

The complaint

Mrs M complains about the advice given by Towergate Financial (West) Limited ("Towergate") to transfer the benefits from her preserved defined-benefit ('DB') occupational pension scheme to a personal pension. She says she was coerced into making the transfer with promises of better returns and guarantees when in fact she has suffered a loss.

What happened

Mrs M met with Towergate in February 2008 to discuss her pension and retirement needs.

Towergate completed a fact-find to gather information about Mrs M's circumstances and objectives. Towergate also carried out an assessment of Mrs M's attitude to risk, which it deemed to be balanced.

On 11 February 2008, Towergate, advised Mrs M *not* to transfer her pension benefits into a personal pension. The suitability report said the reasons for this recommendation were:

- The investment return needed to match Mrs M's DB scheme's benefits was relatively high and as such was out of line with her stated attitude to risk;
- There were no compelling reasons given Mrs M's circumstances to recommend she transfer her pension;
- The generally superior security of a DB scheme met Mrs M's high priority to provide security of her pension fund; and
- The death benefits available before retirement through the DB scheme met Mrs M's priority to provide a spouse or dependants pension on her death.

On 20 February 2008 Mrs M sent Towergate a typed letter, which said that while she had read and understood the suitability report and that transferring her pension was against the advice she'd received, she nevertheless wanted to go ahead and transfer her DB pension into a personal pension. She also said that she wanted to take the taxable cash lump sum (representing the enhancement to the transfer value.)

On the same day Towergate produced a second suitability report. The report repeated the reasons why Mrs M should not transfer her pension. But it went on to say that because she had insisted upon transferring, its recommended solution was to transfer to a personal pension, which would provide investment choice, flexibility and competitive charges.

In 2019 the Financial Conduct Authority (FCA) instructed Towergate to carry out a review of some its past pension transfer review business, which Mrs M chose to be included in.

On 3 July 2020 Towergate wrote to Mrs M to say that its review of the advice she was given showed that she was told not to transfer her DB pension but that she knowingly acted against that advice. It said it wouldn't therefore be offering any redress.

Mrs M referred her complaint to our service. An investigator upheld the complaint and required Towergate to pay compensation. In summary they said they didn't think Mrs M was a true insistent client and that her objectives weren't properly considered by looking at

possible alternatives to transferring.

Towergate disagreed. In summary it said the investigator's assessment contradicted the review work it carried out under the supervision of the FCA and went against a number of decisions the Financial Ombudsman Service had issued on similar cases. It said that the investigator's conclusions were irrational - Mrs M knew she was acting against the advice she was given because she was issued with two suitability reports. It said that it is concerned the investigator had applied modern day regulatory standards in their assessment, which didn't exist at the time of the advice – specifically the point they made about not exploring alternative courses of action with Mrs M.

And finally it offered some broader context referring to the fact-find completed for Mrs M's husband who received advice at the same time, which showed that jointly they had a material income deficit and around £30,000 in outstanding loans and the objective was to clear the debt.

I issued my provisional decision of May 2022. I said here that having considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of the complaint, I was likely to reach the same overall conclusion as the investigator and uphold the complaint – but in the interest of fairness I wanted to expand on my reasoning. In my provisional decision I said my reasons were as follows:

“The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Towergate should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs M's best interests (COBS 19.1.6).

A key aspect in this case is Towergate's categorisation of Mrs M as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were COBS rules in the regulator's Handbook, which required Towergate to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Towergate to provide information that was clear, fair and not misleading. So, Towergate's recommendation had to be clear and Mrs M had to have understood the consequences of going against the recommendation.

In its first suitability report, Towergate recommended that Mrs M should not transfer away from her DB scheme. It said this was because the critical yield or investment return needed to match the benefits of her existing scheme was too high in light of her attitude to risk. It said an alternative arrangement was unlikely to produce better benefits and that it hadn't identified a compelling reason to transfer. Towergate warned Mrs M that she would be worse off in retirement if she transferred.

In its second suitability report, Towergate repeated its warnings that the pension transfer was unsuitable for Mrs M. The report then said that Mrs M had decided she wanted to go ahead in any event on an insistent client basis. It went on to recommend an alternative solution that provided flexible retirement benefits with an investment fund choice which appears to have been appropriate for Mrs M's risk profile.

This would suggest that Towergate provided two suitable recommendations to Mrs M.

