DRN-3219504

The complaint

Mrs N complains about the advice Mike Norris Financial Services Limited ('MNFSL') gave to transfer the benefits from her defined-benefit ('DB') occupational pension schemes to a personal pension plan. She says the advice was unsuitable for her and believes this has caused a financial loss.

Professional representatives have helped Mrs N to bring her complaint. But, for ease of reading, I'll refer to the representatives' comments as being Mrs N's.

What happened

Mrs N was introduced to MNFSL IN 2019 in order to discuss her pension and retirement needs.

MNFSL gathered information about Mrs N's circumstances and objectives, it carried out an assessment of her attitude to risk and it produced at least one pension transfer report. On 1 October 2019 it sent Mrs N a "*pension transfer advice*" letter. That said:

- Mrs N Was 55 years old, married, with one adult son.
- She was working as was her husband. MNFSL didn't record her salary.
- She owned her home and had a small outstanding mortgage, although the figure wasn't given.
- She had "*nominal*" savings.
- She hoped to retire at 60.
- She was a member of her current employer's pension scheme.
- Her attitude to risk was *"balanced*".
- She had no investment experience.
- She was a deferred member of two DB schemes from her former employer who she'd worked for over a period of around 14 years. The two schemes had a combined cash equivalent transfer value ('CETV') of £146,795 and would give her a combined yearly income of around £5,257.
- The investment required in order to provide equivalent, risk free, benefits to the two DB schemes (known as a transfer value comparator or 'TVC') could cost Mrs N almost £277,000.

MNFSL advised Mrs N to transfer her pension benefits from the DB schemes into a named personal pension plan. It said the reasons for this recommendation were because:

- MNFSL deemed the hurdle rate (the amount of growth required to match the DB scheme but without a spouse's pension or adjustment for inflation) as acceptable, based on the assumption that Mrs N's husband was likely to die before her.
- It would meet her needs to access her pension benefits flexibly.
- Her fund would benefit from "*tax advantaged*" growth
- She could take her benefits from age 55.
- She could take 25% of the fund as tax free cash (TFC).

- "*A broad range of investment opportunities offering greater choice and enhanced flexibility compared to other schemes.*"
- Greater freedom and flexibility to access her pension benefits including the "*phasing*" in of benefits in line with her objectives.
- Greater entitlement to death benefits which would not be taxed and she could nominate the beneficiary.
- The invested fund would be in addition to her other pension provision.
- She would avoid any future underfunding of the DB scheme.
- If required it would allow her financial adviser to provide ongoing investment advice.

MNFSL said it would charge Mrs N £3,000 for its transfer advice and service, with an ongoing annual fee of £500 for investment advice should she choose that.

Mrs N went ahead with the transfer which was completed the following month.

Mrs N complained in 2021 to MNFSL about the suitability of the transfer advice because, amongst other things, she said:

- MNFSL led her to believe she would be better off by transferring out of the DB schemes.
- The advice was "*unsuitable, inappropriate and negligent*" and was not in line with the regulator's rules to act honestly, fairly and professionally in accordance with the best interests of its client.
- Mrs N was an inexperienced investor and didn't understand the "*differences and losses*" by moving from the DB scheme to a personal pension and MNFSL didn't explain this to her.

MNFSL acknowledged receipt of the complaint but said that it didn't consider it to be valid and refused to respond further.

Mrs N referred her complaint to our service. We asked MNFSL to provide its file but it didn't do so. It told us that it had provided everything it had to Mrs N (via her representatives). It also said that its former adviser, who had provided the advice to Mrs N, had taken some documents with him when he left MNFSL's employment, so MNFSL no longer had access to those. Our investigator asked Mrs N to provide what information she had. Having considered that he upheld the complaint and required MNFSL to pay compensation. In short our investigator said that Mrs N was likely to receive lower pension benefits by transferring out of her DB schemes and as such the recommendation to transfer wasn't suitable.

MNFSL disagreed, saying that it had discussed the figures with Mrs N and that the transfer allowed her the flexibility to access her pension as she wanted. It said that the transfer also provided substantially better death benefits.

The investigator wasn't persuaded to change his 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.

I've noted above that MNFSL didn't provide us with its file directly. And Mrs N wasn't able to send us all of the documents I would usually expect to see. So, I've had to arrive at my decision based on the limited evidence which is available. And, where necessary, I've done so based on the balance of probabilities, that is what's more likely than not to have happened.

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'), says in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, MNFSL should have only considered a transfer if it could clearly demonstrate that it was in Mrs N's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

The advice 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 the Financial Ombudsman Service on our website. Whilst businesses weren'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.

Mrs N was 55 at the time of the advice and she would have been entitled to draw her full DB scheme benefits at 60. MNFSL carried out pension transfer analysis including a TVC which showed that it could cost her over £130,000 more to provide the same income as her DB schemes through a personal pension. Also, the growth rates required to match Mrs N's benefits at age 60 (known as the critical yield) was 13.92% for her first DB pension if she took a full pension and 10.56% if she took TFC and a reduced pension. The critical yields required for her second DB pension were 15.08% and 11.93% respectively.

