DRN-3686098

The complaint

Mr P complains WPS Advisory Ltd (WPS) failed to provide the necessary confirmation of advice to allow him to proceed with a transfer of his defined benefit pension. This led to delays resulting in additional costs, which he would like refunded.

What happened

I set out the background to this complaint in my earlier provisional decision. For clarity I repeat it here.
Mr P had a preserved occupational pension scheme (OPS) with a former employer.

In January 2021, WPS wrote to Mr P regarding his OPS. His former employers had provided information about the benefits and the choices available for his pension including a cash equivalent transfer value (CETV). It offered to pay for initial advice, which would cover the suitability of the available options including transferring out of his scheme to a personal pension if appropriate.

On 26 February 2021, Mr P had an appointment with WPS to start the financial advice process. WPS sent various documents to read and complete prior to the meeting including access to the online portal.

On 11 March 2021, WPS provided a Retirement Advice document with its recommendations as to whether a proposed transfer of Mr P's defined benefits pension to a personal pension was suitable at this time. WPS explained its recommendation was based on the information provided and Mr P's circumstances. After considering the estimated cost of purchasing the same benefits that Mr P was entitled to already with an annuity, the costs outweighed any benefit and so WPS did not recommend Mr P transfer his OPS to a personal pension.

Mr P accepted the advice and asked WPS to provide the advice declaration form which he believed he was entitled to and was what was needed to request to transfer the CETV to his new plan. He explained he had already carried out his own research of where he wanted to invest but needed the Section 48 Declaration (s48) certificate, to be able to complete the transfer.

WPS didn't agree to provide the s48 certificate. It said it didn't offer an insistent customer procedure and as it hadn't recommended transferring out of Mr P's defined benefits scheme was the proper course of action to take it couldn't provide the declaration.

On 12 April 2021, Mr P complained to WPS about the service he had received.

Mr P had been offered a guaranteed CETV if he completed any transfer within a given timescale. He says he was becoming increasingly concerned he may miss this deadline and so on 15 April 2021, he sought the services of another financial adviser in an attempt to proceed.

On 27 April 2021, WPS issued its final response. It said it had correctly followed its process and confirmed as it didn't have an insistent client process, it could not issue the s48 certificate. It didn't uphold Mr P's complaint.

Dissatisfied, Mr P brought his complaint to this service.

An investigator looked into things for Mr P. He issued his first view on 28 October 2021. He didn't uphold Mr P's complaint and at this stage thought WPS had followed its own policies and procedures and acted fairly and reasonably in Mr P's best interests.

However, following receipt of further information the investigator reconsidered all the information and issued a second view on 22 April 2022. He looked again at the regulatory requirements after pension transfer advice has been provided. He determined that having had enough information to provide Mr P with a recommendation, WPS should have provided him with a s.48 certificate, which would have confirmed he has received advice, albeit advice not to transfer his pension. In failing to do so, it was his view that WPS hadn't acted fairly and reasonably and as a result Mr P had incurred costs he otherwise wouldn't have.

The investigator also noted that the firm he turned to for advice and to complete the transfer within the deadline window had expedited charges to account for the short timescale available. He accepted that Mr P would have had to pay for advice, but he wouldn't have had to pay the expedited costs if WPS had provided the S.48 or explained at an earlier stage that they couldn't provide the service Mr P was looking for.

He upheld Mr P's complaint and set out what he thought WPS should do to put things right.

He said WPS should:

- Pay the difference between the advice he would have had to pay for to transfer his pension and the expedited charges charged by his advice firm
- Mr P took a withdrawal which equated to 21% of his Tax-free Lump Sum (TFLS). Had WPS issued the certificate he would have received this amount earlier and so he said WPS should pay 8% simple interest on the withdrawal amount from the date he should have received it to the date he actually received it.
- Carry out a comparison between current values of the funds transferred – and what the value transferred would have been at the calculation date if the funds had been transferred on the date they should have been. (determined by deducting the number of days' delay for which the investigator thought the business was responsible - he calculated that this is fourteen days.

