DRN-3322381

The complaint

Mr M complains about the advice given by Retirement Direct Limited ("RDL") to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, take the maximum available tax free cash and purchase an annuity. He says the advice was unsuitable for him.

Mr M is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr M.

What happened

Mr M approached RDL around April 2010 after seeing adverts about unlocking his pension as he wanted to see what his options were.

Mr M outlined that he had three different pensions that he was interested in getting advice on. One personal pension, a section 32 buyout plan and an occupational pension, the DB scheme, that he had accrued working for an employer between 1999 and 2006. He gave RDL authorisation to gather information in relation to all of them.

RDL contacted the three pension schemes for information and looked into Mr M's state pension entitlement. The section 32 plan was scheduled to provide a guaranteed minimum pension of over £7,000 per year at the scheduled retirement age. The provider also explained that the cost of securing the GMP was greater than the transfer value and so a transfer was not currently permitted. The personal pension was valued at just over £11,000. There was no guaranteed payment included within this pension. The DB scheme had a cash equivalent transfer value ('CETV') of £60,841.29. It had a preserved pension amount (a guaranteed benefit it would provide) of £3,273.80 per year as of 2006, when Mr M left the scheme. This was scheduled to increase annually in line with the retail price index (capped at 5%) until Mr M reached age 65 – so at retirement would pay more than this amount. The benefit amount would also continue to increase after retirement.

Over the course of a couple of phone calls, several weeks apart, RDL also completed a fact-find to gather information about Mr M's circumstances and objectives. It noted he was 56 at the time. He had been unemployed for several months but had recently begun a new job. He had credit card debts of approximately £1,900, £1,200 of which were accrued by his daughter who was attending university. Mr M said his daughter was meeting the repayments in respect of this portion of the balance.

Mr M was legally married but had been separated for approximately 16 years. He owned a property with his former partner but wasn't living there and was instead living with one of his sons. The property he owned had a mortgage on it and Mr M was paying 50% of the monthly payments – roughly £200. The mortgage was due to finish before his scheduled retirement, at age 65. And the tentative plan was that, after his youngest son left home – which he thought would likely be about a year before his scheduled retirement – the property would be sold, and the proceeds split. He'd then use this to buy a small property of his own if necessary.

RDL recorded that Mr M was likely to require an income of approximately £1,300 per month in retirement – although noted this could've ended up lower, if he purchased a property as suggested. It estimated, based on the value of his current retirement provisions, he'd currently fall short of that amount by £120 per month.

Mr M's main objective was listed as releasing tax free cash ('TFC') to purchase a newer car. This was mentioned in both of the fact-finding calls. In the latter of the two fact finding calls Mr M also said he'd like to try, if possible, to provide some financial support to his daughter who was attending university.

On 16 August 2010, RDL sent Mr M a summary of what it had analysed so far, which it said would be the basis of a discussion scheduled several days later. This also included a section called "*Summary – Our Advice*" which explained;

"Our analysis suggests that at age 65 you may not achieve the level of retirement income you require. You should therefore be maintaining and attempting to increase your retirement provision in order to provide the required level of income when you retire. Alternatively you need to re-consider your objectives in retirement and how you would cope on a reduced income.

…

If you were to take your pension(s) early, your income will probably be considerably less that you could expect if you waited until your retirement date and you will have less to live on when you retire. You would therefore be reducing an already insufficient income in retirement."

This document was discussed with Mr M a few days later. RDL explained it had asked his DB scheme for confirmation of whether he was able to take retirement benefits early under that scheme, as that could be the best way to meet his objectives. But it hadn't received a response. So, it was agreed that it'd get back in touch once that response was received.

The DB scheme then confirmed that there was not, at that time, the option of taking retirement benefits earlier than scheduled.

