

The complaint

Mr G complains that R&Quiem Financial Services Limited (“RQFS”) provided him with unsuitable advice about the transfer of his pension benefits from an occupational pension scheme to a personal pension in November 2010.

What happened

Mr G has been assisted in making his complaint by a claims management company. But in this decision, for ease, I will generally refer to all communication as having been with, and from, Mr G himself.

Mr G held deferred pension benefits in an occupational pension scheme (“OPS”). In September 2010 the sponsoring employer of the OPS wrote to scheme beneficiaries to offer an enhanced transfer value for their pension benefits. And it told the beneficiaries that it had appointed a firm of independent financial advisors to assist members with their decision. That firm is now known as RQFS.

The offer that was made to Mr G, and other members of the OPS, was in two parts. Firstly a transfer value was offered to represent the deferred benefits that were held in the OPS. And a further cash enhancement was offered. That could be taken either as an addition to the transfer value being offered, or as a cash payment. Mr G told RQFS that he wished to take the enhancement as a cash payment, and that was the basis on which RQFS provided its advice to him.

The advice that RQFS provided to Mr G recommended that he should transfer his pension benefits from the OPS to a new personal pension scheme. That scheme had been set up by the OPS administrators and offered a lower annual charge than might be available on the open market. Mr G accepted the advice from RQFS, his pension benefits were transferred, and the cash enhancement was paid to him.

When Mr G first complained to RQFS it told him that it thought his complaint had been made too late. I considered that matter in a decision that I issued in November 2022, in which I concluded that the complaint had been made in time.

Mr G’s complaint about the advice he received has been assessed by one of our investigators. He didn’t think that the advice RQFS had provided to Mr G had been suitable. He thought that the investment returns Mr G would have needed to achieve after the transfer in order to match the benefits he’d given up in the OPS were too high. And he hadn’t seen any other compelling reasons that would have meant the transfer was suitable. So he thought the complaint should be upheld and asked RQFS to pay Mr G some compensation.

RQFS didn’t agree with that assessment. So, as the complaint hasn’t been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr G accepts my decision it is legally binding on both parties.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr G and by RQFS. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority ("FCA"). Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

The applicable rules, regulations and requirements

Within the FCA's handbook, COBS 2.1.1R required a regulated business to *"act honestly, fairly and professionally in accordance with the best interests of its client"*.

The FCA's suitability rules and guidance that applied at the time RQFS advised Mr G were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like RQFS, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, RQFS needed to gather the necessary information for it to be confident that its advice met Mr G's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*
- 2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
- (3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*

- (4) *take reasonable steps to ensure that the client understands the firm's comparison and its advice.*"

Under the heading "Suitability", COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

- (1) a summary of the advantages and disadvantages of its personal recommendation;*
- (2) an analysis of the financial implications (if the recommendation is to opt-out); and*
- (3) a summary of any other material information."*

RQFS asked Mr G to complete a document that it used as the basis of its assessment of his circumstances. Although that form appears to have been relatively well completed, and RQFS offered Mr G the opportunity to discuss his answers by telephone, there remains some risk that Mr G's relative lack of experience on matters such as these could have led to some inconsistent answers being provided - particularly when assessing his attitude to risk.

RQFS provided Mr G with a summary letter, and longer advice document, summarising its findings. Those documents advised Mr G that it would be in his best interests to transfer his pension benefits from the OPS to the new plan. They set out the potential advantages to Mr G of the transfer, and balanced those with a number of disadvantages. I think it would be reasonable to conclude that the document, as a whole, provided a fair assessment of the pros and cons of Mr G making the transfer.

But it wasn't sufficient for RQFS to simply provide information to Mr G. He was entitled to rely on the recommendation the firm gave to him as his professional advisor. Mr G had told RQFS that he had very little knowledge or experience (the lowest option he was able to select) of making investment decisions. So it doesn't seem unreasonable that he might have simply followed the guidance given to him by the firm regardless of whether he really understood the factors that had been considered leading up to that recommendation.

Although recommending that Mr G transfer his pension benefits to the new plan, RQFS's report doesn't present an altogether glowing picture of the transfer. For example it told Mr G that taking the enhancement as a cash lump sum would mean that the required critical yield was *"less likely to be achievable, given current investment conditions and your attitude to investment risk"*.

