

The complaint

Miss J complains about R&Quiem Financial Services Limited's advice to transfer her defined benefit pension scheme into a Group Personal Pension Plan (GPP), which she says has disadvantaged her financially. R&Quiem objected to our Service considering this complaint because they think Miss J referred it too late.

As Miss J is represented by a third party, I'll refer to all submissions as made by Miss J for ease of reading.

What happened

On 12 January 2023, I issued a provisional decision about this complaint. In it, I set out the background to this complaint as follows:

Miss J was a member of her employer's defined benefit pension scheme from 1991 until 2000. In 2012, R&Quiem approached Miss J to tell her she was eligible for an enhanced transfer value if she agreed to transfer the benefits accrued in her defined benefit scheme into a GPP.

R&Quiem completed a fact-find to gather information about Miss J's circumstances and objectives. R&Quiem also carried out an assessment of Miss J's attitude to risk, but it has not, to date, disclosed its assessment.

Miss J was offered a transfer value of £46,740.46 plus an enhancement of £2,305 (£1,654 of the enhancement could be paid to Miss J in cash). R&Quiem advised Miss J to transfer her pension benefits into the GPP – but it advised against her taking the enhancement in cash. Miss J agreed to the transfer, taking the maximum possible of the enhancement in cash when the transfer of her funds into the GPP was completed in April 2012.

In April 2018, Miss J took a 25% tax-free cash lump sum and has taken further drawdowns from the remaining funds.

In 2021, Miss J complained to R&Quiem about the advice provided in 2012. She said the advice to transfer wasn't suitable for her, she wasn't aware of the fees involved in transferring her pension, she wasn't aware she was giving up a guaranteed income or that her GPP would be reliant on investment returns.

R&Quiem said it wasn't obliged to respond to Miss J's complaint because it was made too late – it was more than six years since its advice, and R&Quiem thought more than three years had passed before Miss J ought reasonably to have been aware she had cause to complain.

Unhappy with this response, Miss J referred her complaint to our Service. She said she became aware she had cause to complain around 2019 after receiving a letter from the provider of her GPP that indicated the value of her pension would be lower than Miss J had expected. This prompted her to try find out about the transfer. Miss J said she couldn't recall receiving any paperwork about the transfer process. Miss J said it was only after

complaining about R&Quiem's advice to transfer her pension that she became aware she had been disadvantaged financially.

One of our Investigators reviewed Miss J's complaint and thought it was one we could consider, saying it was brought to us within three years of when Miss J ought reasonably to have become aware she had cause to complain. At the time Miss J transferred out her benefits from her defined benefit scheme, it was projected to give her an income of £5,079 per year. But the statements Miss J received from her GPP provider didn't provide a like for like comparison. Further, the value of Miss J's GPP continued to grow until she began to make withdrawals in 2018. So, our investigator didn't think the statements Miss J received from her GPP provider ought reasonably to have given her cause to complain about the advice she was given to transfer her pension. And because the value of Miss J's GPP grew after the transfer of her funds, our Investigator thought it was unlikely Miss J would have been aware that R&Quiem's advice might have caused her to lose out financially. Our investigator was satisfied it was reasonable for Miss J to have become aware she had cause to complain after contacting her defined benefit scheme in 2019.

R&Quiem disagreed with our Investigator's opinion, noting the 2013 statement for Miss J's GPP showed a projected income of £2,340 a year in retirement. So it thought this should have made Miss J aware she had cause to complain about the advice it had given in 2012, as her DB scheme was projected to pay an income of around £5,000 per year. R&Quiem noted Miss J switched the funds her GPP was invested into in 2016 so someone with Miss J's "level of understanding" would appreciate the difference between the two values of projected income in retirement. Our investigator explained Miss J switched funds in the same year she made further transfers into her GPP and remained of the view her complaint was brought to us in time. So, this has come to me for a decision.

In my provisional decision, I explained I thought Miss J only became aware she had cause to complain in 2019, and made her complaint in 2021. So, I thought this complaint was brought to us within the relevant time limits. I went on to consider the merits of Miss J's complaint, and explained why I thought, on balance, R&Quiem should not have advised her to transfer the benefits accrued in her defined benefit scheme into a GPP. I also explained what I thought R&Quiem should do to put things right. Miss J accepted my provisional decision but R&Quiem didn't respond.

