

The complaint

Mrs B complains about the advice given by Norrix Financial Services Limited to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused her a financial loss.

What happened

In early 2007 Mrs B's former employer closed its DB scheme to members. At the time the scheme closed Mrs B had 17 years and 4 months of pensionable service and her pension at her normal retirement age (NRD) of 65 was forecast to be £17,533.49 with options to take tax-free cash and a reduced pension. A short while after the scheme closed, Mrs B's employer made an offer to all the scheme members that included the option to receive an enhanced cash equivalent transfer value ('CETV') to transfer her DB pension benefits out of the scheme.

Around this time Mrs B was referred to Norrix by her IFA. Norrix advised Mrs B that it would be in her best interests to accept her employer's offer and to transfer her benefits to a personal pension with 'A', investing in four funds – 40% in a property fund, 20% in a retirement distribution fund, 20% in a global distribution fund and 20% in global equities. The transfer went ahead in September 2007 with a transfer value of £108,999.89. Shortly after the transfer took place Norrix sent Mrs B a 'reasons why' letter which said the reason for making the recommendation was that Mrs B would benefit by taking advantage of her former employer's enhanced offer. Norrix has also said it thought the transfer was in Mrs B's best interests as there was a strong probability that she would receive a higher pension than by remaining in his DB scheme.

Mrs B complained to Norrix in August 2021. She said:

- the transfer to the personal pension wasn't suitable for her and that her adviser hadn't properly established her attitude to risk (ATR);
- that Norrix had failed to carry out an adequate fact-find so didn't have full knowledge about her financial situation;
- that it didn't discuss with her the funds her pension would be invested in and the risks associated with them;
- that it hadn't explained the fees and charges associated with the pension and how they would affect the return on her investment.

Norrix looked into Mrs B's complaint, issuing its final response in December 2021, but it didn't recommend that it was upheld. Norrix said to Mrs B that if the transfer had been unsuitable then it wouldn't have recommended it. And it said that based on the mid-range assumptions accepted at the time, the transfer value analysis (TVAS) indicated that at NRD she would receive twice as much tax-free cash (TFC) along with a pension that was 50% higher than her DB scheme. It also said that it had discussed her ATR with her and that the investments recommended were based on those discussions. Norrix also said it had explained to her the differences between a DB scheme and a personal pension and it had given explanations about the investment funds. Finally it said the charges were clearly cited in the documents Mrs B had received.

Unhappy with the outcome of her complaint to Norrix, Mrs B complained to this service. Our Investigator looked into the complaint and recommended that it was upheld. He thought the transfer wasn't financially viable and that Mrs B was likely to receive lower overall benefits than if she had been advised to remain in her DB scheme. He also thought that there were no other compelling reasons to make the transfer, so he thought Mrs B hadn't been suitably advised. Our investigator required Norrix to pay compensation to Mrs B in line with the regulator's pension review guidance. And he required Norrix to pay Mrs B compensation of £300 for the trouble and upset caused to her as a result of worrying about losing her pension.

Norrix disagreed with our Investigator's findings. It said our Investigator had made contradictory findings about whether Mrs B was likely to be better off or not as a result of the transfer. And whilst it accepted that its records relating to the sale weren't as comprehensive as they could be it said it had treated Mrs B fairly.

Our investigator looked at the complaint again but wasn't persuaded to change his mind 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. This includes the Principles for Business ('PRIN') and the Conduct of Business rules ('COB'). 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

What follows 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 Norrix'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.

The provisions in COB 5.3 which deal with the obligations when giving a personal recommendation and assessing suitability.

Having done so I've decided to uphold the complaint for largely the same reasons given by the investigator.

The then regulator, the Financial Services Authority ('FSA'), stated in 'COB' that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Norrix should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs B's best interests (COB 5.3.29G). And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

At the point Mrs B was first approached by Norrix offering her advice, her former employer had closed the scheme and had recently written to all deferred members to make them an offer. Mrs B's former employer said she could choose to remain a deferred member of the scheme, or she could transfer her CETV to a personal pension and receive a cash payment for doing so, or she could transfer an enhanced CETV to a personal pension. After consulting with Norrix, Mrs B decided to choose the third option. Her CETV was valued at £44,853.91 and the additional enhancement was £64,145.98. In total, Mrs B transferred £108,999.89.

Mrs B has said that she was assured by Norrix that by transferring her DB scheme benefits, the personal pension would provide her with a pension income, TFC and capital growth benefits in excess of those her DB scheme would provide. Mrs B has said she relied on what she was told and went ahead with the transfer. She's also said that she was advised by Norrix that her employer would enhance her pension if she transferred her scheme benefits out and, in light of the incentive being provided, it would be in her interests to transfer her pension. Other than the potential for higher growth which persuaded Mrs B it was in her best interests to transfer her DB scheme, it doesn't appear that she had any other objectives in mind.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on its website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return (critical yield) required to match the occupational pension at normal retirement age (age 65) was quoted in the TVAS as 6% per year (if Mrs B took the TFC). I think it's reasonable to assume that Mrs B would have taken the tax-free cash at retirement given that it is a tax efficient way of drawing down a personal pension. And at the time of the advice Mrs B received from Norrix in 2007 her intended retirement age was 65 (according to the selected retirement age stated on her pension schedule).

