

The complaint

Mr J complains that Scottish Widows Limited trading as Clerical Medical failed to provide a guaranteed transfer value in relation to his section 32 policy.

For ease I've just referred to Clerical Medical below.

What happened

I issued a provisional decision on 4 July 2023. I've repeated here the background and my provisional findings. I've corrected a typing error in the fifth paragraph of my provisional findings. I'd said if, when Mr J reached SRD, Clerical Medical had simply said the underlying fund value was insufficient to meet the GMP and so no transfer would be possible, Mr J would've had the option of transferring. I meant to say that Mr J wouldn't have had that option.

'Mr J has a section 32 policy with Clerical Medical. It was set up in November 1991 and represented benefits Mr J had accrued in an employer's pension scheme. Mr J's selected retirement date (SRD) was his 65th birthday in February 2021, which was also his state pension age (SPA).

Mr J's annual statement sent in October 2020 said the policy was worth £33,386.15 as at 17 October 2020 and that Clerical Medical was required to use some or all of the plan value to provide a Guaranteed Minimum Pension (GMP). Mr J's GMP was £2,111.04 pa from age 65. Clerical Medical would top up the policy if the part used to provide the GMP was insufficient. Mr J would have to take advice before he could transfer if the value exceeded £30,000.

Clerical Medical wrote on 8 December 2021 asking Mr J to let Clerical Medical know by his SRD in February 2021 what he wanted to do with his pension. The letter said, if Mr J was thinking about using his pension to buy a retirement income or accessing his pension flexibly, it was important to shop around and he'd need the plan value to do that, which was £33,386.15. If Clerical Medical didn't hear from Mr J by his SRD Clerical Medical would buy Mr J an annuity. But he'd lose the opportunity to choose the type of annuity that best suited him, take tax free cash or shop around to see if another provider had a better deal.

Mr J got in contact with Clerical Medical and a letter was sent to him on 31 December 2020 confirming his retirement options. Amongst other things, it said Clerical Medical could only issue a guaranteed retirement quote within 30 days of the SRD as annuity rates were guaranteed for that period. Mr J's total GMP was £2,110.68 pa. His total fund value was £33,386.15. The cost of providing the GMP was £69,323.83 which meant there was a shortfall of £35,937.68. The letter said that retirement benefits couldn't be taken from the policy until the value of the fund supported the cost of the GMP or SPA if earlier; no tax free cash would be available due to the shortfall; and Clerical Medical would make up any shortfall in provide the GMP from SRD/SPA.

The letter went on to say, if Mr J wanted to take flexible benefits, he'd need to transfer the policy away and, in doing so, he'd be giving up the GMP entitlement. The actual transfer value of the plan was £33,386.15 but the actuarial cash equivalent value was £63,696.14.

Clerical Medical would increase the transfer value to that minimum amount of £63,696.14 in the event of a transfer. Clerical Medical also said: 'As the value of the policy exceeds £30,000.00, in order to proceed with a transfer you must first take financial advice (this is a legal requirement). We would require written confirmation from our adviser that you have received appropriate independent advice before we could action this.'

Mr J wanted to transfer away from Clerical Medical, take tax free cash from the policy and buy an annuity with the remaining fund. He contacted an independent adviser (IFA) to provide advice. The IFA asked Mr J to obtain a guaranteed transfer quotation so that the IFA could give advice. In January 2021 Mr J tried to contact Clerical Medical by telephone but because he was on hold for too long he emailed instead on 27 January 2021. He requested 'quotes both for the GMP and the transfer values on the policy as the letter only gives estimates'.

Mr J didn't get what he'd requested and he called Clerical Medical in February 2021. Clerical Medical sent income quotes on 18 February 2021. The letter noted Mr J's advisers as a different firm to the IFA he'd contacted. A transfer value quote was sent on 28 February 2021 but it wasn't guaranteed. Mr J complained about how long it had taken to receive the quotes. Clerical Medical issued a final response letter in April 2021 and paid £200 to Mr J to say sorry for the delay.

Mr J's IFA asked for a guaranteed transfer value in July 2021. Mr J followed that up in August 2021 and made a further complaint. Clerical Medical issued a final response letter on 1 September 2021. Clerical Medical said it understood Mr J's complaint was that he'd been trying since the beginning of the year to transfer away and Clerical Medical wasn't responding to requests for information from him or his IFA. Clerical Medical didn't uphold that complaint and said they didn't have authority to provide information to Mr J's IFA and they couldn't locate any requests from the IFA or Mr J since April 2021.

