DRN-3665975

The complaint

Ms C's representative has complained, on her behalf, about advice given to her by Sovereign Private Clients Limited (SPC) to transfer defined benefits she held in an occupational pension scheme (OPS) to a personal pension plan (PPP).

What happened

My understanding is that Ms C met with a representative of SPC in early 2017, and although there's no "fact find" from the time of the meeting, Ms C's circumstances at the time were as follows:

- She was 59 years old and widowed.
- She had no savings or assets.
- She hoped to retire at age 62.

Ms C has said, in the course of our investigation, that she had a cautious attitude to risk and had little investment experience.

Ms C had accrued defined benefits in the OPS of a former employer, which had a normal retirement age of 60.

A letter from the scheme to Ms C in 2017 estimated that she would receive an annual income of £1,067, or a "commuted" annual income of £767.09 if Ms C took her tax-free cash entitlement. The scheme would pay a spouse's pension of 50% of her pension entitlement. At the time of advice, Ms C had close to four years of membership, having left the scheme in June 2005. As such, she was a deferred member of the scheme.

Ms C has told us that, in terms of her objectives at the time, she wanted to use the tax free cash for holidays and to buy a new car.

SPC hasn't provided a suitability report. There's also no transfer value analysis (TVAS) available from the time of the advice But a Liverpool Victoria (the PPP provider) illustration indicated that the recommended PPP would need to grow by 8.7% pa at age 62 to match the benefits provided by the defined benefit scheme.

There would be an initial adviser fee of £1,543 applicable to the transfer, along with an ongoing adviser charge of 1% pa of the fund value.

In terms of product fees, this would be set at 0.25% pa of the fund value.

Ms C accepted SPC's recommendation and the transfer took place in or around October 2017. The amount transferred was just under £31,000. By the end of 2018, Ms C had drawn down the entire pension.

Ms C complained, through her representative, to SPC in July 2021, raising concerns that the advice was unsuitable for the following reasons:

- She wasn't informed of the benefits she'd be losing by transferring and, had she known, she wouldn't have transferred.

- She had little previous investment experience and a low attitude to risk/capacity for loss.

- The tax-free cash was used for things that weren't necessary.

SPC didn't provide a final response. The complaint was then referred to this service, where one of our investigators assessed it. He thought that the complaint should be upheld, saying the following in summary:

- Ms C's defined benefits would offer her a guaranteed income for life and would form a significant part of her pension provision.

- From the information provided by Ms C, it seemed that she had a low capacity for loss, which would have meant that the security of the guaranteed benefits offered by the defined benefit scheme would have been very important to her.

- The defined benefit scheme offered valuable benefits with no risk.

- The regulator's guidance (COBS 19.1.6) said that the starting point in assessing the suitability of a defined benefits transfer should be the assumption that it will be unsuitable, unless it could be clearly demonstrated otherwise.

- As there was no suitability report, the investigator couldn't be certain that this had been commented upon by SPC, but he'd nevertheless considered the available evidence to determine whether the transfer had been in Ms C's best interests.

- In terms of financial viability, the advice was given during a period when this service was publishing "discount rates" on our website for use in loss assessments where a complaint such as this was being upheld.

- Businesses weren't required to refer to these rates when providing advice, but they were nevertheless a useful indicator of the growth rates which would have been considered achievable at the time.

- There was no TVAS, and so no critical yield had been produced by SPC, but the PPP provider had calculated this to be 8.7% at age 62 in its illustrations.

- The regulator's upper projection of potential growth at the time was 8%, with the mid band and lower growth level projections being 5% and 2% respectively.

- In terms of Ms C's other assets which might assist in absorbing potential investment losses as a result of the transfer, Ms C was receiving £500pm as a widow's pension.

- Taking this into account, along with the composition of assets used to determine the discount rate, Ms C's low attitude to risk, and her term to retirement, she was likely to be in a substantially worse off position at retirement through transferring.

