DRN-3013080

Financial Ombudsman Service

The complaint

Mr J complains about the advice given by The Tavistock Partnership Limited (Tavistock) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a self-invested personal pension (SIPP). He says the advice was poor and negligent, he thinks that it has caused him a financial loss.

He also thinks that the investment selection was poor and hasn't met his needs.

What happened

Mr J and Tavistock's relationship started in 2015, Mr J requested advice from Tavistock about whether it would be suitable for him to transfer out his DB pension at this time into a personal pension. As his DB pension was valued at £345,000, Tavistock advised him that it wouldn't be in his best interests to transfer. Mr J agreed with this advice and took no action.

Mr J, and a representative of Tavistock, met again in 2017 to discuss Mr J's pension and retirement needs. Tavistock completed a fact-find to gather information about Mr J's circumstances and objectives. Tavistock also carried out an assessment of Mr J's attitude to risk (ATR), which they said was at the low end of moderate to adventurous.

In June 2017, Tavistock advised Mr J to transfer his pension benefits into a SIPP and invest the proceeds using a discretionary fund manager (DFM).

The suitability report said the reasons for the recommendation were:

- Mr J wanted better control over his investments.
- The SIPP had more flexible death benefits.
- The SIPP had more flexibility in respect of taking benefits. For example, after age 55 Mr J could use it to repay some debt.
- He was concerned the DB scheme could end up in the Pension Protection Fund (PPF)

Mr J complained in 2020 to Tavistock about the suitability of the transfer advice. His complaint is very detailed, but it concerned two principle areas. Firstly, he thought the advice to transfer was unsuitable for him. And secondly, the related investment advice was also poor as the investments had not performed well.

Tavistock didn't uphold Mr J's complaint. They said that Mr J would have transferred away in any event and he hasn't suffered a loss due to the advice they gave.

Mr J referred his complaint to our service. An investigator upheld the complaint and said that Tavistock should pay compensation. She said that the advice to transfer the DB scheme benefits was unsuitable as it would likely lead to Mr J receiving lower benefits at retirement. There weren't any other compelling reasons as to why he should have given up his DB scheme benefits.

Tavistock disagreed, saying that the investigator was incorrect to refer to Mr J as a low to medium risk investor as he was recorded as having a low end of moderate to adventurous ATR. And Mr J is clearly not a low risk investor. The critical yield of 6% was within the regulators top two growth figures of 5 and 8%. And the point of the transfer was not to improve his pension payments but to improve the flexibility in the way he could take his benefits. It still thought that Mr J was a persistent customer.

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.

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, Tavistock should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr J'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

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how Tavistock 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 the Financial Ombudsman Service on our website. Whilst Tavistock wasn't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The critical yield required to match Mr J's benefits at age 65 was 6.01% if he took a pension which increased by 3.25% a year and had a 50% spouses pension. It was 5.43% if he took a pension that didn't increase and had no spouses pension.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 4.5% per year for 21 years to retirement. 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 J's attitude to risk and also the term to retirement. There would be little point in Mr J giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

Much of the correspondence about this complaint has concentrated on Mr J's attitude to risk. Tavistock assessed this as being at the low end of moderate to adventurous. But, looking at the descriptions of attitude to risk categories Tavistock has provided, this covers a wide range of them. So, I don't see how it can be correct. I don't see how Mr J could have an attitude to risk that is both lower than moderate and adventurous. Surely it must be one or the other, or something else.

So, I'm not persuaded that Mr J's attitude to risk was properly assessed and, most importantly, I don't think it was as high as adventurous. Whilst Mr J was clearly interested in managing his finances, and wanted a more 'hands on' approach, I can't see that he had any significant experience in doing this at the time.

So here, the critical yield that closest matched his old scheme benefits was just over 6%, And Tavistock should've assumed should've assumed that this was unlikely to be achievable. Because of this I think Mr J was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk.

Even if it was established that his attitude to risk was higher, I still think that he would struggle to invest in a way so that the SIPP would provide better benefits than the DB scheme. And I think Tavistock has recognised this when it said in the suitability letter *'On a standalone basis, transfer would not be appropriate if priority was to increase income.'*

Tavistock has provided cashflow models which it says shows Mr J would've been able to meet his needs despite the high critical yield and I've considered these. Tavistock's models show that Mr J would be able to achieve the same income from the fund as the DB scheme would have provided past age 100 using both the mid growth rate of 4.95% and the higher growth rate of 7.96%. I don't think these amounts account for the provision of a spouses pension.

But at the low growth rate of 1.96%, assuming he took the same income as he would from the DB scheme, he would use all of the fund sometime between ages 80 and 85 (probably about age 83). So, there was a real risk that his pension fund would run out if he made the transfer.

Also, as Tavistock will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

For this reason alone a transfer out of the DB scheme wasn't in Mr J's best interests. Of course financial viability isn't the only consideration when giving transfer advice. Tavistock has said, in this case, the advice wasn't to improve Mr J's pension income it was to provide the flexibility he wanted.

So I've looked to see if there are other considerations which mean a transfer is suitable, despite it likely providing overall lower benefits. I've considered these below.

Flexibility and income needs

I don't think Mr J required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he had a genuine need to access his tax free cash (TFC) earlier than the normal scheme retirement age and leave his funds invested until a later date.

