DRN-3390387

## The complaint

Mr S complains advice given by Cowley and Miller Independent Financial Services Limited to transfer the deferred benefits of his armed forces occupational pension scheme to a personal pension wasn't in his best interests.

Mr S is represented in this complaint by a claims management company (CMC).

## What happened

Mr S had deferred benefits in the armed forces pension scheme (AFPS) from about six years' service. The scheme had a normal retirement age of 60.

In late 2014 Mr S approached Cowley & Miller Independent Financial Services Limited ("C&M") to discuss his pension options. In early 2015 an adviser from C&M met with Mr S and carried out a fact find which recorded his circumstances as follows:

- He was aged 37 in good health, single but living with his partner and baby;
- He was working, earning around £24,800 and received income from a war pension of around £520 per month;
- He was making monthly contributions to his current employer's pension;
- He had savings of around £10,000 and his monthly surplus income after expenditure was just over £1,100;
- He was assessed as having a "balanced" attitude to risk;
- The transfer value of his AFPS was recorded as £26,201;

Mr S said he hoped to retire at age 55, he wanted enhanced non-spousal death benefits, and was aware that if he didn't transfer then he may not be able to do so in the future.

In February 2015 C&M issued Mr S with a suitability report which explained it had just given restricted advice in respect of his pension. It set out three options open to Mr S – he could stay in the AFPS, transfer the benefits to a personal pension with provider "R" or transfer to a stakeholder pension plan.

The report warned that if Mr S transferred his AFPS he'd be giving up valuable guaranteed benefits. But it recommended the transfer to the personal pension with R for the following reasons:

- Control over his pension funds allowing him the flexibility to take benefits at 55 if he wanted;
- Enhanced death benefits compared to AFPS;
- The state pension would cover his income needs in retirement, but this plan would subsidise his expenditure;
- He could still take benefits in the same way as the AFPS if he wanted to

The R pension had annual management charges of 0.9%, and C&M adviser's charge was 5% of the transfer value.

Mr S accepted the advice, signing the authority form on 16 February 2015, and the transfer to a personal pension with R went ahead, with the funds invested in line with Mr S's balanced attitude to risk.

In June 2020 Mr S via his CMC complained to C&M, saying its advice had been negligent. They said by transferring, Mr S had lost both his own guaranteed pension, plus a guaranteed spouse's pension, was now liable for charges and was taking additional risk. It also made a number of additional points, including that Mr S hadn't been in a good place mentally at the time of the advice, the C&M adviser had told Mr S his AFPS was worthless, and that the R plan would make him better off.

C&M didn't uphold the complaint. They said the complaint contained a number of factual inaccuracies. And it had overlooked that Mr S had approached C&M to transfer his AFPS, because he'd been aware the right to transfer was being withdrawn through a change in government legislation. They said its adviser had done a thorough review of Mr S's circumstances, and ensured he was fully aware of the benefits he'd be giving up. But his objective was to retire at 55, and benefits couldn't be taken from the AFPS before normal retirement age of 60, unless for reasons of ill health, and Mr S had described his health as "good". They denied the adviser had told Mr S he'd be better off, and his current financial adviser (who introduced Mr S to C&M) reviewed the plan performance on an annual basis.

Mr S's CMC brought his complaint to this service, where one of our investigators upheld it and set out how C&M should put things right.

Mr S through his CMC accepted the outcome, but C&M didn't respond, despite being chased a number of times. As they hadn't agreed to the outcome and redress, the case was passed to me to issue a decision. In the meantime Mr S is now represented by a different CMC.

*Provisional findings*

I issued a provisional decision on this case as although I'd come to the same outcome as the investigator, I thought I should address some additional points. And I was minded not to award the additional £250 recommended by the investigator for distress and inconvenience. So it was fair to give both parties an opportunity to respond.

I made the following provisional findings:

The approach of this service when considering transfers from defined benefit pension schemes aligns with the FCA guidance, which is the assumption they will generally not be suitable. The guidance applicable at the time of the advice (COBS 5.3.29G) was as follows:

*"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:*

- *(a) start by assuming it will not be suitable, and*
- *(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."*

This is known as the '*presumption of unsuitability'* and has been renumbered to COBS 19.1.6G in the current FCA rulebook. A transfer to a defined contribution pension means the member loses guaranteed benefits and becomes vulnerable to investment risk, with the potential for their funds to run out, leaving them with inadequate provision for their retirement.

