DRN-3878814

The complaint

Mr P complains that Executive Advisory Services Limited (EAS) gave him unsuitable advice to switch his personal pensions, causing him to lose a guaranteed annuity rate (GAR) associated with one of them.

What happened

Mr P had two personal pensions that in 2009 were valued around £16,725 and £37,850. The second pension, valued at £37,850 had GARs attached to it. Mr P sought financial advice from EAS.

In May 2009 EAS reviewed Mr P's circumstances and recorded, amongst other things, that he:

- was 53 years old;
- was married with 2 children;
- intended to retire at 65;
- had no other investments or pensions at that time;
- had a cautious attitude to risk (ATR).

EAS recommended that Mr P switched both existing personal pensions to a new pension contract, giving a recommendation about how that combined fund should be invested. Mr P followed EAS's recommendation and transferred his existing pensions to a single new personal pension with the same provider.

In 2020 Mr P complained to EAS after finding out from his pension provider that his current pension plan didn't have GARs as part of the terms and conditions.

EAS responded to Mr P to explain that it didn't uphold his complaint. It explained that when it gave him its recommendation, it pointed out that one of Mr P's pensions had GARs attached. EAS also explained that it thought Mr P made his complaint too late for it to be considered.

The question of jurisdiction – whether our service has the authority to help with this matter – was looked into, and an ombudsman decided this complaint was one that we could consider.

A second investigator then considered the merits of Mr P's complaint. She was of the opinion that the complaint should be upheld. She didn't think that EAS had provided Mr P with enough information about the GAR to properly understand what he was giving up by transferring. She didn't think proper consideration had been given to the value of the guaranteed benefit that Mr P held on one of his pensions, and that it wasn't suitable to have recommended that it be given up in the way it was.

EAS didn't agree with our investigator and asked for the case to be considered by an ombudsman. I looked into what happened and issued a provisional decision to give both sides the opportunity to consider my view and respond if necessary. In my provisional decision I explained that I was upholding Mr P's complaint for similar reasons to our investigator, but that I thought that EAS should put things right in a slightly different way.

Both parties have had time to respond to my provisional findings and present further evidence as necessary. I haven't been asked to consider any further evidence. But EAS explain that it doesn't agree with the way that I proposed that things should be put right. It thought that the redress proposed by the investigator was fairer.

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.

Having given full consideration to the facts of this case again, my final decision is the same as my provisional assessment. I'll explain why I am upholding Mr P's complaint.

In my provisional decision, I said that this case was in our jurisdiction. The reasons were explained by our investigator and then a decision given by an ombudsman to explain why we could consider this complaint. That decision explained that, in spite of Mr P's complaint being made more than six years after the advice was given, it was made within three years of Mr P first becoming aware of the issue. I note that from EAS's response that it still disagrees, but I consider that the issue it has was already answered correctly in the jurisdiction decision that it received. I will not repeat that decision here but confirm that I have fully considered the question of jurisdiction throughout my consideration of this complaint and agree that this complaint is in our jurisdiction.

Mr P's complaint was specifically about the loss of his GARs, so only related to the transfer of one of his pensions. The other pension was a personal pension, with no guarantees. Nothing was lost in the switch of that pension. So this decision relates to the suitability of transferring the pension with GARs.

The information provided in this case is relatively limited. But EAS have assured us that it has provided all it has on file. I've seen its fact-find and its recommendation letter to Mr P. And an email relating to the GAR attached to Mr P's relevant policy.

From what I've seen, I'm satisfied that EAS were aware that Mr P had GARs for the personal pension that is complained about. They had email confirmation and a copy of the rates applicable on that policy. And EAS referred to it in a very limited way in its recommendation letter.

The GAR was a valuable guaranteed benefit. It was linked specifically to the policy that Mr P held. Mr P intended to retire at 65 when EAS provided him with advice. And the annuity rate table it had been provided with indicated that the minimum annuity rate available to Mr P on that policy was 10.8%. Which, even in 2009, was higher than could have been replicated for a level and single life annuity on the open market. EAS ought to have given proper consideration to whether it was in Mr P's best interests to give that up. And I can't say that it did.

The recommendation was brief and lacked detail. There is a single sentence that mentions GARs. It said, "*I would mention that one of your contracts* [Mr P] *did have a guaranteed annuity, however this was on a single life no guarantee and paid in arrears*". This was not a sufficient explanation.

Firstly, it doesn't explicitly say that transferring would mean that the guaranteed rates were lost. Secondly it doesn't explain what the guarantees were, or why they mattered. For instance, Mr P was provided no comparison of how those guaranteed minimum rates compared to open market annuity rates. It would have made him aware of how much more his annuity could be worth using those guarantees. Equally, annuity rates change, and the guarantee removed the risk of market annuity rates falling. Withholding this information means that I can't be certain that he knew what he was giving up by following EAS's recommendation.

