DRN-3607611

The complaint

Mrs M has complained that Martin Aitken Financial Services Limited ('MAFS') recommended she transfer the benefits held in an occupational defined-benefit ('DB') pension scheme to a self-invested personal pension ('SIPP'). Part of the funds were subsequently invested in high-risk investments which Mrs M says weren't suitable for her.

What happened

Mrs M was introduced to MAFS through an unregulated introducer, 'Mr B', in 2016. In May 2016, MAFS's adviser produced a pension transfer report in which he recommended Mrs M transfer the cash equivalent transfer value of her pension to a SIPP. MAFS's adviser set out what he thought a suitable asset allocation for Mrs M would be, based on her 'medium' attitude to risk. He then recommended that the funds should be invested with a discretionary fund manager ('DFM') who I'll refer to as 'B', using their model portfolio service. MAFS's adviser said B would be responsible for recommending a suitable investment portfolio.

Mrs M accepted the recommendation. On 9 June 2016, £196,320.28 was transferred to the SIPP. MAFS took a fee of 3% of the transfer value and would take 0.5% of the pension value in return for ongoing advice.

Although MAFS had recommended that Mrs M should invest her funds with B, an account with another DFM, which I'll refer to as 'S', was also set up. On 23 June 2016, £85,000 was transferred to S and on 28 June 2016, £99,915.88 was transferred to B. However, on 24 October 2016, Mrs M's funds were disinvested from B (at a small loss), and a further £98,756.40 was transferred to S on 26 October 2016. Part of Mrs M's funds that had been sent to S were then invested in Optima bonds.

In late 2016 MAFS started looking into pension advice provided where Mr B had acted as the introducer. And the MAFS's adviser involved was dismissed as a result of regulatory breaches MAFS uncovered through its investigation. Soon after, S went into administration, meaning Mrs M's investments were inaccessible and were potentially worthless.

A complaint was also submitted to the SIPP provider on the grounds that it had failed to carry out sufficient due diligence checks on S, which had led to unsuitable investments being made for Mrs M. The SIPP provider turned this complaint down so it has been referred to our service and is ongoing.

Mrs M lodged a claim with the Financial Services Compensation Scheme ('FSCS') about S and B but these claims were rejected on the basis she had an ongoing complaint about the SIPP provider regarding the same loss.

Mrs M then complained to MAFS about the suitability of the advice to transfer her pension and the investments made on her behalf.

MAFS upheld the complaint. It accepted the pension transfer advice was unsuitable but it said it wasn't responsible for the investments in S as it appeared Mrs M had authorised these, most likely at the direction of Mr B. Nevertheless, MAFS offered Mrs M compensation of £31,778.65, which it said put her back into the position she would've been in if her DB pension hadn't been transferred.

Mrs M didn't accept the offer as she didn't think it adequately compensated her for her loss, so she referred her complaint to our service. Mrs M's representative said MAFS's offer only compensated Mrs M for the pension transfer and not the subsequent investment losses. He thought Mrs M should be compensated for the investment loss using a benchmark.

Our investigator upheld the complaint. He thought that MAFS was responsible for the advice to transfer the pension and the investments that had subsequently been made. He recommended that MAFS should compensate Mrs M for the unsuitable advice, in line with the regulator's pension review guidance, as updated by the Financial Conduct Authority ('FCA') in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers ('FG17/9'). He also awarded compensation of £300 for the trouble and upset caused by the unsuitable advice.

MAFS accepted this, and provided an updated calculation of the offer. It explained that the investment loss had been accounted for, and the loss now stood at £20,506.80, which it offered Mrs M in full and final settlement of her complaint.

Mrs M didn't accept this, as she still didn't think this compensated her for her entire loss. Mrs M's representative remained of the view that comparing Mrs M's pension with a benchmark was more appropriate way to redress Mrs M's loss. Mrs M's representative said that the 2017 SIPP statement showed Mrs M's loss was in excess of £100,000. As no agreement could be reached, the complaint was referred to me to make a final decision.

I asked the investigator to contact Mrs M's representative to explain that I considered MAFS's method of calculating redress was correct, so if I were to issue a final decision I would be asking MAFS to recalculate the offer on the same basis. So, I gave Mrs M a further chance to accept this. Mrs M's representative still didn't agree the redress methodology was fair. He said that it could be argued the transfer value Mrs M received was inflated but even if that was the case, then any gain made by Mrs M was not attributable to MAFS's advice to transfer the pension funds but to an over generous calculation by the ceding provider. He maintained Mrs M should be compensated for her actual investment loss, which was significant.

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.

Having done so, I'm upholding the complaint for largely the same reasons as the investigator.

It should be noted that because both Mrs M and MAFS accept that the advice Mrs M received to transfer her DB pension was unsuitable, and that Mrs M would've remained in the DB scheme had suitable advice been given, I don't need to consider this further. It should further be noted that MAFS's accepts that it is also responsible for the investment loss Mrs M experienced through S. It says that its offer of redress, which was calculated in line with the FCA's pension transfer redress methodology, accounts for the investment loss.

While Mrs M's representative disputed that this fairly compensated Mrs M, he has since withdrawn this point. However, for completeness, I've gone on to consider whether the redress MAFS has offered fairly compensates Mrs M for the unsuitable advice she received.

