DRN-3975695

The complaint

Mrs M complains about the advice Pension Works Limited (PWL) gave to her to transfer the benefits from her two defined-benefit ('DB') occupational pension schemes to a self-invested personal pension ('SIPP'). She says the advice was unsuitable for her and believes this has caused a financial loss.

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

What happened

A firm of financial advisers, which I'll call Firm G, which didn't have the necessary regulatory permissions to arrange pension transfers, had previously introduced Mrs M's husband to another pension advising firm to arrange the transfer of his DB scheme to a personal pension. In 2021 Firm G introduced Mrs M to PWL to discuss her pension and retirement needs.

PWL completed a fact-find to gather information about Mrs M's circumstances and objectives. It also asked her to complete a defined benefit transfer questionnaire. Amongst other things PWL recorded that:

- Mrs M was 58 years old married with one adult, non-dependent, daughter.
- Mrs M had finished work the previous year and considered herself retired.
- Her husband, Mr M, was 53, still working and earning around £82,000 a year. He had a net income of £3,700 a month which, after paying for bills and outgoings left £1,000 a month disposable income.
- They owned their own home (save for a nominal mortgage of £1).
- They had cash savings worth around £90,000.
- Mr M had a personal pension valued at around £630,000. He was also paying into his employer's pension scheme which had a value of around £65,000.
- They estimated that, once Mr M had retired, which he anticipated being once he'd turned 57, they would require an income of £3,000 a month.
- Mrs M had a personal pension with a fund value of around £10,000.
- She also had two DB scheme pensions from former employers. One, from an employer I'll call G, had a cash equivalent transfer value ('CETV') of around £59,250. That would pay Mrs M a pension of £1,778 at age 65. PWL said the critical yield (the growth rate require to match the benefits from the DB scheme by investing elsewhere) was 6.66%. It had calculated that should Mrs M wish to buy an annuity to match the DB scheme then this could cost her around £70,800 which was roughly £11,500 more than her CETV.
- Mrs M was also a deferred member of a DB scheme with a former employer I'll call T. That had A CETV of around £33,000 and would pay her a pension of around £1,320 a year. The critical yield to match the benefits from that scheme was 10.84% at age 65. PWL had calculated that an equivalent annuity could cost Mrs M around £52,100, which was around £19,000 more than T's DB fund CETV.

Mrs M completed an online attitude to risk assessment. PWL also discussed her risk appetite with her. She confirmed that she believed her risk appetite was six out of ten (with one being cautious risk and ten being high).

In line with the regulator's guidance, PWL initially completed "abridged advice". Having done so, Mrs M confirmed that she wanted PWL to provide full advice and would pay PWL's fee of £2,559 in order to do so.

PWL then produced its suitability report setting out its analysis and recommendations. It recommended that Mrs M should transfer the funds from both her DB schemes into a named SIPP. It noted that Mr M had suitable income to cover both their income needs in retirement. And that Mrs M had 100% capacity for loss. It said that by transferring Mrs M could access her pension funds flexibly and in a tax efficient manner, reducing her income once her state pension became payable. It added that Mrs M would pay Firm G 0.5% of her fund value each year for ongoing financial advice.

Mrs M went ahead and transferred both DB scheme funds to the named SIPP.

In May 2022 Mrs M complained to PWL that the advice to transfer wasn't suitable for her. PWL didn't uphold her complaint. Mrs M then brought it to us. One of our investigator's looked into it. He didn't think PWL had dealt with Mrs M fairly so he said it should compensate her for any loss she'd suffered as a result of its unsuitable advice. He also recommended that it should pay her £300 to address her distress and inconvenience arising from that advice.

PWL didn't agree with our investigator's assessment of the complaint. Amongst other things it said its advice was suitable, in line with Mrs M's attitude to risk and met her objectives. It added that its cash-flow models demonstrated that Mrs M would be better off by transferring. Our investigator wasn't persuaded to change his view of the complaint so it's been passed 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 both Mrs M and PWL have made a number of detailed points. I've considered everything on file and listened to the call recordings that PWL helpfully provided. 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 Mrs M's 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

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 PWL'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 broadly similar reasons to those our investigator gave.

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, PWL should have only considered transfers if it could clearly demonstrate that those were in Mrs M's best interests. And having looked at all the evidence available, I'm not satisfied they were in her best interests.

Financial viability

PWL carried out an appropriate pension transfer analysis report (as required by the regulator). That showed how much Mrs M's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme (the critical yield). It also provided a transfer value comparator ('TVC'), which showed what it could cost Mrs M to buy an annuity which matched the DB scheme benefits.

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.

