

The complaint

Mr U complains that the advice he was given by Kings in 2005 to transfer the benefits from his Armed Forces Pension Scheme (AFPS) into a personal pension was unsuitable.

In this complaint Mr U is represented by a third party, but for simplicity I'll refer to all actions and correspondence as being completed by Mr U himself.

What happened

Between 2004 and early 2005 Kings provided Mr U advice regarding the deferred defined benefit occupational pension scheme he held with the AFPS.

On 29 September 2004 Mr U completed a handwritten financial questionnaire. In this he recorded:

- He was aged 50, married, with one financially dependent child.
- He was type2 diabetic, managed by diet and medication.
- He was an unemployed teacher and receiving benefits.
- The income and expenditure completed showed he and his wife had a joint disposable income of £392 per month.
- He had no financial liabilities such as loans, overdrafts or credit.
- He had previously been bankrupt.

Following this, on 28 January 2005 a telephone conversation occurred between Mr U and Kings, during which Kings completed a pensions questionnaire. On this Kings recorded:

- His attitude to risk (ATR) was 3/5 'Balanced'.
- He had no other pension provision.
- He needed 'day to day living costs only' in retirement and wished to retire aged 60-65.
- He had no other means of raising finance or meeting his objectives.

Under the section 'General objectives' the following were ticked as important:

- To receive the maximum lump sum now.
- To maximise the lump sum death benefits payable to my spouse/dependants because I am in ill health/good health. [side note – neither was lined through]

Ticked as unimportant was:

- To have investment control of my pension fund

The following was noted as his personal objective:

"I require cash to help clear some existing debts, including student loan, overdraft."

And the following was noted:

"Understands JSA will be affected."

Following this, on the same day, Kings wrote to Mr U and explained his options. It included a projection of the benefits he could expect on retirement if he remained in the AFPS, and gave two options (Option one and Option two) for how Mr U could transfer his pension benefits so that he could take them early. It showed projected benefits of both these options and included the fees that would be charged.

It asked Mr U to complete and sign an instruction form indicating how he wished Kings to proceed. The choices were:

- That I wish to pursue taking my Armed Forces benefits now, in accordance with option....., and request that you proceed accordingly
- That I do not wish to proceed
- That I require more information before making a decision (please detail your requirements below)

Mr U completed this indicating he wished to take his Armed Forces benefits and proceed with Option 2.

As a result Kings wrote to him on 3 February 2005 its Suitability Report and Transfer Value Analysis and asked him to confirm his request once he'd read the suitability report and other documents. The transfer from the AFPS into a personal pension was completed on 4 March 2005 with a final transfer value of £73,395.20.

In November 2020, following advice from his representative, Mr U complained to Kings that the advice it had given him in 2005 to transfer the benefits from the AFPS was unsuitable. But Kings didn't uphold his complaint. It said the advice it had given him was not unsuitable given his circumstances at the time, and it had warned Mr U of the benefits and income he would be giving up if he chose to transfer his pension.

Unhappy with this response, Mr U referred his complaint to our service. But Kings thought the complaint had been made too late under the regulator's rules and didn't consent to us considering it. So our jurisdiction in relation to this complaint was the subject of an ombudsman's decision, in which it was decided that the complaint was made within the time limits so it's merits could be considered by our service.

Having considered all the evidence, our investigator thought the complaint should be upheld. She thought that Mr U shouldn't have been advised to transfer his defined benefit occupational pension into a personal pension, and that he'd lost the valuable retirement benefits he was entitled to under the AFPS. And she thought Kings couldn't rely on the warnings it says it gave Mr U to justify its recommendation to transfer.

She thought that Kings should undertake a redress calculation in line with the regulator's Finalised Guidance 17/9. And if it was identified that Mr U had suffered a loss, compensation to redress this loss would be payable.

But Kings didn't agree, and it maintained that Mr U's complaint had been made too late under the regulator's rules. In relation to the merits of the complaint, it said, in summary:

- The advice given to Mr U was in accordance with the rules and standards in force at the time and was suitable given his circumstances.
- The investigator had considered the advice given against the standards and rules of 2021 which was wrong and using hindsight.
- The starting point was that the transfer wasn't suitable, and this was explained very clearly to Mr U over the telephone and in the supporting documents sent to him, but his circumstances meant it was suitable.
- Mr U was clearly told on several occasions that he'd receive lower benefits on retirement if he proceeded.
- The full implications of transferring out, including that it wouldn't be in his long-term financial interests was clearly explained to Mr U during the initial telephone consultation.
- The suitability letter set out the risks and implications of transferring, but made it clear that Mr U must judge whether accessing his pension early was the right thing to do in his personal circumstances.
- Mr U was told he should not proceed if that would mean he lost benefits.
- The information given to Kings at the time of the advice showed the benefits of taking the pension outweighed the benefit of leaving it given Mr U's personal situation at the time.
- Mr U's attitude to risk was 'Balanced' at the time of the advice.

