DRN-4198905

The complaint

Mr R complains that Blueberry Wealth Limited (Blueberry) treated him unfairly when it transferred his Personal Pension Plan (PPP) to a different provider without speaking to him. He further complains that Blueberry Wealth Limited instructed the new PPP provider to switch his investments into cash without his authority.

In this complaint Mr R is represented by a third party, Mr A, who's previous employment meant he had some involvement in the events which led to this complaint.

What happened

Mr R had a PPP and wanted advice on how to access its benefits. He knew Mr A, and Mr A introduced Mr R to a pensions adviser at Blueberry.

On 14 September 2021 information about Mr R's personal and financial circumstances was recorded by Blueberry. It was noted by Blueberry that Mr R said he was concerned about his life expectancy and wanted to draw all his money from his pension. It was also noted that this would be against Blueberry's advice and he may be an insistent client.

Letters of authority for Blueberry to obtain information from Mr R's pension providers were signed by Mr R on 15 September 2021.

Details of Mr R's personal and financial circumstances, including the values of his two pensions, were formally documented by Blueberry on 23 September 2021. This showed, in summary:

- He was 59 years old and married, with three non-dependent children.
- He was in full-time employment.
- He owned his own home outright.
- He had a PPP worth £71,115 and a NEST occupational pension with a transfer value of £4,616.57.
- He anticipated retiring at age 67.

His specific goals were described as:

- *"Access pension flexibly to take maximum tax-free cash and a regular income at a level that can be altered at any time. [Mr R] wants to access his pot with no restrictions and does not require regular advice.*
- *Continue investing for the medium to long term in funds suitable to attitude to risk. [Mr R] believes to be a medium risk taker."*

On 11 October 2021 a formal suitability report was produced by Blueberry. This summarised:

- Mr R wished to take the maximum level of tax-free cash immediately from his pensions, and then to commence drawing an income of approximately £5,000 gross per year. This flexible drawdown arrangement was not possible with his current PPP provider.

- this course of action was against Blueberry's advice, and it was proceeding on an insistent client basis.
- Mr R's risk profile (ATR) was 5 – Low Medium Risk

In order for Mr R to achieve his objective, Blueberry recommended he transfer the full value of his PPP to a new provider, and to retain his NEST occupational pension and continue making his regular employee contributions into this. This would provide Mr R with £17,778.75 tax-free cash (based on the valuation at that time) and the ability to draw a flexible level of additional income as and when he wished, without the need for further advice.

This recommendation document was given to Mr R by Mr A. Along with this, Mr A gave Mr R the risk planner document and a client service agreement. All of these were signed by Mr R on 13 October 2021. Also on this date Mr R signed an insistent client declaration.

The application to transfer the PPP to the new provider was completed electronically by Blueberry on 14 October 2021. The ceding scheme wrote to Mr R on 19 October 2021 to confirm the transfer, and letters were sent to Mr R from the new provider on 25 October 2021 and 29 October 2021 confirming his new pension account had been set up. Mr R had provided details of the bank account he wished the tax-free cash to be paid in to.

On 30 October 2022 Mr A, on Mr R's behalf, emailed Blueberry with a complaint about the pension transfer. He said:

"*Your firm have completed a pension transfer without ever speaking to me. You have never attended my old house, nor have I been to your offices, or even spoken to a qualified pension advisor [sic]. Please can you confirm how this is even possible? I will give you 8 weeks to reply."*

On 2 November 2022 the complaint was also raised with our Service.

As a result of contact from our Service, Blueberry wrote to Mr R on 24 November 2022 and explained it had not received his initial complaint. It asked him to clarify the nature of his complaint and provide evidence to support his position.

On 13 January 2023 Blueberry wrote to Mr R. It said it had concerns that given what it had been told by our Service, it thought that Mr R's ATR was at odds with the advice it had given him in October 2021. Therefore it felt it was imperative it took steps to remedy Mr R's current fund selection to mitigate any further risk until this could be clarified. In order to achieve this Blueberry said it would switch his fund to cash as an interim measure unless it was instructed not to by 18 January 2023.

Mr A emailed Blueberry on 17 January 2023 telling them to have no further direct contact with Mr R and that he was his representative. He said any attempt to transfer Mr R's funds would be reported to the police as fraud.

On 18 January 2023 Blueberry wrote to Mr R and informed him his pension had been moved into the provider's cash fund.

Mr A complained to our Service that Blueberry had been making numerous calls to Mr R and even visited him at his home in order to persuade him to drop his complaint.

Having considered all the evidence provided, our Investigator didn't think Mr R's complaint should be upheld. He thought that the evidence suggested that Blueberry had spoken to Mr R during the advice process, and that the transfer to the new provider was the only option Mr R had if he wished to access his pension funds. And although this was against its advice, Mr R signed the 'insistent client' form for the transfer to proceed. And our Investigator considered what he thought Mr R would have most likely done if, as Mr A insisted, Blueberry had never actually spoken to Mr R. And having thought about everything, he concluded that he thought it likely that Mr R would have proceeded with the transfer anyway, as this was the only way he could access the value of his pension in the way he wanted to. So he didn't think Mr R had suffered a loss as a result of the transfer to the new provider.

