

The complaint

Mr E complains about the advice given by Towergate Financial (East) Limited ('Towergate') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says that he's only just found out that his DB scheme would have provided him with a pension of around £10,000 a year and says that had he known this at the time he wouldn't have transferred out of the scheme.

What happened

Following an introduction via his ex-employer, Mr E met with Towergate in May 2007 to discuss his pension and retirement needs.

On 17 May 2007 Towergate completed a fact-find to gather information about Mr E's circumstances and objectives. Towergate also carried out an assessment of Mr E's attitude to risk, which it deemed to be cautious – a score of two on a scale of one to ten.

After this meeting Mr E sent Towergate a handwritten letter, which said that he wanted to go ahead and transfer his DB pension benefits into a personal pension and take a cash lump sum (representing an enhancement to the transfer value offered by his employer.) He said that he understood this was against Towergate's advice, but he wanted to use some of the lump sum to help him get into the pub trade and because he didn't think he would live long enough to retire – so he wanted to *"...live for today and not worry about tomorrow."*

On 30 May 2007 Towergate provided its advice in a suitability report. The report said that Mr E had indicated he was an insistent client and that he wanted to transfer his pension benefits out of his DB scheme. Towergate went on to advise Mr E *not* to transfer his DB scheme pension benefits into a personal pension. It said the reason for this recommendation was because there was a high risk that Mr E would be worse off in retirement – the critical yield was high at 6.8% when Mr E's attitude to risk was cautious.

Within the same report and immediately beneath the recommendation not to transfer, it said that because Mr E had decided to transfer anyway, he'd asked Towergate to recommend a suitable product and provider to receive his DB scheme benefits. Towergate's recommended solution was to transfer to a personal pension and invest the money in a 'Lifestyle' fund, which would provide flexibility and competitive charges.

In October 2017 Towergate wrote to Mr E 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 E chose to be included in.

In December 2019 Towergate wrote to Mr E 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 that the reason Mr E gave in his insistent client letter for wanting to go ahead with the transfer was the same as he gave in the questionnaire it sent as part of the review work. It also said that despite its findings that Mr E wasn't fully informed, including not being told clearly that he could retire on an unreduced pension from age 60 if he stayed in his DB scheme, Mr E indicated that he'd have still gone ahead with the transfer. But it went

on to say that, despite Mr E being recorded as a cautious investor, his pension monies were invested in a balanced fund and it wasn't clear why this was the case. It said it needed to consider this further.

In August 2020 Towergate wrote to Mr E and offered him £2,441.99 for the loss he'd suffered as a result of being invested in the wrong fund.

Mr E rejected the offer because he said it was too low and he didn't understand why some other people in the same situation as him had got a lot more. He went on to explain that because of the rumours about the financial security of his DB scheme, and its subsequent offer of an enhanced transfer value, like most of his friends and colleagues he moved his pension away without knowing if it was the right thing to do. Mr E said that he'd suffered from a serious medical condition around 2014, which had changed his outlook on life and left him with memory problems.

Because Towergate maintained that its offer was fair, Mr E referred his complaint to our service.

I issued my provisional decision of June 2022 in which I said I was likely to uphold this complaint. I said this was because I wasn't persuaded that Mr E was a true insistent client and that he hadn't been put in a position to make a fully informed decision about whether transferring out of his existing DB scheme to a personal pension was in his best interests. And because I thought Towergate had actually recommended that he transfer out.

Mr E said he agreed with my provisional decision and had nothing further to add.

Towergate disagreed and asked me to reconsider my decision. In summary it said:

- the issues the ombudsman has highlighted about Mr E's attitude to risk and him taking his benefits earlier were addressed in its previous review and so there's no need to re-visit these.
- Mr E's decision to transfer was in part due to the underlying concern amongst the workforce at the time that the company was about to fold – he wanted to avoid the loss of his accrued pension if this were to happen despite the recommendation not to transfer.
- The ombudsman has interpreted Mr E's comments about his health status at the time and wanting to *'live for today and not worry about tomorrow'* as being negative and that Mr E was in a vulnerable position. It says this is without justification and believes Mr E's comments are from someone who was realistic and taking a pragmatic approach to bettering his circumstances given his family's medical history.
- Mr E's complaint was prompted only by his dissatisfaction with Towergate's offer of redress with regard to investing in a fund which didn't match his attitude to risk profile – not because he thought he'd received incorrect financial advice.

