

The complaint

Mr B complains about advice given by Oaklands Wealth Management Limited (OWM) to transfer the value of his deferred benefits in a defined benefits (DB) occupational pension scheme (OPS) to a self invested personal pension (SIPP). Mr B says the advice was unsuitable and has caused him financial loss.

What happened

Mr B consulted OWM in October 2017. At the time Mr B was 51 and married with two dependent children. He owned his own home subject to a mortgage.

OWM wrote to Mr B on 16 January 2018. Amongst other things, OWM's initial and ongoing annual fees and the services provided were set out. OWM said Mr B had completed a personal risk profiling questionnaire and, out of 7 risk groups where 1 is low and 7 is high, his risk and investment group was 4, meaning he normally had a moderate attitude to investment risk. OWM highlighted some answers Mr B had given which differed from how other risk group 4 investors usually responded. OWM said that, after discussion, Mr B had agreed he had a moderate attitude to investment risk. It was noted that Mr B had a progressive health condition. His objectives were:

- Increase the death benefits available to his wife and children.
- Retire at age 55 and withdraw an income of £11,500 to supplement part time earnings.
- Have the flexibility to withdraw tax free lump sums when needed.

A Pension Recommendation Report was enclosed with a Transfer Value Analysis (TVAS) from a pension transfer specialist. Mr B had a CETV (cash equivalent transfer value) of £379,650.79 which included £2,201 relating to a money purchase arrangement which wasn't guaranteed and not included the analysis. Mr B's OPS benefits were an estimated pension of £24,173 pa at age 65 or £9,463 pa at age 55. The critical yield was 9.6% for retirement at age 65 and 15.63% if at age 55.

OWM said the TVAS included an analysis of how long the fund might last if Mr B transferred and took the same level of income as offered by the OPS at age 55 (£9,493 pa). Assuming investment growth of 5% pa, the fund would run out at age 101. If he stayed in the OPS he'd get a guaranteed income of £9,493 pa which was less than the £11,500 pa he wanted. He was keen to gain control over his finances and the level of income he could draw and he was willing to accept the investment risk in exchange in return. Transferring would also allow him the flexibility to take ad hoc tax free lump sums as needed.

OWM said that although Mr B's wife would lose her entitlement to a guaranteed income of 50% of Mr B's OPS pension, she'd have access to any remaining pension fund and could take lump sums and vary the amount of income. And the pension pot could be passed to the children.

Mr B accepted OWM's recommendation and the transfer to the SIPP went ahead.

In March 2021 Mr B, through a complaints management company (CMC), complained to OWM. OWM issued an initial response 24 March 2021. The CMC emailed on 30 March 2021 saying the complaint had been withdrawn. On 14 April 2021 OWM received a data subject access request from another CMC. OWM sent the documentation on 11 May 2021. On 27 May 2021 that CMC advised OWM it couldn't assist Mr B as he'd already complained via another CMC. OWM offered to meet with Mr B. During another call on 24 June 2021 the CMC confirmed that it wasn't assisting Mr B and OWM again offered to meet him.

In July 2021 OWM received Mr B's complaint form from this service. In January 2022 OWM got an email from us saying the complaint had been withdrawn. On 26 April 2022 we emailed OWM to say the complaint was being reopened. OWM replied on 28 April 2022 saying the complaint had been closed and it hadn't been given the opportunity to respond. On 4 May 2022 OWM chased for a response. We emailed OWM on 9 May 2022 saying Mr B wanted to complain. On 18 May 2022 OWM acknowledged the complaint in writing to Mr B.

OWM received our request for its file on 25 May 2022 and telephoned us to discuss the case. The investigator said OWM hadn't responded to the letter of complaint from the original CMC. But OWM said it had sent an initial response on 24 March 2021 before being told the complaint had been withdrawn.