The investigator set out, in this second view, how WPS should go about calculating fair compensation and detailed the calculation method in his view.

Mr P accepted the investigators second view and findings.

WPS did not and said it would provide further submissions. It asked for an ombudsman review.

I said I found the key issues to be whether WPS had sufficient information to make a recommendation and having done so if it should then have provided a S.48 declaration confirming independent advice had been given, to allow Mr P to take any action he chose with regard to the transfer of his pension benefits. If, as Mr P claimed, it failed to follow its regulatory obligations and Mr P suffered a loss or incurred costs as a result, what action WPS should take to put things right.

My provisional view focused on what I consider to be the crux of the complaint and I set these out below.

Did WPS have sufficient information to make a recommendation and if it did so, should it have issued an adviser confirmation of advice certificate?

I explained, legislation regulates the advice process, and the Financial Conduct Authority (FCA), as the regulator, sets out how to practically implement such rules and requirements.

Section 48 of the Pension Schemes Act 2015 says: Independent advice in respect of conversions and transfers:

(1) Where a member of a pension scheme has subsisting rights in respect of any safeguarded benefits, or a survivor of a member has subsisting rights in respect of any safeguarded benefits, the trustees or managers must check that the member or survivor has received appropriate independent advice before —

(a) converting any of the benefits into different benefits that are flexible benefits under the scheme.
(b) making a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to flexible benefits for the member or survivor under another pension scheme.
(c) paying a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the benefits

It defines 'appropriate independent advice' as advice that is given by 'an authorised independent adviser'. There's no requirement in the legislation for the 'member' to follow the advice provided. And shortly afterwards, where advice is defined, that definition doesn't include an obligation on the advice being followed.

In short, Section 48 of the Pension Schemes Act 2015 requires that trustees or scheme managers check that advice has been given (by a firm with the relevant permissions) before allowing a transfer to proceed where there are defined benefits or other safeguarded benefits worth more than £30,000. The requirement doesn't extend to ensuring that positive advice to transfer has been given. Someone who has received advice not to transfer can still go ahead.
I explained COBS 19 sets out the various requirements which firms must comply with when advising on a pension transfer – and in particular, when deciding whether or not such a transfer is suitable for the client, and in his 'best interests'.

COBS 19.1.10 in the FCA Handbook states:

"(1) Where a firm has advised a retail client in relation to a pension transfer or pension conversion, and the firm is asked to confirm this for the purposes of section 48 of the Pension Schemes Act 2015, then the firm should provide such confirmation as soon as reasonably practicable.

(2) The firm should provide the confirmation regardless of whether it advised the client to proceed with a pension transfer or pension conversion or not."

This makes it clear where advice has been given, the declaration should be completed whether the advice is to transfer or not. It's the fact of giving advice that creates the obligation to sign the declaration, not whether the advice is in favour of a transfer or not.

WPS pointed out there are two further pieces of regulatory guidance in addition to COBS 19.

In additional submissions to this service, it said:

In FG21/3. Paragraph 2.14 it states:

"When giving full advice on a DB transfer, you will normally give 2 pieces of advice:

Whether to give up safeguarded benefits
Where to transfer the funds to, should the transfer proceed."

The adviser was unable to establish and demonstrate, on the basis of contemporary evidence, that the transfer was in the complainant's best interests at the time of the engagement, as required by FCA COBS 19.1.6 G (3). Furthermore, the adviser was unable to demonstrate that the complainant was making an informed decision. Therefore, the recommendation was to retain benefits in the scheme without consideration of a receiving vehicle. Therefore, the dual requirements of FG 21/3 were not satisfied.

This means we were unable to satisfy all the condition described in s48 (3) of the Pension Schemes Act 2015 which states "For the purposes of the definition of "appropriate independent advice" in section 48(8) of the Act, the advice must be specific to the type of relevant transaction proposed by the member or survivor."

