DRN-3974038

Financial Ombudsman Service

The complaint

Mr E complains about the advice Niche Independent Financial Advisers Limited (Niche) gave him to transfer the benefits from one of his defined-benefit ('DB') occupational pension schemes to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

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

What happened

Mr E was a deferred member of his former employer's DB scheme. In 2017 Mr E approached Niche about giving him advice about his pension provision.

Niche gathered information about Mr E's DB scheme entitlements. It produced a pension transfer report. Such reports are usually referred to as transfer value analysis reports ('TVAS'), so that's the term I'll use in this decision. Niche also ran cashflow models to show how Mr E might meet his spending needs in retirement.

Niche also conducted a fact-find with Mr E. Amongst other things Niche noted that Mr E was aged 49, in good health, married with two children, one of whom remained financially dependent on him and his wife. He had various savings and investments worth around £415,000 in total. He owned his home and was mortgage free. He had a money purchase personal pension worth around £24,000 and was also a member of his (then) current employer's DB scheme – but that scheme is not the subject of this decision. Mr E's former employer's DB scheme had a cash equivalent transfer value ('CETV') of around £505,050 which would pay him a pension at the scheme's normal retirement age of 60 of £19,179 a year. Niche assessed Mr E's attitude to risk as "cautious balanced".

In October 2017 Niche sent Mr E its suitability report setting out its advice. It recommended that Mr E should transfer the funds from his former employer's DB scheme to a named personal pension. It said the growth rate required to match the benefits from the DB fund (the critical yield) was 8.52%. It also said that – while this yield was "*not unachievable*" – there was no guarantees of reaching that investment return. It added that by transferring his DB funds Mr E was likely to be worse off in retirement. It then said that there were other positive reasons to recommend a transfer including:

- Mr E would have control over the pension, how it was invested, and the level of income he wanted to take from it from age 55.
- It would provide more flexible death benefits for his family.
- If the DB scheme were to go into the Pension Protection Fund ('PPF')[1], the required critical yield would be reduced to 7.67% and that figure was not unachievable.

[1] The PPF acts as a 'lifeboat' for insolvent DB pension schemes. It pays compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme.

Mr E accepted Niche's advice and the DB funds at issue were transferred to the named personal pension.

In 2022 Mr E complained to Niche. In brief he said that Niche's advice wasn't suitable for him. Niche replied. It didn't uphold the complaint. Amongst other things it said it had fulfilled its regulatory requirements.

Mr E brought his complaint to us. One of our investigators looked into it. He didn't think Niche had dealt with Mr E fairly. So he said it should pay Mr E compensation including £250 to address his distress and inconvenience arising from Niche's unsuitable advice.

Niche didn't agree with our investigator's assessment of the complaint so it's been 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.

In bringing this complaint and responding to it Mr E and Niche have made a number of points. I've considered everything on file. But in this decision I don't intend to address each and every issue raised. Instead I will focus on what I see as being the key matters at the heart of this complaint and the reasons for my decision.

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

What follows 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 Niche'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, Niche should

have only considered a transfer if it could clearly demonstrate that it was in Mr E's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Niche carried out a TVAS (as required by the regulator) showing how much Mr E's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

Niche gave its advice 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 our Service published similar rates 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.

Mr E was 49 at the time of the advice. The DB scheme's normal retirement age was 60. The critical yield required to match Mr E's scheme benefits at age 60 was 8.52% if he took a full pension. The relevant discount rate closest to when the advice was given which I can refer to was published by our Service for the period before 1 October 2017, and was 3.8% per year for 10 full 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 E's "cautious balanced" attitude to risk and also the term to retirement. There would be little point in Mr E 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 critical yield was 8.52%, I think Mr E 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 that attitude to risk.

Niche has provided cashflow models which show that Mr E would have been able to meet his income needs in retirement despite the high critical yield. I've considered these, but I'm not persuaded by them. And I've noted that some of them appear to include inaccuracies. For example more than one of the models seems to show Mr E taking pension benefits from age 50. But the earliest Mr E could take pension benefits is age 55. Niche's models also show Mr E accessing, and in some cases depleting entirely, his other savings and investments in order to meet those income needs. And while that's not an unreasonable expectation, unless Mr E could secure consistent investment growth higher than the discount rate the models don't seem to show Mr E being any better off by transferring. So they don't persuade me that a transfer was in Mr E's best interests financially.

In fact it's notable that Niche itself agreed in its suitability report that Mr E was unlikely to be able to achieve the investment growth required in order to match the benefits from his DB scheme. And as he was likely to be worse off in retirement I don't think the advice to transfer was suitable for Mr E. In those circumstances it's all the more important that the other reasons for transferring were sufficiently compelling. I've considered these below.

Flexibility and income needs

Niche recorded that Mr E said he'd like to retire at age 50. Although he was aware that, owing to pensions rules, the earliest he could access any of his pension benefits was from

age 55. But, he told Niche he would use his savings to support his income until he could claim his pension benefits at age 55.

