DRN-3546928

The complaint

Mrs R complains about the advice given by Holborn Assets Ltd to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her. She says she was told that she would get a better pension at retirement, but this probably won't be the case. Mrs R says she wasn't told about the risk of the transfer. She believes it has caused her a financial loss.

What happened

Mrs R says she was approached by a financial adviser, via a cold call, and they discussed accessing her pension. But she says this adviser was unable to give her regulated financial advice.

Mrs R says that after this she contacted her employer and received contact details for another adviser. This adviser was unable to give her DB pension transfer advice but did give her Holborn's details. In 2016, Holborn became involved as it was authorised to give advice about DB pension transfers.

Holborn carried out an assessment of Mrs R's attitude to risk, which it said was 'low medium'. Holborn also looked at her capacity for risk and it said that small / medium losses could be tolerated. The fact find recorded that she had very little understanding, or knowledge, of risk bearing investments.

On 22 August 2016, Holborn advised Mrs R to transfer her pension benefits into a personal pension with Royal London and invest the proceeds The transfer proceeded on 13 October 2016 and Mrs R transferred £44,877. She took immediate tax-free cash of £11,219 and invested the remainder into one of its managed funds. I understand Mrs R has now withdrawn the remainder of the transfer.

The suitability report said the reasons for this recommendation were:

- Mrs R had a family history of poor health, and she was concerned that she may not live long enough to benefit from the DB scheme.
- She wanted to use the tax-free cash to repay her shorter-term debts and her mortgage arears. This would also reduce her monthly outgoings.
- She wanted some flexibility in her retirement arrangements and the death benefits her pension could provide.
- Mr and Mrs R wanted to make some home improvements.

Mrs R complained in 2021 to Holborn about the suitability of the transfer advice. She said, via her representative, that:

- There were no actual health reasons for the transfer, Holborn relied on the adverse health within her family.
- It was her only private retirement pension so she didn't want to risk it.
- She had a low attitude, and tolerance, for risk and she didn't understand the pension transfer process. The advice concentrated on the tax-free cash she could release.

- Her want to reduce her debt was not, in itself, a good reason to transfer her DB scheme benefits.

Holborn didn't uphold Mrs R's complaint. It said it wasn't incorrect to focus on her health, given her family history of heart problems. And she was able to reduce her debt, and the monthly repayments with the transfer. This was important given her past experiences with debt. The transfer met her requirements at the time. And Mrs R was fully informed about the details and the risk of it.

Mrs R referred her complaint to our service. An investigator upheld the complaint and recommended that Holborn pay compensation. He said the personal pension was likely to provide lower retirement benefits for Mrs R, so the transfer wasn't suitable for this reason. And whilst there was a history of poor health in the family it wasn't clear that Mrs R's life expectancy would be curtailed. Lastly, she didn't need to transfer to repay any debts or improve her home.

Holborn disagreed, saying that:

- The DB scheme wasn't a significant part of Mrs R's retirement planning, it was small when compared to the state pension. So, she was not reliant on this pension for her retirement income.
- The fund has performed well.
- The fact that Mrs R has dissipated the fund shows that she did not need it in retirement.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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 taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The excerpts below are not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Holborn's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Holborn should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs R's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

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.

The investment return (critical yield) required to match the occupational pension at her retirement date of 65 was 11.12% if Mrs H took the same pension as the scheme would provide. If she took the maximum tax-free cash and a reduced pension this was reduced to 9.28%.

This compares with the discount rate of 3.2% per year for nine years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

Holborn didn't complete a full cashflow analysis but it did note that if Mrs R withdrew the same income from the fund as the DB scheme would provide it would run out at her age 87 if she took a full pension. And at age 91 if she took tax-free cash and a pension.

I've taken this into account, along with the composition of assets in the discount rate, Mrs R's attitude to risk and also the term to retirement. I think Mrs R was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement, as a result of investing in line with her attitude to risk.

Also, as Holborn will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

Holborn has said that the fund performed well. But the relevant comparison here is whether Mrs R can match her scheme benefits. And the fund performance that Holborn has referred to is still lower than the critical yields. And this is a hypothetical figure anyway as Mrs R's money is no longer invested.

For this reason alone, a transfer out of the DB scheme wasn't in Mrs R's best interests. Of course financial viability isn't the only consideration when giving transfer advice. And Holborn noted at the time of sale that the transfer was unlikely to provide the same benefits as the DB scheme. But it says there were other considerations which meant that the transfer was suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

One of the main reasons that the transfer was recommended to Mrs R was that she wanted to use the fund flexibly to repay some debt. This would put her, and her partner, on a better financial footing.

Holborn has said that Mrs R would have been able to reduce her outgoings by repaying her mortgage arrears and her other short-term debt. And this would save her £230 a month over the next few years. And this would make things a bit easier for them going forward.

But as I've outlined above, this transfer would leave Mrs R materially worse off in retirement. So, in order for the transfer to be in her best interests there needed to an immediate and pressing need for this tax-free cash. I don't think this is the case here.

I can accept that Mrs R had some debts and she needed to be careful to make sure these were repaid. But it seems there was no current repayment problems and the difficulty Mrs R had with credit seems to have been before the time of advice. She and Mr R were repaying the mortgage arrears and the modest amount of other debt she had. The fact find recorded that they were living within their means. So, I don't think there was an immediate need for the transfer, it was more of a 'nice to have'.

