

The complaint

Mr G complains about the advice given by a firm now known as Towergate Financial (West) Limited ("Towergate") to transfer the benefits from his preserved defined benefit ('DB') occupational pension scheme to a personal pension. He says he was told to say that he wanted to go against their advice to get a lump sum, and as a result he's suffered a financial loss.

What happened

Mr G met with Towergate in September 2007, following an introduction via his employer, to discuss his pension and retirement needs.

Towergate completed a fact-find to gather information about Mr G's circumstances and objectives. Towergate also carried out an assessment of Mr G's attitude to risk, which it deemed to be balanced – a score of four on a scale of one to ten.

On 10 September 2007, Towergate advised Mr G *not* to transfer his pension benefits into a personal pension. The suitability report said the reasons for this recommendation were:

- The investment return needed to match Mr G's DB scheme's benefits was relatively high and as such was out of line with his stated attitude to risk;
- There were no compelling reasons given Mr G's circumstances to recommend he transfer his pension;
- The generally superior security of a DB scheme met Mr G's high priority to provide security of his pension fund; and
- The death benefits available before retirement through the DB scheme – 50% of Mr G's pension entitlement - met his priority to provide a spouse or dependants pension upon his death.

The same day Mr G sent Towergate a typed letter, which said that he wanted to go ahead and transfer his DB pension into a personal pension.

He said that, while he had received "*good advice*" he'd decided to take the taxable cash lump sum (representing an enhancement to the transfer value offered by his employer) to invest in a property development he was involved with.

On 7 November 2007 Mr G sent Towergate a further typed letter, which broadly repeated the contents of his letter of September 2007. But in addition it said that he'd received and read the suitability report but still wished to transfer out of his DB scheme into a personal pension.

On 22 November 2007 Towergate produced a second suitability report. The report repeated the reasons why Mr G should not transfer his pension. But it went on to say that because he had insisted upon transferring, its recommended solution was to transfer to a personal pension, which would provide investment choice, flexibility, and greater lump sum death benefits.

In October 2017 Towergate wrote to Mr G to tell him that as part of some work carried out by

the Financial Conduct Authority (FCA) in relation to pension transfer advice, it was carrying out a review of some of its past pension advice, which Mr G chose to be included in. On 7 January 2020 Towergate wrote to Mr G to say that its review of the advice he was given showed that he was told not to transfer his DB pension but that he knowingly acted against that advice. It said it wouldn't therefore be offering any redress.

Mr G referred his complaint to our service.

I issued my provisional decision of June 2022 in which I said I was likely to uphold the complaint because I didn't think Mr G could reasonably be regarded as an insistent client and I didn't think he would've gone ahead if everything had happened as it should have. I invited both parties to let me have anything they wanted me to consider in response before I issued my final decision.

Mr G said he accepted my provisional decision.

Towergate said that it wouldn't be raising any objections to my provisional 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 am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold this complaint and I direct Towergate to put things right. My reasons are set out below.

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 Mr G's best interests (COBS 19.1.6).

A key aspect in this case is Towergate's categorisation of Mr G 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 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 Mr G had to have understood the consequences of going against the recommendation.

In its first suitability report, Towergate recommended that Mr G should not transfer away from his DB scheme.

It said this was because the critical yield or investment return needed to match the benefits of his existing scheme was too high and not in line with his 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.

In its second suitability report, Towergate repeated its warnings that the pension transfer was unsuitable for Mr G. The report then said that Mr G had decided he 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 Mr G's risk profile.

This would suggest that Towergate provided two suitable recommendations to Mr G.

But Mr G says that he was guided and advised throughout the process of accessing the cash incentive, to the point of being told what to write in the instruction letters to insist it went ahead. He says he understands from the paperwork he signed that it looks as if he went against the advice he was given - but he was told he had to do it this way to get the lump sum.

Having considered all of the evidence presented, while Towergate's initial suitability report did set out that its recommendation for Mr G 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 Mr G's best interests. And I think it's likely that Mr G understood or believed overall that Towergate was recommending he should go ahead with the transfer.

I say this because in the first suitability report immediately underneath the summary of why Towergate recommended Mr G should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Towergate's advice, it explained the steps Mr G needed to take to do this, including writing a letter saying why he wanted to pursue this option. I'm also mindful that, when setting out Mr G's options for his pension, the first and second options presented to him involved him transferring his benefits out of the DB scheme - remaining in the scheme was the third option.

I think if Towergate was confident in its advice and recommendation and it was acting in Mr G's best interests, it wouldn't have told him at the same time as delivering its recommendation how he could readily put it aside and bypass it. I think the wording and the emphasis placed on how Mr G could ignore Towergate's recommendation was unfair to Mr G and wasn't in his best interest.

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

I think it should have been clear to Towergate that Mr G had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr G was an experienced investor – in fact there's nothing to indicate he had any prior investment experience. I think this alone should've put Towergate on notice that it had to be careful if it was to take matters through the insistent client route.

Mr G says that he was guided and advised by the adviser of what to write in the insistent client letters – he says he was told this is what he had to do to get the lump sum from his pension.

