DRN-2335644

Financial Ombudsman Service

The complaint

Mrs F complains that Executive Benefit Consultancy Limited (EBC) gave her unsuitable advice to transfer a final salary occupational pension (OPS) into a self-invested personal pension (SIPP).

Mrs F is represented in bringing this complaint, but for ease, all comments and actions will be noted as being Mrs F's.

What happened

In February 2018, Mrs F's former employer (from which she was made redundant the previous year) wrote to her following her request for a cash equivalent transfer value (CETV) in connection with a possible "*transfer out*" of her OPS. The employer confirmed the CETV was £388,775.70.

Mrs F initially met EBC in March 2018, having been introduced to it by a mutual acquaintance (who I believe was an ex financial adviser). Over the following couple of months there were further discussions between Mrs F and EBC. EBC produced a retirement planning report and met Mrs F in May 2018 to discuss it.

It recorded that Mrs F:

- was 52 years old and in good health;
- was separated with four children who were financially dependent on her;
- was a joint owner in the marital home and in an investment property both of which were mortgage free;
- had income from the investment property and from maintenance arrangements amounting to about £2,100 (net) a month (the rental income was expected to cease once a separation agreement was finalised);
- hoped to return to work in the future;
- had about £40,000 put aside in cash and savings accounts (the remainder of her redundancy which she'd been using to supplement her income);
- had no loans or credit card balances; and
- had an OPS, with a CETV of £388,775.70. She had no other pension provision.

It noted Mrs F's main objectives were to:

- break all ties with her previous employer and have more control over her pension;
- access her pension fund as flexibly as possible without any penalty or restriction about the level of income she could access;
- use the tax-free element to provide a tax efficient income stream; and

- pass on any residual fund to her children on her death.

It added that:

- its starting point had been to assume that Mrs F's needs would be best served by staying in the OPS given the guaranteed income it would give her for life. And especially as it included an element of "inflation proofing" due to the annual increases it would be subject to. It noted it wasn't subject to investment risk like a personal pension would be.
- Mrs F confirmed it was not her intention to match her OPS promised pension or secure a fixed income by buying an annuity.

EBC said that the growth rate needed to match Mrs F's OPS benefits if she were to retire at age 65 was 5.77% (based on her taking tax free cash and a reduced pension). It thought that was achievable. It had already determined that the growth rate needed to retire at 55 wasn't achievable.

EBC recommended that Mrs F transfer her OPS to a SIPP with a provider I'll refer to as S. It felt that would better meet her retirement planning objectives. It further recommended that her pension funds should be invested in its bespoke EBC portfolio, selecting active fund managers over passive fund managers given the intention was to achieve outperformance of a market index rather than track it.

It recommended a split portfolio across the following assets:

40% UK Equities	8 funds
20% Global equities	4 funds
35% Targeted Absolute Return/Flexible/Mixed investments* *To reduce the level of volatility and risk and add diversification.	7 funds
5% property	21 funds

It outlined the fees that would be payable, which were:

- an initial fee of 3% of the transfer value (£11,663.27)
- plus a 1% adviser charge (approximately £3,771 a year)

In addition to an estimated overall ongoing charge for the SIPP of 2.21%, which included:

- an initial fund management charge 0.86%
- platform charge 0.35%

Mrs F followed EBC's advice and transferred her OPS into a SIPP.

EBC found out from S, around April 2019, that Mrs F no longer wanted it to act as her financial adviser.

Mrs F complained to EBC in June 2019 and said that the advice she'd received to transfer out of her OPS was unsuitable. Amongst her reasons for saying so, Mrs F said:

- at the time of the advice, many areas of her current and future financial position were uncertain, so she felt the assumptions were made about when she might retire weren't accurate;
- she'd never held any investments or taken on any investment risk and was concerned to see the value of her pension investment (her only source of savings in

retirement) fall;

- she should have been advised to leave her pension where it was - especially due to her vulnerable state and personal circumstances at the time of the advice. She added that her future financial position and asset distribution was still to be decided following her separation.

