DRN-3317500

The complaint

Mr T complained about advice he received from Holistic Pension Transfer Specialists Limited to transfer his defined benefit occupational pension (which I'll refer to as the "work pension") to a self-invested person pension ("SIPP").

What happened

Mr T was a member of his employer's work pension scheme. He was in contact with a business I'll refer to as "L" as he wanted to look at the transferring the pension. A fact find document (which recorded Mr T's financial position and objectives) was completed by L. This recorded things such as:

- Mr T rented his home
- he'd had a bad accident and could no longer work
- he had plans to buy his home and needed £40,000 as soon as possible in order to do so
- he wanted to transfer his work pension to something that was more flexible and take the tax-free cash that would be available to buy the property, and that would enable him to leave his pension to his children
- his attitude to risk was 'balanced'.

Mr T was referred to Holistic as L couldn't advise on the pension transfer. Holistic's advisor phoned Mr T to check the information it had been provided with. Its file note from the time recorded that:

- the advisor told Mr T of his various concerns but Mr T said he was adamant that he wanted to transfer and he explained why eg to buy the home he lived in
- Mr T also said he wanted to help his son by giving him £10,000
- the advisor said the SIPP would enable Mr T to leave the pension to his son but he should consider his own future too.

On 16 June 2018 Holistic sent Mr T a letter outlining its recommendation. Of note, the letter said:

- Mr T considered his work pension surplus and he didn't expect to rely on it until he was 67 (which was 12 years away)
- his plan was to transfer the pension so that he could take control and take the tax-free cash plus another £20,000 in order to buy his home and give £10,000 to his son
- his key objectives were:
    - accessing the tax-free lump sum cash as soon as possible
    - having the flexibility of accessing drawdown to meet changing demands associated with age and lifestyle and to fill any income gaps until he's able to receive the State pension
    - having flexibility over the nomination of beneficiaries, timings and benefit methods
    - the ability to pass 100% of the pension fund to his son

- the critical yield (which is the amount the SIPP needed to grow by in order to match the benefits of the work pension) was 9.4%
- the work pension failed to meet Mr T's objectives
- outlined the benefits of not transferring and the benefits of transferring.

Towards the end, the letter said that in terms of security of a pension income for life the work pension was valuable and it was difficult to replicate that from the proposed SIPP. However, Holistic ultimately recommended that Mr T transfer his work pension to the SIPP. It said this was suitable to meet his objectives.

That was the end of Holistic's involvement in the transaction. The transfer was then completed in August 2018.

In February 2020 Mr T complained to Holistic as he felt the advice to transfer his work pension was unsuitable. Holistic looked into the complaint but didn't think it had acted unfairly. In summary, it said its advice was accurate and appropriate; and that it didn't do any work for Mr T beyond giving the advice.

What I've provisionally decided – and why

I issued a provisional decision which explained why I thought the complaint should be upheld. The relevant parts of my provisional decision are outlined below, and they form part of my final decision.

Issues to decide

- I needed to decide whether the advice Holistic gave Mr T was unsuitable; and if it was unsuitable I then needed to decide what Holistic needed to do in order to put things right.

Relevant rules, guidelines etc

- There were various rules and principles Holistic had to abide by/follow at the time it gave the advice. Three I thought were particularly important were:

    - the advice had to be suitable
    - Holistic had to work on the basis that advice to transfer the work pension was unsuitable; and it only became suitable if it could be clearly shown to be in Mr T's best interests, and
    - Holistic had to treat Mr T fairly and act in his best interests.

General observations

- My impression of Holistic's argument was essentially that it thought the advice was suitable because it met Mr T's objectives. I didn't think that argument in itself was persuasive. That was because what a consumer wanted (ie their objectives) might be completely unrealistic or unachievable without taking risks over and above what they could afford or might wish to take. So what they wanted wasn't always what was suitable/in their best interests. And in that situation the advice should be to not transfer. If the consumer then chose to dismiss the advice and transfer anyway that was their choice.

