DRN-4749130

The complaint

Mr R's representative has complained, on his behalf, that Lycetts Financial Services Limited (Lycetts) gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) to a personal pension policy (PPP) and to then take tax free cash and annuitise the remainder.

What happened

Mr R approached Lycetts in October 2008 to review his finances in the hope of reducing his outstanding debts. Lycetts completed a "fact find" document on 22 October 2008 which established Mr R's circumstances as the following:

- He was 55 years old and married. He had no financial dependants.
- He was employed, earning around £15,000 pa.
- He owned his home, with an interest only mortgage which was due to be repaid in 2016. He had an endowment policy to cover his mortgage which was valued at £15,221 in 2008 - short of the £46,500 required.
- He had had around £6,000 in credit card debts.
- He was a deferred member of a defined benefit scheme with a former employer, with 20 years' service. Its transfer value was £94,094 and would pay a minimum guaranteed annual benefit of £5,444 once he reached 65.
- He didn't have any other pensions or retirement provision at the time of the advice.
- He had no previous investment experience and had a low attitude to risk. He had no capacity for loss.

Lycetts reviewed Mr R's circumstances and issued its advice report on 13 November 2008. Lycetts advised Mr R to transfer his deferred benefits and buy a lifetime annuity. In support of the advice, it said that Mr R had the following objectives:

- Access increased income to repay debts and supplement his current standard of living.
- Reduce his mortgage because the outstanding balance was causing significant worry due to the endowment performance falling short.

Mr R accepted Lycetts' advice, and the transfer proceeded. Mr R took the maximum tax-free cash from his pension and then bought a lifetime annuity starting on 1 December 2008.

The annuity had a purchase price of around £70,000 and pays Mr R a level annual income of £4,329.

In March 2023, Mr R complained through his representative about the advice he received in 2008. He said that the risk of financial loss when transferring his pension wasn't explained and that the advice wasn't suitable for him. As a result, he said, he's now been left significantly worse off in retirement.

Lycetts declined to uphold Mr R’s complaint, however. It said that Mr R was aware of the risks of potential loss and that transferring was the only way he could achieve his objectives.

Unhappy with that response, Mr R asked this service to investigate his complaint.

Having considered the matter, our investigator firstly noted that Lycetts hadn’t commented on our jurisdiction to consider the complaint.

Given that the event complained of was more than six years before Mr R raised his complaint, the investigator said she was obliged to consider whether this service could consider the matter from a timeliness perspective.

Having done so, she said that she hadn’t seen anything which ought to have given Mr R cause for complaint more than three years before he did in March 2023 (in line with the DISP rules set out below). As such, she thought that the complaint was one which we could consider.

She then set out her view on the merits, saying that she thought that the complaint should be upheld. In support of that position, she said the following in summary:

- The OPS benefits offered a guaranteed income for life and would form a significant part of Mr R’s overall pension provision. The available evidence from the fact finding at the time of the advice indicated that he had a low capacity for loss, which meant that the security of the guaranteed, virtually risk free, OPS benefits would have been important to him

- In terms of the merits, 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.

- No projections of future benefits were prepared, as Mr R would be taking tax free cash and buying an annuity. It was clear that Mr R would be buying an annuity with a lower annual benefit than that which would be offered by the OPS, but this would be expected with more than ten years to the normal scheme retirement age.

- Nevertheless, from a financial viability perspective, this did demonstrate that the OPS benefits couldn’t be matched by transferring, which Mr R acknowledged himself in a handwritten letter submitted at the time. And so the investigator proceeded to consider whether there was a specific need which made the transfer suitable.

- Mr R told Lycetts that he was concerned about the likely shortfall in his endowment mortgage arrangement, but Mr R still had around eight years until he needed to repay the mortgage and so plenty of time to make important decisions in the future.

- Mr R’s OPS benefits should have been protected for as long as possible – transferring if necessary to repay the shortfall in the endowment could have happened at a much later stage. It wasn’t a priority at that time, and had it been explained to Mr R that he could make these decisions in the future, then it was likely that Mr R would have accepted that advice.

