DRN-2932046

## The complaint

Mr W complains about the advice given by Quilter Financial Services Ltd ('Quilter') to transfer the benefits from his preserved defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

## What happened

In 2016 at a networking event, Mr W was introduced to a business - who at the time was an appointed representative of Quilter - to discuss his pension and retirement needs.

Quilter completed a fact-find to gather information about Mr W's circumstances and objectives. Quilter also carried out an assessment of Mr W's attitude to risk, which it deemed to be 'moderate'. I will expand on what this means later on.

In January 2017, Quilter advised Mr W to transfer his pension benefits into a SIPP and invest the proceeds in a multi-asset, multi-manager investment fund provided by a third-party investment company. The suitability report listed 11 points, which the adviser called 'key points of advice' that they'd considered in making the recommendation. These included, better death benefits, the need for greater flexibility, the funding level and strength of the DB scheme and other assets and income. But in the adviser's overall summary, the reasons for this recommendation were:

- To enable Mr W to take tax-free cash from his pension immediately, which was higher than he'd get from his DB scheme;
- To provide rental income in retirement – in lieu of guaranteed income - alongside his state pension by using the tax-free cash to make his buy-to-let property habitable;
- To also provide the opportunity for an income near to that offered by the DB scheme; and
- To meet Mr W's requirement for flexibility from his pension.

In 2020 Mr W, through a representative, complained to Quilter about the suitability of the transfer advice because he said he now realises the advice was flawed – he's lost guaranteed benefits and his pension is exposed to significant risk, which was wasn't explored at the time.

Quilter didn't uphold Mr W's complaint. In summary it said the adviser's research carried out at the time to transfer Mr W's DB scheme was in his best interests. It said the advice was suitable and appropriate for Mr W's needs and circumstances.
Quilter said by taking the tax-free cash to make his buy-to-let property habitable, the rental income Mr W would receive in addition to his state pension meant he had no need for the income from his DB scheme – it was surplus to requirements and would therefore be subject to unnecessary tax. It said Mr W's other assets and income meant he had a requirement for flexibility, which his DB scheme couldn't provide. It also said that more flexible death benefits were important to Mr W and the SIPP would allow his wife to inherit the full pension fund upon his death rather than half of the guaranteed income provided by his DB scheme.

Mr W referred his complaint to our service. An investigator upheld the complaint and required Quilter to pay compensation. In summary they said Quilter's assessment of Mr W's future retirement income from both his buy-to-let property and land wasn't guaranteed, which meant they considered Mr W's tolerance for loss wasn't high. They considered it wasn't in Mr W's best interests to give up a guaranteed income given his large dependent family and because he didn't have other significant pension provision. They said the critical yield or growth required to match Mr W's existing benefits was far greater than he could expect to receive and so Quilter should have recommended he remain in his DB scheme. Finally they said Mr W's objective could have likely been met by other means including by taking out a loan.

Quilter disagreed. It simply said it considered the advice was suitable for the reasons set out in the advice letter of January 2017.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasoning is set out below.

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

*Financial viability*

Quilter says the advice to transfer out of Mr W's DB scheme was in his best interests – it says it was suitable and appropriate for his needs and circumstances.

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

Mr W was 58 at the time of the advice and told the adviser he hoped to work as long as he could. The critical yield required to match Mr W's benefits at age 65 was 20.4% if he took a full pension and 17.6% if he took tax-free cash and a reduced pension. The critical yield to match the benefits available through the Pension Protection Fund at age 65 was quoted as 13.6% per year if Mr W took a full pension and 12.1% per year if he took tax-free cash and a reduced pension.

This compares with the discount rate of 3.3**%** per year for six years to retirement in this case (or 3.1% for five years to retirement at the point the transfer was finalised.) For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's recorded attitude to risk as a 'moderate investor' and also the term to retirement.

In my view there would be little point in Mr W giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, taking the most likely option of Mr W taking tax-free cash and a reduced pension, the critical yield was 17.6%. This figure was significantly higher than both the regulator's middle and upper projection rates – it was also around five times higher than the discount rate. And while I have some concerns about how Quilter arrived at classifying Mr W as a 'moderate investor' (this was defined as someone who is willing to take risk with a high proportion of their available assets and usually has some experience of investing in products containing higher risk assets) even if I thought this was the level of risk Mr W was prepared to take with his pension, I think it was clear he was likely to receive benefits of a substantially lower overall value than his DB scheme at retirement, as a result of investing in line with that attitude to risk. I think this would also be the case even if the scheme moved to the PPF .

Because the required sustained growth rate was more than five times the discount rate, I think it is clear the transfer was not compatible with Mr W's attitude to risk. To have come close to achieving the level of growth required, in my view would have required Mr W to take significant investment risk, which was far greater than his recorded appetite. And even then I think it's more likely than not that Mr W would have been worse off financially at retirement if he transferred out. I think the term to retirement was also a limiting factor here.

