DRN-3393586

The complaint

Mrs S complains that Cowgills Wealth Limited gave her unsuitable advice to transfer deferred pension benefits from her Occupational Pension Scheme to a personal pension.

When receiving advice from Cowgills, Mrs S was being represented by her husband, Mr S. She has also been represented by Mr S during the course of this complaint. All references to Mrs S will include information provided by Mr S.
Your text here

What happened

In 2015 Mrs S received advice from Cowgills about her pension arrangements. At the time of the advice, the Cowgills adviser (the 'adviser') produced a number of documents including a 'Confidential Financial Review' (the 'fact find') dated 6 November 2015 and a 'Financial Planning Report' dated 12 November 2015 (the 'suitability report'). It should be noted that these documents were in joint names as the advice related to both Mrs S and Mr S.

In the fact find Mrs S's circumstances were noted as follows:

- She was 52 years old, married with three children.
- She wasn't employed but the total household income was £200,000 per year which was from her husband's earnings and income from buy-to-let ('BTL') properties.
- She was a non-smoker and in good health.
- She was living in a jointly owned property valued at £350,000 with £210,000 remaining on the mortgage.
- She jointly owned three BTL properties with a total value of £375,000 and total mortgages of £233,000.

Mrs S had deferred pension benefits from her previous employer under its Occupational Pension Scheme ('OPS'). Other than the OPS and state pension benefits, Mrs S's had no other pension provision. However, it was noted that Mrs S's husband, had sufficient pension provision to cover the household expected expenditure in retirement. And Mr and Mrs S jointly owned several BTL properties which were expected to bring in an income each year.

In the suitability report, the adviser noted the reason Mrs S was seeking advice was: *"You have been keeping a close eye on the new pension freedoms and the change in law to death benefits and would like to take advice as to whether it may be suitable for you to transfer these defined benefit schemes."*

The adviser also made the following points: *"*[Mrs S] *is in a similar situation* [as Mr S] *where there will be little requirement for a guaranteed income and you deem flexibility of income to rank higher in your priorities. As* [Mr S's] *retirement income and buy-to-let portfolio will more than cover the ongoing expenditure, you see little point in having a small income paid monthly, where ad hoc income may be more suitable. As a moderate investor, you expect the growth of your investments to beat inflation over the longer term and if you do not require income on a regular basis, will have increased potential for higher growth on the capital."*

The adviser went on to note that Mrs S expected her expenditure to be lower in retirement than currently and believed the rental income for her BTL portfolio will cover the bills, with the state pension covering any other necessary expenditure. The adviser said Mrs S was only expecting the pension income to be required for discretionary spending purposes. As such the adviser said:

"…flexibility is more important to each of you than a secured income as you expect to be more than comfortable in your retirement. You will likely take some form of regular income, but think this will be reduced compared to those on offer from the defined benefit schemes with the remainder of income being taken on an ad hoc basis. As such, the flexibility of income drawdown will allow you to benefit both from a tax planning basis and also from the fact that less income means more money remaining invested and therefore potentially higher growth on the funds."

The adviser noted that Mrs S left her OPS in December 2012 with defined pension benefits. The OPS normal retirement age was 60 and the estimated pension at retirement was £9,207 per year, or a Mrs S could receive a reduced amount of £6,647 plus a tax free cash entitlement of £38,049. On death before retirement, a spouse's pension of £3,800 a year was payable and on death after retirement, a 50% spouse's pension was payable. The adviser said that Mrs S's pension benefits could be transferred, and a Cash Equivalent Transfer Value ('CETV') had been offered to her by the OPS of £218,742.

Mrs S completed an 'attitude to risk' questionnaire (the 'ATR questionnaire') with Cowgills on 10 November 2015. Based on her responses, the adviser said he considered Mrs S had a moderate attitude to risk which he noted meant: *"You are prepared to take a moderate amount of investment risk in order to increase the chance of achieving a positive return. Capital protection is less important to you than achieving a better return on the investment. A typical moderate investor will usually invest in a variety of assets to obtain diversification."*

In terms of Mrs S's capacity for loss, the adviser noted that her husband earned 'very well' and that she was able to withstand some risk of loss to her pension funds.

