

## The complaint

Ms E's representative has complained, on her behalf, about the advice Kings gave her to transfer defined benefits from her occupational pension scheme (OPS) into a "section 32" pension policy.

## What happened

At the time of the advice to transfer in 2002, Ms E was 57, single, in good health and self-employed as a caterer. In a financial questionnaire dated 17 May 2002, Ms E's monthly income was recorded as being £1,400 and her total outgoings were £605pm.

Ms E had no financial dependants, but had total credit outstanding of £2,100. Ms E was recorded as having a conservative attitude to risk, which was defined as follows:

*"You prefer not to invest in the stock market and are prepared to accept potentially lower returns from investments."*

Mrs E had deferred OPS benefits from her previous membership of a defined benefits scheme, which she said was a significant proportion of her pension funding. It was recorded that Ms E wished to receive the maximum lump sum for the purpose of buying a van to get her to and from work (£6,000), buying catering equipment (£3,000) and property investment (£7,000).

In the suitability report dated 1 July 2002, Kings said that Ms E's OPS benefits had been valued at £60,908, which included a guaranteed minimum pension (GMP) of £36,875. It said that the normal retirement date for Ms E's OPS was 60, and according to the accompanying transfer value analysis report, she would at that age be entitled to £5,342 pa from her OPS, or a tax free lump sum of £17,386 and a reduced annual pension of £3,761.

Alternatively, at age 60, a personal pension policy (PPP) would provide a lump sum of £6,664 and a reduced annual pension of £3,371, and a section 32 policy would provide tax free cash of £17,746 and a reduced annual pension of £3,481.

The critical yields, i.e. the projected return required to match the scheme benefits, at age 60 were 15.8% for the PPP and 15.5% for the section 32 policy.

Retirement at age 59 would provide tax free cash of £16,880 and a reduced pension of £3,518 from the existing scheme, tax free cash of £6,269 and a reduced pension of £1,135 from a PPP and tax free cash of £14,117 and a reduced pension of £3,001 from a section 32 policy.

The critical yields for retirement at age 59 were 23.3% for the PPP and 23% for the section 32 policy.

The suitability report quoted benefits which would be available to Ms E at that point as being a maximum tax free cash sum of £16,388 and an annual pension income of £371.

Kings recommended that Ms E transfer part of her deferred pension benefits to a section 32

policy, and the remainder to a PPP and take the “open market option” to secure the annuity of £371 (with Norwich Union) and the tax free cash sum of £16,388.

The “protected rights” part of Ms E’s pension funds which weren’t immediately accessed were invested in the Winterthur Deposit fund (35%), the Winterthur Fixed Interest fund (35%) and the Winterthur Gartmore Global bond fund (30%). Kings recommended that the excess over the protected rights portion be invested in cash, as these would be immediately accessed.

Ms E accepted the recommendation and the transfer occurred in August 2002.

Ms E’s representative complained to Kings in March 2021, but Kings declined to uphold it, with its representative saying the following in summary:

- Ms E’s specific circumstances meant that she wished to access the tax free cash. It further said that Kings specialised in pension transfers and would have started with the presumption that a transfer of defined benefits wasn’t suitable.
- Its adviser would have explained how a defined benefit pension scheme worked and what it would mean to a client if they transferred. And it would have been impossible for Ms E to have moved to the next stage of the transfer process unless she’d given a clear and unequivocal statement of her understanding of the risks and implications of transferring her defined benefits.
- The information gathering process would then begin, and a transfer value analysis would be undertaken. Following this, a letter would be sent explaining the details of the arrangement and finally the adviser would then speak to the client again to ensure that they fully understood what was being proposed.
- With specific regard to Ms E’s case, it said that, as a self-employed caterer, she wished to raise capital for her new business venture. Ms E wasn’t informed that the transferred funds would perform better than if they remained with the OPS – rather that the only reason the transfer was suitable was that she needed to raise the capital for her business and property purchase.
- Ms E was aware of the benefits she’d be relinquishing through transferring, but she nevertheless proceeded in the hope that her new business would provide her with income and support her pension needs, particularly as she was aware that she’d be receiving less by accessing her benefits early.
- Although alternative approaches to achieving her objectives weren’t set out in the suitability report, the adviser was required to discuss this over the phone and the financial questionnaire evidenced that Kings specifically asked these questions. It was Ms E’s decision to not use other methods.
- Ms E had a specific objective, rather than just accessing tax free cash, and she didn’t have access to other funds.
- It was explained to Ms E that she would be worse off financially by transferring and taking her benefits early, but in the circumstances this was the suitable recommendation.
- The starting assumption that the transfer would be unsuitable was conveyed to Ms E in phone calls and confirmed in writing – and so Kings adhered to the regulatory guidance.

