The complaint

Mr H complains about the advice given by Chequers Wealth Management Limited (Chequers) 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

Mr H approached Chequers in 2016 to discuss his pension and retirement needs. I understand that Mr H was introduced to Chequers by an Independent Financial Adviser (IFA) as he wanted to look at transferring some deferred benefits he had in a DB scheme. This IFA wasn't authorised to give pension transfer advice.

Chequers completed a fact-find to gather information about Mr H's circumstances and objectives. This was very brief and is undated as far as I can see. It only seems to comprise one page and it's not clear if Mr H had sight of it. Nevertheless, this showed that Mr H:

- Was 43 years old and was recently divorced.
- Had three dependent children.
- Was a full time student, with a part time self-employment income of around £2,500 a year. He also received benefit income of around £14,000 a year.
- He lived in rented accommodation and didn't have any other savings, investments, or debts

Mr H was declared bankrupt in December 2015, he was discharged from this bankruptcy in December 2016. I understand he had problems getting employment after this which is partly why he returned to full time study. Chequers does not seem to have been aware of this at the time.

Mr H had deferred benefits in a DB scheme. This had a current value of £58,000 which was 30% of the full value of the benefits. 70% of this pension had been assigned to Mr H's ex-wife as part of their divorce proceedings.

Chequers also carried out an assessment of Mr H's attitude to risk, which it said was 'balanced'.

Chequers has provided a suitability report but it's not clear exactly when this was issued. It advised Mr H to transfer his pension benefits into a personal pension with a third party provider and invest the proceeds in one of its managed funds. This transfer went ahead in 2016. The suitability report said the reasons for this recommendation were that Mr H:

- Wanted to look at taking the benefits from his pension arrangements flexibly in retirement. He did not want to be limited to taking a fixed amount of income or tax free cash.
- Wanted to ensure his pension fund went to his children, or other nominated beneficiaries, rather than his ex-wife. He felt this was important as his ex-wife had received a large part of this pension as part of their divorce

In November 2018 Mr H transferred the personal pension into a self-invested personal pension ('SIPP') with a third party. This arrangement ultimately invested in a range of higher risk investments that are now much reduced in value.

Mr H complained in 2021 to Chequers about the suitability of the transfer advice. He said that:

- He was informed that the transfer would result in higher pension benefits.
- He felt the sale was pressured as it took place over one day and was possibly as short as 30 minutes. He was already under duress due to his personal situation and his related need for the pension to perform well.
- It was discussed that he should transfer the personal pension to a SIPP to improve the potential for growth after a few years. But this has resulted in the almost total loss of his funds.
- He says this reduction in his pension fund has caused a great deal of distress. He shouldn't have been given advice about a pension transfer when his life was 'in turmoil'.

Chequers didn't uphold Mr H's complaint. It said:

- The advice to move to a personal pension was suitable for Mr H and met his needs at the time.
- His personal pension fund value had grown by a reasonably high amount before he switched it to a SIPP. This would have continued going forward and he had a good chance of improving on the DB scheme benefits.
- It wouldn't have recommended that Mr H move his pension to a SIPP so it shouldn't be responsible for any losses he may have suffered due to this.

Mr H referred his complaint to our service. An investigator upheld the complaint and recommended that Chequers pay compensation. He said that whilst there was a possibility that the transfer was financially viable, he didn't think Mr H had the capacity to risk his pension benefits. He was at a vulnerable point in his life, and this seemed to be his only asset. The reasons for the transfer seemed generic and weren't persuasive. He thought that if Chequers had advised Mr H properly, he wouldn't have transferred.

Chequers disagreed, saying:

- The initial advice was suitable for Mr H as he did want flexibility and the projected income from this pension was inadequate for him to live off on its own.
- The benefits he gave up were outweighed by the benefits he gained due to the transfer, and he could have used the fund as a deposit to purchase a property.
- He was on course to be better off in retirement due to the transfer before he moved the funds to a SIPP.
- The financial loss is wholly due to the reckless investment decisions taken after Chequers gave advice.

There was some further correspondence, but the investigator wasn't persuaded to 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 Chequers' 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, Chequers should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

The sales process in general

Mr H has said that the sales process was rushed and very brief. I think the documentation from the time of sale does support what he says. There was a very small amount of information gathered about his circumstances. And the information Chequers recorded about his objectives seems to be generic, that is they were objectives that would appeal to most people in most circumstances, rather than being specific to Mr H.

