DRN-4249013

Financial Ombudsman Service

The complaint

Mr W complains about the advice given by Charles James Financial Planning Limited ('CJFP') 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 W was an existing customer of CJFP and his pension planning had been discussed with CJFP a number of times. I've seen records that show this took place from 1999 onwards.

On 18 March 2005 Mr W received advice to move two existing personal pension funds to another provider. The value of these funds was around £25,000 and I understand they were the proceeds of an occupational scheme Mr W had transferred some time earlier. Mr W hasn't complained about this advice.

However, Mr W's DB scheme was also looked at in March 2005 and it was noted that Mr W felt that both his old employer and the DB scheme were facing problems and that Mr W was concerned about this. The letter says that the scheme was closed to new members and was in deficit. A transfer analysis had been carried out but CJFP's advice was not to transfer at this time. Mr W accepted this advice and he remained a deferred member of the scheme.

Mr W approached CJFP later in 2005 to further discuss his pension and retirement needs. This was because he had now decided to move abroad and he had placed a deposit on a property development overseas.

It's documented that Mr W had recently failed to secure some borrowing which he said he needed to fund this move. Because of this he wanted to access his pension. Mr W's representative says he was referred to CJFP again by the prospective lender when he was unable to secure the borrowing.

CJFP completed a fact-find to gather information about Mr W's circumstances and objectives. This showed that:

- Mr W was 50 years old, married and had no financial dependents.
- He was employed full time and was hoping to retire early.
- Mr W owned his own home which was subject to a mortgage.
- He had £5,000 savings in cash.
- He had recently surrendered two investments to repay some credit that he had.

In respect of his pension arrangements Mr W was a deferred member of a DB scheme in which he had 11 years of service. The transfer value of this was £59,223. It was estimated that this scheme would pay Mr W an income of around £7,415 at his age 65.

CJFP also carried out an assessment of Mr W's attitude to risk, which it said was 'medium'. It said that his capacity for loss was 'low'.

On 13 December 2005, CJFP advised Mr W not to transfer his pension benefits. It said, given his circumstances, that he should take the benefits early from the DB scheme and access them this way.

It said that at age 51, his DB scheme would provide a tax-free lump sum of £9,810.60 and an annual pension of £1,306.46 increasing by a regular amount annually. It said that if he transferred to a personal pension then at the same age he could receive a tax-free lump sum of £11,966 and an annual pension of £1,100 to £1,230 per annum increasing by a regular annual amount.

But it was noted that Mr W did need access to funds as he was in the process of purchasing a property development abroad, he had already paid a significant deposit for this. Mr W was also in the process of selling his existing property and business to fund this. He had tried to raise the funds he needed by borrowing but was unable to do this due to some adverse credit.

The suitability letter went on to say that Mr W had insisted on transferring the DB scheme to access a greater amount of tax-free cash. It then gave Mr W a recommendation to transfer his DB scheme to a personal pension. The suitability report said the reasons for this recommendation were as follows:

- It met Mr W's requirements for a tax efficient means of saving for retirement.
- He could retire from age 50 onwards although this could change in the future.
- He could get tax-free cash of up to 25% of the fund value.

Subsequent to this, Mr W transferred the DB scheme into a personal pension and invested the proceeds. He took the maximum amount of tax-free cash that he could straight away. The remaining transfer value of £47,864 was invested in two funds that CJFP said matched his attitude to risk.

In 2009 Mr W received further advice from CJFP. His property purchase, and overseas move, hadn't proceeded as he expected, and he was now in financial difficulty.

CJFP advised Mr W to purchase an annuity. Its purchase price was £50,600 and he received a level annual income of £2,872.92. Mr W hasn't complained about this transaction.

Mr W complained in 2022 to CJFP about the suitability of the transfer advice because he thought that he may have lost out significantly. He said he should have been clearly advised not to transfer away from his DB scheme. And CJFP should have declined to process the transfer. But for CJFP's involvement in the process, Mr W said he would have stayed with this DB scheme.

