DRN-3280012

The complaint

Mr B complains about the advice given by Oakhouse Financial Services Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a Royal London Pension Portfolio with Income Release.

He says the advice was unsuitable for him and believes this has exposed him to unnecessary financial risks.

What happened

Mr B approached Oakland in 2016 to discuss his pension and retirement needs.

Oakland completed a fact-find to gather information about Mr B's circumstances and objectives. This showed the following:

- Mr B was 65 and looking to retire. He was working as a director and took an income of £644 per month from this role.
- Mr B was a homeowner and also had an investment property that provided rental income
- He had around £19,000 spread across his bank account and ISA.
- There was also around £170,000 invested in a stocks and shares ISA
- Mr B's current DB scheme offered benefits of either a guaranteed annual income of £35,859.20 (escalating 3% per annum), or the option to take a £165,504 tax-free lump sum with an annual income of £24,825.60 (escalating 3% per annum). Both options included a spouse's pension of £17,929.30 with a five-year guaranteed period.
- Mr B also had the option to choose to take a lower lump sum from the pension or to increase the spouse's income by reducing his income.
- The pension could be transferred with a transfer value of around £799,000
- Mr B's attitude to risk was balanced
- Mr B wanted to take tax-free cash to invest in a property, for the purpose of rental income.
- Mr B also wanted the flexibility of accessing his pension as and when he wanted, rather than take the monthly income offered by the scheme.

In 2017, Oakland advised Mr B to transfer his pension benefits into a Royal London Pension Portfolio with Income Release. The suitability report said the reasons for this recommendation were;

- To allow Mr B to take out tax free cash (TFC) of around £200,000 to fund an investment property purchase.
- To allow Mr B to take an income of approximately £10,000 a year, in the hope that his wife would be able to take a higher income at a later date and avoid in the immediate term paying a higher rate of tax.
- To provide Mr B with flexibility when drawing on his pension income, and to allow him to pass on death benefits to his wife and children.

Mr B complained in 2020 to Oakland about the suitability of the transfer advice because he felt that Oakland had not given appropriate advice and exposed him to unnecessary risks.

Oakland didn't uphold Mr B's complaint. It said that it had provided appropriate advice for Mr B while considering his own personal circumstances and that the transfer allowed him to achieve the financial goals discussed.

Mr B referred his complaint to our service. An investigator upheld the complaint and required Oakland to pay compensation. They said that Mr B could've achieved his retirement goals by remaining in his current scheme, which would not have exposed him to unnecessary risk – and that the reasons Oakland had given for the transfer did not outweigh the potential exposure to those risks.

Oakland disagreed, saying it felt that the investigators view did not reflect a thorough understanding of the benefits of income drawdown for a client in a situation such as Mr B's and for his overall circumstances.

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, Oakland should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

When assessing the suitability of DB pension transfer advice, we normally expect businesses to explain why they thought transferring-out was in the consumer's best interests from a financial viability perspective. To do this, we usually expect advisors to explain what levels of growth the pension funds might achieve outside the scheme, compared with the benefits available through the scheme, so we can assess whether transferring out of the DB scheme to a personal pension was the right thing to do.

Typically, we use a metric known as the 'critical yield' to help demonstrate how much a pension would need to grow by to match the benefits provided by the DB scheme. In this case, however, I've noted Oakland hasn't provided these figures but has used some cash-flow examples in its suitability letters to show how Mr B's pension (if transferred) would have lasted in his retirement years. Because of Mr B's age – he was already at the point of actual retirement – I think the critical yield figures and the discount rates we would usually refer to wouldn't have been of much relevance given he was already around the normal retirement age for both schemes and was looking to take benefits immediately.

I've therefore looked at everything else we've been sent to help determine whether transferring out of the DB scheme could be said to have been in Mr B's best interests.

Oakland recommended that Mr B invest in a Royal London Pension Portfolio with income release and has provided some fund growth analysis graphs to show how Mr B could've used his pension pot.

It made the following assumptions for its most generous analysis

- Mr B's starting fund value is £799,673
- Mr B did not take a lump sum.
- That Mr B begin to take monthly withdrawals of £2,988.26 9 (the annual amount of £35,859.20 which is what Mr B was currently being offered his DB scheme.)