Mr J provided a letter of authority (LOA) and his IFA wrote to say that a guaranteed transfer value was required without which the IFA was unable to advise. In November 2021 Clerical Medical sent a further final response letter, accepting there'd been delays and paying a further £50. Clerical Medical said a guaranteed transfer value couldn't be provided.

Mr J was unhappy and referred his complaint to us. On his complaint form he said he'd been trying to get a (guaranteed) transfer value from Clerical Medical since December 2020 so he could transfer to another provider, take 25% tax free cash and buy an annuity with the remaining fund. He'd had the chance to do that, with the annuity being a similar amount to what he'd have got from Clerical Medical, but he'd missed out on that due to delays by Clerical Medical.

Mr J also said he has serious health issues. Clerical Medical's continued failures to provide the information he needed had caused stress. And Clerical Medical had failed to identify him as a vulnerable customer, despite being advised of his health conditions. Mr J couldn't transfer without specialist advice due the guaranteed benefits but he couldn't get advice because the transfer value wasn't guaranteed. He'd been in that 'catch 22' situation for eleven months. His income had been reduced and he'd been unable to carry out repairs to his home, had to sell his car and he'd been unable to go on holiday. Our investigator looked into what had happened but he didn't uphold the complaint. He said there was no regulatory requirement for Clerical Medical to provide a guaranteed transfer value and typically that wasn't offered for section 32 policies. There'd been some misunderstanding about Mr J's request. But Clerical Medical couldn't reply direct to Mr J's IFA as they didn't have authority to do so. And Mr J had been paid a total of £250 for service failings which the investigator thought was fair.

Mr J's IFA didn't agree. He made detailed submissions. I've summarised the key points:

- Advising based on an estimated transfer value was prohibited by the regulator, the Financial Conduct Authority (FCA). The transfer value was integral to producing the required Appropriate Pension Transfer Analysis and the compulsory Transfer Value Comparator. An adviser is required to give a personal recommendation. It would be odd for an adviser to give that, knowing the data on which it was based could change to values that would only be known after the transfer had gone ahead.*
- The FCA's CP (Consultation Paper) 19/25 clarified that and was confirmed in the FCA's PS (Policy Statement) 20/06 (see paragraphs 7.24 to 7.28). The 'Our Proposals' section sums up by saying: 'Firms should not give advice based on estimated transfer values except where the ceding scheme arrangements are expected to be changed or replaced.' That was now included in COBS (Conduct of Business Sourcebook) 19.1.3B.*
- Mr J was entitled to a guaranteed transfer value in respect of his section 32 policy. That type of policy fell within the definition of safeguarded benefits and, as the transfer value exceeded £30,000, Mr J required appropriate financial advice before he could transfer.*
- A guidance note issued by the Department of Work and Pensions (DWP) in January 2016 specifically listed the right to a GMP as a safeguarded benefit. There was a difference, depending on whether the value of the underlying assets was less than or equal to the amount required to provide the GMP, or more than that amount. If the latter, the policy is divided into two categories of benefit. The value used to secure the GMP would be a safeguarded benefit and to transfer it would require appropriate financial advice. The excess value wouldn't be safeguarded and in theory could be transferred without advice. But here the value of the underlying assets was below the level required to deliver the GMP. Clerical Medical is liable to deliver the GMP so any transfer value would need to be increased to the amount required to deliver the GMP.*
- The guidance note pointed to the Occupational Pension Schemes (Transfer Values) Regulations 1996 (SI 1996/1847) and, in particular, regulations 7A, 7B and 7E as to how safeguarded benefits are to be valued. Regulation 7A – for salary related benefits – was the relevant method here.*
- Part III of SI 1996/1847 which deals with statements of entitlement and calculation of transfer values. It says a member is entitled to one statement of entitlement within any 12 month period. That statement of entitlement must include the cash equivalent value and give a guarantee date.*
- It was then necessary to refer to sections 93 to 95 of the Pension Schemes Act 1993 (as amended) (the 1993 Act). It refers to occupational pension schemes – that included Mr J's section 32 policy with GMP benefits as it was derived from an occupational pension scheme and is considered to be salary related benefits (as per section 7A of SI 1996/1847). The 1993 Act says a member has a right to a cash equivalent transfer value. So a member requests a statement of entitlement, is then issued with a cash equivalent transfer value and then has three months from the guarantee date to apply for that cash equivalent amount.*
- Clerical Medical had repeatedly told Mr J they couldn't give a guaranteed annuity value until Mr J was within one month of his SRD. Clerical Medical was confusing the request for a statement of entitlement (with a guaranteed cash equivalent value) with a request for a guaranteed annuity value.*

