

The complaint

Mr S complains about the advice given by LEBC Group Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a guaranteed annuity. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr S was a deferred member of his former employer's DB scheme. In 2018, the scheme sent Mr S a statement of pension benefits along with a flexible retirement offer ('FRO'). Part of the FRO included an enhanced cash equivalent transfer value ('CETV'). The scheme trustees appointed, and paid for, LEBC to provide advice to scheme members about the suitability of transferring their defined benefit pension to a defined contribution arrangement.

Mr S took up LEBC's offer of advice and a fact-find was completed in September 2018 in order to gather information about Mr S's circumstances and objectives. LEBC noted the following on the fact-find:

- Mr S was aged 57 and in a civil partnership. His partner was aged 25.
- Mr S lived overseas and was self-employed with an annual income of around £36,000.
- Mr S owned a property in the UK worth approximately £800,000 which had an outstanding mortgage of £430,000 and monthly repayments of £1,700; Mr S intended to dispose of the property.
- That Mr S intended to be mortgage free by March 2019 if not sooner.
- He owned further properties overseas valued at approximately £200,000 from which he derived his income.
- Mr S had cash savings of £5,000 and no other pension provision.
- No state pension provision was noted and no details of any outgoings were noted.
- That Mr S would be investing £200,000 in property overseas and was in the process of opening a hotel which he expected to do well. Mr S was also noted as having a 50% share in an existing hotel business from which he derived only minimal income as 90% of its profits were re-invested.
- Mr S wanted to draw a tax-free lump sum and to take an immediate income from his pension to be paid monthly.

The fact-find also included a section about attitude to risk ('ATR') where Mr S was given five options ranging from 'conservative' to 'aggressive' from which he had to select the one that most applied to himself; Mr S ticked the box to say he had an aggressive ATR (defined as meaning he was prepared to take significant investment risk with his retirement income). However, in its suitability report, LEBC noted that as the DB scheme was Mr S's only pension, he had a limited capacity for loss.

On 19 September 2018, LEBC issued Mr S with its suitability report where it set out the three options Mr S had under the FRO. These were:

- To do nothing and take his benefits from the DB scheme at a point in the future;

- To take a pension from the DB scheme now; or
- To purchase a lifetime annuity.

Options one and two were discounted in favour of option three and LEBC advised Mr S to transfer his DB scheme benefits to an annuity with a provider I'll call 'C'. LEBC set out various annuity options for Mr S but recommended that he take a single life level annuity paying him £4,854 gross per year monthly in advance with no dependent's pension; a 20-year guarantee period was included and Mr S would receive £36,604 in tax-free cash ('TFC'). The suitability report said the reason for this recommendation was so that Mr S could draw TFC to help with his planned overseas property construction. It also said that whilst he was able to meet his outgoings and the cost of the project (£220,000), which was to be funded by selling his UK property, he preferred to have an additional sum available to him.

Mr S accepted LEBC's recommendation. The CETV of £146,416 from the DB scheme was received by C, the TFC was paid to Mr S and the guaranteed annuity was set up shortly after. No adviser fee was charged but there was an initial product charge of £150 made against the transferred fund.

In August 2021 Mr S, through his representative, complained to LEBC that he'd been given negligent advice to transfer his DB scheme benefits and that the advice was unsuitable for someone who had no investment experience and a low ATR. Mr S's representative said he'd been induced to transfer his DB scheme benefits by LEBC as it had promised the value of his pension fund would grow. Finally, Mr S's representative said he had suffered a financial loss of £17,000.

LEBC looked into Mr S's complaint and issued its final response letter on 22 September 2021. LEBC said that it had recommended the transfer so that Mr S could benefit from the enhanced CETV his former employer was offering as part of the FRO, as well as a larger annual income and more TFC. LEBC said that the advice it had given Mr S was in his best interests so it was unable to uphold his complaint.

Unhappy with the outcome of his complaint to LEBC, Mr S complained to this service. Our Investigator looked into Mr S's complaint and recommended it was upheld. He thought that there was no immediate need for Mr S to have the TFC nor did he think he needed it in order to achieve his objective. And our Investigator thought that Mr S didn't need the additional income from the annuity at that point in time. Our Investigator also thought that Mr S may not have fully understood the value of the dependent's pension provided by the DB scheme.

