

## **The complaint**

Mr D complains about the advice given by ReAssure Limited to transfer the benefits from his preserved defined-benefit ('DB') occupational pension scheme to a personal pension. Mr D says the advice was unsuitable for him and believes he's lost out as a result.

## **What happened**

In 1995 Mr D was contacted by a business now known as ReAssure to discuss his pension and retirement needs.

ReAssure completed a fact-find to gather information about Mr D's circumstances and objectives. ReAssure also carried out an assessment of Mr M's attitude to risk, which it deemed to be cautious.

In October 1995 ReAssure advised Mr D to transfer his preserved pension benefits in the DB scheme into a personal pension and to invest the proceeds in a managed fund. The transfer checklist completed by the adviser said the reasons for this recommendation were:

- The potential to provide better benefits;
- To provide flexibility of retirement age, including after age 60;
- The ability to choose the investment fund; and
- The desire for Mr D to control his pension fund.

ReAssure followed this up with a "reasons why" letter in December 1995 in which it confirmed the reasons why it believed the transfer was in Mr D's best interest. This confirmed that transferring out of the DB scheme meant Mr D would be giving up all the guaranteed benefits available.

Mr D complained to ReAssure in 2020 about the suitability of the transfer advice because in summary he said that he now realises he's going to receive less income in retirement compared to his DB scheme.

ReAssure didn't uphold Mr D's complaint. In summary it said the paperwork from the time of the advice was very detailed and covered all of the risks involved in transferring. It said a comparison was made between the existing scheme and a person pension and what rate of investment return was needed, which wasn't unrealistic at the time. It said although Mr D's attitude to risk was cautious, he chose the managed fund, which was a medium risk fund. Overall it said it made every effort to ensure that Mr D understood the nature of plan and it was satisfied the advice to transfer was suitable.

Mr D subsequently referred his complaint to our service. An investigator ultimately upheld the complaint and required ReAssure to pay compensation. In summary they said they didn't think the advice Mr D was given to transfer was suitable based on his circumstances at the time, and because the critical yield required to match the benefits Mr D would receive from his employer's scheme wasn't reasonably achievable based on his cautious attitude to risk. They also said Mr D was giving up valuable benefits. They concluded that, had the adviser recommended Mr D remain in his DB scheme, they thought he would've likely done so.

ReAssure disagreed. In summary it said that, it considers Mr D was given, and accepted, the detailed information about the plan, the risks involved and what he was giving up by transferring. It said the projected returns were realistic at the time and within the regulatory parameters for providing growth assumptions. It said Mr D was made aware of this and considered flexibility around his retirement age to be very important to him. Finally it feels the benefit of hindsight has been applied in respect of the likelihood of the growth required to achieve the illustrated benefits.

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 – I don't think the advice Mr D received to transfer out of DB pension scheme was suitable. My reasoning is set out below.

The advice was provided by ReAssure in 1995 (although it was known by another name then). At this time it was regulated by the Personal Investment Authority (PIA). As ReAssure was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), the PIA (LAUTRO) adopted rules applied at the time of the advice.

I can see that our investigator referred to the Conduct of Business Sourcebook (COBS) rules in their assessment of the complaint. This was incorrect because these rules did not come into force until much later on and so do not apply to the time of the advice. While this does not affect the overall outcome of this case, for clarity I've considered the advice given to Mr M with the adopted PIA (LAUTRO) rules in mind. In particular I note:

The adopted LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

## *Financial viability*

ReAssure says that Mr M wanted to transfer out of his DB scheme because of the potential for better benefits through a personal pension.

The advice was given during the period when the then regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pension Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I think they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor when the advice was given in this case.

The critical yield required to match Mr D's benefits at age 60 – his preferred retirement age – was 10.2% if he took a full pension. This compares with the discount rate of around the same percentage as the critical yield to retirement. At age 62 – the normal retirement age of Mr D's DB scheme – the critical yield was 9.9%. For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr D's cautious attitude to risk and also the term to retirement.

In my view there would be little point in Mr D giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And here, because the critical yield based on Mr D's target retirement age of 60 was around the same as the discount rate, it appears that at best, only the same level of benefits might be achieved by transferring. But I'm also mindful that the critical yield was significantly above the regulator's lower projection rate and still above the middle rate.

