DRN-3631273

The complaint

Mr M complains about the advice given by Chase de Vere Independent Financial Advisers Limited (Chase) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a self-invested personal pension (SIPP). He says that pension is not performing as well as it could, and he is able to draw down much less than he would be receiving from the DB pension. So, he thinks the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr M approached a business called Thomsons Wealth Management (Thomsons) in 2001 to discuss his pension and retirement needs. The business has merged with Chase, and Chase is now responsible for this complaint.

Thomsons completed a fact-find to gather information about Mr M's circumstances and objectives. This showed that Mr M was aged 48 and self-employed. He was hoping to reduce his working hours in the near future and possibly retire at 55. Chase also carried out an assessment of Mr M's attitude to risk, which it said was 'neutral or medium'.

Mr M had deferred benefits in two DB schemes. Mr M has only complained about the transfer of larger DB scheme where he had 22 years of deferred benefits.

At the initial time of advice, the transfer value for the DB scheme was £155,891. However, when Mr M was in a position to transfer, due to adverse stock market movements, the transfer value had fallen to £129,621. Mr M was made aware of this and he agreed to the transfer on this basis.

In 2002, Thomsons advised Mr M to transfer his DB pension benefits into a SIPP and invest the proceeds. He transferred £129,621 into a third-party SIPP and invested in its 'Mixed' fund, which was a medium risk fund.

The suitability report said the reasons for this recommendation were that Mr M wanted to reduce the hours that he worked and start to draw down from his pension fund. He wanted to gain some flexibility, and increase his pension. Both the death benefits and tax free cash were greater under the SIPP. The report said the penalties were too high for Mr M to take the benefits from his DB schemes immediately.

Mr M complained in 2021 to Chase about the suitability of the transfer advice. He said that his pension fund had fallen in value significantly over time and he did not recall receiving any advice, or analysis of his situation, when he made the transfer.

Chase didn't uphold Mr M's complaint. It said the transfer met his needs for flexibility in terms of how and when the benefits were taken, it provided greater death benefits and control of the funds. The transfer met Mr M's financial priorities and personal circumstances. He was also informed about the reduction in the transfer value before he proceeded.

Mr M referred his complaint to our service. An investigator upheld the complaint and recommended Chase paid compensation. She said that:

- The transfer was not financially viable as it was unlikely to provide better benefits than the DB pension.
- The other reasons given at the time of sale were generic and Mr M's circumstances, and other options, weren't really looked into.
- So, it wasn't established that Mr M could really retire early, or that he needed flexibility and increased death benefits.

Chase disagreed, saying that:

- Mr M is fine with the transfer of his smaller DB scheme. As both schemes were transferred at the same time, and for the same reasons, the advice must be suitable for him.
- The Ombudsman Service is relying on current regulatory standards rather than the standards at the time. In particular, at the time, the onus was on the consumer to seek clarification of advice where needed.
- Mr M confirmed that he wanted to proceed with the transfer, even though the transfer value had recently fallen significantly
- Full information was provided at the time of sale.

The investigator wasn't persuaded to change their opinion. She clarified the rules and regulations she had used when considering the case and said that the DB transfer that Mr M hadn't complained about was far smaller, so this was reasonable.

As no agreement has been reached the complaint was referred to me to make 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.

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 for largely the same reasons given by the investigator.

The regulators rules that were in place at the time of sale are:

COB 5.3.29A(4):

The regulator expected a *"…prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."*

At least one illustration for the personal pension/section-32 plan had to be on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown.

A 'reason why' letter or equivalent also had to be issued as soon as practicable after the recommendation. It should:

"…explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme." and

"…demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Presumption of unsuitability

COB 5.3.29G specified the information a business should gather from the consumer and the DB scheme in order to assess suitability, in a similar way to the guidance under the previous regulator.

Importantly it also said for the first time that:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

This is known as the 'presumption of unsuitability' and has been renumbered to COBS 19.1.6G in the current Financial Conduct Authority rulebook.

Financial viability

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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.

The investment return (critical yield) required to match the occupational pension at retirement was 7.74% per year. This compares with the discount rate of 6.9% per year for 13 years to retirement in this case.

