

The complaint

Mr M complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a type of personal pension arrangement, in 2007. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr M originally dealt with a different firm during the advice process, but Towergate Financial (East) Limited is now responsible for answering this complaint. To keep things simple I'll therefore refer mainly to "Towergate".

What happened

Mr M was a deferred member of the OPS which was operated by his previous employer. He'd accrued around 8 years' worth of benefits and in 2007, the pension scheme signalled to members, like Mr M, that it would offer 'paid for' financial advice for members who wanted to review their ongoing membership of the scheme. As well as telling members how much their pension was currently worth, the OPS also offered an enhancement for anyone who wanted to transfer their DB benefits to a different scheme, such as a personal pension plan.

Mr M took up the offer of the free financial advice for which Towergate is now responsible. Mr M had the option to keep his DB pension where it was and effectively 'do nothing' with it. Alternatively he could agree to leave the scheme and take the enhancement – and he could take the enhancement as a cash lump sum (he'd need to pay tax and national insurance on this), or he could pay the whole amount into a personal pension arrangement.

The information gathered about Mr M at the time was broadly as follows:

- Mr M was 50 years old, divorced and had children, but not financially dependent on him. Mr M earned around £1,450 per month (net). He didn't have many savings but was said to have around £26,000 in debts comprising of two personal loans.
- The cash equivalent transfer value (CETV) of Mr M's DB scheme was £47,384.
- An enhancement element if leaving the DB scheme was an additional £35,597. Taken together therefore, the total transfer sum Mr M could transfer to a personal pension was £82,981.
- Mr M said at the time he expected to retire when he was 65 years old, which was just under 15 years away.

Mr M complained to Towergate in 2021 that he was given unsuitable advice to transfer away from his DB pension scheme.

Towergate says that in its dealings with Mr M, it told him that transferring away from his DB scheme was only recommended if he reinvested the whole £82,981 back into a personal pension scheme. It says because Mr M took the enhancement element of £35,597 in cash, and then only reinvested the original CETV of £47,384 this wasn't in accordance with its advice.

Towergate says Mr M was therefore an ‘insistent client’ – a term used within the industry when a client wants to go against what was recommended to them by their adviser. Towergate does accept some aspects of the advice could have been better, but it maintains that transferring away on this basis was Mr M’s decision and that he was given several warnings about what he was doing. It also says that even if things had been done differently, Mr M would have always transferred from his DB pension in the way that he did and take the enhancement as cash.

The complaint has been referred to our Service. One of our investigators looked into it and said we should uphold it. They thought Towergate hadn’t treated Mr M correctly when categorising him as an ‘insistent client’.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators’ rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The regulator, the Financial Conduct Authority (‘FCA’), stated in its Conduct of Business Sourcebook (‘COB’) at the time, that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Towergate should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M’s best interests (COB 5.3.29G – since renumbered).

Also at the time of the advice, there was no regulatory advice or guidance in place in respect of insistent clients. But there were rules in the regulator’s Handbook, which required Towergate to “act honestly, fairly and professionally in accordance with the best interests of its client”. In addition, COB required Towergate to provide information that was clear, fair and not misleading. So, Towergate’s recommendation had to be clear and Mr M had to have understood the consequences of going against any recommendation it might have made.

Having considered all the circumstances in this case, I’ve decided to uphold Mr M’s complaint. My decision is along the same lines as given by our investigator.

The financial viability of transferring his pension

Towergate says that its advice to transfer was only ever predicated on Mr M transferring the whole CETV he had with the DB scheme *plus* the enhancement amount. So, I began by looking at whether I thought this advice was right.

Towergate referred in its transfer analysis and suitability report to the ‘critical yield’ rate. 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.

As our investigator explained, this aspect of the case is relevant here because Towergate operated a type of ‘traffic light’ system which it called a “rule of thumb”. Basically, this meant that if the critical yield was deemed to be high (for example, over 7.5%), then a red warning would be given to the client to warn them that achieving a certain higher level of growth after

transferring their DB pension to a personal pension plan, might not be possible. If the critical yield was still quite high (for example, 6% -to- 7.5%) then an amber light might be attributed.

