DRN-3643470

The complaint

Mrs K complains about advice she was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a self-invested personal pension (SIPP), in 2017. She says the advice was unsuitable for her and believes this has caused her a financial loss.

Progressive Strategic Solutions LLP is responsible for answering this complaint. To keep things simple I'll refer mainly to "Progressive".

What happened

Over several years, Progressive has had an ongoing relationship with Mrs K and her husband, Mr K, as their financial advisers. It's fair to point out that Progressive classified Mrs and Mr K as high net-worth investors.

Information gathered about Mrs K at the time of this advice, in 2017, was broadly as follows:

- She was 44 years old at the time and married to Mr K. Whilst Mrs K was currently on a career break at the point of this advice and not earning a salary, she had previously held a number of 'board level' executive posts in large companies. Mr K earned a substantial salary. They had two young children and she was intending to return to a role commensurate with her experience at some point in the future.

- Mrs K had four pensions in existence at that time. Three were DB schemes, comprising cash equivalent transfer values (CETVs) of approximately £445,000, £103,000 and £37,000 respectively. Her other pension was a 'defined contribution' scheme valued at around £57,000. Mrs K's complaint relates only to the first of these pensions - none of the others are the subject of this complaint.

- Mrs K was a deferred member of the OPS in question, having been previously employed in a senior role until 2007. The OPS came with certain guarantees and benefits such as index-linking and a 50% spouse pension. Progressive said the estimated annual pension Mrs K was due at the normal retirement age of 65 was £19,020.

- Mrs K and Mr K also had significant individual and joint investment portfolios comprising savings, property, shares and other investments. The total value of their assets was said to exceed £2 million. They had no other significant debts or liabilities other than school fees and a moderate mortgage on a buy-to-let property.

As a consequence of their ongoing relationship, Mr K had been in dialog with Progressive in 2017 about his own financial affairs. In early 2017, Progressive asked Mr K to tell Mrs K that reviewing her three DB pension schemes would be a worthwhile exercise in the light of generally increasing CETVs. So, with Mrs K's consent Progressive began an assessment of her DB schemes and the financial options she might have going forward.

In March 2017 Progressive produced a pension transfer report for Mrs K which comprised a detailed analysis of her OPS. In May 2017, Progressive wrote to Mrs K setting out her three DB pensions and their respective CETVs. The implication in the letter was that one of her DB pensions in particular had a CETV which had grown to such an extent, that transferring out was something that she ought to consider whilst the value was so high. Progressive said that based on this initial analysis the other two schemes probably wouldn't be suitable to transfer, but the first (the largest) might be suitable for investing in other types of financial instruments. The letter went on to give examples of loan notes, defensive structure products and infrastructure funds as the types of investments she might want to consider investing in if she transferred out of her OPS.

A suitability report was produced by Progressive which recommended she should transfer her largest OPS to a SIPP and invest the funds with a Discretionary Fund Manager (DFM). Mrs K ultimately acted on the advice and transferred out.

Mrs K complained in 2021 first to Progressive and has since referred her complaint to our Service. One of our investigators looked into her complaint and said we should uphold it. They said Progressive shouldn't have recommended the transfer-out of her OPS. They said it wasn't in her best interests. Progressive disagrees with this and because the complaint can't be resolved informally, it's come to me for an ombudsman's 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 also 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'). 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 Progressive'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 this, I'm not satisfied the transfer was in Mrs K's best interests. I've therefore decided to uphold the complaint largely for the same reasons given previously by our investigator.

Introduction

I'd like to assure the parties involved that I've read and assessed everything we've been sent by both sides with great care. I've taken particular note of all the points made in Progressive's final response to our investigator's view, dated 18 July 2022. This response included, but was not limited to, the following areas:

- Progressive said it is not evident that the investigator fairly determined whether it took reasonable steps when advising Mrs K, as set out in the relevant guidance
- the investigator placed a disproportionate weight on the risks Mrs K was willing to take and her attitude to risk in general
- the use of the critical yield figure alone to determine the financial viability of the transfer was not appropriate, and reference to the discount rate was not a requirement placed on Progressive at the time
- there was insufficient regard to Mrs K's personal overall circumstances, including her wealth, and her high degree of financial and business competence.

I've considered all these themes carefully. However, I also noted there has been a great deal of commentary, information and argument generated in this case and sent to our Service. I've therefore rightly focussed on the key issues in what follows below.

I've also considered that the regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Progressive should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs K's best interests (COBS 19.1.6).