RDL then had a further conversation with Mr M in September 2010 where it says he indicated he was still keen to proceed with the transfer. And that another reason for potentially wanting to buy a newer car was that his youngest son was going to begin driving lessons, so he'd like to have him added to the insurance to assist with this. RDL also asked Mr M what he'd prefer to do with the residual balance after taking TFC if a transfer went ahead. Mr M didn't express a preference initially. RDL suggested he could take an immediate income and talked about roughly what the level would be depending on if Mr M chose an increasing or level income. Mr M indicated he'd be interested in the higher income a fixed annuity would provide. After he said this there was no further discussion about other alternative options for the residual fund

Three days after this call a transfer value analysis ('TVAS') report was completed.

RDL then sent Mr M a summary of its recommendation on 16 November 2010. It recommended he take no action with his personal pension and section 32 plan. But it recommended he transfer his DB scheme benefits, take the maximum available TFC (£15,210) and use the remaining fund, after advice fees were paid, to purchase an annuity. The annuity recommended paid £2,160.12 per annum. This was a level annuity, so the benefits would not increase, and it included a five-year guarantee and would provide a 50% spouse's pension. The letter explaining the recommendation said the reasons for it were that it allowed Mr M to take TFC and meet his objectives of raising funds to buy a newer car and assist his children – particularly his daughter.

The transfer went ahead in line with the recommendation made.

Mr M complained in January 2021. In summary his representatives said that the advice was unsuitable and was not in his best interests. They said the things the TFC was used for were not essential and it hadn't been made clear to Mr M the value of what he was giving up or why RDL believed it was appropriate to do so. Mr M felt RDL should've strongly advised him to remain in his DB scheme.

RDL didn't uphold the complaint. It said Mr M had been made aware, and had clearly understood, that he was giving up a higher guaranteed income, the risks associated, the trade off of prioritising TFC and the implications, including that he'd receive a lower income. And it felt the transfer was suitable as it had allowed Mr M to meet his objectives.

The complaint was then referred to our service. One of our Investigator's considered the complaint and thought that it should be upheld and that RDL should pay compensation and £250 for the distress caused. He didn't think the advice was suitable or in Mr M's best interests. He felt Mr M didn't have a need for the regular income recommended, didn't have a genuine need for the TFC – rather this was just something he'd have liked – and had little capacity for loss or appetite for risk. He also commented that making Mr M aware of the risks involved wasn't the same as giving suitable advice.

RDL strongly disagreed with the Investigator's opinion. In summary it said that Mr M had clearly indicated that meeting his objectives in 2010 through the release of TFC was very important to him and he didn't have another way to do that. It also believed he'd demonstrated and implied a need for a stable additional income in all of his contact with RDL. And it remained of the view that the advice was suitable.

The investigator wasn't persuaded to change their opinion. He felt, after looking at everything again, the objectives Mr M had were not genuine needs. Indeed, he felt Mr M had indicated as much. So, he didn't agree that these warranted RDL advising him to transfer his pension. And he remained of the opinion Mr M had no need for an immediate income either.

RDL asked for the complaint to be reviewed by an Ombudsman. As a result, it has been passed to me to decide.

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.

Both parties, and in particular RDL, have provided a significant amount of information. And I'd like to reassure both parties that I've carefully considered all the evidence provided. If I don't comment on or refer to everything I've been sent this isn't meant as a discourtesy or because I haven't thought about it. Rather it is because my decision will address what I consider to be the key issues in deciding what is fair and reasonable.

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.

Mr M's DB scheme provided a guaranteed annual pension. The preserved pension was £3,273.80 per year, as of the date he left the scheme in 2006. This amount was subject to revaluation and would increase at a rate equivalent to the retail price index (capped at 5%) for every year between Mr M leaving the scheme and reaching age 65. The TVAS report projected that this meant the income Mr M would receive if he remained in the scheme until age 65 was likely to be approximately £4,445 per year. This figure would also continue to be revalued to account for inflation after the pension benefits began being drawn. The DB scheme also included a spouse's pension of 66.67% payable in the event Mr M pre-deceased his wife. If Mr M had died prior to retirement it'd also pay a lump sum death benefit of £11,159.02. And I understand that Mr M would also have had the option of releasing TFC from the ceding scheme at age 65 - which RDL says would've been a similar sum to that he obtained under the arrangement it recommended.

