DRN-3568873

The complaint

Mr N has complained that Quilter Financial Planning Solutions Limited, trading as Positive Solutions, gave him incorrect advice about the retention of protected tax free cash (PTFC) before transferring his occupational pension scheme in order to access the tax free cash. This resulted in him losing his protected tax free cash entitlement.

The entity which provided Mr N with the advice was called Redwood Financial, but I'll refer in this decision to the company of which it was an appointed representative – Quilter.

What happened

Mr N had accrued pension benefits in his former employer's defined contribution scheme, amounting to approximately £1.1m. He also had a pension plan with another provider valued at around £1.04m.

In January 2019, a fact find was completed by Mr N's adviser at Quilter, and it was established that Mr N wished to release the maximum available pension commencement lump sum (tax free cash), citing concerns about possible changes in pension legislation.

Mr N had a PTFC entitlement of 26.77% with his defined contribution scheme, rather than the standard 25%. The adviser noted that, due to Mr N's considerable other assets, he didn't want to draw an annuity from the scheme and that, at present, any transfer out would result in Mr N losing his PTFC entitlement.

However, the adviser also noted that a drawdown facility would shortly be in place later in 2019, at which point he said Mr N could then withdraw his PTFC.

The scheme administrator wrote to Mr N on 10 May 2019 saying that a new scheme had been set up to facilitate flexi drawdown, but it also confirmed that the PTFC would be lost through a transfer into that arrangement.

It seems, however, that the adviser nevertheless considered that the PTFC entitlement would persist and advised Mr N to proceed with the transfer.

In a further call between the adviser and the scheme administrator on 30 May 2019, the administrator clarified that the PTFC would be lost on transfer, but although the call note recorded that the adviser hadn't been aware of this, he said that this was the only way in which Mr N could access the tax free cash as he didn't want to receive an annuity.

On 5 June 2019, the administrator emailed Mr N to confirm that the transfer had completed.

Mr N subsequently learned that he had lost his PTFC entitlement, and although some potential solutions were suggested to resolve this, they weren't workable.

Mr N then complained to Quilter, saying that due to its error, he had lost the additional PTFC entitlement of £19,599, and that, as he could no longer rely on its advice, he'd appointed another adviser at a cost of £11,000. He also said that his pension funds had been invested in cash for over eight months, with the associated loss of growth over that period.

In the meantime, the scheme administrator amended the rules to allow members to transfer their pension fund into a drawdown arrangement and also take PTFC. However, this wasn't retrospectively applied to Mr N's transfer.

Quilter didn't uphold the complaint, however, saying the following in summary:

- The scheme administrator had led its adviser to believe that the transfer would be an internal transfer and would allow Mr N to keep his PTFC entitlement. The adviser acted on this, but was unable to evidence that he'd been given that information

- It upheld Mr N's complaint, but concluded that he hadn't been financially disadvantaged. It said this was because, on the basis that Mr N's overall pension funds exceeded the fixed protection (FP14) in place, the PTFC would need to have been taken from the scheme first to ensure its retention. But Mr N had been adamant that he should take funds from his other pension plan before this. This would have resulted in a significant amount of Mr N's tax free cash entitlement in any case being lost.

- It also added that the only way Mr N could have taken the PTFC amount was by also buying an annuity, which Mr N didn't want to do.

- It said it wasn't responsible for Mr N's funds remaining in cash, as the adviser couldn't provide advice on buying or selling shares - and this had been explained in the suitability report.

- Quilter also said that it wasn't prepared to reimburse any fees paid to Mr N's new adviser, as instructing a new adviser was his own decision. Mr N would have been aware of the costs involved before proceeding, it said.

- However, Quilter did propose to refund the ongoing advice charges that had been taken from Mr N's other pension plan for the period 17 May 2019 to 15 November 2019. A notional return would be added to this to reflect any missed investment growth on these charges.

- A further sum of £500 was suggested, to compensate for any trouble and upset caused. The total offer was £2,111.

Mr N was dissatisfied with the response, however, and referred his complaint to this service. One of our investigators considered the matter, but said that he didn't think the complaint should be upheld.