And this should be contrasted with Mr H's circumstances at the time of sale. He was recently divorced, and he was not yet discharged from bankruptcy. He'd had to make significant changes, due to these factors. Added to this he was currently finding it difficult to find work and he was living in rented accommodation. He didn't have any savings or assets to fall back on. Because of this his financial, and personal, situations were precarious, and I agree he was vulnerable at the time of sale. It looked like his situation would remain like this for the foreseeable future.

So Chequers should have looked in detail at Mr H's situation and given thought to whether it this was the right time to give him advice on his pension planning. As a starting point, I'm not persuaded that it was, and I don't think it was treating him fairly when it did give only pension related advice. Rather than, for example, any advice it could have given him to make his situation more stable.

I’ve borne this in mind when I’ve thought about the advice that Chequers did give.

Financial viability

Chequers carried out a transfer value analysis report (as required by the regulator) showing how much Mr H’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 H was 43 at the time of the advice and wanted to retire between the ages 55 and 60. The critical yield required to match Mr H’s benefits at age 60 was 3.25% if he took a full pension and 3.11% if he took tax free cash and a reduced pension. The critical yield required to match Mr H’s benefits at age 55 was 2.79% if he took a full pension and 1.79% if he took tax free cash and a reduced pension.

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 discount rate was 5.3% per year for 16 years to retirement. For further comparison, 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 H’s attitude to risk and also the term to retirement. There would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

Looking at the discount rates alone I think there was a possibility that Mr H could receive better benefits through the transfer. But there was a risk that he may not. And Chequers said about this in the suitability letter:

‘It is therefore unrealistic to expect the transfer option to provide a secure income equal to or better than the existing scheme, retaining within the existing scheme remains the best option to provide a secure retirement Income although this option would not offer flexibility which is required.’

So, I think the most important consideration here was did Mr H have the capacity to take this risk and could he withstand receiving benefits of a lower overall value than the occupational scheme at retirement, as a result of investing in line with his attitude to risk. If this came to pass.

As I’ve outlined above, Mr H’s circumstances were very difficult. He had recently undergone some significant changes in his life and was in a precarious financial situation. This pension seemed to be his only financial asset. And it doesn’t seem likely that this would change soon. So, I don’t think that Mr H did have this capacity to take on this increased risk. And so, I think advising him to do this wasn’t right.

For this reason alone, a transfer out of the DB scheme wasn't in Mr H's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Chequers has said in this case. There might be other considerations which mean a transfer is suitable despite providing overall lower benefits, Chequers said that Mr H wanted greater flexibility with his pension arrangements and improved dependents benefits. I've considered these below.

Flexibility

One of the main reasons that Chequers says that the advice was suitable for Mr H was that it could provide flexibility in his retirement.

It wasn't recorded what Mr H needed in retirement. If he took benefits from the DB scheme at 60, he would be entitled to an annual income of just under £2,000, or tax free cash of £8,000 and an annual pension of £1,500. And he would receive his state pension in time. This may not have met Mr H's total needs at retirement, but I think the guaranteed income from the DB scheme would have been useful to meet his retirement expenditure.

But, overall, I don't think Mr H required flexibility in retirement. This is because based on the evidence I've seen, I don't think he had a genuine need to access his tax free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I also can't see evidence that Mr H had a strong need for a variable income throughout his retirement. Neither of these seemed to have been discussed.

Chequers has said that Mr H may have wanted to purchase a property with the tax free cash in due course. But I can't see a mention of this in the time of sale documents. And given what I know about his circumstances, this would have been a remote prospect at the time of advice. So, I don't think this would be a good reason for him to make the transfer, if it was discussed at the time of sale.

Furthermore, Mr H was only 43 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr H had around 16 years before he would usually think about accessing this pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme.

So, I don't think it was a suitable recommendation for Mr H to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr H later had reason to transfer out of his DB scheme he could have done so closer to retirement.

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 H. Particularly as Mr H may have indicated that he would like the benefits of his pension to go to his children rather than his ex-wife.