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.

As no substantive comments were provided by either party in response to my provisional findings, I see no reason to depart from them. So, I'll reiterate again here my findings in my provisional decision of 12 January 2023.

Jurisdiction – is this a complaint I have the power to consider?

If R&Quiem doesn't consent, we can't consider a complaint if it was brought to us:

- more than six years after the event they're complaining about;
- or if the six years have passed, more than three years from the date on which the consumer became aware, or ought reasonably to have become aware, that they had cause for complaint.

Miss J is complaining about the advice she received from R&Quiem in 2012, which is more than six years ago. But I don't agree with R&Quiem that Miss J ought reasonably to have been aware she had cause for complaint in 2012, or 2013 as R&Quiem has suggested. I'll

explain why.

In 2012, R&Quiem told Miss J her defined benefit scheme offered fixed pension benefits based on her length of service within the scheme and her salary when she ceased to be a scheme member. Her basic pension income, calculated at the date of her leaving the scheme, was £1,236.76 per annum in the “Enhanced Transfer Value (ETV) Report”. The report said:

“As at the date you ceased to be an active member under the Scheme, 30 June 2000, you were entitled to a pension income calculated as £1,256.76 pa (before tax).”

In the transfer analysis document, the £5,079 figure is quoted in two illustrations on page 3 and 21 of the document. On page 10 and 14 of the analysis, R&Quiem quotes an annual pension benefit under the ‘existing’ scheme of £5,001 and a figure of £5,185 is listed on page 11. I’ve not seen a clear explanation was given to Miss J about the differences in the values given in the illustrations in the analysis or how those were calculated – and why these figures were higher than the £1,236.76 per annum figure quoted above.

Furthermore, the suitability letter doesn’t make it clear to Miss J what her pension would likely be worth if she didn’t transfer out of her defined benefit scheme. Overall, I don’t think it was sufficiently clear in the documentation given to Miss J that she was giving up an expected income of over £5,000 a year given the different values given to her. So, I don’t think it’s reasonable to say Miss J should have known she was likely to receive significantly less than this when she received her 2013 statement from her GPP provider, which showed a projected monthly income of around £195 (£2,376 per year) if she retired at 65. I also note her fund value grew, and I don’t think there were any significant decreases in the fund value on a yearly basis that ought to have alerted Miss J she should have cause to complain that she may have been given unsuitable advice to transfer her pension.

Miss J says she realised she may have cause to complain in 2019, after undertaking her own enquiries with her defined benefit scheme provider. I don’t think this is unreasonable, given what I’ve said above. Miss J made her complaint to R&Quiem in 2021, which is within three years of when I think she ought reasonably to have become aware she had cause to complain. So, I don’t think this complaint has been brought to us too late and it is one we can consider.

The merits of the 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 R&Quiem’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.

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, R&Quiem should have only considered a transfer if it could clearly demonstrate that the transfer was in Miss J's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

R&Quiem carried out a transfer value analysis report (as required by the regulator) showing how much Miss J's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme (the critical yield).

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.

Miss J was around 48 years old at the time of the advice and was unsure when she wanted to retire. The critical yield required to match Miss J's benefits at age 65 was 7.5% if she took a full pension and 5.6% if she took tax-free cash (TFC) and a reduced pension. This compares with the discount rate of 6.3% per year for 16 years to retirement from the time the transfer went ahead. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%. Whilst the critical yield rate was marginally lower than the discount rate, the difference is only 0.7%. Further, the critical yield and the discount rate were above the regulator's lower projection rate of 5%, which I think is the appropriate rate to consider in this case as I think Miss J had a low attitude to risk for the reasons I'll explain below.

In the suitability letter R&Quiem said it considered Miss J's attitude to risk was 'adventurous' and she had good investment experience – but I don't think this view is reasonable given the evidence we have available. Miss J ticked two boxes when asked about her attitude to risk – she selected 'Low Risk/Very Cautious'. The 'Aggressive/Adventurous' box is also ticked and dated after Miss J signed the Fact Find, suggesting her answer was revised at a later date. There's no context as to why Miss J's answer changed, and no evidence to support the belief that her attitude to risk was indeed adventurous or aggressive, so I don't think this answer can be relied on.