In my view, by far the main rationale Progressive used for the transfer out of Mrs K's OPS was the high transfer value it provided at the time. Progressive made a number of references in the information it sent to Mrs K about this value being at an historic high. It also said the CETV had significantly increased since 2011 when it had last visited its value. Progressive also made comparisons with Mrs K's other two DB pensions and said these CETVs had not grown by nearly as much. Accordingly, it recommended that Mrs K use the money from her OPS to invest in funds which Progressive said would be more likely to yield higher returns. These included infrastructure investments, and in general, areas of investments which Mrs K now says exposed her to much more risk than she was comfortable with at the time.

I therefore began by looking at whether I thought the transfer out was in Mrs K's best interests from a financial viability perspective.

Financial viability

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.

Progressive also referred to the critical yield rate in its transfer and suitability reports. The critical yield 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. I've read carefully what Progressive said about the critical yield being a "material factor", but not a particularly relevant one when making comparisons and I understand the points being made. However, in my view, the critical yield is part of a range of different things which help me consider how likely it is that a SIPP or personal pension could achieve the necessary investment growth for the transfer out to become financially viable. In addition to the critical yield, I've also taken account of the regulator's growth projection rates which were published at the time.

Progressive said the critical yield required to match Mrs K's benefits at the age of 65 was 4.32% if she took a full pension. It didn't provide a critical yield figure relating to her taking tax-free cash and a reduced pension. The relevant discount rate was 3.9% per year for 20 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've therefore taken all these things into account, along with Mrs K's 'low-medium' attitude to risk, as set out in Progressive's suitability report, and also her term to retirement. There would be little point in Mrs K giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme.

But in this case, given the critical yield was 4.32%, I think Mrs K was likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk. In Mrs K's case, the discount rate was below the critical yield figure. I also think it's fair to say that the lower end of the regulator's projection rates, which would also have been below the critical yield figure, would have been an appropriate growth projection to consider using at the time given Mrs K's attitude to risk.

As well as there being evidence showing the growth rates wouldn't exceed the 4.32% critical yield figure over time, I think it's also appropriate to emphasise that the significant fees and charges of the SIPP and chosen funds would most likely negatively impact upon the growth rate that could reasonably be expected if Mrs K transferred her pension out. So, in reality, growth would need to consistently be higher than this.

I've also noted what Progressive's wider analysis said about the overall value of Mrs K's OPS. I've taken this from the pension transfer report that was produced for her in May 2017. I note this report was later updated with what I think was certain pieces of incorrect or missing data which I think could have been confusing for Mrs K. This updated version included some errors in Mrs K's personal information, a deletion of the previous critical yield figures and some of the predicted annual pension figures at retirement which are lower and which don't appear to be right. However, from what Progressive said in the original report, in order to purchase an annuity to provide benefits of equal value to the estimated benefits provided by her existing scheme at retirement, the estimated fund required was £833,744. In my view, this provides a valuable indication of the guarantees and benefits typically found within this type of pension - and just how much Mrs K could be giving up by transferring out.

Progressive provided a number of financial planning projections which it says shows Mrs K would have been able to meet her needs long into her retirement. I've considered these, but I don't think they were like-for-like comparisons. Our investigator pointed out these models were not inclusive of the costs of operating the SIPP or paying the DFM charges, which in both cases were not insignificant. I also don't think the benefits and guarantees found within Mrs K's OPS were matched in these models. Also, as Progressive will know, past performance is no guarantee for future performance and so I consider the discount rates, the regulator's standard projections and the other comparisons I've made, to be much more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

For these reasons I don't think a transfer out of the OPS was in Mrs K's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Progressive has argued here. So, I've considered these other areas below.

Flexibility, income needs and other issues

The suitability report recommended that Mrs K should transfer out of her OPS to a SIPP administered by a third-party firm. It said this matched her objectives which included:

- To draw income in a more flexible manner given her existing pension and non-pension assets

- To be able to pass funds on to her husband and children tax efficiently

- The improved death benefits.

So, I considered whether the pension transfer objectives are likely to have come from Mrs K herself, rather than being put forward by Progressive to simply justify its recommendation to transfer out. I say this because the rationale for transferring out seems to me to be generic. Our investigator referred to these as 'stock' objectives and I agree. They were not specifically linked to Mrs K's circumstances and I don't think Progressive has been able to provide any persuasive alternative view.

For example, whilst I acknowledge that Mrs K was a long-standing client of Progressive, I think the evidence is more persuasive here that the review of Mrs K's existing DB pensions was something that originated, in 2017, from her advisers rather than from Mrs K herself. I think this is a relevant factor here. Mrs K was only 44 years old at the time and so Progressive should have been taking this into account together with the regulator's starting assumption that such transfers probably wouldn't be suitable. I think that it was probably much too soon for Mrs K to be making any kind of decision about transferring out of the DB scheme or making decisions about the flexibility of post-retirement income.

