DRN-3580317

The complaint

Mr S complains about the advice he received from Cowgills Wealth Limited to transfer his deferred defined pension (DB) benefits to a personal pension.

What happened

In 2015 Mr S received advice from Cowgills about his pension arrangements. At the time of the advice, the Cowgills adviser (the 'adviser') produced a number of documents including a 'Confidential Financial Review' (the 'fact find') dated 6 November 2015 and a 'Financial Planning Report' dated 12 November 2015 (the 'suitability report' or the 'report'). It should be noted that these documents were in joint names of Mr S and his wife. In summary, the fact find noted about Mr S's circumstances:

- He was 49 years old, married with three children.
- He was employed earning £200,000 per year.
- As well as having deferred benefits from two previous employer schemes, he was a member of his current employer's Group Personal Pension scheme (GPP).
- He was a non-smoker and in good health.
- He jointly owned property valued at £350,000 with a £210,000 mortgage.
- He jointly owned three buy-to-let (BTL) properties with a total value of £375,000 and total mortgages of £233,000.
- He had no debts and he had savings of around £5,000.

Mr S had deferred final salary pension benefits from two previous employers (I'll refer to these pensions as 'OPS1' and 'OPS2' and collectively as 'DB pensions'). In summary, the suitability report and other documents noted the following:

- OPS1 - this had a Cash Equivalent Transfer Value (CETV) of £341,297. He had a deferred pension of £11,883 at the time of leaving his pensionable service. At his normal retirement age (NRA) of 60, it was predicted he'd receive an annual pension of £15,287. Alternatively he could receive an annual pension of £10,631 if he opted to take tax-free cash of £69,833. The death benefit before retirement was a yearly spouse's pension of £7,630. Or if after retirement, a 50% spouse's pension.
- OPS2 - this had a CETV of £485,676. At the NRA of 60, Mr S was predicted to have an annual pension of £23,286 with no tax-free cash and £16,374 with tax-free cash of £103,689. On death before retirement, a spouse's pension of £8,770 a year was payable and on death after retirement, a 50% spouse's pension was payable.

In the suitability report, the adviser noted the reason Mr S was seeking advice was: *"You have been keeping a close eye on the new pension freedoms and the change in law to death benefits and would like to take advice as to whether it may be suitable for you to transfer these defined benefit schemes."*

The adviser carried out an assessment of the critical yield, which is the estimated annual investment return needed to match Mr S's DB benefits. The adviser noted the analysis was done on the basis of Mr S taking the maximum tax-free cash he was allowed under each DB pension. In terms of OPS1, the suitability report noted that the critical yield for the recommended SIPP, taking into account the likely charges, would be around 5.24%. And for the OPS2 it would be 5.9%.

The benefits of each DB pension revalued each year in line with the Retail Price Index (RPI) and the adviser noted *"The majority of the benefits are not as a result of contracting out and so the Guaranteed Minimum Pension (GMP) elements are not high and revaluation will be in line with RPI for most benefits. Even so, these are mandatory increases and so carry no risk, as opposed to the risk incurred on investments if you were to transfer away, which may nor may not grow in line with RPI."*

Amongst other things, the suitability report, recorded Mr S's objectives as:

- To have a wide range of investment choice.
- To hold his pension funds within an arrangement that will provide him with a drawdown facility at the point he took his benefits and to have some control as to the income he takes each year.
- To maximise the tax-free lump sum without the need to take an income.
- To pass on the maximum benefits to his wife and children in the event of his death.
- The adviser also noted that Mr S had little requirement for a guaranteed income and that he (Mr S) deemed flexibility of income to rank higher in his priorities.

Mr S attitude to risk was assessed as 'moderate' which meant: *"*[Mr S is] *prepared to take a moderate amount of investment risk in order to increase the chance of achieving a positive return. Capital protection is less important to you than achieving a better return on the investment. A typical moderate investor will usually invest in a variety of assets to obtain diversification."* The adviser said due to his income and other factors, Mr S had a capacity for loss to be able to withstand some risk of loss to his pension funds, at least in the short-term.

The adviser recommended Mr S transfer his DB pensions into a Self Invested Personal Pension (SIPP). The adviser said this was suitable for Mr S because:

- Given Mr S's attitude to risk, the critical yields were achievable.
- Mr S wouldn't need to take a prescribed income level under the SIPP.
- He would benefit from more flexible death benefits.
- He would be entitled to a higher tax-free cash payment than under the DB arrangements and be able to take this without drawing a regular income.
- He would have greater flexibility with regards to tax planning.
- He would be able to access a wider selection of funds and investments.

Mr S complained to Cowgills in 2019 about the advice he received to transfer his DB pensions. He was disappointed with the performance of the funds following the transfer to the SIPP. Mr S said he considers himself to be a low risk investor and doesn't recall discussing his risk appetite or capacity for risk during the advice process.