- The advice to transfer wasn't therefore suitable as it was unlikely to improve her overall financial situation, despite her capacity to absorb some losses as a result of the £500pm she received as a widow's pension.

- In terms of other reasons as to why the transfer might be suitable, advisers were required to understand a consumer's actual objectives so that they could advise on a suitable course of action to meet them.

- These objectives shouldn't be generic, but personal to the individual client, as set out by the regulator's guidance contained in "FG21/3". That guidance said that recorded objectives such as "flexibility" and "control of my pension" were unlikely to be sufficiently personalised without further detail.

- There was no recommendation report to demonstrate what SPC considered to be a motive for Ms C to transfer, but she had herself given this service "stock motives" when describing the reasons for transferring.

- But the available evidence didn't support the position that these stock motives were of sufficient importance to Ms C to justify relinquishing her guaranteed benefits, especially given that she was likely to be worse off in retirement as a result.

- SPC hadn't therefore clearly demonstrated that the transfer was in Ms C's best interests, as required by COBS 19.1.6G.

The investigator concluded that, had Ms C been suitably advised to not transfer, she would have retained her defined benefits. In support of this position, he said that, whilst the reasons for transferring – to take holidays and buy a new car – were nice things to have, they couldn't justify the relinquishing of the guaranteed scheme benefits.

As Ms C didn't have any other substantial provisions for retirement, the importance of the scheme benefits would have been enough to stop her transferring.

As such, the investigator recommended that SPC conduct a loss assessment in line with the guidance issued by the regulator for unsuitable defined benefit transfers, as set out in the FCA's *'Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers'*.

Ms C's representative accepted the proposed outcome and subsequently confirmed that, although Ms C had the option of waiting for the outcome of the FCA's consultation on amending the redress methodology which was announced on 2 August 2022 before redress was calculated and settled by SPC, she would rather any redress be calculated in line with the current guidance.

SPC hasn't responded to the investigator's assessment, and as agreement hasn't been reached on the matter, it's been referred to me for review.

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's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Did SPC provide advice?

In the absence of any information from SPC relating to the advice process, I've needed to firstly establish, as far as is reasonably possible, that it did in fact provide advice to Ms C to transfer. I think it's unlikely that the genesis of the transfer was Ms C herself. Defined benefit transfers are complex matters and I think it's unlikely that the desire to take holidays and buy a new car would have prompted Ms C to have herself begun researching her options to transfer her deferred OPS benefits to achieve this.

Ms C's recollection is that SPC contacted her about transferring – involving several meetings, one of which she thinks happened at her home.

And so, on the basis of Ms C's recollections, I've then considered the evidence produced by the PPP provider. The latter comprises the following:

- A call note dated 23 January 2019 showing the representative of SPC made an enquiry to determine whether they were still the "lead agent" on the plan.

- A letter from Liverpool Victoria to SPC dated 25 October 2017 confirming that the new plan had been set up.

- An email from Sovereign Private Clients Ltd to Liverpool Victoria dated 24 October 2017 attaching the application form.

- A remuneration statement dated 25 October 2017 showing a payment of £1,543.48 was made to SPC as an 'advisor charge'.

I think the above evidence means that, on balance, it's more likely than not that Ms C received advice from SPC to effect the transfer. I've also noted that, in the communication which this service has received from SPC, it hasn't indicated that it considers it wasn't responsible for the advice to transfer.

As such, I'm satisfied that responsibility for the advice to transfer lies with SPC.

The applicable rules, regulations and requirements

This isn't a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business *to "act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time SPC advised Ms C were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like SPC, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, SPC needed to gather the necessary information for it to be confident that its advice met Ms C's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

“A firm must:

(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;

2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client’s attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and

(4) take reasonable steps to ensure that the client understands the firm’s comparison and its advice.”

Under the heading *“Suitability”*, COBS 19.1.6 set out the following:

“When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests.”