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 3% a year for 4 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% a year.

MNFSL's transfer advice letter says that Mrs N had a balanced attitude to risk. But it no longer has the answers Mrs N gave to its questions by which it arrived at that result. But, for the purposes of this decision, and given that I'm upholding the complaint anyway, I've accepted that is accurate. So I've taken it into account, along with the composition of assets in the discount rate, Mrs N's balanced attitude to risk and the term to retirement. There would be little point in Mrs N giving up the guarantees available to her through her DB schemes only to achieve, at best, the same level of benefits outside the schemes. But here, given the lowest critical yield was 10.56%, I think Mrs N was likely to receive benefits of a substantially lower overall value than the DB schemes at retirement, as a result of investing in line with that attitude to risk.

I've noted that when MNFSL gave Mrs N its recommendation, it said that the growth required to match the benefits in the existing schemes was achievable. I think this was seriously misleading. Its advice was based on the "*hurdle rate*", rather than the critical yields, discount rate or TVC. But the hurdle rate doesn't typically allow for fund or adviser charges, nor for increases in pension income over time, which is a guaranteed benefit from the DB schemes.

Nor does the hurdle rate factor in any spouse's benefits. So I don't think this was a fair comparison and could have given Mrs N the impression that the growth required from the personal pension was likely to be able to match her DB scheme benefits when that wasn't the case.

MNFSL has provided cashflow models for Mrs N's first and larger DB scheme's benefits. I haven't been provided with any cashflow models for the second DB scheme, although MNFSL has referred to some of the figures from such models in its transfer advice letter. The figures MNFSL have quoted show that Mrs N would need a total pension pot of around £277,000 to allow her to match the benefits from her DB schemes, if she were to take those from a personal pension on a drawdown basis. But such a figure was only really achievable from a personal pension if her invested funds grew at a high rate (assumed to be 8% a year at that time). And given her balanced attitude to investment risk that seems extremely unlikely.

Further, MNFSL has shown that, if Mrs N transferred her benefits, her funds would likely run out by the time she was 83, if she didn't take TFC, and 85 if she did. But that was on the expectation that her funds grew at the mid-level growth of 5%. But even if I accepted that such a growth was achievable, if Mrs N lived longer than expected, or there was a period of poor investment performance, there was a real possibility that her funds could run out sooner than expected. So overall, I think it ought to have been clear to MNFSL that Mrs N was likely to be worse off financially if she transferred out of the DB scheme.

For the reasons given above a transfer out of the DB scheme wasn't in Mrs N's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as MNFSL has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

I don't think Mrs N required flexibility in retirement. This is because based on the evidence I've seen, I don't think she had a genuine need to access her pension earlier than the normal scheme retirement age. I say this because while MNFSL has recorded that Mrs N's investment objectives included flexible access to her pension funds, it hasn't recorded any reason why Mrs N might need access to her funds before the schemes' retirement age. Neither has it recorded why accessing those funds flexibly would be worth giving up the guaranteed benefits that her DB schemes offered her.

I also can't see evidence that Mrs N had a strong need for variable income throughout her retirement or before. At the time Mrs N and her husband were both still working and MNFSL hasn't shown any evidence that they had significant debt or were struggling to manage on their employment income. So there doesn't appear to have been any pressing need for Mrs N to access the funds in her DB schemes early or more flexibly. I can understand that the ability to access TFC immediately might have been a desirable prospect for Mrs N, it doesn't mean that meeting those desires was in her best interests. That's because in order to have access to those funds before retirement or to do so on a more flexible basis meant giving up a guaranteed income at retirement age.

Also, I can't see any detail within MNFSL's transfer advice letter showing how it analysed the likely income Mrs N would need at retirement and how she intended to meet that need. So it seems that MNFSL gave its advice without a full picture of Mrs N's likely income needs in her retirement and whether it was in her best interest to access her DB pension funds flexibly.

What I can say for certain is Mrs N had the prospect of a guaranteed return from her DB schemes which would increase each year. A return she stood to lose some or all of by moving it into a personal pension which had no guarantees of any return whatsoever. Also, in going ahead with that transfer the funds would instantly be subject to a £3,000 transfer fee. She would also be charged an administration fee of 0.45% each year and a further charge of £500 each year for financial advice. Those are charges that would potentially continue to reduce the size of Mrs N's investment but are charges that wouldn't have been deducted from her DB scheme benefits had she remained in those schemes. It seems to me that these benefits outweigh the possible advantages of having more flexible access to her pension funds.

MNFSL's role should have been to advise Mrs N on what was in her best interests, not simply to arrange what she said she wanted at that moment in time, without carefully examining what her needs, rather than simply her desires, may have been. It's also worth noting that Mrs N had only "*nominal*" savings and had little or no investment experience. And, at most, she had a balanced attitude to risk. So transferring her guaranteed – and essentially risk free – benefits from two DB scheme to a personal pension, which had the potential for losses, wasn't in her best interests.