I don’t doubt that, when asked, Mr E told Niche that he would prefer to retire at age 50. And I can fully understand that desire. I think most people would say when asked that they would like to retire as early as possible if given the chance. But I think that was likely more of an aspiration than a definite plan. And I believe most people would understand that having the opportunity to retire early isn't worth compromising their income security over the remainder of their life for. It seems to me that this is something Mr E was likely to reassess once he grew nearer to retirement age.

Further, Niche’s suitability report and TVAS contain very little in the way of analysis to show exactly how Mr E taking his pension benefits at 55 would affect him. Mr E could have, if he had wanted to, taken his benefits from the DB scheme at age 55. Although his pension would have been reduced by the scheme’s early retirement factors if he’d chosen to do so. But the advantage of that approach would have been that Mr E could then have continued to receive guaranteed and index linked increases in his DB pension for the remainder of his life. That could then have allowed him to reduce the income he was taking from his savings, if in fact that was what he chose to do. But Niche’s suitability report and TVAS don’t show any form of analysis of what Mr E’s entitlement from his DB scheme would be at age 55. So it doesn't present critical yield figures to demonstrate the growth rates required to match those benefits. And given that Mr E apparently told Niche that he wanted to take pension benefits at 55, I would have expected to see such analysis. But Niche didn’t give Mr E the figures for him to be able to make such a comparison. It follows that I don't think Niche presented all the information Mr E needed in order to see how the benefits from the DB scheme, if he took those at 55, compared with his likely income from a personal pension. And, in order to allow him to make a fully informed decision I think that was something that Niche needed to do.

In any event, I don’t think Mr E had a concrete need to take early retirement. In fact Mr E has since confirmed that he didn’t retire at 50 and has no intention of retiring in the immediate future. And while Niche couldn’t have been certain of that at the time, as I've said above, for most people, early retirement means a significant drop in income. And that would reduce most individuals’ spending power and lifestyle choices. So, when faced with that prospect at an early retirement age, the majority choose not to retire. Instead they opt to continue working to support their current and future lifestyle options. And that seems to be a more likely prospect for Mr E. But there’s no evidence that Niche seriously challenged his desire for early retirement. So I don’t think it met its obligations to challenge his objectives in light of what he would be giving up.

That said, it’s true to say that Mr E couldn’t have had the same level of flexible access to his DB funds as he could from a personal pension. While he could have chosen to take his DB funds early, if he’d wanted to take tax free cash (‘TFC’), then he would have had to take that at the same time as drawing a regular income from his pension. Whereas the personal pension would allow Mr E to draw down funds as he saw fit, once he’d turned 55. It’s also the case that Mr E could have taken 25% of his entire personal pension fund as TFC. But the DB scheme has stricter rules about how much can be taken as a tax-free lump sum. But while I can see why a higher lump sum, and more choice over how much to take and when, might have been an attractive prospect to him, I’m not persuaded that Mr E had any concrete need to take TFC at all or to vary his income throughout retirement. And if Mr E did need flexible access to funds, he could have arranged to take those from his savings or from his money purchase pension schemes.

I’ll repeat that I don’t think Niche gave Mr E all the information he needed in order to make a fully informed decision about the transfer. Whilst Mr E didn’t have any obvious need for TFC,

Niche's TVAS doesn't give the TFC figures at any age. The suitability report does say that Mr E could take TFC of around £73,000 at age 65. But the scheme's normal retirement age was 60 not 65. So it's not clear why Niche gave that date for Mr E taking TFC. Similarly, the suitability report said that Mr E could take a yearly pension at age 65 of £19,179. But that was Mr E's DB yearly pension entitlement at age 60, so I don't think Niche presented Mr E's DB entitlement clearly and in a manner that would not mislead.

It follows that I'm not convinced that Mr E had all the information he needed in order to decide whether or not it was in his best interests to transfer his DB funds so he could access those flexibly. I understand that the option of drawing all his pension income flexibly might seem like something that would be nice to have. But, I can't see that Mr E had any genuine need for that flexibility that would be worth giving up guaranteed benefits for. So I don't think it was in his best interests to transfer to achieve that.

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 lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr E. That's because whatever was left within his personal pension at the date of his death would be passed on to his family. And, if that happened before his retirement or soon after then that would likely be a significant sum.

In contrast the DB scheme would pay Mr E's wife two-thirds of his yearly pension after he died. But that pension would die with her. However, whilst I appreciate death benefits are important to consumers, and Mr E 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 E about what was best for his retirement provision. A pension is primarily designed to provide income in retirement – not a lump sum to family after death. But in transferring out of the DB scheme Mr E was essentially giving up a guaranteed, index linked, increasing income in retirement, in exchange for a potential lump sum for his family the size of which was dependent on investment performance and how much the fund had been depleted by at the time Mr E died.