But whilst I appreciate death benefits are important to consumers, and Mr H 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 H about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Chequers explored to what extent Mr H 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. It's not clear what arrangements Mr H had with his ex-wife as part of their divorce, but Mr H did have dependent children. And so, the dependents pensions provided by the DB scheme would've been useful if Mr H predeceased them. I don't think Chequers made the value of this benefit clear enough to Mr H. 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, Chequers should not have encouraged Mr H to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

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

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 H. And I don't think that insurance was properly explored as an alternative.

Control

I think Mr H's desire for control over his pension benefits was overstated. Mr H was not an experienced investor, and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr H – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

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

Summary

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

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr H 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. As our investigator said the reasons given for the transfer were based on very limited information and were seemingly generic. They don't seem to have taken into consideration the reality of Mr H's circumstances and in particular his vulnerabilities at the time.

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

Of course, I have to consider whether Mr H would've gone ahead anyway, against Chequers' advice.

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against Chequers' advice. I say this because Mr H was an inexperienced investor with very low capacity for risk and this pension accounted for the majority of Mr H's retirement provision so far. So, if Chequers 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 H's need for flexibility was so great, if it existed at all, or that he wanted to increase his retirement income to the degree 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 Chequers had explained that Mr H could better meet his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr H would have insisted on transferring out of the DB scheme.

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

Firm A's responsibility for loss

As I've outlined above Mr H transferred the investments at a later date into what look to be investments with a much higher risk. These have fallen significantly in value now and it's not clear if he can access them. He was given advice by a third party I'll call Firm A to do this

Chequers has said that Firm A has separately caused Mr H's loss. So, I have considered whether I should apportion only part of the responsibility for compensating the loss to Chequers. In the circumstances, though, I think it fair to make an award for the whole loss against Chequers.

Chequers should not have recommended Mr H transfer out of his DB scheme. And it was only as a result of Chequers' involvement that Mr H transferred the funds held in his DB scheme to the personal pension. Chequers' role was pivotal, since the eventual investments were fully reliant on the funds being transferred first. If that hadn't happened, Mr H couldn't have invested as he did. So, in my view, the entirety of Mr H's loss stems from Chequers' unsuitable advice to transfer away from his DB scheme.

And as I said above, I've had to bear in mind Mr H's overall situation. This was a very vulnerable time for him and giving him advice to transfer was wrong. He's said that he made the initial transfer, and the transfer to the SIPP, for the same reasons. That is, he wanted to ensure the highest returns possible to be able to live off the pension he had at retirement. It's not clear if Chequers discussed whether Mr H would transfer to a SIPP in the future, but I think the DB transfer advice set him on the path that enabled, and led to, his subsequent decision to move the funds again.

So, for this reason also, I think holding Chequers responsible for the whole of the loss represents fair compensation in this case.

Our Investigator recommended that Chequers also pay M £600 for the distress caused by the unsuitable advice. I don't doubt that Mr H has been caused distress and concern in relation to his retirement planning. And from what he has said it seems reasonable to say that this is significant. He's shown that his mental health, and general wellbeing, have been affected by this change in pension 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 H whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect.

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr H.

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

For clarity, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, 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 H's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H'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 H 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 H within 90 days of the date Chequers receives notification of his 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 Chequers to pay Mr H.

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.

My aim is to return Mr H to the position he would've been in but for the actions of Chequers. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined. In this case either the investments have a very low value or they cannot be accessed.

If the investments are illiquid, to calculate the compensation, Chequers should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Chequers is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Chequers has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Chequers may ask Mr H to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives.

Chequers will need to meet any costs in drawing up the undertaking. If Chequers asks Mr H to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mr H wish to move his investment portfolio) and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by Chequers taking over the investment, or this is something that Mr H can discuss with his SIPP provider directly. But I don't know how long that will take. Third parties are involved, and we don't have the power to tell them what to do.

To provide certainty to all parties, I think it's fair that Chequers pay Mr H an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

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

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Chequers Wealth Management Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Chequers Wealth Management Limited to pay Mr H any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Chequers Wealth Management Limited to pay Mr H any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Chequers Wealth Management Limited pays Mr H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

If Mr H accepts this decision, the money award becomes binding on Chequers Wealth Management Limited.

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

Andy Burlinson
Ombudsman