WPS has argued that they didn't have sufficient information to provide suitable advice. In its final response it details a number of areas Mr P declined to answer or pointed out that he was looking to transfer his pension regardless of the advice that was given by WPS.
It appears that WPS took exception to some of the responses Mr P gave and in terms of providing advice in his best interest, it may have a point. But on that basis, it should not have provided a recommendation within its suitability report which advised Mr P to retain his benefits within his previous occupational scheme.

The relevant rule here can be found within COBS 9.2.6:

If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him.

Further clarification can be found in the FCA's Finalised Guidance FG21/3 – "Advising on Pension transfers" and in particular the following paragraph:

4.3 Knowing and understanding information about your client's circumstances is the foundation of suitable advice. If you do not get the necessary information, you must not make a personal recommendation. This is because you cannot be sure that your advice will be suitable. Many of the problems we have seen with DB transfer advice are directly linked to poor information gathering which results in material information gaps. If you do not get the necessary information to assess suitability, you must not make a personal recommendation to the client or take a decision to trade for them.

I looked carefully at the suitability report. It says:

". Although you have the option of transferring your benefits in the Scheme to a personal arrangement, at present your retirement plans are not clear. In the absence of a clear plan, it is not possible to identify a tangible benefit to you in transferring now and taking on the risks that are currently taken by the scheme. The scheme will continue to provide you with a secure benefit at no risk or cost to you.

You have no immediate need for further capital or income and therefore there is no need to take any benefits now, either from the scheme or from an alternative personal arrangement. ***Therefore, I recommend that you leave your benefits within the Scheme where you will continue to benefit from the security and guarantees offered by the scheme."***

The suitability letter goes onto detail the risks associated with the adviser's recommendation, which focus on the fact the transfer value could be higher or lower at a later date.

Importantly, under the section entitled "Cost of Advice" the adviser points out there is no cost to Mr P for the advice that has been given. This is because Mr P's former employer paid for the advice, and WPS took a fee for the advice it refers to.

WPS has therefore accepted payment for advising Mr P and produced a recommendation and a suitability report and a CETV. So, I don't agree that WPS can argue now that it didn't have sufficient information given the information in the suitability report.

So, it follows that having given Mr P independent advice, and that being the test here, not what the advice was – it should have issued Mr P with a declaration to confirm it had done so.

Did WPS fail to carry out its regulatory responsibilities and did Mr P incur costs and/or any financial loss as a result?

I explained I had considered the suitability report. This is an important document as it usually details the client's circumstances and how the adviser has reached the recommendation given, considering a number of factors.

In its final response, WPS has asserted that Mr P withheld information or chose not to provide specific information which hindered the advice process but as I have already said, not to the extent that the adviser didn't feel able to make a recommendation.

I would have expected, where a client is believed to be unable or unwilling to provide any information that the adviser needed to be able to make a recommendation, they would have pointed to the "Terms of Business" and explained how the advice process worked. This would have been particularly important since WPS does not offer an insistent client process.

Had WPS initially told Mr P that they could not provide help or advice on the terms he may have been seeking, I'm persuaded he was making it clear he would still have wanted to transfer his pension from his employer scheme and so I agree it's fair to assume he would have gone to another adviser.

Mr P sought advice from another adviser very quickly, in fact within days when it became apparent to him that he would not be able to obtain the s48 confirmation of advice.

So, it is my view that WPS should have provided a confirmation that Mr P had received advice in accordance with Regulation 7 of the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015.
In failing to do so, I don't think WPS has treated Mr P fairly and so I have now considered whether Mr P suffered any delays or additional costs as a result.
Mr P would still have had to pay for advice from another adviser. He has provided this service with the costs for this advice and the costs for expediting the advice to meet the necessary deadline to secure the guaranteed CETV.

