

The complaint

Mr R has complained about the advice he was given by Bradford & Bingley Limited to transfer out of a defined benefits occupational pension scheme (OPS) to a personal pension. Mr R considers the advice wasn't in his best interests.

What happened

Mr R's complaint was considered by one of our investigators. He sent his assessment of the complaint to both parties on 21 October 2022. The investigator set out the reasons why he thought we could consider the complaint and the reasons why he thought it should be upheld.

In summary, the investigator explained that we were bound by the Dispute Resolution Rules (DISP) which were set out in the Financial Conduct Authority's Handbook. These included rules on time; we could only consider complaints that were referred to us within the relevant time limits. These limits, set out in DISP 2.8.2, provide that the ombudsman couldn't consider a complaint if it was referred to us more than:

a) six years after the event complained of; or (if later)

b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint.

The investigator said the complaint had been made in 2021, which was clearly more than six years after the event complained of; the transfer which was completed in 1991. He said he'd therefore considered whether the complaint had been made within the relevant three-year time period.

Bradford and Bingley had said the complaint might have been referred out of time because the transfer may have been reviewed as part of the regulator's industry wide pension review carried out in the late 1990s. It provided a copy of a letter that it had sent to the administrators of the OPS dated 1 September 1998, asking it for information about the pension benefits that Mr R had held with it.

The investigator said that Bradford and Bingley hadn't been able to provide evidence that pension review invitation letters – letters offering Mr R the opportunity to have the advice to transfer reviewed – had been sent to Mr R. He said these letters may have started a chain of events leading to Mr R becoming aware that he had cause for complaint. He also said that although there was the copy of the letter to the OPS' administrators, there was no evidence of a review outcome. And Mr R's personal pension provider had confirmed that it couldn't find any evidence that it had received any redress into Mr R's pension that might relate to the pension review.

The investigator said the firm were required to keep evidence of the pension review it had carried out. And taking all the above into account, the investigator didn't think Bradford & Bingley had provided enough evidence about the pension review to show that as a result of it Mr R ought reasonably to have become aware that he had cause for complaint more than

three years before he complained.

The investigator also said that he hadn't seen any other information that might suggest that Mr R ought reasonably to have become aware that he had cause for complaint more than three years before the complaint was made. He said Mr R had transferred his pension to different pension providers, and it wouldn't have been easy for him to have compared the personal pension benefits with those that would otherwise have been provided by the OPS.

Overall therefore, the investigator didn't think the complaint had been made out of time, and said he thought we could consider it. He therefore went on to investigate the merits of the complaint.

The investigator said that at the time of transfer Mr R was in his early thirties, married and with two dependent children. He had no other investments or savings and a low capacity for loss. The investigator said there was very little information available. However he thought it would have been very difficult for the personal pension arrangement to have matched the benefits in the OPS. And on the limited information that was available, it was more likely than not that the advice to transfer was unsuitable.

Bradford and Bingley said it had never contested that the advice to transfer was suitable. It said it had very little point of sale documentation, and as was the case with a lot of transfers it would probably have been more prudent for Mr R to have remained with his OPS.

It said, however, that its issue was in the problems it had had in trying to obtain information in order to ascertain whether Mr R's pension had been reviewed as part of the regulator's pension review.

What I've decided – and why

I've firstly considered whether Mr R has referred his complaint to us within the relevant time limits. Having done so, I agree with the investigator that the complaint was referred in time.

As the investigator explained, Bradford and Bingley hasn't been able to provide any evidence that Mr R was mailed as part of the pension review. It has provided a copy of a letter to the administrators of the OPS. The letter was asking for information to enable the firm to decide whether the advice to Mr R fell within the scope of the review. So this indicates the firm was at least completing the initial stages of a review – deciding whether the advice fell within scope.

However there is no further evidence of whether it wrote to Mr R inviting a review, whether a review was carried out or a loss calculation completed. And no evidence that a letter was sent to Mr R explaining the outcome of a review such that it might have alerted him that he had cause for complaint. The firm was required to keep records of a review. In all the circumstances, I don't think there's sufficient evidence that Mr R fell foul of the time limits as a result of matters relating to the pension review.

I've also considered whether there are other reasons why Mr R ought to have been alerted that he had cause for complaint more than three years before the complaint was made. As the investigator said, Mr R transferred his benefits away from the original personal pension provider some time ago. And has transferred it again since. The pension providers have only been able to provide limited information about what they sent to Mr R.

However I note that when Mr R transferred pension providers in 2004 the illustration from the new provider referred to potential pensions at retirement date that were in excess of those set out in the information provided by the administrators of the OPS; and at the lowest

projection rate. I accept that the figures provided by the administrators of the OPS showed what pension Mr R had accrued at the date he left that scheme. So these were subject to revaluation up until retirement date. However revaluation of deferred pension benefits is quite a complex exercise, and not something I'd expect Mr R to have been able to do. I think it's likely Mr R would have had the headline figures in mind. So I don't think the figures relating to the potential benefits from the personal pension ought to have been a red flag, or ought reasonably to have alerted Mr R that he had cause for complaint.

Overall, therefore, I think Mr R has referred his complaint within the relevant time limits, and that his complaint is one that I can consider.

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

It doesn't appear that Bradford and Bingley dispute that the advice to transfer was unlikely to have been suitable. I note Mr R was transferring around 12 years of pension service from the OPS. At the date of leaving the scheme this amounted to income of just over £2,000 and a lump sum of just over £6,000. Mr R left the OPS in 1989 in his early thirties. There was therefore a considerable period of time for the pension to revalue each year before retirement age. By retirement date it would have provided a significant pension. So there were material risks in transferring a significant and largely guaranteed pension that could be relied on to provide income throughout retirement.

No persuasive evidence has been presented to suggest that Mr R was willing or in a position to take the risks presented by the transfer. For the reasons outlined by the investigator and above, I think it was more likely than not that the advice to transfer was unsuitable, and that Mr R's complaint should succeed.

Putting things right

My conclusion is that a fair and reasonable outcome would be for the business to put Mr R as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr R would have remained in the occupational scheme.

Fair compensation

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 \(FG\) 17/19](#) (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 R whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published

Mr R didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for any new guidance.

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

Bradford & Bingley Limited should 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.

This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

Bradford & Bingley Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R'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 R's SERPS/S2P entitlement.

If this demonstrates a loss, compensation is payable.

The compensation amount must where possible be paid to Mr R within 90 days of the date Bradford & Bingley Limited 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 Bradford & Bingley Limited to pay Mr R.

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 Bradford & Bingley Limited to carry out a calculation in line with the updated rules and/or guidance in any event.

If the redress calculations above demonstrate a loss, the compensation should if possible be paid into Mr R'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 R 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 Mr R's likely income tax rate in retirement – which is presumed to be 20% here. So making a notional deduction

of 15% overall from the loss adequately reflects this.

Income tax may be payable on any interest paid. If Bradford & Bingley Limited deducts income tax from the interest, it should tell Mr R how much has been taken off. Bradford & Bingley Limited should give Mr R a tax deduction certificate in respect of interest if Mr R asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My final decision is that I uphold Mr R's complaint.

I order Bradford & Bingley Limited to calculate and pay compensation to Mr R as I have set out under "Putting things right" above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 15 December 2022.

David Ashley
Ombudsman