DRN-3672386

The complaint

Mr E complains about advice he was given to transfer the benefits of two defined-benefit (DB) occupational pension schemes (OPS) to a personal pension plan. He says the advice was unsuitable for him and believes this has caused him a financial loss.

Tenet Connect Limited is responsible for answering this complaint. To keep things simple I'll refer to "Tenet". I will also refer to the two pensions schemes as "Scheme T" and "Scheme W" respectively.

What happened

Mr E approached Tenet to discuss his pension and retirement needs in 2017. His relationship with Tenet stretched out over a few months, during which his circumstances evolved slightly. However, the information Tenet gathered about Mr E in early 2017 was broadly as follows:

- Mr E was over 65 years old and was still working – although he retired during this same year. His employment income just ahead of retirement was around £27,000 per year. However, Mr E was also already drawing a pension of around £14,700 per year from a previous and unrelated pension.

- Mr E was married with grown up children. His wife, Mrs E, was aged 62. She too still worked and earned £10,000 per year. Their savings comprised of various liquid bank accounts and shares, which totaled around £90,000.

- The cash equivalent transfer value (CETV) of Mr E's two pensions were approximately £143,000 (Scheme T) and £151,000 (Scheme W). Mr E had already reached the normal retirement age for both these schemes.

- Mr E also had some other small defined contribution pension 'pots'. These do not form part of this complaint – one was valued at approximately £15,000 and the other at £2,500. Both Mr and Mrs E were entitled to state pensions said to be around £8,100 per year each.

- Mr and Mrs E fully owned their house with no mortgage.

In February 2017, Tenet advised Mr E to transfer out of Scheme T. In June 2017, it advised him to transfer out of Scheme W. The advice in both cases was to transfer to a personal pension scheme and invest in funds commensurate with Mr E's attitude to risk which Tenet classified as 'cautious balanced'.

Mr E says he was given unsuitable advice by Tenet. The complaint was referred to our Service. One of our investigators looked into the complaint and said we shouldn't uphold it. Mr E did not agree with our investigator.

I issued a provisional decision about this complaint several weeks ago and asked for either party to send in any more information or evidence they wanted me to consider. I said I was minded to uphold Mr E's complaint.

I haven't been sent anything that changes my view, so my final decision now is based mainly on what I've already set out previously.

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.

Having done so, I am upholding the complaint.

Introduction

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, Tenet should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr E's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied these two transfers were in his best interests.

When assessing the suitability of DB pension transfer advice, we normally expect businesses to explain why they thought transferring-out was in the consumer's best interests from a financial viability perspective. To do this, we usually expect advisors to explain what levels of growth the pension funds might achieve outside the scheme, so we can assess whether transferring out of the DB scheme to a personal pension was the right thing to do.

Typically a metric known as the 'critical yield' is used to help demonstrate how much a pension would need to grow by to match the DB schemes that were transferred. There were also periods 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.

In this case, however, I've noted Tenet hasn't provided these figures but has used some cash-flow examples in its suitability letters to show how Mr E's two pension transfer values would have lasted in his retirement years. Because of Mr E's age – he was already at the point of actual retirement – I think the critical yield figures and the discount rates we normally use wouldn't have been of much relevance given he was already around the normal retirement age for both schemes.

I've therefore looked at everything else we've been sent to help me think about whether transferring out of these two schemes could be said to have been in Mr E's best interests. A 'fact-find' was completed in December 2016 which provides a useful insight to Mr E's retirement plans and the type of issues he was looking for advice on. I've noted, for instance, he seemed to like the idea of having some cash available in case it was needed in his retirement, but he was also concerned that should he die, Mrs E's income might not be enough for her to maintain a reasonable lifestyle. Mr E was also keen on exploring how his children and grandchildren might be left money in the event of his passing.

Tenet later issued two suitability letters – one in respect of each of Mr E's two pensions. The first suitability letter, issued on 14 February 2017, related to Scheme T. The second suitability letter, issued on 21 June 2017, was about Scheme W. I think it's fair to say that at the point of the first letter Mr E was still working, but he was *very close to* retiring, whilst at the point of the second letter he had *actually* retired. However, other than this, I think we can say Mr E's other circumstances, and his retirement aspirations, were broadly the same.

<u>*Scheme T*</u>

In issuing the suitability letter about Scheme T, Tenet said it had reviewed his income and retirement benefits and would also provide a cash flow analysis of how a transferred-out pension might fare during his retirement years. It also identified the following retirement needs Mr E had at the time:

- *ensure your beneficiaries benefit from your pension provisions in the event of your death either prior to or after retirement*
- *the ability to access large cash sums if needed*

I think these things that were listed by Tenet were somewhat generic retirement needs and aspirations, and they are ones likely to be shared by a great many people. Mr E's main 'beneficiary', Mrs E, would already have been able to benefit from the spouse's pension available from scheme T. And at 60% of his annual pension, this was a good benefit to have. I think it's also highly relevant in this case that Mr and Mrs E already had substantial amounts of cash available.