RDL recommended that Mr M use the transfer value of the DB scheme benefits, the CETV, to release TFC and then purchase an annuity. Mr M took £15,210 TFC. The recommended annuity then provided a guaranteed level income for the rest of Mr M's life (£2,160.12 per annum), which didn't increase to account for inflation. The annuity included a 50% spouse's pension.

Essentially RDL recommended that Mr M exchange a guaranteed, escalating pension for a policy paying a fixed, lower, annual income for the rest of his life and providing reduced death benefits, in order to access TFC and a regular income immediately, rather than at his scheduled retirement date. He'd receive an income for approximately nine years from the recommended policy that he wouldn't have under his existing scheme. But when he reached scheme retirement age of his existing policy, the income he was receiving wouldn't change and he would be receiving significantly less than he would've by staying put. What I must decide is whether the advice to do this, by transferring his DB scheme pension, was suitable and in Mr M's best interests.

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, RDL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M'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

RDL recorded information about Mr M's likely income needs in retirement. It concluded that, if he didn't transfer, his income would fall short of what he needed once he retired. And in the letter it sent him on 16 August 2010, RDL said that by transferring Mr M would be reducing an already insufficient retirement income and he should in fact be maintaining and looking to increase his retirement provisions. The transfer did mean Mr M received an income from the annuity straight away. So, between that date and his scheduled retirement date under the existing scheme, he'd receive an income he wouldn't otherwise have done. But I don't think this justifies the impact on Mr M's pension income from the scheme retirement date, particularly as he was working at the point of the advice, in receipt of an income and was clear he had no plans to cease working for a number of years.

The primary purpose of a pension is to provide income in retirement and meet the needs of the policyholder. Mr M was already not in a position where his retirement income needs were going to be met and this transfer made the position worse. So, for this reason alone it doesn't appear to have been in Mr M's best interests to transfer.

As I've said, the letter RDL sent in August 2010 did explain this – indicating that the transfer perhaps wasn't in Mr M's best interests. But RDL failed to go as far as saying that definitively or provide detailed reasons why or make a recommendation for or against transferring at that time.

RDL has said that the figures recorded for the income Mr M would need in retirement were a worst case scenario and it was possible his needs wouldn't be this much. And his other retirement provisions, particularly his section 32 plan and state pension, went a long way to meeting his needs and would potentially provide all that he needed if he didn't require as large an income. So, in essence, he could afford to transfer as his position wasn't being worsened significantly.

But while it has explained that now, neither the letter sent in August 2010 or the suitability report sent in November 2010 explained why RDL thought worsening Mr M's retirement provisions were appropriate or in his best interests, beyond that it allowed him to access TFC. So, I don't think Mr M was really in a position to make an informed decision as RDL hadn't really provided him with advice.

This is also true in the calls that we've been provided access too. Mr M was asked on a number of different occasions whether the things he said he'd look at using TFC for were still important and if he still wanted to access money from his DB scheme and go ahead with the transfer. But RDL didn't advise him either way or give its opinion during the call as to whether this was right for him – the service it was required to provide.

RDL has said that Mr M understood the risks involved and had made a decision that accessing funds via the pension, at the time of the advice, was more important to him than the longer term implications. But being told the risks is not the same as being given appropriate advice. RDL's role wasn't simply to facilitate something that Mr M might've thought he wanted or needed. It was to carry out a robust assessment of his circumstances and provide, suitable financial advice, which was in his best interests. And I don't think it did so. I accept that it provided Mr M with a significant amount of information. But it effectively left him to determine what he thought was best before recommending a corresponding strategy.

And ultimately I don't think transferring was suitable in Mr M's case. As I've already established, he would've been left with reduced retirement benefits by transferring. And the recommended policy also had lesser death benefits. The reason that has been relied on by RDL for recommending the transfer is that Mr M had an immediate requirement for TFC and that he was willing to accept the loss of retirement benefits to achieve this. But I don't think Mr M had a genuine *need* for TFC.