The investigator, after considering Mr J's IFA's comments, asked Clerical Medical if it issued guaranteed transfer values for Section 32 policies and if not, why one wasn't provided so as to facilitate the advice process. Clerical Medical confirmed it didn't provide a guaranteed transfer value and referred to what the policy provisions said about transfer of benefits. Section 9.1 says the investor may request that Clerical Medical, in lieu of providing benefits

under the policy, pays a transfer value. And section 9.2 says that any transfer value to be paid in accordance with section 9.1 shall be calculated in accordance with section 7.1 and that 'pension date', for the purposes of section 9.2 only, shall be deemed to be the date on which the units are cancelled. Section 7.1 provides that on the pension date the units allocated to the policy shall be valued at Bid Price on that date.

Clerical Medical said Mr J's IFA was looking for a guaranteed transfer value which Clerical Medical couldn't and wouldn't provide. It could only issue a guaranteed retirement quote 30 days prior to Mr J's retirement date. We also shared what Mr J's IFA had said and asked Clerical Medical for any comments. Clerical Medical told us:

- The transfer value quoted for a policy with GMP represents the amount Clerical Medical believed it needed to pay out at a specific point in time to cover the GMP liability and comply with legislation. For this type of policy Clerical Medical has a legislative responsibility to provide the GMP at NRD.*
- If the customer stays with Clerical Medical that pension income will be provided at retirement. If the customer transfers prior to NRD the transfer value must be sufficient to cover the GMP – the shortfall figure represents the additional amount Clerical Medical is adding to the basic value of the plan, to ensure the value transferred out will cover the GMP liabilities, based on Clerical Medical's current assumptions.*
- As market conditions change, the assumptions within the calculation will also change so amounts needed to provide a GMP will decrease or increase over time. The value quoted won't be a fixed or guaranteed amount – the purpose of the transfer value calculation is simply to release a fair amount of money at the calculation date to cover the GMP liability.*
- The factors used in the calculation are reviewed regularly, some on a monthly basis. One of the biggest changes recently to the assumptions used is long term interest rates which have been rising as inflation increases. Each figure will have been the correct amount Clerical Medical needed at that specific point in time to cover the GMP liability, reflecting the market conditions at the time of each quote. The exact detail of the calculation was business sensitive but Clerical Medical's understanding was that this meets the legislative requirements surrounding GMP liabilities.*
- Clerical Medical referred to the FCA's Finalised Guidance FG 21/3 Advising on pension transfers and what 6.11 said.
'We don't expect firms to advise on estimated or indicative transfer values where a guaranteed transfer value is available. In some circumstances, a guaranteed transfer value is not available or required, eg in the 12 months before NRA [Normal Retirement Age] or where a client is still an active member of a scheme. In these cases, you may find it helpful to follow some of the processes set out in the estimated transfer value guidance in the Handbook, such as communicating assumptions and uncertainties to the client. You may also find it helpful to use a similar approach where a transfer value has expired and a new transfer value or extension has been requested. This means that the client is aware that advice based on a new transfer value is subject to some uncertainties until the advice can be finalised.*
- Clerical Medical's understanding was that the IFA can give advice based on the information provided to them.*

We shared Clerical Medical's comments with Mr J and his IFA. Amongst other things, the IFA thought there might be some issues with the way in which Clerical Medical had calculated the values on the policy.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

I'm sorry if Mr J feels we've delayed in dealing with his complaint. Any concerns about the service we've provided will be dealt with elsewhere. All I'm considering here is Mr J's complaint about Clerical Medical and whether Clerical Medical did anything wrong (or didn't do something it should've done) which has meant Mr J has been unable to take his benefits from the policy. Since he reached his NRD in February 2021 he's received no payments in respect of the policy which has caused him financial difficulties. I can understand that dealing with the matter has been particularly stressful for Mr J.

Mr J has referred to being in a 'catch 22' situation. He wants to transfer his section 32 policy but Clerical Medical is required to ensure he's taken financial advice. But Mr J's IFA says he's unable to advise without a guaranteed transfer value and that Clerical Medical is obliged to provide one. I don't think the position is straightforward and I'm grateful to Mr J's IFA for setting out his position in detail. But from what I've seen I'm not persuaded on either point – I don't think Mr J's IFA was precluded from advising on an estimated transfer value and I don't think Clerical Medical was obliged to provide a guaranteed transfer value.