The adviser noted a Transfer Value Analysis (the 'TVAS') report had been discussed during the advice process. He said in terms of Mrs S's OPS the critical yield was 4.67%. However, the adviser noted that the TVAS had been based on a plan with lower charges. And that when taking into account the higher charges of the plan he was recommending he was increasing the critical yield figure to 6.27%. The adviser didn't comment on whether he thought this critical yield was high or not but in Mr S's case, he noted the critical yield of 5.9% was on the 'high side'. But he said the critical yield was acceptable because the growth rate before charges, was achievable over the long term.

After recommending Mrs S transfer her benefits to a SIPP, the adviser noted this should be done for the following reasons:

- The new plan would provide the opportunity to release benefits by way of income withdrawal in the future as determined by Mrs S.
- She would be able to benefit from the more flexible death benefits.
- She would be able to take out an increased amount of tax free cash.
- She would have more flexibility with regards to tax planning.
- She would be able to take her tax free cash and not be required to take an income.
- Given her attitude to risk, the transfer values and the revaluation rates applicable to the transfer values, the yields required to match the OPS benefits were achievable.

- Given the fact she would not be buying an annuity, or securing an escalating income, and she was happy to remain invested in retirement, there was less pressure on achieving a value at a certain date and this made the transfer more feasible still.

The adviser went on to recommend a Standard Life Wrap Self Invested Pension Plan (the 'SIPP') because he said Mrs S would be able to access a wider selection of funds and investments. He also said she would be able to draw benefits directly from her SIPP by way of income withdrawal and that she would benefit from more flexible death benefits compared to the defined benefit arrangements. Mrs S accepted Cowgills recommendations and instructed it to complete the transfer.

In June and November 2017, various fund switches were made from Mrs S's SIPP after she expressed some concerns about the performance of the funds she was invested in. In June 2018, after reaching the age of 55, Mrs S discussed taking some of her benefits. Whilst she didn't have a need for an income, she wanted funds to cover servicing on her outstanding mortgages. So, the adviser recommended she withdrew a total of £25,000 from her pension.

Mrs S subsequently complained to Cowgills about its advice to transfer from her OPS. She questioned the suitability of the advice and whether the fund she was recommended to invest in was capable of achieving the requisite growth needed to match her OPS benefits. Mrs S disagreed with the analysis that she was a moderate risk investor, instead believing she was a low risk investor due to having no investment experience.

Cowgills rejected Mrs S's complaint. In summary, it made the following points:

- Its recommendations were based on a detailed assessment of Mrs S's risk profile and her objectives. It considered its recommendations were suitable for Mrs S.
- The recommendation to transfer was suitable to achieve Mrs S's objectives including to give her increased flexibility. This gave her the option to pay off her BTL mortgages and leave her assets unencumbered without the requirement to commence the OPS income or suffering an early retirement factor should this have been accessed before her normal retirement date.
- Clear discussions were held around her future retirement plans and the potential to lose a secure, increasing income in retirement.
- A clear assessment was made based on the gains made in flexibility against the loss of security. This was key in assessing whether the transfer away from a defined benefit scheme was suitable for Mrs S.
- It was evidenced that her retirement income would be derived from various sources and once her mortgages were cleared, she would be very likely not to require a secure source of guaranteed income.
- There was an enhanced position on death benefits and an ability for income to be generated without reductions applied to the surviving spouse.
- Mrs S's capacity for loss was at a level that she could absorb some market losses and still be in a financial position to meet her proposed expenditure requirements.
- Mrs S accepted the investment risk and her risk profile.
- Mrs S is disappointed with the returns from her SIPP which is her main complaint. But this risk was clearly set out to her during the advice process.
- The returns that were possible weren't guaranteed but they were achievable.

Our investigator didn't think Cowgills had shown that the advice had been in Mrs S's best interest, for the following reasons (in summary):

