

The complaint

Mr F through a professional representative complains about the advice given by Aveton Gifford Associates Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr F approached Aveton Gifford in September 2018 to discuss his pension and retirement needs. I understand that Mr F's financial adviser had passed him onto Aveton Gifford to get advice specifically about the DB pension in question.

Aveton Gifford completed a fact-find to gather information about Mr F's circumstances and objectives. Aveton Gifford also carried out an assessment of Mr F's attitude to risk, which it deemed to be 'cautious'.

The fact find also recorded the following about Mr F:

- He was 61 years old, in 'medium' health (scribbled underneath it says he has A.F) and married to Mrs F, aged 54
- They had two children aged 30 and 25
- Mr F had recently been made redundant but would look for work and was confident of finding something even with his age and health. He was in receipt of pension income of £187 per month
- Mrs F had been employed for 2 years as a childminder and was in receipt of £1,200 per month
- Joint income was detailed as £1,387 and joint expenditure £1,242
- Cash deposits of £5,000 were held.
- The main residence was valued at around £120,000 with a £35,000 repayment Mortgage.
- Mr F had said he didn't need income just yet. He was happy to wait and see how the job search goes.

On 18 October, Aveton Gifford advised Mr F to transfer his pension benefits into a personal pension. The suitability report said the reasons for this recommendation were that Mr F required access to the tax-free cash element in order to pay for a holiday, replace his car and establish a small emergency sum.

Mr F through a representative complained in 2023 to Aveton Gifford about the suitability of the transfer advice because he was inexperienced and didn't understand the risk associated with transfer. And the advice was unsuitable.

Aveton Gifford didn't uphold Mr F's complaint. It said the advice was suitable. Mr F referred his complaint to the Financial Ombudsman Service. An investigator upheld the complaint and required Aveton Gifford to pay compensation. The investigator said that Aveton Gifford hadn't clearly demonstrated the transfer was in Mr F's best interests. The investigator explained the transfer report submitted to us didn't include enough information to be

confident in the outcome in terms of the financial viability. But that in any event Mr F's only guaranteed benefits in retirement ought to have been prioritised due to circumstances over his reasons for wanting immediate cash. The investigator said that Aveton Gifford had failed to show that its advice was in Mr F's best interests and had it told Mr F to retain his DB pension he was satisfied Mr F would've done so.

Aveton Gifford disagreed, it said Mr F was previously a financial adviser and specifically on DB pensions and was still registered with the FCA up until 2007, so it wasn't true he didn't understand the risks with the transfer. And the warnings and risks about transferring had been clearly set out. Mr F was not an inexperienced investor. It felt the complaint was disingenuous.

Aveton Gifford said the FCA's stance was that transferring wasn't usually suitable but its records show Mr F dismissed this as being '*impractical and unrealistic*'. The aim of the advice was to provide the client with his stated goals and the risks were pointed out to Mr F. And the advice to transfer was the optimum method to achieving these goals. Mr F had stated the state pension income would be sufficient in retirement.

The investigator wasn't persuaded to change their opinion, so the complaint was passed to me an ombudsman at this service to decide.

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.

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 the Conduct of Business Sourcebook ('COBS'). And 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.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Aveton Gifford's actions here.

PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 7: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Aveton Gifford should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr F's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Aveton Gifford carried out a transfer value analysis report (as required by the regulator) showing how much Mr F's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr F was age 61 at the time of the advice and wanted to retire at 65. The transfer report completed at the time said the critical yield required to match Mr F's benefits at age 65 was 0.83%. However, as the investigator stated, the transfer report we've received only shows headline figures and not the inputs used. In the recommendation letter, a different figure is used of 1% stating that its actuaries have calculated this.

I've looked at the information from the product provider Mr F transferred into upon the recommendation of Aveton Gifford. And this shows at the lower growth rate of 1.75% Mr F's fund would erode. At the medium growth rate of 4.75% Mr F's fund however would increase. It also shows at the time the amount transferred would buy him an annuity of £2,890 approximately (tax-free cash had already been taken at this point) and to provide that same annuity at 65 it showed a yield of 6%. It also showed the impact of charges, Mr F having been transferred was now paying 1% a year advisor charges, 0.79% fund charges and 0.45% product charges. And this would eat into any growth he accrued in the fund. Compare this to the DB scheme which had guaranteed escalation each year and was free of charges.

There is a lack of information and contradictory information provided about the financial viability of the transfer at the time of advice. And the evidence from the product provider suggests growth at a rate in excess of the lower rate was required just to keep Mr F's fund from eroding. Therefore, I am not persuaded that for viability reasons alone a transfer out of the DB scheme was in Mr F's best interests. Aveton Gifford has failed to show that this was a compelling reason to transfer.