The charging structure for the third-party advisers details the costs of expediting advice. Issued within 18 working days £2,000

Issued within 12 working days £2,500
Issued within 6 working days £3,500
Issued within 3 working days £5,000

Mr P said if WPS had told him at the appointment on 26 February 2021 that WPS would or could not facilitate what he needed; he would have made the approach to a third-party adviser then. At this point, it's reasonable to assume he would have had more than 18 working days to complete the transfer and so he would have paid at least £2,000 for the advice.

He says his first opportunity to approach them was 15 April 2021. Looking at the timeline of events and the comments made by the third-party advisers, who said they wouldn't be able to issue within 12 days, Mr P paid the expedited costs of £3,500.

I said I'm persuaded by Mr P's testimony, I think everything points to the fact he fully intended to transfer his pension and took the option of the free advice from WPS, as his previous employer paid for this. I find it more likely than not had Mr P been made aware at the beginning that WPS' Terms of Business did not offer an insistent customer process; he would have acted differently. But, in any event, WPS made a recommendation for Mr P to remain in the scheme, on that basis alone, WPS provided Mr P with independent advice and should have issued the Section 48. In failing to do so it unnecessarily delayed the process. So, I said it's fair to assume Mr P would've acted and would have invested earlier into his chosen fund and received his pension commencement lump sum (PCLS) at an earlier date and paid less for the transfer advice.

I said in my view, that WPS had been responsible for delays that led to an increased cost of £1,500 that Mr P would otherwise not have had to pay.
Mr P also took a withdrawal of £80,000, which equated to 21% of his TFLS. Again, in my view, he would have had access to this money earlier, had WPS issued the S.48 conformation of advice and so I intend to ask WPS to pay 8% simple interest on this amount from the date it should have been received to the date it actually was received.
The investigator helpfully worked out an approximate timeline and having worked it back I agreed with his findings. The basis of this was:

- 5 March 2021 being seven days from initial meeting 26 February 2021.
- 23 March 2021 is the latest that the new report issued using 18 standard days.
- 15 June 2021 date of transfer based on 84 days between actual date of report being 27 April 2021.
- 20 July 2021 was the actual transfer date
- 29 June 2021 taking PCLS 14 days after transfer would have been completed.

I set out in my provisional decision what fair compensation should take into account and what WPS should do to put things right.

I offered both parties the opportunity to provide any further submissions they wished me to consider before issuing my final decision.

Mr P accepted my provisional findings but had a query over the number of days delay detailed in my provisional decision, for calculating the delay to his being able to access his TFLS.

WPS responded immediately to say it disagreed with my findings and would be making a further detailed submission.

In that submission WPS said:

- My provisional findings pay lip service to the regulatory requirements and responsibilities of an adviser
- WPS declined to issue a declaration of advice because Mr P failed to disclose material information.
- The recommendation it made was not a suitability report in accordance with COBS 9.4.2AR. It was default recommendation to remain in the scheme because Mr P had not provided the necessary information to make a full recommendation and as such it does not meet the criteria of section 48 of PSA 2015.

WPS also submitted a request for an Oral Hearing in this matter. I rejected that request and set out my reasoning in a separate document. For clarity and in summary, this was on the basis that all the information required to reach a decision was available and there was no necessity to undertake an oral examination of the evidence.

WPS then had until 16 February 2023 to submit any further information it wished me to consider before issuing my final decision but did not submit any further representation.

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 haven't seen anything to persuade me to deviate from my provisional decision and so it follows I have reached the same conclusion and I uphold this complaint.

I have however, reconsidered the timeline of events and simplified the redress calculation. This has been provided to both parties for consideration. Both responded and I have considered all the submissions made before reaching my final decision.

In deciding this complaint I've considered the law, any relevant regulatory rules and good industry practice at the time. I also carefully considered the submissions that have been made by Mr P and WPS. Where the evidence is unclear, or there are conflicts, I said I've made my decision based on the balance of probabilities. In other words, I looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

Mr P relies on section 19.1.10 of the FCA's Code of Business Sourcebook ("COBS"). That section of COBS says.