EBC didn't agree and made a number of points in response. Those included:

- it took two months from signing the transfer request to receiving confirmation that it had gone ahead. At no point during that time did Mrs F suggest she'd changed her mind or was having doubts. Had she done so, EBC could have aborted the transfer;
- the level of analysis and figures it gave Mrs F was consistent with what's expected, to provide a full understanding of the possible outcomes and make an informed decision. It also felt the level of detail was appropriate given Mrs F's employment background; and
- it noted Mrs F's intention to return to work in the future and her aim of accessing her pension without penalty and or restriction about the level of income she might take. So, any advice given was with those objectives in mind. Particularly as she said she wouldn't be able to retire at 55 under her OPS given the early retirement penalties that applied.

Mrs F wasn't happy with EBC's response, so she complained to our service. One of our investigators looked into things and didn't think EBC had given suitable advice in Mrs F's particular circumstances. In summary he said:

- it would have been preferable for Mrs F to defer any significant financial decisions such as transferring her pension. And he thought there would need to be overwhelming reasons to justify her transferring her OPS at the point she did;
- he didn't think a critical yield of 5.77% was achievable. He thought the closest possible investment return was 4% a year with around 12 years to go before retirement. So, he thought it likely Mrs F would receive a materially lower pension from the SIPP than her OPS. And he wasn't persuaded that Mrs F had capacity to accept the level of risk that EBC thought she could;
- whilst she had assets of about £40,000 (which might have given her some capacity to absorb losses), he thought it likely that amount would reduce until Mrs F found further employment. So, in reality he thought that meant she had no or very low capacity for loss. And even though the adviser had stated that Mrs F's capacity for investment losses was low, she'd still recommended an investment strategy at a higher level.
- it wasn't clear how Mrs F could afford to recoup possible investment losses. So, at the very least, she'd need to invest at a more cautious level, which also lowered the potential of future investment returns in any event. And, even at a medium risk, it was unlikely her investments would match the benefits she could have expected from her OPS.
- EBC should have advised Mrs F to stay in her OPS with the option of reviewing things again in future. And, had such advice been given, he didn't think Mrs F would have gone ahead with the transfer.

To put things right, the investigator thought EBC should, as far as possible, put Mrs F into the position she'd now be in had it not been for the unsuitable advice. So, he recommended that it carry out a redress calculation in line with the pension review methodology (as amended by the FCA in October 2017). He recommended that the calculation was carried out using the most recent financial assumptions at the date of the actual calculation. On top of that, the investigator thought EBC should pay Mrs F £300 compensation for the upset caused by the poor advice she was given.

EBC didn't agree. It felt that not all of the facts of the advice process had been considered. Those included:

> Mrs F proactively asked her former employer for a cash equivalent transfer value (CETV) for her pension before she'd even contacted EBC. She was then introduced to EBC through a mutual acquaintance. It disputed these were the actions of a vulnerable customer as Mrs F had since suggested. According to EBC, this demonstrated she had a "*clear and set objective*".

EBC asked for the matter to be considered afresh. So, it's been passed to me 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.

What was EBC required to do?

Apart from the overarching principles for businesses, which include:
Principle 1 – Integrity; Principle 2 – skill, care and diligence; Principle 6 - customers interests; Principle 9 - reasonable care; the Code of Business sourcebook (COBS) sets out other obligations. In particular, COBS 9.2.1 R required EBC to take reasonable steps to make sure any personal recommendations were suitable for Mrs F. That meant it was required to find out about Mrs F's knowledge and experience (relevant to the specific type of investment) her financial situation and investment objectives.

COBS 9.2.2 R says that businesses should gather enough information to ensure the recommendation met the customer's objectives; the customer could bear the risks involved; and had the necessary experience and knowledge to understand the risks.

So, it's against that backdrop that I've considered whether EBC acted fairly and reasonably in Mrs F's particular case.

The advice to transfer out of the OPS

Mrs F was a member of a final salary OPS, which provided many valuable benefits and guarantees based on her salary whilst in that employment. Those benefits weren't based on investment returns. Instead, they would have provided a guaranteed income for the future. Mrs F had been a member of that scheme for almost 24 years and had amassed a pension pot valued at over £388,000. Given the valuable benefits associated with this type of pension, the regulator placed additional obligations on financial firms when advising about potentially transferring out of a final salary (also referred to as a defined benefits) OPS.

COBS19.1.6G says:

When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer, convert or opt-out, a firm should start by assuming that a transfer 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.