Mr J's section 32 policy is a money purchase arrangement but with a GMP liability or underpin. If a transfer is requested the provider will check that the transfer value which can be offered is sufficient to meet the GMP liability. If it isn't, the transfer normally won't be possible and the fund will have to remain with the existing provider until it increases to a point where a transfer is allowed (because the GMP is covered). But, if that hasn't happened by SRD, the existing provider will have to pay out the benefits and meet the GMP liability anyway.

That was essentially Mr J's position. If, when he reached SRD, Clerical Medical had simply said the underlying fund value was insufficient to meet the GMP and so no transfer would be possible, Mr J [wouldn't] have had the option of transferring. Mr J's IFA accepts that Clerical Medical wasn't obliged to offer a transfer value. But Clerical Medical was prepared to offer a transfer value. Because of the GMP liability, Clerical Medical had to 'top up' the transfer value to an amount Clerical Medical had calculated was sufficient to meet the GMP.

I think it's clear that Mr J's benefits under the Clerical Medical policy are safeguarded benefits. The factsheet from the DWP is aimed at helping pension providers to determine whether certain types of pension benefits which contain a promise are safeguarded benefits for the purposes of the advice requirement. And when the exception to that requirement – if the safeguarded benefits are worth £30,000 or less – applies. A section about GMPs is included and says that pension benefits which represent or include a GMP are safeguarded benefits. And the section about buy out policies (including section 32 policies) says the benefits will be safeguarded if a liability in respect of contracted out rights (such as a GMP) has transferred under the policy to the provider, as is the case here.

To protect consumers who might otherwise give up valuable safeguarded benefits, there's a legal requirement on the ceding scheme (see section 48 Pension Schemes Act 2015) to ensure that the consumer has taken authorised financial advice before allowing the transfer to proceed. So it's clear that Mr J, if he wanted to transfer, had to get financial advice and show Clerical Medical that he'd taken such advice.

Mr J's IFA has referred to the FCA's Consultation Paper CP 19/25 and PS 20/06. But I think that's been superseded by FG (Finalised Guidance) 21/3. Clerical Medical has referred to section 6.11 which I think is helpful. The FCA says it doesn't expect firms to advise on estimated or indicative transfer values where a guaranteed transfer value is available. But it goes on to say that in some circumstances, where a guaranteed transfer value is not available or required, firms may find it helpful to follow some of the processes set out in the

estimated transfer value guidance in the FCA's Handbook.

COBS 19.1.3BG, headed 'Guidance on estimated transfer value', refers to where a firm gives advice on conversion or transfer of pension benefits to a retail client where the ceding arrangement is expected to be changed or replaced by another scheme. It sets out what the firm should do, including setting out in a provisional suitability report any assumptions and uncertainties to the client and that the personal recommendation can only be finalised once the transfer value and changed or replacement arrangements are certain.

I appreciate that wasn't Mr J's position. But I think the FCA's guidance acknowledges that there are situations where a guaranteed transfer value isn't available or required and so advice will have to be given on the basis of an estimated or indicative transfer value. The guidance gives two examples but I think they are just that and aren't exhaustive. The reference to the Handbook guidance I've mentioned indicates, notwithstanding that it specifically refers to the situation where the ceding scheme is expected to be changed or replaced, that COBS 19.1.3BC is of wider application. The upshot is that I don't think giving advice without a guaranteed transfer value having been provided was necessarily ruled out.

As to whether Clerical Medical was obliged to provide a guaranteed transfer value, Clerical Medical has referred to the policy terms and conditions. But these date back to 1991. Since then there's been a very considerable amount of legislation relating to pensions, much of which will be overriding. Mr J's IFA's arguments centre on the legislative position so I've considered the matter from that perspective. Mr J's IFA relies largely on the interaction of SI 1996/1847 and the 1993 Act. But my understanding is that transfers of GMPs from 6 April 2016 onwards are specifically governed by the Contracting-out (Transfer and Transfer Payment) Regulations 1996 (SI 1996/1462).

