DRN-3829582

The complaint

Mr B complained that he was given unsuitable advice to transfer a defined benefit (DB) occupational pension, to a type of personal pension plan, in 2014.

Niche Independent Financial Advisers Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Niche".

What happened

Mr B's pension was a 'deferred' one, in that it related to an occupational scheme with former employment he'd ceased some time before. When thinking about his DB scheme, in 2014, it seems Mr B had first dealt with a different independent financial adviser (IFA) but this firm didn't have the necessary accreditation from the regulator to carry out DB pension transfer advice. Mr B was therefore referred to Niche, which did.

Niche hasn't been able to provide our service with documents I'd certainly expect to see when looking at this type of complaint. It's failed to provide any type of 'fact-find' document which I would have expected to see as a fundamental part of the overall advice process. I also can't see any form of 'risk profile' having been carried out. As Mr B was being advised to transfer away from a DB scheme, I would have expected his attitude to risk (ATR) categorisation to have been thoroughly assessed and considered by Niche.

What we do know about Mr B at that time is broadly as follows:

- Mr B was 46 years old and was married.
- The DB scheme in question here was Mr B's only main pension, other than his state pension, due at the age of 67.
- The DB pension had a normal retirement age (NRA) of 65 and it was recorded that this age was when he expected his retirement to begin.
- The cash equivalent transfer value (CETV) of the pension was described in August 2014 as being £208,480 (this value increased a little to around £214,000 in the following weeks before the final transfer eventually took place).

Niche set out its advice in a suitability letter on 21 July 2014. It recommended Mr B could benefit financially by transferring away from the DB scheme and it recommended a type of personal pension arrangement he should transfer to.

Mr B accepted this advice and so transferred from his DB scheme to a new personal pension arrangement. In late 2021 Mr B complained to Niche about its advice, saying he shouldn't have been advised to transfer out of his DB scheme. In response, Niche said it hadn't done anything wrong and was acting on the financial objectives Mr B had at the time.

Mr B referred his complaint to our Service. One of our investigators looked into the complaint and said it should be upheld. As the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). 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 Niche'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, Niche should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests.

I've used all the information we have to consider whether transferring away from the deferred DB scheme was in Mr B's best interests. And I don't think it was, so I'm upholding his complaint.

Initial information gathering by Niche

I mentioned above about the apparent information gaps we have surrounding this complaint, particularly that relating to Mr B's personal situation. In my experience, Niche and firms like it, are usually able to produce documentation from the time of the advice which can help show the circumstances in which the transfer took place. This can help demonstrate whether a consumer's circumstances of the time were commensurate with moving from a DB scheme to a personal pension arrangement.

In this case, as well as key documents such as the 'fact find' and 'risk profile' being absent, I think the information collected by Niche appears to have been generally poor. For example, information about key family members was missing, including details of any children / Mr B's spouse and their respective salaries, if they had any. And I think that to advise Mr B properly, Niche would have needed to know much more about his circumstances than it appears to have known. Examples might have included whether children were financially dependent on Mr B at the time, or whether Mrs B worked and / or had a pension of her own.

I've noted that Niche makes the point several times that as Mr B was primarily dealing with 'his own' IFA, Niche was only responsible for the aspects relating to his pension transfer. However, to be clear, as regulated financial advisers with the necessary accreditation, Niche was fully responsible for providing advice that was in Mr B's best interests. It's difficult to say it did this when I'm not confident it knew what his best interests were.

I've also noted that Mr B was charged a substantial amount of money for the advice Niche provided. It charged him 2.5% of the fund value which in his case amounted to over £5,200. I think it's also relevant that the investments Mr B subsequently went on to make in the personal pension plan were only possible as a consequence of the transfer advice Niche provided to Mr B.

So, to be clear, Niche is fully responsible for providing the advice and answering this complaint. I also think what I've seen here strongly suggests Niche ought to have done much more during these preparatory stages. Very significant information gaps existed when this advice was being provided and there was a surprising lack of attention to detail by Niche in data collection. The information we *do* have available strongly implies this pension was a substantial part of Mr B's overall retirement provision. In this context, Niche's failures to investigate Mr B's personal and financial circumstances was notable.

Financial viability

As required by the regulator, to demonstrate the financial comparisons between his current scheme and transferring out to a personal pension, Niche 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. In Mr B's case, Niche said the critical yield required to match his benefits at the age of 65 (without taking a tax-free lump sum at the same time) was 5.3%. No critical yield was provided for retiring with a tax-free lump sum.

In the suitability letter, Niche said this critical yield rate was relatively low and therefore achievable. But it didn't go into any detail about why it thought this, or the level of growth it was actually assuming Mr B might be able to achieve if he transferred out. So, I think there were also failings by Niche in this area. In my view, Niche's assertions about the growth were somewhat speculative and not backed up by any credible analysis.