There's also no evidence to substantiate R&Quiem's claims that Miss J was an experienced investor. Following its phone call with Miss J, conducted after she filled in the application form, R&Quiem ticked the box that indicated she had 'good' investment experience and had been "investing for several years within a broad range of different asset classes" and had "knowledge and/or experience of investing in a variety of investments such as cash, fixed interest, property, UK and overseas shares". This seems to contradict Miss J's initial answer

to this question, when she said she has “someone who has/is looking after my pension and happy with him looking after this pension.” Further, Miss J indicated she had no savings or investments on R&Quiem’s Fact Find and wanted to be a ‘Low Involvement’ investor following the transfer – I don’t think these answers support the claim she was an experienced investor. There’s no evidence whatsoever to justify R&Quiem revising Miss J’s Fact Find to show she had good investment experience. And there’s no evidence to show Miss J had the opportunity to confirm the amended answers were indeed correct, which has led me to treat these amended answers with greater caution. Based on the evidence available, I think it would have been reasonable to consider Miss J as having a low attitude to risk – as per her original answer on R&Quiem’s Fact Find.

Further, R&Quiem failed to undertake any investigation into whether Miss J had the capacity to lose some or all of these funds. R&Quiem obtained no details of her other pensions. Our investigator asked Miss J for details of any other pensions Miss J held in 2012. Miss J’s representative has said:

Miss J “confirms she had three policies at the time of advice aside from [this] scheme. She had two occupational schemes, one with [employer A] (administered by [company A] with approx. 11 years of service and one with [employer B] (now administered by [company B] with approx. 3 years of service. She also had one personal pension with [company C] which was active for approx. 5 years. Unfortunately, she cannot recall any of the values for these schemes and has not retained any documentation to evidence them.”

On R&Quiem’s Fact Find, I note Miss J ticked ‘no’ when asked if this pension was the cornerstone of her retirement planning. But on the other hand, Miss J said she was ‘not sure’ how important this pension was in relation to her total pension provision. So, I have treated Miss J’s responses to R&Quiem’s question about whether this pension was a cornerstone of her retirement planning with caution. And based on the little information available, I don’t think there’s enough evidence to show Miss J had the capacity to risk the loss of this pension.

Given Miss J’s low attitude to risk and the lack of evidence showing she had the capacity to risk these funds, I think it’s even more important to emphasise that whilst the critical yield of 5.6% could potentially have been matched, there was little prospect of the value of Miss J’s fund outperforming the critical yield. Without the opportunity to improve on the benefits, in my view there was little reason to give up the benefits of a guaranteed pension. And I don’t think it would be reasonable to conclude the very small (only £1,654) enhancement Miss J received – that she didn’t intend to use for herself – was sufficient enough reason to advise her to give up the very valuable guaranteed income provided by her defined benefit pension. For this reason alone, a transfer out of the DB scheme wasn’t in Miss J’s best interests. But, I’ve gone on to consider the other reasons given by R&Quiem in its Suitability letter to support the recommendation to transfer out, to determine whether doing so was suitable despite the lower anticipated retirement benefits Miss J would likely receive.

Flexibility and income needs

On R&Quiem’s Fact Find, Miss J said she would like to have more flexibility and control over her future pension income – but Miss J’s preference alone does not mean R&Quiem’s advice to transfer her pension was suitable. I don’t think there’s any evidence to show Miss J required flexibility in retirement – there’s no evidence in the fact find that suggests she had a genuine need to access her TFC earlier than the normal scheme retirement age. There’s also no evidence to suggest Miss J had a strong need for variable income throughout her retirement.

Miss J was unsure when she wanted to retire and so there's no detail of the level of income she'd need in retirement in R&Quiem's Fact Find or sales documentation. In her complaint to our service, she said she was interested in using any cash made available through the transfer to help her parents repay debt. But there's no evidence to say the merits of taking this course of action were discussed with Miss J or that R&Quiem satisfied itself Miss J could not have achieved this by staying in the DB scheme or drawing on her other personal pensions. There's also no evidence to demonstrate that R&Quiem considered the impact of Miss J using her pension in this way on her income in retirement.

