DRN-3575876

The complaint

Mr D complains about the advice given by TSB Bank PLC (TSB) which is now part of Lloyds Bank PLC (Lloyds) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss. He says that TSB did give some information about the transfer but glossed over the negative aspects and made it seem like it was the right thing to do. This has not turned out to be the case.

What happened

Our adjudicator thought the complaint should not be upheld. Mr D disagreed with the adjudicator's opinion. The complaint was then passed to me.

I issued my provisional decision saying that Mr D's complaint should be upheld. A copy of the background to the complaint and my provisional findings are below in italics and form part of this final decision.

What I said in my provisional decision

Mr D says he met with a TSB adviser when he was doing some 'general banking' in a branch of Lloyds. He says that he met the adviser again, also in the branch, some months later to discuss his pension and retirement needs. I understand that Mr D had recently been made redundant from the business that his DB scheme was with. And he says he'd also had a serious accident. Because of these two things he was finding it difficult to find work. Mr D says he didn't return to work at any point before his state retirement age.

TSB completed a fact-find to gather information about Mr D's circumstances and objectives. It also carried out an assessment of Mr D's attitude to risk, which it said was 'medium'.

In the suitability letter, TSB advised Mr D to transfer his pension benefits into a personal pension and invest the proceeds into the TSB Managed Pension fund which I understand had a 'low to medium' risk profile. The suitability report said the personal pension was recommended as there was a chance it would outperform the DB scheme and provide higher benefits. It says that Mr D thought it was reasonable to transfer because of this.

Mr D complained in 2020 to Lloyds about the suitability of the transfer advice. He says he is worse off due to the advice and he wasn't made aware of the downsides. He thinks that if he had been made aware that his personal pension could be worth less than the DB scheme he wouldn't have transferred.

Lloyds didn't uphold Mr D's complaint. It said that there was a clear comparison between the DB scheme benefits he was giving up and the benefits, and risks, of the personal pension. Mr D proceeded after considering these.

Mr D referred his complaint to our service. An investigator didn't uphold the complaint. He said that the transfer was viable as there was a reasonable expectation that the personal pension would perform well enough to meet, or exceed, the DB benefits he was giving up. And Mr D had no need of the death or dependent benefits the DB scheme provided.

Mr D disagreed, his representative said that it was not certain that the transfer was viable as it was at the limit of what was considered a reasonable return for a medium risk investor at the time. And as this was his only pension planning, he couldn't afford to risk it. It also said that Mr D was unlikely to fully understand the advice he was given, and he probably wasn't a medium risk investor in any event.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to provisionally 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 provisionally decided to uphold the complaint.

The advice was provided by TSB in 1993. At this time it was a member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO).

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- *Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or*
- *Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.*

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

I've considered the advice given to Mr D with this in mind.

Financial viability

The advice was given during the period of the industry-wide Pensions Review, so the rates the regulator published for Financial Viability Tests are directly relevant here. The investment return (equivalent or critical yield) required to match the occupational pension at retirement was around 10.6% per year.

This compares with the upper limit the regulator gave for a Financial Viability Test of 10.6% per year for 17 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate 10.75%, and the lower projection rate 2% per year.

I've taken all into account, along with Mr D's 'medium' attitude to risk and also his term to retirement. There would be little point in Mr D giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

Looking at the documentation from the time of sale, the advice was given on the basis that there was a potential for the personal pension to 'outperform' the DB scheme and provide greater pension benefits at retirement. But this wasn't guaranteed, there was also a risk it would provide less, and looking at Mr D's circumstances I think the risk of the transfer providing lower benefits was greater than it was reasonable to advise Mr D to take.

Mr D's attitude to risk was described as medium. Mr D has provided some detail about his circumstances at the time of sale. As far as I can see, he had no prior experience of risk- based investments, either through personal investments or his employment. So, I don't think he would have clearly understood the equity risk he was taking on in the personal pension scheme.

And I don't think Mr D had the capacity to risk his DB scheme benefits. He had worked at the same employment since leaving school and this was the only pension provision he had accrued. As far as I've been made aware, he didn't have any other significant savings or financial assets. So, I don't think it was right to put what was the majority of his pension provision at risk.

Added to this, Mr D had recently been made redundant and he says it was uncertain at the time that he would be able to find work easily in the near future. So, he was at a financially vulnerable, and uncertain, time in his life. I think this was the wrong time to be making such a significant decision about this financial future.