Mr S's pension pot was relatively modest at £26,201. So although there were still 18 years to his chosen retirement age of 55, it may not grow sufficiently to provide an adequate income, making early retirement seem quite unrealistic. And on the face of it, the critical yield looked reasonably high at 7.86%, to match the scheme benefits at 60. The actual investment growth needed is likely to be higher, based on retiring at 55. And these figures don't allow for the impact of charges, which Mr S wasn't responsible for paying in the AFPS.

Mr S was aware that from April 2015 it would no longer be possible to transfer unfunded public sector defined benefit pension funds (including the AFPS), unless it was to another similar scheme. So Mr S couldn't have postponed the decision to transfer to a personal pension until later, as the opportunity wouldn't be available again.

Mr S had two objectives – the flexibility to retire at 55, not available through the AFPS which only permitted benefits to be taken earlier than 60 on ill health grounds. And he wanted to ensure provision for his partner, to whom he was not married, and their son, should the worst happen.

C&M's suitability report dated 13 February 2015 showed that the AFPS would provide Mr S's "beneficiaries" with a lump sum of £4,362.50 if he died before normal retirement age (of 60) increasing by CPI to a maximum of 5% each year to 60. A table provided the death benefits from the personal pension based on growth rates of -0.5%, 2.4% and 5.4% (allowing for inflation at 2.5%) from day one, and after 5, 10 and 20 years. It read "*assuming a 2.4% p.a. growth, immediately on transfer to the [R] pension portfolio your **death benefits would worsen by 47%**".* But then said this wasn't applicable to Mr S as he was divorced, which I don't think was as clear an explanation as it could've been.

According to the scheme information, Mr S's pensionable service in the armed forces was between October 1995 and November 2001. Those service dates suggest he was a member of the 1975 scheme (AFPS 75), as a new scheme (AFPS 05) was introduced in 2005. The AFPS75 scheme documentation says a "*Surviving **Spouse/Civil Partner** may receive up to 50% of the member's pension. Pensions for **eligible children** may also be payable. Pensions for **eligible partners** may be payable if death is attributable to service*".
In the "definitions" section a spouse is defined as "*The partner from a legal marriage including a same sex marriage. This term does not apply to an unmarried partner*". So it's clear Mr S's partner wouldn't have been eligible for any spouse benefits.

Mr S's partner may have been an "*eligible partner*" as the definition for this is "*Someone with whom the scheme member: (1) was cohabiting, (2) in an exclusive and substantial relationship, (3) had financial dependence or interdependence, (4) was not prevented from marrying or forming a civil partnership*". But any entitlement of an eligible partner was dependent on the member dying in service, whereas Mr S had left the service some years previously.

Depending on when Mr S passed away, his son could qualify as an eligible child, if he was under 17 at the time of death, or under 23 in full time education. And Mr S noted in supplementary questionnaire he signed on 21 January 2015, he anticipated his child being in education until age 18/19.

But while C&M recorded that providing for his family supported the transfer, Mr S answered the *"Lump sum death benefits"* question in the supplementary questionnaire by ticking box (2) "*my dependents will receive significant sums upon my death and whilst a greater amount might be beneficial, it is not an absolute priority for me*".

The fact-find recorded that Mr S "*already has life cover which [his partner] pays for and doesn't want any more protection".*

To the "*Spouse's and dependent children's pensions*" question Mr S ticked box (3) "*I would like the flexibility at retirement to control the way benefits are paid and wish to retain the flexibility to decide depending upon my circumstances at the time".* I think this question is less relevant to my consideration of the complaint, as I don't think any of the four options properly reflected Mr S's circumstances. Option 1 related to the spouse having significant pension provision their own right, option 2 was for someone who was single and anticipating remaining so at retirement, and option 4 was for someone who wanted to retain the same spouse benefits as their ex-employer's scheme, and we know that Mr S didn't have a spouse who could benefit under the AFPS.

While I could see that provision for his dependent child and unmarried was important to Mr S I wasn't persuaded this was enough to make the transfer suitable.