- I noted comments Holistic had made in response to our investigator's opinion about Mr T's actions after the advice was given eg a large amount of withdrawals, the performance of the recommended funds. In considering whether the advice was suitable

I had to consider the situation at the time the advice was given. And at that point in time Holistic didn't know how the underlying funds would perform in the future and it didn't know how Mr T would actually access his funds. So I didn't think what happened after the advice was given was particularly important in me deciding whether the advice was suitable. It was more important in deciding whether Holistic needed to do anything in order to put things right.

Was the advice unsuitable?

- A key predictor for me of whether a transfer from a defined benefit pension scheme was suitable and/or in Mr T's best interest was the critical yield, his attitude to risk and his capacity for loss (including how much of the total pension provision the transfer represents).

- In respect to the critical yield, Holistic's recommendation letter said the SIPP would need to grow by 9.4% each year in order to match the benefits of the work pension Mr T was giving up. For a transfer to be financially viable, the assets a consumer's attitude to risk allowed them to invest in shouldn't just have been capable of achieving the critical yield but exceeding it. That's because there's usually no point giving up the guarantees provided by a defined benefit pension scheme simply to 'stand still', given the risk that the transfer might underperform.

- 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. Although businesses weren't required to refer to these rates when giving advice on pension transfers, I thought they provided a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

- The closest discount rate to this time which I could refer to was published by the Financial Ombudsman Service for the period before 1 October 2017. It was 3.9% per year for 11 years to retirement. Even allowing for Mr T's balanced attitude to risk that was some way short of the 9.4% required each year.

- In respect of Mr T's capacity for loss, apart from the State pension this was Mr T's only pension provision for retirement income. And there was a low likelihood of him gaining any further pensions in the future. I therefore thought Mr T was highly reliant on the work pension for his future retirement income, and I didn't think he could have afforded to take much risk with it eg fluctuations with the investment returns, the funds running out early due to withdrawals.

- Based on the information available at the time I thought the critical yield was unlikely to have been achievable based on Mr T's attitude to risk. I also thought Mr T's capacity for losing the benefits provided by his work pension was low. I was aware of Mr T's stated objectives; however given the guaranteed benefits provided by the work pension and the risks involved in transferring, I wasn't persuaded that those risks were justified. I therefore concluded that Holistic's advice was unsuitable and not in Mr T's best interests.

Did Holistic need to do anything to put things right?

- Mr T was a relatively unsophisticated consumer when it came to investments and pensions. I thought that was relevant as, in my opinion, it meant it was likely he would be wholly reliant on the advice being given to him by a professional advisor. That in turn meant he would more likely than not follow the advice given. Accordingly, if he'd been advised to not transfer, I thought it was most likely that Mr T would have heeded that advice and he wouldn't have transferred his work pension.

- I considered the fact Mr T withdrew virtually all of the transferred funds from the SIPP in the months following the transfer as this could have indicated his plan all along was to transfer the work pension in order to access the funds. That would have supported an argument that Mr T would have transferred his work pension irrespective of the advice he received from Holistic. Mr T told us the reason he made the withdrawals was because he suffered from depression and, essentially, he withdrew the funds from the SIPP because he could ie the money was there and it was accessible. He said, and I believed him, that he had no preconceived plan to transfer the pension and withdraw all of the funds.

- I therefore concluded that Mr T wouldn't have transferred his work pension if he'd been advised by Holistic not to.

Summary

Because I felt the advice was unsuitable and it led to Mr T transferring his work pension when he otherwise wouldn't have, I concluded that Holistic should compensate Mr T for any losses he'd suffered as a result of him transferring his work pension.

Responses to my provisional decision

Mr T said he had nothing further to add, apart from asking for confirmation that as his SIPP is now closed (due to it only having a very small balance) would the compensation be paid to him taking his tax rate into account. Our investigator confirmed that in these circumstances that would be the case.

Holistic made various points. I've considered these and have addressed the ones I feel are material to the outcome of the complaint below.

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.

General observations

I made two general points in my provisional decision – about advice not being suitable just because it enables a consumer to meet their objectives, and about Mr T's actions after the transfer not being important in me deciding whether the advice was suitable.

Holistic said Mr T's objectives were realistic and achievable and the transfer was suitable *if* he followed the advice. It also confirmed the advice wasn't for Mr T to transfer and then spend all the money in the next nine months. And it said Mr T's previous arrangement wouldn't have met his objectives, but they could have been met if he transferred to the SIPP.