COBS 19.1.7 also said:

“When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client’s attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.”

And COBS 19.1.8 set out that:

“When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information.”

I’ve therefore considered the suitability of SPC’s advice to Ms C in the context of the above requirements.

<u>The rationale for transferring</u>

As far as I can tell from the limited information available, Ms C wasn't categorised as an insistent client, and so SPC could be confident that she would be acting upon its advice.

Ms C's objectives, as conveyed by her as there is no available suitability report or fact find, were to take holidays and to buy a new car.

And as there's no suitability report, I can't see that SPC pointed out to Ms C that the starting assumption for an assessment of Ms C's options, as set out above, was that a transfer would be unsuitable, unless it could be demonstrated that it was in her best interests in order to meet specific objectives. But I'll nevertheless explore these objectives further below.

But before I do that, I need to consider the transfer from a financial perspective. The discount rate deemed achievable for the two and a half years left to Ms C's proposed retirement age of 62 was 2.7% pa.

The critical yield produced by Liverpool Victoria – notably not by SPC, as there is no available evidence that a TVAS was undertaken - for retirement at age 62 with the OPS (rather than at the scheme retirement age of 60), at 8.7% pa, was therefore higher than both the discount (or growth) rate deemed achievable over the same period, and the highest achievable growth rate used by regulator. Given Ms C's stated – and likely - attitude to investment risk, that level of growth would more likely than not have been unachievable.

And as a reminder, this growth rate was required to just match the scheme benefits. There needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, it needed to be *clearly* demonstrated that the transfer would be in Ms C's best interests. As such, my view is that the transfer couldn't be justified from a purely financial perspective, especially given the valuable guarantees which Ms C would be relinquishing.

But the feasibility of achieving a critical yield alone wouldn't in any case indicate suitability of a transfer, as set out in COBS 19.1.7b.

I can't know whether any risk warnings were drawn to Ms C's attention by SPC, but as it will in any case be aware, risk warnings alone wouldn't render unsuitable advice suitable. And irrespective of the detail contained in any suitability report which might have been issued at the time, but hasn't been submitted to this service, this also wouldn't make otherwise unsuitable advice suitable.

SPC needed to be satisfied, before providing its recommendation, that relinquishing the guarantees and taking the investment risk was a suitable course of action for Ms C.

As I've said above, the rationale for the recommended transfer, certainly as far as Ms C was concerned, was to take holidays and buy a new car. And so I've given this argument careful consideration.

But as with the investigator, I don't think that these would be of such necessity that they would justify Ms C relinquishing her defined benefits. There wasn't for example, the need to repay high cost debt or fund other essential requirements. They were, as noted by the investigator, "nice to haves", but not to the extent that they would be of more importance or value to Ms C in the future than the guarantees attached to her OPS benefits.

There is then the wider issue about Ms C's capacity to take financial risks with her pension funds which is pertinent to overall suitability here. Ms C was only three years away from her prospective retirement and, as far as I can tell, beyond the £500pm she was receiving as a widow's pension and the state pension, the defined benefits were likely to have been her only source of guaranteed income. Any reduction in the benefits payable from them would therefore have had a considerable impact on her financial security in retirement.

However, I also don't think Ms C in any case needed to take the associated risks here. And in particular, I've thought about whether Ms C could meet her objectives whilst also retaining the valuable guarantees offered by the defined benefit scheme. I think it's likely that Ms C could have begun to take her scheme benefits at 59 if she wanted to access the tax free cash – or simply waited a few more months until she was 60 to retire at the scheme's normal retirement age. And this is in my view more likely than not what Ms C would otherwise have done.

This would have meant that the scheme income would have been payable a couple of years earlier than had been envisaged, but if there was any income which was excess to her requirements, she could have reinvested this for later access. But there's no evidence that this was presented to Ms C as an option.

