

The complaint

Mr K complains about the advice given by Scott and Casey Financial Management Limited ("S&C") 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 and believes this has caused a financial loss.

Mr K 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 K.

What happened

Mr K had an occupational pension that he had accrued working for an employer between 1972 and 1979.

Mr K received letters from his existing pension scheme in July 2009 providing up to date details of his plan. The letters say they were sent after he made enquiries about the plan's status. These confirmed, at that time, Mr K had a preserved pension, payable at retirement, of £602.32 per annum (including a guaranteed minimum pension, 'GMP', of £414.96 per year). The GMP was scheduled to increase by 8.5% for each complete tax year between Mr K leaving the pension and the state pension age. The letters also confirmed that the plan had a cash equivalent transfer value ('CETV') of £11,577.

S&C has said that Mr K approached it in August 2009 as he was looking to release money from his pension. Mr K's representatives have said that S&C offered Mr K a pension review.

S&C completed a fact-find to gather information about Mr K's circumstances and objectives. It noted he was 58 at the time and married. He was employed full time and his household income was recorded as exceeding outgoings. S&C recorded that Mr K had two other pensions, besides his DB scheme, from which he was already taking benefits. And it said Mr K's main objective was to release tax free cash ('TFC') from his DB scheme, in order to pay for a holiday as a gift to his wife, who had only recently recovered from a period of ill health. S&C also carried out an assessment of Mr K's attitude to risk, which it deemed to be 'low/medium' or 'cautious'.

S&C contacted Mr K's existing scheme to see if he could take benefits at that time – earlier than the scheduled retirement age. The scheme confirmed it could not offer the option of taking benefits early.

On 15 September 2009 S&C recommended that Mr K transfer his pension benefits out of his DB scheme. It recommended he take the maximum available TFC (£2,894.25) and use the remaining fund to purchase an annuity. The annuity recommended was an impaired life annuity, due to some pre-existing health conditions Mr K had, paying £496.08 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 K to take TFC, which he couldn't under his existing scheme. An annuity was recommended because Mr K was keen to know exactly what income his pension would provide. And the other choices made in relation to the annuity – it being level, having a guarantee and a spouse's pension – were recommended because they were in line with what Mr K said he preferred.

The transfer went ahead in line with the recommendation made.

Mr K complained in October 2020. In summary his representatives said that the advice was unsuitable and was not in his best interests. He didn't recall receiving the TFC and was unsure what this was used for. And it said what Mr K was giving up was not clearly explained in a way he could understand. The representative also said that Mr K did not want to take any risks with his pension and that it had valuable death benefits which he shouldn't have been told to give up, which again it felt made the advice unsuitable.

S&C didn't uphold the complaint. It said that it had recommended, and Mr K had taken, an immediate vesting pension, giving him a fixed income through an annuity which commenced straight away. So, there was no investment risk and he was provided a guaranteed income for the rest of his life – which also had death benefits of a 50% pension for his wife. S&C said Mr K had gathered information from his existing scheme before contacting it. So, it felt he fully understood the benefits he was due and what he would be giving up. And it felt the recommendation was appropriate as it allowed him to release TFC – in line with his stated objective.

The complaint was then referred to our service. S&C indicated it felt that the complaint fell outside of our jurisdiction, having potentially been made too late for us to consider. An Ombudsman colleague considered the matter and decided that we did have jurisdiction to consider Mr K's complaint.

One of our Investigator's then gave an opinion on the merits of the complaint. They felt the complaint should be upheld. This was because they didn't think the advice was suitable as the regulator's rules explained transfers from a DB scheme should be assumed to be unsuitable unless it could clearly be shown to be in the customers best interests. And they didn't think Mr K had a genuine *need* to release the TFC or to transfer. And if it had been explained this wasn't in his best interests, they didn't think Mr K would've transferred and instead would've remained in his DB scheme, taking retirement benefits at the scheme retirement age. So, they felt S&C should pay compensation in line with regulators redress methodology as well as paying additional interest on monies Mr K had been deprived of since 2015 – when he'd have reached the retirement age of his existing scheme.