The point I made in my provisional decision was a general one along the lines of advice not automatically being suitable just because it enables a consumer to meet their objectives. A consumer may well be able to meet their objectives by following whatever advice an advisor gives them; but if doing that is detrimental to the consumer in other ways it might mean the advice is unsuitable overall.

In response to my provisional decision Holistic said it felt what happened after the transfer was relevant to the advice it gave, and that I inferred that the advisor should have known that Mr T would withdraw the funds from his pension and spend it. I firstly confirm my view that the advisor could only work on the information he was provided with by Mr T at the time eg about his financial position, health, objectives. I don't think the advisor ought to have known – nor could he have known – that Mr T would withdraw all his funds in the nine months following the transfer.

I nevertheless remain of the view that what's important in me deciding whether or not the advice to transfer was suitable is the information the advisor knew at the time – its's not what he didn't know or what happened afterwards. I accept Mr T's actions in withdrawing the funds could indicate that this was his plan all along. But I addressed this in my provisional decision, and I comment on it further below.

Was the advice unsuitable?

In summary, I provisionally concluded that the advice was unsuitable because the critical yield was most likely unachievable and Mr T didn't have the capacity to lose the guaranteed pension benefits provided by his work pension. And I didn't think the fact Mr T might have been able to achieve his objectives outweighed the risks of transferring.

Holistic has said that the critical yield of 9.4% was incorrect and it should have been 5.93%. I've noted this, but it doesn't change the fact that the advisor was at the time working on the higher figure. And the revised critical yield is still unlikely to have been achieved as it's significantly higher than the discount rate I've quoted.

Holistic said the advice was effectively for Mr T to invest 37% of his funds into buying his home and to invest the remaining 63% into a balanced investment portfolio. And it said if Mr T had acted in line with the advice it would have been sound, would have met his objectives and would have reflected his best interests. It also said his capacity for loss was improved as he would own his property outright.

Holistic didn't advise Mr T to buy his home – its advice was to transfer the work pension (based, in part, on Mr T saying he wanted money to buy his home). There's a difference. I'm not persuaded that Mr T's capacity to lose his work pension benefits was enhanced by the fact he would have owned his home outright. Although this might have reduced his regular expenses (eg not having to pay rent), it didn't reduce the risk that Mr T's pension benefits for later in life – which is the main purpose of a pension – would be reduced due to things such as lack of growth, ongoing fees and withdrawals from the fund. And it didn't reduce Mr T's capacity for being able to withstand the loss of his guaranteed pension benefits.

Holistic also said Mr T felt that his best interests were served by being able to access the funds in his pension. This may have been the case. However, Holistic's role here wasn't to just accede to what Mr T felt was in his best interest; it was to step back from that and advise him dispassionately about the situation he realistically faced and the implications for his future retirement income. Going back to the general point I made earlier, I'm sure if you ask most consumers they would think it's in their best interests to access the funds in their pension as and when they wanted – but that scenario simply isn't always possible or in their best interests.

With the above in mind, Holistic's comments in response to my provisional decision don't persuade me to change my mind that the advice to transfer was unsuitable and not in Mr T's best interests.

Does Holistic need to do anything to put things right?

I provisionally concluded that Mr T wouldn't have transferred his work pension if he'd received suitable advice from Holistic ie to not transfer.

In response to my provisional decision Holistic referred to *"the Ombudsman's subsequent personal conversations with [Mr T]"*. I want to make it clear that we (as the Financial Ombudsman Service) have spoken to Mr T in respect of his complaint but I (as the decision maker on the complaint) haven't spoken to him personally. I have obviously taken what Mr T has told us into account when reviewing the complaint though.

Holistic said Mr T didn't act in line with his stated goals and, therefore, that he misled it and the advice was procured on a false basis. It said it trusted the information Mr T had given it and it can't be held accountable for Mr T not telling the truth. It also questioned the fact I had believed what Mr T had told us when he hadn't been truthful with Holistic.

