DRN-3716618

The complaint

Mr D complained about the advice he was given to transfer the benefits from his defined-benefit (DB) occupational pension scheme (OPS) to a type of personal pension plan. Mr D says the advice was unsuitable for him and believes this has caused him a financial loss.

WPS Advisory Limited is responsible for answering the complaint. To keep things simple, Ill refer mainly to “WPS”.

What happened

Mr D was a deferred member of an OPS, having accrued the benefits from service with a previous employer between 1985 and 2001.

As a result of the changing pensions landscape including the so called ‘pension freedom’ rules, his OPS signalled an intention to offer independent financial advice to deferred members like Mr D.

WPS was contracted to provide that advice. Mr D first approached WPS in 2018 to discuss his pension and retirement, and he was given a recommendation about what to do, in February 2019. Information gathered about Mr D at that time was broadly as follows:

- He was aged 58 and had no financial dependents. Although single at the time, Mr D told WPS his partner was intending to move in with him in due course.
- Mr D owned a home valued at approximately £180,000. The property had an outstanding mortgage of around £53,000 on it, with 11 more years left to run.
- As well as the DB scheme in question, Mr D also had a modest personal pension with his current employer. His state retirement age was just over the age of 66.
- Mr D had suffered a heart attack around 4 years before he sought this advice. He told WPS that as a consequence of this, he’d like to reduce his working hours which at the time were quite high. However, he expected to work reduced hours or part-time until 65 or later.
- The cash equivalent transfer value (CETV) of Mr D’s OPS was £177,590.

Mr D now says he was given unsuitable advice by WPS and states he is worse off as a result. He complained first to WPS which said it hadn’t done anything wrong. It said its recommendations were in accordance with Mr D’s financial objectives.

In 2021 the complaint was referred to our service. WPS made an offer to resolve the complaint which was rejected by Mr D. As the complaint couldn’t be resolved informally, it’s come to me for a final decision.

What I’ve decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of WPS's actions here.

- PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, WPS should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr D's best interests.

I've used all the information we have to consider whether transferring away from the OPS to a personal pension was in Mr D's best interests.

I don't think it was, so I'm upholding his complaint.

<u>*Financial viability*</u>

The advice was given in February 2019, after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 and was 3.3% per year for 6 years to retirement, calculated to the normal retirement age (NRA) of 65 under Mr D's OPS. The share returns that were used to compile this discount rate wouldn't have been significantly different from the time of transfer and, if anything, the bond returns would have got lower.

I've also kept in mind that the regulator's upper growth projection at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%. Mr D's attitude to risk (ATR) was categorised by WPS as “cautious” and so I think all these figures were already demonstrating that Mr D’s ability to achieve higher growth than these rates by transferring out would be constrained.

WPS didn’t say what the critical yield figure was in Mr D’s case. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. However, I’ve calculated that the critical yield would have probably been significantly higher than the discount rate *and* the regulator’s lower growth projection (above). And in such a case, this would mean Mr D was highly likely to receive lower pension benefits overall as a result of transferring out of his DB scheme to a personal pension arrangement.

I say this because looking at the transfer value comparator WPS produced, this showed that Mr D would need a sum in excess of £242,000 to invest, at a risk-free return, to provide the same benefits as the DB scheme at the age of 65 (the scheme’s NRA). This was substantially above Mr D’s CETV which was £177,590. So, in my view this provided a revealing window into the value of pension benefits Mr D would be giving up by transferring from his DB scheme.

I've therefore taken all these things into account. In my view, there would be little point in him giving up the guarantees available through his DB scheme, only to achieve, at best, the same level of benefits outside that scheme after transferring. But here I think Mr D was likely to receive benefits of a materially lower overall value at retirement than those with his DB scheme.

However, it’s reasonable to say these were probably moot points anyway. This is because WPS itself didn’t promote the transfer-out based on him being able to grow his pension outside the DB scheme to an extent that made transferring the right thing to do. Even WPS itself said in its suitability report that a *“realistic but not guaranteed”* rate of growth was only 1.7%. So, having implied at the time there was no financial viability case for the transfer, it would be hard for WPS to argue now that there was.

Accordingly, WPS based its recommendation for Mr D to transfer on other reasons. I’ve considered these below.

Basis for the recommendation

In its suitability report of 22 February 2019, WPS recommended a transfer to a personal pension based on what it said were Mr D’s objectives which I’ve summarised:

- Mr D wanted to access his pension fund immediately to clear his outstanding mortgage.
- The recommendation to transfer out said he could access £44,397 as a tax-free lump sum, and another £12,837 which would be taxed. Taken together, these sums would enable Mr D to completely pay down his mortgage and reduce his monthly outgoings by £450 so he could afford to work less hours.
- WPS said Mr D had said he would be able to use his state pension to live on in retirement.
- WPS said Mr D would be able to access the rest of the residual fund as he wished.