S&C disagreed. They said Mr K had clearly indicated this was what he wanted to do – a choice it felt he was entitled to make. And it said he'd made a choice to take TFC, for a very specific purpose, for which there wasn't a viable alternative and was keen to increase his income by taking a pension. And its recommendation had been in line with this choice. S&C also indicated it felt Mr K would have insisted on the transfer.

The investigator wasn't persuaded to change their opinion as they still believed the advice to be unsuitable. And they didn't agree that Mr K would've disregarded advice not to transfer, had this been given.

Because agreement couldn't be reached, the complaint was referred to me. I issued a provisional decision in June 2022 explaining that I intended to uphold Mr K's complaint but felt some amendments to the redress were appropriate. Below are extracts from my provisional findings, explaining why I thought this.

A number of the things that Mr K's representatives have said about the suitability of the transfer don't appear relevant here. It has said part of the reason that the recommendation was unsuitable was that Mr K did not want to take risks, doing so was not appropriate and valuable guarantees were lost as a result of the transfer. But the transfer here didn't involve investing Mr K's pension in unit linked investments, or any other action that put the amount transferred at risk of decreasing.

Mr K's existing scheme provided a guaranteed annual pension. In 2009, this was quoted as being £602.32 per year and included a spouse's pension of 50% - payable in the event Mr K pre-deceased his wife. A portion of that benefit accrued was though subject to revaluation increases until state retirement age. Meaning the benefits would likely have been higher at retirement age, if they'd remained with the existing scheme. The scheme however confirmed, at that time, Mr K could not take benefits early. So, he could not access his pension fund for several years, if it stayed where it was.

S&C recommended that Mr K use the transfer value of those benefits, the CETV, to release TFC and then purchase an annuity. That annuity provided a guaranteed level income for the rest of Mr K's life (£496.08 per annum), as well as a 50% spouse's pension. So, the CETV was not invested in a fund that could go up and down in value – and not exposed to investment risk. 25% was released to Mr K tax free, to spend as he chose, and the rest was used to buy an annuity, which still provided a fixed guaranteed income. So, the guarantees were not lost – they were exchanged for alternative guaranteed benefits.

What I must decide is whether the advice given – the recommendation to make that exchange – was suitable and in Mr K's best interests.

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.

The regulator, now the Financial Conduct Authority ('FCA'), set out, in its Conduct of Business Sourcebook ('COBS'), 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;*
- 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, or opt-out, a firm should start by assuming that a transfer 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 or opt-out is in the client's best interests."

S&C's role wasn't simply to facilitate something that Mr K might've thought he wanted or needed. It was to objectively consider all of the relevant information, provide clear comparisons so he could make an informed decision and provide him with robust, suitable financial advice, which was in his best interests. And based on what I've seen, I'm not sure that S&C did this.

The letter setting out S&C's recommendation set out the details of the annuity being recommended. But the only information included about the existing scheme was the transfer value and that TFC and monthly payments couldn't be taken at that time. I don't think that comparison included enough information for Mr K to make an informed decision. Because it didn't reflect the benefits due to Mr K under the scheme at retirement, if he remained invested. And this is what he was giving up and was a more appropriate comparison than simply saying he couldn't take benefits at age 58. S&C has argued information about existing benefits was provided by the scheme to Mr K before he contacted it for advice. So, he was familiar with what he was giving up and had decided he was willing to do so. But I don't think S&C can reasonably rely on this to say it fulfilled its obligations under the relevant rules to provide Mr K a clear recommendation that allowed him to make an informed decision.

The recommendation made was based on releasing TFC at that point being something that Mr K wanted to do and it being appropriate to do so. And because the existing scheme wasn't in a position to allow benefits to be taken early, a transfer was recommended. But the information I've seen doesn't suggest that the need for TFC was tested. And there isn't anything in the recommendation that explained to Mr K why S&C thought it was right to do this – something I'm satisfied it was required to comment on.

The information from the time is consistent that releasing TFC for the purposes of a holiday was something Mr K was interested in. I know he has said he doesn't remember the purpose of this now. But I'm conscious that memories do fade over time. And I'm satisfied that this was the position at the time – particularly given the documents he signed that confirmed this aim. I also think it's likely Mr K approached S&C, rather than the other way around as his representative has suggested, to discuss this. I say that because I've seen information from his existing scheme that was addressed to him, dated prior to any correspondence he received from S&C and before he signed a letter of authority to S&C. Indicating he requested this directly and then contacted S&C after it was received. So, I'm satisfied that Mr K was looking into releasing TFC and contacted S&C because he was interested in doing so.