Given what the regulator says, my starting point is also that a transfer won't usually be suitable. I'd need to be satisfied there were good reasons why a transfer was in Mrs F's best interests. And generally speaking, that will only be the case if there's a reasonable prospect that the new arrangement will provide better retirement benefits. But the transfer will also need to be suitable, taking into account the individual's particular circumstances. I can see that EBC also started from the point that the transfer probably wouldn't be suitable. It also said that Mrs F shouldn't be "seduced" by the high CETV of her OPS. The evidence shows that it also considered whether each of Mrs F's objectives could be better served by staying in her OPS or by transferring to a SIPP.

However, I'm not persuaded that EBC did enough to fully understand Mrs F's objectives – and whether they were realistic – or demonstrate overall why transferring out of her OPS was in her best interests. So, like our investigator, I'm going to uphold this complaint. I'll explain why.

I don't think EBC did enough to fully understand why Mrs F wanted to invest at the point she did. The fact find shows she was 52 years old and in good health. And she'd pretty much ruled out retiring at age 55, so there didn't seem to be a pressing need for Mrs F to alter her pension arrangements at that point.

She was also introduced to EBC at a time when she was going through some fairly major changes in her life. She'd been made redundant less than a year before and was in the process of finalising a marital separation. Her contact with EBC seems to have been instigated, at least to some extent, by the fact that she wanted to make sure her husband didn't have a claim on her pension in the event of her death. But, as I understand it, that was something that could be agreed through other channels in any event. Whilst I can see why matters such as a marital separation might turn a customer's attention towards things such as retirement provision, EBC still needed to be satisfied that any advice it gave was suitable taking account of all of the relevant factors.

Mrs F said she was hoping to return to work at some point in the future. And in itself is something that may well have changed her retirement needs. But she was also expecting to lose one of her other sources of income (from rental property) once the separation was finalised. So, until such time as these things were settled, I think it was probably more difficult for Mrs F to make important decisions about an OPS that was of significant value in her retirement. And in these circumstances, I'm inclined to agree with our investigator that a more appropriate response would have been for EBC to suggest that she wait before taking things further.

To some extent, I think EBC made an assumption that as Mrs F had already asked her former employer for a CETV, she was wedded to the notion of transferring out of her OPS. And that's what probably led to it forming the opinion that she had a *"clear and set objective".* But I'm not persuaded that she did. In any event Mrs F approached EBC for advice and it was EBC's responsibility to clearly demonstrate how her aims and objectives could be best achieved and why, ultimately, it felt it was in her best interests to transfer out of her OPS. If it couldn't do that, EBC's advice should have been that she remain in her OPS. Based on everything I've seen, I think EBC's advice should have been for Mrs F to leave her pension where it was.

I can see one of Mrs F's aims was to break ties with her former employer. I accept this may well be an attractive prospect to some people once they've left their former employment. But it's not clear whether that was a pressing need, or something that could happen in time. Whatever the reason, it still needs to be considered in the wider context of the risks of transferring valuable and guaranteed benefits compared to an arrangement with more risk and may result in a loss of investment. This particular aim may also have been linked to Mrs F saying she wanted more '*flexibility'.* 'Flexibility' is a reason often cited for wanting to transfer a pension. Again, it's important that the adviser understands what is meant by that and whether it can be achieved through existing arrangements. And whilst it's evident that EBC did explore the 'flexibility' question to some extent, I'm not persuaded it really did enough to satisfy itself whether this was a legitimate personal objective for Mrs F. As I've said, she was 52 when she took advice from EBC. And she'd pretty much ruled out retiring at age 55. As having more flexibility typically applies when pension benefits are being paid (and Mrs F wasn't close to that point) I can't see that this was a pressing need for Mrs F.

In any event, I can see that EBC compared the features of an OPS versus a personal pension when thinking about 'flexibility' and breaking ties with Mrs F's former employer. And it rightly said that within an OPS, control over investments rested with its trustees. Whereas under a personal pension, it said Mrs F could take control of her pension pot, whilst also taking on any investment risks. I agree that Mrs F would probably have more control and flexibility under a personal pension than had previously been the case. But that again needs to be considered in the context of the wider risks and Mrs F's experience as an investor. And I think this is perhaps where EBC overstated the extent of Mrs F's experience and likely control. I understand she worked in the financial sector for many years and had indicated she had some awareness of investment markets. But, it seems her work didn't involve pensions or investments. So, I don't think her knowledge is likely to have been any greater than any other retail investor. In these circumstances I think it was EBC's role to not only record Mrs F's objectives, but to also decide whether they were realistic or achievable. And with her low level of investment experience, having an objective geared towards having more control doesn't seem to be realistic. It seems to me that she'd always need support and would have to pay an adviser such as EBC for that. So, I'm not persuaded that, overall, Mrs F truly needed or wanted the control she'd referred to.