But having considered these further submissions our investigator didn't change her view. She said, in summary:

- She'd not used hindsight, and had considered the advice against the rules and standards in place in 2005.
- Kings appeared to be placing the burden of responsibility to realise that the advice was unsuitable onto Mr U, which wasn't fair. Kings were the professional advisers so had a responsibility to make a clearly explained and balanced suitable recommendation.
- Providing risk warnings doesn't make unsuitable advice become suitable.
- Kings had not provided evidence which showed its recommendation to transfer benefits was suitable and how this met Mr U's needs and objectives.

As no agreement could be reached the matter has come to me for a final 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've firstly revisited the question of our service's jurisdiction. Kings have maintained that the complaint has been made too late under the regulator's rules. I have reconsidered the arguments and have reviewed my original jurisdiction decision. Having done so I see no reason to depart from my original conclusion that the complaint is within our jurisdiction. I don't think Mr U ought reasonably to have known he may have cause for complaint until he was advised as such by his representative, so I am satisfied that the complaint has been

made within the time limits set down by the regulator.

As regards the suitability of the advice to transfer the benefits of his AFPS, I agree with the investigator, for broadly the same reasons. I'm satisfied the advice wasn't suitable. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by Kings for Mr U. The regulator's handbook at the time of the advice contained eleven Principles for businesses, which it said were fundamental obligations firms must adhere to (PRIN 1.1). These included:

- Principle 2 – which required a firm to conduct its business with due skill, care and diligence.
- Principle 6 – which required a firm to pay due regard to the interests of its customers and treat them fairly.
- Principle 9 – which required the firm to take reasonable care to ensure the suitability of its advice...for any customer who is entitled to rely upon its judgement.

So the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They had to be complied with by regulated firms like Kings. As such, I need to have regard to them in deciding Mr U's complaint.

Mr U approached Kings for advice about his pension and retirement planning. He had a defined benefits occupational pension scheme (OPS) at the time, and Kings have said it was aware of the rules surrounding these particular pension schemes. But for clarity, the rules in place at the time of the advice, contained in COB 5.3.13 G(4) stated:

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.

When the firm is recommending a customer to transfer or opt out of any other type of occupational pension scheme, the suitability letter should include:

(a) A clear explanation why transferring or opting out is more suitable than remaining in the occupational scheme;

(b) ...

So the onus was on Kings to start by assuming that the transfer of Mr U's occupational scheme was unsuitable. And Kings should've only recommended the transfer if it could clearly demonstrate it was in Mr U's best interests. I note the wording of the presumption in the COB rules referred to an active member of a DB scheme, so there could be an argument that it didn't apply to members such as Mr U who had deferred benefits in his OPS. But 'active' wasn't defined and could, by implication at least, extend to members such as Mr U. But, even if the presumption didn't apply at the time, it would still be for Kings to demonstrate that its advice was suitable for Mr U. And I think it has failed in this first and fundamental hurdle.

Fact find

Kings has said there was an initial telephone consultation. Unfortunately Kings hasn't provided any record or notes of what was discussed, but it has said that it clearly explained the potential impact of transferring his pension, and it was Mr U's decision to go on to the next stage of the process. But I can't see how Mr U had anything to lose by going to the next stage. After all he was asking for its advice, and Kings could only give him that advice if it knew about his personal circumstances and objectives, which it didn't at that time.

So following the initial consultation, Mr U completed a financial questionnaire. I've summarised this in the background section of this decision, so I won't repeat it here. But having read it I can see Mr U and his wife didn't have much disposable income left each month. And Mr U was unable to work due to illness and his only income was through state benefits.

So Kings needed to ensure it fully understood Mr U's needs and whether they were reasonable or warranted. This is important as suitable advice is dependent on balancing Mr U's circumstances at the time, with his needs in retirement.

The initial report

Kings then sent Mr U *The initial report* on 28 January 2005. This summarised the previous telephone consultation and provided some information about how his current pension scheme worked, and the risks associated with taking his benefits early. It confirmed that Mr U wanted to obtain a cash lump sum from his pension, but he wasn't sure how much he needed, but was interested to see how much he could get.

Kings also included a warning to Mr U that taking his pension benefits early may put his state benefits at risk, and that he should speak to his local benefits office. Kings warned him

"You should not proceed if you will lose benefits as a result."

This is an important point as it is fundamental to the advice Kings should give. But I can't see Kings explored this any further, and given its importance I think it should have.

Mr U completed the options part of this form, indicating he wished to take his pension benefits early by transferring its benefits to a personal pension plan.

The suitability report

As a result of the option Mr U had chosen, Kings provided him with the above-named document. In the introduction it said the following:

We provided you with relevant information about your options in a Report (the Initial Report) dated 28th January 2005. Subsequent to receiving this report, you have asked us to proceed on the basis of Option 2. The purpose of this Suitability Report is to confirm your decision, and to make certain recommendations in the light of your decision to proceed.

But the document (and the attachments) just gave Mr U information. I can't see that it made any formal recommendation other than agreeing to facilitate his request after he was able to fully consider the ramifications. But this isn't what a suitability report should be. It should spell out Mr U's options, take into account his personal circumstances and financial objectives, and as required under COB 5.3.13 G(4), provide a firm and justified recommendation of how it thought Mr U should proceed.