Indeed, the whole tone of the suitability letter was that Mr E was always going to transfer out of scheme T, and his apparent desire to have access to cash from his pension was, in my view, unspecific. Other than general comments about taking holidays and no doubt enjoying the comfort having additional savings might bring, there seems no basis for having the amount of cash transferring this pension would release.

I also think the approach taken by Tenet conflicts with the starting point recommended by the regulator, which is that such transfers will probably not be suitable. I noted, for example, that Tenet said it was going to include a cash-flow analysis (in retirement) at the outset of the letter, thus indicating that transferring Mr E's pension was always going to be the prominent feature in its advice. In addition to this, the letter consistently refers to Mr E already having various income sources, which Tenet said made further income from scheme T unnecessary.

In this respect, the letter noted Mr E had a guaranteed income through an existing DB pension which he was already drawing from and earning £14,772 per year. He was also entitled to a state pension of over £8,100 per year. Mrs E was also still working at the time and the implication was that she too would soon be able to access a state pension of a similar value. So, with these incomes available to them Tenet said that Mr E should comfortably be able to cover his day-today living expenses, without the need for more income to be added from scheme T.

With these things in mind, the suitability letter said Mr E was happy with the guaranteed income he already benefitted from. And Tenet also said Mr E had himself agreed he didn't see a need for an additional guaranteed income stream such as the one offered by scheme T at this point in his life. It said he would prefer to have access to a larger lump-sum fund – meaning he should transfer around £143,000 out of Scheme T. Tenet added Mr E wanted to leave some money to his children and grandchildren for them to enjoy in years to come.

The suitability letter recommended Mr E should transfer out to a personal pension plan on this basis.

<u>*Did these reasons justify advising Mr E to transfer-out of his pension?*</u>

I've considered all these issues with great care. I've also noted that Tenet hasn't relied so much on demonstrating that Mr E's pension could grow more outside Scheme T rather than leaving it where it was - instead, its advice was almost entirely predicated on him having enough income already and a desire to hold large amounts of cash for future use. The death benefits were also an issue.

However, I think Tenet's rationale was flawed.

When providing regulated financial advice, Tenet's job wasn't simply to transact what Mr E thought he wanted. Its job was to really understand his needs and provide advice that was in his best interests.

I can accept that Mr E may have found the prospect of having access to a substantial amount of additional cash a good idea at the time. And I'm sure he may have been tempted to think it would be of use to make big purchases in his retirement years or treat his loved ones as he saw fit.

However, the main purpose of this pension was that it was an important component in Mr E's overall retirement provision. Taking account of his other income at that time, we can say this would have been around £23,000 as he began his retirement years. Whilst this might be more than some retirees can hope for, it was by no means a large income. Longer term care issues, increasing monthly expenditures and the cost of living were all matters that ought to have been considered by Tenet when providing the advice; and Tenet should have been drawing these types of issues to Mr E's attention in a more meaningful way. Tenet should also have been mindful of the drop in income that would be caused by Mr E's death and the possibility of Mrs E outliving him by several years.

Left within the DB pension structure, Mr E's scheme T pension was estimated to pay him £5,379 per year. This pension was paid for life and included other useful benefits and guarantees, such as index-linking and a widow's pension of £3,227. On the other hand, the recommended personal pension contained no such guarantees and any death benefits - which I explain later - were subject to quite different considerations.

In short, what I'm saying here is that adding £5,379 to Mr E's income certainly wasn't going to be of no use to him in his retirement years. I think he could have also accessed some tax-free cash from this scheme, which would have aligned with his apparent objectives of having more cash available. In this scenario his scheme T income would have been slightly less. I'm afraid I think comments such as Mr E having no use for additional income to lack credibility. I've said above, for example, that Mr E did consider income to be a potential issue for Mrs E if he died. So, I think this apparent disregard for additional retirement income is likely to have come from the advisor and used to justify the overall recommendation. It did not take Mr E to another income-tax bracket and as it represented a life-long income, with a 60% widows' pension, it was in his interests to use the pension in the way in which it was originally intended.

Even if I could accept that taking benefits from the scheme could leave Mr E with excess income, I think the adviser ought to have advised Mr E that he could redirect this back into his savings, or another tax-efficient vehicle, such as a trust. This would've allowed him to build his savings further or provide a legacy for his children.