- There was no immediate need for her to access her tax free cash when she reached the age of 55. The mortgage on the family home was being overpaid by £1,000 each month, and the rental income from the BTL properties exceeded the mortgages.
- Mrs S had said she was a low risk investor and she had concerns about the risk she was taking with her pension benefits by transferring.
- Mrs S had the option to take tax free cash under the OPS aged 60 and then receive a guaranteed regular income for life – there was no evidence that a lump sum payment or income was needed any earlier than this.
- Flexible access to pension withdrawals wasn't a good enough reason to give up valuable guaranteed benefits – the tax free cash under the OPS was sufficient to meet this need for flexibility.
- The decision to transfer could have been taken at any point prior to the age of 60 – Mrs S should have been advised to have at least deferred the decision until there was a need to access the cash.
- The advice was given during the period our service was publishing discount rates on our website for use in loss assessments of this kind. This was a useful indication of what growth rates would have been considered reasonably achievable – the discount rate in Mrs S's case was 3.8% but the critical yield was higher than this at 6.27%. So, it was very unlikely Mrs S's fund would grow sufficiently to provide her with a means to purchase an equivalent income to her OPS in retirement.
- Mrs S wasn't recorded to be in poor health or as having any concerns over low mortality. So, the enhanced death benefit didn't necessarily outweigh losing the guarantees that came with her OPS.

The investigator recommended that Cowgills undertake a redress calculation in accordance with the regulator's (the Financial Conduct Authority's) guidance, on the basis that Mrs S would have retained her deferred benefits in the OPS.

Mrs S accepted the investigator's view. Cowgills disagreed with the investigator's conclusions. In summary, as well as reiterating the points it made above, it also noted that:

- Death benefits weren't the sole reason for the transfer. There was also a benefit to repaying the debt on the BTL portfolio at the earliest date and transferring them into Mrs S's name for tax purposes – this was not possible until the debt was reduced/removed due to Mrs S's lack of earnings. This was a point of discussion from the start and indeed Mrs S did access SIPP tax free cash at the earliest point for precisely this reason.
- It conceded the investment returns hadn't be as high as Mrs S hoped and thought this was her main reason for bringing the complaint, but Cowgills said this didn't make the advice unsuitable.
- Mrs S had agreed with her categorisation as moderate risk and at no point did she say she was low risk. The advice would have been different if this had been the case. Mrs S didn't disagree with the risk profile or suggest that her risk profile should be anything other than agreed.
- The risks associated with the investments as opposed to staying within a defined benefit scheme was fully discussed.
- A decision to stay with the defined benefit pension until normal retirement age would not be risk free. If the transfer value at the point of advice was sufficient to meet her objectives, which Cowgills feels it was, then deferring the decision to transfer is equally risky as providing advice to transfer if there are reasons enough to do so.
- Mrs S wasn't planning on taking an annuity, so it's not fair to compare the returns with the critical yield. Nor to compare the critical yield with the discount rates for the same reason.

- Cowgills questioned why the investigator used poor health to suggest the objective to avoid total loss of pension on second death was less than sufficient. Had it advised against transfer and subsequently, Mrs S's health deteriorated, it would've been much more problematic to transfer at that point.

Our investigator addressed Cowgills further submissions. But he said it hadn't changed his view. Cowgills asked for the matter to be passed to an ombudsman for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I note that Cowgills has provided a very detailed response to this service. We are an informal dispute resolution service and I am not required to address every point raised. I have instead focussed on what I consider to be the crux of this complaint.

The starting point for this decision is the regulator's guidance under COBS 19.1.16, in relation to occupational pension transfers. This says: *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme… 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 for optout 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."*

The action taken by Cowgills to transfer Mrs S from her defined benefit arrangements with her previous employer has resulted in the loss of the guarantees the OPS provided and means she faces additional investment risk in the new scheme. So, given the starting position is the transfer was not in Mrs S's best interests, I would expect to see sufficiently compelling reasons for her to be advised to relinquish her guaranteed benefits.

The critical yield figure, which was set out in the TVAS and the suitability reports, was merely the figure to provide the same benefits Mrs S was giving up. So, it had to appear likely that Mrs S's fund could grow by more than just the critical yield for her to improve on the financial benefits that she was giving up.

The TVAS report showed that the investment return (critical yield) required to match the OPS at retirement (at age 60) was 7.02% per year for a 'Scottish Widows Retirement Account' if no tax free lump sum was taken. And where a tax free lump sum was taken with a reduced pension, the critical yield was 4.3%. But, Mrs S was advised to transfer to a Standard Life SIPP which had higher fees. So, this impacted on the critical yield in that it needed to be increased.

