

## **The complaint**

Mr J complains that Norrix Financial Services Limited gave him an unsuitable recommendation to transfer the deferred benefits in his occupational pension scheme (OPS) to a personal pension plan (PPP). He says this caused his pension benefits to be lower than they'd have been under his OPS.

## **What happened**

In 2007 Mr J had deferred benefits in an OPS. He'd been made redundant from his employer in December 2006. And in 2007 had been contacted by his former employer's OPS with two offers to transfer his deferred benefits.

He had the option of accepting a cash equivalent transfer value (CETV) around £42,000, in addition to a lump sum cash incentive, that amounted to around £32,000 after tax. Or a second option of transferring an enhanced CETV around £91,000.

Mr J sought advice from an independent financial adviser (IFA), who referred him to Norrix who had the authority to provide specialist pension transfer advice.

Following the advice process, Mr J opted to take the taxed lump sum and transfer the smaller CETV to a personal pension plan. The transfer completed in September 2007.

Mr J complained to Norrix, in February 2020, that he thought he'd been given unsuitable advice to transfer his OPS.

Norrix didn't uphold Mr J's complaint. It set out its understanding of Mr J's options at the time. It said that a transfer analysis report had been obtained that indicated Mr J would be better off by transferring into a personal pension.

Mr J wasn't satisfied with Norrix's answer so brought his complaint to us. Our investigator wasn't able to resolve this case informally. So this case was referred for an ombudsman decision.

I considered all of the circumstances, and issued a provisional decision to Mr J and Norrix explaining why I thought that Mr J's complaint should be upheld.

## **In my provisional decision I explained the following:**

- The evidence showed that Norrix failed to provide Mr J with a clear written recommendation explaining its advice.
- Transfer analysis for the full CETV failed to demonstrate that Mr J was likely to receive better retirement benefits by transferring out of his OPS.
- That the transfer analysis for Mr J's recommended transfer most likely left him facing lower benefits in retirement.

- Norrix failed to demonstrate that it was in Mr J's best interests to sacrifice future pension to pay off an element of his mortgage. It failed to fully understand his circumstances and the impact of his having found new employment prior to providing its recommendation.

### **Response to my provisional decision**

Mr J made no further comments in response to my provisional decision.

Norrix responded to explain that it disagreed in the following areas:

- It disagreed that Mr J didn't have a need for a cash lump sum at the time. It explained that it had considered the £20,000 redundancy payment as part of his overall assets. And stated that its advice had helped a client "*threatened with eviction precisely because he could not continue to pay his mortgage*".
- It said that the referring IFA had spoken to Mr J face-to-face, about the differences in the types of pension and Mr J's investment options. And argued that this was better than Mr J being provided with a letter that may have been difficult to understand.
- That the full CETV was the fairest way to assess the financial suitability of this transfer.

Norrix also provided a written testimony from the IFA that referred Mr J. He explained, from his recollection of events, that Mr J was concerned regarding his redundancy and the impact it was going to have on the affordability of his mortgage. And recalls Mr J being keen to use his lump sum to pay off his mortgage and reduce his outgoings.

Norrix also disagreed with my provisional decision to put things right using the Financial Conduct Authority's Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

### **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'm grateful to both sides for responding. I've considered all of the evidence and responses very carefully. I understand that Norrix disagreed with the conclusions I'd reached in my provisional decision. But, as I'll explain, neither Norrix's additional arguments nor the testimony that it's shared from the referring IFA have changed my mind. I'm upholding Mr J's complaint for similar reasons that I explained in my provisional decision.

This case relates to the transfer of an OPS that had defined benefits which didn't expose Mr J to any investment risk. The transfer meant giving up the guaranteed benefits of the OPS and then assuming investment risk in a PPP. This is an area of financial planning that is specifically regulated.

In this case, Mr J had contacted an IFA who had considered his circumstances. But wasn't authorised to be able to provide the specialist advice regarding this type of pension transfer. So the responsibility of advising on his pension transfer was passed to Norrix.