I'm mindful too that, looking at the adviser's advice letter of January 2017 in which they set out their recommendation and the reasons for it, they said the critical yield was *"quite high..."* and *"it is unlikely to be achievable..."* But despite what appears to have been an acknowledgement that the transfer wasn't financially viable, they went ahead anyway and recommended Mr W transfer out his pension. I don't think this was acting in Mr W's best interests.

I can see the adviser explains in their advice letter the reason why they consider the true relevance of the critical yield figures may be limited. They say the figures assume an annuity is taken at retirement age to generate the pension income, which they say isn't necessarily the case because the new pension rules offer more flexibility. They also say it was unlikely Mr W would take an annuity. That said, later on in the advice letter, the adviser says that Mr W could take an immediate annuity which was *"more in line with his requirements..."* and was suitable for him. I think this highlights the gaps in the adviser's advice and knowledge about Mr W's future income and wider pension planning needs, which I will discuss further below.

But in any event, I don't think the importance of the critical yield figures should have been downplayed by the adviser. The regulator required Quilter to provide the rates of return required to replicate the benefits available to Mr W through his DB scheme.
So, telling Mr W it wasn't really relevant to him undermined the analysis the regulator required it to undertake. And I think given the very high critical yield figures in Mr W's case, these should have acted as a clear sign that Mr W ought to retain his DB scheme and that transferring out was not likely to be in his best interests.

I can see the adviser provided Mr W with risk warnings and told him that *"There will be advantages and disadvantages to consider, and you need to be satisfied that on balance* *you believe the transfer to be in your best interests."* But Quilter was under a duty to provide suitable advice and to act in Mr W's best interests – it wasn't for Mr W to work it out for himself. So if Quilter didn't think the transfer was suitable for Mr W because of the difficulty in achieving the critical yield, the adviser should not have recommended he go ahead with it. Merely disclosing information doesn't make an unsuitable recommendation suitable.

Overall, I think Quilter ought to have told Mr W it wasn't in his best interests to transfer out of the DB scheme because I think it's clear that he would be worse off financially if he did so. And for this reason alone, I don't think the advice to transfer out was suitable. Of course financial viability isn't the only consideration when giving transfer advice. I accept there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

*Flexibility – access to tax-free cash and income requirement*

It appears that Mr W's primary objective, and the reason for the recommendation to transfer out of his DB scheme was to access his tax-free cash to make his recently purchased buy-to-let property habitable so he could rent it out to generate income.

But I don't think this was a suitable reason to recommend the transfer. I say this because crucially the adviser did not establish how much money Mr W needed to realise his plans. The adviser recorded that Mr W had released some money from other pension sources, which he'd used towards the renovations – but all the adviser said was that he needed *"more than this"* to make the property habitable.

But by not establishing how much Mr W needed, the possibility existed that Mr W might not actually have enough money to realise his plans to enable him to generate the rental income he said he could achieve. And even if Mr W was able to complete the renovations, I don't think rental income can reasonably be described as guaranteed.

Quilter says Mr W didn't need the income from his DB scheme and was likely to pay more tax in retirement if he took his benefits from the scheme. But again, this was predicated on Mr W being able to achieve a particular level of rental income, some of which was attributable to a property development that Mr W hadn't even got planning permission for. So, given what I've said above, I don't think it was reasonable for the adviser to conclude that Mr W didn't need the guaranteed income the DB scheme provided or that he was likely to pay more tax if he took benefits from the scheme instead. And given Mr W's other pension was worth only around £35,000 and was subject to investment risk, I think he could have been reliant on the guaranteed income his DB scheme provided.

Overall, I think the advice to give up guaranteed benefits provided by Mr W's DB scheme for something which, at the time of the advice wasn't clear that it could be reasonably achieved, and also couldn't be guaranteed, wasn't acting in his best interests.

Furthermore, there is no evidence the adviser explored alternative solutions to help meet Mr W's objective before recommending he transfer his pension to access the tax-free cash to achieve it. But I would have expected them to have done so. For example, I would've expected the adviser to have explored with Mr W the possibility of him accessing more readily available methods of funding such as a loan or a mortgage. Mr W said that he purchased his buy-to-let property without the need for a mortgage, so it appears there was scope for him to consider taking out a mortgage on the property to raise the required funds.

And a buy-to-let mortgage lender would typically take into account a percentage of the expected rental income when considering a lending application. That said, because Mr W appears to have been debt free, I've not seen any evidence that affordability was a likely issue.

Overall, I've not seen any evidence to persuade me that Mr W's objective couldn't have likely been met by alternative means of funding rather than recommending he make an irreversible decision to transfer his DB scheme to a personal arrangement to help achieve it.

The other reason the adviser gave for the recommendation to transfer was to provide flexibility in how Mr W took future income. But I can't see that Mr W had a strong need for variable income through his retirement – Mr W's future income needs weren't known at the time.