In the suitability report the adviser said: *"It was also important to note that the charges for the contract in the TVAS report were lower than those on the scheme I would recommend (given your investment preferences) and so we should add a further charge of around 1.6% onto the critical yield to take this into account."* The adviser went on to say that in Mrs S's case, the increased charges meant the critical yield for her Standard Life SIPP was increased from 4.67% to 6.27%. But these figures related to Mr S's pension plan. The TVAS report produced in respect of Mrs S gave a critical yield figure of 4.3% in the event of the tax free cash being taken. So, with 1.6% added, the critical yield for Mrs S's SIPP was 5.9%.

As noted by our investigator, the advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on its website, for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case. In Mrs S's case the discount rate for the year in question was 3.8%.

So, even based on the lowest critical yield of 5.9% that would have been needed for Mrs S to equal what she would be entitled to under her OPS, this was still higher than the published discount rate of 3.8%. And the adviser stated in the report that the critical yield of 5.9% was on the 'high side'. Mrs S wanted her investments to be managed in a 'moderate' way, so I don't think it's likely she would have been able to achieve a critical yield on the 'high side' that would have been needed to match her OPS benefits.

Cowgills says that Mrs S's risk rating wasn't for a 'low risk' investor and if it had been, the advice would have been different. But from what I can see, even if I accept Mrs S as a moderate risk investor, she was at the lower end of this scale. This is demonstrated by the ATR questionnaire she completed on which Cowgills based her rating. For example, Mrs S answered these questions as follows:

- *"What amount of risk do you feel you have taken with your past financial decisions?"* Mrs S replied: *"small"*.
- *"To reach my financial goal I prefer an investment which is safe and grows slowly but steadily, even if it means lower growth overall."* Mrs S replied: *"I tend to agree with this statement."*
- *"I am looking for high investment growth. I am willing to accept the possibility of greater losses to achieve this."* Mrs S replied: *"I tend to disagree with this statement"*.
- *"Imagine that you have some money to invest and a choice of two investment products, which option would you choose?"* Mrs S replied: *"A mixture of low average annual return but almost no risk of loss and high average annual return but some risk of loss".*

So, taking into account Mrs S's attitude to risk, I don't think the types of investments that were most suitable for her, were likely to achieve more than the discount rate of 3.8%. Therefore, even when using the most favourable critical yield of 5.9%, Mrs S was likely going to be financially significantly worse off by transferring out of her OPS.

Cowgills says Mrs S had quite a high capacity for loss, and therefore, the investment returns she'd need to match her OPS benefits were achievable. However, the benefits from the OPS made up the majority of her retirement provision. Even though I appreciate she had investments in BTL properties and her husband's income was significant, I don't think it's likely she had the capacity to take substantial risks with her pension benefits.

Cowgills says the critical yield wasn't the significant factor in Mrs S's case, as this assumed the benefits would be taken in the form of an annuity at age 60. Cowgills said Mrs S wasn't planning on taking an annuity due to her other sources of income. But, I've not seen any detailed discussions with Mrs S about what income she would actually require in retirement. As Cowgills says, it didn't meet with Mrs S but rather conducted its advice through her representative and in writing. So, it's unclear how Cowgills could come to an accurate conclusion about her income needs in retirement.

In any event, I accept the critical yield isn't the only factor to consider when weighing the suitability of a transfer. And even if I thought the critical yield was achievable, it wouldn't have been enough for Cowgills to have recommended that Mrs S transfer her OPS benefits. Cowgills had to demonstrate there were further benefits in transferring.

Cowgills says its advice was suitable based on, amongst other things, Mrs S's intentions to access her pension benefits to pay off her mortgages. Cowgills points to the fact that Mrs S withdrew tax free cash from the SIPP at the earliest point for precisely this reason.

I think it's important to point out here that whilst Mrs S's objectives may have been the reason why she sought advice, her needs should have also influenced the advice being given. I say this because someone's objectives aren't always realistic, or in their best interests. And the overarching principles governing Cowgills is that it needed to work in its client's best interests.

So, in this case, I'm not sure how realistic it was for Mrs S to pay off her mortgages given the extent of the borrowing on the BTL properties and her home. Further, given Mrs S's borrowing was adequately covered by the BTL rental income, I'm not persuaded that this particular objective was more important than having a secure income in retirement and potentially being worse off due to the investment returns she needed just to match her OPS benefits.

In terms of Mrs S's decision to withdraw £25,000 when she reached the age of 55, which was to be used to overpay on some of her mortgages, it should be noted that she would have been entitled to just over £38,000 from her OPS at age 60. This sum could have been used for the same purpose. From what I can see, given the rental income was sufficient to cover the BTL mortgage payments, there was no urgent need for Mrs S to pay off some or all parts of her jointly held mortgages.