Norrix appear to have placed a great degree of trust in the face-to-face advice that the referring IFA provided. But I've been provided no meeting notes or written recommendations from those meetings. And Mr J doesn't now recall being told what he would be giving up by

transferring. So, on balance I'm unable to infer that the ceding IFA fully explained to Mr J the pros and cons of the transfer. Testimony from the referring adviser makes it clear that it was unable to provide a recommendation on this pension transfer anyway. Ultimately, the responsibility for providing a suitable recommendation to Mr J rested with Norrix.

The regulator at the time – the FSA – had conduct of business (COB) rules, set out in its handbook. At the time of the advice COB 5.3 gave the rules and guidance regarding suitability of personal recommendations. Under COB 5.3.29G guidance was provided regarding recommendations for Pension Transfers. It included guidance for firms advising customers on the suitability of transferring deferred benefits from a scheme like Mr J's OPS.

It explained that Norrix should have started by assuming that the transfer wasn't suitable, and only then consider it to be suitable if it could clearly demonstrate on the evidence available at the time that it was in Mr J's best interests. The guidance stipulated the sort of information Norrix should obtain in order to make this recommendation. It also placed an obligation on Norrix, when recommending a transfer, to send a '*suitability letter*' which included "*a clear explanation why transferring or opting out is more suitable than remaining in the occupational pension scheme*".

I would expect to see certain things when considering a case like this. One of these being the written recommendation that Norrix gave to Mr J. I'd expect this to be in the form of a recommendation letter or suitability report. It should explain to Mr J what was being recommended and why it was suitable for him. In the absence of such a document I need to determine, on a balance of probabilities, what Norrix recommended and why.

Norrix have provided a copy of a letter of 3 October 2007. This was sent to Mr J after the pension transfer completed. It explained to Mr J the background of the offer made by his ceding OPS. It explained the difference between his OPS and the PPP. And it explained to Mr J, "*Following discussions, we felt that you would benefit by taking advantage of the [ceding scheme] offer and transferring to a personal pension with [pension provider]. I am preparing a special report for you which gives the details of the transfer process and illustrates the benefits you have received from this change.*" I'm satisfied from this letter that Norrix were responsible for the recommendation that led to his transferring his deferred OPS benefits.

I also consider that the content of the October letter makes it more likely than not that Mr J was never provided with a written suitability letter before the transfer took place. Which means that it's unlikely he was ever made aware of the benefits he was giving up and the likelihood of his being able to match or improve on those benefits by transferring before his pension had been transferred.

After Mr J had complained to Norrix he asked them to provide him with a copy of the suitability report. Norrix responded by providing Mr J with a copy of a transfer analysis document and an accompanying email offering commentary on the transfer analysis. Which gives me further cause to believe that Mr J was never provided with a clear recommendation.

In response to my provisional decision, Norrix commented that the face to face advice provided by the referring IFA would have been clearer to Mr J. But I have no evidence of what that verbal advice would have contained. I agree that explaining a recommendation face to face is valuable. But in addition to a written recommendation. Not instead of one. And in this case it was Norrix that was qualified to make and provide this recommendation. Not the referring IFA. Without a clear written recommendation and supporting rationale, I can't say that the referring IFA explained to Mr J, what Norrix now says were the reasons that made transferring suitable.

In the absence of a clear recommendation with accompanying explanation why it was suitable, Mr J was unable to make an informed decision about his pension. Which I don't think was fair to Mr J. And didn't comply with the COBS guidance I've referred to. It also means that I can't say that Norrix did enough to determine, at the time, that the transfer was in Mr J's best interests. I have to decide whether this failing made a difference. Which means considering whether the transfer could have been considered suitable to his circumstances anyway.

Norrix have provided us with two copies of transfer analysis (TVAS) reports that were provided by its recommended personal pension provider. These are dated 17 May 2007 and I accept that they were produced for Norrix to be able to consider Mr J's transfer.

