DRN-3787097

Financial Ombudsman Service

The complaint

Mr W complains about the advice given by Quilter Financial Services Ltd ('Quilter') to transfer the benefits from his deferred defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr W approached Quilter in March 2018 to discuss his pension and retirement needs. Mr W was introduced to Quilter by another advice firm.

Quilter completed a fact-find to gather information about Mr W's circumstances and objectives. In summary it recorded that Mr W was 59 years old, he'd recently lost his partner, he rented his home and he had unsecured debts of around £40,000, which he was seeking to repay because his monthly expenditure was greater than his income. Quilter also carried out an assessment of Mr W's attitude to risk, which it deemed to be 'Moderate'.

On 8 May 2018, Quilter advised Mr W to transfer his pension benefits into a personal pension and invest the proceeds in a multi-manager investment portfolio, which it deemed matched Mr W's attitude to risk. In summary the suitability report said the reasons for this recommendation were:

- To provide a cash lump sum to enable Mr W to pay off his debts in full, create a contingency savings fund, make some future home improvements and go on holiday.
- To enable Mr W to increase his contributions to his workplace pension scheme from his surplus income and provide an overall pension pot, which together with his state pension would likely provide him with the £17,000 income he said he needed in retirement.
- To provide lump sum death benefits for his children.

Mr W accepted the recommendation and around £219,000 was transferred to his personal pension from which Mr W took his tax-free cash and the remainder was invested as recommended.

In 2021 Mr W complained to Quilter, via a representative about the suitability of the transfer advice.

Quilter didn't uphold Mr W's complaint. In summary it said the recommendation was suitable because it met Mr W's objectives at the time – it allowed him to address his financial situation and repay his outstanding debts, it allowed him to maximise his future pension contributions and provide a legacy for his family. It said Mr W's DB scheme did offer a tax-free cash lump sum, but it didn't allow him to defer his pension income which wasn't needed at the time. Mr W might have to pay high-rate tax on the funds while he continued to work. Because Mr W's income from the scheme would've been significantly reduced by taking early retirement from the scheme, it said there would've been an income shortfall throughout

Mr W's retirement. It said it explained the risks involved including the guarantees Mr W would be giving up to enable Mr W to make an informed decision.

Dissatisfied with its response, Mr W referred his complaint to our service. An investigator upheld the complaint and required Quilter to pay compensation. In summary they said the transfer wasn't financially viable due to the growth rate required to match Mr W's scheme benefits, Mr W's medium attitude to risk and his capacity for loss. They said the adviser acknowledged the critical yield wasn't achievable but went on to recommend the transfer for other reasons – but they didn't think those reasons were in Mr W's best interests. They said that while Mr W needed to repay his debts, they thought Mr W could've achieved his objective by taking his benefits from his DB scheme – it would've provided a sufficient lump sum to clear his debts and while he didn't need the income while he was still working, he could've saved this towards providing for his future retirement. They said Mr W's future income needs also could've been met by remaining in the DB scheme – he had his state pension and other pension provision to supplement it.

Quilter disagreed. In summary it questioned the usefulness of reference to the critical yield in this case as a primary reason for why the advice was unsuitable. Overall it said there were several ways for Mr W to meet his objectives, all of which contained elements of risk. It said the advice considered all of the options, which resulted in a recommendation for a sustainable solution which would meet Mr W's needs and potentially provide more options than committing to taking his scheme benefits immediately. It believes it provided a balanced suitability report, which explained the advantages and disadvantages of each option to allow Mr W to make an informed decision. Mr W was also accompanied during the meetings by someone who possessed considerable knowledge and experience, so it's satisfied Mr W understood the advice he was given.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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 Quilter'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

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, Quilter should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

The advice was given 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.

Mr W was 59 at the time of the advice and while he indicated that he enjoyed his work, and intended to continue beyond his state retirement age if he was allowed, his DB scheme normal retirement age was 65. The critical yield, or growth rate required to match Mr W's benefits at age 65 if he transferred his benefits to a personal pension arrangement was 16.13% if he took a full pension and 14.35% if he took a tax-free cash lump sum and a reduced pension.

