DRN-3973896

The complaint

Mr C complains about the advice given by Truly Independent Limited 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.

What happened

I'll firstly say that Mr C was also advised by Truly Independent at the same time as Mrs C. I've looked at Mr and Mrs C's complaints separately, but I have referred to both of their circumstances regularly in this decision because of how they were given advice.

Mr C approached Truly Independent in August 2017 to discuss his pension and retirement needs. He had been referred to Truly Independent as his existing adviser was unable to give him advice about pension planning and he wanted his pension arrangements reviewed.

Truly Independent completed a fact-find to gather information about Mrs and Mrs C's circumstances and objectives. This showed that:

- Mr C was aged 53, married and living with his wife who was 50. They had two young dependent children.
- Mr C was on a career break and Mrs C had recently been made redundant (from the same employer). So, they both had no income at the time of advice.
- They did have savings of £80,000 in cash, £100,000 in investments and a £24,000 savings policy that was due to mature in the near future.
- Their expenditure was recorded as being £1,950 a month.

Mr C's DB scheme benefits had been built up over 25 years service. The transfer value at the time of advice was £406,577.

Truly Independent also carried out an assessment of Mr C's attitude to risk, which it said was 'balanced'.

On 19 February 2018, Truly Independent advised Mr C to transfer his pension benefits into a personal pension and invest the proceeds into one of the new pension provider's managed portfolios which it said met his attitude to risk.

The suitability report said the reasons for this recommendation were:

- Mr and Mrs C both intended to live off their savings until they could access their pensions at age 55 and then retire.
- Mr and Mrs C didn't think the death benefits that the DB scheme offered would meet their needs.
- Mr C wanted flexibility in the way benefits were paid, especially as they'd had children later in life.
- And he wanted to take advantage of what he thought was a higher transfer value.

Mr C complained in March 2022 to Truly Independent about the suitability of the transfer advice because:

- He should have been advised to stay in his DB scheme. The transfer was unnecessary and exposed him to risk.
- It wasn't suitable for him and he didn't have the capacity to take losses on this pension. His risk profile wasn't properly assessed.
- It wasn't financially viable.
- He gave up important and valuable guaranteed death benefits.

Truly Independent didn't uphold Mr C's complaint. It said that it looked into Mr and Mrs C's circumstances in detail at the time of advice. They had both worked in financial services for many years and were experienced investors. The transfer met their requirements for early retirement and flexibility and the death benefits were greater. The DB scheme only partially met their early retirement needs. It had not treated Mr C unfairly or given him unsuitable advice.

Mr C referred his complaint to our service. An investigator upheld the complaint and recommended that Truly Independent pay compensation. He said that Mr C was now likely to receive a lower level of benefits than he would have if he had remained in the DB scheme. And that Truly Independent failed to highlight the death benefits he was giving up. He could have met his need for flexibility with his existing arrangements.

Truly Independent disagreed, but it didn't provide any further arguments or evidence for me to consider.

The investigator didn't change their opinion, 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 Sourcebook ('COBS'). 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

The 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 Truly Independent'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.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Truly Independent should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Truly Independent carried out a transfer value analysis report (TVAS), as required by the regulator, showing how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

Mr C was 53 at the time of the advice and wanted to retire between the ages of 55 and 60. The TVAS said the critical yield required to match Mr C's benefits at age 60 was 12.81% if he took a full pension and 9.08% if he took tax free cash and a reduced pension. The critical yield to match the benefits at age 55 was quoted as 36.62% per year if Mr C took a full pension and 10.35% per year if he took tax free cash and a reduced pension.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 2.5% for one year to retirement and 3.3% for six years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr C's 'balanced' attitude to risk and also the term to retirement.

In the suitability letter Truly Independent said about the 12.81% critical yield that '*This, in my opinion, is not an achievable return, based on the term to retirement. …*' I agree with this, an assumed growth of over 12% is far higher than what it would be reasonable to assume a higher risk investment would provide over this term. And at age 55 this figure rose to over 30% which is almost certain not to be achievable.

And Mr C wasn't a high-risk investor. I can accept that he was knowledgeable about financial matters, and he had some investment experience. He also had some capacity to bear losses. But he'd indicated he had a balanced to risk for the DB transfer, not a high one.

There would be little point in Mr C giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was around 9%, I think Mr C was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk.

Truly Independent has provided cashflow models which it says shows Mr C would've been able to meet his needs despite the high critical yields. I've considered that Truly Independent's models show that the fund could last past his expected life expectancy. But, as Truly Independent will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

And the TVAS showed that the fund required to purchase the pension Mr C was giving up was £942,380 if he took a full pension at age 60 and £530,646 if he took tax free cash and a lower pension. There are other amounts shown, but they essentially give the same information. These are higher amounts than it would be reasonable to expect his transferred out fund to grow to. And they give a revealing insight into the cost of the benefits he was giving up.

For this reason alone, a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Truly Independent has said in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

One of the main reasons that Truly Independent advised that Mr C should transfer was because of the flexibility he could have with how he took his benefits. The information from the time of sale says that Mr and Mrs C essentially wanted to retire at age 50. They would then start to take benefits from the personal pension as soon as possible, maybe at age 55, and use these funds to live off until their state retirement age. When they may start to withdraw a lower amount.