So, the critical yield identified in the Transfer Value Analysis report ('TVAS') for matching the benefits at age 65 of 6% compares favourably with the discount rate of 6.7% per year for 28 years to retirement. 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% per year. So it is reasonable to assume, based on the fact that the critical yield was lower than both the discount rate of 6.7% and the regulator's middle projection rate of 7% I have cited above, that Mrs B could most likely have matched, and possibly exceeded, the guaranteed benefits offered by her DB scheme at her normal retirement age of 65.

Whilst there is no documented evidence from the time of the advice about what Mrs B's attitude to risk then was I do note that she said in her complaint: *"I am not risk averse"*. I can see too that Mrs B appointed a new IFA and transferred her personal pension with A to another provider in 2018. I can see that her new IFA noted her ATR as 'balanced' (or medium). And Mrs B recently told our Investigator that her ATR in 2007 was 'balanced'. So, I'm satisfied that Mrs B's ATR has never been anything other than medium.

As Mrs B's ATR is and was, by her own account, medium, it is reasonable to assume that a critical yield of 6% based on that attitude to risk was achievable and that she would be prepared to make the investments needed to try and attain that level of growth. So based on

the critical yield it is possible therefore that Mrs B could have improved on the guaranteed benefits offered by her DB scheme at her normal retirement age of 65.

But despite a critical yield of 6% based on a balanced/medium ATR being potentially achievable, Mrs B's overall circumstances don't, in my view, support a transfer. I'll explain why.

At the time of the advice to transfer, Mrs B had ceased to work for the employer that provided her DB scheme, having taken redundancy in December 2006. Mrs B told our Investigator that she decided to use her redundancy payment to stay at home with her young family and didn't, in fact, return to work until 2010. Although, that wasn't necessarily planned at the time. Given Mrs B had given up work for the foreseeable future, I think it's reasonable to say that she had a very low capacity for loss. I say this because the DB scheme was Mrs B's only pension (aside from any state pension entitlement that she had built up by that point) and she didn't know to what extent she'd be able to build further funds in the future. So, in my view, Mrs B's DB guaranteed DB scheme benefits weren't ones that she had the capacity to lose.

And despite the critical yield being lower than both the discount rate and the middle projection rate, I think it's important to stress that Mrs B, being only aged 36, was very far away from her retirement in 2007. So, I don't think she could reasonably say what her retirement looked like, or whether she thought she would benefit from a guaranteed pension. I also don't think she could reasonably say when she expected to retire. And while the critical yield at age 65 was favourable, if she needed to access her pension before her NRD and take early retirement then I'd expect the critical yield to be higher. And in those circumstances, I think matching or exceeding her DB scheme benefits would be less likely.

So whilst I accept that, on the face of it, the transfer was financially viable, I can't reasonably ignore Mrs B's circumstances as they stood at the time of the advice. It wasn't known if she would return to work, if she would be able to build up further pension benefits in the future or what her retirement objectives were. So it follows that I don't think her guaranteed DB scheme benefits were ones she had the capacity to lose.

For this reason alone a transfer out of the DB scheme wasn't suitable for Mrs B or in her best interests. But there might be other considerations which mean a transfer is suitable overall and I've considered these below.

Mrs B's objectives

Before November 2007, the regulator expected a "...prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up." At least one illustration for the personal pension had to be on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown. A 'reason why' letter or equivalent had to be issued as soon as practicable after the recommendation. It should: "...explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme." And "...demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Mrs B was only aged 36 at the time of the advice. I don't know if she had any retirement plans because there is no record of this information being recorded. Norrix has said it has no fact-find on its files.

In fact, the only documented objectives for the transfer appear in the short 'reason why' letter sent by Norrix to Mrs B on 3 October 2007. The letter provided a very brief explanation of the main differences between a DB scheme and a personal pension. It also stated, *"it [is] very difficult to compare the two types of pension. One [the DB scheme] is based on salary and years' service, the other depends on how well the investments in your account grow until retirement age"*. There then followed a section headed 'Your choice' where Norrix stated, *"we felt that you would benefit by taking advantage of the [employer] offer and transferring to a personal pension with [A]. I am preparing a special report for you which gives the details of the transfer process and illustrates the benefits you have received from this change"*.