Part II deals specifically with transfers and transfer payment in respect of GMPs. Provided that certain conditions are met, accrued GMP rights can be transferred to another scheme (other than an overseas scheme or arrangement. The conditions, which are set out in regulations 5(a) and 10(a), are that the member consents in writing; the member confirms in writing to the transferring scheme that they have received a benefit statement from the receiving scheme in respect of the transfer amount; and that they accept the benefits to be provided by the receiving scheme may differ in form and amount to those which would've been payable by the transferring scheme and that there is no statutory requirement on the receiving scheme to provide survivors' benefits out of the transfer payment.

Regulation 5(b) provides that, in the case of a GMP transfer (whether or not it forms part of a large payment in respect of both GMP and other rights), the transfer payment is of an amount at least equal to the cash equivalent of the accrued rights to the GMP, calculated and verified in a manner consistent with regulations made under section 97 of the 1993 Act.

Two points arise: first there's no reference to a guaranteed transfer value. I think if there was that right or that was intended then SI 1996/1462, which, as I've said, deals expressly with post 6 April 2016 GMP transfers, would have said that. Particularly as there's reference to the 1993 Act in connection with how the transfer payment is to be calculated. Secondly, if other provisions of the 1993 Act were also intended to apply (such as those Mr J's IFA has pointed to), SI 1996/1462 would've said so.

As I've said, SI 1996/1462 does refer to section 97 of the 1993 Act in terms of how the transfer payment is to be calculated. Initially Mr J's IFA said although he hadn't checked there was no reason to suspect the transfer value which had been offered had been incorrectly calculated. But I think there may now be some question mark about the value.

I think the transfer value that was offered is outside the scope of this complaint – which is

about whether Clerical Medical was obliged to offer a transfer value on a guaranteed basis. In any event, Mr J didn't accept the transfer value offered and any transfer value now offered will need to be recalculated. So I see little point in looking into how the original transfer value was calculated and if it was correct. I'd also point out that we don't offer actuarial services so we're unlikely to check in detail any calculations although we might look to see if, in broad terms, it appeared correct and in line with the relevant provisions. I'd ask Clerical Medical to bear in mind what I've said about how any transfer value should be calculated – that is, in a manner consistent with the relevant regulations – in recalculating any current transfer value.

In the circumstances I'm unable to say that there were failings on Clerical Medical's part which meant that the necessary advice couldn't be provided and so Mr J was prevented from transferring. I know Mr J has missed out on a lump sum and income since his 65th birthday. But I'm unable to say that was Clerical Medical's fault and so it follows that I can't order Clerical Medical to make up the shortfalls Mr J has suffered. I note what Mr J has said about being vulnerable but I think the £250 Mr J has been paid for service failings was fair and reasonable.'

Clerical Medical accepted my provisional decision and made no further comments. Mr J said he didn't really have anything to add other than to express his disappointment and frustration, particularly as the transfer value had fallen by some 25% which meant he was unable to take any income from the policy. Mr J had forwarded my provisional decision to his IFA who made some comments.

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 don't have much to add to what I said in my provisional decision. I've set out above in full my provisional findings and these form part of this decision. I do understand Mr J's disappointment and frustration. But I'd only be able to uphold his complaint if I thought Clerical Medical had done something wrong in not providing a guaranteed transfer value. From what I've seen I don't think that was the case.

To deal briefly with the points made by Mr J's IFA, I agree there's some ambiguity around FG 21/3 and that specific guidance as to whether advice can be given on an estimated transfer value in the situation that has arisen here would've been helpful. But neither my research nor Mr J's IFA's has come up with any. I think Mr J's position is somewhat unusual in that, in most cases where the fund value is insufficient to meet the GMP liability, a transfer won't be permitted and can't be insisted on. Based on what I've seen my views remain as set out in my provisional decision and I don't think advising on an estimated transfer value is ruled out.

Mr J's IFA accepts that the entitlement to transfer a GMP is now covered in SI 1996/1462. Again I don't disagree that there's perhaps some room for argument and different interpretation. But, in the absence of specific reference to a guaranteed transfer value and express cross referencing to the relevant provisions in the 1993 Act, my views remain as set out in my provisional decision.

I note that Mr J's IFA has said that my decision is binding on Clerical Medical but not Mr J. To clarify, if Mr J notifies us that he accepts my final decision within the time limit specified, it will be final and binding on both parties, that is Mr J and Clerical Medical. But, as I'm not upholding the complaint, Mr J may not wish to accept my final decision. As his IFA has pointed out, there's no appeal process.

My final decision

I don't uphold the complaint and I'm not making any award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 11 August 2023.

Lesley Stead
Ombudsman