DRN-3869298

The complaint

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

What happened

There is very little information available from the time of the sale. Chambers says that it doesn't have any records from this time, it says they are no longer available due to circumstances beyond its control. And Mr L also doesn't have any documentation. Mr L's personal pension provider has given us some of the point of sale information, but there isn't anything about why the advice was given in this.

So, I've had to make a decision on limited information. That said, I still think I've been able to reach a fair outcome in this complaint.

As part of the complaint process Mr L, and his representative, have provided some information about his circumstances at the time. This shows that:

- He was aged 29 at the time of sale.
- He was married and had two children aged six and two.
- He was employed earning £11,000 a year. Mrs L had an income of £7,000 a year.
- They didn't have any savings or investments.
- They had loans of around £5,000.

Mr L's only pension so far was the DB scheme he transferred as part of this advice.

I understand that Mr L met with a representative of Chambers at Mr L's work around the year 2000. He met with Chambers at an event his employer arranged so that the employees could get financial advice and discuss their pension arrangements.

As a result of this contact with Chambers, Mr L transferred the deferred DB pension benefits he had into a personal pension and invested the proceeds. The transfer value from the DB pension scheme was £12,031.53 and the transfer was completed on 22 June 2000.

Mr L complained in 2021 to Chambers about the suitability of the transfer advice. He said he wasn't told about the benefits, or risks, of the transfer, and he trusted the adviser when he was told that the new pension would perform better. But he wasn't told that guarantees would be lost on the transfer and Chambers failed to fully consider his circumstances. He was told the transfer would leave him better off, but he says this is probably not going to be the case. Mr L also says he was living in rented accommodation and had no investment experience or capacity for loss.

Chambers didn't uphold Mr L's complaint. It said:

- He was made aware that guarantees would be lost on the transfer, that investment performance could vary and his pension fund may lose value.
- His DB benefits, and the transferred fund value, were not significant so he could afford to risk them.
- He has not suffered a loss, but he has gained due to his ability to access the funds earlier.

Mr L referred his complaint to our service. An investigator upheld the complaint and said that Chambers should pay compensation. The investigator essentially said that the DB scheme would have given Mr L a solid base for his retirement pension, and he should not have been advised to transfer. It wasn't likely that the transfer was in his best interests.

Chambers disagreed, saying:

- It was likely the adviser met with Mr L after the time of sale for reviews.
- As he was still relatively young, and this scheme was a smaller part of his overall retirement provision. He was likely to be able to take some risk with it.
- If he had died prematurely his wife and children would have benefited from the better death benefits of the personal pension.

And Chambers provided a statement from the adviser as part of its response to the investigator's opinion. He provided his recollections of the sale. He said that he met with Mr L a few times and then advised him not to transfer. This was partly because it wasn't likely to be in his best interests to do so, and the amount he had to transfer was 'trivial'. He says that Mr L proceeded on an 'insistent' customer basis.

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

What I've decided – and why

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time.

The advice was provided by Chambers in 2000. At this time it was regulated by the Personal Investment Authority ('PIA'). Chambers was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). When the PIA took responsibility for LAUTRO businesses in 1994, they adopted the LAUTRO rules. And these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the

consumer's best interests and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

I've considered the advice given to Mr L with this in mind.

Financial viability

Mr L says he was told that the pension would perform better than his DB scheme at the time of sale.

As I've said above there is very little information from the time of sale. And what I do have doesn't detail the advice Mr L was given. And there isn't an agreement about what the advice was. So, I can't conclusively say what Mr L was told.

But, as a starting point, Chambers should be able to demonstrate that it had informed Mr L what the risks of the DB transfer were and whether it was likely it would provide the same benefits as the DB scheme. It seems reasonable to say the relative performance of the two pensions were discussed, but it's not clear if Chambers did this in the way that it should have.

And Chambers' adviser has essentially said that the transfer didn't make a lot of sense financially. This is because he thought that the transfer value was too small and it wasn't likely to perform well enough to make it worthwhile. And Chambers has said that the transfer was processed on the basis that it may not provide the same benefits. But this didn't matter as it would only form a small part of Mr L's total retirement planning.

So, if Mr L's adviser now says the transfer wasn't in Mr L's best interests financially, I think it's fair to say that, whether or not this was properly communicated to Mr L, it now seems established and agreed by both sides, that this transfer was probably not financially viable.

Chambers has said that this wasn't important as the transfer value was small and the DB scheme was likely to be an insignificant part of Mr L's overall pension planning. So, it was reasonable that he take some risk with it.

Whilst the pension his DB scheme may have provided wasn't large, it would be guaranteed and would increase. It could have provided an important foundation for Mr L's income in retirement. So, replacing this with something that was dependent on investment performance was a significant risk for him.

Mr L was relatively young, at age 29, and he did have a long time until his retirement. It's reasonable to assume he would build up some further retirement benefits going forward. And given the time this fund would be invested for, it's also a reasonable assumption that he could took *some* risk.