I've also considered the cash-flow models which Tenet set out in the suitability letter. It implied these helped to show how Mr E could have met his retirement needs by transferring out of scheme T to a personal pension. However, I disagree with this. These were not like-for-like comparisons with the scheme Mr E was in – the cashflow model was based on Mr E taking the starting pension amount from the scheme but without any increases - and I've noted certain assumptions were made, including the returns of the recommended investment portfolios probably being based on historic investment returns. Past performance is no guarantee for future performance and I also think the models were heavily summarised in the suitability letter to an extent Mr E would have found difficult to comprehend - the data behind the assumptions was not comprehensive enough for Mr T to come to an informed decision about what to do.

Finally, I considered the issue of death benefits. Tenet implied the death benefits were better for him under the personal pension it was recommending. However, I disagree.

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 possibly an attractive feature to Mr E. But whilst I appreciate death benefits were important to Mr E, and he 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 him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr E was married and so the spouse's pension, in particular, provided by the DB scheme would have been useful if Mr E predeceased his wife. We know from Tenet's own suitability letter that this was important to Mr E. Scheme T had very good death benefits and I don't think Tenet made the value of these benefits clear enough to Mr E. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. Tenet should not have encouraged Mr E to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

In any event whether the death benefits were improved following a transfer depended on how much remained in the pension funds at the point of Mr E's passing. Given average life expectancy, and the size of these funds, it was always likely that the funds would be depleted prior to Mr E's death, potentially providing little or no death benefits at all.

For these reasons a transfer out of scheme T certainly wasn't in Mr E's best interests. By transferring out, Mr E was giving up a guaranteed index-linked income with a number of useful and long-term benefits. In my view, Mr E simply didn't need access to more cash and the reasons given for wanting it were at best, vague. I also don't think sufficient emphasis was placed on the tax-free lump sum Mr E could've taken from the scheme, which met his objective of providing for more cash savings.

Scheme W

The suitability letter for this scheme lagged behind that from the scheme T letter, mainly due to the delays in obtaining a current CETV, which was approximately £151,000. Around £8,700 of this was offered by scheme W as a 'top-up' if Mr W transferred out.

When it was issued on 21 June 2017, Mr E as expected, had retired from his job. Tenet identified the following retirement needs Mr E had at the time:

- *ensure your beneficiaries benefit from your pension in the event of your death*
- *increase flexibility in taking pension benefits in addition to your guaranteed income from your* [other DB pension] *and state pensions*
- *To give* [Mrs E] *flexibility in retirement upon your death*

Essentially the issues in the case of this second scheme were broadly the same as those before. Mrs E was still working but moving closer to retirement. However, while I noted many similarities in the two suitability letters – mainly the 'theme' about Mr E not needing additional retirement income - I can see there was also mention of Mr T being keen on not paying too much income tax. I also noted the desire for 'flexibility'. I've considered these issues in turn, For the first issue, I think Tenet was implying that the additional income from scheme T would simply add to Mr E's tax burden. And of course, I accept that paying as little tax as possible will probably always be near the top of a pensioner's consideration. However, this income, nor the scheme T income before it, would have propelled Mr E into a higher tax bracket. So I don't think this apparent objective bears much scrutiny. It's true Mr E may have been able to access 25% of his pension funds tax-free in a personal pension, but this could have also broadly happened if he'd remained in either DB scheme, which I don't think was ever realistically explored.

I also think the apparent desire for 'flexibility' was poorly defined and again, no more than a generic comment from Tenet, unspecific to Mr E's circumstances. I can't see that Mr E had a particular need for flexibility in retirement. This is because I don't think he had a genuine need to access more cash and I also can't see evidence that Mr E had a strong need for variable income throughout his retirement. From what I've seen, Mr E was an organised individual with a good grip on his day-to-day financial affairs. So, I'm satisfied Mr E could have met all his needs in retirement by remaining in scheme W. This could have delivered an income of £6,721 per year, or a reduced pension of £4,607 with a tax-free lump-sum of £30,717.

I additionally considered whether there were any other reasons for Mr E to transfer to a personal pension such as him wanting to exercise personal control of his pension investments. Although this point hasn't been specifically raised, I think it's implicit in some of the rationale in Tenet's suitability letter(s). However, as Mr E was already in two DB pension schemes managed on his behalf and his membership required very little, if any, effort from him, I don't think there's anything in this case showing that Mr E had either the capacity or desire to manage his pension investments.

As regards the death benefits, I note these were slightly more prominent in the case of scheme W and its suitability letter. However, my view on this is identical to what I've set out above. Mr E needed to balance his income needs (and Mrs E's if he died) with the substantial guarantees and benefits he'd be giving up by transferring out to a personal pension plan. And as I've comprehensively explained, those guarantees simply weren't worth giving up in his case.

There is one more issue to mention with regard to scheme W. This relates to the 'top-up' offer of £8,700 I mentioned earlier. Having looked at the recommendation Mr E was given by Tenet, my conclusion is that this uplift did not materially affect either Tenet's advice to him, or the action Mr E was prepared to take. Although in its own right this is a significant amount, it represented a small percentage increase in the CETV and I've seen no evidence this changed anything that happened.