It assumed a growth rate of 4% net of charges (i.e. after fund management charges, adviser charges etc.- meaning actual growth of at least 5%) and allowing for an increase in income at a rate of 3%. And based on the above assumptions, calculated that Mr B's fund could last until age 91.

The growth rate used was consistent with the regulator's middle projection rate of 5%, which was potentially achievable based on Mr B's balanced attitude to risk. But it also may not have been achieved consistently if there was market volatility – whereas Mr B's current DB scheme was guaranteed. Furthermore, the suitability report stated that if growth was lower – 3% net of fees and charges – then the fund would run out by the time Mr B reached age 88. So, if Mr B took the same level of benefits his DB scheme provided from the personal pension, there was a real risk of the funds running out, particularly if Mr B lived a long life and investment returns were poor.

Nevertheless, I also consider the fund analysis graph to be fundamentally flawed as it does not allow for the £200,000 TFC that Oakland says that Mr B wanted to take in order to invest in property for the rental market. Oakland has said that the lump sum was excluded because in a flexible drawdown contract Mr B had the option of taking income as a blend of his tax free and taxable income, which may be the most tax efficient way for Mr B to take his income or at least an option to consider.

But the primary reason for Mr B wanting to take a lump sum was to invest in property – so taking this in a flexible way wouldn't have allowed him to do this. Had the TFC lump sum been taken into account, Mr B would've needed to take out a significantly lower monthly income form the pot, in order for it to last to age 91. It does appear that Oakland later produced a cashflow analysis showing the impact of Mr B taking TFC of around £200,000 and then taking an income of £10,400 per year, escalating at 3%. It said this showed Mr B would've had a substantial fund left over if he passed away at age 91 – over £1million. However, Oakland failed to give Mr B a meaningful comparison with the benefits he was giving up. It ought to have shown the impact of Mr B taking the same benefits the scheme provided (TFC of £165,504 and an annual increasing income of £24,825.60). It seems to me that the fund would've likely run out far sooner. Without providing Mr B with such a comparison, I don't think he would've understood that he was likely to be worse off in retirement as a result of transferring his benefits to a personal pension.

For this reason alone a transfer out of the DB scheme wasn't in Mr B's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Oakland 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

Mr B would've been able to take a lump sum of £165,504 from his current DB scheme – albeit a lower amount than he was able to under the recommendation made from Oakland. Taking this sum as TFC would've allowed him to take a reduced annual income of £24,825.60.

Oakland says that Mr B needed TFC of around £200,000 – which was above what his current DB scheme allowed. But Mr B has provided information that shows he purchased a property at £165,000 – which he could've funded with the TFC provided by his DB scheme. And even if the property he purchased *had* been more expensive or if he required additional funds for renovations as Oakland has suggested, I think Mr B had other assets he could've utilised to make up the difference. Mr B had £19,000 in cash accounts and access to an additional £170,000 in a stocks and shares ISA. I don't think the fact that Mr B could only replace up to £20,000 per year in an ISA should've been a barrier to this – using the maximum ISA allowance should never be prioritised over security in retirement.

Ultimately, I think Oakland needed to do more to understand the exact amount of money Mr B required to meet his needs and fully explore the alternatives to cashing in the pension. And if Mr B did in fact need the full £200,000 then he already had access to this sum through his scheme and savings. So, I don't think Mr B needed to transfer his pension to meet this need.

Oakland also suggests that Mr B didn't need to take the income as he was living comfortably off his rental income and other assets – and that he could've avoided paying unnecessary taxes by not taking an income, and using his pension pot flexibly to allow for fallow periods when the rental income was not as high.

Oakland adds that rental demand was and remains high – but it is still risky to place reliance on rental income and potential property sales to meet a client's retirement needs. The rental income can't be guaranteed and despite the pandemic being a totally unforeseen event, it clearly demonstrates the risks involved. The issues Mr B had with a tenant that Oakland alludes to is another example of this.

