DRN-3351374

The complaint

Mr T complains that the advice he was given by TenetConnect Limited to transfer the benefits of an occupational pension scheme (OPS) to a personal pension plan (PPP) in 2015 was unsuitable. TenetConnect were known as LEBC Group Limited at the time of the advice, but for clarity I'll refer to them as TenetConnect throughout.

What happened

In 2015 Mr T had a deferred OPS from a previous employer [X]. This OPS had a Cash Equivalent Transfer Value (CETV) of £53,132 but X were offering a time-limited enhanced value of £55,788 should Mr T decide to transfer it to another arrangement. X had engaged TenetConnect to advise the scheme members about any possible transfer.

Mr T approached TenetConnect for advice on 5 August 2015. The enhanced CETV offer expired on 11 August 2015.

Mr T completed a 'fact find' which showed his current personal circumstances. In summary:

- He was aged 51, married with three dependent children, and in excellent health.
- He was employed with an annual salary of £210,000.
- He wanted to retire aged 60.
- He had joint savings with his wife of £150,000.
- His previous investment experience was limited to savings and ISAs.
- He had three other occupational pensions in addition to the one provided by X.

He then answered some questions regarding his attitude to taking risks with his finances. The result of these answers indicated he had a High Medium attitude to risk (ATR), but it is documented that following a discussion this was reduced to Low Medium, as it was felt this better reflected his attitude at the time.

On 6 August 2015, as a result of the fact find, TenetConnect produced a Pension Transfer Analysis (commonly known as a TVAS), to show whether it would be beneficial to Mr T to transfer the benefits from his OPS. It also made a personal recommendation in the form of a suitability report.

Mr T's objectives were identified as follows:

- Provision for a partner and dependent's pension after retirement.
- Retire aged 60; and
- maximise his tax-free cash (TFC) at retirement.

TenetConnect recommended to Mr T that he transfer his OPS benefits to a PPP. The benefits of this transfer were documented as follows:

- There will be greater flexibility in an individual plan to enable you to control the way benefits are paid to you at retirement.

- There is a better chance of increasing your pension fund within an individual plan subject to prevailing annuity rates.
- You will have greater investment control and have access to a range of funds or lifestyle investment options to suit your needs.
- The tax-free cash lump sum is likely to be better in an individual plan, at both your normal retirement age of 65 as well as age 60. This would give you greater freedom to choose how best to draw income.
- The lump sum death benefits are considerably better within an individual arrangement. The overall death benefits are considerably better within an individual arrangement from outset.

The annual charges for the PPP totalled 0.35% of the fund value. Mr T accepted TenetConnect's advice and the transfer was completed on 14 September 2015.

In November 2019, Mr T, through a representative, complained to TenetConnect that the advice it gave him in 2015 was unsuitable. But TenetConnect didn't uphold his complaint. It said the advice to transfer his OPS benefits, and the funds it recommended, met his objectives, and was therefore suitable.

But Mr T didn't agree so complained to our service.

Our investigator initially thought the complaint should be upheld. She thought, in summary

- Mr T was likely to receive benefits of a substantially lower value overall than the OPS on retirement.
- Mr T had a moderate ability to absorb some losses on his pension (he had £75,000 savings), but that didn't mean he should've been put in that position in the first place.
- The benefits that Mr T would receive in retirement from a personal pension would be dependent on its performance, and this was outweighed by the guaranteed nature of the benefits provided by the OPS.
- Comparing the critical yield to the relevant discount rate showed it was unlikely he would be better off
- TenetConnect hadn't properly compared the reduced benefits from the OPS and the PPP should they be taken early at age 60, which Mr T wanted to do.

In order to redress any losses Mr T had suffered due to being given unsuitable advice by TenetConnect, the investigator thought it should undertake a redress calculation in line with the pension review methodology, as amended by the Financial Conduct Authority (FCA) in October 2017.