Mrs F made it clear that she wanted to be able to take her pension whenever she wanted and at the level she decided. And she also said she didn't want to suffer the penalties that she felt her OPS imposed if she decided she wanted to retire early. Again, having made the appropriate comparisons, EBC appeared to suggest that the personal pension was probably the more suitable option here. It said that unlike the OPS (in relation to which a reduction factor will be applied to the starting level of pension) with a personal pension, *"you can draw on benefits from age 55…This is completely at your own discretion and without early retirement penalties although it may depend on the pension fund value being at a level where you feel comfortable drawing on the desired level of tax-free cash and / or income".*

I don't think EBC was wrong to say what it did. However, I do think it should have made its comparison clearer to help Mrs F fully understand the position and make an informed decision. I say that because the reality is that benefits from *any* scheme will be lower if the customer retires early. That's because the scheme has less time to grow and the proceeds of the investment will also have to last longer in retirement. But OPS schemes have a similar issue. And it wouldn't be fair for an OPS scheme to pay the pension at the same level if the member asks to retire five years early. So, a reduction is made to ensure that benefits which are to be paid for five years longer are of the same overall value. Referring to this as a 'penalty' might make the OPS scheme seem inferior or less attractive, when that's unlikely to be the case. And in the absence of an explanation such as this, I can see why Mrs F might think a personal pension was a more appealing option. So, I don't think EBC fully fulfilled its duty when explaining the position.

A driver in Mrs F thinking about transferring her OPS was the ability to leave a residual pension fund to her children on her death. I can understand that. But, EBC needed to understand how much of a priority this was especially as Mrs F didn't have any concerns about her health and was only age 52 at the time. So, there didn't seem to be a pressing need to meet this objective either. And it needed to advise her accordingly - especially if leaving a bigger residual fund on death meant relying on a reduced level of retirement income in life. And Mrs F had made it clear that she wanted to make sure she had enough income in retirement. In at least one of the questionnaires she completed (there appeared to be a slight contradiction with information contained elsewhere about what was more important), she suggested that it was more of a priority having enough income than leaving a residual fund to her family.

Having thought about this carefully, I don't think providing for her family in the event of her death should have been at the expense of maintaining a reasonable level of income in her retirement. And, as I've indicated, it's not clear that Mrs F had decided this was more of a priority. In these circumstances and given the apparent contradiction, I think EBC should have clarified things. Mrs F had saved for her retirement for a number of years. And, as she had no other pension provision at the time she took advice, it seems to me that she'd more likely need the guarantees and indexed income that her OPS would provide. And, in any event, I think there were other ways that her family could be provided for. Mrs F had a house that she owned outright and some savings. She'd also indicated that in the event she started other employment, she'd look to join whatever pension schemes were available. So, it seems entirely likely there would have been additional provision for her family from those sources. I think it's also worth saying that whilst EBC talked about the pension 'pot' being passed on to her children, that pot is likely to have reduced in value, not only due to the investment risks it was subject to, but because Mrs F would have been using it to fund her retirement. And given that there were other equally viable means for Mrs F to provide for her children in the event of her death, I wasn't persuaded that this objective could be best served by transferring the valuable benefits from her OPS. And I think EBC should have done more to explain that. Instead, it appears to have simply pointed out that, unlike her OPS (which has certain stipulations surrounding dependants benefits), a personal pension had more flexibility when it comes to providing for dependants.

Mrs F said she was looking for investment growth of between about 5-7% over an investment horizon of 15 years +. I don't think this is an unusual objective. However, it needed to be considered in the context of her attitude to risk. EBC classed Mrs F as a balanced investor. That's typically someone *"looking for a balance of risk and reward, and whilst seeking higher returns than might be obtained from a deposit account, recognises that this brings with it a higher level of risk and that the value of their investment may fluctuate in the short term".* And EBC noted in its suitability report that Mrs F did "*not mind"* a reasonable degree of risk in the hope that her benefits could be higher in retirement.