I can see that EAS mentioned that the GARs were limited to providing an annuity on a single life basis with no guarantees. Which I agree may not be suitable for everyone. But Mr P was still 12 years away from needing to decide how he would take his pension benefits in retirement. In fact EAS gave him no recommendation about how he might do so. So I don't think it was fair or reasonable of EAS to make an assumption that Mr P wouldn't want the benefits offered by the GAR in 12 years time. It was too far away to know what his circumstances would be. It was a decision that could be made later. Leaving this pension in the existing policy would have enabled him to consider all of his options at retirement age. Recommending that he transfer, permanently removed a very valuable way of taking his benefits in the future.

For the above reasons, I don't think that EAS's recommendation to Mr P was suitable for him. So I uphold Mr P's complaint.

Putting things right

I need to try to determine what position Mr P would now be in if he'd been given more suitable advice. EAS were instructed to give advice on Mr P's pension and investments. I've explained that I don't think it was suitable for EAS to recommend this pension transfer. But that doesn't mean that the alternative would have been for EAS to leave it exactly as it was, if that wasn't in Mr P's best interest's.

In its response to my provisional decision EAS ask that I consider the investigator's proposed redress. Which suggested comparing the existing pension fund with the notional value if it'd remained in the ceding scheme. But, for the same reasons that I explained in my provisional decision, I don't think that would generate a fair or reasonable outcome.

EAS determined that this pension was held in cash at the time of giving advice. EAS recommended that after transferring, the fund be invested in accordance with Mr P's cautious ATR. So even though I don't think EAS's recommendation to switch his pension was suitable, It would have had to have made an alternative recommendation. I think it's more likely than not that it would have made a recommendation that the fund be invested in line with Mr P's ATR. I say this because EAS ought to have been acting in Mr P's best interests. It determined that he had a cautious ATR, so some form of investment would have been more appropriate than leaving the fund in cash. As it went on to identify in the recommendation that it gave.

I don't know what investment options were available to Mr P in his previous personal pension. EAS don't seem to have given any consideration to leaving that pension where it was and gave no explanation whether or not suitable investment options were already available. But I think it's more likely than not that investment options for a cautious investor were available in the previous pension. I can't say that the fund could have been invested in the same way that was recommended following the transfer. The original pension may not have offered those exact options. As I can't say exactly how the fund would have been invested if it had remained where it was, I think that the fairest way to determine what that fund value may have been is to use an index to ascertain the notional value for Mr P's previous pension fund.

Mr P explains that by age 65, he was no longer married and his children were no longer financially dependent on him. And at 65 he enquired of his pension provider if he could use his GARs. He even decided to defer taking his annuity to have this complaint regarding this resolved. So I'm satisfied that he would more likely than not have used the GAR option if it had still been available to him. He's explained that he would also have been likely to use his tax free cash option. EAS have suggested that taking tax free cash is not compatible with the availability of a GAR. But I disagree. I don't think that it's unreasonable to assume that Mr P could have the need for a lump sum at the start of his pension, and still want to secure the best possible annual income with the remainder.

My intention is to put Mr P, as close as is possible, into the position he would most likely have been but for EAS's unsuitable advice. I think he would have taken the option of tax free cash and made use of the GAR. EAS should compensate Mr P as follows:

1. Calculate the notional value of Mr P's pension policy (with GAR) by applying the following benchmark: *For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds*‡ - from date of transfer to date that EAS is told that Mr P accepted this final decision.

2. Obtain details of the GAR applying at the consumers exact age, at the date that EAS is told that Mr P accepted this decision, on a monthly in arrears, single life, no guarantee period basis.

3. Look up annuity rates on the date that EAS is informed that Mr P accepted this final decision, to determine a rate payable on the open market for the same format and age.

4. Assuming (2) is greater than (3), increase the value in (1) by the ratio of 75% x ((2) divided by (3)). Otherwise leave (1) unchanged.

5. Obtain the fund value at the date of calculation from the provider Mr P switched to as a result of the original advice. And determine the proportion of it accounted for by the transfer value of the pension under consideration.

6. The loss to Mr P's pension funds at the date of calculation is calculated as the result of (4) – (5). If the answer is negative, there's a gain and no redress is payable.

The loss should if possible be paid into Mr P'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 P as a lump sum after making a notional deduction to allow for future income tax that would otherwise have been paid.

As Mr P would have taken tax-free cash, 25% of the loss would be tax-free and 75% would have been taxed according to their likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

EAS must pay the compensation within 28 days of the date on which we tell it Mr P accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

‡ Why is this index suitable?

I've chosen this method of calculating the notional value of the pension because:

- Mr P wanted capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr P's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr P into that position. It does not mean that Mr P would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr P could have obtained from investments suited to his objective and risk attitude.

My final decision

For the above reasons, I uphold Mr P's complaint and direct Executive Advisory Services Limited to compensate Mr P in the manner I have set out in *Putting Things Right* above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 6 February 2023.

Gary Lane
Ombudsman