OWM sent its business file to us on 14 June 2022. The investigator issued her view on 21 June 2022. She upheld the complaint. Her main points were:

- The benefits Mr B had accrued in the OPS offered a guaranteed income for life and would form a significant part of his total pension provision. Mr B had a low capacity for loss which would've likely meant the security of the guaranteed benefits offered by the OPS with virtually no risk would've been very important to him.
- The regulator had made it clear that an adviser should, as a starting point, assume that transferring would be unsuitable unless it could clearly be demonstrated to be in the client's best interests.
- The investigator referred to the regulator's 'discount rates' in loss assessments where a complaint about a pension transfer was upheld. Although businesses weren't required to refer to those rates when giving advice on pension transfers, they gave a useful indication of what growth rates would've been considered reasonably achievable for a typical investor. The investment return (critical yield) required to match the OPS pension at retirement at age 65 was around 9.96%. The relevant discount rate closest to when the advice was given was 2.6% for 13 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection 5%, and the lower projection 2%.
- As well as attitude to risk, capacity for loss was also important. Mr B was transferring 28 years of service from the OPS. He had no significant assets or anticipated sources of income in retirement (other than any state pension). The advice to transfer was unsuitable as Mr B was highly unlikely to improve on the benefits he was entitled to from the OPS and he had little to no capacity to absorb any losses on the transfer.
- The investigator didn't think the transfer was justified because the SIPP offered more flexible death benefits. The purpose of a pension was to provide an income in retirement and the OPS was Mr B's only source of guaranteed income in retirement.
- If Mr B transferred he'd have more flexible access to his pension. But, at the time of the advice, he had no need to take tax free cash and he could've taken a tax free lump sum from the OPS at age 55.
- Although Mr B had a health condition, he could take his benefits from the OPS at age 55 and he'd get a pension of £6,226 pa. Or he could perhaps have applied for ill health early retirement – there was no evidence that option had been explored. Mr B might receive a lower income than the £11,500 he wanted, but the lower income was

guaranteed. Mr B was in fact still working full time as he was concerned he now can't afford to retire.

- The investigator also referred to the OPS being underfunded but she said that wasn't uncommon and, in any event, the Pension Protection Fund (PPF) would match up to 90% of the OPS income.
- The investigator said, with suitable advice, Mr B would've retained his OPS benefits. She set out how OWM needed to calculate and pay compensation to Mr B to put him in the position he'd be in if he'd stayed in the OPS.

In response, OWM said it hadn't been treated fairly. OWM said it had asked for further time to collate its response. OWM said it didn't know if Mr B had taken any tax free cash from his pension or whether it had been invested and if it had grown in value. OWM said it needed that information to fully respond to the complaint. And it wasn't OWM's fault that the complaint had been with this service for so long. We'd closed the complaint on 23 July 2021 and reopened it on 26 January 2022. OWM set out a chronology. It said there'd been confusion and full information hadn't been provided and so OWM wasn't in a position to respond fully to the complaint but it would respond as fully as it could.

OWM said it had at all times provided correct advice to Mr B, treated him fairly and ensured he had all the information he required (and that he understood that information) so he could make informed decisions and instruct OWM accordingly. OWM had made all efforts to understand what Mr B's requirements were and denied any negligence. OWM went on to set out extracts from the investigator's view with OWM's comments. I've read and considered everything but what follows is a summary of OWM's main points.

- OWM didn't advise Mr B to leave his OPS. When Mr B instructed OWM he was already a deferred member. He was 51 at the time of the recommendation. He had a health condition and he wanted to be able to retire at age 55 and if necessary do some part time work. He had no investment experience but that didn't mean he didn't understand the advice. OWM set out some emails from and to Mr B.
- Mr B's objectives were for his wife and children to benefit from the value of his pension fund, to be able to take ad hoc withdrawals of tax free cash from age 55 and to take a flexible income should he choose to seek alternative part time work. At no time did he say a guaranteed income or benefits were a priority. It was wrong to say the security of the guaranteed benefits offered by the OPS would've been important to him when that wasn't consistent with his objectives.
- OWM referred to the risk profiling questionnaire completed at the onset of the advice process and thereafter every two years. It enables OWM to construct portfolios which match the client's attitude to risk, assessed on an ongoing basis. OWM referred to what the suitability letter said about the results of the questionnaire and that, following discussion, Mr B had agreed he had a moderate attitude to risk.
- The investigator had said Mr B could get a pension of £6,226 pa from the OPS from age 55. But Mr B's income requirement was £11,500 pa. His needs wouldn't have been met by remaining in the OPS. At no time did Mr B say his medical condition would worsen and make him unfit for work and eligible for ill health early retirement from the OPS. Mr B is still working and if his health has deteriorated he should be exploring the possibility of buying an enhanced annuity. If he'd remained a client of OWM as part of its annual review process the continued suitability of drawdown and any possible alternatives, such as annuity purchase, would've been discussed.
- Early retirement and Mr B's health condition was only one of the considerations for transferring. OWM also took into account the factors set out in COBS 19.1.6G – including the client's attitude to and understanding of the risk of giving up safeguarded benefits for flexible benefits. The value and security of the DB benefits was explained and that, if securing the highest pension with the least risk was Mr B's

main objective, he'd be better off sticking with the OPS. But Mr B wanted flexibility and certainty of income wasn't one of his objectives. Taking tax free cash at age 55 from the OPS wouldn't have met his priority to leave his fund to his wife and children.