Cowgills rejected Mr S's complaint. In summary, it made the following points:

- The transfer could meet Mr S's objectives including to give him increased flexibility around the tax-free cash amount and drawdown income.
- The flexibility gave him the option to pay off his BTL mortgages and leave his assets unencumbered without the requirement to commence the income, or suffering an early retirement factor should this have been accessed before his NRA.
- Clear discussions were held around his future retirement plans and the potential to lose a secure, increasing income in retirement.

- An assessment was made on the gains made in flexibility against the loss of security.
- There was an enhanced position on death benefits and an ability for income to be generated without reductions applied to the surviving spouse.
- Mr S's capacity for loss was at a level that he could absorb some market losses and still be in a financial position to meet his proposed expenditure requirements.
- Mr S accepted the investment risk and his risk profile.
- Mr S is disappointed with the returns from his SIPP which is his main complaint. But this risk was clearly set out to him during the advice process.
- The returns that were possible weren't guaranteed but they were achievable.

In brief, our investigator upheld Mr S's complaint. He also said that Cowgills should pay Mr S redress for the pension transfer that happened in 2016 relating to his (Mr S's) GPP. Cowgills disagreed. And the matter was passed to me for a decision.

I issued a provisional decision on this matter on 10 June 2022. I said that I would not consider the advice Mr S received in 2016 to transfer his GPP as this was the subject matter of a separate complaint. I amended the redress to reflect this. Both parties have responded to my provisional decision. Mr S accepted the recommended outcome. Cowgills made the following points in response to my provisional decision:

- Mr S is not in a position of disadvantage following the transfer and maintains its advice to transfer his DB pensions was in his best interests.
- Mr S had the financial security to accept the risk of a transfer away from valuable guarantees, and his circumstances were such that he would have benefited from it.
- Cowgills disagree around the critical yield point as it does not provide an accurate comparison, unless taking the benefits in a specific format, and should not be the yardstick to measure future income provision into retirement.
- The Ombudsman maintains that ill health is a driver for consideration of death benefits. But it would be unsuitable to wait until ill health occurred to give Mr S the advice to transfer.
- In terms of waiting to give advice closer to Mr S's retirement age, Cowgills can only provide advice at the time and assessed that this was a suitable move.
- The Ombudsman uses the phrase valuable guarantees several times. The guarantees, however, are only as valuable as the individual and Cowgills assessed that Mr S had sufficient financial security with or without the guarantees.
- The mortgage repayment was part of a process leading up to retirement and repaying would provide a number of benefits before retirement, not just in retirement.
- The advantage of unencumbered income would allow a discussion to enhance savings elsewhere and provide the platform for retirement. In isolation this could have been delayed, but when assessing the overall suitability and the security of Mr S's financial position, Cowgills recognised this as a benefit of transferring.

So, the matter has been passed back to me for 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.

As I noted in my provisional decision, Cowgills has provided a very detailed response to this service. We are an informal dispute resolution service and I am not required to address every point raised. I have instead focussed on what I consider to be the crux of this complaint.

In terms of its further submissions, these are a repeat of what it has told our service previously. I addressed these points in my provisional decision and nothing that Cowgills has said on these points, has persuaded me to change my mind. As I've already dealt with these points, my decision remains the same as it did in my provisional decision which is as follows:

As a preliminary comment, I do acknowledge that Mr S was likely to have understood the principle of needing to take some risk to achieve the required reward. Whilst he says he can't remember these types of conversations, I can see it was clearly set out in the suitability report, which he would've received and agreed to before agreeing to the transfer. So, I think Mr S may have had a reasonable understanding of the concept of risk/reward.

I also think it's fair to say Cowgills did provide warnings on the guarantees which would be relinquished. However, as Cowgills will be aware, risk warnings alone, wouldn't render unsuitable advice suitable. And irrespective of the detail contained in a suitability report, this also wouldn't make otherwise unsuitable advice suitable. Cowgills needed to be satisfied, before providing its recommendation, that relinquishing the guarantees and taking the investment risk was a suitable course of action for Mr S.

The starting point for a transfer of this type is set out in the regulator's (Financial Conduct Authority's) guidance under COBS 19.1.16 which says: "When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme… whether to transfer, convert or opt-out, a firm should start by assuming that a transfer…will not be suitable. A firm should only then consider a transfer…to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer…is in the client's best interests."

The action taken by Cowgills to transfer Mr S from his DB arrangements has resulted in the loss of the guarantees these schemes provided. It means he faces additional investment risk in the new scheme (SIPP). So, in light of this and that the starting position is the transfer was not in Mr S's best interests, I would expect to see sufficiently compelling reasons for him to be advised to relinquish his guaranteed benefits.

