

The complaint

Mrs C complains about the advice given by Truly Independent 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 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.

Mrs C approached Truly Independent in August 2017 to discuss her pension and retirement needs. She had been referred to Truly Independent as her existing adviser was unable to give her advice about pension planning and she wanted her pension arrangements reviewed.

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

- Mrs C was aged 50, married and living with her husband who was 53. They had two young dependent children.
- Mrs C had recently been made redundant and Mr C was on a career break (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.

Mrs C's DB scheme benefits had been built up over 22 years service. The transfer value at the time of advice was £460,844.

Truly Independent also carried out an assessment of Mrs C's attitude to risk, which it said was 'balanced' overall. But it was recorded that she wanted to take a 'cautious' approach with her pension fund.

On 31 August 2017, Truly Independent advised Mrs C to transfer her pension benefits into a personal pension and invest the proceeds into one of the new pension provider's managed portfolios which it said met her 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.
- Mrs C wanted flexibility in the way benefits were paid, especially as they'd had children later in life.
- And she wanted to take advantage of what she thought was a higher transfer value.

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

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

Truly Independent didn't uphold Mrs 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 Mrs C unfairly or given her unsuitable advice.

Mrs C referred her complaint to our service. An investigator upheld the complaint and recommended that Truly Independent should pay compensation. He said that Mrs C was now likely to receive a lower level of benefits than she would have if she had remained in the DB scheme. And that Truly Independent failed to highlight the death benefits she was giving up. She could have met her need for flexibility with her 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 Mrs C's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

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

Mrs C was 50 at the time of the advice and wanted to retire between the ages of 55 and 60. The TVAS said that the critical yield required to match Mrs C's benefits at age 60 was 9.17% if she took a full pension and 6.78% if she took tax free cash and a reduced pension. It's not clear why these calculations were not done to her retiring at the age of 55 as this is when she may have wanted to retire. In my experience, these yields would usually be higher than those above.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our 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 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 3.8% per year for ten years to retirement. For further comparison I've kept in mind that 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, Mrs C's 'cautious' attitude to risk and also the term to retirement.

In the suitability letter Truly Independent said about the higher critical yield that *'This, in my opinion, is an achievable return, based on the term to retirement. ...'* But an assumed growth of over 9% is higher than the regulators upper growth rate, and so it was above what it would be reasonable to assume a higher risk investment would provide.

And Mrs C wasn't a high-risk investor. I can accept that she was knowledgeable about financial matters, and she had some investment experience. She also had some capacity to bear losses. But she'd indicated she had a lower attitude to risk for the DB transfer.

There would be little point in Mrs C giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was around 7%, I think Mrs 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 her attitude to risk.

Truly Independent has provided cashflow models which it says shows Mrs C would've been able to meet her needs despite the high critical yields. I've also considered that Truly Independent's models show that the fund could last past her 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 Mrs C was giving up was £942,380 if she took a full pension and £769,098 if she took tax free cash and a lower pension. These are higher amounts than it would be reasonable to expect her transferred out fund to grow to. And they give a revealing insight into the cost of the benefits she was giving up.

For this reason alone, a transfer out of the DB scheme wasn't in Mrs 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 these below.

Flexibility and income needs

One of the main reasons that Truly Independent advised that Mrs C should transfer was transfer was because of the flexibility she could have with how she took her 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.

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.

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.

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 the advice, and taking the 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 retirement 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 Mrs C could have met her 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 Mrs C was concerned about what she 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 Mrs C. But whilst I appreciate death benefits are important to consumers, and Mrs C might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs C about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Truly Independent explored to what extent Mrs C was prepared to accept a potentially lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mrs C was married and had children and so the spouse's and dependent's pensions provided by the DB scheme would've been useful to her dependents if Mrs C predeceased them. I don't think Truly Independent made the value of this benefit clear enough to Mrs 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 Mrs C to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Mrs C genuinely wanted to leave a legacy for her children, which didn't depend on investment returns or how much of her pension fund remained on her death, I

think Truly Independent should've instead explored life insurance. I have seen some evidence that shows this may have been done in Mr C's case but not in Mrs C's.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mrs 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 Mrs C's desire for control over her pension benefits was overstated. I don't think that Mrs C had an interest in, managing her pension funds on her own. So, I don't think that this was a genuine objective for Mrs C – it was simply a consequence of transferring away from her DB scheme.

Suitability of investments

Truly Independent recommended that Mrs C invest in a partly equity-based portfolio. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for her, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs 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 Mrs C. But Truly Independent wasn't there to just transact what Mrs C might have thought she wanted. The adviser's role was to really understand what Mrs C needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs C was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs 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 her DB scheme.

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

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

I've considered this carefully, but I'm not persuaded that Mrs C would've insisted on transferring out of the DB scheme, against Truly Independent's advice. I say this because Mrs C was an investor with a lower attitude to risk and this pension accounted for the majority of her retirement provision. So, if Truly Independent had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

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

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

Our Investigator recommended that Truly Independent also pay Mrs C £200 for the distress caused by the unsuitable advice. I don't doubt that Mrs 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 Mrs C 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.

She 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 C.

A fair and reasonable outcome would be for the business to put Mrs C, as far as possible, into the position she would now be in but for Truly Independent's unsuitable advice. I consider Mrs C would have most likely remained in her 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 Mrs C is now retired, I think she would have taken the benefits from her DB scheme at age 60 if she was advised properly. So, compensation should be based on her 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 Mrs C's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs 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 Mrs 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 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 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 Mrs 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 Mrs 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 Mrs 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 Mrs 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 Mrs 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 Mrs C the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs C.

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

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

Andy Burlinson
Ombudsman