On the evidence I've seen, I don't think it could yet be said Mrs K required the flexibility in retirement as put forward by Progressive on her behalf. It was too soon to say, for instance, whether or not she had a strong need for a variable income in retirement and also too soon to say what her financial retirement needs might be in general. Furthermore, Mrs K had other pensions and assets that she could have used differently if she did in fact require flexibility in retirement. Similarly, I've found the comments about passing on wealth in a tax-efficient manner to be no more than generic ones.

Not surprisingly, at her age, I don't think she had yet developed any concrete, or even emerging, retirement plans. So, I don't think it was a suitable recommendation for her to give up her pension's guaranteed benefits when she didn't yet know what her needs in retirement would be. If Mrs K later had reason to transfer out of her DB scheme she could have done so closer to retirement.

It's clear that Progressive considered the transfer value of the OPS to be high, and that seems to have been a key consideration when recommending Mrs K transfer out of the scheme. But I don't think that this ought to have been a driving factor – ultimately this had to be weighed up against the loss of guarantees. Furthermore, it isn't possible to say whether or not Mrs K would have received a higher or lower transfer value in the future had she decided closer to retirement that she wanted to transfer out of her DB scheme. So, I don't think it's something that she should have been encouraged to take advantage of when there were no other compelling reasons to transfer out.

Progressive also put forward the issue of death benefits as being very important to Mrs K's situation. But I don't agree that these were better suited to her outside the OPS, than remaining inside. 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 SIPP may have been portrayed as an attractive feature to Mrs K. But whilst I appreciate death benefits were important to her, and she might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs K about what was best for her pension and retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Progressive explored to what extent Mrs K 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. Mrs K was married and had children and so the spouse's / dependent's pension provided by the DB scheme would have been useful to her if Mrs K predeceased them. I think these were good benefits under her particular scheme and Progressive didn't make the value of these benefits clear enough to Mrs K. These were guaranteed benefits and they escalated – they were not dependent on investment performance, whereas the sum remaining on death in a SIPP was. And if Mrs K lived a long life, or investment returns were poor, there may not have been a lot left to pass on. In this context Progressive should not have encouraged Mrs K to prioritise the potential for higher death benefits through a SIPP over her security in retirement.

I also noted the issue of life insurance was discussed at the time but not taken up. In all likelihood, I think Mrs K would have had existing life cover. Nevertheless, at the age of 44, I think life insurance would have been a realistic and affordable consideration if she genuinely wanted to leave a legacy for her spouse / children which didn't involve her transferring out of her pension. In any event and given the circumstances, I think this issue is relatively minor which doesn't impact upon my decision in any way.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of the retirement and death benefits Mrs K already enjoyed through her OPS.

I've considered everything that was said in the suitability and pension transfer reports and I do acknowledge Mrs K was given a considerable amount of information. I have also considered that Progressive has made the point several times that Mrs K was an intelligent person who held a number of senior roles whilst employed. It says Mrs K agreed to the transfer at the time and that she understood the process.

However, I've seen that Mrs K accepts these things and also that she had previously demonstrated a knowledge and good oversight of her investments in the past, including those aspects managed both *for* her, and *by* her. But Mrs K also says that none of these things indicate a detailed knowledge about pensions, or specifically, the complexities involved in pension transfers. I think this is a very reasonable point.

Conversely, in providing regulated financial advice Progressive's job here was to really understand what Mrs K's needs were and to recommend what was in her best interests. Her previous occupations and investment history don't detract from the responsibilities Progressive had when advising her about this DB transfer process. Progressive's job therefore wasn't to simply transact what Mrs K may have thought she wanted at the time and give her enough information to make her own decision – it had to give her suitable advice and recommend what was in her best interests. Overall, I don't think Progressive did this.

Use of a DFM

Progressive recommended that Mrs K use a DFM to manage her pension funds. As I'm upholding the complaint on the grounds that a transfer out of her OPS wasn't suitable for Mrs K, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs K should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage her funds if suitable advice had been given.

Summary

In my decision I've explained why I don't think the advice given to Mrs K was suitable.

Mrs K was giving up a guaranteed, risk-free and increasing income with her OPS. However, by transferring out, she was likely to obtain lower overall retirement benefits. The discount rate and the regulator's growth projections both indicated that Mrs K would be unlikely to be able to grow her funds outside the scheme, to an extent that made transferring worthwhile, in accordance with her attitude to risk. And Progressive's own analysis provided an insight into the cost of the valuable guarantees and benefits contained within her OPS that she'd be giving up if she transferred out.