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 was likely an attractive feature to Mrs N. But whilst I appreciate death benefits are important to consumers, and Mrs N might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here for MNFSL was to advise Mrs N about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think MNFSL explored to what extent Mrs N 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 schemes were underplayed. Mrs N was married and so the spouse's pension provided by the DB scheme would've been useful to her husband if Mrs N died before him. I don't think MNFSL made the value of this benefit clear enough to Mrs N. 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 fact I've noted that MNFSL seems to have assumed that Mrs N's husband would die before her and it based its advice around that assumption. I understand that Mrs N's husband had suffered a serious health condition in the past. But it's also recorded that at that time he was reasonably well. So it had no real basis on which to assume that Mrs N's husband was more likely than not to die significantly earlier than her. But its advice clearly gave the impression that the DB schemes' death benefits would be of little value, when I don't think that was a fair representation of their potential.

It's worth noting that the death benefits available from the personal pension would decrease over time. And if Mrs N chose to take TFC then it's likely they would decrease by around 25% overnight. And the funds available for Mrs N's beneficiaries on her death would have continued to reduce as Mrs N drew down sums for her income needs. And that amount would likely be further reduced the longer Mrs N lived for. So, depending on her lifespan and the funds she'd taken from her personal pension, the fund might not have a large – if indeed any – sum left at the time of Mrs N's death. In any event, MNFSL should not have encouraged Mrs N to prioritise the potential for higher sums being available at her death through a personal pension over her security in retirement.

Further, if Mrs N genuinely wanted to leave a legacy for her husband or her son, which didn't depend on investment returns or how much of her pension fund remained on her death, I think MNFSL should've instead explored life insurance. But there's no evidence that it did so.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement income for Mrs N. And I don't think that life-insurance was properly explored as an alternative.

Control of pension investments

I think MNFSL overstated Mrs N's desire for control over her pension investments. She was not an experienced investor and I can't see that she had the knowledge to be able to manage her pension funds on her own. In fact MNFSL has recorded that, in the short term at least, because of the current volatility of the market, she'd chosen to invest in *"deposit based investments*" with a view to "*more bespoke investments*" once the market stabilised. So, she had no need to step into the investment arena immediately. And I don't think that this was a genuine objective for Mrs N – it was simply a consequence of transferring away from her DB schemes.

Summary

I don't doubt that the access to TFC, flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs N. But MNFSL wasn't there to just transact what Mrs N might have thought was attractive. The adviser's role was to really understand what Mrs N needed and recommend what was in her best interests.

Ultimately, I don't think the advice MNFSL gave to Mrs N was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs N 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 – to my mind, the objectives recorded by MNFSL were generic and non-specific. MNFSL shouldn't have advised Mrs N to transfer out of the scheme in order to have more flexible access and control of her pension funds or for the potential for higher death benefits. Those simply weren't worth giving up the guarantees associated with her DB scheme for.

So, I think MNFSL should've advised Mrs N to remain in her DB schemes.

Of course, I have to consider whether Mrs N would've gone ahead with the transfers anyway, against MNFSL's advice. I've considered this carefully, but I'm not persuaded that Mrs N would've insisted on transferring out of the DB schemes, against MNFSL's advice. I say this because Mrs N was an inexperienced investor with a balanced attitude to risk and the DB pensions were valuable assets in Mrs N's retirement provision. So, if MNFSL had provided her with clear advice against transferring out of the DB schemes, explaining why it wasn't in her best interests, I think she would have accepted that advice.

In light of the above, I think MNFSL should compensate Mrs N 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 MNFSL to put Mrs N, as far as possible, into the position she would now be in but for MNFSL's unsuitable advice. I consider Mrs N would have most likely remained in her DB schemes if MNFSL had given suitable advice.

MNFSL 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, Mrs N has not yet retired, and she has no plans to do so at present. So, compensation should be based on her DB schemes' normal retirement age of 60, 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 Mrs N's acceptance of the decision.

MNFSL may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs N'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 N's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs N'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 N 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mrs N within 90 days of the date MNFSL 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 MNFSL to pay Mrs N.

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 £350,000, 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 £350,000, I may recommend that MNFSL pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Mike Norris Financial Services Limited to pay Mrs N the compensation amount as set out in the steps above, up to a maximum of £350,000.

Where the compensation amount does not exceed £350,000, I would additionally require Mike Norris Financial Services Limited to pay Mrs N any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £350,000, I would only require Mike Norris Financial Services Limited to pay Mrs N any interest as set out above on the sum of £350,000.

<u>Recommendation:</u> If the compensation amount exceeds £350,000, I also recommend that Mike Norris Financial Services Limited pays Mrs N the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs N.

If Mrs N accepts this decision, the money award becomes binding on MNFSL.

My recommendation would not be binding. Further, it's unlikely that Mrs N can accept my decision and go to court to ask for the balance. Mrs N 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 Mrs N to accept or reject my decision before 22 August 2022.

Joe Scott
Ombudsman