- Mr B was a moderate risk investor. At the time of the advice the regulator was reviewing the validity of the TVAS for pension transfers due to the Pensions Freedoms and individuals no longer having to purchase an annuity. OWM still provided the TVAS and critical yield but, as the investigator had acknowledged, OWM wasn't required to refer to those rates when giving advice.
- OWM had to consider the likely impact on the sustainability of the funds over time, including whether the retail client would be likely to access funds in an arrangement with flexible benefits in an unplanned way. Mr B had no intention of accessing his benefits in a conventional way and so the simple comparison of his benefits against a critical yield calculation fell short of the regulator's expectation. OWM referred to the regulator's alert issued in 2017. The use of the critical yield calculation remains a factor but should not be relied on to the extent the investigator had.
- OWM had used three different measures of return to show fund longevity. Those comparisons satisfied the regulator's guidance and demonstrated fund suitability and scope for unplanned payments. Mr B would've had a greater income in retirement by transferring from the OPS. The income of £6,226 was lower than the £11,500 he needed. OWM had improved the benefits Mr B would receive.
- Mr B was categorical about what should happen in the event of his death – he wanted the value of the fund passed on to his wife and children. But that was only one of his objectives. He wanted to be able to retire at 55 and access his pension flexibly. The investigator had referred to funding concerns for the OPS. But that wasn't raised by Mr B and the advice to transfer wasn't based on the OPS funding.
- OWM maintained its advice was correct and met Mr B's objectives. OWM couldn't be held responsible if those had since changed. At the time he left OWM he hadn't suffered a loss. All of Mr B's objectives were met by transferring. The only reason to remain in the OPS was the critical yield calculation based on buying an annuity which wasn't one of his objectives and would result in none of his objectives being met. The reliance on critical yields didn't meet Mr B's objectives or the regulator's expectations.

In reply the investigator explained that a complaint can be reopened. She said OWM's comments hadn't changed her view. She appreciated that Mr B was already a deferred member but she still thought transferring was unsuitable for the reasons she'd given. She confirmed that Mr B hadn't taken any tax free cash. But, even if his fund value had increased, that didn't mean he hadn't lost out by transferring. If the complaint was upheld OWM would need to ask Mr B for information to carry out the redress calculations.

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.

I'm sorry if OWM feels it was unfairly treated. I note what OWM says about having been told the complaint had been withdrawn and that's why it didn't provide its full final response to the complaint. But OWM has since been able to provide its response to the investigator's view. I note what OWM says about not having details of Mr B's current position. As far as I'm aware, he's not yet accessed his pension benefits. But, in any event, what's being considered is if OWM's advice was suitable at the time. I don't think what Mr B has done since is relevant in deciding that. Although, as the investigator pointed out, details of Mr B's current position will be needed to calculate redress.

I'm sorry that there were some factual errors in the investigator's view, including Mr B's age at the time of the recommendation and the date of the suitability report. But I don't think it was wrong to say that Mr B complained to OWM on 12 March 2021. We'd often just refer to the consumer having complained, even if the complaint letter was written by a CMC.

I've read and considered all OWM has said. I appreciate it feels very strongly that it gave suitable advice to Mr B. I don't agree. My reasons are more or less the same as the investigator's.

As the investigator has acknowledged, Mr B was already a deferred member of the defined benefits section of the OPS when he approached OWM for advice. OWM has acknowledged that COBS 19.6.1G is the starting point and that a firm should start by assuming a transfer won't be suitable. OWM maintains it has demonstrated that the transfer was in Mr B's best interests. OWM has stressed that its advice met Mr B's objectives. In Mr B's situation, particularly given his health concerns, I can see that accessing his benefits early and flexibly would've looked attractive. Mr B's objectives were a relevant consideration and the driver for him seeking advice.