Firstly Mr W said that he had no plans to retire any time soon and that he wanted to continue working. I think this was driven by the fact that he had a large dependent family. As I've said above, Mr W's plans to generate rental income from his newly acquired property hadn't come to fruition, so it wasn't possible to know what income, if any, this might generate. And the land that Mr W owned, which he said he had plans to develop to generate further income, was also only at the planning stage so wasn't in any way guaranteed.

Because Mr W's future income needs weren't known, I think this explains why the adviser's advice letter was at times confused and appeared contradictory on the point of income need. On the one hand the adviser talks about Mr W's need for flexibility, but on the other hand they went on to say that Mr W could use his pension money to take an immediate annuity, which would better suit his requirements and was suitable. In addition I can see the adviser cautioned Mr W about taking his tax-free cash entitlement from his DB scheme at age 65 because it would significantly reduce his income – yet they went on to recommend Mr W transfer out, which the illustration showed was likely to result in Mr W getting even less income than his DB scheme.

Overall I'm not persuaded Mr W's need for flexibility was a real objective – I think it was simply a consequence of transferring out to a different arrangement to meet Mr W's need for access to cash. And in any event, Mr W already had a degree of flexibility because he had already switched his personal pensions to the SIPP and so he could choose how to access these benefits in future.

*Death benefits*

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension arrangement was likely an attractive feature to Mr W. But whilst I appreciate death benefits are important to consumers, and Mr W might have thought it was a good idea to transfer his DB scheme to a personal pension arrangement because of this, the priority here was to advise Mr W about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Quilter established the extent to which Mr W was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr W was married and had children - so the spouse's and dependent's pension provided by the DB scheme would've been useful to them if Mr W predeceased them. I don't think Quilter made the value of this benefit clear enough to Mr W. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Quilter should not have encouraged Mr W to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

While I'm mindful that Mr W was 58 at the time, if he genuinely wanted to leave a legacy for his spouse and children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Quilter should've instead explored life insurance. This didn't have to be a whole of life policy with a sum assured for the full transfer value, which given Mr W's age might have been costly. The starting point ought to have been to ask Mr W how much he wanted to leave to his family, and this could've been explored on a whole of life or term assurance basis, which I consider was likely to be cheaper to provide.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr W. And I don't think that insurance was properly explored as an alternative.

*Concerns over financial stability of the DB scheme*

I can see the adviser highlighted that Mr W's DB scheme's funding level was at 86% as at April 2015 and that Mr W was concerned by this. But I'm not persuaded the funding of his deferred DB scheme was in a position such that Mr W should have genuinely been concerned about the security of his pension. In any event, if the scheme did end up moving to the PPF, as I've explained above, Mr W was still likely to be better off than transferring out given the high critical yield required to match the benefits available through the PPF.

*Summary*

I don't doubt that the immediate availability of tax-free cash, flexibility and the potential for higher death benefits on offer through a SIPP would have sounded like attractive features to Mr W. But Quilter wasn't there to just transact what Mr W might have thought he wanted. The adviser's role was to really understand what Mr W needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free and increasing income to meet an objective that in my view could likely have been achieved through other means such as a form of borrowing, which would've been far preferable to Mr W than giving up his only guaranteed retirement income. By transferring, Mr W was very likely to obtain lower retirement benefits and in my view, there were no compelling reasons which would justify a transfer and outweigh this.

So, I think Quilter should've advised Mr W to remain in his DB scheme.

I now need to consider whether Mr W would've gone ahead anyway, against Quilter's advice. Having done so, I don't think Mr W would've insisted on transferring out of his DB scheme and gone head in any event. I say this because Mr W was not in my view an inexperienced investor, despite how Quilter classified his attitude to risk and experience - so I think he relied on the advice he was given. At the time this pension was the primary source of Mr W's guaranteed future retirement provision.
So, if Quilter had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, and if it had explained that Mr W should explore alternative source of funding his project to meet his primary objective and not risk his guaranteed pension to do so, I think that would've carried significant weight. I think Mr W would've accepted that advice.

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

I can see the investigator also recommended an award of £200 for the distress and inconvenience the matter has caused Mr W. Taking everything into account, including that Mr W is now at the age when his retirement provision is of greater importance, I think the unsuitable advice has caused him distress. And overall, I think an award of £200 is fair in all the circumstances.

**Putting things right**

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

Quilter 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.

My understanding is that Mr W has not yet retired. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 Mr W's acceptance of the decision.

Quilter may wish to contact the Department for Work and Pensions (DWP) to obtain Mr W'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 Mr W's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W'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 Mr W 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 his 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr W within 90 days of the date Quilter receives notification of his 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 Quilter to pay Mr W.

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.

**My final decision**

Determination and money award: I uphold this complaint and require Quilter Financial Services Ltd to pay Mr W 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 would additionally require Quilter Financial Services Ltd to pay Mr W any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Quilter Financial Services Ltd to pay Mr W any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Quilter Financial Services Ltd pays Mr W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W accepts this decision, the money award becomes binding on Quilter Financial Services Ltd.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 13 June 2022.
Paul Featherstone
**Ombudsman**