DRN-3624587

The complaint

Mr H complains about advice he was given in 2009 to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan. Mr H was a deferred member of this scheme, having been employed from 1987 until 2008. He says the advice was unsuitable for him and believes this has caused him a financial loss.

Concerva Limited is responsible for answering this complaint. To keep things simple I'll refer mainly to "Concerva".

What happened

At the time, the OPS was offering deferred members, like Mr H, the opportunity to consider transferring out of the scheme. This was accompanied by a time limited offer of an enhanced transfer value to a pension, and a cash offer on which tax would be applied. My understanding is there was a degree of flexibility in what Mr H could choose to do.

I've used figures supplied to Mr H at the time by Concerva to set out the overall enhancement offer Mr H was presented with:

- The cash equivalent transfer value (CETV) of Mr H's OPS was £81,030. However, if he took up the offer to transfer out, an enhancement of around £18,875 was being made available to him, making the total enhanced CETV £99,905.
- Of this, there was an option of up to £10,000 (net) which could be paid to Mr H as cash if he wanted, if he transferred out, representing a gross sum of £14,493. In such a case, a remaining £4,382 could then be paid to his pension final transfer value.

Put another way, if he agreed to transfer out of the OPS, Mr H could have had an enhanced CETV *plus* a lump sum of up to £10,000.

I've also noted that alongside the OPS, Mr H had been contributing additional voluntary contributions (AVCs) which in his case amounted to around £6,400. As we'll see later, the enhanced offer came with a condition that the AVCs would also have to be transferred if the OPS transfer went ahead.

The OPS allowed deferred members like Mr H to source their own financial advice and it contributed to the cost of this. Mr H first approached an independent financial adviser (IFA) he apparently knew at the time, but that IFA didn't have the necessary regulatory permissions to deal with these types of pension transfer matters. The IFA therefore asked Concerva, which did have the necessary permissions, to provide regulated advice to Mr H to discuss his pension and retirement needs.

Information gathered by Concerva about Mr H at the time was broadly as follows:

- He was 42 years old and working full time. He was married and had two dependent children. He hoped to retire at the age of 60.

- He and his wife, Mrs H, owned a home valued at approximately £195,000 and had an outstanding mortgage of around £7,000. They had no other liabilities.
- They had savings amounting to around £16,000.

A recommendation letter was issued by Concerva to Mr H on 17 September 2009. It recommended that he transfer out to a type of money market fund. It also explained some of the differences between the OPS Mr H was in and the type of personal pension he'd be transferring out to. However, I've noted this recommendation was made before Concerva had established Mr H's attitude to risk (ATR); it sent Mr H an ATR form which it asked him to fill out. Ultimately, Concerva categorised his ATR as 'balanced' broadly meaning, it said, that Mr H was prepared to tolerate his transferred funds fluctuating with the stock market in the years ahead.

Mr H now says he was given unsuitable advice by Concerva and has complained. Concerva investigated his complaint but didn't uphold it. The complaint was then referred to our Service. One of our investigators looked into it and said we should uphold it as Concerva's advice was unsuitable for Mr H. Concerva maintained its position that Mr H *"was in an informed position"* and so disagreed with the investigator's view

As the complaint couldn't be resolved informally, it's come 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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Concerva's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having done so, I've decided to uphold the complaint.

<u>Introduction and points of complaint</u>

I'm going to start by reiterating, as our investigator did, that Concerva is responsible for answering this complaint. I say this because I can see Concerva has mentioned several times that Mr H had an established IFA in place and that he was referred by the IFA to Concerva only for the pension advice. The arrangement was, that after that advice had been provided, Mr H was to be 'handed back' to the IFA for any further services he needed.

However, this does not abrogate Concerva from its responsibility. In providing regulated financial advice about this pension, Concerva received a commission. And at the time, there were a number of important rules in the Conduct of Business Sourcebook ('COBS') part of the regulator's Handbook. These included but were not limited to a requirement upon Concerva to *'act honestly, fairly and professionally in accordance with the best interests of its client'*. In addition to this, COBS required it to provide information that was clear, fair and not misleading.

The regulator, the Financial Conduct Authority ('FCA'), also states in COBS that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Concerva should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests (COBS 19.1.6).

Concerva therefore had a number of important responsibilities when providing this advice.

<u>*Financial viability*</u>

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

A critical yield figure is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity income as the DB scheme. In this case, Concerva said the critical yield required to match Mr H's benefits *without* the enhancement, at the age of 65, was 8.1%. It said the required yield if *including* the enhanced offer was 7.2% at the age of 65. If he retired earlier, at 60 as Mr H had implied he'd like to, the critical yield figures were higher. For instance, if comparing the enhancement with taking a full pension at 60, the critical yield was 7.4%.