In support of that position, the investigator said, in summary, that there was no dispute that incorrect advice had been given relating to the PTFC. But he concluded that, on the basis that Mr N was keen to access the tax free cash (given possible changes in legislation) and had no need for an annuity, he would have proceeded even if he'd been aware that the PTFC entitlement would be lost.

He acknowledged that the loss of nearly £20,000 wasn't an insignificant sum, but he didn't think that Mr N's standard of living – given other available assets – would have been impacted by this. But if a change in legislation had resulted in the removal of the tax free cash entitlement, this would have had a significant impact on Mr N.
In terms of the reimbursement of the fees paid to Mr N's new adviser, the investigator noted Mr N's comment that he had moved advisers due, in part, to his experience relating to the PTFC, but also as the adviser didn't offer a bespoke investment service. It was important to Mr N that his funds were professionally managed, the investigator said.

But he said that the advisory function required before a subsequent move to a new proposition from the defined contribution scheme would in any case have incurred a cost to Mr N, whether it was provided by Quilter or by a new advising firm. It had been Mr N's choice to switch to a new firm, but the investigator thought that he could instead have requested to be allocated a new adviser within Quilter. As such, he didn't think that the fees paid to the new adviser should be refunded.

As to the issue of the loss of investment growth, the investigator didn't think there had been a need for Mr N to have retained his pension funds in cash whilst discussions were ongoing about a resolution of the matter relating to the transfer and the loss of the PTFC. Although he understood that Mr N may have wanted his funds to remain liquid at the time, he considered that this was Mr N's personal choice.

He also noted the refund of fees in respect of Mr N's other pension plan, along with a notional gain on them, and the £500 payment in respect of the trouble and upset that the matter would have caused to Mr N. And he thought that this was appropriate in the circumstances.

Mr N disagreed, however, saying the following in summary:

- There could be no dispute that the reason he didn't transfer to a different drawdown facility was the prospect of being able to transfer within his ex-employer's arrangement and retain the PTFC.

- He hadn't been aware of the 30 May 2019 phone call between the administrator and the adviser – he only found out that he'd lost the PTFC entitlement later from the scheme administrator.

- He'd received a letter from the scheme administrator in September 2019 confirming that his PTFC entitlement remained. This hadn't been taken into account.

- When the adviser realised what had happened, he worked with the scheme administrator to change the scheme deed on the basis that previous advice it had receive on this had been incorrect. The deed had since been amended so that members could transfer and retain their PTFC, and it must be assumed that this would have applied to him as well.

- With regard to his concerns about a change in legislation, this was before the spring budget in 2019, but once he learned that a transfer would be possible within the employer's in house arrangements later that year, he decided to take the risk of not transferring to a different drawdown plan at that point. And he didn't transfer after this as he believed that the position was going to be put right.

- As to the loss of growth on his pension funds whilst in cash, he said that it had been assumed that he would know how long it was going to take to resolve. After the error, he'd assumed that it would be resolved in a few weeks, as was confirmed by the administrator's letter stating his PTFC entitlement in September 2019. But he didn't actually receive cash from the scheme until mid-February 2020.

- In respect of the new adviser fees, Mr N said that the whole matter had caused him many hours of work and stress, and the prospect of remaining with Quilter and appointing another adviser was unpalatable. He felt that, under the circumstances, he had no option other than to engage a new advisory firm.

The investigator acknowledged Mr N's points and replied, saying that he remained of the view that the adviser should have clarified the position with regard to the PTFC before the transfer. And it was clear that Mr N wouldn't have bought an annuity to otherwise secure it.

He also noted the change in the scheme's position relating to the PTFC entitlement for members, but said that it had indicated that this change had occurred because of Mr N's experience. He couldn't be certain that the change would have occurred but for the adviser's challenge to the position - or that this challenge would have materialised but for the unfortunate position which emerged from his advice to Mr N.

The investigator added that, if Mr N thought that the scheme had reneged on an offer to pay the PTFC, this was something that he could raise with the Pensions Ombudsman.

He also wasn't persuaded to change his view on the issue of any lost fund growth, saying that Mr N could have mitigated his position at any point.