So, taking all of the above into account, I don't think that Mr D was likely to have had a 'medium' attitude to risk at the time. I think it was likely to be much lower than this.

Mr D did have 17 years until retirement and so it's reasonable to say that he could be advised to take some risk over this time. But, I don't think this overrides the factors above that lead me to conclude that he should have been advised to take on an investment risk that was at the lower end of the risk spectrum.

In this case, given the critical yield was 10.6%, Mr D needed to follow at least a 'medium' risk investment strategy for the transfer to be worthwhile. He needed to invest in funds with a medium risk, or above, for the personal pension to be likely to keep pace with the DB scheme benefits. I don't think this would be right for him.

If Mr D invested in a fund (or funds) that had a lower risk than medium, it would likely provide lower returns. And this, in turn, would make it likely that Mr D would receive pension benefits of a substantially lower overall value than the DB scheme would provide at retirement. It's relevant that the literature from the time said that Lloyd's wouldn't recommend that a transfer proceed if Mr D had a low, or no, attitude to risk. I think this is closer to Mr D's likely tolerance to risk.

With this in mind, I think the recommendation to transfer out of the DB scheme was unsuitable for Mr D.

Flexibility and income needs

I don't think Mr D required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. There is no evidence from the time of sale that his was discussed and Mr D hasn't subsequently said he wanted to do this.

I also can't see any evidence that Mr D had a strong need for a variable income throughout his retirement. Again, this doesn't seem to have been discussed.

Under the DB scheme, Mr D was entitled to an annual income of £13,284 at 65. And the income planning was based around this. So, I'm satisfied Mr D could have met his income needs in retirement through the DB scheme at 65.

Furthermore, Mr D was only 42 at the time of the advice and based on what I've seen he didn't have concrete retirement plans. As Mr D had at least 17 years before he could think *about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr D later had reason to transfer out of their DB scheme he could have done so closer to his retirement.*

Death benefits

Mr D was divorced at the time and it was recorded that he had a child. I understand this child lived with his ex-partner, so Mr D wasn't directly financially responsible for him. He was also in a relationship and he says it was discussed that it may be more beneficial for any dependents he may have (in the future) if he transferred the DB scheme to a personal pension.

But the advice was given on the basis that Mr D had no dependents. And this doesn't seem unreasonable. So, overall, I don't think the possibly of different death benefits available through a transfer to a personal pension justified the risk of a decrease of Mr D's pension benefits.

Suitability of investments

TSB recommended that Mr D invest in the TSB Managed Pension fund. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr D, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr D should have been advised to remain in the DB scheme and so the investment in the TSB Managed Pension fund wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the potential for a greater retirement income and perhaps some flexibility, with a personal pension would have sounded like attractive features to Mr D. But TSB wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what Mr D needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr D needed to take a higher risk than he should or risk obtaining lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer that outweigh this. So, I think TSB should've advised Mr D to remain in his DB scheme.

I have to consider whether Mr D would've gone ahead anyway, against TSB's advice. I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the DB scheme, against Lloyds's advice. I say this because Mr D was an inexperienced investor and this pension accounted for the majority of Mr D's retirement provision. I note that TSB approached Mr D whilst he was in a branch, and there was no indication he wanted, or even was aware he could, transfer his DB benefits before this.

So, if TSB had provided him with clear advice against transferring out of the DB scheme, explaining why it may not be in best interests, particularly in respect of the risk of it, I think he would've accepted that advice.

In light of the above, I currently think Lloyds should compensate Mr D for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Lloyds and Mr D received my provisional decision. Mr D, or his representative, didn't have anything to add to what I said.

Lloyds didn't agree with my provisional decision it said that:

- Lloyds and Mr D had significant contact over a number of months.

- The advice was fully explained to Mr D and he confirmed that he understood and agreed with it. He was aware of the DB scheme benefits he was giving up, before he proceeded.
- In April 1992 Mr D took out an equity based savings plan. He paid £25 a month into this.
- He also invested £10,000 into an equity based savings bond around the same time as the pension transfer (Lloyds has not given me the exact date).
- And he also had around £30,000 in cash savings.
- He made other investments in subsequent years.
- At the time of advice 10.6% was a reasonable expectation of investment growth, given that, for example and amongst other things, interest rates were around 10.5%.
- The transfer analysis, which was done at a later time as part of the personal pension review, confirmed that the transfer was broadly reasonable.