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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 report estimated that, should he take a pension commencement lump sum ("PCLS – otherwise known as tax free cash) at retirement Mr G's transferred pension savings would need to grow at a rate of 6.7% per annum (or 7.4% if no PCLS was taken) to match the benefits that he was giving up in the OPS. This compares with the discount rate of 6.4% per year for 16 years to retirement in this case.

Mr G had told RQFS that his attitude to risk was between cautious (25%) and balanced (75%). So considering the likely composition of the regulator's investment assumptions I think that the self-assessed attitude to risk chosen by Mr G would mean that he would be unlikely to reach the level of return that was indicated by the discount rate above.

I think it is important to also recognise that Mr G would be seeking to make this transfer in order to receive greater benefits at retirement. It seems to me that there would be little incentive for Mr G to agree to the transfer, and accept the corresponding investment risk, if his benefits were only likely to match those being offered by the OPS.

So taking the critical yield into account, along with the composition of assets in the discount rate, Mr G's attitude to risk and also the term to retirement. I think Mr G was unlikely to receive benefits of a materially higher overall value than the occupational scheme at retirement, as a result of investing in line with his attitude to risk.

But of course it wouldn't be right to simply consider the financial aspects of the transfer when deciding whether it was suitable for Mr G. There are other aspects that might have made it appropriate for his circumstances. As I've said earlier, by agreeing to the transfer Mr G benefitted from the payment of a cash lump. And, as RQFS's suitability report pointed out, by moving his pension savings into the new plan Mr G gained additional control over their use. He would be able to retire at a time chosen by himself (after the statutory age of 55), he would be able to choose the format in which any retirement benefits were paid, and his pension savings could be used to provide an income for his family after he had died.

The cash lump sum that Mr G would receive was relatively modest, valued at £4,090.94, and would be reduced even further by the deduction of income tax and national insurance contributions. Whilst it might have been attractive to Mr G to receive that payment, particularly given the approaching Christmas period, I cannot reasonably conclude that it was essential. Mr G was still in employment, and declared that he had a surplus of income over expenditure each month. I don't think it was reasonable to jeopardise his retirement provision simply to allow the receipt of that lump sum.

As the time the advice was given Mr G was still around ten years away from the earliest time that he could retire under the relevant legislation. He doesn't appear to have given any indication to RQFS that he had a requirement to seek early retirement. So given that the transfer he would be applying to his new pension plan was not enhanced by the OPS, and the benefits he would receive from transferring were at best marginal, I think it would have been reasonable to defer any transfer decision until his future plans became more clear.

On balance I don't think that the recommendation RQFS gave to Mr G to transfer his pension benefits from the OPS was suitable. Whilst RQFS might have given appropriate information to Mr G, he was entitled to rely on the recommendation that was made. So I think that this complaint should be upheld, and RQFS should calculate whether Mr G has lost out as a result of its inappropriate advice.

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 G 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 didn't make a choice, so as set out previously I've assumed in this case he 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 Mr G.

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. RQFS 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.

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 G's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G'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 G 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 Mr G'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.

The compensation amount must where possible be paid to Mr G within 90 days of the date RQFS receives notification of his 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 RQFS to pay Mr G.

Income tax may be payable on any interest paid. If RQFS deducts income tax from the interest, it should tell Mr G how much has been taken off. RQFS should give Mr G a tax deduction certificate in respect of interest if Mr G asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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 the new guidance or rules come into effect, I'd expect RQFS to carry out a calculation in line with the updated rules and/or guidance in any event.

At this stage I am unable to determine the size of the award that will be payable to Mr G. 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.

Determination and money award: I require RQFS to pay Mr G 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 additionally require RQFS to pay Mr G any interest on that amount (if required) in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require RQFS to pay Mr G any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that RQFS pays Mr G the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

If Mr G accepts my decision, the money award is binding on RQFS. My recommendation is not binding on RQFS. Further, it's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold Mr G's complaint and direct R&Quiem Financial Services Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 21 April 2023.

Paul Reilly
Ombudsman