In Mr M's case, this was somewhat meaningless. I say this because Towergate said the critical yield was 7% meaning he was given an amber warning. However, the issue with this was that this critical yield was based on him transferring the whole CETV *plus* the enhancement. And what wasn't made clear in my view, was that if only transferring the CETV (*without* the enhancement element) then the critical yield was much higher – it was over 11%. Given that Mr M was clearly thinking about reinvesting only the CETV and taking the enhancement as cash, this means Mr M wasn't given all the information he needed to make an informed decision. This is because the 11% critical yield figure wasn't set out in the suitability report.

Even if considering only the 7% critical yield scenario, I don't think this was well explained either. This is because to me, the evidence is not persuasive that consistently exceeding this level of growth was likely in this case. 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 rate published by the Financial Ombudsman Service for the period was only 6.4% per year for 14 years to retirement (age 65), which is below the 7% critical yield figure I've referred to above and so this infers that reaching it would be more unlikely than likely.

I've also kept in mind that the regulator's upper projection rate at the time of the advice was 9%, the middle projection rate was 7%, and the lower projection rate was 5%. Towergate said Mr M's attitude to risk (ATR) was "medium", so I think a growth assumption around the regulator's mid-rate was appropriate. However, this was still not above the critical yield of 7% I've set out above.

But of course, we also know that the costs associated with a personal pension arrangement were much more likely to be higher than in Mr M's existing DB scheme; and the charges and costs involved would therefore be a 'drag' on potential growth. We know too, that he'd be giving up certain benefits and guarantees in his DB scheme which wouldn't be replicated in a personal pension plan. And there would be little point in transferring if Mr M was likely to receive lower – or even the same - pension benefits in the longer term. Further to this, we know that the regulator's stance on transferring these types of pensions was that the starting assumption should be that transferring wasn't suitable.

So, I think that the advice to transfer was unsuitable, even if considering investing the CETV and the enhancement. There was simply no evidence that Mr M's best interests, from a financial comparison perspective, were likely to be met by transferring away from his DB scheme. For these reasons, I think the transfer advice, even if moving across the whole amount, was flawed.

Other possible reasons to transfer Mr M's pension

Having said all that, advice to transfer away from a DB scheme usually isn't wholly based on a straightforward financial comparison between the existing pension and a 'new' personal one recommended by an adviser. And this was probably the case here.

What I've shown above is that there were *no* compelling reasons or rationale to transfer away, based on achieving a better set of financial pension benefits in the longer term. But I can't see any other reasons for transferring either. So I think even the advice to transfer, based as it was on him moving the whole amount across to a personal plan, was also fundamentally flawed in this sense too.

I would have expected the adviser, for instance, to comprehensively consider Mr M's wider circumstances in determining whether transferring out, for any other non-financial reasons, was in his best interests. However, I think the adviser did a poor job in this respect. For example, the adviser accepted without question that Mr M didn't want to get into detailed discussions about the death benefits relating to his existing scheme or talk about life insurance. And whilst I accept Mr M may have thought these things weren't a priority for him, I think the failures to probe these areas demonstrate wider shortcomings in the advice. It was the adviser's job to set the agenda so that they could really understand Mr M's situation and recommend accordingly. In addition to this, there was no real assessment of what Mr M's financial needs in his retirement might be and whether the forecasted pension from the DB scheme met those requirements. Nor did the adviser seem to go into whether Mr M had a need for more pension flexibility than his existing scheme offered.

So, as well as there being no apparent longer-term financial benefits to transferring his pension to a personal plan, no other case was made for transferring in the longer-term, such as Mr M needing a more flexible income. I also think there was little regard given to what his retirement would look like and how he was intending to fund it if he transferred away.

The suitability report and recommendation

The suitability report was issued on 12 July 2007. But all the indications are that Mr M already held a well-formed view that he'd like to access the cash enhancement rather than invest this element into the personal pension with the CETV.