And Mrs R was giving up a pension of £3,315 a year to do this. This would be payable from her age 65 and was guaranteed and increasing. So this seems to me to be a very short-sighted thing to advise Mrs R to do. She was giving up a reasonable income in the future to repay these modest amounts of debt. I don't think she needed to do this, and I don't think this was in her best interests. And I think that Holborn should have been aware that it wasn't appropriate to transfer a DB scheme to pay down debts that are being repaid.

It was noted that Mr and Mrs R might want some funds for home improvements. But there isn't any detail about this, or any indication that it was urgent. So, I'm also not persuaded that she needed to transfer for this reason.

Holborn has said that Mr and Mrs R needed £19,200 per year in retirement. This seems to be based on their current budget less their mortgage. The section on the fact find about their likely expenses in retirement wasn't completed. Holborn has gone on to say that this was very close to the amount of state pension her and Mr R would receive. And so, they didn't need the income from this DB scheme.

But I don't think this was good reason to transfer her DB scheme. Whilst Mrs R's pension provision was limited it wasn't in her best interests to limit it further, and for her to potentially receive a lower retirement income.

So, I don't think Mrs R required flexibility in retirement. This is because based on the evidence I've seen; I don't think she had a genuine need to access her tax-free cash earlier than the normal scheme retirement age and leave her funds invested until a later date. I also can't see evidence that Mrs R had a strong need for variable income throughout her retirement. This was mentioned at the time of sale but not in any detail.

Overall, I think Mrs R could have met her retirement income needs by remaining in the DB scheme and taking an income and some tax-free cash if she needed it.

Mrs R's health situation and death benefits

It was documented that one of the primary reasons for the transfer was Mrs R's concern about her health and how this would impact on her ability to take benefits from the plan.

Her family had a history of poor health, and this had led to some of them not living as long as might be expected. It was assumed that these issues may also affect Mrs R. So Holborn says it advised her to transfer away from the DB scheme to maximise the benefits she could receive from it. Because if she were to die before it became payable she wouldn't benefit from it at all.

But I'm not persuaded that this is reasonable. I'm sure her relative's health was a concern for her. But the information supplied about her, rather than her family, was that she was in good health. I think Holborn needed some kind of indication, other than her general worry about her family's health, that she had a reduced life expectancy in order to make this transfer appropriate for this reason. Particularly as Mrs R now says she didn't have any serious health problems.

And death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension were likely an attractive feature to Mrs R. But whilst I appreciate death benefits are important to consumers, and Mrs R might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs R about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Holborn explored to what extent Mrs R was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mrs R was married and they had one dependent child. And so the spouses and dependent's pensions provided by the DB scheme would've been useful to them if Mrs R predeceased them.

I don't think Holborn made the value of this benefit clear enough to Mrs R. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, the fund may have been depleted particularly if Mrs R lived a long life. In any event, Holborn should not have encouraged Mrs R to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Mrs R genuinely wanted to leave a legacy for her spouse or children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think Holborn should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mrs R. And I don't think that insurance was properly explored as an alternative.

Suitability of investments

Holborn recommended that Mrs R invest in one of Royal London's managed funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs R, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs R should have been advised to remain in the DB scheme and so the investments in the Royal London funds wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs R. But Holborn wasn't there to just transact what Mrs R might have thought she wanted. The adviser's role was to really understand what Mrs R needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs R was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs R was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mrs R shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable, and the potential for higher death benefits wasn't worth giving up the guarantees associated with her DB scheme.

So, I think Holborn should've advised Mrs R to remain in her DB scheme.

Of course, I have to consider whether Mrs R would've gone ahead anyway, against Holborn's advice.

I've considered this carefully, but I'm not persuaded that Mrs R would've insisted on transferring out of the DB scheme, against Holborn's advice. I say this because Mrs R was an inexperienced investor with a low to medium attitude to risk and this pension accounted for the majority of Mrs R's private retirement provision. So, if Holborn had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

I'm not persuaded that Mrs R's concerns about her short-term debt and her health were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If Holborn had explained that Mrs R could meet all of her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs R would have insisted on transferring out of the DB scheme.

In light of the above, I think Holborn should compensate Mrs R for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mrs R whether she preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

She didn't make a choice, so as set out previously I've assumed in this case she doesn't want to wait for the new guidance to come into effect.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mrs R.

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

Holborn 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, Mrs R has not yet retired, and she has no plans to do so at present. So, compensation should be based on her normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs R's acceptance of the decision.

Holborn may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs R'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 R's SERPS/S2P entitlement.

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

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.

If the complaint hasn’t been settled in full and final settlement by the time any new guidance or rules come into effect, I’d expect Holborn to carry out a calculation in line with the updated rules and/or guidance in any event.

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 require Holborn Assets Ltd to pay Mrs R 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 Holborn Assets Ltd to pay Mrs R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Holborn Assets Ltd to pay Mrs R any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Holborn Assets Ltd pays Mrs R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs R.

If Mrs R accepts this decision, the money award becomes binding on Holborn Assets Ltd.

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs R to accept or reject my decision before 18 January 2023.

Andy Burlinson
Ombudsman