But OWM didn't just have to consider how Mr B's objectives could be met. OWM had to ensure that its advice was suitable for Mr B overall. The benefits offered by transferring can't be considered in isolation and have to be weighed up against the advantages of remaining in the OPS. I think that's what the investigator had in mind when she referred to the guaranteed nature of the OPS benefits and Mr B's low capacity for loss. Mr B may not have expressly said that the guaranteed benefits offered by the OPS were important to him. But those benefits were valuable and it was important Mr B was fully aware of what he'd be giving up.

In connection with Mr B's capacity for loss, OWM has referred to the risk profiling it undertakes at the start of the advice process and on an ongoing basis. But a consumer's attitude to risk is different from their capacity for loss. A consumer may indicate that they are prepared to take a certain level of risk but the adviser should consider if that level of risk is consistent with the client's circumstances generally. I can't see Mr B had much capacity for loss. His OPS benefits represented 28 years' service and formed the bulk of his pension provision. He had no significant assets or other anticipated sources of income in retirement, other than a very modest money purchase fund and his state pension. I don't think he was in a position to take a significant degree of risk with the benefits he'd accrued in the OPS.

As to Mr B's attitude to investment risk, the suitability letter recorded that as moderate. It also highlighted answers Mr B had given which differed from what would usually be expected from an investor with that risk profile. The suitability letter said that, after discussion, Mr B had agreed that his attitude to risk was moderate. I'd expect the results of a risk profiling questionnaire to be discussed and anything which wasn't consistent to be explored. That seems to have happened here. But I think OWM should've been cautious in proceeding on the basis that Mr B's attitude to risk was moderate when some of the answers he'd given indicated that he wouldn't be comfortable with taking more than a small degree of risk, that security was important to him and even relatively small falls in investment values would concern him.

I'm not sure of the relevance of the emails which OWM has produced as they postdate the advice to transfer. But they do show that Mr B was concerned about performance and fund losses which would support what I've said about Mr B not wanting to take much risk and being concerned about any falls in value.

But, that aside and even if Mr B's attitude to risk had been correctly assessed as moderate, I think the transfer represented a higher degree of risk than he'd said he wanted to take. The TVAS indicated that the critical yield (the rate of return that would need to be achieved to

replicate the benefits Mr B was giving up in the OPS) was 9.6% if Mr B took his full pension at age 65. That increased to 15.63% if Mr B took his pension at age 55.

OWM says the critical yield wasn't pivotal and indeed suggests, with reference to the 2017 regulator's alert, that it was obsolete. I don't think there's any suggestion that was the case. The alert did warn firms against recommending transfers based solely on whether or not the critical yield was below a certain rate set for transfers generally. The regulator made two points about that. First, that it expected the firm to consider the likely expected returns of the assets in which the client's funds will be invested relative to the critical yield; secondly, that the firm should also consider the personal circumstances of the client before making any personal recommendation, taking into account specific other factors as they apply to the client. I think the regulator was making it clear that the financial viability of the transfer had to take into account how and where the transfer value was to be invested and that suitability depended on the client's particular personal circumstances.

I don't agree that the critical yield is irrelevant. It shows the estimated investment return needed to purchase an annuity to provide benefits of equal value to the estimated benefits that would be provided by the OPS at retirement (ages 65 and 55). Mr B wasn't considering buying an annuity. But the critical yield values all the benefits given up in the OPS, including, for example, spouse's pension and escalation. I think it gives a reasonable indication of whether the CETV offered represents good value and it helps put into context the risks of transferring.

The TVAS showed the fund required to buy an annuity to provide benefits of equal value to those it was estimated the OPS would provide was £1,061,970.72, whereas the transfer value on offer was £379,650.79. And a fund of £532,879.84 would be required to purchase an annuity assuming no spouse's pension, increases in payment and no guarantee.

As the investigator explained, the 'discount rate' was 2.6%. That wasn't part of the advice process and OWM wasn't required to take it into account. But I think it does provide some context as to the level of risk the transfer presented at the time and when the required rate of return was 9.6% at age 65 or 15.63% at age 55. Further, at the time the regulator's standard nominal rates of return for projections were 2%, 5% and 8%. Again I think that's indicative of the risk that the transfer represented and suggests that it was higher than the moderate degree of risk that Mr B had indicated he was willing to take. And, as the critical yield is the return required to match the benefit given up, a higher degree of risk would need to be taken to improve on the benefits offered by the OPS.