- Mr R also had credit card debts which he wished to repay, but the monthly repayments were being met and other ways of potentially reducing his debt weren’t discussed.

- Mr R’s motives for transferring weren’t a priority at the time and so the investigator couldn’t conclude that the advice to transfer away was suitable. Had Lycetts explained the importance of protecting the defined benefits and provided other options for debt management, Mr R would have accepted suitable advice not to transfer.

- Lycetts’ role was more than to simply transact the course of action that Mr R felt he wanted – it was to understand what would have been in Mr R’s best interests and make a suitable recommendation on that basis.

- There wasn’t a compelling reason to justify Mr R relinquishing his guaranteed benefits and Lycetts should have advised Mr R to retain them.

The investigator recommended that Lycetts undertake a loss calculation in accordance with the regulator’s consultation paper CP22/15.

If the redress was paid directly to Mr R, Lycetts could make a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

Mr R’s representative accepted the investigator’s assessment. Lycetts disagreed, however, saying the following firstly with regard to our jurisdiction to consider the matter:

- Mr R had enjoyed a level income from his annuity since 2008 and so had been aware that this was the case for nearly 15 years.

- If Mr R had wanted or needed an inflation linked income, he should have said that this was his objective at the time. As he didn’t, the case should be time barred.

- Mr R was also aware that the income provided by his defined benefit scheme (which was index linked) couldn’t be bettered at the time. But he confirmed in writing on 17 November 2008 that he was aware of this, still expressing his desire to transfer his defined benefits. He’d therefore formally acknowledged what he was sacrificing.

- The suitability report also set out that the scheme benefits would be index linked – and so Mr R was aware that he was foregoing an increasing income.

It then addressed the merits as follows:

- The report said that Mr R wished to take his OPS benefits at that point to assist in maintaining his standard of living and to repay loans/reduce the mortgage. The latter in particular was recorded as being very worrying for Mr R, given the likely shortfall on the endowment policy.

- The tax free lump sum available from the OPS was just over £10,000, and whilst this would have enabled Mr R to have repaid the credit card debt, this would only have made a dent of around £4,000 on the mortgage. The transfer resulted in a considerably higher lump sum - £23,523 – which enabled Mr R to better meet his objectives.

- Although Mr and Mrs R’s outgoings were seemingly met by their combined income, the absence of savings and the level of unsecured debt suggested otherwise. So their desire to improve their standard of living was understandable, and an annuity rather than drawdown therefore seemed to be a suitable outcome.

- Mr R had relinquished the index linked income, and the rationale for not establishing an escalating annuity was set out in the suitability report – in that the starting income would be substantially reduced and it would take many years to achieve the level income he could receive at the time.

- The starting income from the annuity comfortably exceeded the OPS income, and had Mr R taken the latter, this wouldn't have exceeded the annuity until 2019 based on increases in RPI. The benefits available at 65 were also barely more than £1,000 greater than the annuity.

- It was Mr R who approached Lycetts, saying that he wished to repay his debts with the tax free lump sum, rather than the other way around. If Mr R was living comfortably at the time, as had been asserted by his representative, it was queried as to why the mortgage and unsecured debt was such a concern.

- Mr R had accrued 20 years' service within the OPS, but this accounted for less than half of an individual's likely working life. Mr R continued to work at the time and an OPS was available, which would provide further pension benefits.

- The representative's comment that the transferred benefits would form a very significant part of Mr R's pension therefore appeared to be incorrect and misleading. Their state pensions could feasibly have provided significantly more than the OPS benefits.

- Mr R may have had a low capacity for loss, which meant the security of the OPS benefits was important to him, but the annuity also provided guaranteed benefits with virtually no loss.

- Although Mr and Mrs R could have deferred the decision to transfer nearer to the time the mortgage was due to be repaid, it was the representative's position that Mr R's primary objective was to repay the mortgage, so it was unclear as to which would have been the better course of action.