Health and mortgage issues

WPS's advice was predicated on Mr D telling the adviser that he had been working very long hours for quite a while and that he was looking to reduce these commitments to more manageable levels. The main factor behind this was his health: Mr D had suffered a heart attack around four years earlier and although evidently recovered by the time of the advice, he said his doctor had advised him that working fewer hours and to keep active would be beneficial. Mr D said he'd been working up to 60 hours per week and wanted to bring this down to the '40's'.

Given what I've said above about both the financial viability of transferring not being apparent in this case - and the regulator's starting assumption that transfers from a DB scheme are unlikely to be suitable - I thought about whether WPS's advice to transfer for these other reasons was in Mr D's best interests.

WPS said if he transferred out to a personal pension arrangement, he'd be able to eradicate his mortgage and save the £450 it was costing him each month. In turn, this would enable Mr D to reduce his working hours.

I concede that upon 'first look' it could be said that the issue of health can constitute a genuine reason for changing one's working lifestyle. However, to think this transfer was suitable *because* of his health, I'd need to think that irreversibly transferring from Mr D's DB scheme was necessary to achieve what he wanted to do i.e. reduce his working hours. I would need to also think that the advice to do things this way was in his best interests.

I certainly don't doubt Mr D wanted to reduce his working hours, which upon any reasonable view could be described as being very high at the time. Nor do I doubt that his income would have been lowered as a consequence of this. But I've seen nothing showing that Mr D's health was, at that point, at such a serious stage whereby he had no other options but to completely pay off his outstanding mortgage.

I say this because there is every reason to say that Mr D was still physically able to work. And his plan was to moderate his hours down rather than to drastically reduce them or stop working altogether. In fact, he'd told WPS of his intention to still work up until his NRA of 65 and maybe to even work part-time beyond that. So I think what the evidence shows here is that what Mr D was planning at the time was not going to represent a big financial drop in his monthly salary.

So, whilst paying down a mortgage early could be viewed as a generally good thing to do, Mr D's mortgage was only costing him £450 per month. Mr D earned £1,885 per month (net) at the time, he was single and from what I've seen of his income and outgoings, he would have had some monthly disposable cash left available to mitigate some of the work / salary changes he was hoping to make. And I've also seen nothing showing that saving £450 was absolutely necessary for Mr D to achieve the desired reduction in his working hours. For example, there was no real assessment of what his actual financial requirement was to make good his potential losses in pay from working less. And I've also noted that Mr D told WPS that his partner intended to move in with him and that bills would be shared as a result.

So, I think these things show there were other solutions available to Mr D's desire to work less. Put another way, I don't think the case was made out for transferring out of his DB pension, and to access his benefits via a personal pension, just to completely pay off a mortgage that wasn't costing him that much.

Even if I were to consider that paying down his mortgage really was important to Mr D as WPS infers, and he simply didn't want to compromise in making at least some 'in-roads' into the outstanding debt, I don't think WPS sufficiently investigated the use of his existing DB pension scheme to do this.

We know, for instance, that taking the benefits from his existing DB scheme more or less straight away was possible for Mr D. At the age of 58, this would have yielded him a tax-free lump sum of £28,141 and an annual pension of £4,221. The majority of this pension would have increased in line with the RPI capped at 5%. I think that drawing upon that pension would have largely covered his income reduction which would have resulted from him working less hours, as this represented around 15% of his current gross salary. And bearing in mind Mr D's capacity to absorb some monthly income losses, which I've explained above, I think it's reasonable to say that this course of action ought to have been more seriously considered. I've noted WPS now accepts this.

This option would also have enabled Mr D to pay down over half of his outstanding mortgage and, of course, derive a monthly benefit from doing so in the form of lower interest and repayment charges. I think his partner's potential contributions to the household in the near future and Mr D's lack of any other debt adds weight to the suitability of this option. There would then have been no reason why he couldn't continue to pay the much-reduced mortgage in the usual way.

Alternatively, accessing his DB pension at the NRA would have resulted in higher tax-free cash and a higher pension still, as Mr D wouldn't have had the actuarial reductions applied in taking his pension earlier, and for longer. Of course, Mr D could have also started to access his DB pension somewhere between the ages of 58 and 65, which would have enabled him to pay a higher percentage of his mortgage down. Doing this would have enabled Mr D to achieve his objectives whilst retaining the guarantees and benefits in his DB scheme.

Pension for retirement

WPS also referred to Mr D being able to access the maximum tax-free cash via a personal pension. It showed Mr D that the lump-sum in a personal pension was more than in the DB scheme.

However, it's usually the case that more tax-free cash can be accessed from a personal pension when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But WPS should have been telling Mr D at the time that extra tax-free lump sums being removed from a personal pension also came with consequences in that the amount left for his later retirement years would obviously decrease.

So, whilst I accept the notion of accessing more tax-free cash might have been appealing, this needed to be considered against the other options Mr D faced, including opting for keeping his funds in a DB scheme where future income was guaranteed.

