DRN-3245946

The complaint

Mrs T complains about the advice given by Argentis Financial Management Ltd ('Argentis') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Mrs T approached Argentis in June 2017 to discuss her pension and retirement needs. Mrs T met with Argentis jointly with her husband. This complaint is about the advice Mrs T received – but where appropriate and for context I will refer to Mrs T's husband's circumstances.

Argentis completed a fact-find to gather information about Mrs T's circumstances and objectives. Argentis also carried out an assessment of Mrs T's attitude to risk, which it deemed to be 'moderate'.

In September 2017, Argentis advised Mrs T to transfer her pension benefits into a SIPP and invest the proceeds via a Discretionary Fund Manager ('DFM') arrangement provided by a company Mrs T already had a customer relationship with. The suitability report said the reasons for this recommendation were:

- To provide flexibility of when benefits are taken including income because Mrs T wanted to retire gradually and not take benefits all at once.
- To provide better death benefits.
- To provide for a wider range of investment vehicle and opportunity.
- To provide a SIPP, which the chosen DFM could use for their investment products.

Mr T accepted the recommendation and the transfer duly went ahead.

In August 2019 Argentis contacted Mrs T as part of a review of the pension transfer advice it gave and it invited Mrs T to be part of it. Mrs T accepted the invitation and Argentis considered the advice it gave to her. In September 2020 it wrote to Mrs T to say that it concluded the advice it gave to transfer out of her DB pension scheme was suitable. In summary it said that while it noted Mrs T's pension monies appeared to have been invested in a fund which was of a higher risk than her recorded attitude to risk, and that the adviser had made a wrong assumption about the continuation of Mrs T's rental income, it said the transfer met her stated objectives and the points noted didn't impact the suitability of its advice.

Mrs T referred his complaint to our service. An investigator upheld the complaint and required Argentis to pay compensation. In summary they said that because the critical yield required to match Mrs T's existing scheme benefits was 6.2% assuming she took her tax-free cash entitlement, taking into account her attitude to risk and the relevant discount rate of 3% per year, they thought Mrs T was likely to be worse off financially as a result of transferring. They noted that the adviser said the growth rate was unrealistic and if Mrs T was looking to purchase an annuity they wouldn't have recommended the transfer. They said despite the fact that Mrs T had other assets and income streams available to her, which might have indicated she could take some risk with her DB scheme benefits, they didn't think she needed to do so – she didn't have a strong need for flexibility of income, she had no plans to retire early and she didn't have an immediate need for a lump sum. Overall they didn't think the transfer was in Mrs T's best interests.

Argentis disagreed. In summary it said the advice was given on a joint basis with Mrs T's husband and it needs to be considered in this context. It said Mrs T's capacity for loss was high given the considerable joint assets held and it believed her guaranteed DB scheme income was surplus to their overall joint retirement income. It said given their existing assets, Mrs T wanted flexibility of benefits, which the transfer gave her. It said Mrs T was told about the critical yield – but it says it believes this is less relevant in her case because she wanted flexibility and wasn't looking to match the scheme benefits. It went on to say that Mrs T was attracted to the transfer value, the resulting tax-free lump sum, which she said she wanted to use to help out her children financially and improve the inheritance position.

It explained that while it had found Mrs T's husband's advice to transfer out of his DB scheme was unsuitable, because it deemed Mrs T wasn't reliant on her pension income the advice was suitable. It said that, had both Mrs T and her husband retained their DB benefits, their two key objectives of gaining immediate flexibility and better death benefits wouldn't have been met. Finally it said it also noted the suitability report confirmed Mrs T intended to use the income from her pension to avoid a potential Lifetime Allowance (LTA) tax charge for her husband.

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 reasons are 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, Argentis should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs T'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 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.

The investment return or critical yield required to match Mrs T's benefits at age 63 – her DB scheme's normal retirement age - was 7.6% if she took a full pension and 6.2% if she took tax-free cash and a reduced pension. This compares with the discount rate of 3**%** per year for four years to retirement in this case.

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, Mrs T's 'moderate' attitude to risk and also the term to retirement.

There would be little point in Mrs T giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the most likely scenario of Mrs T taking her tax-free cash entitlement and a reduced pension, the critical yield was 6.2%. This figure was significantly higher than the regulator's lower rate and higher than the middle projection rate – it was also more than double the discount rate. I think Mrs T 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 that attitude to risk.