- Mr R was clearly worried about both the mortgage and the unsecured debt, and making a lump sum repayment would not only have reduced his interest payments, but also have reduced the endowment shortfall. Mr and Mrs R could also then have surrendered the endowment policy and converted the remaining mortgage to a repayment arrangement, thereby reducing their risk exposure and enjoying a better standard of living.

- Mr R's primary objectives of reducing his mortgage and repaying unsecured debt were met through the advice, along with improving his standard of living by way of the supplementary income produced by the annuity. Mr R was aware of the loss of the additional OPS benefits, but was prepared to accept this for the sake of easing his debt burden.

- With the benefit of hindsight, and with increasing inflation over recent years, Mr R has sought to question the suitability of the advice he received, but this overlooked the overall benefits, including improved lifestyle and financial security, which the advice had produced.

As agreement on both whether this service could consider the matter wasn't reached, along with disagreement on the merits, it was referred to me for review.

I firstly issued a decision on whether the complaint fell within our jurisdiction on 17 April 2024, in which I set out my reasons as to why I considered that it did. The following is an extract from that decision.

"The rules within the regulator's handbook (DISP 2.8.2) say that unless a business consents (and Lycetts doesn't here), or exceptional circumstances apply, our service can't consider a complaint if it's brought to us:

- *more than six years after the event complained of, or if later*
- *more than three years after the consumer became aware, or ought reasonably to have become aware, they had cause to complain*

Mr R has complained about the advice and information he received from Lycetts in 2008. So as that's more than six years before Mr R complained to Lycetts, the three year part of the rule is the relevant one here.

I've therefore considered when Mr R became aware, or ought reasonably to have been aware, that he had cause to complain.

I've noted what Lycetts has said about Mr R reasonably being aware that he had a level annuity when he first established this - and that the scheme offered an escalating income.

Whether Mr R ought to have been advised to relinquish the escalating income in return for the level annuity would be a matter for a merits consideration. But given the comments in the suitability report, it may well be the case that he was aware that he would be receiving a level annuity, and indeed has been since the benefits were transferred.

But the complaint goes beyond whether Mr R was aware or not that he was receiving a level annuity instead of the escalating income which would have been provided by the scheme. The complaint is characterised by a lack of awareness more generally about the benefits he would be relinquishing by transferring out of the defined benefit scheme, and, importantly, that the transfer wasn't suitable for him.

It is of course Lycetts' position that Mr R was fully aware of the benefits that he was relinquishing. And this may well be the case, but again this would be a matter for a merits consideration – and as I've said above, any such consideration would also need to factor in whether, notwithstanding Mr R's awareness or otherwise of the lost scheme benefits, the advice was suitable. And also whether, if Lycetts had advised against the transfer, Mr R would in any case have proceeded.

And so I need to consider at what point Mr R became aware, or ought to have become aware, that there may be a problem with the overall suitability of the advice.

As Mr R annuitised immediately upon the advice of Lycetts, I don't think there would necessarily have been a later moment in time when he might naturally have come to question the suitability of the transfer – perhaps, for example, as with other similar cases, beginning to take benefits from the PPP and, by reference to a deferred benefit statement, realising that the pension he was receiving was significantly lower than that which he would have received from the scheme.

And so, taking all of the circumstances here into account, I don't think that, following the initial point of transferring and buying an annuity, and until March 2023, Mr R would reasonably have had cause for complaint on the basis of the suitability of the advice to transfer. He was receiving a guaranteed income from the annuity, which he had expected, *and had also received the tax free cash, which he was also expecting. And if Mr R had cause for complaint in 2008 on the basis of the advice given to take the tax free cash and the establish the annuity, it seems somewhat unlikely that he would have accepted that advice and proceeded with the transfer and annuity purchase in the first place.*

I haven't been made aware of anything else which might reasonably have made Mr R aware of cause for complaint before March 2023 on the basis of the overall suitability of the advice, for example further discussions with a financial adviser.