I've seen no evidence that Mr J was provided with either of these documents. Both reports say "*This report is directed at financial advisers and should not be distributed to or relied upon by private customers*". So I think that it's more likely than not that Mr J wasn't provided with either of these until he contacted Norrix much later to ask for a copy of his suitability report.

The copy that Norrix referred Mr J to, in place of a suitability report, compared his OPS benefits with those potentially achievable following a transfer of the higher CETV of £91,000. I'll refer to this as TVAS1. The second report compared his OPS benefits with those potentially available following a transfer of the lower CETV of £42,000. I'll refer to this as TVAS2.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our 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.

TVAS1 indicated that the investment return (critical yield) required to match the occupational pension at retirement was 6.6% per year. This compares with the discount rate of 6.5% per year to retirement age of 65 in this case. Whilst it is very close to being an achievable growth rate, the critical yield is slightly higher than the discount rate. And this is the return needed just to match the benefits being sacrificed. I would expect to see a realistic likelihood of being able to perform above the critical yield in order to improve on the benefits and make a transfer financially worthwhile. At best, TVAS1 highlights that a transfer of the higher CETV was borderline in terms of being able to match the OPS's benefits.

In assessing realistic returns for Mr J after this transfer, I would expect to see that Norrix had considered Mr J's attitude to investment risk. Norrix have been asked for evidence of its understanding of his attitude to risk and how it was assessed. The evidence it provided doesn't make it clear what Norrix considered Mr J's attitude to risk to be. It appears to have left this to Mr J's original adviser.

Norrix has explained that the referring IFA advised on the investments. But I would still have expected Norrix to have considered them to determine the likelihood that Mr J could improve his benefits following a transfer. Had Mr J had a low or cautious attitude to risk for example, then it would have been even less likely that he could realistically have achieved the investment returns needed to justify this transfer.

In this case though, Norrix didn't recommend that Mr J transfer in order to improve his benefits in retirement. It hasn't said that it considered that would have been the case. And

given the critical yield, and the discount rate, I don't think that there was a good enough chance that transferring from his OPS would improve Mr J's benefits in retirement.

I've given attention to TVAS1 initially as it is the analysis that Norrix used to justify its recommendation to Mr J in response to his complaint. Norrix have argued that it was the fairer comparison to use. And I'm not convinced that it can be fairly interpreted as indicating that a transfer of the higher CETV was financially viable. But Mr J didn't transfer the higher CETV. He took the option of an immediate cash incentive and the lower CETV. So I still don't think that Norrix's reliance on TVAS1 to justify its recommendation is reasonable. It ought to have considered the overall financial implications of its recommendation. Which was based on the transfer outlined in TVAS2, and Mr J's use of the enhanced cash payment.

The transfer that Mr J made, and was most likely recommended by Norrix, was highlighted in TVAS2. Unsurprisingly given the reduced transfer value, it showed a much higher critical yield figure of 10%. Which was significantly above the discount rate I referred to above. And higher than the higher industry projection, at the time, of 9%. Which meant that it was highly likely that the recommended transfer from his OPS was going to leave Mr J with a much lower pension in retirement.

The main purpose of a pension, and therefore pension planning, is to provide access to income in retirement. On face value, the transfer that Mr J made would leave him with lower benefits in retirement, so wasn't obviously suitable.

Norrix have rightly pointed out that the option Mr J took gave him access to an immediate cash lump sum. Norrix should have assessed the value of that so that Mr J was able to understand the impact on his future benefits. But I've seen no indication that Norrix considered that in any detail, nor that Mr J was given any such explanation.

Norrix have been asked for a record of its fact-find with Mr J. It provided brief handwritten notes from the referring IFA. They're undated, but the information on it appears to relate to the circumstances at the time so I accept that it's likely that it was from the time of advice. I don't think that it provides any depth of understanding for Mr J's circumstances.

It indicates that Mr J had an outstanding mortgage around £57,000, with monthly repayments of £530. But provided no comment on income or expenditure. Mr J had been made redundant in December 2006 from the ceding OPS's employer. Which Norrix knew. But Mr J explained to our investigator that he wasn't out of work for very long. He had a new job by January 2007, as well as the redundancy settlement he'd received.

