DRN-3268532

The complaint

Mrs H complains about the advice given by Sterling Wealth Ltd (Sterling) trading via it's appointed representative PH7 Wealth Management (PH7) to transfer the benefits from her defined-benefit (DB) occupational pension scheme to a self-invested personal pension (SIPP).

She says that she wasn't provided with full information about the transfer before it went ahead. She says that now she has seen these documents she thinks the advice was unsuitable for her. She believes she has given up valuable benefits and this has caused her a financial loss.

What happened

Mrs H approached PH7 in late 2019 to discuss her pension and retirement needs.

PH7 completed a fact-find to gather information about Mrs H's circumstances and objectives. PH7 also carried out an assessment of Mrs H's attitude to risk, which it deemed to be 'Low end Moderate to Adventurous' for this part of her pension planning. It said that Mrs H was able to take a higher than average investment risk in order to potentially increase returns, for this smaller part of her capital.

On 13 December 2019, PH7 advised Mrs H to transfer her pension benefits into a SIPP. Mrs H transferred around £63,500 and she invested the proceeds using a discretionary fund manager (DFM).

The suitability report said the overarching reason for the pension transfer was to increase flexibility. As Mrs H, and her husband, had enough income at retirement they could use the transfer value of Mrs H's DB scheme to meet some of Mrs H's other aims. These aims were:

- Mrs H wasn't working, so she wanted to use the proceeds from this pension to provide an income from age 60 (at the time of advice) to her state pension age of 66.
- She could take lump sums as required until her full retirement later on.
- Her partner, and her children, could have full access to this money in the event of her death.

Mrs H complained in 2020 to PH7 about the suitability of the transfer advice. She said at this point that she hadn't received full information about the transfer before it went ahead.

PH7 didn't uphold Mrs H's complaint. It said she was provided with full information prior to the transfer and this would have been fully discussed. The advice to transfer was suitable for her. This was, essentially, because she wanted to use the funds held in her DB scheme to provide flexibility over the next five years or so and the transfer to the personal pension allowed her to do this.

Mrs H referred her complaint to our service. An investigator upheld the complaint and said that PH7 should pay compensation. He said that the transfer wasn't viable financially and did leave Mrs H worse off. And the flexibility that she wanted didn't outweigh this. It was likely she could have met her aims and still kept her deferred DB scheme benefits.

PH7 disagreed, it said that:

- Mrs H had a full understanding of the advice and she agreed with it at the time. She also confirmed that she had received the point of sale information.
- It thought the advice was valid as Mrs H felt the guaranteed income from her DB scheme 'wouldn't make a great deal of difference' so she could give it up.
- She felt the flexibility the transfer gave her was more beneficial and prudent.
- She took a lump sum from the SIPP but no income, which demonstrates she wanted to make the transfer.

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, PH7 should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs H'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.

Mrs H's complaint about the information she received at the time of sale

Mrs H's complaint was initially that she didn't receive the documentation, and other information she should have, at the time of sale. Both parties to the complaint have presented differing opinions about what happened here.

Similar to our investigator, I can't say for certain whether Mrs H did, or didn't, receive all of the information she should have done at the time of sale. But I don't need to reach a firm conclusion about this issue to consider the complaint. This is because I've found that the advice wasn't suitable for Mrs H. So, I'm upholding the complaint for this reason.

If Mrs H did receive all of the information about the advice, this wouldn't change my opinion that it wasn't suitable for her. And similarly, if she didn't receive all the information she should have about the advice my decision about the suitability would still be the same.

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how PH7 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 PH7 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 Mrs H's benefits at age 66 was 14.19% if she took a full pension with spouses provision, and 13.07% if she took pension on a single life basis tax free cash and a reduced 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 3.3% per year for six 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.

PH7 also produced some cashflow models which it says indicate Mrs H would've been able to withdraw from the fund on a regular basis. I've considered these, and PH7's models show that if Mrs H was to drawdown from her pension fund the same benefits she would have received from the DB scheme, and assuming a 'medium' rate of return, the fund would 'run out' at her age 81. Which is below her expected life expectancy.

And PH7 also did a transfer value comparator (TVC). It said that this was the 'estimated replacement cost' of the benefits that Mrs H was giving up. This showed that to purchase the same benefits as the DB scheme would provide, at age 66, would cost Mrs H £131,980.21. So, to match that, she would need the amount transferred to grow by around £70,000 in the next six years.

I've taken all of these factors above into account, along with the composition of assets in the discount rate, Mrs H's recorded attitude to risk and her term to retirement. There would be little point in Mrs H 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, I think Mrs H 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 her attitude to risk. There seems very little prospect, if any, of the transfer providing better pension benefits than the DB scheme. For this reason alone, a transfer out of the DB scheme wasn't in Mrs H's best interests.

Of course, financial viability isn't the only consideration when giving transfer advice, and PH7 has said that Mrs H wanted flexibility above maximising the amount of pension she would receive. It is fair to say that the advice was given on the basis that the transfer would reduce her income overall, but this was reasonable as there were other advantages to the transfer.

So, I accept there might be other considerations which mean this transfer was suitable, despite it providing overall lower benefits. I've considered these below.

Flexibility and income needs

As a starting point, if the DB scheme benefits are 'surplus to requirements', as PH7 said they were, then it doesn't necessarily follow that she should give them up. It's equally valid that this guaranteed, and increasing income, could form a cornerstone of Mrs H retirement income, and she could use the other assets, both her and Mr H had, to provide the flexibility they wanted.

