DRN-3062744

The complaint

Mr M through a professional representative complains that The Royal London Mutual Insurance Society Limited (Royal London) gave him unsuitable advice to transfer his Occupational Pension Scheme (OPS) into a Personal Pension with it.

What happened

Mr M was advised by Royal London to transfer his OPS into a Personal Pension in 1993.

In October 1994, the then regulator, the Securities and Investment Board, set up an industrywide review of certain types of advice that was given between 29 April 1988 and 30 June 1994.

The transfer of Mr M's OPS to his Personal Pension should have been included within this review. Royal London initially rejected this complaint on the basis that Mr M did not respond to questionnaires issued inviting him to have the transfer reviewed. But they later realised they'd written to an out of date address for Mr M.

So Royal London agreed then that the complaint should be upheld and carried out a loss assessment using an external actuary which it says was in line with the regulators most recent guidance known as FG17/9.

The offer was put to Mr M's representative, but they noticed what they thought were some errors in the data input. The calculation was then re-run with amendments and put to Mr M to accept.

However, Mr M's representative argued that the wrong retirement date had been used. He said the rules were clear and the retirement date that should be used is the earliest Mr M could take the benefits without reduction from the OPS scheme – in this case Mr M's representative said this was age 65. The calculation carried out on behalf of Royal London was on the basis that Mr M would've retired at age 60.

Our investigator looked into matters and agreed that the offer made by the business was fair. Mr M had taken his benefits at age 59 from the Personal Pension, so the investigator felt it was fair and reasonable to say he'd likely have taken his benefits from the OPS at the same time. And the business had made the offer at 60 not 59 so this was in Mr M's favour.

She also said Royal London should award £200 for the distress and inconvenience its initial errors caused Mr M. Royal London accepted the investigators view.

Mr M's representative disagreed, he said the rules were clear and the investigator in coming to this conclusion had ignored the clearly stated fact about what the regulator had said should be done in this situation.

Our investigator explained that the offer put Mr M back into the position she thought he'd have been in had he not transferred or as close as possible. And that she recognised what the regulators guidance said but it couldn't cover all scenarios – and what Royal London had

done in this scenario was fair.

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.

As Royal London has conceded that the advice was unsuitable I do not need to comment further on this. The only thing left to decide is what represents fair compensation.

Both parties agree that the Pension Review process and FG17/9 is the correct way to redress the situation and for the avoidance of doubt I agree.

Mr M's representative's argument is fair compensation under FG17/9 means that the retirement age used should be 65 and not 60. He's pointed to FG17/9 saying the below about the assumed retirement age:

'The earliest date that a customer could retire and receive a non-reduced pension from their DB pension scheme. This is calculated based on the assumption of the customer's retirement age (see paragraphs 15 and 16)…

Consumer's retirement age

15. The earliest age at which the customer could have retired from the DB pension scheme without both:

- *requiring the consent of the employer; and*
- *suffering a reduction in benefits.*

16. Where a customer has benefits payable from different ages, the redress calculation should reflect the most favourable option for the customer'

Mr M's representative says this is clear and cannot be interpreted any other way. However, FG17/9 also says this under point 7:

'*Except where expressly specified below, pension transfer redress should be calculated in accordance with, and using the assumptions set out in, the provisions designated by the Financial Services Authority (FSA) in November 2013 (subject to any amendments made by the FSA after that date) for the selling of rights in, or interests under, personal pension schemes, between 29 April 1988 and 30 June 1994, where those provisions relate to pension transfers.'*

The guidance before FG17/9 which was originally set out by the Securities and Investments Board (SIB) and updated through the years as referred to above said where the customer has already taken retirement benefits (actual loss cases), the loss should be calculated at the date of actual retirement, including early retirement. So in this case it would be when Mr M took income at age 59.

It's my understanding that the industry has interpreted the FG17/9 guidance to be in relation to prospective loss cases. And SIB (and its updates) still applies to actual loss – although this is not explicitly stated anywhere in FG17/9. I've not relied on this in making my decision but the new guidance (referred to below in the putting things right section) does now say if there is evidence to say a customer would've more likely than not taken their benefits earlier (than the earliest date of no reduction within the scheme) – this date can be used as the retirement date for the calculation.

I appreciate why Mr M's representative may feel that isn't a satisfactory position for Royal London to take given the passage he has highlighted in FG17/9.

However, whilst the guidance is given to help firms calculate fair compensation in a practical way, it shouldn't be forgotten that the objective when compensating customers is to put them as much as possible back into the position they would be in if they had been given suitable advice. This is how this service approaches complaints and the regulator has the same objective in mind – for example at the beginning of FG17/9 it says *'Respondents should also consider how the Financial Ombudsman Service has taken account of such circumstances when determining similar complaints.'*

And:

FG17/9 says under point 2:

'Where a firm or adviser has failed to give compliant and proper advice, or has committed some other breach of the relevant requirements, the basic objective of redress is to put the customer, so far as possible, into the position they would have been in if the non-compliant or unsuitable advice had not been given or the breach had not occurred.'

So ultimately, I need to decide whether the offer Royal London has made is fair and reasonable and puts Mr M in as close as position as possible had the unsuitable advice not been given.

Given Mr M started taking income from the Personal Pension at age 59, I don't think it is unreasonable to assume he likely would've looked to do the same from the OPS had he remained invested there. It is the clearest indication of what Mr M would likely have done.

I've also thought about whether this course of action would've been allowed and likely taken under the OPS. The evidence shows early retirement from the scheme was allowed from age 55 but will likely have been subject to reductions. But Mr M in taking an annuity out at age 59, will have suffered a reduction of sorts in that his fund had less time to grow and the fund value used to buy the annuity will have been spread out across more years.

So I think it's reasonable to assume had Mr M not transferred, the same reasons he chose to take benefits at 59 would've still applied.

Royal London's offer was made on the basis of retirement at 60 and so I think that's fair given the above. So I think its offer to review the case under FG17/9 with a retirement date of age 60 is fair and reasonable and puts Mr M back into the position, as close as possible, as if he'd remained in the OPS until that date.

Royal London also agreed to pay £200 for the distress and inconvenience caused by its initial errors in investigating Mr M's complaint. It ought to have realised earlier that it had written to an incorrect address during the review process and in not doing so its delayed matters for Mr M. I think the £200 offer adequately compensates Mr M for this.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice.

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr M's representative whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect.

He didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr M.

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme until age 59 but Royal London should use age 60 as per its offer. Royal London 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 Mr M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 compensation amount must where possible be paid to Mr M within 90 days of the date Royal London 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 Royal London to pay Mr M.

Income tax may be payable on any interest paid. If Royal London deducts income tax from the interest, it should tell Mr M how much has been taken off. Royal London should give Mr M a tax deduction certificate in respect of interest if Mr M asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Royal London to carry out a calculation in line with the updated rules and/or guidance in any event.

Royal London should also pay Mr M £200 for the distress and inconvenience caused, if it hasn't already done so.

My final decision

I uphold the complaint and direct The Royal London Mutual Insurance Society Limited to carry out a calculation in line with the above, once the decision is accepted.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 21 January 2023.

Simon Hollingshead
Ombudsman