Elsewhere in its transfer analysis, Niche also made mention of the PPF, which it described as a compensation scheme providing a *"safety net"* for pension schemes when the sponsoring employer becomes insolvent. It said the critical yield to match the benefits available through the PPF at the age of 65 was lower than the yield I've referred to above. However, there was no reason for Mr B to consider the PPF as his ceding scheme appeared to be well funded. I've therefore considered the 5.3% rate and I've thought about whether saying this was achievable was a reasonable thing for Niche to say to Mr B.

Niche's 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 before 1 October 2017 was 5.6% per year for 19 years to retirement (calculated to age 65). I've also kept in mind that the regulator's upper projection rate was 8%, the middle projection rate was 5%, and the lower projection rate was 2%. However, as I've said above, Niche cannot say what Mr B's ATR was or whether such a risk exercise was even carried out.

In my view, this was another notable failure, and I've seen nothing indicating that Mr B was a knowledgeable investor, or that he was able to call upon investment experience when thinking about how much his transferred pension might grow by, in 'money market' funds, if he came out of his DB scheme. Our investigator also pointed out that, in all likelihood, Mr B was someone who had little capacity for loss. On the evidence I've seen, I agree with this.

So, taking these considerations and failures into account, I think the assumed growth rate at the time should have been considered as much closer to the regulator's lower projection of 2%. And even though Niche said at the time that the 5.3% critical yield rate could be achieved, it provided (and now still fails to provide) any real evidence or rationale supporting the assumption that his transferred funds would grow by this amount. Even if I were to refer only to the discount rate, which was 5.6%, I've also considered that the additional costs and charges associated with a personal pension – an annual service fee and also fund management charges - would have most likely acted as a 'drag' on any future fund growth if Mr B transferred to a personal plan. And by transferring away, Mr B was exposing himself to a risk that wasn't present in his current scheme.

I therefore think it's fair to say that from a financial comparison perspective, Niche's figures, shown in its suitability letter and transfer analysis documents, failed to evidence how transferring to a personal pension plan was right for him. In my view, transferring would mean Mr B would likely receive lower pension benefits in the longer term, when compared against his existing DB scheme; and chasing higher levels of growth would mean an exposure to risk levels which were inappropriate in Mr B's case.

In reality, Niche's suitability letter and the recommendation contained therein was a short, and in my view, poor piece of work. It did not comprehensively capture Mr B's circumstances and it made references to Mr B principally being the client of the 'other' IFA: these look to me to be attempts to abrogate Niche from responsibility.

Nevertheless, I've taken account that Niche's recommendation that he should transfer out to a personal pension was not based on the financial comparisons with his current scheme alone. Rather, Niche also said Mr B had some other reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer *was* suitable for him, despite providing the overall lower benefits mentioned above.

I've considered these issues below.

<u>Other issues relating to transferring</u>

I accept that Mr B was given some generalised written warnings about transferring. But Niche still recommended a transfer to a personal pension, based on what it said were Mr B's objectives. I've also seen some documents where Mr B himself provided some rationale for transferring. I've summarised all these potential transferring reasons as follows:

- There were references in the advice to Mr B having more direct control over his pension if he transferred to a personal plan. Mr B could have a personal input in to the fund selection if moving forward with a personal scheme.

- There would be an opportunity to grow the overall fund value of his pension in a personal pension scheme.

- There would be greater flexibility when eventually accessing his personal pension benefits.

In my view, these were no more than generic transfer reasons and not specifically related to Mr B's personal circumstances. But I have also considered the additional issues of Mr B's age and some of the benefits and guarantees he would be giving up if leaving his DB scheme. I have considered all these issues in turn.

- *Mr B's age*

Mr B was only 46 years old at the time of the advice and based on what I've seen he didn't have any concrete retirement plans. As he had around 19 years before he was intending to access his pension, I think it was far too soon to make any kind of decision about transferring out of the DB scheme.

So, I don't think it was a suitable recommendation for Mr B to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr B later had reason to transfer out of the DB scheme he could have done so closer to retirement. In any event I've noted, as did our investigator, that Niche apparently failed to assess or consider what Mr B's financial needs in retirement might actually be. This also included an apparent failure to look at what Mrs B might contribute to their joint retirement income.

What Niche was recommending to Mr B was for him to transfer away from a DB scheme which was well-funded and which contained significant guarantees and benefits. Evidently, there were some discussions around this because I can see some cautionary warnings were given in the documents from the time. But again, these warnings were generic and not personalised to Mr B and ultimately Niche still promoted the recommendation for Mr B to transfer away from his DB scheme. Transferring away at such a young age left Mr B facing an uncertain retirement, particularly because Niche had failed to consider any retirement plans or financial aspirations he might have. In my view, Niche's approach to this was substantially affected by its perception of it being no more to Mr B than a firm that could transact what he thought he wanted to do. However, as I've said, Niche's responsibilities were much wider than this and its job was to understand his retirement needs and recommend what was in his best interests.

- *The DB scheme death benefits*

It's not entirely clear, whether, or to what extent Niche discussed the ceding DB scheme's death benefits. 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 may been portrayed as an attractive feature to Mr B. But 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. And I don't think Niche explored to what extent Mr B was prepared to accept a lower retirement income in exchange for higher death benefits.