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

I can see that Argentis has argued that Mrs T's capacity for loss was high because she had significant other assets. But while I accept Mrs T did have other assets of a substantial value, albeit the majority of them were not liquid, this doesn't automatically mean that the transfer was suitable or that Mrs T needed to risk her DB scheme benefits. As I've indicated above, the high critical yield figure in this case in my view clearly showed that Mrs T was likely to be worse off in retirement as a result of investing her pension monies as proposed. I think this should have acted as a clear sign that Mrs T ought to retain her DB benefits and that transferring out was not likely to be in her best interests – other assets and capacity for loss notwithstanding.

Indeed I can see the adviser in their recommendation letter acknowledged the financial unviability of the transfer saying the growth rate required seemed *'...potentially unrealistic based on the assumed term to retirement and your current attitude to investment risk..."* But they went on to say that the decision to transfer away should not be solely based on the potential to generate the same or similar benefits provided by the existing DB scheme. I can also see that Argentis has argued the relevance of the critical yield figure in this case.

But I don't think the importance of the critical yield figure should have been downplayed by the adviser, which I think is what happened here.
The regulator required Argentis to provide the rates of return required to replicate the benefits available to Mrs T through her DB scheme. So, telling Mrs T it wasn't really relevant to her in my view undermined the analysis the regulator required it to undertake. And as I've already said, I think given the high critical yield figures in Mrs T's case, these should have acted as a clear sign that Mrs T ought to retain her DB scheme and that transferring out was not likely to be in her best interests.

I also think it's clear from what's recorded in the advice paperwork that Mrs T's income needs could already reasonably be met by remaining in her DB scheme – she didn't need to take on any investment risk with her DB scheme benefits. I'll talk more about this later on.

Overall, I think Argentis ought to have told Mrs T it wasn't in her best interests to transfer out of the DB scheme because I think it's clear that she would be worse off financially if she 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 – something the adviser said in giving their 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 needs

One of the primary reasons for the recommendation to transfer out of the DB scheme, was because Mrs T wanted flexibility of how she took her benefits. It's recorded that Mrs T also wanted access to a lump sum to help out her children financially.

But I don't think this was a suitable reason to recommend the transfer. I say this because firstly I can't see that Mrs T had an immediate need to access a lump sum from her pension. The recommendation letter says Mrs T wanted to use the tax-free cash entitlement to help her children *'if required for a property purchase or student loan repayment and would like to be able to have access to this part of the pension for ad hoc needs in and during retirement.'*

But this doesn't say or imply that Mrs T needed the money straightaway – it says: *'if required'* and *'ad-hoc needs in and during retirement.'* And Mrs T has told us she didn't have an immediate need for a lump sum. Mrs T's ad-hoc needs in retirement could have been met by remaining in her DB scheme and taking her entitlement to tax-free cash at her normal retirement age, which was only around four years away.

And as for helping out her children, it's recorded in the assets section of the fact-find that Mrs T was planning to sell a property within the following 12 months, which after repayment of the mortgage would have provided for a large sum of money. So given there was no immediate need and no apparent set timeframe for helping out her children, I see no reason why Mrs T couldn't have used part of this expected lump sum to meet her objective – I don't think she needed immediate access to her pension monies to do so.

The other reason Argentis gave for the recommendation to transfer was to provide flexibility in how Mrs T took future income – the adviser recorded that as she wanted to potentially retire gradually and not take benefits all at once, a personal pension arrangement would facilitate this allowing as much or as little to be taken as needed.

But I can't see that Mrs T had a strong, if any need for variable income through her retirement. In fact the advice paperwork appears contradictory on this point. I say this because in the 'Pension Review Questionnaire' the question was asked about whether Mrs T anticipated retiring gradually or in one go, and the adviser has written *'One go.'* Yet the primary reason given for recommending the transfer was to provide flexibility for gradual retirement.
Argentis has said its advice was given jointly to Mrs T and her husband – but if Mrs T and her husband had different retirement plans this should have been clearly set out in the recommendation.

I'm mindful that Mrs T's husband isn't a party to this complaint and I'm not considering the advice he received from Argentis here. But in my view his circumstances are relevant in this case, so I will refer to these here. For example the suitability letter also records that jointly Mrs T and her husband's income and expenditure wasn't expected to change and they didn't expect any significant changes to their future circumstances within the next five years. And when asked how much income they needed in retirement they gave a fixed figure – not differing amounts at different times. This in my view doesn't describe a need for flexibility.