It was recorded that Mr and Mrs C wanted an income of £30,000 to £35,000 per year. But this seems to have been based on what they thought was the likely return from their funds. The fact find shows they were spending around £24,000 each year so they would need at least this. And they did have a young family so their income and expenditure needs would be likely to increase over time, in the medium term at least.

And at Mr C's normal retirement date of 60, which was around six years time, he could receive a pension of £16,246. Or he could take a lower pension of £11,669 plus a tax free lump sum of £77,798.

At Mrs C's age 60, in around ten years time, it was estimated that she would receive a pension of £19,400 a year. Or she could take a reduced income of £13,935 and a lump sum of £92,904.

And at age 55, in around 18 months, Mr C could receive an annual pension of £9,351 or a tax free lump sum of £45,827 plus a reduced annual pension of £6,874.

And in time they would receive their state pensions of around £8,500 each.

And Mr and Mrs C had savings and investments of about £200,000. This looks to be enough to meet their current expenditure for around nine or so years. But Mr C would've received his DB scheme pension in six years time at the latest, which would reduce the amount they would need to take from their savings. So, I don't think it's unreasonable to say that Mr and Mrs C could have used their existing funds to 'bridge the gap' between the time of advice, and taking benefits from their respective DB schemes.

I accept that they may not have been able to withdraw the £35,000 each year that Truly Independent says they wanted. But this figure wasn't based on their actual needs anyway. It was based on what they thought they could receive.

I think a reasonable way to look at this situation was that Mr and Mrs C's current arrangements already gave them a significant amount of flexibility. They had enough to pay their expenses for a significant number of years. And so, they could have decided when to take the benefits from their DB schemes, and maximised the amount of income or tax free cash they would receive.

And I think a guaranteed and increasing income would have been important to them. It could have met their living expenses while their children grew up and met their retirements needs. And if, later on, Mr and Mrs C ended up with a surplus amount of income they could invest or save this in a tax efficient way, such as a trust arrangement for their children.

So, I don't think Mr and Mrs C required any further flexibility in retirement. This is because, based on the evidence I've seen, I don't think they had a genuine need to access their tax free cash earlier than the normal scheme retirement age and leave their funds invested until a later date. I think they could have met their need for a variable income through their existing arrangements.

So, I'm satisfied Mr C could have met his income needs in retirement through the DB scheme.

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The point of sale information is clear that Mr C was concerned about what he said was the low death benefits the DB scheme offered.

The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr C. But whilst I appreciate death benefits are important to consumers, and Mr C might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr C about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Truly Independent explored to what extent Mr C was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr C was married and had children and so the spouse's and dependent's pension provided by the DB scheme would've been useful to his dependents if Mr C predeceased them. I don't think Truly Independent made the value of this benefit clear enough to Mr C. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Truly Independent should not have encouraged Mr C to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr C genuinely wanted to leave a legacy for his spouse and children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Truly Independent should've instead explored life insurance.

It seems that Truly Independent did look at whole of life policies. But this looks to have been after the advice was given and the quotes I've seen are very expensive. And if Mr C did see these, I don't think they would be a balanced way of presenting this option to him.

Basing the quote on the transfer value of Mr C's pension benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mr C wanted to leave whatever remained of his pension to his spouse or children, which could be a lot less than this if he lived a long life or if investment returns were poor. So, the starting point ought to have been to ask Mr C how much he would ideally like to leave to his family. And this could've been explored on term assurance basis, which was likely to be a lot cheaper to provide.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr C. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr C's desire for control over his pension benefits was overstated. I don't think that Mr C had an interest in managing his pension funds on his own. So, I don't think that this was a genuine objective for Mr C – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

Truly Independent recommended that Mr C invest in an equity-based portfolio. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr C, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr C should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr C. But Truly Independent wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. The potential for higher death benefits and gaining some perceived flexibility wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Truly Independent should've advised Mr C to remain in his DB scheme.

Of course, I have to consider whether Mr C would've gone ahead anyway, against Truly Independent's advice.

I've considered this carefully, but I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme, against Truly Independent's advice. I say this because

Mr C was an investor with a balanced attitude to risk, but the personal pension needed higher returns, and this pension accounted for the majority of his retirement provision. So, if Truly Independent had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr C's concerns about the DB schemes death benefits were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. If Truly Independent had explained that Mr C could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr C would have insisted on transferring out of the DB scheme.

In light of the above, I think Truly Independent should compensate Mr C for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Our Investigator recommended that Truly Independent also pay Mr C £200 for the distress caused by the unsuitable advice. I don't doubt that Mr C has been caused distress and concern in relation to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

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 C 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 C.

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

Truly Independent 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, although I understand Mr C is now retired, I think he would have taken the benefits from his DB scheme at age 60 if he was advised properly. So, compensation should be based on his schemes normal retirement age of 60, 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 Mr C's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr C'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 C 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 C within 90 days of the date Truly Independent 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 Truly Independent to pay Mr C.

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 Truly Independent to carry out a calculation in line with the updated rules and/or guidance in any event.
Truly Independent should also pay Mr C £200 for the distress caused by the unsuitable advice.

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 Truly Independent Limited to pay Mr C 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 Truly Independent Limited to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £170,000, I would only require Truly Independent Limited to pay Mr C any interest as set out above on the sum of £170,000.

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

If Mr C accepts this decision, the money award becomes binding on Truly Independent Limited.

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 6 April 2023.

Andy Burlinson
Ombudsman