

The complaint

Mr L complains about advice that he received from WPS ADVISORY Ltd (WPS) which meant he lost out on his right to enhanced tax free cash.

What happened

Mr L said he was a member of an employer's pension scheme. The employer ceased trading in the UK and wanted to shut down the pension scheme. The employer paid for WPS to provide financial advice about the transfer. WPS said he had two options, to buy an annuity with the fund but with no tax free cash (TFC) or transfer the fund to an insurance company that would take the funds into a mirror scheme and his right to enhanced TFC would be matched and protected (PTFC). This is what the report from WPS to Mr L said. Later the insurance company contacted Mr L to say his PTFC would not be protected because he was already a member of the receiving scheme. It said WPS should have been aware of this.

WPS said that it had relied on information from the insurance company that proved to be incorrect. It wasn't at fault for the lost entitlement to PTFC. It had become clear that Mr L had two existing plans with the insurance company via his employer, It was appointed by the trustees of the occupational scheme to advise their members on the options available to them. The second plan available through the employer was contract based rather than trust based. When it became clear that some members had PTFC it asked the insurance company for express confirmation that this would be protected on the transfer. This was confirmed to it. It had a right to rely on information given to it by the insurance company provider when asking if PTFC would be maintained on transfer.

I issued a provisional decision in this case. I said the following.

It is clear that a mistake had been made and WPS accepted that, however it did not accept that it was at fault. That mistake is that it was believed that Mr L's transfer to the new insurer would not result in the loss of right to PTFC that he had in his previous employers pension scheme. WPS however disputed that this was their fault and said they relied on information supplied to them by the insurance company which was incorrect and they should not be responsible for any loss caused by the mistake.

Before I considered this further I first considered the contractual relationship between Mr L and WPS.

I had seen a copy of a letter from Mr L's occupational pension scheme regarding the transfer of his pension. It said the trustees are exploring providing his pension benefits by insuring them with an insurance company. It confirmed that Mr L was a member of his previous employers occupational money purchase scheme from 1 September 1998 to 30 March 2001. His pension account as at 4 September 2018 had a value of around £54,400 and had a guaranteed minimum pension underpin. At the date of leaving in 2001 that was worth £649 per year and was anticipated to be worth around £1,103 per year by the time he was 60.

The letter told Mr L that the business is considering securing his pension benefits via an annuity. But the letter went on to say the following:-

It may be that you would prefer that your benefits were not secured in this way. If this is the case, then you do have the option to transfer your benefits to another arrangement. However, this is not a decision that should be taken lightly, and you will generally need to take professional financial advice before you can transfer your benefits out of the Plan.

Opportunity for you to receive professional financial advice

The Trustees are aware of the importance of any decisions you make about your retirement benefits. Therefore they have arranged access for you to professional financial advice provided by WPS Advisory Limited (WPSA).

They will help you consider the best decision for you in the light of your personal circumstances, for instance if you are in poor health then WPSA will help you decide on the most appropriate option for you. In the event you want to transfer your account to an alternative provider, then it may be a requirement that you have received professional financial advice

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The Trustees selected WPSA after considering in detail a range of potential advisors. WPSA are independent of both the Trustees and the employer. The Trustees and employer have agreed that this advice will be paid for by the Trustees. The fees paid to WPSA for providing this advice are not linked to any recommendation that WPSA may make to you. There is therefore no incentive for WPSA to steer you toward any particular course of action, and you can be confident that their sole focus is on providing you with the right advice for your particular circumstances.

Based on this it was clear that the transfer which Mr L opted to take was not into an annuity (as the trustees of his employers pension scheme were proposing) but into another pension scheme.

WPS said they were appointed by the trustees of the occupational pension scheme that Mr L was a member of, to advise on the block transfer of the members. I have asked but not been supplied with a copy of the terms of agreement between WPS and the trustees as it said it needed to get the consent of the trustees first. However based on the letter from the trustees to the members it is clear that WPS were available to advise Mr L who was their client. It was not appointed to implement whatever plan the trustees may have wished to implement.

I was supplied with a copy of the WPS general client agreement for use in relation to the funded retirement advice from the trustees of the employer's pension plan. This must have applied to the advice given to Mr L. The terms say the following:-

In connection with the Trustees of the (employer pension scheme trustees) ("the Trustees") offer, our advice will be limited solely to the options made available in connection with your existing (employer pension scheme) ("the Plan") benefits. In connection with the Trustees of the (employer pension scheme trustees) ("the Trustees") offer, our advice will be limited solely to the options made available in connection with your existing ("the Plan") benefits.