To me, this indicates that a discussion about taking the enhancement as cash had already taken place even before the suitability report was published. I've noted that Towergate even told Mr M in the suitability report how much tax and national insurance he'd have to pay to access the cash there and then. I think this was confusing, because on one hand Towergate was recommending he only transfer if he was reinvesting all the money, but on the other hand, it was showing him how much he'd have left over in cash if he invested only a part. That Towergate then facilitated the pension transfer out of the DB scheme so Mr M could access the cash was another anomaly.

In my view, what Towergate should have been doing is issuing its suitability report with a clear and unambiguous recommendation about what it thought he should do. This should have explained the different critical yields, particularly as one such yield was showing he'd probably have to grow his pension, in a money market fund, by over 7% every year until retirement. This was simply to get, at very best, similar financial benefits to his current scheme.

More importantly, if Mr M really was contemplating taking the enhancement as cash, the critical yield of over 11% would obviously help to demonstrate just how much he could be losing by the time his retirement came about, if he transferred away from the DB scheme. Achieving over 11% growth year-on-year was highly unlikely in my view, and so there were other ways Towergate could have demonstrated the real risks of transferring.

Towergate ought to have set out all these things clearly in the suitability report and then allowed Mr M to digest the contents. If Mr M had disagreed with the recommendations and still requested immediate access to the enhanced cash, then a further discussion would

have been appropriate whereupon the adviser could explain all the aspects where Mr M was going against the advice and to check Mr M's understanding.

I think one obvious risk here was that Mr M may have been thinking about only the short-term, and not his longer-term retirement needs. We now know that a part of Mr M's thinking at the time was that he wanted to access the cash to pay down some personal loans he had outstanding. But the documentation from the time doesn't go into any details about these loans and as our investigator pointed out, the detail of this debt was not clear - and there was certainly no indication that Mr M wasn't repaying down the two loans in the normal way. So, it simply wasn't made clear why Mr M needed to use part of his pension to pay off two personal loans. This was therefore very weak rationale for doing what Mr M wanted to do and it ought to have been robustly pointed out to him.

In short, Towergate conflated a number of issues in the suitability report. It put forward a recommendation, but it also said he was going ahead with a different version of the transfer nonetheless, because specifically accessing the cash was something he wanted to do.

Was Mr M really an 'insistent client'?

A key aspect in this case is Towergate's categorisation of Mr M as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time when Towergate met with Mr M and was advising him, there was no specific regulatory advice or guidance in place in respect of 'insistent clients'. However, as I've pointed out above, there were a number of important general rules in the regulator's Handbook. These included but were not limited to a requirement upon Towergate to '*act honestly, fairly and professionally in accordance with the best interests of its client*'. In addition to this, COBS required Towergate to provide information that was clear, fair and not misleading.

So, firms like Towergate, had a number of important responsibilities when providing this type of financial advice. Despite what Mr M might have thought he wanted at the time, Towergate's job here, as a regulated adviser, was to provide advice that was clear and in his best interests. In particular, Towergate should have been clear that if it was not recommending a particular transaction or course of action, then the risks of what Mr M was apparently interested in were pointed out during the course of the advice.

I don't think Towergate adequately did this. It had discussed Mr M's cash enhancement offer with him before even issuing its suitability report, and this indicates to me that the adviser clearly understood that he was tempted to access the cash even though he'd have to pay quite a bit of tax and national insurance to get at it. The adviser then just produced a suitability report with his recommendations and in the same document he made reference to Mr M effectively wanting to go against the advice.

I don't believe the evidence is plausible that Mr M even was an 'insistent client'. The evidence I've seen is strongly suggestive of him not being experienced in these types of financial matters and so was heavily influenced by his instincts. If Towergate had followed a much better process, I don't think Mr M would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mr M what he would be losing out by transferring his deferred benefits.