Mr N still disagreed, however, saying that it was disingenuous to conclude that the scheme would have changed the deed for all members excluding him, had his adviser not complained on his behalf. It was only through the complaint made by his adviser that the scheme realised that the previous advice they'd received on the matter was wrong, and it was a leap of faith to say that the scheme would have changed its mind by itself. This would only have arisen because of the pressure from Mr N and his adviser.

As agreement wasn't reached on the matter, it was referred to me for review.

I issued a provisional decision on the complaint on 31 May 2022, in which I set out my reasons as to why I considered the complaint should be partially upheld. The following is taken directly from the provisional decision:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'd firstly echo the opinion seemingly expressed by all parties here, and including our investigator, in that an error was made by the adviser in conveying the impression that Mr N would still receive the PTFC if he transferred within the "in house" scheme arrangement.

This then leaves the position of loss to be considered, and whether this is mitigated by a conclusion as to what, on balance, Mr N is more likely than not to have done if he'd been made aware that the transfer would result in the loss of the PTFC.

I've firstly noted the point made by the business that Mr N was adamant that he should take the tax free cash from his other pension plan, even though this had consequences for the PTFC he could take. But whilst its response to the complaint may have made it clear that, by not taking the PTFC first, he would be forfeiting any enhancement beyond the usual tax free cash position as dictated by the lifetime allowance, I don't think the available evidence – namely the suitability report - supports the position that this was made clear to Mr N at the time.

And so I'm not persuaded by the argument that Mr N was determined to take the tax free cash first from his other pension plan in the knowledge of the effect that this would have on his overall tax free cash entitlement.

I also don't think that it could be reasonably concluded that Mr N had a great sense of urgency to take the maximum tax free cash from either of his pension plans in case of a *change in legislation. I appreciate that this may have been a concern for Mr N, given the amounts at stake, but I do think, as Mr N suggests, that his own ability to manage that concern is borne out by his decision to wait until the scheme would (as it seemed to the adviser at least) establish an arrangement later in the year to accommodate a transfer and the payment of the full PTFC.*

So I don't think that it's clear cut as to what Mr N would have done, had he known that the PTFC would not be paid after a transfer. I've therefore carefully considered the facts of the case to determine, on balance, what I think is more likely than not have been the case.

Mr N's adviser was clearly of the view, in the run up to the transfer, that Mr N would still benefit from the PTFC once his funds had been transferred "in house". This was the very reason as to why Mr N was advised to wait until the new recipient in-house scheme had been established before transferring.

And so an expectation of a transfer and the PTFC had been created, irrespective of how legitimate that expectation may have been. On that particular point, and whilst I appreciate that the information which led him to believe that this would be the case cannot be produced, I think it's unlikely that the adviser simply imagined this scenario.

But if, prior to the transfer occurring, it had been made known to Mr N that this was no longer the case, I think it's more likely than not that both he - and then his adviser - would have challenged this. And I think Mr N would have opted to place the transfer on hold until the outcome of this challenge was known.

Mr N's adviser was seemingly quite effective, after the transfer, in putting the case to the scheme administrator/trustees that it would be in all members' best interests to allow them to take PTFC and then transfer the remainder to a drawdown arrangement. The vociferousness with which this occurred on behalf of Mr N's adviser may well have been influenced by the complaint which was being brought by Mr N, but I think it's fair to assume that he might have acted in a similarly compelling manner even if a complaint wasn't ongoing. And I don't think Quilter would suggest that there might have been any less effort placed in acting on a client's best interests simply because it wasn't in the process of defending a complaint.

So I think that both Mr N and his adviser would have robustly challenged the decision previously made by the scheme. And on the basis that it then changed its stance without, as far as I can tell, too much resistance, I think it's more likely than not that it would have also appreciated the benefit to all members on the basis of what Mr N was trying to achieve, rather than on the back of what had already happened.

I think it's also worth noting in support of the position that the scheme wouldn't only have acted in this way in response to a complaint situation that there was no complaint about the scheme, nor was it seemingly considering any concessionary payment to Mr N before changing the deed. It seemingly decided to allow the withdrawal of PTFC and then drawdown on the basis that this was fair to its valued members.