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.

What I said in my earlier decision was that I didn't think the transfer was suitable for Mr D. This is because the fund he invested in needed to perform at a reasonably high rate, that is around 10.6% each year, in order for it to be worthwhile. This was similar to the regulators 'middle or medium' growth rate which was 10.5% or 10.75%. I wasn't persuaded that Mr D wanted to, or had the capacity to, take this much risk. I didn't think it was reasonable to recommend that Mr D give up his DB scheme benefits given his likely tolerance and capacity for risk.

Lloyds has said that Mr D had started a small equity-based savings plan before he made the pension transfer. He also had some cash in savings and current accounts. And he invested £10,000 in an equity based lump sum savings plan at around the same time he made the DB pension transfer. So, it wasn't correct to say Mr D didn't have any investment experience and he did have some capacity to take investment risk. Lloyds thinks that because of this it's likely that he was prepared to take the risk of transferring the DB scheme.

I've gone on to consider if it was suitable to recommend that Mr D transfer his DB scheme benefits given this new information.

I can accept that Mr D may have had some investment experience before making the transfer. But the regular savings plan he started was for a modest amount, and he hadn't been saving for a long time. So, I don't agree that Mr D was likely to have fully understood the 'ups and downs' of equity-based investments due to the savings plan he started before the transfer.

He did invest a larger amount in equity based investments around the same time as the DB transfer. And he did go on to make some other investments. But these don't demonstrate any kind of significant knowledge or acceptance of investment risk *before* he made the DB transfer. They were all started at the same time at the DB scheme or later. And the plan he started at around the same time still represented a modest amount of his capital in any event. Again, I don't think this investment shows he wanted to take a significant risk with his pension arrangements.

So, overall, I don't think Mr D's investment history demonstrated that he would be familiar with the volatility and risks of equity-based investment to any great degree at the time of sale. I don’t think that fact that he did have some investments led to his attitude to risk being as high as ‘medium’.

The pension fund needed to perform at, or above a ‘medium’ risk for it to be worthwhile. As I think that Mr D had a lower attitude, and capacity for risk than this, I don’t think it was likely to be right for him to make the transfer.

Lloyds hasn’t commented on Mr D’s wider situation, other than believing that this didn’t affect his ability to make financial decisions. But, to me, this is the most important aspect of his circumstances.

My earlier findings about Mr D’s capacity to take a risk with his *pension* planning were based on the fact that his was his only accrued private pension. And his future employment prospects seem to have been limited. So, it wasn’t certain, or perhaps even likely, that he would be in position to accrue any further private pension entitlement. I still think Mr D was in a vulnerable situation because of this and TSB should have recognised this and acted accordingly.

So, there was a significant risk that Mr D would be materially worse off due the advice Lloyds gave. And taking into account all of his circumstances. I don’t think it was right that Lloyds advised him to do this.

Mr D did have some cash at the time of sale. But I think this strengthens my findings above. If Mr D had some other means to live off for the foreseeable future then this was a further reason why he didn’t need to transfer he DB scheme benefits. He could, of course, have transferred at a later date if he had a pressing need to do this.

Overall, I still don’t think he had the tolerance for risk, or capacity for risk, to say it was suitable for him to take on the risk of the pension transfer.

I accept that Mr D may have had a reasonable amount of contact with the TSB representative, and the advice may have been explained to him. Although after such a long time, as I said above, it’s difficult to say what happened conclusively. But this doesn’t alter my findings about whether it was right to advise him to transfer his DB scheme benefits. I still don’t think this was the case.

Because of all of the above I still think that Mr D’s complaint should be upheld.

Putting things right

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for TSB’s unsuitable advice. I consider Mr D would have most likely remained in his DB scheme if suitable advice had been given.

Lloyds should 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, I understand Mr D retired at 65 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 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 D’s acceptance of the decision.

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

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

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

<u>Determination and money award</u>: I uphold this complaint and require Lloyds to pay Mr D 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 Lloyds to pay Mr D any interest on that amount in full, as set out above.

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

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Lloyds pays Mr D the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts a final decision on the same basis, the money award becomes binding on Lloyds.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 10 August 2022.

Andy Burlinson
Ombudsman