LEBC disagreed with our Investigator's findings but its response provided no new comments or evidence. Our Investigator thought about what LEBC had said in response to his findings but wasn't persuaded to change his mind.

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 LEBC'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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, LEBC should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr S's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

As required by the regulator, LEBC carried out a transfer value analysis ('TVAS') report in September 2018 showing how much Mr S's fund would need to grow by each year (the critical yield) in order to provide the same benefits as his DB scheme at ages 59 and 60 (the scheme's normal retirement date ('NRD')). Whilst I note that LEBC concluded that the required returns to match Mr S's DB scheme were likely unachievable, LEBC's advice and recommendation in this case was not based on Mr S retiring at 60 (or 59) and investing his pension monies in the meantime in the belief that he would be better off by transferring. Rather LEBC's advice was based on addressing what it considered was Mr S's immediate need for both income and a cash lump sum (at age 57). So while I'm satisfied this analysis was clearly explained to Mr S in the suitability report, I don't think it's necessary in this case for me to consider in detail the financial viability of the transfer. What I need to consider in this case are the other reasons LEBC believes mean the transfer was both suitable and in Mr S's best interests.

Flexibility and income needs

It seems to me that the sole reason LEBC recommended Mr S transfer his DB scheme for a guaranteed annuity and TFC, despite its conclusion that the required returns to match his DB scheme were likely unachievable, was to have the flexibility to access a tax-free cash lump sum to help with his planned overseas property construction. Additionally LEBC said that whilst he was able to meet his outgoings and the cost of the project (£220,000) by selling his UK property, he preferred to have an additional sum available to him.

But I'm not persuaded that there was a genuine need for Mr S to access his TFC to fund his overseas property project. And I note that LEBC acknowledged this was the case too as it noted that the TFC wasn't needed to fund the project because as it was being funded from the sale of Mr S's UK property in which there was equity of £370,000. As the construction costs were estimated to be £220,000 it's clear to me that Mr S would have sufficient funds available after the sale of Mr S's UK property to be able to fund his project without the need to transfer his DB scheme. And I've seen no evidence for why Mr S genuinely needed to have an additional sum 'available' to him either; so I think that Mr S could have left his DB scheme where it was.

Mr S might have been tempted to access cash from his pension, particularly as the amount of cash available had been enhanced, but I've seen no evidence that he had a genuine need to do so. It is clear to me from both the fact-find and suitability report that LEBC established there was no immediate need at all to access any TFC. But despite this, option 1 – retaining the DB scheme and taking benefits at some future point – was specifically rejected on the grounds Mr S required immediate access to his pension in order to purchase an additional overseas property when, in fact, that was not the case.

Nor can I see that Mr S needed the additional income that the annuity was to provide. The suitability report notes that Mr S had an annual income of £36,000 and annual 'core' outgoings of £10,000 *"leaving you with a surplus of approximately £26,000 pa gross which you are currently investing into your business..."* It is unclear, because Mr S's actual outgoings aren't documented, if there was flexibility around the investment of the surplus income but the very definition of surplus is something that is 'left over'. That being the case it is reasonable to assume Mr S had some discretion as to how to utilise the amount of income he had left over each year and that consequently he didn't need more surplus income in the form of an annuity.

I can see too that the only outgoing mentioned on the fact-find is Mr S's monthly mortgage payment at £1,700. Annually that equates to £20,400 but as Mr S was resident overseas it is possible that his UK property was tenanted and that the mortgage was therefore covered. This is likely given that a mortgage is likely classed as 'core' expenditure and Mr S's mortgage payments clearly aren't reflected in his documented annual core expenditure.