TenetConnect didn't agree. It said, in summary;

- A difference of only 0.7% between the critical yield and the discount rate didn't mean it was unachievable. The last 1,3 & 5 year cumulative performance showed a return of 8.81%, 15.79% and 28.97% respectively. This showed the critical yield was realistically achievable.
- Advisers couldn't really be expected to be aware of the published discount rates, so they weren't necessarily relevant.
- The TVAS provided to Mr T gave clear comparisons between the projected benefits of the OPS and PPP at age 60.

- Recommendations taking into account projected growth are the industry norm and a reasonable position to take. Mr T wanted to maximise his TFC and the transfer allowed him to do that.
- Mr T had a reasonably healthy capacity for loss, as he had three other DB pensions and £150,000 in savings
- The transfer was suitable for Mr T's needs and he was provided with full information at every stage.

As a result of TenetConnect's submission, our investigator obtained further information about the three other OPS pensions that Mr T had. She then thought overall that the complaint shouldn't be upheld. She thought that although the required growth in the PPP investments (the critical yield) to match the probable growth in the value of the OPS was unlikely to be achieved, this was outweighed by the benefits of the PPP as it met his objectives. And because he had three other valuable OPS and savings upon which he could rely in his retirement, he had a very high capacity to absorb any potential investment loss in the PPP.

Mr T, through his representative, didn't agree. He said, in summary:

- The time taken to produce the TVAS and advice document (one day) showed the advice was templated in nature rather than personalised.
- TenetConnect hadn't sufficient information from Mr T regarding his other pension provision, including his position with respect to the Lifetime Allowance (LTA).
- There was sufficient provision for his partner and dependents in the transferred OPS and his other pensions, and had these benefits been explored and explained to Mr T he may have taken the view that his current arrangement was sufficient.
- Mr T would've been able to retire at 60 and take benefits from the transferred OPS, so the transfer wasn't necessary to meet this objective.
- When taking into account his other cash savings, an increase of only around £9,000 in the available TFC at 60 wasn't enough to justify the risk in transferring, and the purpose for maximising the TFC wasn't documented.
- Had Mr T not transferred, he could've easily afforded to purchase a term assurance policy designed to provide a lump sum equivalent to the increase in death benefits offered by a personal pension, without taking the risks associated with the transfer.

As no agreement could be reached the matter has been passed to me for a decision. And having reviewed all the available evidence and arguments, I was minded to uphold Mr T's complaint, for generally the same reasons as the investigator had in their initial view. So I wrote to both Mr T and TenetConnect, explaining my provisional thoughts, and inviting them to make any further submissions that they wished me to consider before I made a final decision.

TenetConnect replied and reiterated that in its view Mr T took no real risk from transferring as he was already financially secure having three substantial DB pensions. Not transferring would've meant not being able to leave a legacy for his wife and children, which was his primary objective. By transferring Mr T was able to leave the pension pot to his family as he saw fit, whilst his other provisions would disappear, short of any spouse's pension. It went on to say that it thought the critical yield was very much achievable, and there was effectively no risk in the transfer as Mr T didn't need to draw an income from it.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time, and carefully considered the additional submissions made by TenetConnect.

Within the FCA handbook, COBS 2.1.1R required a regulated business to "act honestly, fairly and professionally in accordance with the best interests of its client".

The FCA's suitability rules and guidance that applied at the time TenetConnect advised Mr T were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like TenetConnect, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements in COBS 9.2.2R, TenetConnect needed to gather the necessary information for it to be confident that its advice met Mr T's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;
2) ensure that that comparison includes enough information for the client to be able to make an informed decision;
3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and
4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."

Under the heading "Suitability", COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

I've therefore considered the suitability of TenetConnect's advice to Mr T in the context of the above requirements.

And COBS 19.1.8 sets out that:

"When a firm prepares a suitability report it should include:

1) a summary of the advantages and disadvantages of its personal recommendation;
2) an analysis of the financial implications (if the recommendation is to opt-out); and
3) a summary of any other material information."