Of course financial viability isn't the only consideration when giving transfer advice, as Aveton Gifford has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

The benefits Mr F had accrued in the DB scheme offered a guaranteed income for life and would form a significant part of his total pension provisions. The evidence gathered during the fact find indicated Mr F had a low capacity for loss which would've likely meant the security of the guaranteed benefits offered by the DB scheme ought to have been very important to him. The DB scheme offered valuable benefits with virtually no risk.

So I don't think Mr F required flexibility in retirement in place of the above. Although it was recorded Mr F wanted funds to take a holiday, replace his car and have a small emergency fund, I don't think this should've been prioritised over financial security in the future.

At the time Mr F had just been made redundant (the evidence shows he used the redundancy pay to meet credit card debt) and the combined household income was very small. It was recorded that Mr F's wife worked part-time as a childminder and Mr F was unemployed but hoping to find work. It was also recorded that income met expenditure, however Mr F had previously run up credit card debts and so this suggests that perhaps it didn't always. Mr F did have £5,000 in savings but it's not clear if this was the excess of redundancy payments or a pot built up over time. But regardless their financial situation was fairly tight.

Aveton Gifford said that Mr F had an immediate requirement for tax-free cash and wished to have the flexibility and freedom to choose the income that he required. And it recommended he transfer to meet these objectives.

However, it doesn't look like alternatives to this action were considered. Given Mr F's fairly precarious financial situation, a guaranteed escalating pension in retirement starting at £5,200 would've been very valuable in retirement – and Mr F was already 61 at the time of advice. I accept that Mr F was five years away from being able to claim the state pension but that doesn't diminish the advantages additional benefits his other main source of income in retirement could've provided.

If Mr F's requirements for a replacement car and holiday were non-negotiables and required immediately, Aveton Gifford ought to have challenged and tested this but it doesn't appear it did, it ought to have been considered whether this could be achieved from the scheme. For example, Mr F could've taken tax-free cash from the scheme alongside a reduced pension. Or alternatively he could've taken full income and used the excess income he received either to help fund this, or use his savings with the excess income replenishing this over time. This would've kept his guaranteed escalating income in place for life – and provided 50% of this for his wife in the unfortunate event of his death. I also note his wife was seven years younger than him and so statistically there is a strong chance she would come to benefit from this.

None of this was considered in any detail or put forward to Mr F as a realistic option. I also note that the recommendation said Mr F's starting pension at 61 would be £4,160 (the report said the early retirement penalty was 4% p.a) but the information from the scheme showed a pension at date of leaving service (31/08/2018) of £4,711 per annum.

I also can't see evidence that Mr F had a strong need for variable income throughout their retirement. No analysis was carried out to suggest why this was the case. I think what Mr F needed was to retain as much income as he could in retirement. And this was by far his most valuable source of income (bar the state pension) in retirement and guaranteed. I think Aveton Gifford should've explained this ought to outweigh his more immediate requirements.

Mr F said he was confident of finding work, which if he did do so, the additional income could've helped to fund these needs, whilst retaining his valuable DB benefits. Transferring was a permanent solution to what at the time was a temporary problem. But in the scenario he was unable to find work, it may have been even more necessary to have retained his guaranteed escalating benefits for retirement. Analysis showed that on transfer and using drawdown his funds could be depleted at age 82. Whereas benefits from the scheme would last for the rest of his life and 50% would be payable to his wife if he predeceased her.

I'm satisfied that Mr F's needs in retirement would've been met by his DB income. Whilst Aveton Gifford relied on the fact Mr F said his income needs could be met by the state pension I think more analysis of this ought to have been carried out. Emphasis should've been put on the fact that retaining his DB benefits would give him and his wife a more comfortable retirement, whereas transferring the benefits to spend now could put this at risk.

Further evidence of the lack of critical analysis is evidenced by the fact Mr F said if he didn't find work he may need to draw on more funds and this could exhaust his fund before retirement. Which is at odds with the income/expenditure recorded. And I think this ought to have been a point where the adviser challenged Mr F's needs now and in retirement. And whether his state pension alone would really be sufficient, given at some point his wife's income would also reduce upon retirement. I don't think the adviser sufficiently considered whether giving up a starting benefit of £5,200 a year escalating and guaranteed for life was right for Mr F (or the benefits available immediately from the scheme at 61).

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr F. But whilst I appreciate death benefits are important to Mr F, and Mr F might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr F about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

I also think the existing death benefits attached to the DB scheme were quite likely to be more valuable than the death benefits upon transfer. Mr F was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr F predeceased him. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as it had indicated in the report, it knew there was the potential that Mr F may exhaust this fund and, in that situation, it would leave nothing for Mrs F upon his death anyway.