The relevant discount rate at the time was 7.2% per year for 22 years to retirement. If Mr H went into drawdown at some point, the discount rate would be below 7%. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5% per year.

I've taken all these things into account, along with the composition of assets in the discount rate, Mr H's 'balanced' ATR (as assessed by Concerva) and also the term to retirement.

However, I've also noted that Concerva's recommendation of 17 September 2009 was provided to Mr H *before* his ATR was even established. In my view, this was poor and it demonstrates the overall weakness in Concerva's approach. This is because the recommendation was substantially based on Mr H's transferred funds growing outside the OPS, in a way that made the transfer worthwhile. However, without assessing his ATR first, I think Concerva's recommendation of transferring out to a money market fund was no more than guesswork. Although I accept Concerva wrote to Mr H again after the ATR form had been completed, I think all the documents I've seen demonstrate that Concerva was pre-disposed from the outset to simply transacting the transfer for him.

I think this was a significant failure by Concerva because there's no evidence Mr H was an experienced investor or that he had a capacity for much loss. And, in my view, the whole categorisation of his ATR was not comprehensive. In the event though, I don't think this really matters to the overall outcome of the complaint, so I don't need to go into great detail about it. For example, there would be little point in Mr H giving up the substantial guarantees available to him through his OPS only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield for taking the enhanced CETV was 7.2%, I think it's clear enough that Mr H was unlikely to receive benefits of an equal value to, let alone better than, his OPS.

I say this because the discount rate and regulator's projections were at, or below, the critical yields I've referred to above. Given what I've said above, it's fair to use 7% as a reasonable growth assumption. So I can see no obvious scenario where it could be reasonably said that he'd be better off by transferring, particularly given the other benefits and guarantees he had with this pension. In some cases, depending on the retirement scenario considered against, for example retiring at the age of 60, the maximum assumed growth rate was below the critical yield meaning it was unrealistic to say it was in Mr H's best interest to transfer out.

For the lower critical yield examples Concerva provided at the time, such as him retiring at 65 with the enhancement value factored in, I accept the margin with the discount rate was somewhat tighter. However, it's important to say that even parts of a percentage point, considered year-on-year (and over many years), can still make a big difference to the overall growth in transferred funds. The regulator's 'middle' projection of 7% was also below the critical yields I've referred to. So, this too indicates that matching what Mr H already had in his OPS was unlikely, even before considering the weaknesses in Concerva's approach to his ATR.

Our investigator also rightly pointed out that the effect of fees and charges would substantially reduce further, the chances of Mr H's funds growing to an extent that made transferring worthwhile. I too think that Concerva underplayed the effects of all the different fees and charges on the recommended personal pension and money market funds. They included fund management charges, investor charges and an on-going advisor charge payable to his IFA. In my view, Concerva's own wording in its recommendation letter reflected the growth uncertainties. Nevertheless, Concerva still recommended he transfer out to a specific fund.

I've considered carefully what Concerva says about potential growth assumptions. It says, for example*, "that the rules allowed projections to 9% at the time".* But this needs context; to achieve this level of projected growth, Mr H would have had to have accepted an ATR much higher than his circumstances merited. So, this simply isn't right. In my view, Concerva exaggerates the potential growth Mr H could have achieved by transferring out. Conversely, it underestimates the effect of the fees and charges.

Concerva also provided some cashflow models showing how Mr H's funds might grow in different scenarios over time, and I've considered whether these affect what I've said above in any way. But I think most of these models are irrelevant to his situation and none of them provide a meaningful like-for-like comparison with the scheme Mr H was advised to leave. Also, past performance is no guarantee for future performance and I consider the discount rates and the regulator's standard projections to be much more realistic in the long term rather than projecting historic returns forward, particularly over such a long period of time. To be clear, these show Concerva's growth assumptions to be unrealistic.

Of course financial viability isn't the only consideration when giving transfer advice, as Concerva has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits.

I've considered these below.

<u>Mr H's needs at the time</u>

Concerva said Mr H's other reasons to transfer included him being offered the enhancement, and also his desire to pay off his mortgage.

I've considered these issues with care, but Mr H's mortgage was already very small and it represented less than 4% of the estimated value of his home. Mr H also had more than enough in savings to pay off this mortgage, so he certainly didn't need to resort to his pension retirement savings to do this. I've also seen nothing that showed that his mortgage repayments were other than standard payments that would see his loan paid off over time in a controlled manner. Paying off his mortgage was therefore no reason to transfer out of his pension scheme.