Mrs M was 58 at the time of the advice. She had no intention of working again and considered herself to be retired. But she wasn't taking any retirement income at that point and it's clear that Mr M's salary was supporting both of them. Mrs M's DB schemes both had a normal retirement age of 65. The critical yields required to match Mrs M's benefits at age 65 was 6.66% for a full pension from G and 10.84% for a full pension from T. While PWL has commented in its suitability report that Mrs M wanted to maximise her tax free sum, it's not documented on file that Mrs M had any desire to take a tax-free lump sum from her DB funds immediately, or what she needed this money for.

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 3.3% per year for 6 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, Mrs M's high medium attitude to risk and also the term to retirement. There would be little point in Mrs M 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, the lowest critical yield was 6.66% so her reinvested funds would have to perform particularly well in order to match the benefits from the DB schemes. Similarly, PWL's TVCs show that, in order to achieve equivalent benefits from an annuity, Mrs M would have to spend around £30,000 more than her CETVs were worth together. So I think Mrs M 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.

I should say here that I'm not convinced Mrs M's attitude to risk was in fact six out of ten, which I'd consider to be high-medium. It doesn't seem to me that she had the knowledge or experience to understand or accept the risks that such an investment strategy would pose, even if she did have some capacity for loss. However, for the purpose of this decision I don't think it makes a difference. That's because even if Mrs M did have a high-medium attitude to risk, as I've said above, I think it's unlikely she would be able to match, let alone exceed the relevant critical yields and so would likely be worse off even if PWL had assessed her risk appetite as lower than six out of ten.

PWL has provided cashflow models which it says show Mrs M would've been able to meet her needs despite the high critical yields. It says that these showed, at Mrs M's life expectancy of 87, she and Mr M could expect to have accrued savings of £1,015,313 compared to a lower sum of £947,407 if she took her pensions from the DB schemes. In other words it says its models show that Mr and Mrs M would be better off if Mrs M transferred her DB funds to a SIPP. However, the models PWL refers to assume that Mr and Mrs M's pensions investments will all grow at 5.99% each and every year.

Furthermore, PWL's models also include a "stress test" scenario where the transfer value and pensions investments fell by 20% in the first couple of years and then grew at variable return rates after that. That model shows that Mr and Mrs M would have considerably reduced saving of £507,727 when Mrs M was age 87, which is only around 54% of the model where Mrs M took her DB funds directly from the schemes. So PWL's models show that if there were periods of poor performance and the investments suffered losses, Mrs M's financial assets would be lower in the long-term than if she kept her DB pensions.

Also, as PWL will know, past performance is no guarantee for future performance and so a consistent year on year return of 5.99% seems unlikely. 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. Also it's notable that while PWL said that matching the income from G's DB scheme *was* potentially achievable it said that matching the income from T's DB scheme was not. So I think PWL recognised that Mrs M was likely to be worse off by transferring. PWL said it recommended transferring anyway as Mrs M wasn't looking to copy the DB scheme benefits and was prepared to give those up in order to access her benefits tax efficiently. But just because an individual is prepared to give up benefits doesn't mean that it's in their best interests to do so.

In summary, Mrs M was likely to be worse off by transferring. So I don't think a transfer out of the DB schemes was in her best interests. Of course financial viability isn't the only consideration when giving transfer advice, as PWL has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below. When doing so I've been mindful that PWL's role was to find out what Mrs M's wants and needs were and why. Its role wasn't simply to do what she wanted without appropriate analysis and challenge of her motives for doing so, in order to ensure its recommendation was in her best interests.

Flexibility and income needs

PWL's said that transferring her DB schemes' funds allowed Mrs M to access those flexibly. And I've noted that Mrs M rated control over how she could access her funds as being her number one priority in retirement. But, while that might have been something that was nice to have, I don't think Mrs M required flexibility in retirement. This is because based on the evidence I've seen, I don't think she had a genuine need to access her DB scheme funds earlier than the schemes' normal retirement age. I say this because Mrs M had already retired, she had no intention of going back to work again and, as a result, she had no income of her own. But it's apparent that Mr M's salary was supporting both of them. So she had no need to access her DB funds at all at the time that PWL gave its advice.

In response to our investigator's assessment of the complaint PWL said that the question shouldn't be why should Mrs M have accessed her funds when she did but why shouldn't she have taken those then. I think the answer to that question is a simple one. In transferring she was putting her otherwise safeguarded benefits at risk. She had no desire to take those benefits at that time, so she had no reason to take the risks of losing or reducing those. In my view, it simply wasn't in her best interests to do so just to have flexibility she had no need for.