But Mrs M says that she was coerced into transferring with promises of better returns. She says that she was led by the hand throughout the process of accessing the cash incentive, to the point of being given the wording to use for the instruction letter to insist it went ahead. She says she did not understand what she was doing.

Having considered all of the evidence presented, while Towergate's initial communication with Mrs M did set out that its recommendation for her was *not* to proceed with the transfer, I think there were weaknesses and failings in the advice process, which meant Towergate didn't act in Mrs M's best interests. And I think Mrs M likely understood or believed overall that Towergate was recommending she should go ahead with the transfer.

I say this because in the first suitability report immediately underneath the summary of why Towergate recommended Mrs M should not transfer away from her DB scheme, it said that she could go about doing it regardless, by effecting her right to transfer on an insistent client basis. And while it said this would be against Towergate's advice, it explained what Mrs M needed to do, including writing a letter saying why she wanted to pursue this option. Also, when setting out Mrs M's options, the first and second options presented to her involved her transferring her benefits out of the DB scheme, with the third option being to remain in the scheme.

I think if Towergate firmly believed in its advice and recommendation and it was acting in Mrs M's best interests, it wouldn't have told Mrs M at the same time as delivering its recommendation how she could put it aside and bypass it. I think the wording and the emphasis placed on how Mrs M could ignore Towergate's recommendation was unfair to Mrs M and wasn't in her best interest.

I don't think it was in Mrs M's best interest to go against Towergate's recommendation – yet Towergate made it very easy for her to do so. I also think that, given the context and the emphasis placed on this Mrs M could have interpreted this overall that Towergate was recommending she go ahead and transfer.

I think it ought to have been clear to Towergate that Mrs M had little knowledge or experience of financial matters based on the information available at the time of the advice. I say this because there's nothing recorded on the assets section of the fact-find, which suggests Mrs M was an experienced investor. I'm mindful too that Towergate assessed Mrs M's attitude to risk as balanced, which according to its own definition described someone who may view their investment experience as limited and is only moderately confident in relying on that experience to help make future decisions. And I think this should've put Towergate on notice that it had to be careful if it was to take matters through the insistent client route.

Mrs M says that the wording for the insistent client letter she signed was provided by Towergate and she didn't really know what she was doing. Looking at the letter I think it's likely it was templated. Not only is some of the language used quite formal and business like, I can also see that Towergate has provided an identically worded letter signed by Mrs M's husband who Towergate says jointly received advice at the same time.

While I acknowledge it wasn't a requirement at the time, given Mrs M's level of experience, I think it would've been important for Towergate to ensure she understood what she was getting into. And a good way to have done this would've been to see in her own words that she understood the recommendation being made and importantly why she wanted to proceed. Because I have doubts that these were her own words, I'm not persuaded Mrs M was able to make an informed choice here. And I think the lack of explanation from Mrs M

about why she wanted to proceed ought to have given Towergate reason to ask her further questions.

Instead, Towergate produced a second suitability report, which I believe muddled the waters further. Despite repeating the recommendation not to transfer out of the DB scheme, it then proceeded to give a positive recommendation, advising Mrs M to transfer her benefits to a personal pension and invest it in a balanced lifestyle fund.

In order to fulfil the regulator's requirements under COBS 9.2, Towergate needed to give Mrs M advice on the overall suitability of the transaction envisaged - that is the transfer *and* the choice of pension and investment. Instead, it first gave Mrs M advice on the question of whether to transfer, and only considered the suitability of the proposed alternative in the second suitability report after securing Mrs M's confirmation to proceed on an insistent client basis.

So, by recommending that Mrs M transfer her benefits to a particular scheme, I think it effectively recommended that she transfer out of her DB scheme. If Towergate didn't think that transferring out of the DB scheme to a personal pension was in Mrs M's best interests, it needed to ensure that it gave clear advice that the whole of the transaction was unsuitable for her. It couldn't separate out the elements. For this reason, I think that on receipt of the second suitability report Mrs M likely believed Towergate was recommending she transfer out of the DB scheme, and it was reasonable for her to do so.

Nevertheless, Towergate has said there is some wider context to consider in this case. It says Mrs M was advised at the same time as her husband and that her decision to transfer was based on the financial situation as recorded on her husband's fact-find. It says this recorded a household income deficit over expenditure and that there was around £30,000 of outstanding loans. It says the income deficit was explained by Mrs M as being due to her pending employment change, which was due to take place around seven months' later.

