

The complaint

Mrs R complains about the advice given by AFH Independent Financial Services Limited trading as AFH Wealth Management ('AFH') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Mrs R approached AFH in June 2021 to discuss her pension and retirement needs. I understand Mrs R was introduced to AFH through a family member.

AFH completed a fact-find to gather information about Mrs R's circumstances and objectives. In summary this recorded that she was 54 years old; she was married; she'd recently resigned from her job, she was a homeowner and had a mortgage with an outstanding balance of around £50,000; she owned rental properties with her husband, which had a combined value of around £600,000; and she had joint cash assets with her husband of around £180,000. AFH also carried out an assessment of Mrs R's attitude to risk, which it deemed to be 'moderate'.

In July 2021 AFH advised Mrs R to transfer her pension benefits into a SIPP and invest the proceeds in a fund which AFH deemed matched Mrs R's attitude to risk. I understand Mrs R was unhappy about the charges of the investment products recommended and having conducted her own research the recommendation was changed to an alternative SIPP provider and an investment fund from Mrs R's preferred provider, albeit not the actual fund Mrs R indicated she wanted to invest in or the SIPP provider of her choice. In summary the suitability report said the reasons for this recommendation were to allow Mrs R to leave more funds to her son upon her death and to maximise the value of her estate and grow her funds.

Mrs R accepted the recommendation and around £233,000 was subsequently transferred to her new personal pension.

Mrs R complained to AFH in September 2021 about the advice she received. In summary she raised concerns about the product and fund selection – she wanted to understand why when she'd asked for a certain SIPP provider she'd ended up with a different one, why she couldn't have the fund she'd chosen and how it was cheaper to invest in the investment fund using the recommended SIPP provider. Mrs R also highlighted her concerns about being told she had to agree to ongoing service as a condition of the transfer and that she wasn't given online access to her SIPP account.

AFH didn't uphold Mrs R's complaint. In summary it said it isn't the case that it would simply recommend a product suggested by a client – in its view the SIPP recommended was suitable and there was no difference in the charges had it been able to recommend the SIPP provider Mrs R indicated she wanted. It said it didn't recommend the investment fund Mrs R had selected because it wasn't in line with her assessed attitude to risk. It added that it believed offering an ongoing advice service was the right thing to do in the circumstances given the complexity of a DB pension transfer, but Mrs R could cancel this service. Finally it

apologised for not setting up the online access to the SIPP account and it offered Mrs R £100 as a gesture of goodwill.

Dissatisfied with its response, Mrs R referred her complaint to our service adding that she thought the transfer itself was unsuitable and not in her best interests. An investigator upheld the complaint and required AFH to pay compensation. In summary they said the transfer wasn't financially viable because of the growth rate required to match Mrs R's scheme benefits, and there was no other compelling reasons to support a transfer given her circumstances at the time.

AFH disagreed. In summary it said it provided a robust advice process where everything was shared and explained with Mrs R. It said that, prior to the advice Mrs R completed a questionnaire without its involvement and it set out the detailed answers to the questions Mrs R answered. I haven't set out all of this here – but in summary AFH said the answers Mrs R gave here portrayed a client who had clear objectives; she understood the benefits and risks of transferring; she didn't intend to take an income from her pension relying on other income sources; and that it was logical for her to want to maximise her pension fund for succession planning.

AFH said that the investigator had focused solely on the analytical aspect of the advice, ignoring Mrs R's personalised needs and adopted a blanket approach that no DB transfer is suitable. It said Mrs R didn't raise the issue of the suitability of the transfer advice when she complained to them – her complaint was about the product and the fund she was recommended. It repeated the answers it gave in its final response letter to these points. It also said that while Mrs R didn't use an insistent client approach, when she initially complained she brought up her concerns about the lack of an insistent client option and this shows the importance she attached to achieving her objectives and that she didn't have any issue with refusing the recommended course of action.

The investigator wasn't persuaded to change their opinion, so 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.