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 3.1% per year for five years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's documented 'Moderate' attitude to risk and also the term to retirement. Here, given the lowest critical yield was 14.35%, I think Mr W was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of transferring out to a personal pension arrangement and investing in line with that attitude to risk. The return needed was far in excess of both the regulator's middle and upper projection rate and it was several times higher than the discount rate.

So based solely on this reason, it doesn't appear the transfer out of the DB scheme was in Mr W's best interests.

But I'm mindful that in this case, the primary reason for the recommendation was to enable Mr W to raise a cash lump sum to repay his debts – it wasn't primarily about Mr W being able to improve on his DB scheme benefits. And Quilter acknowledged in its suitability letter that the critical yield wasn't achievable. So while ordinarily there would be little point in a consumer giving up the guarantees available to them through their DB scheme only to achieve, at best, the same level of benefits outside the scheme, I accept it's possible in Mr W's case there were other considerations which mean a transfer was suitable, despite providing lower overall benefits – as Quilter referred to in its suitability report. I've considered this below.

Flexibility and access to tax-free cash

It is not disputed that Mr W's main objective and the primary reason he sought advice from Quilter was because he was looking to repay his debts.

Mr W's circumstances were well documented in the advice paperwork, which included that he was struggling to continue to service his unsecured loan and credit card debts due to recent unfortunate personal circumstances, which had affected his financial position. Mr W's outstanding unsecured debt totalled around £40,000, which was costing him over £1,000 in monthly repayments. And this meant that his total monthly expenditure exceeded his income by more around £160. The advice paperwork records that this was ''financially crippling' for Mr W and was causing him concern.

It's therefore clear to me that Mr W's objective of wanting to clear his debts was reasonable in the circumstances and in my view it was somewhat pressing. If Mr W continued as he was, his financial position was only going to worsen. Because Mr W didn't have any savings or other assets he could've used to meet his objective, I think Mr W had an immediate need to access a lump sum.

I've thought carefully about whether Mr W's objective could've reasonably been met by other ways, rather than transferring his DB scheme benefits, which I can see the advice paperwork records Quilter considered at the time.

The first of these options was for Mr W to borrow the money. But I can see the advice paperwork records that Mr W had already been turned down for a loan by his bank because he didn't have any assets that the bank could secure the lending on. It doesn't surprise me that Mr W's bank wanted some form of security given the amount of the loan and I think another lender would likely insist on the same. So I'm satisfied this wasn't a viable option.

I can see that Mr W has told us he would've considered entering into an Individual Voluntary Agreement ('IVA'). But I think this was considered and discounted at the time. I can see the advice paperwork records that Mr W had sought advice from a debt councillor and discounted it for several reasons. And these reasons were also recorded in the advice paperwork from the time.

The third option was whether Mr W could've stayed in his DB scheme and taken early retirement. This would've allowed Mr W to gain access to a lump sum as well as an income. And I can see this too was considered by Quilter at the time. But while Quilter discounted it and recommended Mr W transfer his DB benefits to a personal arrangement instead to meet his objective, I think it was in Mr W's best interests to remain in the DB scheme and access his benefits immediately by taking early retirement to meet his objective. And I say this for the following reasons.

Mr W's early retirement quote from his DB scheme showed that he could take a tax-free cash lump sum of just over £41,600. And I think this amount was sufficient to allow Mr W to clear his outstanding debts in full. I can see this option was discounted by Quilter because there wasn't enough money to enable Mr W to achieve his other objective of having a contingency fund, money for some house improvements and the holiday he wanted. But I don't think Mr W's objective of wanting money for home improvements or a holiday could reasonably be described as pressing such that the option of early retirement should've been discounted on this basis. It was recorded earlier in the advice paperwork that the home improvements and holiday were *'...future expenditure'*. But in any event, I think Mr W could still achieve these things by taking early retirement from his DB scheme.