Holistic has focussed on the fact that Mr T didn't act in accordance with what was recorded as to his intentions – which I accept: it's not documented, for example, that he intended to withdraw all his pension funds. However, I don't think this changes my opinion that (a) the advice to transfer the work pension was unsuitable/not in Mr T's best interests, or (b) that Mr T most likely wouldn't have transferred if he'd received suitable advice. I'm not holding Holistic accountable for Mr T not telling the truth. Even if Mr T had bought his home and had left his pension funds alone, my conclusion that the advice was unsuitable would probably still the same – because the critical yield was still unachievable and Mr T's capacity for being able to lose his pension was still low. The only difference would be in what compensation Holistic would ultimately have to pay – but the withdrawals are accounted for in the redress methodology.

Holistic challenged the reason Mr T gave us for why he withdrew the funds and it wants the issue of his depression explored eg medical evidence to be presented and an assessment undertaken regarding Mr T's behaviour. It thinks Mr T might have been fraudulently influenced by an unregulated third party or he always intended to access his pension funds and his plan was gain transfer advice which would then enable him to withdraw his funds and spend the money or invest in alternative unregulated products.

Holistic had the opportunity to thoroughly investigate Mr T's complaint prior to it being referred to us. And if its investigations highlighted the need to get medical evidence – as it believes ours has – it had the opportunity to get that prior to formally responding to the complaint. I don't think it's necessary to get medical evidence as I'm satisfied that I can reach a fair and reasonable conclusion based on what's been provided thus far.

Holistic does make a valid point in respect of Mr T's credibility in respect of what he's told us given what he told Holistic. And it's of course possible that Mr T did have an ulterior motive for wanting to transfer his work pension – something I can't dismiss that out of hand. However, my remit is to decide complaints on the balance of probability – in other words, based on what's most likely to have happened. Direct testimony from a consumer is always evidence I will consider. But, unlike a court, I don't have the power to cross-examine consumers or to compel them to tell us the truth. So it's always a question of how much weight I place on a consumer's testimony.

In this case I don't necessarily find all of what Mr T has told us compelling. For example, upon further questioning he's told us that because of his mental health he can't remember what he spent the money he withdrew from his pension on – which, given the amounts involved, I find hard to believe. However, despite this, I haven't seen anything which persuades me that there was any ulterior motive behind Mr T transferring his pension and I haven't seen anything to suggest that he was the victim of any fraudulent or unscrupulous behaviour by a third party.

It therefore remains my view that Mr T most likely wouldn't have transferred his work pension if he'd received suitable advice from Holistic.

Sundry points

Holistic has raised some other issues which I will cover off for completeness. The first one related to the fact that due to Mr T's health he might have been entitled to receive an enhanced annuity. I don't think this affects the outcome of the complaint because this point is made based on what the position is, or might be, now, rather than what the position was and what was known at the time of the advice.

It also referred to the fact that Mr T received warnings about aggressively withdrawing his pension funds. Again, I don't think this affects the outcome of the case because the warnings don't in my opinion change the fact that the advice was unsuitable or that Mr T wouldn't otherwise have transferred his pension. And the fact Mr T did withdraw the funds is accounted for in the redress methodology.

Putting things right

Holistic isn't responsible for Mr T's actions or for any advice he might have received from others after the transfer took place. That's because, its involvement in this matter ended at the point it issued its recommendation. However, the unsuitable advice put Mr T on the path to transferring, which in turn led to him suffering potential losses due to the transfer.

A fair and reasonable outcome is for Holistic to put Mr T, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the work pension. Holistic 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. This guidance takes account of any withdrawals made, so that Mr T isn't "doubly compensated" for money he's already withdrawn from the SIPP.

This calculation should be carried out as at the date of this final decision, using the most recent financial assumptions at the date of this 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 T's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr 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 (and it seems from Mr T's response to my provisional decision that this might be the case) or has protection or allowance implications, it should be paid directly to Mr 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 Mr T's 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 compensation amount must where possible be paid to Mr T within 90 days of the date Holistic 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 Holistic to pay Mr 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.

My final decision

I uphold this complaint. I require Holistic Pension Transfer Specialists Limited to settle this matter as outlined under the 'Putting things right' heading above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 22 March 2022.
Paul Daniel
Ombudsman