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 AFH'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 considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, AFH should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs R's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Firstly, I understand that AFH is concerned about the fact that Mrs R is now complaining about the transfer advice itself, which wasn't something she raised in her initial complaint to them. It also says Mrs R's comments to us about the advice are contrary to what she said at the time when she completed the pre-advice questionnaire.

I don't think it's in dispute that at the time of the advice Mrs R felt that transferring out of the DB scheme was a good idea. But it's clear that, with the benefit of hindsight she feels differently now, which is why she is complaining about it. I don't think it is unreasonable that Mrs R has changed her mind about things or that her complaint has changed to reflect her concerns. I can see that the investigator told AFH about the broadening nature of Mrs R's complaint and I'm satisfied it has been given a fair and reasonable opportunity to argue its case. Mrs R hasn't provided anything which hasn't already been shared with AFH, so I'm satisfied I can proceed with my final decision.

Financial viability

I can see that AFH is concerned about the focus or weight the investigator placed on the 'analytical side' of the advice – a reference to the transfer value analysis it carried out to show how much Mrs R's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme.

I accept, as I will expand on below, that financial viability isn't the only consideration when giving transfer advice and that there might be other considerations which mean a transfer is suitable despite providing lower or the same overall benefits. But I still think it is an important part of the advice – it's also the case that the regulator required this analysis to be carried out – so I think it is important that I consider it here.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

I can see that in response to the investigator's assessment, AFH queried the investigator's reference to the discount rate. To reinforce what the investigator said - while there was no requirement for AFH to have regard for the discount rate, I think it is a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice. Under COBS 19.1.2, the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension by using reasonable assumptions. The discount rate would be considered a reasonable assumption of likely returns. And businesses were free to refer to it. So, 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 for a typical investor.

Mrs R was 54 at the time of the advice and the advice paperwork records that it was her intention to fully retire in a few years' time. AFH produced a Transfer Value Comparator ('TVC') showing what sum of money Mrs R would need now to invest at a risk-free return to provide equivalent benefits to her DB scheme at retirement – in this case her normal retirement age of 62. This figure was £323,029 against Mrs R's transfer value amount of £233,238. The difference, £89,791, was therefore the extra amount Mrs R needed her fund to grow by – by investing with some risk - to achieve the same level of benefits as her DB scheme at her normal retirement age.

AFH also produced critical yield figures – a different way of showing the same thing. The critical yield required to match Mrs R's benefits at age 62 was 6.2% if she took a full pension and 4.2% if she took a tax-free cash lump sum and a reduced pension (these were the figures referred to in the revised suitability report following the amended product and investment fund recommendation I referred to earlier on.)

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.4% per year for 7 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mrs R's 'moderate' attitude to risk and also the term to retirement. There would be little point in Mrs R 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 here, given the lowest critical yield was 4.2%, I think the opportunity to improve on the benefits available to Mrs R through her DB scheme was limited as a result of transferring to a personal pension arrangement and investing in line with that attitude to risk.

For this reason alone, I don't think a transfer out of the DB scheme was in Mrs R's best interests. But as I said above, and as AFH has argued in this case, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite the limited opportunity to improve on the benefits. I've considered this below.

Death benefits

It appears that the primary reason for the recommendation was to enable Mrs R to leave her pension fund to her son as she indicated that she was unlikely to need to access her pension given her other sources of income.

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 was likely an attractive feature to Mrs R. But whilst I appreciate death benefits are important to consumers, and Mrs R 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 R about what was best for her retirement provisions.

A pension is primarily designed to provide an income in retirement – not a legacy provision tool. And it was AFH's duty to advise Mrs R what was in her best interests – not simply to facilitate what Mrs R thought she wanted.

It's clear that Mrs R and her husband had accumulated significant wealth – they had an investment property portfolio valued at around £600,000, which was unencumbered and they held significant joint cash deposits of around £180,000. It's also clear that the property rental income alone of around £2,100 a month was more than sufficient to cover both their essential expenditure of £12,000 a year and their current expenditure of around £18,000 a year. Mrs R's short-term plan was to purchase another investment property and repay their joint mortgage when the fixed rate expired. This would result in an increase to their joint disposable income. So on the one hand, Mrs R's capacity for loss was relatively high and there was no apparent reliance on her DB scheme income to meet her retirement income need.