Our Investigator also considered Mr R's complaint that Blueberry had transferred his pension into the cash fund without his authority. Whilst acknowledging that this wasn't best practice, he thought it was done with the intention of protecting the value of Mr R's pension, and was only intended to be an interim measure until his ATR could be reconsidered.

But Mr A, on Mr R's behalf, didn't agree. He said Mr R had never been spoken to by a pensions adviser at Blueberry. He said Mr R was vulnerable and basically illiterate, and Mr A had completed the fact find document for Mr R without consulting him. He agreed that what was in the fact find was correct, but maintained this was proof that Blueberry had never spoken to Mr R. When our Investigator pointed out that Mr R had signed the various forms, Mr A said that he'd been away on holiday when Mr R had signed them, and he had done so without understanding what he'd signed.

Our Investigator reiterated that if there had been any procedural errors made by Blueberry, he thought they hadn't made any difference to the outcome, and Mr R would have gone ahead with the transfer anyway. Mr A said the fact he thought Blueberry had lied, and there had been procedural errors meant the complaint ought to be upheld.

As no agreement could be reached the matter has 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.

There are two elements to this complaint. Although they are linked they have occurred at different times, so I will consider them separately.

The transfer advice process.

The crux of Mr R's initial complaint is that the transfer of his PPP to a new provider was actioned by Blueberry without it ever speaking to him. And the result of the transfer is that his PPP has lost a significant amount of value. But I agree with the Investigator in that this complaint should not be upheld. I think the evidence that I have means, on the balance of probability, it is more likely than not that Mr R was spoken to by Blueberry as part of the advice process. And I think he would have likely transferred his pension to the new provider irrespective of any advice he was or wasn't given by Blueberry. I'll explain why I think this.

Mr A has agreed that Mr R wanted advice regarding his pensions in late 2021, and he referred Mr R to Blueberry. But the reasons given to our Service for Mr R needing this advice differ between what has been said by Mr A, and what has been said by Blueberry. Mr A has asserted that Mr R wanted advice as his pension fund was insufficient to cover his future lifestyle. Blueberry has said Mr R was intent on taking the benefits from his PPP in the form of tax-free cash, and having the ability to withdraw ad hoc amounts to supplement his income, and he wasn't able to do that in his current arrangement.

There is a clear difference of opinion here, so I need to decide, using all the evidence available to me, what I consider most likely to have happened on the balance of probabilities.

Blueberry was Mr R's paid financial adviser. Mr R sought professional advice from Blueberry in its role as a regulated financial adviser. As such Blueberry had certain professional responsibilities towards Mr R. These are spelled out in the Financial Conduct Authority (FCA) Handbook. Most relevant to this complaint is COBS 2.1.1 – *A firm must 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 Blueberry advised Mr R were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Blueberry, 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 in COBS 9.2.2R, Blueberry needed to gather the necessary information for it to be confident that its advice met Mr R'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.

But I do not consider it necessary for Blueberry to have had a face-to-face meeting (either directly or by video etc) to have acted fairly here. Many transactions such as this are conducted remotely. But it was necessary for Blueberry to treat Mr R fairly. So I do think Blueberry needed to have satisfied itself that it was able to obtain all the necessary information to enable it to make a recommendation which was suitable in all the circumstances.

Blueberry has said this fact find process was conducted over the telephone by its pensions adviser on the evening of 14 September 2021, and this call informed the full fact find document it produced on 23 September 2021. And Blueberry have provided handwritten notes which it says were made immediately following this call. Whilst I acknowledge these are undated and unsigned, I do find them persuasive evidence that a call with Mr R occurred. And during this call Mr R's personal and financial circumstances were discussed, and his objectives noted. It was also noted that what Mr R wanted to achieve was going to be against Blueberry's advice, so I think it likely that this was also discussed, and Mr R was probably aware of this at this early stage.

I've not seen any further evidence which leads me to believe Mr R met with, or spoke with anyone connected with Blueberry, other than Mr A, until after the transfer was completed. But I don't think this was necessary in these particular circumstances. I can see the formal recommendation document was informed by the fact find, along with the risk analysis document which Mr R had signed. And having considered the recommendation document closely, I'm satisfied that it contains sufficient information to allow Mr R to make an informed choice as to what he wished to do.

But Mr R was being treated as an *insistent client,* and from what I've seen I'm satisfied that Blueberry only facilitated the transfer once it was comfortable that Mr R was an insistent client. In fact, Blueberry explicitly told Mr R in several places within the suitability report, and as I've said most likely in the initial telephone call one month earlier, that it didn't recommend the transfer as it didn't consider it to be in Mr R's best interests. For example, one of the bullet points under the heading *Goals and Objectives* in the suitability report says the following:

"As taking money out of your pension is against what we would recommend, we have documented you as an insistent client and have requested you sign the relevant declarations to confirm you understand the risks involved."