Norrix ought to have known this. COB 5.2.5R, at the time of the advice, placed the following obligation on Norrix:

*"Before a firm gives a personal recommendation concerning a designated investment to a private customer, or acts as an investment manager for a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide. "*

I think that it was of great importance to understand what income Mr J had. In addition to his other assets that had been identified, it had a direct bearing on whether or not Mr J needed the cash incentive.

It appears that Mr J used the cash incentive that he obtained from transferring his pension, along with redundancy money and other savings to pay off his mortgage. He's explained that

this was something that he did because he could. The money was potentially available. And I've no doubt that it was an attractive proposition at the time. But just because it may have sounded like an attractive idea to Mr J, that wasn't a reason to recommend it. The purpose of seeking professional advice was to get expert opinion on whether it was suitable for him.

He'd found new employment very quickly after his redundancy. Which Norrix ought to have established. And he had £20,000 from his redundancy settlement, which Norrix knew. I'm not convinced that, on balance, Mr J had a pressing enough need for the up front cash lump sum to warrant giving up his valuable deferred OPS benefits.

Norrix have said that its advice helped a client that faced being unable to repay his mortgage. But I don't agree that the evidence points to that. Based on the evidence I've referred to, I consider that it's more likely than not that Mr J was able to meet his expenditure. I accept that the idea of repaying his mortgage early was attractive, in the same way that it would be to most people with a mortgage. But whether it was suitable or not would have depended on an understanding of what he was actually giving up in the long run for that luxury. Norrix didn't provide Mr J with that advice. So, In the absence of a genuine and immediate need for the cash lump sum, I can't see that transferring the deferred benefits in his OPS was a suitable recommendation.

For the reasons I've given, Norrix failed in its regulatory responsibility to provide Mr J with a well-considered and suitable recommendation. If it had, it should have advised Mr J that it would have been more suitable to keep his deferred benefits. Mr J sought advice that was independent from the advice on offer by his OPS. I don't think this indicates someone who wanted to transfer regardless of advice. And I don't think he had an immediate need for the incentive payment that would have overridden clear and well explained financial advice not to transfer. So I think that it's more likely than not, that he'd have followed that advice, and stayed in his OPS.

### **Putting things right**

A fair and reasonable outcome would be for Norrix to put Mr J, as far as possible, into the position he would now be in but for the unsuitable advice.

In my provisional decision I proposed putting things right in line with the FCA guidance for such cases. Norrix has instead asked me to consider a deferred annuity to Mr J's OPS retirement age. It highlights the uncertainties in future inflation, fund growth and annuity rates that make such a calculation complex. These issues are fair, but have been considered by the regulator in its guidance. In a case such as this, I'm unable to return Mr J to his OPS, so any redress is intended to put Mr J, as far as is now possible, into the position he'd have been. I'm satisfied that the issues that Norrix raise are accounted for in the regulatory guidance on redress for such cases.

Norrix must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance (FG) 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. I recognise Norrix's concern at the way I proposed to address the cash incentive in my provisional decision, so think that the mechanism that already exists within FG 17/9 to deal with this is fair and addresses that.

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr J's acceptance of the decision.

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

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

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.

**Determination and money award:** I require Norrix to pay Mr J 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 Norrix to pay Mr J any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Norrix to pay Mr J any interest as set out above on the sum of £160,000.

**Recommendation:** If the compensation amount exceeds £160,000, I also recommend that Norrix pays Mr J the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr J.

If Mr J accepts my decision, the money award is binding on Norrix. My recommendation is

not binding on Norrix. Further, it's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J may want to consider getting independent legal advice before deciding whether to accept this decision.

### **My final decision**

For the above reasons, I uphold Mr J's complaint.

I direct Norrix Financial Services Limited to compensate Mr J in the manner that I set out in '*Putting things right*' above.

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

Gary Lane  
**Ombudsman**