But I don't think that means it was a need. It was something he was exploring, but it was to fund something that was not essential. And the main purpose of a pension is to provide income in retirement. There was no commentary by S&C on why the desired holiday being funded by the TFC outweighed the benefits being given up. And there doesn't appear to have been any detailed consideration of this.

There is also nothing to suggest that alternatives were explored. S&C has said it doesn't think there were any alternative options, particularly given Mr K's other pensions were already paying benefits. But I'd have expected this to be covered in the recommendation letter. And a pension is not the only way of funding a holiday. The fact find showed that Mr K's household had surplus monthly income in excess of £500. Given the amount listed as being needed by Mr K was £2,500, financing that through a loan or credit seems to have been a realistic option. This would likely have resulted in interest being incurred. Which Mr K would've needed to decide if he was willing to pay. But in order to make that decision, S&C should've discussed this option to him, and commented on it in the recommendation, so that he could make an informed decision.

The recommendation letter also, very briefly, said that another of Mr K's objectives was to "obtain extra income". This wasn't however reflected in the fact find that has been provided. And again, the information provided indicates Mr K's household had surplus income each month. So, I'm not sure this was a genuine objective. And even if it were, there was again no commentary on why this was appropriate or anything which set out what did or did not support this course of action – so that Mr K could make an informed choice.

S&C has said that the pension belonged to Mr K and it was his choice what to do with it. While that is true, again S&C's role wasn't just to facilitate what Mr K wanted. Just because he might have been interested in releasing tax free cash for an intended purpose doesn't mean it was in his best interests to do so. S&C still needed to consider if it was and explain why, setting out reasons for and against as required by the regulator – taking into account what the regulator says about the starting assumption being a transfer will usually be unsuitable. Which I can't see it did. There is no commentary on why it was right for Mr K to transfer and give up the benefits under the DB scheme – which appear to have been better. The letter simply outlines this is what Mr K apparently wanted and this was a way of doing that. Which wasn't, in my view, robust or suitable advice.

Taking everything into account, I don't think S&C provided clear comparisons in order for Mr K to make an informed decision. The recommended annuity did, as I've said, provide a guaranteed income, so the recommendation wasn't contrary to Mr K's attitude to risk. But this income was at a lower level than offered by the DB scheme, even before the next several years of revaluations was taken into account. And I don't think enough emphasis was given to the benefits Mr K was giving up so that he could make an informed decision. Rather S&C seems simply to have facilitated a transfer without consideration of whether it was in Mr K's best interests. And again, this wasn't S&C's role, simply to transact what Mr K might've thought he wanted.

And I don't think the transfer was in Mr K's best interests. I don't doubt that Mr K likely wanted to take a holiday. And he may've been particularly keen on doing this. But by transferring, Mr K was going to receive a lower retirement income. And I don't think reducing his retirement income appears to have been the only option and, in my view, certainly wasn't the best option. Particularly given when Mr K did come to stop working, he'd have greater reliance on the benefits he would receive from his pension.

So, I think S&C should've advised Mr K to remain in his DB scheme and look at funding the holiday another way, potentially using the surplus income available to him at the time.

Of course, I have to consider whether Mr K would've gone ahead anyway, against S&C's advice. S&C has said it believes that he would have. It says Mr K had researched his fund status in advance of their discussions and he instigated the advice process - which it thinks suggests he'd already chosen to take money from this pension.

I've considered this carefully, but I'm not persuaded that Mr K would've insisted on transferring out of the DB scheme, against S&C's advice. Mr K does appear to have other pensions that were paying him benefits already. But I've seen nothing to suggest Mr K was particularly experienced or had more than a standard knowledge of pensions that another regular customer might have. While he may have had an intended use for TFC, I don't think the impact on his retirement income that would be caused by this action and why this wasn't in his best interests was made clear. And if it had been, and he'd been provided clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that what Mr K had said he'd like to use TFC for was a genuine need. Or that his desire for this 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. If S&C had explained that Mr K could meet his objective without reducing his retirement income, I think that would've carried significant weight. So, I don't think Mr K would have insisted on transferring out of the DB scheme.