Mrs M's representative has previously argued that Mrs M should be compensated for her actual loss, and that this should be based on comparing the actual value of her SIPP with a fair value using a benchmark in line with her attitude to risk. The representative says the amount Mrs M has lost on her investments made through S is significant. And he believes that there is scope within the FCA's pension transfer redress methodology to depart from the guidance where the guidance did not address the particular and individual circumstances of a customer's complaint. Mrs M further added that she didn't see how it was possible for MAFS to offer compensation now which would reflect the cost of obtaining a comparable pension to her DB scheme at her normal retirement age, providing the same benefits as the DB scheme.

I've considered these points carefully. But I'm satisfied that redress calculated in line with the regulator's pension review guidance, as updated by the FCA in FG17/9, fairly compensates Mrs M for the unsuitable advice to transfer her pension.

The redress method requires MAFS to calculate the cost of replacing the benefits Mrs M lost as a result of transferring out of her DB scheme, i.e. the amount required to purchase an annuity providing comparable benefits with her DB scheme at her normal retirement age of 65. This sum is then discounted back to allow the compensation amount to grow in line with assumed investment returns until 65. This is then compared with the current actual value of Mrs M's SIPP, and if the actual value is lower, compensation is due. So, I'm satisfied the calculation is putting Mrs B as far as possible into the position she would've been in if she had remained in the DB scheme. And this calculation method will aim to provide Mrs M with sufficient funds to purchase an annuity providing comparable benefits to her DB scheme at the date of calculation.

If Mrs M accepts my final decision, MAFS will be required to recalculate the compensation due to her. However, I note the calculations it has previously carried out have produced a lower amount of compensation compared to the amount she has lost through her investments with S. So, I can understand why Mrs M may feel that the method of redress isn't appropriate for her as it doesn't reflect the amount she lost through her investments.

However, it's important to note that Mrs M complained she should not have been advised to transfer her DB scheme, and that if suitable advice had been given, she would not have transferred out of the scheme. So, the appropriate way to compensate Mrs M is to ensure that she has sufficient funds to purchase an annuity that would provide comparable benefits to her DB scheme. In any event, the Regulator has set out what it deems to be appropriate redress to put right instances of unsuitable defined benefit pension transfer advice. And I see no reason to depart from this in the circumstances of this complaint as it puts Mrs M back into the position she would've been in but for the unsuitable advice.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs M, as far as possible, into the position she would now be in but for MAFS's unsuitable advice. I consider Mrs M would have most likely remained in her DB scheme if she'd been given suitable advice.

On 2 August 2022, the FCA launched a consultation on new DB 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) 17/9 (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 FG17/9 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.

We've previously asked Mrs M whether she preferred any redress to be calculated now in line with current guidance or wait for any new guidance/rules to be published.

Mrs M has chosen not to wait for any new guidance to come into effect to settle her complaint.

So, I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mrs M.

MAFS 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.

For clarity, Mrs M has no plans at present to retire any earlier than her normal retirement age. So, compensation should be based on her normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 Mrs M's acceptance of the decision.

MAFS may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs M'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 Mrs M's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs M'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 Mrs M 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 her 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 Mrs M within 90 days of the date MAFS receives notification of her 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 MAFS to pay Mrs M.

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.

My aim is to return Mrs M to the position she would’ve been in but for the actions of MAFS. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can’t be determined, which appears to be the case here.

To calculate the compensation, MAFS should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If MAFS is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything MAFS has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, MAFS may ask Mrs M to provide an undertaking to account to it for the net amount of any payment she may receive from the investment. That undertaking should allow for the effect of any tax and charges on what she receives.

MAFS will need to meet any costs in drawing up the undertaking. If MAFS asks Mrs M to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mrs M wish to move her investment portfolio) and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I’ve set out above how this might be achieved by MAFS taking over the investment, or this is something that Mrs M can discuss with her SIPP provider directly. But I don’t know how long that will take. Third parties are involved, and we don’t have the power to tell them what to do.

To provide certainty to all parties, I think it’s fair that MAFS pay Mrs M an upfront lump sum equivalent to five years’ worth of SIPP fees (calculated using the previous year’s fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

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 MAFS to carry out a calculation in line with the updated rules and/or guidance in any event.

MAFS should also pay Mrs M £300 for the trouble and upset caused by the unsuitable advice, which has had an impact on her retirement planning.

My final decision

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above.

My decision is that Martin Aitken Financial Services Limited should pay Mrs M the amount produced by that calculation up to the maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Martin Aitken Financial Services Limited pays Mrs M the balance plus any interest on the balance as set out above.

If Martin Aitken Financial Services Limited does not pay the recommended amount, then any investment currently illiquid should be retained by Mrs M. This is until any future benefit that she may receive from the portfolio together with the compensation paid by Martin Aitken Financial Services Limited (excluding any interest) equates to the full fair compensation as set out above.

Martin Aitken Financial Services Limited may request an undertaking from Mrs M that either she repays to Martin Aitken Financial Services Limited any amount she may receive from the portfolio thereafter, or if possible transfers the investment to MAFS at that point.

Mrs M should be aware that any such amount would be paid into her pension plan so she may have to realise other assets in order to meet the undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 17 November 2022.

Hannah Wise
Ombudsman