PWL has now argued that by transferring when she did Mrs M was able to benefit from the high CETV rates that were available at the time. And its pointed out that, owing to market conditions, CETV rates have now fallen and that this was predictable. It is the case that CETV rates have since fallen, and PWL might well have been anticipating that. However, I don't think that is something it could've been certain about and as far as I can see this is not something that PWL referred to at any point during the advice process. It doesn't refer to this in its suitability report as being a reason to transfer at that point in time. And it didn't discuss this with Mrs M when it asked her in its phone calls why she should transfer then. So I don't think this was genuinely a reason it recommended transferring as, if it was I would have expected PWL to refer to it. But it didn't do so. And in any event, securing the value of the CETV is only relevant if transferring out of the scheme was suitable for Mrs M and in her best interests. As I've set out above and will continue to explain below, I don't think it was.

Further I can't see evidence that Mrs M had a strong need for variable income throughout her retirement. This is because it's apparent that the majority of her income in retirement would come from Mr M's pension. So Mrs M had no need to access her benefits flexibly, either immediately or at her normal retirement age of 65. But by transferring when she did she was putting those funds at risk. It's evident that Mr M's private pensions were all exposed to investment risk, whereas Mrs M's DB income was guaranteed. In light of this, I don't think giving up their only guaranteed source of private pension income was in Mrs M's best interests.

I've noted PWL's point that, given that Mr M had a healthy pension fund, Mrs M didn't need her pension at all and Mr M's pension investments provided a large capacity for loss. So she could afford to take investment risks as her DB schemes' income would only represent a small fraction of their joint retirement income. I agree that's the case. But, apart from a small personal pension worth a total of around £10,000 and her state pension, Mrs M had no other pension provision of her own. So should circumstances have changed and Mr M was no longer in a position to support her then her DB funds could have increased her income by over 38% a year above her state pension level. And while that scenario might have seemed less likely to happen, given that she had no reason to put any of her pension at risk, I think it's a point PWL should have raised with her.

Further PWL's commented that the regulator says that one reason a DB transfer might be suitable is where the consumer concerned has no need for the funds. And it would seem to be the case that Mr M's retirement income alone would be enough to support both Mr and Mrs M. So I can understand why it's raised this point. But, I think that overlooks the point I've made above that, if for some unforeseen reason Mrs M could no longer rely on Mr M's pension income, for example if those were eroded by market crashes or some other unexpected events, then the DB scheme income could have been very important to her. But it doesn't appear PWL considered that possibility when making its recommendation.

Indeed I've noted that PWL spoke with Mr and Mrs M about why they were considering transferring her DB funds at that time. And Mr M answered that it would allow them to know what they would have access to once they reached retirement age. But in fact the opposite was true in terms of Mrs M's DB schemes' income. The precise amounts the DB schemes would pay Mrs M would depend on inflation and how the indexation levels her DB schemes guaranteed increased her pension entitlement each year. But Mrs M could be certain that she would receive a guaranteed income, thought to be over £3,000 a year from both schemes. But, by transferring those funds to a SIPP her income levels would depend on the investment performance of the SIPP and that could be subject to losses. So transferring wouldn't allow Mr and Mrs M to know what income they'd have in retirement, instead it would only enable them to try and benefit from any investment growth. So I don't think transferring really helped them to understand what their income would be in retirement.

Also, I've noted that PWL commented in its suitability report that transferring would allow Mr and Mrs M to buy a campervan to indulge in their shared hobby. But Mr and Mrs M had considerable savings which they could have used for such a purpose if they wanted to. There was certainly no need for Mrs M to give up the guaranteed benefits of her DB scheme in order to be able to do that.

That said, it's true to say that Mrs M couldn't have had the same level of flexible access to her DB funds as she could from a SIPP. For example if she'd wanted to take a tax free lump sum, then she would have had to take that at the same time as drawing a regular income from her pension. Whereas the SIPP would allow her to draw down funds as she saw fit. It's also the case that Mrs M could have taken 25% of her entire SIPP fund as a tax free lump sum. But the DB schemes has stricter rules about how much she could take as a lump sum. But, as far as I can see, Mrs M didn't express any desire to take a tax free lump sum. So I don't think that was something she needed to have. I can understand that greater choice over how much to take and when might have been an attractive prospect for Mrs M. But, as I've said above if she did need flexible access to funds, she could have arranged to take those from her cash savings in the first instance while still having a guaranteed income from her DB scheme once she reached 65. And I think PWL should have made the advantages of that clear to Mrs M.

As I've said above I understand that the option of drawing all her pension income flexibly might seem like something that would be nice to have. But, I can't see that Mrs M had any genuine need for that flexibility that would be worth giving up guaranteed benefits for. So I don't think it was in her best interests to transfer her DB funds 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. In this case Mrs M has provided some contradictory information about the importance of death benefits to her. For example when telling PWL what her priorities for retirement were she didn't rate death benefits highly. Similarly when discussing her needs on the phone she said that she was more concerned about what she wanted to do in her own lifetime rather than provide death benefits. But when completing the defined benefit transfer questionnaire, she "strongly agree(d)" that she would want any residual money from her DB fund passed to her dependents in the event of her death, rather than Mr M receiving the guaranteed income that he would otherwise be entitled to from the DB schemes. So I can understand why PWL believed that this was an important factor for Mrs M.