So, I've not seen any evidence to persuade me that Miss J needed flexibility in retirement or that she wasn't relying on the income the DB scheme provided to support her needs in retirement.

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 was likely an attractive feature to Miss J, as I note she had sadly lost her son and wanted to pass on benefits to other family members. But whilst I appreciate death benefits are important to consumers, and Miss J might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Miss J about what was best for her retirement provisions.

A pension is primarily designed to provide income in retirement. And I don't think R&Quiem explored to what extent Miss J was prepared to accept a lower retirement income in exchange for higher death benefits.

Furthermore, if Miss J genuinely wanted to leave a legacy for her family, which didn't depend on investment returns or how much of her pension fund remained on her death, I think R&Quiem should've instead explored life insurance. This would likely have been a cheap alternative of providing a legacy without Miss J risking her own security in retirement. Overall, I don't think different death benefits available through a transfer to a GPP justified the likely decrease of retirement benefits for Miss J. And I don't think that insurance was properly explored as an alternative.

Control of Miss J's pension benefits

I think Miss J's desire for control over her pension benefits was overstated. As I've explained above, Miss J declared she was not an experienced investor and R&Quiem acknowledged she would not be an 'involved' investor in its Fact Find. I cannot see that she had an interest in or the knowledge to be able to manage her pension funds on her own at the time she was advised to transfer her benefits. So, I don't think that this was a genuine objective for Miss J – it was simply a consequence of transferring away from her DB scheme.

Summary

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

Ultimately, I don't think the advice given to Miss J was suitable. She was giving up a guaranteed, risk-free and increasing income and I don't think this was suitable for her, given it was unlikely her transferred pension would exceed the critical yield needed to match the valuable guaranteed income she was giving up. In my view, the very modest enhancement

offered would not justify a transfer and outweigh this. Miss J shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable, or weren't hers, and the potential for higher death benefits wasn't worth giving up the guarantees associated with her DB scheme.

On balance, I think R&Quiem should've advised Miss J to remain in her DB scheme.

I've considered whether Miss J would've gone ahead with the transfer regardless of the advice she received. But I'm not persuaded that any concerns Miss J may have had about her death benefits were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she was relying on, didn't think it was suitable for her or in her best interests. And I also don't think the enhancement being offered if Miss J transferred out of the DB scheme was enough to make her want to proceed with the transfer even if she'd been clearly told it wasn't in her interest to do so. So, I don't think Miss J would have insisted on transferring out of the DB scheme.

In light of the above, I think R&Quiem should compensate Miss J 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 - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

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

Miss J didn't make a choice, so as set out previously I've assumed in this case she doesn't want to wait for the new guidance to come into effect.

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

A fair and reasonable outcome would be for the business to put Miss J, as far as possible, into the position she would now be in but for R&Quiem's unsuitable advice. I consider Miss J would have most likely remained in her DB scheme if suitable advice had been given.

R&Quiem 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, whilst Miss J has withdrawn benefits from her GPP, she has not yet retired and she has no plans to do so at present. So, I think Miss J has only taken some benefits from her GPP by virtue of the flexibility she got from transferring – I don't think she would've otherwise taken her DB scheme benefits. For this reason, compensation should be based on her 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 Miss J's acceptance of the decision.

R&Quiem may wish to contact the Department for Work and Pensions (DWP) to obtain Miss J'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 Miss J's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss J'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 Miss J 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 her 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 Miss J within 90 days of the date R&Quiem receives notification of her 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 R&Quiem to pay Miss J.

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 R&Quiem to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

Determination and money award: I uphold this complaint and require R&Quiem Financial Services Limited to pay Miss J the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require

R&Quiem Financial Services Limited to pay Miss J any interest on that amount in full, as set out above.

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

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

If Miss J accepts this decision, the money award becomes binding on R&Quiem Financial Services Limited.

My recommendation would not be binding. Further, it's unlikely that Miss J can accept my decision and go to court to ask for the balance. Miss J 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 Miss J to accept or reject my decision before 28 February 2023.

Victoria Blackwood
Ombudsman