Consequently it seems to me that Mr S had more than sufficient income from which he could meet his outgoings so he had no need for the additional income provided by the annuity at that point; he could have waited less than three years until his NRD (or longer, until he was ready to retire) to draw his benefits from his DB scheme. Had he done so he was forecast to receive an annual pension of £6,771 a proportion of which would have increased by up to 3% each year from the age of 65. Alternatively he would have been able to receive an annual pension of £4,778 (a proportion of which would also have increased by up to 3% per year from age 65) and TFC of £31,852. And if Mr S didn't want to retire at 60 – and there is no evidence that he did – then both his pension and the TFC under this DB scheme would have been greater the longer he deferred taking his benefits. But I can't see that LEBC explained that to Mr S or interrogated in any way what his retirement plans were.

Rather LEBC recommended that Mr S transfer his DB scheme and take an annuity with C on the basis that it would provide *'greater benefits'* than if he were to take immediate benefits from the scheme – specifically a higher level of TFC (£36,604 as opposed to £27,960). But as I've said above, there was no need immediate need for Mr S to access any cash. And whilst the income provided by the annuity was marginally higher than that which would have been paid by the scheme at NRD (had TFC also been taken) the fact remains that the annuity and the DB scheme weren't like for like because the latter included dependent's death benefits whereas the former didn't.

In fact, only one of the numerous annuity quotes included in the suitability report included provision for a dependent's pension – that was for a level annuity, payable monthly in advance with a 70% spouse's pension and a five-year guarantee period. But in this quote the income annual income was £3,403.32 together with TFC of £27,965.46. Whilst the spouse's pension in this annuity is a greater percentage than that provided under the DB scheme, the pension payable is considerably lower than it would have been had Mr S taken his benefits at age 57 from the scheme – there he would have received a pension of £4,194 each year and TFC of almost the same amount at £27,960. So it is reasonable to assume that even had LEBC obtained an annuity quote which included a 50% spouse's pension (to more closely mirror the benefits provided by the scheme being given) the pension payable would likely have still been less than that available under the DB scheme and even then, it was only guaranteed to pay that income for a limited period whereas part of any DB scheme pension was subject to index linked increases from the age of 65.

So I'm unable to agree with LEBC that the transfer was in Mr S's best interests.

In addition, LEBC's recommendation provided Mr S with a potentially taxable income of £4,854 that he didn't appear to need. And the pension of £4,854 he received was only marginally higher than what he would have received had he remained in the scheme and taken his pension at NRD and, as I've said above, had he chosen to retire after NRD then it was likely his DB scheme pension would have increased yet further. Nor can I ignore that the guaranteed annuity was fixed for 20 years – namely that it wouldn't increase over time (and could, in fact, decrease after the expiration of the guarantee period). And whilst the DB scheme pension was also fixed to a certain degree a significant proportion of it was subject to up to a 3% annual increase from the age of 65. So LEBC advised Mr S to exchange a partially index linked pension for one that would never increase.

I've seen no evidence that LEBC meaningfully explored Mr S's retirement objectives with him or determined what income he thought he would require in retirement. If LEBC had acted in Mr S's best interests it should have established when he wanted to retire and what his retirement income needs and plans were. Whilst Mr S was noted as still working, the exact nature of his employment and income stream was unclear. Consequently it isn't known whether the income he was receiving at the time of the advice would continue should he cease being active in his business.

So whilst I note the section on the fact-find which asks, '*What does retirement look like to you*', the answers given by Mr S weren't interrogated by LEBC. If LEBC had had full regard to Mr S's information and communication needs I think it should have explored how his retirement objectives were to be funded once he had retired and also what was important to him. Ascertaining such information is key to the advice being provided and goes to show LEBC sufficiently knew its customer. But there's no evidence that it sought to obtain this information.

In summary, I've seen no evidence that Mr S needed to transfer his guaranteed DB benefits to achieve his sole objective of funding his overseas property project or that he immediately needed the additional income that the guaranteed annuity would provide. LEBC should also have explained to Mr S how his objective could be achieved *without* transferring and giving up his scheme benefits. Unfortunately this option wasn't explored by LEBC with Mr S and without any realistic insight into what Mr S's actual retirement needs were I'm unable to agree with LEBC that the transfer was in his best interests. I'm satisfied that LEBC didn't provide Mr S with suitable advice for his circumstances and that he could have achieved his objective by using the proceeds from the sale of his UK property without having to give up his guaranteed DB scheme benefits.