Mr S was provided with three illustrations of the R plan in January 2015, the figures from which were reflected in the suitability report dated 13 February 2015. These were based on retirement at age 55, 60 and 65, based on growth rates as set out above. These show that at age 60 (the normal retirement age for his AFPS) Mr S's plan could be worth £18,200, £36,200 or £68,900 respectively. Which would provide him with annual income of £673, £1,780 or £4,340, or a tax-free lump sum of £4,570, £9,050 or £17,200, and annual income of £505, £1,330 or £3,250. The figures for retiring at 55 as Mr S hoped to do, were even lower, providing a maximum annual income without tax-free cash of between £646 and £3,240. Based on these figures, it was unrealistic for Mr S to retire at 55, around a decade before he could claim the state pension.

Mr S's CMC said he had a "low" attitude to risk, but this isn't supported by his response to the "Risk and Reward" question in the supplementary questionnaire. He ticked box (2) which read "*I do not mind a reasonable degree of risk in the hope that my benefits could be higher in retirement*". Rather than selecting (3) "*I do not consider it to be appropriate to expose myself to anything other than a minimal amount of risk*…." Or (4) "*I require no risk with maximum possible guarantees*".

The CMC also says Mr S didn't want to take any risk with his pension "*due to not having any other pensions in place".* Although C&M say they were only engaged to advise on the transfer from the AFPS, the way Mr S answered the "*Percentage of Benefits*" question suggested he had other provision. It read "*Most people anticipate that they need to work for a full 40 years to achieve the maximum level of pension benefits. Bearing this in mind, how do you consider the benefits under discussion*?" And then there were four boxes from (1) being a "*major proportion*" and (4) being an "*insignificant part".* Mr S ticked (3) "*Whilst of value, these benefits do not represent a significant proportion of my potential pension at retirement*".

According to the fact-find, Mr S was working as a sales manager, and had been in that role for 3 years 6 months, making monthly pension contributions of £12.95 which his employer was matching. So I think C&M could've explored what benefits Mr S's partner might have been entitled to under that policy. Mr S left the armed forces in 2001 and started his current job 3.5 years prior to the advice, leaving about ten years unaccounted for, in which Mr S could've been employed and paying into a pension, which C&M didn't question.

I understand Mr S and his partner have since married. So if he hadn't transferred, his now wife would be entitled to a spouse pension from the AFPS. This may not have been Mr S's intention at the time of the advice, but I don't think it's unreasonable for C&M to have asked Mr S whether he'd considered resolving the spouse pension issue by marrying.

I found no evidence C&M took advantage of Mr S not being in a "*great place mentally*" as it didn't seem they could've known. The fact find suggested Mr S described his health at the time as "*good*" and didn't anticipate this changing in the future.

I couldn't say Mr S wasn't made aware of the guaranteed benefits he'd be giving up by transferring. The suitability report contained in bold type the warning that Mr S will be "*giving up valuable guaranteed pension benefits*…..". It also said "*I recommend you give careful consideration to your attitude to investment risk and capacity for loss before you consider transferring* ….."

Due to the way the suitability report was worded it wasn't clear the C&M adviser had recommended the transfer, or just said they would facilitate it. But either way – I thought the adviser should have been clearer with Mr S that based on various factors (the transfer value, his apparent lack of other pension provision, and the rate he was contributing to his current pension scheme), retirement at age 55 was somewhat unrealistic, and the transfer wasn't in his best interests. I understood Mr S might have wanted to transfer, knowing the opportunity would be lost after April 2015. But I didn't think this was enough to "*demonstrate on the evidence available at the time that it is in the customer's best interests"* as the presumption of unsuitability requires.

So I upheld the complaint and set out how C&M should put things right.

*Responses to the provisional decision*

Mr S's CMC had nothing further to add. C&M didn't respond, and the deadline to do so has now passed.

**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.

As neither party has provided any new evidence or arguments for me to consider, I see no reason to depart from the conclusion I reached in my provisional decision.

So I uphold the complaint and require C&M to pay redress as set out below.

**Putting things right**

A fair and reasonable outcome would be for the business to put Mr S as far as possible, into the position he would now be in but for the unsuitable advice, which would mean Mr S would have remained in the armed forces occupational scheme.

Cowley & Miller Financial Services Limited 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, 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 S's acceptance of the decision.

Cowley & Miller may wish to consult the Department for Work and Pensions (DWP) to obtain Mr S'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 S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr S'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 S 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 compensation amount must where possible be paid to Mr S within 90 days of the date Cowley & Miller 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 Cowley & Miller to pay Mr S.

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. Cowley & Miller independent Financial Services Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 20 April 2022.

Sarah Milne
**Ombudsman**