- There's no evidence that Mr M, an inexperienced investor, desired any input or control over the investment choices of his pension funds.
- I also think that if Mr M had really wanted to better deal with these outstanding two loans he had, there could have been other ways of exploring how this might be achieved. Because the details of the loans weren't comprehensively recorded at the time of the advice, it would only be speculation as to what was needed – or whether any action on them was needed at all. However, I don't think the case for irreversibly withdrawing from a DB scheme, to pay two loans which were not apparently in default, was made out by Towergate.

Towergate has asked me to consider some further important issues and I've done this with great care.

Firstly, I have considered the various warnings included in the documentation from the time. I've also thought about a declaration Mr M signed confirming his understanding of the implications involved in transferring away and taking the enhanced element as cash.

However, to be clear, Towergate still transacted this transfer-out for Mr M. And it did so directly after issuing the suitability report. As I've said, the suitability report referred to the adviser's recommendation and Mr M's apparent disregard for it in the same document. In my view, the report was therefore issued only because it had to be – and it merely represented another step towards transacting what Mr M found attractive at the time. As for the declaration he signed, this is clearly a pre-formatted document produced for Mr M rather than by him. In my view, the words used in the declaration are not his own and probably not reflective of his understanding at the time.

Secondly, I've considered whether Mr M would have still gone ahead and transferred his pension anyway, even if Towergate had done a much better job of advising him. Towergate says he would have gone ahead regardless and that this is supported by a subsequent question Mr M was asked about this when he complained. However, I don't think there's evidence Mr M had received enough information from Towergate at the time of answering this question, to demonstrate that he fully understood the significance of it. I don't think he understood Towergate's failings at that point, or how these could have affected the probity of the advice he'd received back in 2007.

Everything I've seen points to Mr M requiring pension advice and not having much experience in these matters. I think if Towergate had gone back to Mr M and really explained the pitfalls of what he apparently wanted to do, and potential alternatives for him, then he would have listened to that advice.

Summary

In this decision I have set out why I think this complaint should be upheld.

Towergate's initial position was to recommend that Mr M transfer away from his DB scheme, but *only* if he was intending to transfer *both* his original CETV *and* the considerable enhancement he was being offered on top. I've explained that in the event, I don't think even this option was justified. There was no evidence showing how such a recommendation would make transferring worthwhile from a financial perspective. And similarly, there were no other, non-financial, reasons applying to Mr M that showed why transferring away from his existing DB scheme was right for him in the longer-term. As a result of transferring away, I think it should have been clear that Mr M was facing an uncertain retirement. Towergate didn't explain this enough.

By taking the enhancement element as a cash payment, rather than reinvesting it in a personal pension, Towergate says Mr M was an 'insistent client'. But I don't agree. Towergate should have first clearly set out its recommendations - and if Mr M wanted to go against these, then further discussion, clarification and advice should have been forthcoming at that point.

Ultimately, I don't think Towergate did enough to ensure Mr M understood that transferring away from his DB scheme wasn't in his best interests, or that he appreciated the potential consequences of doing this. I've not seen evidence that Towergate effectively advised Mr M about the gap in his retirement income he might face or the potential risk of funds in a personal pension running out in drawdown. And given these failings, I don't think it would be reasonable for me to conclude the process Towergate followed meant that Mr M can truly be regarded as an insistent client.

Towergate's communications weren't clear or fair. It didn't act in Mr M's best interests and it failed to act with due care and skill.

Towergate failed in its duty, so I'm upholding Mr M's complaint.

Putting things right

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 M, through his representative, 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 doesn't want to wait, so 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 M.

Compensation should be based on his stated and normal retirement age of 65, as per the usual assumptions in the FCA's guidance. This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 M within 90 days of the date Towergate 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 Towergate to pay Mr M.

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 Towergate 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.

I now direct Towergate Financial (East) Limited to pay Mr M 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 Towergate Financial (East) Limited to pay Mr M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only Towergate Financial (East) Limited to pay Mr M any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Towergate Financial (East) Limited pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M accepts my final decision, the money award becomes binding on Towergate Financial (East) Limited.

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

Michael Campbell
Ombudsman