Death benefits

There is some inconsistency around the information gathered by LEBC about Mr S's view of death benefits. In one section of the fact-find he indicates he would like his partner to benefit from his pension but elsewhere he indicates he has provided for his partner in other ways. I can see too that Mr S ranked death benefits on the fact-find as his lowest priority. And the guaranteed annuity that was set up was on a single life basis so included no provision for a dependent's pension.

I think the existing death benefits attached to the DB scheme were underplayed by LEBC. Mr S had a partner and under the DB scheme the trustees had the discretion to pay a co-habiting dependent a pension. And in the event of Mr S's death before he took his DB scheme benefits his beneficiaries would receive a lump sum equivalent to five times his deferred pension. And if Mr S had taken his scheme benefits and passed away before five full years had been paid to him then the balance would have been payable to his beneficiaries. These benefits would have been useful to Mr S's partner if he predeceased him.

I think that LEBC should have highlighted the death benefits available under the DB scheme to Mr S regardless of any preconceived views he had about them. Mr S's partner was far younger than him so the likelihood was that he would predecease him. Given the age difference between them any dependent's pension granted by the trustees would be in payment for a long period, providing Mr S's partner with a guaranteed income for life which would have likely been of great value to him. So I don't think LEBC made the value of this benefit clear enough to Mr S or that he fully understood the value of the dependent's pension and lump sum death benefits under his DB scheme.

Summary

I don't doubt that the attractiveness of the enhanced transfer value offered by the DB scheme and opportunity to obtain tax-free cash and an additional income would have sounded like attractive features to Mr S. But LEBC wasn't there to just transact what Mr S might have thought he wanted. The adviser's role was to really understand what Mr S needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr S was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr S was very likely to obtain lower overall retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr S shouldn't have been advised to transfer out of the scheme on the basis he needed the money to fund an overseas property project for which he already had sufficient funds. Nor can I see that accessing TFC and an income he didn't yet need was worth giving up the guarantees associated with his DB scheme for.

So, I think LEBC should've advised Mr S to remain in his DB scheme.

Of course, I have to consider whether Mr S would've gone ahead anyway, against LEBC's advice. I've considered this carefully, but I'm not persuaded that Mr S would've insisted on transferring out of the DB scheme, against LEBC's advice. I say this because Mr S was an inexperienced investor and this pension was his only retirement provision. So, if LEBC had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr S desired to access the enhanced transfer value and the TFC was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. If

LEBC had explained that Mr S could meet his objective without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr S's objective was such a priority for him that he would have insisted on transferring out of the DB scheme.

And if LEBC had explained to Mr S that he was always unlikely to exceed the guaranteed benefits available to him by transferring, that he shouldn't be prioritising obtaining TFC he didn't need over retirement benefits and that his objective could be met by other means I think that would've carried significant weight. So, I don't think Mr S would have insisted on transferring out of the DB scheme.

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

I agree with our Investigator that Mr S will have been caused some distress and inconvenience by LEBC's unsuitable advice so I think that LEBC should pay him compensation of £250 in recognition of any trouble and upset it has caused him.

Putting things right

A fair and reasonable outcome would be for the LEBC to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr S would have most likely remained in the occupational pension scheme if suitable advice had been given.

LEBC must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, Mr S has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 60, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr S's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, LEBC should:

- calculate and offer Mr S redress as a cash lump sum payment,
- explain to Mr S before starting the redress calculation that:
 - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
 - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr S receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr S accepts LEBC's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr S for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented,

given the inherent uncertainty around Mr S's end of year tax position.

Redress paid to Mr S as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, LEBC may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr S likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

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.

LEBC should also pay Mr S compensation of £250 for the distress and inconvenience its unsuitable advice caused him.

My final decision

Determination and money award: I uphold this complaint and require LEBC Group Limited to pay Mr S the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that LEBC Group Limited pays Mr S the balance.

If Mr S accepts this decision, the money award becomes binding on LEBC Group Limited.

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

Claire Woollerson
Ombudsman