When Mr M first spoke to RDL he said he didn't have a plan in mind and was just looking at what options were available to him. Which I think indicates clearly that he didn't have a predetermined course of action or set need when first contacting RDL.

It is true that later in the same call Mr M said he was potentially interested in purchasing a newer car as his was getting quite old and he was concerned about potentially escalating repair bills. RDL recorded that this was essential. And this has formed the basis of its advice. But I'm satisfied that while Mr M was interested in using TFC for this purpose, it wasn't essential that this objective be achieved.

This objective was referred back to in all of the later calls and correspondence. But for the large part it was RDL that referenced and brought up this objective, asking if it was still something Mr M was interested in. This kept it at the forefront of Mr M's thinking. But that isn't the same as him saying and constantly referencing that he needed this to be achieved. Indeed, during one of the discussions with RDL he said he was getting his existing car MOT'd and that maybe he was kidding himself slightly that he needed a new car simply because he might be able to access TFC. I think this shows that Mr M understood that this objective perhaps wasn't essential. And I'm satisfied it wasn't. I think it was simply a potential use for TFC he'd thought of, if releasing TFC from his pension was in his best interests.

Mr M did also mention, during the second discussion he had with RDL, he was hoping to provide some financial support to his daughter who was at university. But again, from what I've seen I'm satisfied this was simply something that Mr M would've liked to do if he had money available. It wasn't something that he *needed* to do. And the same applies to helping one of his sons with driving lessons.

So, taking all of this into account, I don't think Mr M had a genuine need to access TFC. And given this and the reduction in his retirement benefits that the transfer would bring about, I don't therefore think that transferring was in his best interests. And I think RDL should've advised Mr M to remain in his DB scheme.

Our investigator also said they didn't think Mr M had a need for an immediate income so questioned the advice to take an annuity. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M, it follows that I don't really need to consider the suitability of the recommendation about how to use the residual funds after TFC was taken.

Of course, I have to consider whether Mr M would've gone ahead anyway, against RDL's advice, if it had explained the transfer wasn't in his best interests. But I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against RDL's advice.

The available information seems to be very clear that both parties acknowledged Mr M wasn't a particularly experienced investor. And while he may have had an intended use for TFC, as I've said, I think he understood that this was not necessarily essential. While he was provided a lot of information, I don't think he was provided particularly reasoned or clear advice. And if he'd been provided clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, rather than RDL leaving it largely to him to decide a course of action and then facilitating that, I think he would've accepted that advice.

I'm not persuaded that his desire for TFC was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests.

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

Our investigator also recommended that RDL pay Mr M £250 for the distress caused. I don't doubt that Mr M has been caused distress and concern as a result of the disruption to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. So, in the circumstances, I think the award the Investigator recommended is reasonable.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for RDL's unsuitable advice. I consider Mr M would have most likely remained in his DB scheme if suitable advice had been given.

RDL 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, I'm satisfied Mr M wouldn't have taken benefits under the DB scheme, until the normal scheme retirement age. So, compensation should be based on his 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 Mr M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, I'd usually recommend that this be paid into Mr M's pension plan. But I understand, as Mr M has taken an annuity, that further contributions aren't possible. So, in the circumstances, it appears appropriate that the payment be paid directly to Mr M 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 M within 90 days of the date RDL 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 RDL to pay Mr M.

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.

In addition, RDL should pay Mr M £250 for the distress caused by the disruption to Mr M's retirement planning.

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

<u>Determination and money award</u>: I uphold this complaint and require Retirement Direct Limited to pay Mr M 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 Retirement Direct Limited to pay Mr M any interest on that amount in full, as set out above.

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

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Retirement Direct Limited pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M accepts this decision, the money award becomes binding on Retirement Direct Limited.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 8 August 2022.

Ben Stoker
Ombudsman