Oakland says that Mr B was able to meet his needs during the pandemic, when his rental income was impacted, by using his pension pot flexibly to meet his outgoings. But Mr B wouldn't have needed to do this if he'd taken the benefits from the scheme. He'd have had at least £25,000 per year coming in which ought to have been sufficient to meet his expenses when he wasn't in receipt of rental income. And the impact of Mr B taking this extra income from his pension is likely to have an adverse effect on his retirement.

Oakland says taking income from the scheme would've pushed Mr B into a higher tax bracket because the income he received from his rental property was substantial. However, Oakland didn't record what income Mr B received from his rental property, so I don't know by how much this would put Mr B in a higher tax band. But even if it meant that Mr B paid more tax, I think it was worth it to ensure his security in retirement. And it's evident that any excess income either from the pension or rental property could be saved or even gifted to his children in a tax-efficient manner.

Overall, I don't think Mr B required flexibility in retirement in this way – instead, it was simply a consequence of the transfer. I think Mr B was able to meet his objectives without transferring out of the DB scheme and that the downside of paying extra tax was more than compensated for by the guarantees Mr B would retain for him and Mrs B.

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 Mr B. But whilst I appreciate death benefits are important to consumers, and Mr B might have thought it was a good idea to transfer his DB scheme because of this, the priority here was to advise Mr B about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Mr B explored to what extent Mr B 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. Mr B was married and had a dependent child and so the spouse's/dependent's pension provided by the DB scheme would've been useful to his spouse and dependents if Mr B predeceased them. I don't think Oakland made the value of this benefit clear enough to Mr B. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, on Mr B's death there may not have been a large sum left or the fund may have been depleted entirely, particularly if Mr B lived a long life or investment returns were poor. In any event, Oakland should not have encouraged Mr B to prioritise the potential for higher death benefits over his security in retirement.

Furthermore, Mr B already had £150,000 in whole of life cover – so I would question why Mr B would've needed funds in excess of this. If he did indeed need extra funds, he could've started a trust and redirected excess income that way.

Overall, I don't think different death benefits available through the transfer justified the likely decrease of retirement benefits for Mr B.

Suitability of investments

Oakland recommended that Mr B invest in a Royal London Pension Portfolio with Income Release. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr B, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr B should have been advised to remain in the DB scheme and so the investment wouldn't have arisen if suitable advice had been given.

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 Mr B. But Oakland wasn't there to just transact what Mr B might have thought he wanted. The adviser's role was to really understand what Mr B needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr B was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr B was likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr B shouldn't have been advised to transfer out of the scheme just to purchase an investment property when his current scheme and assets would've allowed him to achieve this goal already, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Oakland should've advised Mr B to remain in his DB scheme.

Of course, I have to consider whether Mr B would've gone ahead anyway, against Oaklands's advice. I've considered this carefully, but I'm not persuaded that Mr B would've insisted on transferring out of the DB scheme, against Oakland's advice. I say this because while Oakland suggests he was an experienced investor, Mr B was not experienced in pensions, and in any event, Oakland recorded his attitude to risk as 'balanced' when it provided the advice, and this pension accounted for the majority of Mr B's retirement provision. So, if Oakland given him clear advice against transferring out and explained that Mr B could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr B would have insisted on transferring out of the DB scheme.

In light of the above, I think Oakland should compensate Mr B for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I've taken into account Oakland's comments that Mr B's complaint is 'opportunistic' and that it has been driven by the impact of the pandemic on his fund value, which has since recovered. But Mr B is entitled to complain about the advice he received and it isn't surprising that the drop in value of his pension fund caused him to question whether the advice he received was suitable.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in but for Oakland's unsuitable advice. I consider Mr B would have most likely remained in his DB scheme, and taken the tax free lump sum available to him of £165,504, along with the reduced income of £24,825.60 (escalating 3% per annum) if suitable advice had been given.

Oakland 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, Mr B retired at 65, so this should be the basis for the calculations.

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 B's acceptance of the decision.

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

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

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 Oakhouse Financial Services Limited to pay Mr B 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 Oakhouse Financial Services Limited to pay Mr B any interest on that amount in full, as set out above.

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

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

If Mr B accepts this decision, the money award becomes binding on Oakhouse Financial Services Limited.

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 28 August 2022.

Claire Pugh
Ombudsman