I accept it's possible Mr G was told what to write as he says. For example the second letter appears out of context because although it's dated in November 2007 it refers to Mr G only having received the suitability report from September, which doesn't make sense. But even if they are his own words, both letters are short and lack detail about what he understood about the recommendation made. While I acknowledge it wasn't a requirement at the time, given Mr G's apparent financial inexperience, I think it would've been important for Towergate to ensure he understood what he was getting into. And a good way to have done

this would've been to see in his own words that he understood the recommendation being made. I'm not persuaded that reference to having simply received "*good advice*" reasonably indicates this was the case.

So I'm not persuaded that Mr G was able to make an informed choice here. I also think that given Mr G's explanation about why he wanted to proceed – he said he wanted to invest the lump sum in a property development - it ought to have prompted Towergate to ask further questions.

But instead Towergate produced a second suitability report, which I think was misleading and confused matters. I say this because, despite it repeating the recommendation not to transfer out of the DB scheme, it then proceeded to give a positive recommendation, advising Mr G to transfer his 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 Mr G advice on the overall suitability of the transaction envisaged i.e. the transfer and the choice of pension and investment. Instead, it first gave Mr G advice on the advice to transfer, and only considered the suitability of the proposed alternative in the second suitability report after securing Mr G's confirmation to proceed on an insistent client basis.

So, by recommending that Mr G transfer his benefits to a particular scheme, I think it has effectively recommended that he transfer out of his DB scheme.

If Towergate didn't think that transferring out of the DB scheme to a personal pension was in Mr G's best interests, it needed to ensure that it gave clear advice that the whole of the transaction was unsuitable for him - it couldn't separate out the elements. For this reason, I think on receipt of the second suitability report Mr G likely believed Towergate was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

I also think that, given what Mr G said he intended to do with the lump sum from his pension, I think this ought to have been documented in his advice paperwork so that when it delivered its recommendation to Mr G, it was clear that Towergate didn't think it was suitable advice to transfer from his DB scheme to a personal arrangement for what was the apparent sole purpose of raising funds for a potential property investment.

I'm not persuaded that this was a real or set objective of Mr G's. And I think this is likely the reason why there is no reference to it in the advice paperwork. I say this because Mr G says that reference to him wanting to invest in a property development only came about following a discussion with the adviser. He says a discussion took place about investing the lump sum if he was to take it, and that it was the adviser who planted the seed that an investment in property might be a good idea. But Mr G says it was just thoughts and ideas at this stage and no actual plans were made. This is contrary to what Mr G's insistent client letter said – this said he was already involved in a property development.

But if it was a true objective, in acting in Mr G's best interests, I think Towergate should have gathered more information from Mr G about his intended investment plan to better understand the position – if only to suggest that there might be other ways he could achieve his objective before continuing to facilitate an irreversible transaction to transfer his pension.

I'm mindful that there were no specific insistent client rules in place 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 Mr G's best interests. And by not seeking to fully understand Mr G's objective or to clearly communicate that there might be other things he could consider before carrying things out – for example was there a possibility of borrowing the funds he needed by way of a mortgage or other loan type - I'm not persuaded this was acting in Mr G's best interest. Ultimately, I don't think he was able to make an informed choice here – it seems to me that Mr G most likely went ahead with the transfer as he believed this was the only way to meet his objective. And also because Towergate actually gave him a positive recommendation to transfer out of his DB scheme in the second suitability report, which I think would've given Mr G the impression that Towergate agreed with his approach.

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 Mr G can truly be regarded as an insistent client. Towergate's communications overall weren't clear or fair. I don't think it acted in Mr G's best interests. And I think it failed to act with due care and skill.

If Towergate had acted fairly and reasonably, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, properly addressing Mr G's objective, I don't think Mr G would've insisted on going ahead with the transfer. As I've outlined above, I think Mr G was an inexperienced investor who didn't possess the requisite knowledge or had the confidence to go against the advice he was given. I'm also not persuaded that the Mr G's alleged plans for an investment in property was set in stone or something he had firm plans for at the time, such that he would have gone ahead and transferred in any event. I think Mr G relied *solely* on the advice and process Towergate employed – so if things had happened as they should have, I don't think Mr G would have insisted on going ahead with the transfer.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for Towergate's unsuitable advice.

I consider Mr G would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

I therefore 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.

For clarity, because it is my understanding that Mr G could've taken benefits from his DB scheme at age 60 without reduction, I think compensation should be based on a retirement age of 60.

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 G's acceptance of the final decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid

into Mr G'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 G 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 Mr G within 90 days of the date Towergate receives notification of his acceptance of any final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of a final decision to the date of settlement for any time, in excess of 90 days, that it takes Towergate to pay Mr G.

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 Mr G 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 Mr G 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 Mr G 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 Mr G the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

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 Mr G can accept a final decision and go to court to ask for the balance. Mr G 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 Mr G to accept or reject my decision before 19 July 2022.

Paul Featherstone

Ombudsman