An assessment of your needs will be made prior to providing any advice or recommendations to you. WPS Advisory is able to offer advice on a wide range of financial products from the whole of the market. In executing or transmitting applications on your behalf to third parties, all reasonable steps will be taken to ensure the advice we provide is relevant to your objectives:

needs and wants. WPS Advisory has obligations to you, known as 'best execution'. This is a method of working which is designed to try to ensure the best outcome for you. Further details of the best execution arrangements are available on request.

Also

Before we can provide you with advice we need to obtain information from you regarding your personal and financial circumstances.

Based on these terms I thought it was clear that WPs was responsible for advising Mr L about his options arising as a result of what the trustees proposed and understanding his personal circumstances before it did so.

I had also seen the personal retirement advice letter from April 2019 from WPS to Mr L. It said the following about TFC.

On 5 April 2006, you were entitled to a tax-free cash sum of £6,714.02 which at the time represented 58% of your fund.

Based on the transfer value figures provided, we have calculated that your current level of Pension Commencement Lump Sum (PCLS) is £19,656.52, which represents 36% of your current transfer value of £54,400.00.

The letter also noted he had other defined contribution plans from previous employers. The letter recommended that he should transfer to the new insurer's group flexible retirement plan. This showed that it was clear that WPS was aware that Mr L was entitled to PTFC and that he had other pension schemes at the time it gave that advice.

There was no suggestion that this was incorrect and the insurance company had reconfirmed that the data it supplied showing he was entitled to PTFC was correct.

The letter of advice also referred to the issue of PTFC and said

Firstly, in order to retain your entitlement to PCLS of more than 25%, you can only transfer as part of a 'block' transfer, which means at least 2 individuals transferring at the same time to the same destination. As we are transferring many members to this arrangement, this requirement is met.

Secondly, in order to receive this higher PCLS entitlement, you must take it all in one go.

You cannot use it to provide a tax-efficient income stream over a number of years. Although the (insurance company) GFRP does not currently offer flexible access drawdown, it does allow you to take all of your PCLS entitlement and then transfer to a product that offers this facility. Therefore the GFRP allows you to benefit from the higher level of PCLS when you take benefits.

If you transfer to (insurance company name), we will let them know the level of PCLS that applied to you on 5 April 2006. They will use that figure to calculate how much PCLS you can draw when you take benefits.

As your fund grows and the Lifetime Allowance increases, it is likely that although the amount of PCLS will increase in cash terms, it will decrease as a percentage of the total fund value, although it will never fall below 25%.

This section demonstrated to me that WPS were aware that there are special technical conditions that needed to be met to enable the right to PTFC to be transferred. It mentioned a number of issues including that it must be part of a bulk transfer, which this was. I thought this showed that WPS was aware there were issues and was advising on how to ensure those issues didn't prevent the transfer of enhanced TFC. I thought it was up to WPS to ensure that the transfer was implemented on the basis of terms that satisfied all of the technical requirements and allowed Mr L to transfer his PTFC. If this wasn't possible it needed to tell Mr L that was the case so that he could make an informed decision.

The letter from WPS, did not list all of the preconditions to allow the transfer of the right to PTFC, only some of them. Another condition was that Mr L hadn't already been a member of the receiving scheme for more than twelve months. Whether or not WPS expressly checked all of the technical requirements, I think it was clear it needed to do so in order to advise Mr L.

I had seen more recent written confirmation from the receiving insurance company to Mr L, that both the scheme that accepted the block transfer and his GFRPP were within the same registered pension scheme. This meant that he had been a member of the receiving scheme for more than 12 months before the block transfer took place and he didn't meet the condition for carrying forward the rights to PTFC he had the previous scheme. So there was clearly a mistake in not picking this up prior to the transfer and the advice to Mr L was not complete because it didn't make this clear.

WPS suggested that it relied on information supplied by the insurance company. But I had not seen any evidence that it questioned whether Mr L had been a member of the receiving scheme for more than 12 months. It was clear from its letter of advice that it was aware of his other pension schemes Further the insurance company has confirmed the original information about Mr L was correct. So it does not seem that WPS relied on any such representation in giving its advice. But even if it did It is WPS with whom Mr L has a contractual relationship to receive advice and it is responsible for that advice. It was up to WPS if it feels it has sufficient grounds to pursue the insurance company for any claim from Mr L due to loss of his PTFC.