The suitability report was issued before the regulator's revised guidance, which was released in late October 2017, and provided "discount rates" for levels of growth which were deemed achievable for particular time periods until prospective retirement. But, before that, similar rates were published by this service. Businesses weren't required to reference these when providing advice on transfers, but they would nevertheless have been a useful indicator of the type of investment return deemed feasible at the time.

At the time of the advice, the discount rate deemed achievable was 4.2% per year. And the critical yields needed to just match, rather than improve on, Mr S's DB pension benefits, were 5.9% and 5.24%. So, Cowgills advice meant Mr S would be no better off and in fact, could be considerably worse off financially in his retirement. I don't see how this was in his best interests. It should be borne in mind that Mr S was a 'moderate' risk investor. I think it was unlikely he could afford to take any increased risks to achieve better returns if the growth rates were failing to achieve the level needed to just match his previous DB arrangements.

Cowgills says as Mr S wasn't going to buy an annuity, the comparison with the critical yield calculations is an unfair one. And I agree that the feasibility of achieving a critical yield wouldn't, by itself, indicate suitability of a transfer. This is supported by the rules at the time which said (COBS 19.1.7b): "In considering whether to make a personal recommendation, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme or other scheme with safeguarded benefits as sufficient in itself." So, I'll consider what other reasons Cowgills gave for recommending the transfer.

Cowgills says the reason for its recommendation was the benefit to Mr S in terms of other objectives being met - including control over investment choice and flexibility, along with the different format of death benefits which a SIPP could offer over a DB pension scheme. Cowgills says, as recorded in the suitability report, Mr S required flexibility of income in retirement as he didn't want to take out an annuity and wanted to draw income down as and when this was needed. So, I've given its arguments careful consideration.

In terms of the 'control and flexibility' argument, I understand this to be that Mr S would have control over his pension funds and could alter the income he withdrew from a flexi-drawdown arrangement to satisfy changing income needs. But he was at least eleven years away from the normal retirement age for both DB schemes. So, it's unclear to me why he needed to arrange those flexible arrangements in terms of the drawdown at that particular point in time.

Another reason for the transfer was to maximise the amount of tax-free cash that could be withdrawn. Under the DB pensions this would have been much less than that available if Mr S hadn't transferred. It was recorded Mr S wanted to use this money to repay his BTL mortgages so he could benefit from a higher income in his retirement. But as I've already said, Mr S was some time away from his retirement age of 60. So, if Mr S wanted to increase the amount of tax-free entitlement he could have done so at a later date rather than take the risks that were involved in giving up his guaranteed benefits.

Further, whilst Mr S may have wanted this as an objective, the use of tax-free cash for the purpose of mortgage repayment didn't seem particularly urgent issue for him. The was income being generated from the BTL properties which was sufficient to cover the mortgage repayments. And together with the funds already available to him via his DB pensions there didn't appear to be any immediate or urgent need to plan for this at the point of the advice.

I accept that if Mr S remained in his two DB schemes, this would've been less flexible than the SIPP he transferred into. But equally, given he had no immediate requirement for an income, and was unlikely to for a considerable period of time, I don't think he'd any need for increased flexibility. And whilst Mr S may well have wanted to take advantage of the new pension freedoms, it was Cowgills role to not just transact what Mr S wanted, but to give him objective advice on whether a transfer was in his best interests. In my view, these benefits should not have been relinquished in favour of a more flexible income or the potential to pay off a liability at some time in the future, without further compelling reasons for this.

Cowgills says advising Mr S to wait also came with risks. But I'm not persuaded that anything about Mr S's circumstances, including his age and health, meant there was any particular urgency to transfer when the starting position was this wouldn't be in his best interests.

Having more flexibility around the death benefits, was the other significant reason given for the suitability of the transfer. He was recorded as being keen in the event of his death, for death benefits to be paid to his dependants as a lump sum. And it's fair to say that, after the transfer, a lump sum would be payable to his beneficiaries, rather than in the form of a spouse's annual pension from the scheme.

But Mr S was 49 years old and had no particular health issues, which would mean death benefits – or any likelihood not to benefit from a pension income derived from his DB schemes upon retirement for a reasonable amount of time – were of a particular concern at the point he received advice. I take on Cowgills point about not waiting until Mr S was ill to advise him about his options. But all indications were that Mr S was in good health and this was recorded as such by the adviser in the suitability report.

The accrued pension provision is intended to provide for an individual's retirement rather than a desire to leave a lump sum legacy for that individual's spouse or dependants. And it's clear that between Mr S and his wife, they had a significant BTL portfolio and other assets. If Mr S had concerns about leaving these to his family unencumbered, there were other alternatives, such as taking out life assurance policies, that could have provided for this eventuality without the need to give up valuable guaranteed benefits.