And later under the heading *Risk Profile* is the bullet point:

"*Despite this [the warnings above] you are willing to take your tax-free lump sum and a level of income outside what is usually recommended. You understand the funds recommended are unlikely to perform better than the rate of income you receive but despite this you wish to proceed. You understand the risk that your pension may run out and your balance may be left at nil after so many years. Due to your desire to proceed anyway, we have documented you as an insistent client."*

I consider it reasonable for Blueberry to recommend that Mr R didn't transfer as it didn't think his intention to withdraw lumpsums meant his fund was sustainable. And from what I have seen Blueberry had demonstrated to Mr R that his desired ad hoc lump sum withdrawals, on top of his 25% tax-free cash wasn't demonstrably viable in financial terms. And I consider this was made sufficiently clear to Mr R, so it wouldn't be fair or reasonable to conclude that Blueberry recommended the transfer.

But the FCA has also set out guidance for businesses on insistent clients in COBS. Whilst businesses are allowed to carry out business for insistent clients, they must ensure their client understands the consequences of going against the advice they're given. I'd usually expect to see a written acknowledgment from the consumer, in their own words, that the transfer isn't in accordance with the adviser's recommendation and that it's being carried out at their request.

Blueberry has shared a copy of Mr R's signed declaration form. The form contained the following typed sentence (their emphasis):

"*I wish to take my maximum pension commencement lump sum and setup a high level of regular income despite the affect this may have on my income available in retirement. I understand that my wishes to withdraw money are against the recommendations of my adviser;* ***however, I still wish to continue against this as an insistent client."***

Based on the documentation I've seen, I'm satisfied that Blueberry made Mr R aware of the basis on which he would have to carry out the transfer. And, as I consider that the explanation was clear, both within the declaration and the suitability report, I can't reasonably agree that Mr D didn't understand what it meant.

But the FCA guidance also said that the declaration ought to be in the consumer's own words, and this appears to have been pre-written. And I'm not convinced that Mr R would have used the type of words above. But because I'm satisfied Mr R understood what it meant, I don't think this makes a significant difference here, as I think that Mr R would have most likely wished to proceed with the transfer anyway.

I say this because I can see from the recorded information in the fact find that Mr R had some concerns about his life expectancy – his father had died relatively young – so Mr R wished to access the money within his pension fund so that he could enjoy it while he could. And because of the way his existing PPP was set up, he was unable to make multiple withdrawals from it. The only way he could access the funds via a flexible drawdown method was to transfer to a provider which would facilitate this.

Blueberry was required to ensure it treated Mr R fairly. And as I've said above, I'm satisfied that it did. It was clear in setting out that it did not consider what Mr R wanted to do was suitable and it explained why, along with the possible ramifications of his proposed course of action. And it made clear that it would only proceed with facilitating the transfer on an 'insistent client' basis. And whilst I can see Blueberry didn't follow the Regulator's guidance to the letter, I'm satisfied that even if it had, Mr R would have wanted to transfer anyway. And the PPP that Blueberry recommended, and the associated fund choice were suitable and matched his objectives and ATR.

The instruction to switch the investments into cash.

Mr R's pension fund investments were switched into the cash fund on 18 January 2023 as a result of an instruction given by Blueberry to the PPP provider. Mr A, on Mr R's behalf, says this was done without Mr R's authority and the funds should have remained invested. He says that Blueberry should redress any investment loss which occurred as a result of this unauthorised switch.

Blueberry has said that as a result of the complaint that was made to our Service, it was concerned that Mr R's attitude to investment risk had changed, and that it was necessary to protect his investment prior to being able to reassess his ATR. It said it visited Mr R at his home address on 13 January 2023 and hand delivered a letter explaining its intended course of action. And it says it followed this up with a telephone call to Mr R later that evening, and during this call Mr R said he was happy for Blueberry to proceed. But he didn't return the written authority Blueberry had left for him, and Blueberry was unable to reach him again on the phone.

Mr A, on Mr R's behalf, says these calls and visit were unwanted and amounted to harassment, and were intended to persuade Mr R to withdraw his complaint. So again, there is a difference in the testimony provided.

Although there are no recordings or call notes of any of these calls, I have seen copies of the letters. And these letters make reference to a conversation which appears to have taken place between Mr R and Blueberry. So on the balance of probability, I think it more likely that not that this call took place and discussed the proposed switch to the cash fund. But Mr R didn't return the written authority, so I need to decide if Blueberry acted fairly in proceeding with the switch, and whether it should be held responsible for any investment losses which resulted from it.

Although I don't think Blueberry followed best practice, I think it most likely acted in a reasonable attempt to protect Mr R's pension fund. And the switch to cash was only intended to be a short-term measure until his ATR could be reassessed.

It is also clear that both Mr A and Mr R knew that the switch to cash had occurred, and Mr A says this was contrary to Mr R's wishes. But this switch could have been immediately reversed by either Mr R or Mr A, by contacting Mr R's PPP provider and asking them to do it. So I can't fairly hold Blueberry responsible for any losses suffered by Mr R's pension fund through not being invested, when these could have been easily and quickly mitigated by Mr R, especially as I've seen Mr A was already in contact with the PPP provider at the time.

As a result of all of the above I do not agree that Blueberry has treated Mr R unfairly.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr R to accept or reject my decision before 7 August 2023.

Chris Riggs
Ombudsman