I considered whether WPS could have done anything differently had it been aware of the fact Mr L could not satisfy this technical requirement. It would seem that it should still have been possible to protect Mr L's right to enhanced TFC if he took part in a block transfer to another insurer or another policy with the same insurer where he was not a member of scheme for more than 12 months, at the time of transfer.

I have heard a recording of a call between Mr L and the adviser who gave the advice. The adviser comments that this is not an isolated case. Given that there were others affected in a similar way, it would have been possible for WPS to have created another group that could have participated in a block transfer in a way that would not have caused this problem.

In conclusion I thought WPS provided incorrect advice to Mr L which he has relied upon. It was contractually responsible for that advice. It was clearly aware that he had a right to PTFC and that there were technical requirements that had to be satisfied to protect this right. Mr L had relied on that incorrect advice and suffered as a consequence.

So for all those reasons I thought WPS was responsible for any financial loss and distress and inconvenience that Mr L had suffered as a consequence of that mistake.

Loss

I therefore considered an award for financial loss and distress and inconvenience. In making an award for financial loss my aim was to put Mr L back as closely as possible to the position he would have been in but for the mistake. That would mean that he retained his right to PTFC. However that was not possible as he has now lost that right.

Further as the advice to Mr L explained, with time his right to enhanced tax free cash will reduce until it reaches 25%. So the extent of the loss in part depends on when Mr L decides to take the TFC. I have asked him what plans he has at present and he has indicated that he is content with his current work and pattern of life. He is not yet 55 and would not be able to take the tax-free cash but in the next 18 months when he reaches 55 and said he was considering doing this. He confirmed that he intended to take the maximum tax-free cash lump sum.

The investigator proposed a basis for calculating the loss calculation which I have set out below.

The investigator used Mr L's current pension figures to calculate the value of his PTFC. This assumed the tax deduction used will be the basic rate of 20%, as this was the likely rate Mr L will pay on his pension income in retirement. Mr L challenged this but has not submitted evidence to show that he would be a higher rate tax payer. For that reason I have not changed this assumption..

In order to establish the amount of additional tax Mr L would pay, WPS first needs to establish the current value of his protected tax-free cash and compare it with the 25% tax-free cash to which he is now entitled. I suggest this calculation is done with effect from the date of my final decision and assuming that he has reached age 55 (even though that will not be the case at the time. This should enable WPS to calculate the amount of additional tax that he would have to pay if he took his PTFC at that date.

Calculating financial loss

The current value of a protected tax-free cash entitlement can be calculated using the formula outlined in the HMRC Pensions Tax Manual here: <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm063130#calculating>. For ease of reference I have set this out below, but to complete the calculation WPS will need to make reference to the pension tax manual at the time the calculation is completed.

Calculating the maximum permitted pension commencement lump sum

Paragraph 34 schedule 36 Finance Act 2004

The maximum scheme-specific pension commencement lump sum will be the amount of 'VULSR' on 5 April 2006 increased by 20% for so long as the standard lifetime allowance does not exceed £1.8 million, plus an additional lump sum (ALSA).

The amount of a scheme-specific pension commencement lump sum is currently found by using the following formula:

$$(\text{VULSR} \times \text{ULA/FSLA}) + \text{ALSA}$$

VULSR = the value of the individual's uncrystallised lump sum rights under the scheme on 5 April 2006

ULA = is the greater of £1.8 million and the standard lifetime allowance when benefit entitlement arises

FSLA = £1.5 million.

ALSA is the amount found by the formula:

$$[LS + AC - (VUR \times CSLA/FSLA)]/4$$

LS = the amount of pension commencement lump sum actually paid

AC = the amount actually crystallised by becoming entitled to a pension in connection with which the pension commencement lump sum is paid, or the amount of the trivial lump sum paid in accordance with the conditions described earlier above.

VUR = the value of the individual's uncrystallised rights under the scheme on 5 April 2006.

CSLA = the current standard lifetime allowance.

FSLA = £1.5 million

PTM063140 explains how the value of VULSR and VUR is obtained.