(1) Where a firm has advised a retail client in relation to a pension transfer or pension conversion and the firm is asked to confirm this for the purposes of section 48 of the Pension Schemes Act 2015, then the firm should provide such confirmation as soon as reasonably practicable.
(2) The firm should provide the confirmation regardless of whether it advised the client to proceed with a pension transfer or pension conversion or not.

WPS argues that it didn't provide advice because Mr P did not disclose all the material information required to provide a recommendation. If, as WPS, claims it was not in a position to provide Mr P with advice then I would have expected to see that clearly set out stating it did not offer an Insistent customer process and as such could not provide Mr P with any advice. I don't accept its position that the suitability letter it provided was for a "default recommendation" due to a lack of information.

I say that because the pack it provided clearly sets out on page 1.

"Thank you for taking advice from WPS Advisory. In this pack you will find the following:

1. *Advice Letter*

***This letter summarises my advice to you**, together with an outline of any costs you may have to pay and what you need to do next."*

The TVAS provided to Mr P says:

*The test confirms that if you had no clear alternative plan other than to take benefits in their current form, then we would have known to advise you not to transfer. It shows that there is a cost to the security you would be giving up by transferring, and what that cost is. As we have not identified good reasons to suffer this cost, this test simply reinforces **our advice**.*

Cost of Advice

*(Mr P's former employer) …**is paying for you to receive advice on this offer**. As you are retaining your benefits within the ceding scheme... there are no further costs to you.*

For all of the reasons set out in my provisional view and those listed above, I don't agree with WPS' assertion that it did not provide advice. WPS did provide a recommendation to remain in the scheme, issued a suitability letter and carried out a CETV analysis – all of which led it to advise Mr P to remain in his former employers DB scheme. It was also paid for the advice it provided by Mr P's former employer.

If, as WPS, claims it was not in a position to provide Mr P with advice then I would have expected to see a summary of why it could not provide any advice without the necessary disclosures.

When taking all this into account I'm persuaded that WPS did give Mr P advice and should have provided him with a declaration of advice to that effect. In failing to do so within a reasonable time from issuing its recommendation it led to Mr P having to seek expedited advice elsewhere to carry out the transfer which incurred him costs he would otherwise not have had to pay.

I have reconsidered the timeline of events. Although this wasn't challenged by WPS, I thought about the whether the insistent customer process made a material difference to the delays, and I wasn't persuaded that this element actually makes a difference. The issue here is that a recommendation was made and then WPS failed to issue the S.48 declaration, so I have simplified the timeline to reflect when the S.48 should reasonably have been issued and worked back from. In essence this means the timeline is brought forward in terms of calculating the redress.

The timeline should be based upon:

- 11 March 2021 – Date of Recommendation
- 18 March 2021– The notional date the S.48 declaration could reasonably have been issued
- 20 March 2021– The notional date that Mr P would then have submitted the transfer request along with the s48 declaration to the scheme trustees (two days later seems reasonable)

- 17 May 2021 – The notional date at which the funds would have been transferred to the pension plan (i.e., number of days after the actual transfer request was submitted to the trustees up to the transfer completing and the funds being received by the pension plan). I calculate 14 days to be a fair and reasonable timescale, however, this takes the date to 03 April 2021 which was a Saturday and therefore this is calculated to the next working day i.e., 5 April 2021.
- 31 May 2021- The notional date that Mr P would have received the PCLS (i.e., 14 days after the notional date above on which the transfer would been completed).

WPS accepted the revised timeline as did Mr P.

WPS challenged the fund used to calculate the redress (the actual fund Mr P transferred into) as it "suspects" access this particular fund would only be available and have to be advised by an IFA, and if he had proceeded with the S.48, it argues the fund used to calculate the redress wouldn't have been available to him.