In any event, Aveton Gifford should not have encouraged Mr F to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Mr F's previous experience and knowledge of DB pensions

Aveton Gifford has strongly argued that Mr F knew what he was doing and fully understood all the risks and rewards of his options. It's argued that he was a DB pension specialist. However, as the investigator noted it appears his last role in this sector was at the latest 2007 – and him being a DB pension specialist was recorded with a question mark. So it seems the adviser wasn't fully confident of this. His representatives told us his experience was from some 25 years ago and this is why he sought advice.

Regardless of this, Mr F came to Aveton Gifford as a retail consumer when he received advice to transfer and any experience he may have had does not change the fact that Aveton Gifford was required to act in his best interests and give suitable advice.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr F. But Aveton Gifford wasn't there to just transact what Mr F might have thought he wanted. The adviser's role was to really understand what Mr F needed and recommend what was in his best interests.

The benefits of transferring were promoted to Mr F, whereas much more should've been done to set out the benefits of remaining in the scheme and how this may be achieved. If Mr F was adamant funds were required immediately, it should've considered whether the scheme was better placed to meet his needs here and in the long term.

Aveton Gifford hasn't clearly demonstrated that the transfer was financially viable, there are question marks around the figures used and its transfer analysis. I think it has failed to take reasonable steps to ensure that its recommendation was suitable for its client as per COBS 9.2.1.

Ultimately, I don't think the advice given to Mr F was suitable. He was giving up a guaranteed, risk-free and increasing income in retirement and given his financial circumstances I think this would've been very valuable. There were no other particular reasons which would justify a transfer and outweigh this.

So, I think Aveton Gifford should've advised Mr F to remain in their DB scheme.

Of course, I have to consider whether Mr F would've gone ahead anyway, against Aveton Gifford's advice. Aveton Gifford argues that this is the case, as it's said Mr F was experienced and saw the benefits from the DB scheme as impractical. However, it was its role to challenge Mr F's pre-conceptions and it ought to have set out clearly why the benefits from the DB scheme were valuable. And considered other options to meet Mr F's needs whilst retaining these benefits.

So I've considered this carefully, but I'm not persuaded that Mr F would've insisted on transferring out of the DB scheme, against Aveton Gifford's advice. Mr F had a cautious attitude to risk and this pension accounted for the majority of Mr F's retirement provision. So, if Aveton Gifford had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

In light of the above, I think Aveton Gifford should compensate Mr F for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

The investigator awarded £200 for the distress and inconvenience caused to Mr F. I don't think this was unreasonable, Mr F was 61 at the time and so close to retirement and the advice to give up his guaranteed escalating benefits in retirement cannot now be undone, with little opportunity to accrue more in the future. I think this has likely caused disruption to his retirement plans and caused some distress and inconvenience.

Putting things right

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

Aveton Gifford must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, it is my understanding that Mr F retired at age 63. Providing he started taking benefits from the pension in question at or around this point, compensation should be based on retiring at age 63. If he hadn't released income or cash from the plan, then compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr F's acceptance of the decision.

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

- calculate and offer Mr F redress as a cash lump sum payment,
- explain to Mr F before starting the redress calculation that:
 - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
 - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr F receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr F accepts Aveton Gifford's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr F for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr F's end of year tax position.

Redress paid to Mr F as a cash lump sum includes compensation in respect of benefits that may otherwise have provided a taxable income. So, in line with DISP App 4, Aveton Gifford could usually make a notional deduction to cash lump sum payments to take account of tax that Mr F would otherwise pay on income from their pension in retirement. However, given the relative low value of this fund and Mr F being reliant on the state pension in retirement, I don't think a notional deduction for tax should apply here.

It should also pay £200 to Mr F in recognition of the distress and inconvenience caused.

Where I uphold a complaint, I can award fair compensation of up to £190,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £190,000, I may recommend that the

business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Aveton Gifford Associates Limited to pay Mr F the compensation amount as set out in the steps above, up to a maximum of £190,000.

Recommendation: If the compensation amount exceeds £190,000, I also recommend that Aveton Gifford Associates Limited pays Mr F the balance.

If Mr F accepts this decision, the money award becomes binding on Aveton Gifford Associates Limited.

My recommendation would not be binding. Further, it's unlikely that Mr F can accept my decision and go to court to ask for the balance. Mr F may want to consider getting independent legal advice before deciding whether to accept any final decision.

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

Simon Hollingshead
Ombudsman