That said, I recognise the financial wellbeing of Mr S's wife and his children would inevitably have been a priority for him. And in some situations, the ability to pass on a lump sum to beneficiaries of your choosing, could be particularly advantageous. But the recommendation needed to be given in the context of – primarily – Mr S's best interests in terms of his retirement needs. I don't think the prospect of a lump sum benefit for Mr S's wife and his children by way of transferring to the SIPP, constituted sufficient reason to transfer and lose otherwise valuable guaranteed benefits for Mr S. I think Cowgills should've advised Mr S that his own financial security in retirement took priority here.

Whilst I know Cowgills says it gave all issues proper weight when providing its advice, I note Mr S was a member of a Group Personal Pension (GPP) scheme with his employer. This had a value of around £80,000 and was still, at that point, being paid into by Mr S. It would have almost certainly offered more flexibility in terms of death benefits if this was a priority for Mr S. But this doesn't appear to have been a potential area for discussion. Neither is it recorded that Mr S may have been better to wait nearer his retirement age before making an irreversible decision to give up guaranteed benefits.

In summary, I don't think the perceived advantage of flexibility and control of income outweighed the guaranteed benefits in the scheme. The available evidence simply doesn't support the position as to why these attributes would have been sufficiently compelling reasons for Mr S to relinquish valuable benefit guarantees, particularly as they could have been exercised at any point up until he was considering drawing his benefits.

In terms of what Mr S would have done but for the advice, I've taken into account the risk warning that he was given. But in my view, when the adviser, who was qualified to provide him with this advice, said it was in his best interests to transfer his DB pensions to a SIPP, I think he (Mr S) would reasonably have understood from the suitability report that a transfer was suitable to the level of risk he wanted to take.

A transfer of this nature is a complex issue with a variety of inter-relating factors to be taken into account. So, when the adviser said this was suitable for Mr S, on balance, I consider he (Mr S) would've relied on the recommendation made by the adviser in making his decision. I think if he'd been given suitable advice, he more likely than not would have followed this.

Cowgills considers the whole complaint is due to the investment returns not reaching what Mr S was expecting, and that it would be unfair to uphold the complaint as Mr S would be benefitting from the flexibility of a defined contribution plan as well as an award for a defined benefit pension. But our awards are meant to try, as far as possible, to put Mr S back into the position he would've been but for the unsuitable advice. If as a result of this, he still maintains the flexibility of the SIPP, this is something that has resulted from the unsuitable advice he relied on.

Finally, I should just cover the advice Mr S was given to stop making payments into his GPP. The advice he received at that time was to stop making payments and secure the Lifetime Allowance (LTA), which the adviser noted was due to decrease. In lieu of this it was noted that Mr S would receive payments directly from his employer. On balance, I think even if Mr S hadn't transferred his defined benefit pensions, there was a significant risk of him *reaching the LTA if it were lowered. So, I don't think the advice to secure the LTA as it was in 2016 was unsuitable for Mr S.*

So, whilst I've taken on board the further submissions by Cowgills, which I think have been sufficiently addressed above, I still think this complaint should be upheld.

Putting things right

The proposed redress set out below must be done in relation to both the occupational pension schemes which are the subject matter of Mr S's complaint. A fair and reasonable outcome would be for Cowgills Wealth Limited to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr S would have remained in both schemes but for Cowgills Wealth Limited's unsuitable advice.

Cowgills Wealth Limited must 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 defined benefit 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. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr S's acceptance of the decision.

Cowgills Wealth Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Mr S'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 calculations, which will take into account the impact of leaving the occupational schemes on Mr S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should be paid to Mr S. The payment should allow for the effect of charges and any available tax relief. The reason it should be paid directly to Mr S rather than into his pension arrangements is because the compensation would conflict with his existing Lifetime Allowance Protection. So, the calculated redress should be paid directly to Mr S 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 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr S within 90 days of the date Cowgills Wealth Limited 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 Cowgills Wealth Limited to pay Mr S.

Income tax may be payable on any interest paid. If Cowgills Wealth Limited deducts income tax from the interest, it should tell Mr S how much has been taken off. Cowgills Wealth Limited should give Mr S a tax deduction certificate in respect of interest if Mr S asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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 Cowgills Wealth Limited to pay Mr S 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 Cowgills Wealth Limited to pay Mr S any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I only require Cowgills Wealth Limited to pay Mr S any interest as set out above on the sum of £160,000.

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

If Mr S accepts my decision, the money award is binding on Cowgills Wealth Limited. My recommendation is not binding on Cowgills Wealth Limited. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

I'm upholding this complaint and I require Cowgills Wealth Limited to settle the matter as per the 'Putting things right' heading above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 2 August 2022.

Yolande Mcleod
Ombudsman