The critical yield to match Mr D's benefits at age 62 was slightly lower at 9.9% and the relevant discount rate was just over 10%. But again, the critical yield was still higher than the regulator's middle projection rate. And while the discount rate was marginally higher, this needs to be considered in the context of Mr D's attitude to risk. From the fact-find document provided by Mr D, ReAssure recorded his attitude to risk as cautious. And this was defined in as willing to *"take some but generally little risk."* In my view given Mr D's recorded circumstances including his age and investment knowledge and experience, this is an accurate reflection of the risk he was willing to take with the investment of his pension.

But I'm not persuaded that the transfer was compatible with Mr D's cautious attitude to risk. In my view, to achieve the necessary sustained growth rates, it required Mr D to take investment risk which was above his recorded appetite. It appears that at best he might match his existing benefits if he invested in line with a medium attitude to risk. But in my view there was a real possibility that he could receive lower value benefits than his DB scheme at retirement as a result of investing in line with his cautious attitude to risk, which is what ReAssure's advice ought to have been based on.

I can see that ReAssure says it is only with the benefit of hindsight that the growth figures look unachievable.

But I disagree - I think it was reasonable for ReAssure to have believed at the time that, given the level of growth required set against Mr D's circumstances including his attitude to risk, this wasn't a suitable recommendation to have made on financial viability alone.

To achieve Mr D's stated objective of higher potential benefits through a personal pension would require a sustained growth level, which in my view required him to take a greater level of risk than Mr D had indicated he was willing to take.

ReAssure says that Mr D was told in the transfer value analysis document that the projected value of his personal pension wasn't guaranteed and was subject to market conditions. So overall ReAssure believes Mr D understood the risks involved in transferring out of his DB scheme.

But ReAssure was under a duty to provide suitable advice. It wasn't sufficient for ReAssure to simply ask Mr M to acknowledge that he'd been given warnings that the projections weren't guaranteed or to document that he was aware of the required investment returns to match his existing benefits. Merely disclosing information doesn't make an unsuitable recommendation suitable. ReAssure told Mr D that it was recommending the transfer because the personal pension had greater benefit potential. But I think it was unlikely that Mr D would be able to match, let alone exceed the benefits he was entitled to under the DB scheme through a personal pension. So, I think ReAssure ought to have told Mr D it wasn't in his best interests to transfer out.

I'd add here that I can see Mr D's pension funds were invested in a managed fund. And ReAssure has described this in its submissions to us as being a medium risk fund, which I would agree with. It also says Mr D chose this fund. It strikes me as odd that ReAssure would offer Mr D a medium risk fund given it had assessed his attitude to risk as being cautious. It's possible this was because it realised that a great level of risk was required to achieve the necessary investment returns. This does mean it would appear Mr D's fund choice wasn't compatible with his recorded attitude to risk. But in any event, given that I don't think the transfer overall was suitable or in Mr D's best interests, it's not necessary for me to consider this any further.

Overall I think it is clear that Mr D would not be better off and was more likely to be worse off financially if he transferred out of his DB scheme. And for this reason alone, I don't think the advice to transfer out of the DB scheme was suitable for Mr D. But I accept that financial viability isn't the only consideration when giving transfer advice - there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

### *Retirement age flexibility*

The transfer checklist said that flexibility of retirement age was important to Mr D, and the adviser has written "*after 60*"

I don't think this was a clear enough or suitable reason to recommend the transfer. I say this because, firstly it's not clear to me why the adviser has recorded "*after 60*" in terms of Mr D needing flexibility.

Mr D's DB scheme's normal retirement age was 62 – so this already offered Mr D the potential for retirement after age 60. But if Mr D wanted to continue working beyond 62, there was nothing to stop him from doing this. It's possible his existing DB scheme might have allowed him to delay taking benefits.

But if he had to take them at 62 and this provided him with more income than he needed at the time because he still wanted to work, he could've simply saved anything extra for future use – I don't think there was any risk to him taking the benefits as they became payable in the DB scheme.