For the enhancement offer, I can certainly understand that the figures involved would have seemed very relevant to Mr H. As a working man with two children, I can see how having up to a £10,000 payment and some more paid into his pension would have sounded like a good idea at the time. However, Concerva's role here wasn't simply to transact what Mr H thought he wanted; its role was to really understand his needs and to provide advice that was in his best interests.

Mr H was also only 42 years old at the time. It seems, unsurprisingly, that he didn't have any concrete retirement plans. As he had up to 22 years or so before he could think about accessing his full pension from this OPS, I think it was far too soon to make any kind of decision about transferring out of the DB scheme. I think the Concerva should have been making it clear to Mr H that transferring out was therefore a risk to his future income in retirement. And even when considering the enhancement on offer here, there were no specific reasons for him to transfer just to secure this.

The issue of death benefits did not feature prominently in the advice. Nonetheless, I think the existing death benefits attached to the OPS were underplayed in this case. Mr H was married and had children and so the spouse and dependent's pension provided by the OPS would have been useful if he predeceased them. I think these types of benefits in his OPS were good, and I don't think Concerva made the value of them clear enough to Mr H.

I therefore don't think it was a suitable recommendation for Mr H to give up his guaranteed benefits at that time especially when he didn't yet know what his needs in retirement would be. If Mr H later had reason to transfer out of his OPS he could have done so closer to retirement.

Transfer of Mr H's AVC

I mentioned at the beginning of this decision, the relatively small AVC element Mr H had alongside the OPS. I've noted documentation from the time where Concerva set out to Mr H that it was a condition of the enhanced offer that the AVC's would also have to be transferred. It therefore follows that the only reason for transferring the AVC, as we now know Mr H subsequently did, was because of this requirement. And so, had Concerva provided Mr H with suitable advice not to transfer the OPS, it's highly unlikely he would have transferred the AVCs.

Accordingly, I'll be including this unsuitable advice in the redress I am directing Concerva to pay.

Suitability of investments

Likewise, Concerva recommended that Mr H invest in funds within a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the OPS wasn't suitable for Mr H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr H should have been advised to remain in the OPS and so the investments in the personal pension funds wouldn't have arisen if suitable advice had been given.

Summary

In this decision I've explained why I don't think the advice given to Mr H was suitable. Given the starting position of the regulator, Concerva should have noted from the outset that transferring out of Mr H OPS was assumed to not be suitable.

However, as I've described, Concerva took the opposite approach and recommended that he transfer out nonetheless, and for reasons that don't bear scrutiny. The financial comparisons showed he would most likely receive lower retirement benefits, even after applying the enhancement he was being offered to transfer away from the scheme. And I've explained why there were also no other reasons he should have been advised to transfer out, particularly at such a young age.

Ultimately, Mr H was giving up a guaranteed, risk-free and increasing income and has lost the guarantees associated with having a DB scheme, such as a pension for life and a spouse's pension in the event of his passing.

So, I think Concerva should have advised Mr H to remain in his OPS and used the pension in the way it was originally intended.

I'm therefore upholding his complaint.

Putting things right

Overview - 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 Mr H's case, this guidance applies to part of his pension complaint.

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.

We've now asked Mr H whether 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 has chosen not to wait for any new guidance to come into effect to settle his 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 Mr H

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

What should Concerva do?

My aim in awarding redress is to put Mr H as far as possible in the position he would be in now if Concerva had given him suitable advice. I think Mr H would have remained in the DB scheme. I also think he would have retained his existing personal AVC arrangement.

To compensate Mr H fairly, Concerva must determine the *combined fair value* of his transferred pension benefits as outlined in Step One and Step Two below. If the *actual value* is greater than the *combined fair value*, no compensation is payable.

Actual value

This means the actual amount payable from the personal pension at the date of the calculation. My aim is to return Mr H to the position he would have been in but for the actions of Concerva.

Fair value – step one

If Mr H had been given suitable advice, I think he would have remained in the DB scheme. Concerva should therefore undertake a redress calculation in line with the regulator's pension review guidance, as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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

Fair value – step two

Had Concerva provided suitable advice, Mr H would have kept his AVC where it was.

To determine any loss Mr H suffered as a result of transferring the AVC, Concerva should obtain the notional value of the AVC from the ceding scheme provider on the basis that it had been invested in the same funds as it was invested in prior to the transfer. The combined value of the sums produced by the above two steps is the ***combined fair value***.

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mr H'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 H 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'.

My final decision

Determination and money award: I uphold this complaint and require Concerva Limited to pay Mr H 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 Concerva Limited to pay Mr H any interest on that amount in full, as set out above.

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

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

If Mr H accepts this decision, the money award becomes binding on Concerva Limited.

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H 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 H to accept or reject my decision before 7 November 2022.

Michael Campbell
Ombudsman