And if it decided to allow the withdrawal of PTFC and a transfer into drawdown, this would in all likelihood have applied to Mr N as with all other members. There's no reasonably conceivable circumstance in which Mr N might have been excluded from that provision, especially if he and his adviser had been the genesis of the endeavour in the first place.

Therefore, whilst I agree with the investigator's point that the change in the scheme provisions to allow PTFC to be taken and then for members to move into drawdown came about after Mr N's experience with the transfer, I don't think this was the only way in which such a change could or would have been effected.

And so I'm currently minded to conclude that Mr N would have followed just such a course of action, and would have paused the transfer whilst further efforts were made to persuade the scheme that a change of stance was required. And given my view that this would have resulted in a similar change in the scheme rules, I think Mr N would then have transferred and capitalised on the higher PTFC amount.

I do, however, have a similar view to that expressed by the investigator on the lack of investment exposure of Mr N's pension funds to financial markets for the months following the transfer. I take Mr N's point about not knowing how long it might take to resolve the matter, and not wishing to face the cost of what might be short term investment, but I think when it transpired that this wasn't going to be quickly resolved, then he could have taken matters into his own hands.

And if the scheme administrator's letter of September 2019 offered him false comfort as to the likely retention of the PTFC and therefore stayed his hand, as with the investigator, this is something he would need to raise with them – and ultimately if dissatisfied with its response, refer to the Pensions Ombudsman.

But Mr N will also note my specific reference to "investment exposure" used above, rather than "investment growth". And whilst this doesn't influence my overall view on the matter of whether any investment losses should be met by Quilter, I'd ask Mr N to carefully consider the relatively flat performance, certainly of the FTSE 100, from the beginning of June 2019 to the end of February 2020 and the significant and sudden declines in financial markets from late February 2020 onwards. It's unclear to me exactly when Mr N reinvested his pension funds, but if he still had a cash holding at that point this might have been viewed with some considerable envy by those still invested in, for example, equities at that time.

I'm also broadly of the same view as the investigator in terms of the issue of the fees. I accept that Mr N may have been distinctly disillusioned by what had happened, and that he had no choice but to change his firm of advisers, but this was nevertheless his choice. It seems more likely than not that additional fees would have been required by Quilter for the provision of transfer advice, and I also note that Mr N has said he switched to obtain an investment management service which Quilter couldn't provide. And so it might well have been the case that Mr N needed to seek a new advisory busines in any case.

But I have in any case noted the refund offered, along with the £500 payment in respect of the stress and trouble caused to Mr N by the matter, which I accept will have been not insignificant. And I currently think that this is probably about right and in line with other types of award this service might make in similar circumstances.

<u>Putting things right</u>

As I've set out above, I think that, had Mr N been told that the PTFC wouldn't apply upon the transfer of his pension funds, he would have paused the transfer until further enquiries were made in this regard. And that once the matter had been pursued by both him and his adviser, the scheme would have reached the same conclusion as it ultimately did – in the interests of fairness to its members rather than because of a complaint from Mr N.

And so to put Mr N in a position as close to that he would otherwise have been, my current view is that Quilter should pay Mr N the difference between the tax free cash he received and the PTFC he would have received had the transfer been made, say, two weeks (providing a ten working day turnaround) after the decision was made to allow members to withdraw PTFC and then transfer into drawdown.

Mr N didn't in fact receive his tax free cash until mid-February 2020, due I understand, to the *ongoing attempts at resolution of the matter. Although if there were other reasons for this which need to factored in, I'd be grateful to be informed of these.*

As Mr N would in all likelihood have received his PTFC sooner than he received his normal 25% tax free cash, interest should be added on the entire PTFC amount he would have received at the rate of 8% simple pa from the date that it would have been paid (see above) up to the date that Mr N actually received the normal 25% tax free cash amount.

Quilter should also apply interest at the same rate to the difference in the two tax free cash amounts from the date that the PTFC would have been paid up to the date of settlement."

Neither party has submitted further comments in response to my provisional findings.

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.

My view on this matter remains the same, for the same reasons as set out in the provisional decision.

My final decision

My final decision is that I uphold the complaint. Quilter Financial Planning Solutions Limited, trading as Positive Solutions, should pay any loss to Mr N as directed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 27 July 2022.

Philip Miller
Ombudsman