So there was no further "event", other than seeing the press coverage of potentially mis-sold defined benefit transfers online which did ultimately prompt him to complain, which might reasonably have given him cause for complaint at an earlier point than March 2023.

Therefore, although I appreciate that a number of years has passed since the advice in 2008, on the basis of the available evidence I don't think that Mr R would reasonably have been aware of cause for complaint on the basis of the overall suitability of the transfer advice before March 2023.

As such, my view is that the complaint has been brought in time, and therefore falls within our jurisdiction."

The investigator provided both parties with a further opportunity to provide further commentary on the case if they wished, but I note that no further submissions have been received.

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 in 2008, but provides useful context for my assessment of the business' actions here.

Within the FSA'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 FSA's suitability rules and guidance that applied at the time Lycetts advised Mr R were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Lycetts, 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, Lycetts 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.

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

COBS 19.1.2R required the following:

"A firm must:

1. *compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension;*
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, 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 whether to transfer 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 or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer 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 or pension opt-out, it should consider the client's attitude to risk 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 Lycett's advice to Mr R in the context of the above requirements and guidance, and would comment as follows.

For the transfer to be worthwhile from a financial perspective, there needed to be a realistic prospect that the transfer would result in greater benefits for Mr R.

I don't think this could be clearly demonstrated here. Even if Mr R had begun taking the pension benefits in 2008, although he may have received a higher starting level income from the annuity, as Lycetts has itself noted this would have been exceeded by the OPS benefits within ten years or so, even at the modest rates of RPI in those first ten years. Although Mr R smoked, he had no recorded health issues which meant that it was unlikely he would survive beyond age 65, and so from that point, the increasing scheme benefits would have outstripped those which he was receiving from the annuity.

Therefore, I think it's possible that Mr R would receive pension benefits of a lower overall value than those he'd have been entitled to under the scheme by transferring (albeit given the higher tax free cash sum offered through transferring, I comment on this further below).

It's nevertheless Lycetts' position that Mr R's particular circumstances meant that he wanted to access his pension benefits to improve his overall situation at that time. But as noted by the investigator, although Mr R may have considered the prospect of reducing his debt to be appealing, he was seemingly able to service the mortgage and unsecured debt. There may have been no surplus for additional savings, but as Lycetts has pointed out, he still had ten years' potential pensionable employment and both he and Mrs R could expect state pensions. As such, there appears to have been no pressing need for Mr R to transfer for this purpose and relinquish valuable guaranteed benefits which could have been deferred until either the mortgage needed to be repaid or Mr R retired.

Mr R was recorded as having a low capacity for loss, given in large part his lack of other pension provision up to that point, and I think, as seems to be accepted by all parties, that he would quite justifiably have considered 20 years' OPS benefits to be of some importance to his future income provision. This wouldn't sit at all comfortably with a transfer of the defined benefits, which were guaranteed and would have received revaluation up to retirement and would then escalate post retirement.

As I've said above, Mr R may have found the prospect of mortgage reduction appealing, albeit with an unknown fee which might usually have been levied for this kind of overpayment, but as observed by the investigator, financial advice isn't simply concerned with wish fulfilment.

That said, I take Lycetts' point that it was Mr R who approached it for assistance with accessing his pension benefits to repay his unsecured debts and reduce the mortgage. And I think it's entirely plausible, as with many people in a similar position at the time, that he would have been concerned by the apparent shortfall in the endowment policy.

But even if I accept that Mr R was independently keen on accessing his pension benefits for the repayment/reduction of overall debt, and as noted by the investigator any redress calculation would in any case need to take into account the fact that Mr R began taking benefits in 2008, I've then thought about whether he needed to transfer from the OPS to achieve his stated objectives.

As noted above, Lycetts has said that the level annuity of £4,309 pa comfortably exceeded the starting income from the OPS – at £3,358 pa. And it's further said that, at the rates of RPI between 2009 and 2019, it would have taken ten years for the OPS income to exceed the annuity. But for the reasons set out above, I don't think this would have justified eschewing the OPS income in favour of the annuity. Mr R wanted a more comfortable standard of living, but in the absence of health issues, I think a more sustained escalating income to match inflation would have been the suitable choice. Mr R didn't need a specific amount of additional income to improve his standard of living, and although he was worried about his overall debt position, it does seem that he and Mrs R were able to meet the repayments.

