons.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The applicable guidance, rules, regulations and requirements

This isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business to *“act honestly, fairly and professionally in accordance with the best interests of its client”*.

The FCA's suitability rules and guidance that applied at the time AFH advised Mr A were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like AFH, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, AFH needed to gather the necessary information for it to be confident that its advice met Mr A's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a “fact find” process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

“A firm must:

- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises*

- a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*
- (2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
 - (3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*
 - (4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading "Suitability", COBS 19.1.6 set out the following:

"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."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

- (1) a summary of the advantages and disadvantages of its personal recommendation;*
- (2) an analysis of the financial implications (if the recommendation is to opt-out); and*
- (3) a summary of any other material information."*

I've therefore considered the suitability of AFH's advice to Mr A in the context of the above requirements and guidance.

In accordance with COBS 9.2.2R, fact finding was undertaken for Mr A and his circumstances and objectives were recorded – as noted above.

As with the investigator, I've noted above that the FCA's guidance was that the starting assumption for an assessment of Mr A's options was that a transfer would be unsuitable, unless it could clearly be demonstrated that it was in his best interests in order to meet specific objectives.

And so I'll therefore explore these objectives further below. But initially, I'll consider the advice from a purely financial perspective – so, in broad terms, how likely was it that Mr A would be better off financially as a result of the transfer.

The financial viability of the transfer

AFH obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr A's objectives from a financial perspective.

The suitability report was issued before the FCA's revised guidance which was released in late October 2017, and which provided "discount rates" for levels of growth which were deemed achievable for particular time periods until prospective retirement. But before that, similar rates were published by this service. Businesses weren't required to reference these when providing advice on transfers, but they would nevertheless have been a useful indicator of the type of investment return deemed feasible at the time.

The discount rate deemed achievable for the number of years left to age of 60 was 4.1% pa. And that to age 55 was 3.5%.

The critical yields to age 60, at 6.5%, and then 7% to age 55 therefore comfortably exceeded the discount (or growth) rate deemed achievable over the same periods. And these growth rates were required to just match the scheme benefits.

From a financial perspective, there needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, the guidance was that it needed to be clearly demonstrated that the transfer would be in Mr A's best interests. As such, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Mr A would be relinquishing.

But AFH acknowledged this in its suitability report. It said it considered the critical yields to likely be challenging, and I agree - I think it's more likely than not that the critical yields were in fact unachievable, year on year, for the number of years that Mr A had until he reached either early or normal retirement age.

The recommendation

The suitability report of March 2017 also considered Mr A's objectives beyond the prospect of improving upon the income which could be produced by the scheme. But having done so, and also taking into account Mr A's options as set out above – to retain the scheme benefits, to transfer, or to delay making a decision – AFH recommended that Mr A delay making his decision to transfer.

AFH clearly set out the advantages and disadvantages of each option, and I think this was a reasonable and balanced assessment. It also took into account Mr A's key objectives of repaying his mortgage and retiring at age 55 with sufficient income, and whilst noting that the reduced pension at age 55 from the scheme would be lower than the income Mr A envisaged needing, AFH said that this could be met through additional assets which it thought could be accrued by that time. So I think it ought to have been reasonably apparent to Mr A that his needs could likely be met by retaining his scheme benefits.

I think the suitability assessment was, overall, a balanced and fair appraisal of Mr A's situation and his options – and I also think that these were set out clearly and without misrepresentation of the facts.

Broadly, I think AFH's recommendation that Mr A wait until closer to retirement to provide more certainty as to the outcome of a transfer was suitable. This would enable him to reassess his situation and, as set out by AFH, see how much in terms of other assets he'd accumulated, along with the effects of any high impact events such as illness or changes in employment. I don't think that transferring at the time of the advice would have been in Mr A's best interests. And I'm satisfied that both of the suitability reports reflected this and that they contained enough detail for Mr A to be able to make an informed decision.

The insistent client categorisation

Until January 2018, there weren't specific regulations relating to insistent clients, but the regulator had issued guidance prior to this, which AFH ought have followed.

The FCA issued guidance entitled "*Pension reforms and insistent clients*" in February 2016, which set out three key steps a business needed to take when advising an insistent client.

In order to demonstrate that Mr A was an insistent client who was acting against advice, AFH needed to demonstrate that it had: provided a clear personal recommendation to Mr A that was suitable; clearly explain the risks of Mr A's chosen course of action; and communicate with him in a way which left Mr A in no doubt that the transaction was against its advice.

Having reviewed the overall communication between AFH and Mr A, which wasn't restricted to the suitability reports, I'm satisfied that it met these requirements.

Mr A's representative has referred to "the insistent client letter". But there was much more to the communication between Mr A and AFH regarding the transfer than one letter.

There were several emails between Mr A and AFH, in which I think it's fair to say that Mr A quite clearly set out his own understanding and acceptance of the risks involved, and which involved challenge of this by AFH. I won't document every aspect of the email correspondence in which Mr A set out in quite comprehensive terms his rationale for wanting to transfer, despite AFH's advice not to. But suffice to say this included unequivocal confirmation that this was a fully informed decision that he was making, with a considerable degree of reasoning around this relating to his personal circumstances and objectives.