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%.

I've taken this into account, along with the composition of assets in the discount rate, Mr M's attitude to risk and also the term to retirement. I think Mr M was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement, as a result of investing in line with their attitude to risk.

For this reason alone, a transfer out of the DB scheme wasn't in Mr M's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Chase has said in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

It’s relevant to say that the information taken from Mr M at the point of sale was very brief. And it follows that I don’t think his needs were really established. Some broad aims or wants were noted, but there was no in-depth analysis of Mr M’s circumstances.

Chase has said that Mr M wanted flexibility in retirement, and this is why the transfer was suitable for him. But, it isn’t enough just to say that Mr M wanted some flexibility in his pension arrangements. The advice needed to go further than this, encompass some analysis of Mr M’s circumstances, and say why the transfer was suitable for this reason.

It wasn’t established what Mr M’s income needs were in retirement. So, it’s difficult to now say Thomsons was right to recommend that Mr M lose his DB scheme benefits when it didn’t know he definitely needed a flexible income. And the DB scheme might have better met his income needs. The transfer seems to have gone ahead based on Mr M expressing a desire to (possibly partially retire in five years or so, which is sooner than his DB schemes retirement age, but no more than this. I don’t think this was right.

So, having looked at the point of sale information, I don’t think it was established that Mr M required (rather than simply wanted) flexibility in retirement. This doesn’t seem to have been discussed in any detail. I also can’t see evidence that Mr M had a strong need for variable income throughout his retirement. This also doesn’t seem to have been discussed.

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension were likely an attractive feature to Mr M. But whilst I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr M about what was best for his retirement provisions. A pension is primarily designed to provide an income in retirement. And I don’t think Chase explored to what extent Mr M was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr M was married and so the spouse’s pension provided by the DB scheme would’ve been useful to his spouse if Mr M predeceased her. I don’t think Chase made the value of this benefit clear enough to Mr M. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Chase should not have encouraged Mr M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Overall, I don’t think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr M. And I don’t think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr M’s desire for control over his pension benefits was overstated. I cannot see that he had an interest in, or the knowledge, to be able to manage his pension funds on his own. So, I don’t think that this was a genuine objective for Mr M – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

Chase recommended that Mr M invest in equity based funds, which did have some investment risk. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr M should have been advised to remain in the DB scheme and so the investments in the SIPP wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr M. But Chase wasn't there to just transact what Mr M might have thought he wanted. The adviser's role was to really understand what Mr M needed and recommend what was in his best interests. It didn't do this here.

Ultimately, I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr M was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

And this was exacerbated by the fall in the transfer value. I appreciate that Mr M still proceeded after this. But Chase still advised him that it was suitable to do so.

I don't think that this is changed as Mr M hasn't complained about his second DB transfer. This transfer value was very modest, and so, Mr M may not have thought it worth pursuing. And in any event this doesn't affect my findings above.

So, I think Chase should've advised Mr M to remain in his DB scheme.

I have to consider whether Mr M would've gone ahead anyway, against Chase's advice.

I've considered this carefully, but I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against Chase's advice. I say this because this pension accounted for the majority of Mr M's retirement provision. So, if Chase had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr M had any concerns that were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Thomsons had explained that it wasn't in Mr M's best interests to risk his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr M would have insisted on transferring out of the DB scheme.

In light of the above, I think Chase should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

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) 17/19 (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 asked Mr M whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance and or rules to be published.

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

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 M.

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

Chase 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, Mr M 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 as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr 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 Mr 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 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 M within 90 days of the date Chase receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Chase to pay Mr 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.

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.

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

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Chase de Vere Independent Financial Advisers Limited to pay Mr M 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 Chase de Vere Independent Financial Advisers Limited to pay Mr M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Chase de Vere Independent Financial Advisers Limited to pay Mr M any interest as set out above on the sum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Chase de Vere Independent Financial Advisers Limited pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M accepts this decision, the money award becomes binding on Chase de Vere Independent Financial Advisers Limited.

My recommendation would not be binding if Mr M accepts this decision. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 2 November 2022.

Andy Burlinson

Ombudsman