Financial comparisons

The issue of financial viability is one I mentioned at the outset. In general terms it's often useful to make comparisons about the value of DB versus private schemes in determining whether transferring out was in the best interests of the consumer. And I explained why, in this case, we couldn't really use direct growth comparisons due to Mr E's age and the stage he'd reached in his life. I also mentioned that Tenet does not attempt to make a case for the transferred-out funds growing by so much as to make leaving the pensions where they were an unsuitable thing to do.

However, I noted that in the scheme W suitability letter a comparison was made with buying an annuity with certain death benefits and I think this comparison offers a window into just how valuable Mr E's DB pensions were likely to be. Tenet's analysis showed scheme W's annual income was significantly higher than he'd get from buying an annuity – even one which probably had less guarantees and benefits than the scheme he'd be leaving. In my view, this goes some way in demonstrating how valuable these types of DB scheme were. In short, it helps show the 'worth' of the pension Mr E was advised to give up.

Suitability of investments

Tenet recommended that Mr E invest his funds in a personal pension plan. As I'm upholding the complaint on the grounds that a transfer out of the DB schemes wasn't suitable for Mr E, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

Summary

In my decision I have explained why it wasn't in Mr E's best interests to transfer out of either of his two DB pension schemes.

I don't doubt that the issues raised by Tenet, such as more access to cash through a personal pension, or apparently more flexible death benefits could have sounded like attractive features to Mr E at the time. But Tenet's rationale was based almost wholly on two things: that Mr E did not need more income and so he wanted cash lump sums instead; and that the death benefits of a personal plan were more attractive.

However, I've shown that Mr E simply didn't need additional lump-sums of cash. In a low-interest environment it would have been of limited use, particularly as he already had up to £90,000 which was reasonably accessible to him. The need for cash was also very poorly defined; Tenet was unable to present any real reason why it was needed. I also considered the comments made by Tenet that Mr E just didn't need more income added to that which he already had. I think this argument is weak; Mr E was entering retirement on an acceptable income, rather than from a position of real affluence. So, I think the income from both schemes, guaranteed for life and with a spouse's pension as they were, would have been of much more use to him and Mrs E. His aspiration to have money on hand to use for holidays or spend on other things could have been met from that income or the existing savings they had.

Finally, I explained about the potential for more flexible death benefits. Like the other objectives listed in the suitability letters, my view is that these were simply generic benefits most likely to have been put forward by Tenet, rather than Mr E himself. The death benefits in his existing schemes were very good and substantially underplayed by Tenet. As far as passing on money after his death more flexibly, I note life 'whole-term' insurance was considered as being too expensive. And at 65 years old, I think life insurance was probably not the right product to be advising Mr E to buy, even a shorter-term type which would have been expensive. But that's not to say Mr and Mrs E didn't have other assets to pass on. As I've said, they owned their own home, had savings and I note Tenet referred to Mrs E potentially inheriting a 50% share of a property, albeit in circumstances I'm sure she would have hoped would be a few years off yet.

Overall however, the advice given to Mr E was not suitable. It was limited in its scope and tax-free lump sums could have been obtained by still remaining in both schemes and taking reduced pensions. Accordingly, Tenet should have advised Mr E to remain in his two DB schemes. Mr E went to Tenet looking for advice and I think if that advice had been suitable and he'd been told to remain within those schemes, he'd have followed it.

In light of the above, I think Tenet should compensate Mr E 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 E whether he preferred any redress to be calculated now in line with current guidance, or wait for the any new guidance /rules to be published.

He has now told us he would like to wait for the outcome of the consultation before the complaint is settled.

I therefore consider it's fair that Tenet waits for the outcome of the consultation to settle this complaint.

But to be clear, as I'm upholding the complaint, a fair and reasonable outcome would be for Tenet to put Mr E, as far as possible, into the position he would now be in but for Tenet's unsuitable advice. I consider Mr E would have most likely remained in his DB schemes if suitable advice had been given.

For clarity, he has transferred the benefits to a personal pension but not taken any of the benefits and 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 E's acceptance of the decision.

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 Mr E.

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

Tenet must therefore 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 Mr E'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 E 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 compensation amount must where possible be paid to Mr E within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Tenet has received notification of Mr E's 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 Tenet to pay Mr E.

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

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

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 Tenet pays the balance.

My final decision

Determination and money award: I am upholding this complaint and require Tenet Connect Limited to pay Mr E 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 Tenet Connect Limited to pay Mr E any interest on that amount in full, as set out above.

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

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

If Mr E eventually accepts the final decision, the money award becomes binding on Tenet Connect Limited.

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

Michael Campbell
Ombudsman