But on the other hand, Mrs R and her husband, certainly prior to receipt of their state pensions, were reliant on the rental income as the primary source of their retirement provision. But rental income cannot reasonably be described as guaranteed and in my view, by placing all of their eggs in one basket, Mrs R and her husband were already exposed to a not insignificant degree of risk. Over time it's possible that the rental market could change affecting their income stream and/or the upkeep and maintenance of the property portfolio could increase their expenditure needs.

So while Mrs R said she didn't envisage needing the income from her pension, it seems to me that Mrs R's guaranteed and increasing DB scheme income – according to AFH's analysis around £7,100 as a full pension at age 62 - could've played a useful part in providing her with security in retirement. Furthermore, the DB scheme offered a generous spouse's pension of 66% of Mrs R's pension. Given Mrs R's husband had little by way of his own pension income provision, I think the spouse's pension provided by the DB scheme would've been useful to her spouse if Mrs R predeceased him. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

I'm mindful here too that, given the size of Mrs R's estate, her son was due to inherit a significant amount of wealth as a lump sum in any event. Furthermore Mrs R was still relatively young, she was recorded as being in good health and her son was financially independent. So it strikes me that there was no pressing need here to transfer Mrs R's pension to address succession planning and I don't think AFH should've encouraged Mrs R to prioritise the potential for higher or different death benefits through a personal pension over her security in retirement.

But if Mrs R genuinely wanted to consider providing for her son, which didn't depend on investment returns or how much of her pension fund remained on her death, there were other ways to achieve things – things the recommendation report referred to yet still went on to recommend the transfer. For example Mrs R could simply save any unused pension income adding to the overall estate value, she could gift money to her son in her lifetime instead, or she could take out life assurance written in trust for the benefit of her son for an amount that either Mrs R wanted to leave him over and above that which he was already going to inherit, or to cover the likely inheritance tax liability. And given Mrs R's disposable income, it seems to me that this would've been affordable.

Overall, I don't think Mrs R wanting to leave her pension fund to her son was a compelling reason to recommend she transfer out of her DB scheme. As the recommendation report set out, there were other viable alternatives to meet Mrs R's need which didn't involve her taking on any additional investment risk – something AFH also said Mrs R didn't need to take.

Flexibility

While not a key reason for recommending the transfer - AFH referred to flexibility as being a preference rather than a need – I've also considered whether this was a suitable reason for recommending the transfer.

But I don't think Mrs R needed flexibility in retirement. For example while AFH referred to the fact that a higher tax-free lump sum could be taken through a personal pension, there was no apparent need for it. And neither was there a need to access her tax-free cash earlier than the normal scheme retirement age and leave her funds invested until a later date. While Mrs R had a mortgage and it was her intention to repay it when the fixed rate expired, she already had sufficient liquid assets to enable her to do this. I also can't see evidence that Mrs R had a strong need for variable income throughout her retirement based on her expenditure needs recorded at the time of the advice.

So I'm satisfied that Mrs R did not have a need for flexibility that justified the transfer out of her DB scheme.

Summary

I accept that when Mrs R approached AFH she was motivated to transfer and it's apparent that she was engaged with the advice process. And I don't doubt that control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs R. But as I said earlier, AFH wasn't there to just transact what Mrs R might have thought she wanted. The adviser's role was to really understand what Mrs R needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs R was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs R was unlikely to improve on her retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. In my view, Mrs R shouldn't have been advised to transfer out of the scheme just for legacy planning reasons and the potential for higher or different death benefits – I don't think it was worth giving up the guarantees associated with her DB scheme to do so when there were viable alternatives available to her.

So, I think AFH should've advised Mrs R to remain in her DB scheme.