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 my reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), stated in its Conduct of Business Sourcebook ('COB') at the time, 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 E's best interests (COB 5.3.29G).

A key aspect in this case is Towergate's categorisation of Mr E 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, COB required Towergate to provide information that was clear, fair and not misleading. So, Towergate's recommendation had to be clear and Mr E had to have understood the consequences of going against the recommendation.

In its suitability report, Towergate recommended that Mr E 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 given his cautious attitude to risk. Towergate warned Mr E that there was a high risk he'd be worse off in retirement if he transferred.

In the same report, Towergate said that Mr E had decided he wanted to go ahead in any event. And in response to Mr E's request, it went on to recommend a solution that provided flexible retirement benefits.

Mr E says that because of the rumours about the financial security of his DB scheme, and its subsequent offer of an enhanced transfer value, like most of his friends and colleagues he moved his pension away without knowing if it was the right thing to do. He says that, had he understood he'd have been better off staying in his DB scheme, he wouldn't have gone ahead.

Having carefully considered all of the evidence presented, while I accept that Towergate's suitability report did initially set out that its recommendation for Mr E was *not* to proceed with the transfer, I think there were significant weaknesses and failings in the advice process as a whole, which meant Towergate didn't act in his best interests. And I think Mr E likely understood or believed overall that Towergate was recommending he should go ahead with the transfer.

I say this because firstly I can see that Mr E's insistent client letter was written and received by Towergate before Mr E had received Towergate's suitability report – so it appears before Mr E knew what Towergate's advice really was and certainly before he'd had time to read, understand and reflect on the written advice and recommendation made.

I think this means it was during Mr E's initial meeting with Towergate on 17 May 2007 that the adviser entered into a discussion about how he could put aside its advice and transfer anyway, which ultimately appears to have led to Mr E deciding to transfer out of his DB scheme in any event.

I don't think Towergate's actions here were fair to Mr E or were acting in his best interests. I think if Towergate firmly believed in its advice and recommendation and it was acting in his best interests, it wouldn't have told Mr E at the same time as formulating its advice – and before it delivered its actual written recommendation – how he could put that

advice to one side and how Towergate could facilitate the transfer anyway.

I don't think it was in Mr E's best interests to go against Towergate's recommendation – yet the evidence appears to indicate that Towergate made it very easy for him to do so. And as I will discuss later on, given the way the recommendation was worded and structured, I think Mr E could have interpreted this overall that Towergate was recommending he go ahead and transfer.

I think it ought to have been clear to Towergate that Mr E 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 E was an experienced investor – in fact it appears he was completely inexperienced.

I'm mindful too that Towergate assessed Mr E's attitude to risk as cautious (later described in the suitability letter as very cautious) which doesn't suggest that he would be someone who was confident or had the requisite knowledge or skill to go against the advice they were given by a professional adviser. Indeed, the answers Mr E gave to the questions Towergate asked as part of its assessment of his attitude to risk, in my view support this – for example he said that he didn't like to keep up to date on financial matters, his knowledge of financial terms was limited, and the thought of losing his money on an investment made him nervous.

I also think that Mr E was in a vulnerable position at the time. Towergate has challenged this and said that my view is wholly without justification. It says that I've interpreted what Mr E said about his health and what he wrote in his insistent client letter about wanting to *"live today and not worry about tomorrow"* as being negative, whereas it believes they are the words of someone who was taking a realistic and pragmatic approach given his circumstances.

I disagree. I think the evidence that Mr E was unemployed having recently been made redundant from a job which he'd given several years of service to, coupled with the language he used in his insistent client paperwork supports my view that he was in a vulnerable position. But even if I thought that wasn't the case, his financial inexperience coupled with his cautious attitude to risk should've put Towergate on notice that it had to be very careful if it was to take matters through the insistent client route.