CJFP didn't uphold Mr W's complaint. It firstly said that it had been brought too late. It then went on to say that Mr W had a need for cash at the time of sale due to his overseas house purchase. The amount he could receive from a personal pension was higher than the cash he could receive from his DB scheme. Because of this Mr W insisted that the transfer went ahead. The analysis was robust, and the recommendation was that Mr W shouldn't transfer his DB scheme. Mr W was fully informed about this but proceeded in any event.

Mr W referred his complaint to our service. One of our Investigators firstly considered if the complaint was brought in time. Having considered everything she thought that it was. CJFP didn't disagree with this and went on to provide the information that it had about the sale of the plan.

However, later on, CJFP again said that it thought the complaint hadn't been brought in time. I've issued a decision saying the complaint is within the jurisdiction of the Financial Ombudsman Service. So, the merits of the complaint can now be considered.

Our Investigator didn't uphold the complaint. She said it was clear that the transfer may not have been in Mr W's best interests financially. That said, Mr W did seem to have a pressing need for cash. And whilst she thought that CJFP's insistent customer process could have been better she did think that Mr W would have proceeded in any event, due to this pressing need for funds.

Mr W, via his representative, disagreed, saying that it wasn't properly established at the time of sale that Mr W had a need for cash. He did have other means of obtaining funds and he had other assets. And there was no immediate need for him to transfer as he wasn't due to move for over a year. So, the transfer wasn't suitable for him. Mr W agreed that CJFP's insistent customer process was flawed.

The Investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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.

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 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 CJFP's actions here.

COB 5.3.29A(4):

The regulator expected a *"…prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."*

At least one illustration for the personal pension/section-32 plan had to be on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown.

A 'reason why' letter or equivalent had to be issued as soon as practicable after the recommendation. It should:

"…explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme." and

"…demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Presumption of unsuitability

COB 5.3.29G specified the information a business should gather from the consumer and the DB scheme in order to assess suitability. Importantly it also said that:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

This is known as the 'presumption of unsuitability' and has been renumbered to COBS 19.1.6G in the current FCA rulebook.

As far as I can see CJFP didn't carry out a transfer value analysis (as required by the regulator) showing how much Mr W's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). CJFP does refer to a 'transfer analysis' but this doesn't seem to have been the same thing.

CJFP did look at the situation based on what Mr W could achieve if he took benefits straight away from the DB scheme and if he transferred to a personal pension as I've outlined above. And CJFP did explain the risks of the personal pension versus the risks of the DB scheme and that he would be giving up important guarantees. The suitability letter went on to say that he should consider taking his pension benefits from the DB scheme. And use the tax-free lump sum payment to help with the move.

But, as I said above, what CJFP should have done, and what the regulator required it to do, was to consider the rate of investment growth that would have to be achieved to replicate the benefits being given up. So, it needed to provide an analysis based on the critical yield and I do think this would have been a relevant consideration here.

I appreciate that Mr W wasn't looking to keep the DB scheme but a clear explanation of what investment growth he'd need to achieve to replicate the benefits he was giving up at the schemes normal retirement date may have changed this. It's a significant failing that CJFP didn't provide the analysis it should have done.

I can't be certain, but I think it's reasonable to say, particularly given Mr W's lower attitude to risk, that a full analysis would have likely shown that Mr W was likely to receive substantially lower benefits due to the DB transfer. For this reason alone, a transfer out of the DB scheme wasn't in Mr W's best interests, as CJFP said.

But Mr W was planning to move abroad. I understand that he'd already made significant borrowing to do this. And his plans were fairly advanced, even if they wouldn't come to fruition until sometime in the next year.

Mr W had sought advice about releasing some funds as he wasn't able to obtain any further borrowing. Mr W did not have enough savings, or other assets he could use. So, I do think it was established that Mr W had a genuine need to obtain some funds straight away. And Mr W had looked around elsewhere to do this but was unable to. This was the reason why he was referred back to CJFP to look at accessing his pension.

So by accessing his tax-free cash Mr W may've been able to complete the move abroad, which he had already committed significant assets to. This included taking steps to sell his home and business and become semi-retired when the move was completed.

Although this meant Mr W wouldn't be able to take as much income from his pension as he would've been entitled to through the DB scheme, I'm satisfied that Mr W thought that accessing his pension was necessary in the circumstances.