I also think the existing death benefits attached to the DB scheme were underplayed. It's worth pointing out that Niche – incorrectly – referred to the spouse's pension in its suitability report as being only 50% (rather than two-thirds) of Mr E's yearly pension. So Mrs E's death benefit entitlement from the DB scheme was 66.6% of Mr E's yearly pension and that would be calculated as if he had not taken any TFC, even if he had, in fact, done so. That pension would be payable to her until her death. And I don't think Niche made the value of these death benefits clear enough to Mr E when compared to those available from a personal pension. Not only were they guaranteed and escalated but they were not dependent on investment performance or how much was left in the pot, whereas the sum available to Mr E's family on his death in a personal pension was.

Given the size of the CETV I can understand that Mr E might have thought that guaranteed a significant lump sum for his family on his death. But, the available fund was reliant on a number of factors, including investment growth. And a period of poor performance, particularly if the invested fund suffered losses, could reduce the sum available as a death benefit. Also, the fund would reduce as Mr E drew down money from it. So if he took higher sums from it in the early years of his retirement, then that could significantly reduce the amounts available to live off, let alone to leave as a legacy for his family on his death.

If Mr E genuinely wanted to leave a legacy for his family, which didn't depend on investment returns, I think Niche could have explored life insurance with him. I understand that such

cover can be expensive. But if he didn't want to pay a significant premium then Niche's starting point ought to have been to ask Mr E how much he would ideally like to leave to his family. It could then have looked into cover for that sum to find something affordable that met his needs.

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 E. And I think Niche should have made this clear to him.

Control

Niche said that by transferring from the DB scheme Mr E would gain control over how his pension was invested. But while Mr E did have some limited investment experience, I don't think he can be said to be a sophisticated investor. So I doubt that he had any genuine desire to start taking control of the investment decisions associated with his pension fund. And it's notable in any event that the funds Niche recommended Mr E invest in were managed funds that required no active investment management from Mr E. Also, Mr E would be paying Niche an ongoing service fee, of £1,500 a year, to give him investment advice. So, in practice, he would be delegating control of the investment decisions to financial professionals. It follows that I don't think this was a genuine objective for Mr E – it was simply a consequence of transferring away from his DB scheme.

Concerns over financial stability of the DB scheme

Niche said that Mr E had concerns about his DB scheme moving into the PPF. But it's anything but clear why Mr E would have those concerns. The evidence on file shows that Mr E's scheme was fully funded. And, as far as I'm aware, there were no genuine concerns over the DB scheme's sponsoring employer's solvency that could have meant that the scheme was likely to move into the PPF at any point in the immediate future. So I think Niche should have taken the time to explain to Mr E that his concerns on this point appeared to be without foundation. But there's no evidence it did that. Instead, it said that transferring his DB funds to a personal pension could allay those concerns. And given that there didn't appear to be any genuine reason to worry about the scheme funding I don't think Niche's advice was clear, fair and not misleading.

Summary

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

Ultimately, I don't think Niche's advice was suitable for Mr E. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr E 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 option to access his pension flexibly and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Niche should've advised Mr E to remain in his DB scheme.

In the interests of fairness I've thought about whether Mr E would've gone ahead anyway, against Niche's advice. I've considered this carefully, but I'm not persuaded that Mr E would have insisted on transferring out of the DB scheme, against Niche's advice. I say this

because Mr E wasn't a sophisticated investor; he had a "cautious balanced" attitude to risk that was unlikely to mean his investments would make him better off in retirement. And this pension accounted for a large part of his retirement provision. So, if Niche 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 have accepted that advice.

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

Further, Mr E's explained to us that the impact of Niche's advice has caused him sleepless nights and worry. That wouldn't have happened if Niche had advised him appropriately. So to address that I think Niche should pay Mr E £250.

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 E 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 would like his complaint to be settled in line with new guidance/rules. I consider it's fair that Niche calculates Mr E's redress in line with new guidance and rules when they come into effect.

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

The basic objective of the amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and policy statement, I'm satisfied that the changes still reflect a fair way to compensate Mr E.

Niche must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

For clarity, while Mr E 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.
In accordance with the regulator's expectations, this calculation should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.
If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr E'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 E 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 compensation amount must where possible be paid to Mr E within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Niche has received notification of Mr E's acceptance of my decision. Further, Niche must add interest to the compensation amount at the rate of 8% a year simple from the date any changes to DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes Niche to pay Mr E.

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

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

In addition it should pay Mr E £250 to address his distress and inconvenience arising from 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 Niche Independent Financial Advisers Limited to pay Mr E 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 Niche Independent Financial Advisers Limited to pay Mr E any interest on that amount in full, as set out above.

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

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Niche Independent Financial Advisers Limited pays Mr E the balance. I would additionally

recommend any interest calculated as set out above on this balance to be paid to Mr E.

If Mr E accepts this decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr E can accept my decision and go to court to ask for the balance. Mr E 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 E to accept or reject my decision before 11 April 2023.

Joe Scott
Ombudsman