So, to be clear, from a financial viability perspective, the transfer was not in her best interests.

There were also no other compelling reasons to transfer out of this pension scheme. Mrs K was only 44 years old. Consequently, she hadn't yet made any retirement plans and Progressive couldn't realistically say what her needs in retirement would be. Progressive's recommendation was based substantially on the CETV being high and Mrs K investing the transferred funds in areas which were designed to offer comparatively high rates of investment growth. It supported this rationale with generic statements about Mrs K requiring future income flexibility, better death benefits and passing on wealth more tax efficiently. I've explained why I don't think these things were applicable to her situation. And in any event, Mrs K had other pensions and assets that she could have used to give her flexibility if she so required. To my mind, there was no reason for her to give up a substantial guaranteed income in retirement when she had other pensions that she could use flexibly or leave to her dependents.

Mrs K was, by most standards, a wealthy individual who already had an existing and wide portfolio of different investments and assets. In her situation, I think Mrs K should have been advised to use the pension in the way it was designed. This was Mrs K's largest pension and I think by remaining in the OPS she was complementing the other investments she had elsewhere at the time.

Finally, I considered whether I think, if Progressive had properly recommended that Mrs K shouldn't transfer out, she would have accepted that advice. As I've said, Mrs K was a long-standing Progressive client and I've seen throughout the documentation in this case that she took a careful note of the advice it offered. I think if Progressive had provided more comprehensive and balanced advice in this case, ultimately advising that she not transfer out of her OPS, I think she would have followed that advice. I've seen nothing to persuade me that Mrs K was motivated to transfer out for any particular reason at the time – indeed, she couldn't access her pension for another 10 years. So, I'm satisfied that she would also have come to the conclusion that transferring out wasn't something she ought to do.

I think Progressive should have advised Mrs K to remain in her OPS. In light of this, I think Progressive should compensate Mrs K 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 previously asked Mrs K whether she preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published. She has said she would like to wait for the outcome of the consultation before her complaint is settled. So I consider it's fair that Progressive waits for the outcome of the consultation to settle this complaint.

A fair and reasonable outcome would be for the business to put Mrs K, as far as possible, into the position she would now be in but for the unsuitable advice. I consider she would have remained in the occupational scheme.

The basic objective of the proposed amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and its proposed updates to the DB transfer redress methodology, I'm satisfied that the proposed changes will, if ultimately implemented, still reflect a fair way to compensate Mrs K.

I therefore don't consider it necessary for me to wait for any new guidance /rules to come into effect to determine this complaint.

Progressive must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs K'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 K 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 40%. So making a notional deduction of 30% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mrs K within 90 days of the date any changes to DB transfer redress guidance *or new rules come into effect* and Progressive has received notification of Mrs K acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to DB transfer redress guidance *or new rules come into effect* to the date of settlement for any time, in excess of 90 days, that it takes Progressive to pay Mrs K.

Income tax may be payable on any interest paid. If Progressive deducts income tax from the interest, it should tell Mrs K how much has been taken off. Progressive should give Mrs K a tax deduction certificate in respect of interest if Mrs K asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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.

Illiquidity - my current understanding is that some elements of Mrs K's investments in the SIPP are illiquid, meaning they can't be readily sold on the open market. If this is the case it can be complicated to establish its value.

To calculate the compensation in this event, Progressive 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 investments.

If Progressive is genuinely unable to buy the investments, it should give the SIPP a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Progressive has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Progressive may ask Mrs K to provide an undertaking to account to it for the net amount of any payment she may receive from the investment in future. That undertaking should allow for the effect of any tax and charges on what she receives. Progressive will need to meet any costs in drawing up the undertaking. If Progressive asks Mrs K to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If Mrs K wants to close the SIPP and the SIPP only exists because the illiquid investments prevent her from doing so, the investments need to be removed from the SIPP. I've set out above how this might be achieved by Progressive taking over the investment, or this is something that Mrs K 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, if Mrs K wants to close the SIPP, I think it's fair that Progressive pays Mrs K 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.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Determination and money award: I am upholding this complaint and I direct Progressive Strategic Solutions LLP to pay Mrs K 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 Progressive Strategic Solutions LLP to pay Mrs K any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Progressive Strategic Solutions LLP to pay Mrs K any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Progressive Strategic Solutions LLP pays Mrs K the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs K.

If Mrs K accepts this decision, the money award becomes binding on Progressive Strategic Solutions LLP.

My recommendation would not be binding if she doesn't accept. Further, it is unlikely that Mrs K can accept my decision and go to court to ask for the balance. Mrs K 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 Mrs K to accept or reject my decision before 28 December 2022.

Michael Campbell
Ombudsman