DRN-3739639

The complaint

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

A business called Oval Financial Service Limited gave Mr C the advice at the time. However, R&Quiem Financial Services Limited is now responsible for answering this complaint. So, in referring to the advising business I'll call it "RQFS".

What happened

In late 2010, Mr C was a recently deferred member of an OPS. He'd accrued the benefits from service with a previous employer he'd recently left.

The OPS signalled an intention to offer a time-limited enhancement to the cash equivalent transfer value (CETV) for deferred members who opted to leave the DB scheme. In Mr C's case, an offer of £3,422 was being made on top of the CETV of £9,930, making the total enhanced CETV around £13,352. Mr C was offered regulated financial advice. RQFS was contracted to provide that advice.

Information gathered about Mr C at that time was broadly as follows:

- He was aged 45, married to Mrs C and at the time they had no financial dependents.
- Mr and Mrs C owned their own home and had around £50,000 savings and investments, although there were no specific details recorded of where that money was held. Mr and Mrs C had combined net salaries of £4,000 per month and £900 per month net disposable income.
- As well as the DB scheme in question, Mr C also had a personal pension plan with a large and well-known pension provider said at the time to have a fund value of around £80,000.
- Mr C said at the time of the advice that he hoped to retire at around the age of 60 although the normal retirement age (NRA) for the OPS was 65. However, the recommendation documentation also mentions Mr C wanted to retire, if possible, as early as age 57.

Mr C now says he was given unsuitable advice by RQFS and states all the contacts between himself and the advisers was by post or other remote means.

RQFS previously disputed whether the complaint had been brought by Mr C in accordance with the relevant time limits. In August 2022, I issued a Jurisdiction Decision about this, outlining that I thought the complaint was within our jurisdiction to consider, and I directed our investigator to carry on with his inquiry. He subsequently said we should uphold Mr C's complaint.

RQFS doesn't agree with this. So, as the complaint couldn't be resolved informally, it's come to me for a 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'). 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 RQFS'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, RQFS should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests.

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

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

The recommendation

I'm going to start by pointing out, as our investigator did, that RQFS's recommendation to transfer away from his OPS was mainly based Mr C on transferring the full CETV *and* the enhancement, to a new personal pension.

However, it's clear throughout the postal documentation Mr C completed, that he preferred to take the enhancement portion on its own, as a cash lump-sum (on which he'd have to pay some income tax). Mr C subsequently took the enhancement in cash, which amounted to around £2,700. He went on to spend the money. In this context, Mr C ultimately went against the RQFS advice.

At the time of the advice, there was no specific regulatory advice or guidance in place in respect of 'insistent clients', a term commonly used in the industry to explain when a client goes against what an adviser is recommending. However, there were still a number of important COBS rules in the regulator's Handbook. These included but were not limited to a requirement upon RQFS to *'act honestly, fairly and professionally in accordance with the best interests of its client'*. In addition to this, COBS required RQFS to provide information that was clear, fair and not misleading.

So, everything I've said above demonstrates that firms, like RQFS, still had a number of important responsibilities when providing advice in these situations. And despite what Mr C might have thought he wanted at the time, I think his overall expectation was that he would be clearly guided by RQFS on the basis of his circumstances and means.

Upon receiving Mr C's instructions to transfer only the original CETV of £9,930 to a new personal pension, RQFS wrote to Mr C on 14 March 2011 and reiterated that what he was asking for was not in accordance with its recommendation. Nevertheless, it said it was *"happy to proceed"* with his request and it transacted the transfer-out on this basis.

I accept that RQFS did point out to Mr C that its recommendation was to transfer the full amount, rather than just the CETV of £9,930. But I also think it's fair to point out that the option to take the enhanced cash element had previously been 'put to him' in the preliminary documents such as the 'fact-find' when he was deciding what to do about the offer. I think questions and statements such as *"I would seriously consider giving up any guarantees and accept greater degree of risk in exchange for the possibility of a higher pension and / or greater flexibility"* would have already had an influential effect on Mr C's view about what he thought was the right thing to do.