There is then the matter of the tax free cash. Lycetts has said that the OPS would pay Mr R £10,131, whereas the transferred funds would pay him £23,523. I accept that this is a substantial difference. There's a reason for this, to the extent that the greater perceived benefit lies within the guaranteed escalating income which would be paid to Mr R. Whilst, as noted above, this would initially be below the level income produced by the annuity, by age 65 this would have exceeded it, and would continue to do so for the rest of Mr R's – and then Mrs R's (if longer) - lifetime. The advantage of the higher tax free cash sum may well therefore ultimately have been eliminated, and exceeded, by the escalating nature of the OPS income.

And I don't think Mr R in any case needed to take that risk. Lycetts has itself noted that it would have been possible for Mr R to surrender his endowment policy and convert the mortgage into a repayment arrangement (although the suitability of doing so would need to have been assessed in greater detail). With the additional £4,000 which would be left after Mr R had repaid his unsecured debt with the lump sum paid by the OPS, his outstanding mortgage would be around £27,000. Even at an interest rate of 5% (and to note Bank of England rates dropped sharply after 2008/9), this would have required a monthly repayment of around £280 over the ten years to age 65. Given that Mr R was paying an endowment premium alone of £133 pm, this would seem to have been affordable, especially taking into account the additional £280 (escalating each year) which could be provided by the OPS income.

I can't see that this option, which would have allowed for the retention of all of the scheme benefits and guarantees, including guaranteed escalation, was considered. Had it been, given that guaranteed escalation of the OPS benefits, the repayment of the unsecured debt and the likely affordability of a guaranteed method of mortgage repayment, along with some improvement in the monthly income, I think this would have appealed to Mr R.

But I in any case think this is the route which should have been recommended to Mr R – and I think he would then have accepted that recommendation. He didn't need to transfer to achieve his objectives. The potential overall loss in OPS benefits which he would otherwise suffer by transferring and buying an annuity would then have been avoided.

As such, I think the complaint should be upheld.

Putting things right

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in but for the unsuitable advice.

I consider that Mr R would most likely have begun to take his OPS benefits, rather than transferring and annuitizing, if suitable advice had been given.

Lycetts Financial Services Limited 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 (which followed CP22/15) and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

This calculation should be carried out using the most recent financial assumptions in line with 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 R's acceptance of my final decision.

The calculation should reflect the assumption that Mr R would have begun to take his OPS benefits at the same time as he annuitized in 2008.

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

- calculate and offer Mr R redress as a cash lump sum payment,

- explain to Mr R before starting the redress calculation that:

  - its 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 his defined contribution pension

- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr R accepts Lycetts Financial Services Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr R for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr R's end of year tax position.

Redress paid to Mr R as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr R's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this. But the particular tax free cash circumstances in this case, in that Mr R was able to access a higher amount of tax free cash by transferring, would need to be factored in here – in the sense that there may be no loss in terms of tax free cash and so no allowance for that in an income tax deduction would be appropriate.

If Mr R accepts this final decision, the award will be binding on Lycetts Financial Services Limited.

At this point, however, I think I should manage Mr R's expectations. Although I consider that, suitably advised, Mr R wouldn't have transferred, the fact that Lycetts has determined that the annuity income wouldn't have been surpassed by the OPS income until 2019, along with the significant difference in the respective tax free cash sums which would have been produced by the annuity and the OPS, may well mean that any comparison calculation between the annuity and OPS benefits as set out above would produce a "no loss" outcome.

Should this turn out to be the case, the situation of not having lost out financially by transferring will nevertheless hopefully be reassuring to Mr R.

My final decision

My final decision is that I uphold the complaint and direct Lycetts Financial Services Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 30 May 2024.

Philip Miller
Ombudsman