The advice therefore needed to balance using his pension funds to pay for something 'at the time', against his overall retirement needs in the future. A pension is primarily for use to fund retirement and Mr D's pension was getting smaller as a result of what WPS recommended to him. I say this because WPS's recommendation was based on him transferring out, accessing 25% in tax-free cash and then accessing a further £12,837 in cash which would be taxed at his personal rate. This meant that in total, around one-third of Mr D's overall pension was being used before his retirement.

In my view, this left Mr D with a modest sum as he approached his retirement years. And if he'd needed to stop working in his 60's, for example, there would be a gap until his transferred pension funds were complemented by the state pension, in his case at the age of just over 66.

WPS also implied the state pension would be enough for Mr D to live on when he retired, but this might have come sooner that the age of 66 in Mr D's circumstances. Even if it didn't, I think there's conflicting evidence of the state pension being enough for him to live on. In the 'fact-find' mention was made of the state pension being insufficient for his needs and that part-time work or other income might be needed to add to this. I do accept there is some speculation here, as we can't say what Mr D would have done or when he'd have stopped working – and he's still working four days a week now. However, I think going into retirement with the guarantees associated with a DB pension would have been a much more suitable option in Mr D's case, particularly as his other pensions and savings were so modest.

I don't think WPS comprehensively assessed this option and so I don't think Mr D was given enough information to make an informed choice.

Flexibility and control of funds

I've seen no evidence that Mr D needed flexibility in his income requirement going forward. In fact, I think the opposite was true. In reality, Mr D's requirement was for a steady and reliable income stream and once he'd made payments to his mortgage, I think his needs were for him to access the DB pension in the way it was originally intended.

I've also seen no evidence that Mr D had the capacity or desire to manage his own pension affairs. The evidence here suggests that he was an inexperienced and cautious investor who's only exposure to money market investments was very limited. So, access to the residual funds – as set out by WPS as an advantage – was really no more than a 'stock' objective in his case; it was simply a consequence of transferring away from his DB scheme.

Death benefits

In this case, I don't think the issue of death benefits arose or was relevant although I note WPS provided some information to Mr D in its suitability report.

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 were probably made to look like an attractive feature to Mr D in the information provided by WPS. But whilst I appreciate death benefits are important to consumers, and Mr D might have thought it was a good idea to transfer to a personal pension because of this, the priority here was to advise him about what was best for his retirement provision.

Mr D wasn't married but had a partner who was intending to move in with him, so this may have made the death benefits in the DB scheme relevant to their situation in the future if they had ever decided to marry. I've seen nothing showing this was likely at this particular stage. However, as far as passing on money in a personal pension to other beneficiaries was concerned, there may not have been a large sum left anyway upon Mr D's passing. This is particularly true if he either lived a long life or, as we know he did, he used large sums from the pension for other spending. So passing money on after death wasn't a suitable reason to transfer away from his DB scheme. I don't think all this was made clear enough on the suitability report.

To be clear, whilst I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of the valuable retirement benefits Mr D would enjoy through the DB scheme, the issue of death benefits doesn't much feature in this case.

Summary

I don't doubt that the flexibility on offer through a personal pension would have sounded like an attractive feature to Mr D. But WPS wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what Mr D needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr D was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. I don't think the evidence shows Mr D's health was so bad to prevent him earning for several more years. In fact, the evidence shows Mr D wanted to continue working. So, Mr D shouldn't have been advised to transfer out of the scheme just to repay a mortgage that was affordable and which could have been paid down in other ways, with the assistance of his existing DB scheme whilst still retaining its major benefits.

I therefore think WPS should have advised Mr D to remain in the DB scheme and access these benefits early.

I have considered whether Mr D would have transferred to a personal pension in any event. I accept that WPS disclosed some of the risks of transferring to Mr D, and provided him with a certain amount of information. But ultimately it advised Mr D to transfer out, and he relied on that advice.

I'm not persuaded that Mr D would have insisted on transferring out of the DB scheme, against WPS's advice. I say this because Mr D asked WPS for advice and this pension also accounted for virtually all of his retirement provision at that time. So, if WPS had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

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

Putting things right

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for WPS's unsuitable advice. I consider Mr D would have most likely remained in his OPS, rather than transfer to the personal pension if he'd been given suitable advice.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

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

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr D whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. He wants the calculation done now, so doesn't want to wait for the new guidance to come into effect.

I am therefore satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr D.

For clarity, Mr D didn't retire and is actually still working. He did however access his transferred benefits whilst still 58 in accordance with the recommendation. I think Mr D would have always wanted to pay down part of his mortgage. And so, whilst my findings are that he'd have remained in the DB scheme, I think he would have taken his benefits as soon as possible. So, compensation should be based on a retirement age of 58 and using 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 D's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D'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 D 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr D within 90 days of the date WPS receives notification of his 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 WPS to pay Mr D.

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

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 the business pays the balance.

My final decision

Determination and money award: I am upholding this complaint and I now direct WPS Advisory Limited to pay Mr D 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 WPS Advisory Limited to pay Mr D any interest on that amount in full, as set out above.

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

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

If Mr D accepts my final decision, the money award becomes binding on WPS Advisory Limited

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 13 January 2023.

Michael Campbell
Ombudsman