By taking early retirement Mr W also had to take an immediate income recorded as being around £6,250 a year. I accept that Mr W didn't need this income at the time – his earned income once he'd cleared his debts would've provided him with a surplus income. But importantly by taking the extra income it wouldn't have pushed Mr W's total income into the high-rate tax band and as the adviser recorded in the advice paperwork, Mr W could've saved this surplus income towards meeting his other objectives. And while Mr W is recorded as saying that he didn't see a need to do so, I think Quilter could've explained to Mr W how saving this income could've met his objectives. Quilter's role wasn't simply to accept what Mr W said and facilitate what he thought he needed – it's role was to really understand Mr W's needs and act in his best interests.

Mr W's surplus income from his earned income, once he'd repaid his debts, was recorded as being around £930. After allowing for Mr W to increase his pension contributions to his workplace DC scheme to benefit from his employer's increased contribution, which he could still achieve doing things this way, this gave Mr W a surplus monthly income of around £720. When added to his DB scheme income, which would add at least £400 net a month, I think Mr W would've had a total surplus income in excess of £1,100 a month.

So in a little over four months, Mr W would've saved enough to provide for the contingency fund he was seeking to achieve - recorded as being a need for four times his essential monthly expenditure of around £1,300 – after which he could've continued saving to provide for his 'future expenditure' of home improvements and a holiday. Furthermore by maintaining this level of saving, which I see no reason why Mr W couldn't do, he could've built up an additional sum which he could've used to help support his future retirement needs when he decided to stop working. So I don't think Mr W needed to risk his pension benefits to achieve things.

I can see that Quilter says Mr W had more flexibility by transferring to a personal arrangement, so if his circumstances changed and he needed to retire early he could've still purchased a fixed income. But by remaining in the DB scheme Mr W had an income which was guaranteed and it escalated. It also formed a solid foundation to Mr W's overall retirement income need. Mr W's plans were to continue working and given he was in good health at the time of the advice, and he said he enjoyed his work there was nothing to indicate this wasn't possible. So as I will now go onto explain, I think Mr W could also met his retirement income needs by remaining in the DB scheme.

Mr W's retirement income need was recorded as being £17,000 a year. Mr W's DB scheme pension combined with his state pension due at age 66 amounted to a little over £14,500. Mr W also had a section 32 buyout plan, which was projected to provide another £500 or so a year. This wasn't enough to meet Mr W's income need in full, although it provided just under 90% of it.
But importantly, Mr W was also contributing to his workplace pension, which he intended to increase once he'd repaid his debts and his income allowed it. It was recorded that Mr W wanted to increase his contribution to 10% of his salary (I understand this is what Mr W did) which meant his employer would commit to contributing a further 16% giving a total pension contribution of 26%, or a little over £9,100 a year. Over the next six or more years Mr W intended to continue working, this had the potential to amount to a not insignificant sum – around £80,000 based on his current salary (not allowing for any growth) and the £25,000 lump sum it was recorded his employer had agreed to add following changes to the pension scheme. I think this would've likely provided the difference Mr W needed to meet his overall retirement income need.

And while there is nothing to indicate Mr W had a need for variable income, Mr W's workplace pension would've provided him with flexibility. He could've taken lump sums as and when required and adjusted the income he took from it according to his needs.

Overall I think Mr W could've met both his short-term and retirement income needs by remaining in the DB scheme. Mr W could've taken early retirement form the scheme using the cash lump sum on offer to repay his debts. And his DB scheme income, together with his other smaller section 32 plan, his state pension and his workplace pension, would've likely given him the income he needed in retirement. I don't think Mr W needed to risk his guaranteed benefits to achieve things.

Death benefits

The suitability report recorded that another reason for the recommendation was to enable Mr W's children to benefit from his pension, in the form of a lump sum benefit, in the event of his death.

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 likely an attractive feature to Mr W given the circumstances. But whilst I appreciate death benefits are important to consumers, and Mr W might have thought it was a good idea to transfer his DB scheme benefits to a personal pension because of this, the priority here was to advise Mr W about what was best for his retirement provisions.

A pension is primarily designed to provide income in retirement. So I don't think the potential for different or greater death benefits should have been prioritised over this and Mr W's security in retirement. And I say potential, because the sum left on Mr W's death was dependent on investment returns – so if he lived a long life, and/or investment returns were lower than expected, there may not have been a large sum to pass on anyway.