So, the fact Mr C ticked certain pre-prepared boxes on a form and made some generic statements – such as him having a 'need' for the cash – ought to have been to be balanced against the responsibilities his financial adviser had at the time: RQFS's responsibility to act in Mr C's interests didn't end just because he'd ticked some boxes.

So, I think when RQFS received Mr C's postal documents about his pension preferences, it should have enquired as to what the cash enhancement money was really for. And it should have pointed out straight away that he had other means to pay for what he wanted to do. For instance, RQFS had already been told Mr C had savings of £50,000 and I've seen no evidence that his need for £2,700 in cash at the time was so great as to make accessing the pension enhancement the right thing to do. This should therefore have been pointed out once again to Mr C as should the obvious fact that he seemed to be needlessly incurring a tax penalty by accessing this money.

In short, what I think happened here was that RQFS simply conducted the transfer of the OPS on this basis and it didn't properly reiterate its advice or why what Mr C was proposing was unnecessary and unsuitable for him. I think it's likely that the communication methods in this case exacerbated these failures, as RQFS should have entered into a further dialog with Mr C and comprehensively explained the long-term consequences of his actions.

Of course, I accept this was a relatively small pension. But it nonetheless was estimated to pay him an annual amount of £993 per year at 65. And as I explain below, there are several other reasons, connected with the guarantees and benefits, which made this pension useful in Mr C's circumstances.

As I also explain below, even if I consider the *actual* advice – to transfer both the CETV and the enhancement, I still believe this was unsuitable. The following paragraphs explain why.

Financial viability

As required by the regulator, to demonstrate the financial comparisons between his current scheme and transferring out to a personal pension, RQFS referred in its transfer analysis to 'critical yield' rates.

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 income as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable.

Based on the total enhanced transfer value of £13,352 RQFS said the critical yield required to match Mr C's full OPS benefits at the age of 65 was 6.6%, and 7.3% at the age of 60. The corresponding yields were also provided if Mr C had chosen to take a tax-free lump sum together with a reduced pension at those ages; these were 5.9% (aged 65) and 6.4% (60) respectively.

However, Mr C had told RQFS at the time that he had a requirement for, and wanted to spend, the cash enhancement element separately. And we now know Mr C went on to take the cash enhancement of £3,422 as a taxable lump sum. In its transfer analysis, RQFS referred to the critical yields for this eventuality, describing them as *"Alternative Critical Yields"*. In this case, the yields were 8.2% at the age of 65 (if taking a full pension) and 9.5% at the age of 60 (full pension). And if taking a reduced pension together a with a tax-free lump sum upon retirement, the yields were 7.5% and 8.5% respectively.

Our investigator, not unreasonably in my view, pointed out that Mr C wanted to take – and eventually did take - the enhancement element as cash. He had also clearly said he wanted to retire under the scheme rules early if possible. So the investigator thought the critical yield figure of 8.5% was ultimately the appropriate one to use.

RQFS said at the time that it was possible for growth in a personal pension to match the critical yield. But I don't see evidence of this and, in my view, there would also be little point in Mr C transferring away from a DB scheme only to achieve similar growth. But here, I think the likelihood was that he would receive *less* pension benefits in the longer by transferring.

For example, the advice was given during the period 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. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The relevant discount rates published by the Financial Ombudsman Service for the period before 1 October 2017 were 6.4% per year for 19 years to retirement (calculated to age 65) and 6.3% (calculated to age 60), which are well below the 8.5% critical yield figure I've set out above. This therefore implied that achieving the critical yield rate would be unlikely.

Even compared with RQFS's 'original' recommendation, I think the relevant critical yield to use, as explained above, was 6.4%.

I've also kept in mind that the regulator's upper projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate was 5%. When asked about his attitude to risk (ATR) Mr C preferred his funds to be in a 'balanced' portfolio, so I therefore think a growth rate around the mid-point of the regulator's projections above could have been reasonably assumed.

I've taken all these projected growth figures into account together with the critical yields and also the likely additional fees and charges associated with a personal pension, which I think would have acted as a 'drag' on future growth. And I think there's a clear indication that by transferring out of his DB scheme at the time, Mr C would be likely to obtain pension benefits of a lower overall value than the scheme he was in, over the longer term.