Mr W was married and so the spouses and pension would have been useful to Mrs W if Mr W predeceased her. That said he was clear with the adviser that he did not have any financial dependents and that the spouse's pension the DB scheme provided wasn't a priority. So, I think Mr W was prepared to lose these benefits. And their life cover arrangements were something that it was noted they should consider later on, after the house move.

Was it right to classify Mr W as an insistent customer

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were Conduct of Business Sourcebook ('COBS') rules in the regulator's Handbook which required CJFP to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required CJFP to provide information that was clear, fair and not misleading. So, CJFP's recommendation had to be clear and Mr W had to have understood the consequences of going against the recommendation.

Like the Investigator, I consider there were shortcomings in CJFP's processes and how it treated Mr W as an insistent client – that is, one who wanted to act contrary to the advice given. The information about Mr W acting against CJFP's advice is very brief and there is no confirmation from Mr W in his own words why he wanted to go ahead against the advice. And I think this would have been good practice here, even though it is clear from the documentation I have why he was going ahead.

And, as I've outlined above, I don't think that Mr W was given all of the information he should have been. There are some key pieces of information that I'm not certain that Mr W was provided with.

However, even if CJFP had gone further to try and dissuade Mr W from transferring, I think Mr W would still have gone ahead with the transfer of his DB scheme into the personal pension and made the subsequent investments. I'll explain why.

Mr W was a longstanding customer of CJFP and his pension had been discussed previously. It was documented in early 2005 that Mr W had some concerns with the DB scheme (it was closed to new members and in deficit etc). But after CJFP considered the benefits of the scheme, and these concerns, he accepted its advice not to transfer at this time. So, I think it's reasonable to say that he wouldn't have transferred unless his personal situation had changed. And this is what happened here and I think this is a key point.

It's established that later on in 2005 Mr W placed a deposit on a house that would be built in 2006/7 overseas. He needed to pay half of the balance in 2006 and the remainder in 2007 when the house was completed. He had been able to borrow some of the house purchase money from an overseas lender, but he needed to find the remainder. He'd tried to borrow in the UK but he hadn't been able to secure any further loans. He said that the lender itself told him to consider using his pension benefits to fund this. I understand that Mr W was looking to ultimately sell his UK property and his business but he wasn't able to do this whilst there was some uncertainty about the overseas properly – such as the building not being completed and so on.

The fact find notes show that in the second meeting to discuss the advice Mr W thought that this was the only realistic way he had of securing the funds he needed to finance *'his dream overseas move'*. And in the notes and communications that exist, it's clear that Mr W confirmed that he didn't think that he had another means to finance the changes to his life that he felt he needed to make. I'm satisfied from the evidence that I have that this was the case. I think Mr W was clearly driven to transferring his pension to access the tax-free cash. And he did have what he thought were good reasons for doing this.

So he did have a genuine and pressing need for further money, and I don't think he was able to obtain this elsewhere. Taking all of this into consideration I think it's evident that Mr W was set on this course of action. He had strong personal reasons for wanting to transfer out of his DB scheme, and even if CJFP had done more to try and explain why it wasn't in his best interests, I think he would've gone ahead anyway.

Summary

CJFP initially recommended that Mr W shouldn't transfer out of his DB scheme. It explained the benefits he could receive now and in the future from the DB scheme. And explained that the DB transfer would also likely not meet his retirement aims. It went on to explain that Mr W should consider taking the benefits from the scheme and accessing his guaranteed pension this way.

I think the advice and explanations that CJFP provided were reasonable. It demonstrated that it had considered Mr W's situation and provided what I think were viable alternatives to what he wanted to do. I think it was clearly presented to Mr W that the DB transfer was not in his best interests.

So, it was suitable advice for Mr W not to transfer; CJFP explained why this was and gave what I think were reasonable alternatives. But Mr W, for his own strongly held reasons disregarded this advice.

Overall, even though I think CJFP's process could have been more robust, I don't think that would have changed the outcome in Mr W's particular case. I think Mr W would have pursued the transfer and insisted on CJFP transferring his pension in any event.

My final decision

For the reasons set out above, I don't uphold Mr W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 19 October 2023.

Andy Burlinson
Ombudsman