In summary, the 'objective' for the transfer appears to be that Mrs B would benefit from her former employer's offer. If a 'special report' was ever produced I have unfortunately not seen it. But in any event, both the reason why letter and any 'special report' post-date the transfer. And the TVAS report contains a statement that it is directed at financial advisers and should not be distributed to private customers. So I'm not persuaded that Mrs B received any information prior to agreeing to the transfer.

And the rule I referred to above states that a *prospective* investor should receive sufficient clear information to make an informed decision. Norrix's reason why letter and special report were provided retrospective to Mrs B's investment. I've seen no evidence that Mrs B understood the risks involved or had any understanding of the protections, or understood the benefits, she was giving up. I appreciate that Norrix says there were face-to-face meetings but I can't know what was discussed. It is not sufficient for Norrix to say that it wouldn't have recommended an unsuitable transfer – it needs to be able to show that Mrs B had enough information before her to be able to make an informed decision and I don't think that it's been able to do that.

Nor can I agree that the reason why letter explained why the transfer was suitable for Mrs B. No such explanation appears in the letter at all and there is certainly no *'explicit account'* of the alternative of remaining in the DB scheme. Nor is there any link between the circumstances, objectives and risk profile of Mrs B and the recommendation Norrix was making.

So I can't reasonably conclude that Norrix discharged its regulatory obligations to Mrs B by advising her to transfer. Whilst she was in possession of a number of illustrations in the TVAS I don't think that these demonstrate that she had been provided with clear enough information for her to make an informed decision about whether transferring his DB scheme was in her best interests.

Death benefits

I can see that the DB scheme included a spouse's pension equal to 50% of Mrs B's accrued pension in the event of her death and a dependent's pension of 33.33% of the accrued spouse's pension payable to age 18 (or 23 if in full time education). Small lump sums were also payable. Norrix has confirmed that death benefits didn't form part of the discussions it had with Mrs B. So I have no information available about what Mrs B thought at the time about the guaranteed death benefits she was giving up by transferring his DB scheme. But As Mrs B is married it seems her family could've benefitted from the death benefits attached to the DB scheme. So, I don't think she ought to have been encouraged to give these up.

Summary

I don't doubt that the offer of an attractively enhanced CETV by Mrs B's former employer and the potential financial viability of the transfer to a personal pension could have sounded attractive to Mrs B. But Norrix wasn't there to just transact what Mrs B might have thought she wanted. The adviser's role was to really understand what Mrs B needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mrs B by Norrix was suitable. She was giving up a guaranteed, risk-free and index linked retirement income and what was, at the time of the advice her only pension provision. By transferring, it meant Mrs B's retirement was exposed to investment risk and in my view, there were no other particular reasons which would justify a transfer to outweigh this. Mrs B shouldn't have been advised to transfer out of her DB scheme just because her employer was offering an enhanced CETV. So, I think Norrix should've advised Mrs B to remain in her DB scheme.

Of course, I have to consider whether Mrs B would've gone ahead anyway, against Norrix's advice. I've considered this carefully, but I'm not persuaded that Mrs B would've insisted on transferring out of the DB scheme, against Norrix's advice. I say this because I've seen no evidence that she would have done. If Norrix had provided Mrs B with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've likely have accepted that advice. And I don't think the enhanced CETV would've been enough of an incentive for her to go against that advice.

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

Like our Investigator I also think that Mrs B will have been caused some trouble and upset as a result of realising she had been given unsuitable advice to transfer her pension. Where a financial business, through its words or deeds, causes a consumer avoidable trouble and upset, this service can require it to pay compensation. I agree with our Investigator that Norrix should pay Mrs B compensation of £300 for the distress and inconvenience she was caused as a result of worrying the transfer had caused her a financial loss. This amount is in line with awards made by this service in similar circumstances and is, I think, fair and reasonable.

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 Mrs B 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. Mrs B 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 Mrs B.

A fair and reasonable outcome would be for the business to put Mrs B, as far as possible, into the position she would now be in but for Norrix's unsuitable advice. I consider Mrs B would have most likely remained in her DB scheme if suitable advice had been given. Norrix 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, Mrs B has not yet retired, and she has no plans to do so at present. So, 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 Mrs B's acceptance of the decision.

Norrix may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs B's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs B's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs B's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs B as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to 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 Mrs B within 90 days of the date Norrix 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 Norrix to pay Mrs B.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90-day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90-day period in which interest won't apply.

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 Norrix to carry out a calculation in line with the updated

rules and/or guidance in any event.

In addition, Norrix should also pay Mrs B compensation of £300 for the trouble and upset she was caused as a result of its unsuitable advice.

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 Norrix Financial Services Limited to pay Mrs B the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Norrix Financial Services Limited to pay Mrs B any interest on that amount in full, as set out above.

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

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

If Mrs B accepts this decision, the money award becomes binding on Norrix Financial Services Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs B can accept my decision and go to court to ask for the balance. Mrs B may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 6 April 2023.

Claire Woollerson
Ombudsman