The lump sum death benefits on offer through a personal pension or a SIPP is often an attractive feature to people considering a DB transfer. That's because whatever was left within a personal pension or SIPP at the date of death would be passed on to family. And, if that happened in Mrs M's case before she'd accessed her funds then the amount to pass on as a legacy would be a significant sum. In contrast the DB scheme would pay Mr M two thirds of her yearly DB pension entitlement after she died. And that pension would die with him so Mrs M couldn't leave it as a legacy for her adult daughter. But, whilst I appreciate death benefits are important to consumers, and this might have been a factor that came into play when Mrs M was considering a transfer, the priority here for PWL was to advise Mrs M about what was best for her 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 Mrs M was essentially giving up a guaranteed, index linked, increasing income in retirement, for the potential for a lump sum for her family that they may not need for many years to come.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mrs M.

Summary

I don't doubt that the flexibility and control on offer through a SIPP would have sounded like attractive features to Mrs M. But, as I've said above, PWL wasn't there to just transact what Mrs M might have thought she wanted. The adviser's role was to really understand what Mrs M needed and recommend what was in her best interests.

I've noted that PWL did take time to explain some of the risks that Mrs M was taking by transferring. And, there's certainly no suggestion that PWL tried to cajole Mrs M into a transfer against her will. Also from the answers she gave to PWL during its fact-find and risk assessment process, I can understand why PWL gained the impression Mrs M didn't object to taking risks with her DB scheme funds. But the fact that Mrs M gave PWL the impression that she was happy to take on the risk of being worse off in retirement, doesn't mean it was in her best interests for her to expose her safeguarded funds to those risks.

As I've said above, the regulator's starting position, which PWL referred to while going through the advice process, is that transfers aren't suitable for the majority of people. And advising firms like PWL should only make a recommendation to transfer where they can clearly demonstrate on contemporaneous evidence that a transfer is in a consumer's best interests. And that's not the same as saying that a transfer is something that the consumer is prepared to take a chance with. And I think that was the situation here.

Ultimately, I don't think the advice PWL gave to Mrs M was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs M 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. So PWL shouldn't have advised her to transfer out of her DB schemes in order to gain flexible access to her funds that she didn't need. That wasn't worth giving up the guarantees associated with her DB schemes for.

So, I think PWL should have advised Mrs M to remain in her DB schemes.

Of course, I have to consider whether Mrs M would've gone ahead anyway, against PWL's advice. PWL argues that this is the case, and I've thought about it very carefully. I've noted that Mr M had previously transferred his DB benefits to a personal pension. So it's likely that another advising firm had told him doing so was in his best interests and he assumed the same would be the case for Mrs M. So he and Mrs M might have had a preconceived notion about what they wanted to do at the beginning of the advice process. But I'm not persuaded that Mrs M would've insisted on transferring out of the DB scheme, against PWL's advice. I say this because she was an inexperienced investor and this pension accounted for a significant part of her own retirement provision. So, if PWL had provided her with clear advice against transferring out of the DB schemes, explaining why it wasn't in her best interests, I think she would have accepted that advice.

In light of the above, I think PWL should compensate Mrs M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And, as learning that PWL had given her unsuitable advice was a source of distress and inconvenience for her I think it should pay her £300 to address that.

For completeness I'll add that Mrs M has now transferred her funds from the SIPP into another personal pension. PWL asked us to confirm who had advised her to do that. While it's not for me to pass on details of Mrs M's current advising firm. As far as I'm aware it was a new advising firm and not Firm G who initially introduced Mrs M to PWL.

Putting things right

A fair and reasonable outcome would be for PWL to put Mrs M, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs M would have most likely remained in the occupational pension schemes if PWL had given suitable advice.

PWL must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, although Mrs M is retired, she has not taken any of her benefits and she has no plans to do so at present. So, compensation should be based on the schemes' normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs M's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, PWL should:

- always calculate and offer Mrs M redress as a cash lump sum payment,
- explain to Mrs M before starting the redress calculation that:
    - her redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest her redress prudently is to use it to augment her defined contribution pension
- offer to calculate how much of any redress Mrs M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs M accepts PWL's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mrs M for the

calculation, even if she ultimately decides not to have any of the redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs M's end of year tax position.

Redress paid to Mrs M as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, PWL may make a notional deduction to cash lump sum payments to take account of tax that Mrs Ms would otherwise pay on income from her pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mrs M's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

Determination and money award: I uphold this complaint and require Pension Works Limited to pay Mrs M the compensation amount as set out in the steps above.

If Mrs M accepts this decision, the money award becomes binding on Pension Works Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 8 June 2023.

Joe Scott
Ombudsman