While I acknowledge it wasn't a requirement at the time, given Mr E's level of experience and circumstances, I think it would've been important for Towergate to ensure he understood what he was getting into. And while Mr E's insistent client letter was in his own words, none of what he said says or implies that he understood the recommendation being made – most likely because he had hadn't yet received it. So I don't think that Mr E was able to make an informed choice here. And I think the reasons Mr E gave for wanting to proceed – using the cash lump sum to *"hopefully go into the pub trade"* and what we said about wanting to live for today ought to have given Towergate reason to ask further questions.

But instead Towergate immediately proceeded to produce a recommendation, which I think was unclear and confused. I say this because Towergate initially recommended that Mr E should not transfer away from his DB scheme. But immediately underneath the brief one reason it gave as to why he shouldn't do so – and after setting out Mr E's options the first and second of which involved him transferring his benefits out of the DB scheme - it proceeded to give a *positive* recommendation advising Mr E to transfer his benefits to a personal pension and invest in a cautious lifestyle fund. And crucially this was all set out under a heading titled *'Recommendation'*.

While the suitability requirements under COB 5.3 were not as prescriptive as the current rules and were more principles-based, I think Towergate was still required to give Mr E advice on the overall suitability of the transaction - that is the transfer and the choice of pension and investment. Instead, it first gave Mr E advice on the advice to transfer, and only considered the suitability of the proposed solution after Mr E decided to proceed in any event.

So, by recommending that Mr E transfer his benefits to a particular scheme, I think Towergate 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 E's best interests, it needed to ensure that it gave clear advice that the whole of the transaction was unsuitable for him. I don't think it could separate out the elements. For this reason and given the way the suitability report was set out, I think Mr E likely believed Towergate was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Turning back to the first and in my view the main reason Mr E said he wanted to go ahead – he said he wanted to use the available cash lump sum to help him get into the pub trade. I think in acting in Mr E's best interests Towergate should have gathered more information to better understand Mr E's plans – for example I think Towergate could have asked questions around why Mr E needed money to achieve this and importantly how much money he needed and whether it was a viable proposition - before continuing to facilitate an irreversible transaction to transfer his pension.

Mr E has told us that following his redundancy, his employer offered meetings with agencies to help him find work. He says that he was asked to think about any prior experience, which might help. With this in mind he said because his family had worked in pubs and he knew the trade, he planned to take a course and hopefully buy a lease. But importantly, Mr E says that he didn't know how much he might need to do this at the time. In fact it turned out that it was much more than Mr E says he could afford. So it appears that Mr E's plans weren't viable. But Towergate didn't try to understand this. Instead it simply accepted what he said, recorded this as his objective and proceeded to facilitate Mr E transferring his pension.

I can see that Mr E also said he wanted to go ahead because he didn't think that based on family history he would reach retirement age, and so he wanted to live for the moment. Towergate also says that Mr E's decision was in part based on concerns of him losing his accrued pension if the rumours about his employer's solvency were true.

But again, in acting in Mr E's best interests I think Towergate should have helped Mr E to see through what I think was simply an emotional response to the vulnerable position I consider he was in. This was Towergate's opportunity to highlight and remind Mr E of several things: to remind him that he was only 45; he was in good health; fit for work; and what the current average life expectancy was, and also that he should not have genuinely been concerned about the security of his pension - if the scheme did end up moving to the Pension Protection Fund, I think Towergate should have explained that this was not as concerning as Mr E might have thought.

But also crucially in Mr E's case, and despite what Towergate says about this already having been addressed in its previous review of the advice it gave, it should have been clear that Mr E could access the benefits in his DB scheme from age 60 without penalty – so at a relatively early age. I think without this crucial information Mr E was not in a position to make an informed decision.