Taking the tax-free cash (TFC)

The personal objective recorded for Mr U was to take tax-free cash (TFC) to “*help clear some existing debts, including student loan [and] overdraft*”. But this objective is at odds with the information that Mr U himself provided in the earlier financial questionnaire he’d filled in. The section about liabilities, including loans and overdrafts, he’d lined through, indicating that there weren’t any. And I can’t see that this discrepancy was explored at all by Kings during the following call. I also can’t see how much TFC Mr U thought was required to cover the debts and loans, which I submit is a fundamental piece of information required by Kings in order for it to give suitable advice on what Mr U should do.

But I can’t see that Mr U was even aware, before being told by Kings, that he may be able to release cash from his pension fund before retirement. I think, on balance, given the overdraft and student loan wasn’t mentioned originally, it is more likely that Kings told him he had the opportunity to take TFC upon switching, and as a result it was then recorded that he would use the TFC to help clear an overdraft and the student loan, as some reason had to be recorded.

I also can’t see that Kings explored any alternatives for raising the money for the debt clearance. The suitability report indicates that Mr U said he didn’t have any other means of doing this. But Kings had a duty to explore what alternatives were available. And whilst it may be understandable, given his limited disposable income and lending history, that alternatives may have been difficult or expensive, these would probably, in the longer term, have worked out cheaper than reducing his income for the entire period of his retirement. And there was no suggestion that Mr U was unable to furnish the debt despite his limited income. And in the case of the student loan, it should’ve been discussed whether it was even necessary to clear at that point given the manner, as the investigator said, that these loans were administered and eventually written off.

Was the advice to transfer suitable?

When considering a case where someone has been advised to transfer their pension funds, the consumer’s circumstances at the time must be considered. And in order to make the advice to transfer suitable, it would need to be in the person’s best interests.

The personal pension, by Kings’ own admission, was more expensive, in terms of fees and charges than Mr U’s occupational scheme. And as I’ve already said, I don’t think the advice to access the tax-free cash was suitable, so there needed to be other compelling reasons why it was in Mr U’s best interests to switch at the point he did. And I’m not satisfied that there were. In order for the transfer to be in his best interests, it would usually need to have a good chance of significantly improving on the guaranteed benefits that came with his occupational pension scheme. In order to demonstrate the potential future gains of a personal pension compared with his current scheme, Kings provided Mr U with a Pension Transfer Analysis document.

The advice was given during the period when the regulator was publishing ‘discount rates’ for use in loss assessments resulting from the industry-wide Pensions Review. Whilst businesses weren’t required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The investment return (critical yield) required to match the benefits of Mr U’s occupational pension at retirement aged 60 was around 9.7% per year. When the advice was given, the relevant discount rate was 6.6% per year for 9 years to retirement. For further comparison, the regulator’s upper projection rate at the time was 9%, the middle projection rate 7%, and

the lower projection rate 5% per year. And taking into account Mr U's recorded 'Balanced' ATR, this shows that a personal pension was highly unlikely to even match the benefits Mr U would probably achieve at retirement if he remained in his occupational scheme.

I've also considered if Mr U had the capacity to absorb any potential losses to a personal pension, given that it was subject to market volatility and additional fees and charges. At the time of advice Mr U had no assets, was unable to work due to illness, and was receiving state benefits. He appeared to have no other source of retirement income, other than the state pension, so in effect he would have been relying on his occupational pension to support him in his retirement. So I can't see he had any capacity to absorb any losses on this pension transfer.

Ultimately a pension is intended for a person to use in their retirement. Kings' role was to advise the most appropriate course of action Mr U could take with his occupational pension in order to meet his objectives. The most appropriate advice, given the apparent lack of any pressing need, would've been to advise him not to take his pension benefits at that point and leave his pension in situ until retirement. But Kings didn't advise Mr U against transferring. It actually recommended that he did, despite acknowledging that he would be worse off in retirement and the death benefits, which he said were important to him, wouldn't be as good. Explaining risk and giving warnings doesn't abdicate Kings from its responsibility to provide appropriate advice.

The advice and recommendation that Kings gave to Mr U, to transfer the benefits of his defined benefits occupational pension scheme to a personal pension, was unsuitable.

Having concluded the advice Kings gave Mr U was unsuitable, I need to consider what I think Mr U would've most likely done had Kings advised him to leave his AFPS untouched at that time. And there is nothing to suggest it's likely he would've gone against its advice. Mr U was inexperienced in financial planning and had sought the advice of an independent financial adviser, so it follows that I'm satisfied he would've most likely followed that advice.

Putting things right

A fair and reasonable outcome would be for the business to put Mr U, 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. Kings 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 U's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr U'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 U 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 U within 90 days of the date Kings 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 Kings to pay Mr U.

Income tax may be payable on any interest paid. If Kings deducts income tax from the interest, it should tell Mr U how much has been taken off. Kings should give Mr U a tax deduction certificate in respect of interest if Mr U asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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. I require Kings to redress Mr U as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr U to accept or reject my decision before 19 July 2022.

Chris Riggs
Ombudsman