WPS seems to be suggesting, after some considerable submissions, that an alternative fund to the actual one be considered. I'm not in agreement that is a fair and reasonable way to calculate the redress. Mr P was put in the position of having to seek advice from another IFA precisely because WPS failed to issue the S.48. As WPS challenged the timeline of the actual DB transfer, and so the actual timeline has been used in the calculation, it seems fair and reasonable to use the actual fund he transferred into for clarity and consistency in determining how to put things right.

Putting things right

Fair compensation

In assessing what would be fair compensation, this service looks to put Mr P as close as possible to the position he would probably now be in if WPS's error hadn't have taken place.

Based on the timeline, it's reasonable to assume without the delays Mr P would have transferred his OPS on 17 May 2021 to AJ Bell (his Self-Invested Pension Provider)

What should WPS do?

To compensate Mr P fairly it should:

Compare the performance of Mr Ps' investment with the notional value if it had been transferred on 17 May 2021. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

It should also pay any interest set out below.

If there is a loss, WPS should pay into Mr Ps' pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. WPS shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If WPS are unable to pay the compensation into Mr Ps' pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr

P won't be able to reclaim any of the reduction after compensation is paid.

The *notional* allowance should be calculated using Mr Ps' actual or expected marginal rate of tax at his selected retirement age.

It's reasonable to assume that Mr P is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

If either you or Mr P dispute that this is a reasonable assumption, you must let us know as soon as possible so that the assumption can be clarified, and Mr P receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

Mr P had paid an additional £1,500 in adviser fees which formed part of the deduction of charges within the AJ Bell SIPP on 21 July 2021.

WPS should assume £1,500 would not have been deducted from the AJ Bell SIPP. If the above comparison shows that no compensation is payable, the difference between the *actual value* and the *notional value* can be offset against the fees with interest.

Provide the details of the calculation to Mr P in a clear, simple format.
Income tax may be payable on any interest paid.

If you consider that you're required by HM Revenue & Customs to deduct income tax from that interest, you should tell Mr P how much you've taken off. You should also give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("Start date) _	To ("End Date")	Additional Interest
A J Bell SIPP	Still exists and liquid	Notional value from A J Bell	Notional Transfer date of 17 May 2021	Date of decision	8% simple interest from the date of the decision to the date of settlement

Actual value
This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Mr P's investment had the occupational pension scheme benefits been transferred to AJ Bell on 17 May 2021. WPS should request that AJ Bell calculate this value.

Any additional sum paid into the AJ Bell SIPP should be added to the *notional value* calculation from the point in time when it was actually paid in. This would include the AVC which was transferred at the same time as the DB scheme.

The £80,000 tax free cash withdrawal from the AJ Bell SIPP should be deducted from the notional value calculation at 14 days later, 17 May 2021 so it ceases to accrue any return in the calculation from that point on.

Any withdrawal, income, or other distribution out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if you total all those payments and deduct that figure at the end instead of deducting periodically.

Due to the delay, Mr P has had been deprived of using the £80,000 tax-free cash withdrawal. I consider he would have been paid the lump sum on 31 May 2021, 14 days after the assumed transfer date. WPS should calculate and pay interest at a rate of 8% per year simple from the notional withdrawal date 31 May 2021 to the date of the actual payment of 3 August 2021. And it should then pay the same interest rate on the difference from the date of actual payment up to the settlement date.
In addition, WPS should pay Mr P £300 for distress and inconvenience caused by unnecessary delays, the failure to provide the confirmation of advice certificate and causing undue worry that he may miss the TVAS deadline and lose the initial enhanced offer.

Why is this remedy suitable?

I've chosen this method of compensation because:

The Brooks Macdonald portfolio fund is where Mr P invested his funds when the transfer occurred, and it is fair and reasonable to assume that this is where he would have invested had the transfer occurred on the date it should have. The notional value should therefore be calculated on the same basis as Mr P actually invested within his replacement SIPP.

My final decision

For the reasons I have given I uphold this complaint and direct WPS Advisory Ltd to undertake the redress as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 April 2023.

Wendy Steele
Ombudsman