To give suitable advice PH7 would need to look at all of her retirement provision, and determine if this transfer was in her best interests. And in this case PH7's felt that Mrs H could transfer her DB scheme as she didn't really need, or want, a pension from it. What PH7 are essentially saying here is that it was better to give up this increased pension to obtain other benefits, such as flexibility. But Mrs H was giving up benefits that PH7 said were worth around £70,000. So, I think PH7 needed to have established a genuine need to do this, rather than it just being what Mrs H wanted.

Having looked at everything I don't think there was a genuine need for this flexibility. I've said why below.

It was established that Mrs and Mr H could meet their retirement income needs from both their state pensions and a private pension that Mr H was receiving. Mr H was due to receive his state pension in around two years. And Mrs H was due to receive her state pension in around six years. I understand these would provide enough for them to live off in the longer term.

Mrs and Mr H were both not working, and so they did have a need for an income over the time between the advice and full retirement. But I don't think Mrs H had a genuine need to access her tax-free cash earlier than the normal scheme retirement age and could leave her funds invested until a later date due to this.

This is because Mr H had recently taken the cash transfer value from an occupational scheme himself and realised a significant amount of money, I understand this was around £250,000. And whilst some of this was 'earmarked' for a property, there was enough to meet Mr and Mrs H's shorter-term needs. So, Mr and Mrs H already had arrangements in place up to full retirement. And I don't see why Mrs H would need to risk her DB pension when this was in place.

I do note that Mrs H took some cash from her pension. But his was relatively modest amount and I don't think it changes my findings above.

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

Furthermore, I don't see why Mrs H needed to make any kind of decision about transferring out of the DB scheme at this time, given the arrangements she and Mr H had in place. So, I don't think it was a suitable recommendation for Mrs H to give up her guaranteed benefits. If Mrs H later had reason to transfer out of her DB scheme she could have done so closer to retirement.

And for all of the above reasons Mrs H also didn't need to consider early retirement from 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 personal pension was likely an attractive feature to Mrs H. But information from the point of sale does show that Mrs H felt that she had other assets to provide for her family on death, and she didn't have any dependents.

I appreciate that allowing her family to access her pension fund on her death was a feature she may have seen the value of. And Mrs H might have thought it was a good idea to transfer her DB scheme to a personal pension because of this. But the priority here was to advise Mrs H about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think PH7 explored how not transferring could also have met her overall aims.

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

Control or concerns over financial stability of the DB scheme

It was documented at the time of sale that Mrs H wanted 'a clean break from her employer' and control over her pension fund. But I think Mrs H's desire for control over her pension benefits was overstated. There is space on the point of sale paperwork where Mrs H could have said why this was but this wasn't completed. So, it's not clear why she wanted to do this.

Mrs H was not an experienced investor and I cannot see that she had an interest in or the knowledge to be able to manage her pension funds on her own. So I don't think that wanting to cut ties with her employer was a genuine objective for Mrs H. And the funding of her employer's DB scheme was not in a position such that she should have genuinely been concerned about the security of her pension – if she was.

Use of DFM

PH7 recommended that Mrs H use a DFM to manage her pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs H should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage her funds 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 personal pension would have sounded like attractive features to Mrs H. But PH7 wasn't there to just transact what Mrs H might have thought she wanted. The adviser's role was to really understand what Mrs H needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs H was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs H was very likely to obtain lower retirement benefits and in my view, there were no other pressing reason which would justify a transfer and outweigh this. Mrs H shouldn't have been advised to transfer out of the scheme just to gain some short-term flexibility. I don't think this was worth giving up the guarantees associated with her DB scheme.

So, I think PH7 should've advised Mrs H to remain in her DB scheme.

Of course, I have to consider whether Mrs H would've gone ahead anyway, against PH7's advice.

I've considered this carefully, but I'm not persuaded that Mrs H would've insisted on transferring out of the DB scheme, against PH7's advice. I say this because Mrs H was an inexperienced investor and this pension accounted for the majority of Mrs H's retirement provision outside of her state pension. So, if PH7 had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

In light of the above, I think PH7 should compensate Mrs H 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 PH7 to put Mrs H, as far as possible, into the position she would now be in but for PH7's unsuitable advice. I consider Mrs H would have most likely remained in her DB scheme if suitable advice had been given.

PH7 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 H has not yet retired, and she has no plans to do so at present. So, compensation should be based on her 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 Mrs H's acceptance of the decision.

PH7 may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs H'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 H's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs H'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 H 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 H within 90 days of the date PH7 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 PH7 to pay Mrs H.

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 £355,000, 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 £355,000, I may recommend that the PH7 pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Sterling Wealth Ltd to pay Mrs H the compensation amount as set out in the steps above, up to a maximum of £355,000.

Where the compensation amount does not exceed £355,000, I would additionally require Sterling Wealth Ltd to pay Mrs H any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £355,000, I would only require Sterling Wealth Ltd to pay Mrs H any interest as set out above on the sum of £355,000.

Recommendation: If the compensation amount exceeds £355,000, I also recommend that Sterling Wealth Ltd pays Mrs H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs H.

If Mrs H accepts this decision, the money award becomes binding on Sterling Wealth Ltd.

My recommendation would not be binding. Further, it's unlikely that Mrs H can accept my decision and go to court to ask for the balance. Mrs H 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 H to accept or reject my decision before 18 July 2022.

Andy Burlinson
Ombudsman