In light of this, as the guarantees attached to the defined benefits would have been of considerable value, these benefits should not in my view have been relinquished in favour of a pension fund invested in a PPP which had little chance of matching the scheme benefits – given the critical yield.

What should SPC have done – and would it have made a difference to Ms C's decision?

For the reasons given above, I don't think the perceived advantage of taking holidays and buying a car of outweighed the guaranteed benefits in the scheme. The available evidence simply doesn't support the position as to why these expenditures would have been sufficiently compelling reasons for Ms C to relinquish valuable benefit guarantees.

My further view is that, if properly discussed, Ms C would have appreciated the important guaranteed benefits which she would be relinquishing for the sake of non-essential expenditure, and a future pension which would be diminished as a result of losing the scheme guarantees.

The critical yield is usually a telling indicator of the value of the benefits being relinquished. And as the critical yield to just match the OPS benefits was considerably higher than the discount rate, the regulator's mid (and indeed higher) rate growth assumptions, I think it was unlikely to be achievable to even simply match the scheme benefits.

I'm also unconvinced by the justifications for proceeding with the transfer, for the reasons given above.

This was a complex matter involving many factors with which Ms C, as a layman, wouldn't have been familiar – hence her reliance on a professional party to take those factors into account and provide suitable, balanced advice.

For the reasons given above, my view is that, certainly in the absence of any evidence to the contrary, Ms C simply wasn't placed in a properly informed, or suitably advised, position when making the decision to transfer.

Taking account of Ms C's circumstances, including her attitude to risk, her objectives and the guarantees which the OPS offered, my view is that SPC should have advised against the transfer.

And I think that, had this happened, and SPC had explained the options available to Ms C, along with the value of the benefits she was relinquishing, Ms C would have followed that advice and not transferred her benefits to the PPP.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to a clear conclusion – that the recommendation to transfer wasn't suitable for Ms C, nor was it in her best interests. The key contributing factors here are: Ms C's attitude to risk and its incompatibility with the type of investment risk which would have likely been required to match the scheme benefits – a failing under COBS 19.1.7; and the absence of any evidence which would suggest a comprehensive and balanced portrayal of Ms C's options and the future benefits available from the OPS – a failure to adhere to COBS 19.1.2 (2) and 19.1.8.

Furthermore, access to the tax free cash would in any case have been available to her through the OPS. It follows that my view is that, taking account of the critical yield, Ms C's attitude to risk and matching that with the likely corresponding investment returns, it was unlikely that the benefits available from the OPS could be bettered through the transfer.

As the other reasons for transferring were insufficiently compelling, when considered against the valuable benefits being relinquished, as required by COBS 2.1.1R and COBS 19.1.6, SPC would - or should - then have drawn, and conveyed, the conclusion that transferring wasn't in Ms C's best interests.

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.

As mentioned above, we've asked Ms C whether she preferred any redress to be calculated now in line with current guidance or wait for any new guidance/rules to be published.

She has chosen not to wait for any new guidance to come into effect to settle her 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 Ms C.

A fair and reasonable outcome would be for the business to put Ms C, 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. Sovereign Private Clients Limited 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.

This calculation should be carried out as at the date of this final decision, 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 Ms C's acceptance of the decision.

Sovereign Private Clients Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Ms C'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 transferring out of the occupational scheme on Ms C's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Ms C'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 Ms C 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%/40%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Ms C within 90 days of the date Sovereign Private Clients Limited 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 Sovereign Private Clients Limited to pay Ms C.

Income tax may be payable on any interest paid. If Sovereign Private Clients Limited deducts income tax from the interest, it should tell Ms C how much has been taken off. Sovereign Private Clients Limited should give Ms C a tax deduction certificate in respect of interest if Ms C 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.

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 Sovereign Private Clients Limited to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

My final decision is that I uphold the complaint and direct Sovereign Private Clients Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 19 December 2022.

Philip Miller
Ombudsman