- It was unsurprising that Ms E wasn't able to recall being made aware of the risks associated with the recommendation, given that the advice was given 18 years ago.
- Kings highlighted that the transferred benefits would need to perform particularly well to match the projected scheme benefits, and this was set out in writing. This was underlined by the critical yields, which showed that transferring was a high risk strategy. But Ms E was prepared to take those risks for the sake of her new business venture.
- Although Ms E may have asserted that she wasn't a gambler with her money, the setting up of her own business was in itself a gamble with her income. And Ms E wasn't told that the transferred pension would perform better – rather the reverse.
- Kings wouldn't have proceeded with the transfer unless Ms E had confirmed her understanding of what was at stake, and she did so in writing on 3 July 2002.

Dissatisfied with the response, Ms E's representative referred the matter to this service. One of our investigators considered the complaint and thought that it should be upheld. He said the following in summary:

He'd firstly considered whether this service had jurisdiction to consider the matter on the basis of whether the complaint had been brought in time under our rules. But although it had been raised more than six years after the event complained of, the investigator thought that Ms E had only become aware of having cause for complaint after seeing and advert about possible mis-selling online around March 2020. As she'd raised her complaint through her representative within three years of that point, the investigator concluded that the complaint was in time.

As to the merits of the case, the investigator noted that, according to a letter from the scheme administrator to Kings in May 2002, Ms E had been a member of her OPS for 16 years. The letter also explained that Ms E would be entitled to immediate scheme benefits of either a full pension of £4,370 pa or a tax free lump sum of £7,205 with a reduced pension of £3,751 pa. Alternatively, on the basis of RPI being either 2.5% pa or 3.5% pa, the administrator projected that Ms E could expect an annual income of £5,322 or £5,361 pa respectively.

The investigator accepted that Ms E wished to buy catering equipment which was related to her occupation, but she hadn't said that she wanted to set up her own business and he wasn't persuaded that buying a van would have been necessary to go to and from work, or that property investment was a requirement of setting up a business.

He noted that Ms E already owned a car, and said that, if Ms E did wish to use her tax free cash to set up a business, then she would have confirmed this when Kings asked her to do so in a letter dated 29 May 2002. The investigator thought that the only part of her stated objective associated with her occupation was the £3,000 required for catering equipment.

He further said that, in terms of the critical yields, Kings had itself noted that they were unachievable, especially for a conservative investor such as Ms E, but it still recommended the transfer on the basis of her desire to access tax free cash.

But Kings needed to act in Ms E's best interests, the investigator said, and noted that the OPS benefits would constitute a significant proportion of her pension funding. And he didn't therefore consider that the transfer would have been suitable advice.

Ms E already owned a car, and there were no details about the property Ms E wished to buy,

he added. But had Kings advised Ms E of the alternative of immediately accessing around £7,200 tax free cash and taking an annual pension of around £3,700, the investigator thought that this would have been an attractive option to her, especially given her cautious attitude to investment risk. By transferring, any further returns would be entirely dependent upon investment growth and future annuity rates. But the investigator couldn't see that the option of taking the scheme benefits was explored or explained to Ms E.

Further, in terms of Ms E's capacity for loss, she'd built up 16 years' OPS benefits, but her only other assets were her home contents and car. She had no savings, and so Ms E didn't have the means of subsidising any loss associated with her pension benefits, the investigator said.