I also don't think transferring to secure the lump sum death benefits, would've been enough of a reason to override the negatives in transferring from her OPS. Especially considering Mrs S was in good health. Under these circumstances, I don't think the lack of flexibility around the death benefit provision in the OPS, was sufficiently important when weighted against the benefits and guarantees she was losing by transferring out of her scheme.

The suitability report notes that Mrs S was interested in transferring to take advantage of the new pension freedoms. Cowgills points to the withdrawal she made at age 55 as evidence of her desire for flexibility. I accept that if Mrs S remained in her OPS, she was unlikely to have taken her benefits before the age of 60 due to this reducing her entitlement. But equally, given she had no immediate requirement for an income, I don't think Mrs S had any need for increased flexibility. And whilst Mrs S may well have wanted to take advantage of the new pension freedoms, it was Cowgills role to not just transact what Mrs S wanted, but to give her objective advice on whether a transfer was in her best interests.

Looking at Mrs S's circumstances at the time of the advice, if she was looking for flexibility to achieve her objectives, this is something which could have been considered when she was older and closer to her retirement age. Cowgills says if its advice had waited, this would also have had risks. But I think the risks of losing guaranteed benefits outweighed the risks of waiting until Mrs S reached near to her retirement age. At this point, if the advice was to transfer, this would've mitigated a number of significant risks and costs which she took on immediately the transfer had taken effect. I don't think Mrs S's objectives were sufficiently pressing that she should've been advised to give up her defined pension benefits.

Cowgills says the whole complaint is due to the investment returns not reaching what Mrs S was expecting, but that there were never any promises about the performance. And all risk warnings about the transfer of risk to Mrs S was given as part of the advice and she accepted these. Cowgills also says it would be unfair to uphold the complaint as Mrs S would be benefitting from the flexibility of a defined contribution plan as well as an award for a defined benefit pension.

I can see Cowgills did provide appropriate risk warnings. But in my view, Mrs S would reasonably have understood from the suitability report that a transfer was suitable to the level of risk she wanted to take. A transfer of this nature is a complex issue with a variety of inter-relating factors to be taken into account. I consider she would've relied on the recommendation made by the adviser in making her decision. I think if she'd been given suitable advice, she more likely than not would have followed this. And whilst the trigger for Mrs S's complaint may've been lower than expected returns, this reaction further supports her cautious attitude to risk and a reason why the transfer was not suitable for her.

In terms of the award, this is meant to try, as far as possible, to put Mrs S back into the position she would've been but for the unsuitable advice. If as a result of this, she still maintains the flexibility of the SIPP, this is something that has resulted from the unsuitable advice she relied on.

Having carefully considered the matter, as with the investigator, I'm not persuaded that transferring guaranteed benefits was suitable for Mrs S in the context of her overall circumstances, her capacity for risk and the critical yield required to improve on the benefits of the former scheme.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs S, as far as possible, into the position she would now be in but for the unsuitable advice. As set out above, I consider she would've remained in the occupational scheme and not drawn her benefits until her normal retirement age of 60. So, the calculations should be based on Mrs S staying in her occupational scheme until age 60.

Cowgills Wealth Limited must 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 Mrs S's acceptance of the decision.

Cowgills Wealth Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs 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 Mrs S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs 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 Mrs 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 her 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 Mrs S within 90 days of the date Cowgills Wealth Limited receives notification of her 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 Cowgills Wealth Limited to pay Mrs S.

It's possible that data gathering for a SERPS adjustment may mean the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Cowgills Wealth Limited to pay Mrs S 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 additionally require Cowgills Wealth Limited to pay Mrs S any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I only require Cowgills Wealth Limited to pay Mrs S any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Cowgills Wealth Limited pays Mrs S the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mrs S.

If Mrs S accepts my decision, the money award is binding on Cowgills Wealth Limited. My recommendation is not binding on Cowgills Wealth Limited. Further, it's unlikely that Mrs S can accept my decision and go to court to ask for the balance. Mrs S may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

I uphold this complaint. Cowgills Wealth Limited must calculate and pay redress to Mrs S as set out above under 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 21 April 2022.

Yolande Mcleod
Ombudsman