Mr J wanted to retire early, possibly at age 55, and he was thinking about using some TFC to repay a mortgage. But I'm satisfied he could have achieved this if he stayed in the DB scheme. This is because he was entitled to take TFC from the DB scheme at retirement. And I think, given his income and future prospects, there wasn't any pressing need to make arrangements to repay his debts early at this point in time.

I also can't see evidence that Mr J had a strong need for variable income throughout his retirement. This doesn't seem to have been discussed.

Furthermore, Mr J was only 42 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. Mr J had over 13 years before he was even thinking about accessing his DB pension, if he were to retire early. And possibly much longer than this. So, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr J to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. And if Mr J later had reason to transfer out of his DB scheme he could have done so closer to retirement.

And I understand that Mr J was also a member of his employers defined contribution (DC) scheme. So, he would build up a fund of money in this over time and it's likely the benefits from this could be used in a more flexible way. This would mean that he potentially could've met any flexibility aims he may have had without giving up his guaranteed DB scheme benefits.

And the transfer planning was based on Mr J's income from the DB scheme and how to replace this. But I can't see that Tavistock actually looked at what Mr J's income needs were at retirement. And this isn't unreasonable given how far away Mr J's retirement was. But I think it's difficult for Tavistock to have advised Mr J on his retirement planning when it didn't adequately determine what his retirement needs were.

Overall, I'm satisfied Mr J could have met his income needs in retirement through the DB scheme.

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 SIPP were likely an attractive feature to Mr J. But whilst I appreciate death benefits are important to Mr J, and Mr J might have thought it was a good idea to transfer his DB scheme to a SIPP because of this, the priority here was to advise Mr J about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Tavistock explored to what extent Mr J 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 J was married and had children (although his children may not have been dependent on him for too much longer) and so the spouses and dependent's pension provided by the DB scheme would've been useful if Mr J predeceased them. I don't think Tavistock made the value of this benefit clear enough to Mr J. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a SIPP was.

And as the cashflow analysis shows, the fund may have been depleted particularly if Mr J lived a long life or investment returns were lower. In any event, Tavistock should not have encouraged Mr J to prioritise the potential for higher death benefits through a SIPP over his security in retirement.

Furthermore, if Mr J 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 Tavistock should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr J.

Control or concerns over financial stability of the DB scheme

I think Mr J's desire for control over his pension benefits was overstated. Mr J was not an experienced investor at the time of advice. Clearly he had an interest in becoming more 'hands on' with his investments and has now researched how his pension is invested. I understand he has now changed these investments. But with this increased knowledge of his financial affairs he has also concluded that the transfer away from the DB scheme was inappropriate. So, I don't think that this was a more pressing objective than maximising his pension benefits. And if things were explained properly at the start he wouldn't have transferred away.

As far as I can see the funding of his employer's DB scheme was not in a position such that Mr J should have genuinely been concerned about the security of his pension. And Mr J has said that he wasn't overly concerned about this. Furthermore, if the scheme did end up moving to the PPF, I think Tavistock should have explained that this was not as concerning as Mr J thought (if indeed he did think it was concerning). As I've explained above, Mr J was still unlikely to match, let alone exceed the benefits available to him through the PPF if he transferred out to a SIPP.

Suitability of investments

Tavistock recommended that Mr J invest in a fund the DFM used. And much of Mr J's complaint is that these funds haven't performed well. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr J, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr J should have been advised to remain in the DB scheme and so the complaint about the suitability of the investments and their performance wouldn't have arisen if suitable advice had been given.

Summary

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

Ultimately, I don't think the advice given to Mr J was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr J was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr J shouldn't have been advised to transfer out of the scheme just to potentially repay debts or gain some flexibility. This wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Tavistock should've advised Mr J to remain in their DB scheme.

Of course, I have to consider whether Mr J would've gone ahead anyway, against Tavistock's advice. Tavistock says that this is the case. This is because it advised Mr J a few years earlier not to transfer, but he came back for advice again when he was aware the transfer value had increased. Tavistock says he was very aware that his transfer value was high and he wanted to capture this ‘high watermark’ value.

I’ve considered this carefully, but I’m not persuaded that Mr J would’ve insisted on transferring out of the DB scheme, against Tavistock’s advice. I think the clearest indication of what Mr J would have done is what did happen. He didn’t transfer when Tavistock said it wasn’t right to do so. So, if Tavistock had again provided him with clear advice against transferring out of the DB scheme, explaining why it wasn’t in his best interests, I think that would’ve carried significant weight. And I think he would’ve accepted that advice again. As Mr J has pointed out, he did contact Tavistock to say that he wouldn’t proceed if Tavistock said a second time that it wasn’t in his best interests to transfer.

So, I don’t think Mr J would have insisted on transferring out of the DB scheme.

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

Putting things right

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

Tavistock 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.

For clarity, Mr J has not yet retired, and he has no plans to do so at present. 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 J’s acceptance of the decision.

Tavistock may wish to contact the Department for Work and Pensions (DWP) to obtain Mr J’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 J’s SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr J’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 J 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 J within 90 days of the date Tavistock 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 Tavistock to pay Mr J.

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 Tavistock pays the balance.

My final decision

Determination and money award: I uphold this complaint and require The Tavistock Partnership Limited to pay Mr J 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 Tavistock to pay Mr J any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require The Tavistock Partnership Limited to pay Mr J any interest as set out above on the sum of £160,000.

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

If Mr J accepts this decision, the money award becomes binding on The Tavistock Partnership Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J 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 J to accept or reject my decision before 4 July 2022.

Andy Burlinson
Ombudsman