Mr T had approached TenetConnect as it was the business engaged by the administrators of his OPS to provide advice to its members who were considering transferring their benefits out. And in accordance with COBS 9.2.2R TenetConnect asked Mr T to complete its fact find, setting out his circumstances and objectives. The latter were recorded as follows:

- Provision for a partner and dependent pension after retirement.
- Retire aged 60; and
- maximise his TFC at retirement

But I don't think the recorded objectives contain enough detail, and they are what is considered 'stock motives'. They didn't contain details specific to Mr T and explain why he had those particular objectives, especially his apparent wish to maximise the available TFC.

And TenetConnect considers the transfer was in Mr T's best interest because it met his particular needs and objectives at the time. Whilst I accept that there were some benefits in transferring, the transfer had to be considered in the context of Mr T's circumstances and objectives, and weighed up against the advantages and disadvantages of staying in the OPS.

As can be seen from the above, the presumption that TenetConnect should've used when looking at Mr T's situation was that the transfer of his pension benefits from the OPS to a new PPP would not have been in his best interests. It would've then needed to consider whether, given the information it had gathered and the analysis it had performed, there were compelling reasons why it might be appropriate to recommend that Mr T does in fact make the transfer.

I think the right starting point for that analysis would be consideration of the TVAS that TenetConnect produced. That report assessed the investment performance Mr T would need to achieve in order to replicate the guaranteed benefits he would be giving up by agreeing to a transfer. So I've looked carefully at the conclusions that were presented in that report.

In its analysis, TenetConnect calculated the growth required in the PPP to match the defined benefit OPS at the point of retirement. This is called the critical yield. But as future investment growth in a PPP isn't guaranteed, TenetConnect would've had to predict, as far as it could, whether it thought this growth was reasonably achievable.

Taking into account Mr T’s marital status, his recorded objectives to retire at 60 and to take the maximum available TFC, the critical yield required to match the defined benefit (DB) OPS at retirement was 5.2% per year. The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld.

TenetConnect is entirely correct to say that the discount rate wasn’t part of the advice process, and it wasn’t required to take it into account. Whilst I agree businesses weren't required to refer to these rates when giving advice on pension transfers, they do provide a useful indication of what growth rates would have been considered reasonably achievable.

When the advice was given, the relevant discount rate was 4.5% per year for 13 years to retirement and 3.9% for Mr T’s objective of retirement at 60. 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.

And using the accepted industry mid-range growth projections for the fund at the time, TenetConnect showed in the TVAS that Mr T’s projected annual income from the recommended PPP would likely only provide an annual income of £1,776. But the OPS provided a guaranteed annual income of £2,108.

So taking this into account, along with his ATR and term to retirement, I think Mr T was likely to receive a lower income from the PPP than he would’ve if he’d retained his benefits in his OPS. But I also think this was made clear within the TVAS. I’m satisfied that it gave an unambiguous break down of the projected income at retirement at ages 60 and 65, and it is likely that Mr T would’ve been aware that he may be giving up a guaranteed income on retirement higher than would likely be achieved in a PPP should he accept the advice to transfer.

But just because the information was clearly laid out doesn’t mean the advice was suitable, nor does it excuse TenetConnect from its obligation to provide suitable advice. And what was not made clear, was why it was suitable for him to transfer the value of his OPS, with the guarantees which came with it, into a PPP when he was 51. After all he didn’t want to take the benefits until he was 60. So in transferring, he was exposing the value of his pension to nine years of investment risk and the associated charges in the PPP, whereas he could’ve remained in the OPS scheme, with no fund reduction due to charges, retaining his guaranteed benefits, and then reviewing his options when he either reached 60 years of age, or was closer to it.

But the recorded objectives, albeit generic, stated that Mr T was more concerned with maximising the available TFC at aged 60, and improving the provision for his wife and children upon his retirement. And the TVAS shows that both of these were projected to be significantly improved should he transfer into a PPP. And TenetConnect have reiterated its position that not transferring would’ve meant Mr T not being able to leave a legacy for his wife and children, which was his primary objective. It said that by transferring, Mr T was able to leave the pension pot to his family as he saw fit, whilst his other provisions would disappear, short of any spouse’s pension

But as I’ve said above, I’ve not seen any reasons as to why Mr T had these objectives, especially given that he had three other DB pension schemes which would likely provide guaranteed death benefits anyway. I acknowledge that in transferring from a DB scheme to a PPP, the main change in death-benefit provision is the flexibility a PPP provides in allowing the fund to be passed to a nominated beneficiary, and not solely his spouse. But I have concerns about using this as justification for the transfer.