Quilter recorded that Mr W had death-in-service cover through his employer if he died before retirement. So he already had lump sum death benefits available, which I see no reason why he couldn't have nominated his children to receive - if he hadn't already done so. And Quilter knew Mr W was contributing to his workplace DC pension scheme and he would've been able to nominate his children as beneficiaries of this plan too – again if he hadn't already done so.

I can see that Quilter discussed achieving Mr W's objective using life cover and it produced a quote for a sum assured for the full transfer value of £219,000. This was discounted because Mr W didn't want to take on additional costs, which at £55 a month given Mr W's current financial circumstances isn't perhaps surprising.

But I don't think that this was a balanced way of presenting this option to Mr W. If Mr W genuinely wanted to leave a legacy for his children, over and above that which was already available, and which didn't depend on investment returns or how much of his pension fund remained on his death, I think Quilter should've instead explored additional life insurance properly.

Basing the quote on the transfer value of Mr W's pension benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mr W wanted to leave whatever remained of his pension fund to his children, which would be a lot less than this if he lived a long life and/or if investment returns were poor. So, the starting point ought to have been to ask Mr W how much he would ideally like to leave to his children, and this could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide. And given Mr W's financial position was going to improve substantially, the level of his disposable income would've meant it was affordable – something Quilter should've reminded Mr W about.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr W. And I don't think Quilter did enough to explore or highlight the alternatives available to Mr W to meet this objective.

Summary

I don't doubt that the larger tax-free cash lump sum, flexibility and potential for higher or different death benefits on offer through a personal pension would have sounded like attractive features to Mr W. But Quilter wasn't there to just transact what Mr W might have thought he wanted. The adviser's role was to really understand what Mr W needed and recommend what was in his best interests.

I accept that Mr W was accompanied by a third-party in his dealings with Quilter because he was deemed a vulnerable client and that it detailed the advantages and risks associated with the transfer to Mr W. But that doesn't alter the fact that ultimately, I don't think the advice given to Mr W was suitable. By transferring, Mr W 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. It's clear that Mr W had a pressing need to access a lump sum to clear his outstanding debts to ease his financial burden and to allow him to further fund his future pension provision. But I don't think Mr W needed to transfer and give up the guarantees associated with his DB scheme – for the reasons I've set out above, I consider Mr W could've achieved all of his objectives by remaining in his DB scheme and taking immediate early retirement.

So I think Quilter should've advised Mr W to remain in his DB scheme and take his benefits immediately.

Of course, I have to consider whether if things had happened as they should have, whether Mr W would've gone ahead anyway against Quilter's advice.

I've considered this carefully - but I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against Quilter's advice. I say this because I don't think Mr W was sufficiently experienced in financial matters such that he possessed the necessary confidence, skill or knowledge to go against the advice he was given in pension matters. Mr W's DB scheme accounted for a significant portion of his retirement income at the time. So, if Quilter had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests and that he could achieve his goals by taking immediate benefits from his DB scheme rather than risking his guaranteed pension, I think that would've carried significant weight - I think he would've accepted that advice.

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

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 W whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

Mr W has chosen not to wait for any the new guidance / rules to come into effect to settle his complaint.

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

A fair and reasonable outcome would be for the business to put Mr W as far as possible, into the position he would now be in but for Quilter's unsuitable advice. I consider Mr W would have most likely remained in his DB scheme and taken early retirement if suitable advice had been given.

Quilter 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.

For clarity, had suitable advice been given, I think Mr W would've taken the benefits from his DB scheme early at 59, so this should be the basis for the calculations.

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 W's acceptance of the decision.

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

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

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 Quilter to carry out a calculation in line with the updated rules and 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 uphold this complaint and require Quilter Financial Services Ltd to pay Mr W 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 Quilter Financial Services Ltd to pay Mr W any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Quilter Financial Services Ltd to pay Mr W any interest as set out above on the sum of £160,000.

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

If Mr W accepts this decision, the money award becomes binding on Quilter Financial Services Ltd.
My recommendation would not be binding. Further, it’s unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 6 January 2023.
Paul Featherstone
Ombudsman