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

Our Investigator recommended that S&C pay interest, at 8% per year, on the difference in what Mr K has received and what he would've received by remaining in the DB scheme since the scheduled scheme retirement age. This was in addition to the regulators standard redress methodology. But I don't intend to require S&C to do this. Mr K received income under the purchased annuity from 2009 that he wouldn't otherwise have done as well as tax free cash earlier than he would've done. So, he has benefitted from this. Which I think counterbalances him potentially not having received as much since 2015 as he would have under the DB scheme. So, in the circumstances I don't think it'd be fair to require S&C pay additional interest. And instead I think it'd be appropriate for the compensation to largely just follow the regulators usual methodology.

Usually we'd say that a notional deduction should be made from the compensation to allow for income tax that would otherwise have been paid. But based on the information that I've seen about Mr K's retirement provisions and what his income in retirement is likely to be, I think it seems probable his income will be under the annual tax allowance. So, in this case, I don't think a notional deduction is appropriate.

Responses to my provisional decision

I gave both parties an opportunity to make further comments or send further information before I reached my final decision.

Both Mr K's representatives and S&C made no further comments regarding the merits of the complaint or my provisional findings on this.

Mr K's representative noted they felt it was correct that a notional deduction is not made for tax.

S&C however asked what evidence I'd relied on when reaching this conclusion and said, if none was provided, omitting a notional deduction should be conditional on Mr K providing evidence of his income.

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 have provided any further comments for me to consider about the advice itself and whether it was suitable, I see no reason to depart from my provisional findings in respect of this. So, for the reasons summarised above, I think the advice provided by S&C was not in Mr K's best interests, it should've advised him to remain in his DB scheme and I think he would've accepted this advice. So, I think S&C should compensate Mr K.

On the point of whether a notional deduction from the compensation amount should be made for tax, as I explained in my provisional findings, I thought it seemed probable Mr K's income *in retirement* would be under the annual tax allowance. This was based on the information S&C gathered at the point of application - when it recorded that Mr K had one pension paying £384 annually and another paying £26 monthly (so £312 annually). And Mr K's likely state pension entitlement.

I didn't think it was unreasonable to rely on the figures S&C recorded regarding Mr K's other pensions – particularly bearing in mind it relied on these when giving advice. But I have, since my provisional decision, asked Mr K for some further information and evidence.

Mr K has said he isn't currently working and has no pension provisions beyond those recorded during the advice process. Mr K has also provided extracts from his online banking service showing the amounts he has received recently in respect of his different pensions (including the state pension).

Based on this information, it appears Mr K's annual income is very close to the amount of the annual tax allowance. The figures suggest, if they did not change throughout the year, it might fall just below the threshold. But it isn't entirely clear, particularly as the figure for the annuity recommended by S&C seems slightly lower than what I'd have expected it to be given payments were fixed at a set amount. So, I can't say with certainty that Mr K would not be liable to pay income tax in retirement.

With that in mind, I think it would be fair for a notional deduction for tax to be calculated. But, if Mr K can provide S&C with evidence he does not pay tax, this deduction should not be applied to the compensation amount.

Putting things right

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

S&C 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 K wouldn't have taken benefits under the DB scheme, until the normal scheme retirement age. So, this should be the basis for the calculations.

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 K's acceptance of the decision.

S&C may wish to contact the Department for Work and Pensions (DWP) to obtain Mr K'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 K's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, I'd usually recommend that this be paid into Mr K's pension plan. But I understand, as Mr K 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 K as a lump sum.

A notional deduction to allow for income tax that would otherwise have been paid should usually be made from this amount. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr K's income tax rate in retirement - presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this. And I think it is reasonable that S&Q calculate this deduction. However, if Mr K can provide it with evidence that he is not paying income tax, this deduction should not be made from the compensation amount. This evidence needs to be provided within a reasonable period of time by Mr K, bearing in mind the requirements I mention below around when redress should be paid.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr K within 90 days of the date S&C 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 S&C to pay Mr K.

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

For the reasons I've explained I uphold Mr K's complaint.

To resolve matters I order Scott and Casey Financial Management Limited to take the action set out in the 'Putting things right' section of my decision, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 17 August 2022.

Ben Stoker
Ombudsman