So, it says Mrs M wanted to transfer out of the DB scheme so that she could use the additional lump sum to pay down some of these debts. On the one hand I'm mindful that this is a complaint about the advice Mrs M received and not another party. The documentation provided in relation to the advice Mrs M received paints a very different financial picture – the fact-find records a surplus income and no debts. But I can also see that Mrs M has said in the course of her complaint that the loans were manageable - so it appears there were debts; albeit I don't know in what name or names they were held.

But if Towergate knew or understood this was the true position and it was Mrs M's objective to secure funds to clear the debt, then I think this ought to have been documented in her advice paperwork. In acting in Mrs M's best interests I think Towergate should have gathered more information about the debts to better understand the position – if only to suggest that if there was financial pressure Mrs M should seek further advice and guidance from the lenders before continuing to facilitate an irreversible transaction to transfer her pension. I say this particularly in the context of Towergate appearing to have understood that Mrs M's financial situation would change in the relative short term.

I can see that Towergate says suggesting it should have discussed alternatives is applying modern-day standards – there were no specific rules around insistent clients at the time of the advice. And as I've said above, I acknowledge there were no specific insistent client rules at the time. But I consider the rules that were in place at the time were clear that Towergate had to act with due care and skill and in Mrs M's best interests. And by not seeking to fully understand Mrs M's objectives or to clearly communicate that there might be

other things she could consider before carrying things out, I'm not persuaded this was acting in Mrs M's best interest. Ultimately, I don't think she was able to make an informed choice here – it seems to me that Mrs M most likely went ahead with the transfer as she believed this was the only way to meet her objectives. And because Towergate actually gave her a positive recommendation to transfer out of the scheme in the second suitability report.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Towergate followed meant that Mrs M can truly be regarded as an insistent client. Towergate's communications overall weren't clear or fair. It didn't act in Mrs M's best interests. And it failed to act with due care and skill.

If Towergate had acted reasonably, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mrs M's objective to use the available funds to clear some debts in detail, I don't think Mrs M would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mrs M was an experienced investor such that she possessed the knowledge or had the confidence to go against the advice she was given. I think she relied on the advice and process Towergate employed – so if things had happened as they should have I'm not persuaded Mrs M would have insisted on going ahead with the transfer.

For completeness, Towergate also objected to the investigator's view on the basis that our service had issued decisions in its favour, thereby accepting that it employed a fair insistent client process. It added that the regulator had also reviewed its processes and also did not find any flaws.

I've taken this on board - but each case is considered on its own merits and I've explained in detail why I currently think in the particular facts and circumstances of this complaint it should be upheld."

To put things right, I said I intended to direct Towergate to 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.

In response to my provisional decision, both Mrs M and Towergate said they had nothing further to add.

While I'm mindful that both parties have ostensibly accepted my provisional decision, for the sake of completeness I'm issuing 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.

When considering what is fair and reasonable, I'm 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.

Having done so, given that neither Mrs M nor Towergate has provided anything new for me to consider in response to my provisional decision, I've no reason to change my conclusions. So for this reason and the reasons set out in my provisional decision which I have detailed above, I uphold this complaint and direct Towergate to put things right.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs M, as far as possible, into the position she would now be in but for Towergate's unsuitable advice. I consider Mrs M would have most likely remained in her DB scheme if suitable advice had been given and the correct process followed.

I direct Towergate to 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.

I understand Mrs M retired at 60 taking benefits in January 2021 - 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 my 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 M's acceptance of the decision. Towergate may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs M'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 M's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs M'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 M 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mrs M within 90 days of the date Towergate 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 Towergate to pay Mrs M.

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.

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.

My final decision

Determination and money award: I uphold this complaint and direct Towergate Financial (West) Limited to pay Mrs M 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 would additionally require Towergate Financial (West) Limited to pay Mrs M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Towergate Financial (West) Limited to pay Mrs M any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Towergate Financial (West) Limited pays Mrs M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs M.

If Mrs M accepts my final decision, the money award becomes binding on Towergate Financial (West) Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs M could accept my final decision and go to court to ask for the balance. Mrs M may want to consider getting independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 16 June 2022.

Paul Featherstone

Ombudsman