If the formula for ALSA gives a negative result, ALSA will be nil

For the purposes of illustration the investigator calculated the value of Mr L's tax-free cash entitlement using the HMRC approach and I have set this out below:

- Increasing the tax-free cash entitlement as at 5 April 2006 by the maximum percentage change in LTA from that point until now (which is 20%).
- Calculating 25% of any growth in value of pension rights since 5 April 2006.
- Adding the above two figures together.

Once this figure is established, WPS should:

- Subtract 25% of Mr L's current fund value to obtain the amount on which Mr L would pay additional tax.
- Multiply this figure by 20% to calculate the additional tax Mr L would pay
- Pay this amount direct to Mr L to compensate him for his loss.

Mr L has provided the following information to assist with the calculations. I have included them by way of illustration but WPS will need to repeat these calculations by reference to the figures as at the date of my final decision.

- His tax-free cash entitlement as at 5 April 2006 was £6,714.02 (this figure will not change).
- His pension fund value as at 5 April 2006 was £11,575.90 (this figure will not change)
- His pension fund value at the time the value was given to the investigator was £60,272.77 (this figure will need to be updated to the value at the date of my final decision)

Using those figures:

- The revalued tax-free cash in line with changes in lifetime allowance is £8,056.82 ($£6,714.02 \times 120\%$).
- The additional lump sum amount is £12,997.84 ($(£60,272.77 - (£11,575.90 \times (£1,073,100/£1,500,000))) / 4$).
- The value of his tax-free cash entitlement was £21,054.66. ($£8,056.82 + £12,997.84$).
- The 25% tax-free cash entitlement he was entitled to was £15,068.19. ($25\% \times £60,272.77$).
- This meant Mr L would pay tax on additional £5,986.48. ($£21,054.67 - £15,068.19$).
- At the basic tax rate, this meant Mr L would pay an additional £1,197.29 in tax. ($20\% \times £5,986.48$).

Mr L commented that he didn't think historic figures should be used to calculate his loss. I have directed that the calculation should be done at the date of my final decision using the appropriate figures at that time.

Neither Mr L nor WPS has suggested that Mr L is entitled to and/or claimed primary protection or enhanced protection for the purposes of the Lifetime Allowance.

Mr L also said that another consequence of the error is that he would have to pay higher income tax as more of his fund would remain within his pension plan than would have been the case had he been able to take the amount of the PTFC. He is correct but he will also receive more from his pension (assuming it grows) and his loss of PTFC will have been compensated for. So on balance he benefits from a higher residual fund even though this may mean he pays more tax due to the tax on that amount.

I also noted that Mr L has said that an alternative form of compensation for his loss would be an indemnity against the amount of additional tax he has to pay when he actually takes his TFC. However this service could not advise on such an indemnity nor who should provide it (e.g. WPS or its insurer). Further as with time Mr L's PTFC amount will reduce such that there is no difference between it and the amount of TFC he can claim that loss will reduce to nil with time. However it remains open to WPS and Mr L to reach its own agreement outside of any direction that I make in my final decision.

I have considered an award for distress and inconvenience. Such an award is to reflect the impact on Mr L not to punish WPS. While I have taken into account the time Mr L has taken dealing with this matter, this service does not make awards based on an hourly rate for time spent. I think that the mistake has been upsetting but Mr L isn't yet 55 and couldn't have taken his PTFC any sooner than he proposes. I have however reflected on the amount of time he has needed to spend seeking to get this put right. On balance and for those reasons I thought an award of £250 was fair and reasonable in the circumstances.

I proposed to uphold this complaint and direct that WPS ADVISORY Ltd should within 30 days for this service notifying it that Mr L has accepted my final decision, pay Mr L:-

1. £250 for distress and inconvenience (to the extent that it has not already do so).

2. Such amount of additional income tax Mr L would have to pay if he had taken his full PTFC at the date of my final decision (whether or not he has reached age 55 at that date) using the calculation for financial loss and the model of calculation illustrated to determine that as set out above.

If for any reasons these amounts were not paid to Mr L within the 30 days stated above they shall be further increased by interest at the rate of 8% per annum simple from the expiry of the 30 days to the date of actual payment. WPS should provide Mr L with a detailed breakdown of its calculations to enable him to check them.