For this reason, a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility

The recommendation letter of 2 February 2011 said that Mr C should transfer the benefits of his OPS to a personal pension plan. In support of this, it said Mr C had indicated he wanted *"flexibility and control"* and the ability to generate more tax-free cash when he eventually came to access his benefits. The issue of death benefits was also briefly included. I'll address each of these areas in turn.

However, I don't think it could be reasonably said that Mr C required flexibility in retirement at the time. This is because Mr C was only 45 years old at the time of the advice and based on what I've seen he didn't have concrete retirement plans. So, whilst I accept he may have had an aspiration to retire early, it was still many years before he could think about accessing his pension benefits. I therefore think it was much too soon to make any kind of decision about transferring out of the DB scheme. I don't think it was a suitable recommendation for Mr C to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr C later had reason to transfer out of the DB scheme he could have done so closer to retirement.

I've also noted that at the time Mr C already had a substantial degree of flexibility with the 'defined contribution' (DC) pension he had. Mr C had already built up pension savings of £80,000 in this fund and I think it's reasonable to assume he could contribute more in the following years and benefit from a degree of future growth. In reality, Mr C's OPS was modest by comparison so I don't think he needed flexibility – which in any event was poorly defined by RQFS. I think this was no more than a 'stock' objective and not really related to Mr C's circumstances.

Tax-free cash

It was also implied Mr C may have been able to access more tax-free cash by transferring. 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 schemes are calculated differently. However, this was a only a small pension and as I've said, it couldn't reasonably be said at that point what Mr C's retirement needs or plans were. Whether he therefore would have opted to take tax-free cash was merely speculation at that point in time. In any event, RQFS should have been telling Mr C 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 remaining in the OPS which came with a range of benefits and guarantees.

Death benefits

RQFS said that death benefits in a personal pension could enable Mr C to better choose the beneficiary of his fund if he died.

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 probably made to look like an attractive feature to Mr C. But whilst I appreciate death benefits are important to consumers, and Mr C 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 provisions. A pension is primarily designed to provide income in retirement.

Mr C was in good health and still only 45 years old. I also think the likely death benefits attached to the DB scheme were underplayed. As Mr C was married, I think the spouse's pension provided by the OPS would have been useful to Mrs C if Mr C predeceased her and I don't think RQFS made the value of this benefit clear enough. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

In any event, there may not have been a large sum left anyway upon Mr C's passing. Mr C could have also nominated Mrs C as the beneficiary of any funds remaining in his DC scheme. Life insurance may also have been a reasonably affordable product if Mr C really did want to leave a legacy for Mrs C.

Overall, in this case I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr C. I think this objective, listed briefly as it was in the recommendation section, was also no more than a generic comment and not meaningful to Mr C's situation.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr C. But RQFS wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. he was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C 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. So, I think RQFS should have advised Mr C to remain in his DB scheme.

In light of the above, I think RQFS should compensate Mr C 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 C, as far as possible, into the position he would now be in but for RQFS's unsuitable advice.

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) 17/9 (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.

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 previously asked Mr C 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's said he doesn't want to wait for any new guidance.

RQFS 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.

As I've said, Mr C was only 45 years old at the time and had no concrete plans to retire. Compensation should be based on his NRA 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 C's acceptance of the decision.

RQFS may wish to contact the Department for Work and Pensions (DWP) to obtain Mr C's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr C's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr C's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 40%. So making a notional deduction of 30% 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 C within 90 days of the date RQFS 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 RQFS to pay Mr C.

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.

RQFS should pay Mr C £300 for the distress and inconvenience caused. As our investigator explained, he has had to live with the worry that the advice he was given, more than a decade ago, was unsuitable.

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 RQFS 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've decided to uphold this complaint and require R&Quiem Financial Services Limited to pay Mr C 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 R&Quiem Financial Services Limited to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require R&Quiem Financial Services Limited to pay Mr C any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that R&Quiem Financial Services Limited pays Mr C the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr C.

If Mr C accepts my final decision, the money award becomes binding on R&Quiem Financial Services Limited.

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 16 December 2022.

Michael Campbell
Ombudsman