As for flexibility to retire earlier – presumably why the analysis was carried out on a retirement age of 60 - Mr D's DB scheme allowed him to take benefits at 60 albeit with a

reduction. But given ReAssure didn't carry out any assessment of Mr D's likely future income needs in retirement, it's possible his objective could in any case be met by remaining in the DB scheme. It's not clear he needed to transfer his benefits to a personal pension to achieve this.

But importantly here Mr D was only 45 at the time of the advice. And based on what I've seen, he didn't have any concrete retirement plans. While the advice documentation notes that Mr D wanted to retire at 60, as I said above Mr D didn't know and ReAssure didn't explore what his income requirements might be. So Mr D couldn't have known whether retirement at age 60 was affordable and a realistic proposition.

Mr D had around 15 years before he thought he might retire. So I don't think it was imperative to transfer at this time – I think in the circumstances it was too soon to make any kind of irreversible decision about transferring out of his DB scheme.

Overall, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits when he didn't know what his needs in retirement would be. If Mr D later had reason to transfer out of his DB scheme – for example because he needed to access a higher income than the scheme provided - he could have done so closer to retirement.

#### *Control and choice of investment fund*

I think Mr D's desire for control over his pension benefits was overstated. Mr D was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own – indeed the fund choice was a managed fund which I think supports my view. So, I don't think that this was a genuine objective for Mr D – it was simply a consequence of transferring away from his DB scheme.

While Mr D's DB scheme had been wound up by the trustees, it appears that his benefits had been secured through the purchase of a deferred annuity. So the funding or financial position of his previous employer's DB scheme was not in a place such that I think Mr D should have genuinely been concerned about the security of his pension, or that this was a suitable reason for the advice to transfer out.

#### *Death benefits*

Death benefits was not something ReAssure documented as a reason for its recommendation to Mr D to transfer. But I can see that providing protection for his family if he died before his normal retirement was something that Mr D indicated was very important to him on the fact-find document ReAssure completed (he scored it a number 1 on a scale of 1 to 4, where 1 was deemed very important). Yet the transfer value analysis, documented in the transfer checklist, showed that the death benefits were lower immediately following the transfer. And while it's recorded that Mr D was happy with his current level of life cover, the recommendation to transfer from his DB scheme wasn't compatible with this stated priority objective – so I don't think it was in his best interests.

#### *Summary*

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

Ultimately, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free, and increasing income. By transferring, Mr D was at best likely to

obtain no more than his existing benefits and in my view he was very likely to obtain lower retirement benefits. I also think there were no other particular reasons, which would justify a transfer and outweigh this.

So, I think ReAssure should've advised Mr D to remain in his deferred DB scheme.

I now need to consider whether Mr D would've gone ahead anyway, against ReAssure's advice. ReAssure appears to argue that this is the case because it says that it made Mr D aware of and he accepted, the detailed information about the plan, the risks involved and the guaranteed benefits he was giving up by transferring.

I've considered this carefully - but I'm not persuaded by what ReAssure says. ReAssure wasn't just providing Mr D with information – it was advising him. So simply telling Mr D what he was giving up didn't make the recommendation to transfer suitable.

And if things had happened as they should have, I don't think Mr D would've insisted on transferring out of his DB scheme and gone ahead in any event. I say this because Mr D was not in my view an experienced investor, he had a cautious attitude to risk and at the time his pension accounted for the majority of his retirement provision. I think he relied on the advice he was given. So, if ReAssure had provided Mr D with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, I think he would've accepted that advice.

In light of the above, I think ReAssure should compensate Mr D 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 the business to put Mr D, as far as possible, into the position he would now be in but for ReAssure's unsuitable advice. I consider Mr D would have most likely remained in his DB scheme if suitable advice had been given.

ReAssure 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, if advised suitably I consider Mr D would've remained in his DB scheme and more likely than not taken his benefits at the scheme's normal retirement age of 62.

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 D's acceptance of the decision.

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

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

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 ReAssure Limited to pay Mr D 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 ReAssure Limited to pay Mr D any interest on that amount in full, as set out above.

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

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

If Mr D accepts this decision, the money award becomes binding on ReAssure Limited.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 27 May 2022.

Paul Featherstone

**Ombudsman**