Argentis has also said that Mrs T's DB pension income was surplus to their overall joint retirement income need allowing Mrs T to be flexible with how she accessed her benefits. But I disagree it was surplus to requirements. Based on the income figure Mrs T said they jointly needed, her DB scheme income played a key part in achieving it taking into account the expected reduction to their rental income following the future sale of one of their jointly owned properties.

Not only was Mrs T's income important, crucially in my view the overall income recorded as being needed by Mrs T and her husband was already achievable based on what the adviser recorded their respective DB schemes would provide at their normal retirement ages. These were guaranteed and would escalate. So I'm satisfied Mrs T's contribution to their joint income needs in retirement could be met by remaining in her DB scheme.

I can see that Argentis has also said that the suitability report confirmed Mrs T intended to use the income from her pension flexibly to avoid an immediate LTA tax charge for her husband. But as the adviser recorded in the suitability report, Mrs T's husband couldn't avoid this completely – it was going to happen at some poinT. So I don't think this was a suitable reason for recommending Mrs T transfer out of her DB scheme

Overall, nothing here supports a need for flexibility in my view and I'm not persuaded it was a real objective – I think it was simply a consequence of transferring out to a different arrangement.

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 T. But whilst I appreciate death benefits are important to consumers, and Mrs T might have thought it was a good idea to transfer her DB scheme to a personal pension because of this - I can also see that a general reference was made in the advice paperwork of Mrs T wanting to use her pension as an estate planning vehicle - the priority here was to advise Mrs T about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Argentis properly explored to what extent Mrs T 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. Mrs T was married so the spouse's pension provided by the DB scheme would've been useful to her spouse if Mrs T predeceased him – notwithstanding the fact that Mrs T's contribution to the joint household income was lower. I don't think Argentis made the value of this benefit clear enough to Mrs T. 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, Argentis should not have encouraged Mrs T to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Overall, I don't think different death benefits available through a transfer to a personal pension arrangement justified the likely decrease of retirement benefits for Mrs T.

Summary

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

Ultimately, I don't think the advice given to Mrs T was suitable. She was giving up a guaranteed, risk-free and increasing income, which I consider would have met her future retirement income needs. By transferring, Mrs T was very likely to obtain lower retirement benefits and in my view, there were no other compelling reasons which would justify a transfer and outweigh this.

So, I think Argentis should've advised Mrs T to remain in her DB scheme.

I now need to consider whether Mrs T would've gone ahead anyway, against Argentis' advice. Having done so, I don't think Mrs T would've insisted on transferring out of her DB scheme and gone ahead in any event. I say this because I'm not persuaded Mrs T was enough of an experienced investor or had the requisite skill, knowledge or confidence to go against the professional advice they received - I think she relied solely on the advice she was given. At the time this pension was the primary source of Mrs T's guaranteed future retirement provision. So, if Argentis had provided Mrs T with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for her because it met her stated future retirement income need, and not risk her guaranteed pension to do so, I think that would've carried significant weight. I think Mrs T would've accepted that advice.

In light of the above, I think Argentis should compensate Mrs T 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 Mrs T, as far as possible, into the position she would now be in but for Argentis' unsuitable advice. I consider Mrs T would have most likely remained in her DB scheme if suitable advice had been given.

Argentis 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.

If Mrs T had remained in her DB scheme, I don't think she would have accessed her pension benefits early. So compensation should be based on her accessing benefits at her scheme's normal retirement age of 63.

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 T's acceptance of the decision.

Argentis may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs T'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 T's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs T'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 T 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 Mrs T within 90 days of the date Argentis 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 Argentis to pay Mrs T.

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 Argentis Financial Management Ltd to pay Mrs T 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 Argentis Financial Management Ltd to pay Mrs T any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Argentis Financial Management Ltd to pay Mrs T any interest as set out above on the sum of £160,000.

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

If Mrs T accepts this decision, the money award becomes binding on Argentis Financial Management Ltd.

My recommendation would not be binding. Further, it’s unlikely that Mrs T can accept my decision and go to court to ask for the balance. Mrs T 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 T to accept or reject my decision before 24 August 2022.
Paul Featherstone
Ombudsman