But Mr L doesn't seem to have been an experienced investor at the time and there is no evidence he wanted to take a significant risk with his pension arrangements. Being unemployed at the time, with no savings or investments, and young children, I don't think his circumstances support this either.

So, I'm not persuaded it was reasonable for him to potentially take the risk of a lower retirement income and the risk this transfer represented. So, I also don't think this transfer was suitable for him because of this.

For this reason alone, I think a transfer out of the DB scheme, on the balance or probabilities, wasn't in Mr L's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Chambers has said in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

Chambers has said that Mr L was happy to give up the DB scheme benefits on the basis that he would gain some flexibility in retirement.

But I've not seen any evidence from the time of sale that Mr L required this flexibility. I've not seen anything that shows he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I also can't see evidence that Mr L had a strong need for variable income throughout his retirement. These two things don't seem to have been discussed.

And, as I've said above, Mr L was giving up a guaranteed income here which would increase over time. Whilst it wasn't established how much income he wanted at retirement I don't see why this income wouldn't potentially be important to him. So, I'm satisfied Mr L was likely to have better served his income needs in retirement through the DB scheme at age 60 or 65.

Furthermore, Mr L was only 29 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr L had at least 31 years before he could think about accessing this pension, I think it was 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 L to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr L later had reason to transfer out of his DB scheme he could have done so closer to 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 were likely an attractive feature to Mr L. And I've noted that Chambers has said this was the primary reason for the transfer.

But whilst I appreciate death benefits are important to consumers, and Mr L might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr L about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I've not seen any persuasive evidence that Chambers explored to what extent Mr L was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr L was married and had children and so the spouse and dependents pensions provided by the DB scheme would've been useful to his dependents if Mr L predeceased them. I don't think Chambers made the value of this benefit clear enough to Mr L. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

In any event, Chambers should not have encouraged Mr L to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr L genuinely wanted to leave a legacy for his spouse or children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Chambers should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr L. And I'm not persuaded that insurance was properly explored as an alternative.

Suitability of investments

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

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 Mr L. But Chambers wasn't there to just transact what Mr L might have thought he wanted. The adviser's role was to really understand what Mr L needed and recommend what was in his best interests.

Ultimately, I don't think any advice given to Mr L to transfer would have been suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr L was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr L shouldn't have been advised to transfer out of the scheme due to the potential for higher death benefits. This wasn't worth giving up the guarantees associated with his DB scheme. So, I think Chambers should've advised Mr L to remain in his DB scheme for these reasons.

Chambers has said that the advice to transfer was suitable. But it's also said recently that it advised Mr L not to transfer and that he was an 'insistent' customer. But the adviser has qualified this by saying this was because the transfer value was 'trivial'.

This doesn't lead me to think that Chambers conclusively gave Mr L full advice as to why the transfer wasn't in his best interests. It could have simply been that the adviser didn't think it was worth their while.

And as I've said above Mr L invested in a range of funds, and some of these were higher risk, albeit balanced by lower risk funds. Again it's not clear what happened at the point of sale but I think it's very unlikely that Mr L chose these funds, and this portfolio approach of managing risk, himself. As I've outlined above he seems to be an inexperienced investor who didn't have the knowledge to do this himself. Consequently, I don't think it's likely that Chambers simply told Mr L not to proceed, as it now seems to suggest.

So, I have to consider whether Mr L would've gone ahead anyway if Chambers had advised Mr L not to proceed with the DB transfer as it wasn't in his best interests. And just to be clear Chambers hasn't said it did this.

I've considered this carefully, but I'm not persuaded that Mr L would've insisted on transferring out of the DB scheme, against Chambers' advice. I understand Mr L was an inexperienced investor and his circumstances seemed modest at the time. This pension accounted for the majority of Mr L's private retirement provision so far. So, if Chambers 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 L's want to improve his death benefits or have a more flexible retirement arrangement (if he did have these wants) were 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 Chambers had explained that Mr L could perhaps meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr L would have insisted on transferring out of the DB scheme.

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

Our Investigator recommended that Chambers also pay L £200 for the distress caused by the unsuitable advice. I don't doubt that Mr L has been caused distress and concern in relation to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

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

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

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

Chambers 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, Mr L has not yet retired, and he has no plans to do so at present. So, compensation should be based on his 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 Mr L's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr L'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 L 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 L within 90 days of the date Chambers receives notification of his/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 Chambers to pay Mr L.

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

Chambers should also pay Mr L £200.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Chambers & Newman Financial Services to pay Mr L 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 Chambers & Newman Financial Services to pay Mr L any interest on that amount in full, as set out above.

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

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

If Mr L accepts this decision, the money award becomes binding on Chambers & Newman Financial Services.

My recommendation would not be binding. Further, it's unlikely that Mr L can accept my decision and go to court to ask for the balance. Mr L 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 L to accept or reject my decision before 1 February 2023.

Andy Burlinson
Ombudsman