

The complaint

Mr W complains about the advice Zurich Assurance Ltd gave to him 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.

At the time of the events complained about it was a different firm which gave Mr W advice. Zurich is now responsible for responding to the complaint. So in this decision I will refer to the advising firm as Zurich.

Professional representatives have helped Mr W to bring this complaint. But, for ease of reading, I will refer to the representatives' comments as being Mr W's.

What happened

Mr W was a deferred member of his former employer's DB scheme. In 1993 he spoke with Zurich about his pension provision. It conducted a fact-find and gathered information from Mr W's DB scheme. Zurich established that Mr W was not yet 32 years old. He was unemployed and had no other pension provision, savings or investments. It recorded Mr W's attitude to risk was *two* on a scale of one to four, where one was "*very cautious*" and four was "*speculative*". Zurich advised Mr W to transfer his DB funds into a named personal pension. Subsequently, in June 1993 Mr W's DB scheme administrators paid Zurich the cash equivalent transfer value from his DB scheme of £5,565.

I understand that Mr W took all the funds from his personal pension in 2019 and 2020.

In 2022 Mr W complained to Zurich. In brief he said its advice to transfer out of his DB scheme wasn't suitable for him. Zurich replied. It said it had invited Mr W to take part in an industry-wide review of potential mis-selling of pensions in 1999 but he hadn't replied. And, as a result he was now out of time to complain.

Mr W brought his complaint to us. One of our investigators initially looked into it noting that Zurich believed Mr W had brought it out of time. Mr W provided evidence, which the investigator passed to Zurich, which showed Mr W wasn't living at the address Zurich sent its pension review invitation letters to at the time. As such Mr W hadn't been in a position to respond to its review invitation. Zurich then consented to us looking into the complaint.

Another of our investigators then considered the merits of Mr W's complaint. She felt we should uphold it. She thought the advice to transfer wasn't in Mr W's best interests. So, she said Zurich should pay Mr W appropriate compensation. As Zurich didn't reply to our investigator's assessment, 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. 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

At the time of the advice the regulator was the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). Its code of conduct said advisers should not advise customers to convert, cancel or allow to lapse any occupational pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages of doing so.

Having considered the above and the evidence in this case, I've decided to uphold the complaint for broadly the same reasons our investigator gave.

Financial viability and suitability of advice

Zurich gave its advice during the period of the industry-wide Pensions Review, so the rates the regulator published for Financial Viability Tests ('FVT') associated with that review are directly relevant here. The upper limit the regulator gave for a FVT was 10.9% a year for 28 full years to retirement.

For further comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate 10.75% and the lower projection rate 8.5%.

I've noted that the FVT figure is broadly comparable with the regulator's middle projection growth rate at the time. And Mr W still had 28 years until his DB scheme's normal retirement age. So Zurich might have felt that gave a personal pension fund sufficient time to grow and exceed the benefits from the DB scheme. It follows that Zurich might have thought it was possible that Mr W could be better off by transferring his DB funds to a personal pension.

Zurich has provided very little documentation which shows on what basis it made its recommendation for Mr W to transfer. It hasn't provided us with a suitability report or other documentation setting out an analysis of the consequences and disadvantages of investing in the personal pension against remaining in the DB scheme. There is an entry on one of its forms which says that a transfer was in Mr W's best interests. But it doesn't provide any explanation as to why it thought that was. And I've seen nothing by way of a comparison of how the projected growth rates from the personal pension would compare against Mr W's entitlement from his DB scheme.

So it's anything but clear on what basis Zurich concluded that Mr W would benefit from transferring out of his DB scheme. And there's simply no evidence on file to demonstrate whether that level of growth would have been sufficient for Mr W to have exceeded the income his DB scheme would have provided at retirement. It follows that I'm not persuaded on the balance of probabilities that Zurich's advice was suitable for Mr W.

Further, I also need to consider Mr W's capacity for loss. Apart from his state pension he had no other pension provision. And, at the time of Zurich's advice, he was unemployed and wasn't making further pension contributions. He had limited savings, lived in rented accommodation and had no other assets to protect his pension benefits if his investments suffered losses.

In addition, Zurich hasn't shown that it made it clear to Mr W what the advantages or disadvantages were of him transferring. And there's little evidence it made it clear that by transferring out of his DB scheme he would be giving up a guaranteed and index linked income in retirement and instead would be investing in a product that was subject to investment risk and the volatility of the financial markets.

So I'm not satisfied that Zurich did all it needed to do to ensure that Mr W was aware of the consequences and disadvantages of transferring out of the DB scheme. It follows that I'm not persuaded that Zurich gave Mr W all the information he needed in order to make an informed choice about whether or not he wanted to transfer.

And as I'm not persuaded that Zurich gave Mr W enough information to make a fully informed decision, I don't think its advice was suitable for him or in his best interests. And but for that advice its likely he would not have transferred out of his DB scheme. So I think Zurich should compensate Mr W for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Zurich to put Mr W, as far as possible, into the position he would now be in but for Zurich's unsuitable advice. I consider Mr W would have most likely remained in his DB scheme if Zurich had given suitable advice.

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.

The FCA published a policy statement 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 W 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'm satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr W.

For clarity, Mr W has depleted his pension fund but has yet to retire. His DB scheme's normal retirement age was 60. And he could have taken his full pension at that age. So, in line with the FCA's guidance compensation should be based on his taking benefits at this age.

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 W's acceptance of the decision.

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

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

If the redress calculation demonstrates a loss, Zurich should pay the compensation if possible into Mr W'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, Zurich should pay it directly to Mr W 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 W within 90 days of the date Zurich receives notification of his acceptance of my final decision. Further Zurich must add interest 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 Zurich to pay Mr W.

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. In those circumstances, 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.

Zurich should provide details of its calculations to Mr W and his representative in a clear, simple format.

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Zurich Assurance Ltd to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £170,000.

Where the compensation amount does not exceed £170,000, I would additionally require Zurich Assurance Ltd to pay Mr W any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £170,000, I would only require Zurich Assurance Ltd to pay Mr W any interest as set out above on the sum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Zurich Assurance Ltd pays Mr W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W accepts this decision, the money award becomes binding on Zurich Assurance Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 12 April 2023.

Joe Scott
Ombudsman