So while I acknowledge there were no specific insistent client rules at the time, 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 E's best interests. And by not seeking to fully understand Mr E's objectives and what he was trying to achieve (and whether it was possible) before carrying things out,

I'm not persuaded this was acting in Mr E's best interest. And ultimately, I don't think Mr E was able to make an informed choice here – Mr E didn't have Towergate's written recommendation to digest before he decided to act against its advice, I think he was in a vulnerable position, and it seems to me that Mr E likely went ahead with the transfer as he believed this was the only way to meet what he thought was his objective and because it seemed like a good idea given what his ex-colleagues had done. I also cannot ignore that I think the evidence shows Towergate actually gave Mr E a positive recommendation to transfer out of the scheme, which in the circumstances I think would've given him the impression that Towergate agreed with this 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 E can truly be regarded as an insistent client. Towergate's communications overall weren't clear or fair. It didn't act in Mr E's best interests. And it failed to act with due care and skill.

I now need to consider whether Mr E would've insisted on going ahead with the transfer had things happened as they should have. Having done so, if Towergate had acted in Mr E's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, fully addressing Mr E's objectives at the time and being clear that he could access his existing scheme benefits at age 60, I don't think Mr E would've insisted on going ahead with the transfer. As I've outlined above, I don't think Mr E was an experienced investor such that he possessed the requisite skill, knowledge, or had the confidence to go against the advice he was given. I think he relied solely on the advice and process Towergate employed.

I accept that Mr E was unemployed and it's recorded that he had an income deficit of just under £400 a month – so on the one hand this might have been given Mr E good reason to want to transfer. But on the other hand he was fit for work and seeking work – he also still had savings he could've used to offset his income shortfall for a further ten months or so. So I'm not persuaded Mr E would've insisted on going ahead because of his financial or employment situation.

I can see that Towergate says Mr E indicated he'd have still gone ahead anyway in one of the answers he gave on the questionnaire it sent him as part of the review of the advice it gave – it says he used the same language here as on his insistent client letter at the time. I've thought about this carefully. Firstly I'm mindful that Mr E suffered a serious medical condition around 2014, which he says affects his memory, creates confusion, and makes form filling difficult. And I've no reason to doubt this given the seriousness of his condition. But despite that, it strikes me that Mr E likely gave the same answer and said he'd have still gone ahead because he still believed at this point that this was only way he could've met what he thought was his objective at the time. As I set out above, I don't think Towergate put Mr E in a fully informed position at the time of the advice – and I haven't seen enough to persuade me that Mr E was in a substantially more informed position later on when he completed Towergate's questionnaire.

So if things had happened as they should have, taking everything into account, I'm not persuaded that Mr E would have insisted on going ahead with the transfer.

In closing I can see that Towergate says Mr E's subsequent decision to raise a complaint was prompted by his dissatisfaction with the level of redress it offered when compared to that of his ex-colleagues and not out of a sense that he had received incorrect financial advice. It's not entirely clear what point Towergate is trying to make here. But in my view Mr E has raised a valid complaint – he's given a written expression of dissatisfaction, whether justified or not, about the provision of, or failure to provide, a financial service. Mr E doesn't

have to articulate precisely what he thinks has gone wrong – simply that he believes something has gone wrong. And I'm satisfied he's done that here.

Putting things right

A fair and reasonable outcome would be for the business to put Mr E, as far as possible, into the position he would now be in but for Towergate's failings. I consider Mr E would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

Towergate must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

My understanding is that Mr E could've taken his DB pension benefits without reduction at age 60. So, I think compensation should be based on Mr E accessing his benefits at age 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 this 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 E's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr E'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 E 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 E within 90 days of the date Towergate 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 any final decision to the date of settlement for any time, in excess of 90 days, that it takes Towergate to pay Mr E.

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 I direct Towergate Financial (East) Limited to pay Mr E 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 (East) Limited to pay Mr E 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 (East) Limited to pay Mr E 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 (East) Limited pays Mr E the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr E.

If Mr E accepts my final decision, the money award becomes binding on Towergate Financial (East) Limited.

My recommendation would not be binding. Further, it's unlikely that Mr E can accept a final decision and go to court to ask for the balance. Mr E 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 E to accept or reject my decision before 11 August 2022.

Paul Featherstone

Ombudsman