However, I need to bear in mind that tolerance of risk isn't the same as having the capacity to accept the level of risk that a customer is willing to take. Mrs F had no other pension provision. Whilst she had some savings, she needed those to supplement her income until she returned to employment. And until that happened, it seems she had little means of replacing any potential losses to her pension. On top of that, EBC had already said that her capacity for loss was low.

An important part of considering the viability of an OPS transfer is careful consideration of the level of return needed to match (let alone exceed) the benefits from an OPS. EBC had already determined that the critical yield needed if Mrs F wanted to retire at age 55 couldn't be achieved. It was satisfied that in order to match the benefits from her OPS at a retirement age of 65, a critical yield of 5.77% was achievable. But the regulator has made it clear that in order for a pension transfer to be financially viable, the assets a customer's attitude to risk allowed them to invest in, shouldn't just mean it's a case of achieving the critical yield, it should be capable of exceeding it. That's particularly relevant in Mrs F's case. She'd made it clear that she wasn't looking just to match her OPS benefits. She was looking for investment growth. And it seems to me that there would be no point giving up the guarantees of the OPS simply to 'stand still', given the risk that the transfer might underperform.

The advice in this case 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 this service on our website. 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.

As I've said, the investment return (critical yield) required to match the OPS at retirement was quoted as 5.77% per year. This compares with the relevant discount rate of 4% given it was around 12 years to Mrs F's retirement. The shortfall is significant. Had Mrs F had a higher attitude to risk, it's arguable that any shortfalls could have been made up. But she was considered a balanced investor, with low capacity for loss. So, realistically, it seems unlikely she'd have been able to make up any shortfalls. And I think EBC should have made that clear.

But, on top of that, the critical yield of 5.77% didn't take account of the ongoing charges. And Mrs F's fund had already instantly reduced by 3% (Over £11,600) before any of the annual charges or SIPP charges were applied. This is relevant as it means that the level of growth needed just to match the benefits being given up was likely to have been understated. And particularly so when factoring in investment growth. So, even for a balanced investor, I think it would have been difficult to achieve the level of growth needed to match Mrs F's investment aims, let alone exceed them, so as to make the transfer more viable than if she'd stayed in her OPS.

EBC said it felt a personal pension would best serve Mrs F's specific retirement aims. For the reasons I've outlined, I'm not persuaded about that. But, in any event, it wasn't just a question of what served the retirement aims Mrs F cited, EBC had to give advice that was in Mrs F's best interests overall. And, based on everything that I've seen, I don't think transferring out of her OPS was in Mrs F's best interests. So, as I've outlined, that's the advice that I think EBC should have given her.

Would Mrs F have gone ahead with the transfer anyway?

After careful consideration, I don't think she would. Mrs F wasn't an experienced investor and she clearly relied on EBC for advice taking account of her particular circumstances at the time. In addition, there was no compelling reason for Mrs F to transfer her pension at the point she did. In those circumstances, I'm not persuaded she'd have gone ahead had it not been for EBC's advice.

I uphold this complaint and I've set out below what EBC now needs to do to put things right.

Putting things right

A fair and reasonable outcome would be for EBC to put Mrs F as far as possible, into the position she would now be in but for the unsuitable advice. I consider she would have remained in the occupational scheme. EBC must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs F's acceptance of the decision.

EBC may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs F's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs F's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs F's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs F as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mrs F within 90 days of the date EBC receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes EBC to pay Mrs F.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000 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 £160,000 I may recommend that the business pays the balance.

Determination and money award*:* I require EBC to pay Mrs F the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000 I additionally require EBC to pay Mrs F any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000 I only require EBC to pay Mrs F any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that EBC pays Mrs F the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mrs F**.**

If Mrs F accepts my decision, the money award is binding on EBC. My recommendation is not binding on EBC. Further, it's unlikely that Mrs F can accept my decision and go to court to ask for the balance. Mrs F may want to consider getting independent legal advice before deciding whether to accept this decision.

In addition to the above, if the compensation amount does not exceed £160,000 I also require EBC to pay Mrs F £300 compensation for the upset it's caused. I say that because it's clear Mrs F has been caused distress at seeing her sole pension provision reduce as a result of EBC's recommendation.

My final decision

I uphold this complaint. Executive Benefit Consultancy Limited should now take the steps I've outlined above to put things right.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 29 March 2022.

Amanda Scott
Ombudsman