Mr B was only 46 years old and he was married. So, I think the death benefits attached to the DB scheme were probably underplayed in this case. The spouse's pension provided by the DB scheme would have been useful to Mrs B if Mr B predeceased her and I don't think Niche 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.

I also can't see whether, or the extent to which, life insurance was discussed in this case. But at around 46 years old, this may have been a reasonably affordable product if Mr B wanted, for example, to leave a legacy for Mrs B or anyone else. This would have been a far better alternative to irrevocably transferring away from his DB pension scheme just to access different death benefits, which in any event, were probably less suited to Mr B's family set up.

- *Control of the funds*

Several references were made in the advice to Mr B being able to influence his investments going forward, if he transferred to a personal pension plan. However, I've seen nothing which shows Mr B had either the desire or capacity to exercise personal control over his pension. Everything I've seen shows Mr B would have probably needed ongoing financial advice, which of course, he would have had to pay for. His current scheme was run by trustees, the costs were most likely minimal, and there were guarantees related to future payments. From what I've seen, Mr B's circumstances were much more aligned to him retiring from a DB scheme, such as the one he was already in, and drawing a pension when it became due.

I therefore think the suitable option here was for Mr B to access his DB pension in the way it was originally intended.

- *Flexibility*

Overall, I can't see that Niche clearly showed that Mr B required flexibility in retirement in the way suggested. In any event 'flexibility' was not defined by Niche and so I think this was no more than a generic point, put forward to bolster the recommendation for transferring.

Niche said in its transfer analysis about his existing scheme that Mr B's estimated pension upon his NRA was £16,772. This amount was guaranteed and index linked and I've seen absolutely nothing showing why it didn't fit Mr B's needs. But this was the only reference made during the advice process to what an income in retirement might look like for Mr B. Niche failed, for instance, to find out whether Mr B could even estimate what income he'd need in retirement, and whether this pension would likely meet his needs, although as I've said, this was a very long way off in his case.

Also, because Niche had failed to find out or record details of Mrs B's salary and pension, I think there were other considerable gaps in the information about what Mr B's retirement would look like.

<u>Other relevant matters</u>

There were no apparent concerns about the overall funding or stability of Mr B's DB pension scheme and so the information I've seen shows there was no need for Mr B to transfer away on these grounds. Mr B had no cause to have been concerned about the security of his pension.

Also, as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr B, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Finally, I of course ought to consider whether Mr B would have still gone ahead anyway and transferred out, even if this had been against Niche's advice. But I've seen no evidence Mr B would have insisted on transferring out of the DB scheme against advice. I say this because he was an inexperienced investor with no capacity for loss and this pension accounted for almost all of his retirement provision. So, if Niche had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think Mr B would have accepted that advice.

Summary

In this complaint, Niche has argued that properly informed, correctly advised individuals should be in a position to decide for themselves if they wanted to transfer their safeguarded benefits. Nevertheless, the issue here is that this was a complex matter involving many factors which Mr B was not familiar with.

Ultimately, Niche's collection of information about Mr B's circumstances was poor. It failed to properly assess his ATR and its recommendation to transfer away from his existing DB scheme was based on generic points. I think its whole approach lacked rigour and I don't think the advice given to Mr B was suitable. He was giving up a guaranteed, risk-free and increasing income within the DB scheme he already was in. By transferring to a personal pension, the evidence shows Mr B was likely to obtain lower retirement benefits. And at the comparatively young age of 46, I don't think there were any other particular reasons which would justify the transfer.

I don't doubt that the flexibility, control and potential for things like higher death benefits on offer through a personal pension might have sounded like attractive features to Mr B when he was being given this advice in 2014. But Niche wasn't there to simply transact what Mr B might have thought he wanted. The adviser's role here was to really understand what Mr B needed and recommend what was in his best interests. Niche failed in these duties.

I therefore don't think it was in Mr B's best interests for him to transfer his DB scheme to a personal pension. And in light of everything I've said above, I think Niche should compensate Mr B 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 B, as far as possible, into the position he would now be in but for Niche's unsuitable advice. For clarity, Mr B has no plans at present to retire any earlier than age 65. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 B whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. His adviser didn't clarify this issue, so as we've previously indicated, our approach in these circumstances is to not wait for any new guidance to come into effect to settle his complaint. So 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 B.

Niche 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. 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 B's acceptance of the decision.

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

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

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.

Our investigator noted there was most likely distress and inconvenience caused by Niche's actions and inactions in this case. I agree, and I've further considered his age, circumstances and the fact that this pension represented by far the largest part of his future retirement income. In addition Niche should therefore pay Mr B £300 for the distress and inconvenience this matter has caused him.

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 Niche 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

I require Niche Independent Financial Advisers Limited to pay Mr B 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 Niche Independent Financial Advisers Limited to pay Mr B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Niche Independent Financial Advisers Limited to pay Mr B any interest as set out above on the sum of £160,000.

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

If Mr B accepts my final decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 30 March 2023.

Michael Campbell
Ombudsman