As such, the investigator recommended that Kings undertake a loss calculation in accordance with the guidance set out by the regulator for such cases, and if this demonstrated a loss, to either pay this to Ms E's pension plan or, if not possible, to her directly with an appropriate deduction for income tax which would otherwise be payable on such pension benefits.

Kings' representative said that it intended to respond to the investigator's view on the complaint, but that it would do so in the latter part of September. However, no response has yet been received.

As such, the matter was referred to me for review.

More recently, the investigator has updated his recommendation to reflect the changes which the regulator is proposing to the manner of conducting redress calculations for transfer cases like this, giving Ms E the option of either accepting redress which would be calculated under the current guidance, or waiting until any new methodology is implemented – likely in early 2023.

In response, Ms E's representative said that her preference would be to accept any redress which might be calculated under the current guidance.

Kings was also given the opportunity to respond to this amendment, but no response to this was received.

### **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.

And having done so, I'm broadly in agreement with the conclusions reached by the investigator, and for similar reasons.

In terms of the financial viability of the transfer, as recognised by all parties, it was highly unlikely that, through transferring, Ms E would be able to match the benefits which would be provided by the OPS. The quoted critical yields serve to demonstrate this point well.

It has been Kings' position that the transfer was nevertheless suitable on the basis of Ms E's stated objectives, which were recorded as being to buy catering equipment and a van, and to also invest in property.

But as with the investigator, only one of these appears to have been strictly necessary to facilitate Ms E's business. On that particular point, I have noted above that Ms E was recorded as being self-employed, and so I do think that provisioning for her business was an

entirely credible objective. But in terms of what was essential at that point to boost her business prospects, whilst I accept the figure quoted for catering equipment as being reasonable, even if she needed to replace her car with a van, it seems that by selling her existing car, the amount she needed to do so might reasonably have been reduced.

And as to property investment, as noted by the investigator, there are no details as to the form this might have taken, or how such an investment could in fact be made with the sum of £7,000.

The point that the investigator has made about options not being properly discussed is, in my view, valid. So for example, had it been explained to Ms E that she could have achieved the goal of buying the catering equipment, and possibly a cheaper van than had been envisaged, through accessing her guaranteed scheme benefits, then I think it's more likely than not that she would have opted for this.

And I say this for the same reasons as set out by the investigator. Ms E was recorded as being a conservative investor – with the lowest possible categorisation on Kings' risk rating. Whilst she may have been willing to take some risks by establishing her own catering company, I don't think there's a read across to the type of risk she would then be willing to take with her pension funds. In fact, it might reasonably be argued that, given the risks she was taking with the business, she would have preferred the offsetting effect of a stable, guaranteed pension income.

Kings had the opportunity to not only present this as an option to Ms E, but recommend it as being the suitable course of action. Even if Ms E had expressed a firm desire to take the full amount of tax free cash available, Kings' role extended beyond simple wish fulfilment. It needed to act, and advise, in her best interests, and given the ostensible lack of other pension benefits or savings, her recorded conservative attitude to risk, and the possibility of meeting at least some of her objectives by taking a slightly lower amount of tax free cash, my view is that Kings should have set out that alternative option of taking the scheme benefits and recommended it.

And had it done so, my view is that Ms E would have accepted the recommendation.

Overall, therefore, for the reasons given my view is aligned with that of the investigator, in that the complaint should be upheld.

### **Putting things right**

As set out above, 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 E 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 E.

A fair and reasonable outcome would be for the business to put Ms E, 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. Kings 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, and assuming that Ms E would have begun to take her scheme benefits, including the maximum tax free cash, at the same time as she accessed her pension benefits in 2002. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Ms E's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Ms 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 Ms 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 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 E within 90 days of the date Kings 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 Kings to pay Ms E

Income tax may be payable on any interest paid. If Kings deducts income tax from the interest, it should tell Ms E how much has been taken off. Kings should give Ms E a tax deduction certificate in respect of interest if Ms E 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 Kings 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 Kings to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms E to accept or reject my decision before 22 November 2022.

Philip Miller  
**Ombudsman**