AFH challenged Mr A's reasons for wanting to transfer, which included point by point requests for more information in specific areas such as early retirement, protection for Mrs A in the event of his death, and the potential breach of the LTA.

AFH set out its position that it seemed Mr A wished to transfer on the basis that he believed the CETV was as high as it could be, which it said may be true, but that the guarantees provided by the scheme were more valuable than the inflated CETV.

In response, Mr A confirmed his understanding of issues relating to the death benefits which would be provided by the scheme and the proceeds of the transfer, along with those relating to a possible breach of the LTA – in his words, "*the point I am making is that I get the tax charge and understand the risks*".

Mr A also said the following:

"I fully take on board your points around advice/future risks/proceeding against your advice on a facilitated basis. I have had plenty of time to consider this, I have not only had the last 8 weeks to strongly consider, I have actually been thinking about this for over a year now. I am happy to pay the 2% initial fee that you state. I do not wish to defer, I fully understand the risks as mentioned several times in this note and previous ones. I am happy to sign an indemnity against future claims."

Mr A then set out a six point summary as to why he wished to transfer, and said that he'd fully digested the suitability report recommending that he defer any decision making on the transfer, but that he was "*still in the space of wanting to proceed immediately*".

This is much more than might usually be seen in what Mr A's representative has said (in the

regulator's words) would be a typical "papering exercise". And I'm satisfied that the reasons for recommending against the transfer were set out in clear and understandable terms in both the suitability report and the subsequent communication between Mr A and AFH.

I also don't think that the way in which Mr A set out his rationale for wanting to transfer is indicative of it being dictated to him by AFH. Mr A included much personal information and detail specific to his and his family's circumstances, and my general impression is that these were his own words. Mr A even challenged the fee which was being charged to facilitate the transfer on the basis of the insistent client categorisation, which I think would be quite an unusual and surprising inclusion for insistent client documentation which had been dictated by the advising firm.

As Mr A himself confirmed at various points during the advice process, he wasn't a layman in financial matters (and I address his employment history further below), and so it isn't particularly surprising that he was able to articulate his thoughts on this coherently. I don't therefore think, on balance, that it's more likely than not that he was coached into writing what he did.

But even if I'm to accept that the degree of back and forth which occurred here was contrived for the sake of it appearing to have been Mr A's insistence upon transferring, and that he was, in the words of his representative, coached to do so, the degree and sophistication of such a process would clearly have required Mr A to be an active participant, beyond simply signing a letter which had been prepared for him by AFH.

And I just don't think it's credible that Mr A would have participated in this without reasonably wondering as to why that much artifice was required and therefore without also giving serious thought to the overall unsuitability of the transfer.

Mr A was a clearly an intelligent individual who held a senior post with his employer – and, whilst not involved in pension matters, he was nevertheless employed in financial services.

I've also noted that, in an email exchange between Mr A and AFH in February 2017 relating to his financial experience, Mr A also said that he had the full Financial Planning Certificate (FPC) and had been a financial adviser with his previous employer for seven years. Mr A said that he hoped this information would provide AFH with reassurance that he understood the risk factors involved. And notwithstanding the "adventurous" risk rating attributed to him, I think this would have meant that, in line with the "challenging" critical yields, he also understood the level of risk which would need to be taken to match the overall value of the scheme benefits.

I think that Mr A would therefore have been capable of the kind of inquisitiveness around the process here which, if indeed conceived in order to circumvent regulatory requirements, ought reasonably to have given him pause for thought as to what was being proposed.

Put simply, and notwithstanding all of the reasons set out in the suitability report (and beyond this in other communication) as to why the transfer was indeed unsuitable, which I think Mr A would have well understood, if this level of deception was required to demonstrate that Mr A was indeed an insistent client, when this wasn't really the case, I think this ought to have emphasised to Mr A that something was very wrong with what was happening.

And if Mr A was nevertheless prepared to transfer despite this, I think this is indicative of his keenness to transfer, and it's more likely than not that, if AFH hadn't facilitated the transfer, then he would have sought the assistance of a different firm of advisers – in other words, even if it's an arguable position that, on the basis of the unsuitability of the proposal, AFH should have declined to transact the business at all – and I've noted the comment of Mr A's

representative's that the transfer shouldn't "have been allowed" - then I think it's more likely than not that Mr A would in any case have transferred through other means.

Summary

Overall, therefore, for the reasons given above, my view is that AFH suitably advised Mr A to defer making any decision on transferring until a later point, but that Mr A declined to do so and insisted upon transferring against that advice. And my further view is that, on a fair and reasonable assessment of the evidence and facts of the case, Mr A was accurately categorised as an insistent client who understood, or ought reasonably to have understood, the risks of proceeding against AFH's advice.

My final decision

For the reasons given, my final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 5 February 2024.

Philip Miller
Ombudsman