Firstly, it doesn't appear that Mr T had any particular health issues at the time of the advice other than asthma. And he recorded his state of health as 'Excellent' on the transfer questionnaire he completed. So I don't think it likely that the death benefits, or the likelihood that he wouldn't benefit from a pension income from the OPS upon retirement for a reasonable amount of time, were of particular concern to Mr T.

Secondly, the accrued pension provision was intended to provide for Mr T's retirement rather than a desire to leave a lump sum legacy to his family. I accept that the financial wellbeing of his family would inevitably have been a priority for Mr T, but the recommendation needed to be given in the context of - primarily - Mr T's best interests in terms of his retirement needs.

And under the OPS's terms, Mr T's wife would in any case have been entitled to a spouse's pension, if Mr T pre-deceased her. And I can see from the suitability report that TenetConnect had investigated the option of Mr T taking out life cover, and this was available for a relatively modest cost. But TenetConnect discounted this option as it was recommending the transfer of his OPS into a PPP. So his objective to provide for his wife and children could've been achieved for a modest cost without transferring, and thus retaining the guaranteed benefits from his OPS.

And he already had, along with his wife, a level of savings well in excess of the TFC which was projected to be provided by the PPP, which in any case was only about £9,000 more than was guaranteed by his OPS. So I can't see how exposing his pension fund to nine years of investment risk and charges to achieve only a modest increase, was in his best interests.

TenetConnect have made the point that Mr T had the capacity to absorb any financial losses from the transfer, as he had three other relatively large occupational pensions, and considerable savings. I acknowledge Mr T had documented in the fact find that he had three other occupational schemes, and had made contributions to his current OPS for 11 years, based on a salary of £175,000. He had also agreed with the following statements about the potential transfer of the OPS, when taking into account his overall assets:

- large losses (over 25%) would have a low impact on my standard of living in retirement;

and later, with regards to the relevant OPS, he records:

- whilst of value, these benefits do not represent a significant proportion (less than a quarter) of potential retirement funds.

And in addition to his pension provision he had about £150,000 in savings shared with his wife. So I'm satisfied that Mr T had sufficient capacity to absorb any potential losses in the PPP. But just because he could probably afford potential losses, doesn't mean his funds should be unnecessarily exposed to that risk, and doesn't make unsuitable advice suitable.

But even if I thought the documented stock objectives of maximising his TFC and improved dependent provision were acceptable - and I don't, - I don't see why he was advised to transfer when he did, aged 51, when he could've waited until nearer his desired retirement age of 60 to then consider his options. He would still have been able to make the decision to transfer his benefits at 60 if it was considered suitable, without having exposed his pension fund to nine years of investment risk, charges and not having lost the valuable guaranteed benefits. But he would've also been able to make that decision whilst having a much clearer idea of his personal circumstances at the time, and not trying to predict his circumstances nine years ahead.

I note that X were offering a time-limited enhanced CETV to its members if they decided to transfer out. So I've considered whether I think this enhancement was a driving force behind TenetConnect's recommendation. But I don't think it likely was. The enhancement was only approximately 5% of the CETV, so was relatively modest, and wouldn't have made a significant difference to the benefits it provided. So whilst I think the time-limited nature of the offer probably encouraged Mr T to seek advice from TenetConnect, given his overall financial circumstances I don't think the 5% increase was enough to make the transfer advice suitable.

Putting things right

A fair and reasonable outcome would be for the business 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 occupational scheme. TenetConnect 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 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 T's acceptance of the decision.

TenetConnect 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 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 his likely income tax rate in retirement – presumed to be 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr T within 90 days of the date TenetConnect 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 TenetConnect 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 Mr T’s complaint. I require TenetConnect Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr T to accept or reject my decision before 1 April 2022.

Chris Riggs
Ombudsman