OWM has said it would generally regard any figure higher than 6% as requiring significant investment risk to be taken to reach it on a consistent basis. And that Mr B would likely be worse off in pension income terms if he purchased an annuity after transferring. OWM has stressed that remaining in the OPS wouldn't have met Mr B's objectives. But, as I've said above, although Mr B's objectives were a factor to be taken into account, what he wanted to achieve wasn't paramount and it wasn't just up to OWM to advise Mr B how his objectives might be met. It was up to OWM to give suitable advice which meant that the transaction had to be considered in the whole – including the risks and the benefits that the new arrangement might provide. Where the TVAS shows the OPS benefits outweigh those likely to be provided by the new arrangement, I think that's a clear indication that the transfer is unlikely to be in the client's best interests.

Further and in any event, I don't see that Mr B was compelled to leave the OPS when he did. OWM has stressed that the transfer met Mr B's objectives about accessing benefits flexibly at age 55, including, if required, a lump sum to pay off his mortgage. But Mr B was 51 at the time of the advice. He wasn't looking to access his pension benefits for another four years. In the interim, he could've remained in the OPS and so not exposed his pension savings to

investment risk and then considered his options when he was approaching age 55. I note that the investigator referred to Mr B being entitled to a pension of £6,226 pa if he took his pension from the OPS at age 55. But I think that was wrong and Mr B's annual pension from the OPS would've been, and as OWM recognised, £9,493.

OPS has also cited Mr B's objective about leaving his pension fund to his wife and children. And Mr B did have some health concerns. But I don't think these were unduly serious or urgent. Mr B planned to carry on working full time until he was 55. He might then seek part time work and access his pension benefits. Again Mr B could've considered his position again when he was closer to age 55, including, if his health had deteriorated, whether he might be eligible for ill health early retirement from the OPS, or his prospects of securing a part time income.

I don't think there was any compelling need, as Mr B didn't anticipate accessing his pension benefits for some years, to make an irreversible decision to give up the valuable guaranteed benefits offered by the OPS.

All in all I don't think the advice to transfer was suitable or in Mr B's best interests. I think the transfer represented a higher degree of risk than Mr B had indicated he wanted to take or should've been advised to take. The risk of transferring outweighed the benefits and when there was no pressing need for Mr B to transfer at the time and when he could've waited and reassessed his position when he actually wanted or needed to take benefits and so avoiding exposing his pension fund to risk in the interim. I think if he'd been advised to remain in the OPS he'd have accepted that advice.

I'm upholding Mr B's complaint. I've set out below how OWM needs to calculate and pay redress to Mr B.

Putting things right

What I've set out below follows what the investigator said in her view and the email she sent to the parties on 3 October 2022. As explained, on 2 August 2022, the regulator, the FCA (Financial Conduct Authority) launched a consultation on new defined benefit transfer redress guidance and has set out its proposals in a consultation document - CP22/15- calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/19 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

The investigator asked Mr B to let us know if he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance/rules to be published. He didn't make a choice, so, as set out previously, I've assumed in this case Mr B doesn't want to wait for any new guidance.

I'm satisfied that a calculation in line with FG 17/19 remains appropriate and, if a loss is identified, will provide fair redress for Mr B.

My conclusion is that a fair outcome would be for Oaklands Wealth Management Limited to put Mr B as far as possible, into the position he would now be in but for the unsuitable advice. I consider he'd have remained in the OPS.

Oaklands Wealth Management Limited 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.

This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. Oaklands Wealth Management Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Mr B'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 B's SERPS/S2P entitlement.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr B'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 B 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.

Oaklands Wealth Management Limited must also pay Mr B £200 for the stress and worry he's been caused and the disruption to his retirement plans.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Oaklands Wealth Management Limited to carry out a calculation in line with the updated rules and/or guidance in any event.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to in this case £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as I've set out above. My decision is that Oaklands Wealth Management Limited should pay Mr B the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Oaklands Wealth Management Limited pays Mr B the balance.

This recommendation is not part of my determination or award. Oaklands Wealth Management Limited doesn't have to do what I recommend. It's unlikely that Mr B can

accept my decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept this decision.

My final decision

I uphold the complaint. Oaklands Wealth Management Limited must calculate and pay redress as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 22 December 2022.

Lesley Stead
Ombudsman