Mr L said the following in reply to my provisional decision

Mr L provided a copy of WPS's 'Your Circumstances' document drafted by WPS and also his 2021/22 Tax Year P60. He said these showed WPS knew he paid income tax at the then highest rate in 2019 when advising on his pension transfer and that he continued to pay at the highest 'additional' rate of income tax now.

There was no reason to believe this would change as at his 55th birthday - when he planned to access his pension's cash lump sum.

Therefore, to have the same amount of money at his disposal when aged 55 - net of any tax due - as he would have had if his protected tax free cash lump sum hadn't been lost due to faulty advice from WPS he would have to take the now reduced (no longer protected) tax free cash lump sum and top up that up with pension income - which was likely to be taxed at the highest 'additional' rate.

Therefore, the extent of his financial loss - to be in same position (of amount of disposable cash at age 55) - must be calculated at the highest 'additional' income tax rate and not the basic rate. It should be noted that this course of action will also serve to deplete his remaining pension pot more than it would have otherwise been, but for the lost protected tax-free cash lump sum.

He also said he had made several attempts to communicate with the CEO of WPS Advisory. He had never once responded to his correspondence. He again tried to open communication following this services recent suggestion to ".... reach its own agreement outside of any direction." again without acknowledgement. This rude and dis-courteous approach to business adds to the distress and anxiety caused.

He had repeatedly requested that WPS advise how much they were paid by the Pension Trustees to provide financial advice to him and received no response. Whilst he understood the Ombudsman's stance that "...the award was not to punish the business." nor should their failure to engage and be transparent allow them to potentially profit for the provision of damaging financial advice. That a professional regulated business he was solely reliant upon by circumstances beyond his control can act this way distresses me further.

He trusted the Ombudsman would consider the nearly 2 years of effort and perseverance that had been required on his part to address the stress and anxiety caused by WPS's poor advice and exacerbated by its business approach to resolution and upwardly revise the suggested £250.

WPS did not comment further. WPS was supplied with the evidence provided by Mr L to show that he currently pays income tax at the highest rate of 45%. It did not comment on this.

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.

Mr L has provided evidence that he is paying income tax at a higher marginal rate so I think it is appropriate that WPS should calculate his loss on that basis.

I note Mr L's comments about having to take more from his pension in order to achieve the same level of tax-free cash as he would have had with PTFC. I have already commented on the impact the lower TFC has on his remaining pension so I am not making any further award in that respect for the reasons set out in my provisional decision.

I would also note that my direction requires WPS to pay compensation at the time of my final decision which will be before Mr L's 55 birthday. He does not have to draw his tax-free cash in order to receive the compensation. While this is unusual because Mr L will not have suffered the loss at the time the compensation is paid, I think this is fair and reasonable in the circumstances. I say that because it isn't possible to be certain when Mr L will actually take his tax-free cash.

I note Mr L's comments about the award of £250 for distress and inconvenience. I have already taken into account the time and stress caused by the error for the reasons set out in my provisional decision so I have not changed my mind.

Putting things right

In order to put things right WPS should pay Mr L £250 for distress and inconvenience and such amount for financial loss as is calculated in accordance with my direction.

My final decision

I uphold this complaint.

I direct that WPS ADVISORY Ltd should within 30 days of this service notifying it that Mr L has accepted this decision, pay Mr L:-

1. £250 for distress and inconvenience (to the extent that it has not already done so).
2. Such amount of additional income tax Mr L would have to pay if he had taken his full PTFC at the date of my final decision (whether or not he has reached age 55 at that date) using the *Calculating financial loss* model of calculation, as set out above (and in my provisional decision) but on the basis that:-
 - Mr L currently pays income tax at the rate of income tax supported by the evidence he has produced to this service and provided to WPS (believed to be 45%) and
 - using an up to date value for Mr L's pension that is at a date within 30 days of the date of my decision.

If for any reasons these amounts are not paid to Mr L within the 30 days stated above they shall be further increased by interest at the rate of 8% per annum simple from the expiry of the 30 days to the date of actual payment. If WPS believes it should deduct income tax from any such interest payment it should provide Mr L with a certificate of deduction.

WPS should provide Mr L with a detailed breakdown of its calculations to enable him to check them.

Mr L should as soon as possible provide WPS with a valuation of his pension fund (at a date that is within the 30 days after the date of this final decision) to enable WPS to calculate and pay the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 29 March 2023.

Colette Bewley
Ombudsman