Of course, I have to consider whether Mrs R would've gone ahead anyway, against AFH's advice, which it argues is the case. It says Mrs R's disappointment that there was no insistent client route demonstrates that she was willing to put aside its advice and refuse its recommended course of action.

I've considered this carefully, but I'm not persuaded that Mrs R would've insisted on transferring out of the DB scheme, against AFH's advice (had AFH allowed it) or that she would've gone elsewhere to do so. I say this because, in my view, Mrs R's disappointment with not being offered an insistent client categorisation isn't an indication that she was willing to transfer regardless of the advice she was given. I think it was simply borne out of her disappointment at AFH declining to include her choice of investment fund and SIPP provider in its recommendation when she believed that it would, based on what she said she was told if she proceeded to full advice.

While I accept Mrs R wanted to choose her own investment fund, this appears to have been driven by her unhappiness with the charges of the initial recommended fund and her misunderstanding that AFH would only be recommending one fund rather than presenting her with options from which she could choose. While AFH recorded that Mrs R had invested in the past, I'm not persuaded Mrs R was an experienced equity-based investor. It seems to me that her investment experience was primarily based around property investment. Mrs R had a moderate attitude to risk and her DB scheme pension accounted for the majority of her private pension provision. So, if AFH had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

I'm not persuaded that Mrs R's desire for wanting her son to benefit from her pension fund was so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If AFH had clearly explained, and ultimately recommended, that Mrs R could meet all of her objectives without any need to risk her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs R would have insisted on transferring out of the DB scheme.

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

I can see the investigator also recommended an award of £200 for the distress and inconvenience the matter has caused Mrs R in addition to the £100 already offered by AFH.

So I've also thought about whether it's fair to award compensation for distress and inconvenience - this isn't intended to fine or punish AFH - which is the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mrs R. Taking everything into account, I think the unsuitable advice has caused her distress. So I think an award of £300 in total is fair in all the circumstances.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

In this consultation, the FCA 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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mrs R whether she preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

Mrs R didn't make a choice, so as set out previously I've assumed in this case she doesn't want to wait for the new guidance to come into effect.

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 R.

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

AFH 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, although my understanding is that Mrs R is retired and she took some tax-free cash from her pension to repay her mortgage, it is my view that she did only do this by virtue of the fact that the transfer to a personal pension arrangement enabled her to do so – she had other means at her disposal to repay her mortgage if she chose to. So if things had happened as they should have and AFH had recommended that Mrs R remain in her DB scheme, I think it's likely that Mrs R would've accessed her benefits at the scheme's normal retirement age of 62, which is the earliest point she could access her benefits without reduction. So compensation should be based on a retirement age of 62.

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 R's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs R'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 R 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 R within 90 days of the date AFH 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 AFH to pay Mrs R.

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.

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

AFH should also pay Mrs R £300 in total - £200 in addition to the £100 AFH has already offered to pay - for the distress and inconvenience caused in this matter.

Where I uphold a complaint, I can award fair compensation of up to £355,000, 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 £355,000, I may recommend that the business pay the balance.

My final decision

Determination and money award: I uphold this complaint and require AFH Independent Financial Services Limited trading as AFH Wealth Management to pay Mrs R the compensation amount as set out in the steps above, up to a maximum of £355,000.

Where the compensation amount does not exceed £355,000, I would additionally require AFH Independent Financial Services Limited trading as AFH Wealth Management to pay Mrs R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £355,000 I would only require AFH Independent Financial Services Limited trading as AFH Wealth Management to pay Mrs R any interest as set out above on the sum of £355,000.

Recommendation: If the compensation amount exceeds £355,000, I also recommend that AFH Independent Financial Services Limited trading as AFH Wealth Management pays Mrs R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs R.

If Mrs R accepts this decision, the money award becomes binding on AFH Independent Financial Services Limited trading as AFH Wealth Management.

My recommendation would not be binding. Further, it's unlikely that Mrs R can accept my decision and go to court to ask for the balance. Mrs R 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 R to accept or reject my decision before 23 March 2023.

Paul Featherstone

Ombudsman