

The complaint

Mr B has complained that TenetConnect Limited's appointed representative, Surebond Limited, gave him unsuitable advice to transfer his defined benefit occupational pension ('DB') scheme to a personal pension plan. I will refer to TenetConnect Limited (TenetConnect) throughout this decision.

What happened

In 1994 TenetConnect advised Mr B to transfer his preserved benefits in the Mineworkers Pension Scheme (MPS) to a personal pension plan. The basis for the recommendation was recorded as the potential for bettering Mr B's MPS benefits.

Mr B's pension benefits were transferred to a new provider on 7 September 1994, for a cash equivalent value of £61,142.44. Three years later, through a different financial advisory firm, Mr B switched his pension plan to second new provider.

Shortly after Mr B's 52nd birthday, in February 2007, he withdrew a tax-free lump sum in the region of £32,500 and set up two annuities providing a reduced level income (due to the tax-free cash lump sum) of approximately £5,100 per year. He also paid for a guarantee to ensure payments to his wife in the event of his death.

In 2019 Mr B made enquiries through the National Union of Mineworkers to find out what benefits he would've received had he not transferred out of the occupational pension scheme. Following this, Mr B raised a complaint January 2020 centred on two main issues. Firstly, Mr B said that he would've been receiving a higher pension if he hadn't transferred. Secondly, he said his wife would have the potential of higher pension benefits if he pre-deceased her. In summary, therefore, he felt the advice he had received from TenetConnect in 1994 to transfer his pension benefits was unsuitable.

TenetConnect told Mr B his complaint had been made too late, and that they were unwilling to look into it. TenetConnect highlighted a number of events or points in time by which they said Mr B should've reasonably become aware he had cause for complaint, including the advice given in 1997, receipt of ongoing pensions statements, and the setting up of annuities in 2007. As Mr B's 2020 complaint was made more than six years after the original advice was given, and more than three years after TenetConnect said he should've been aware of cause for complaint, TenetConnect argued that Mr B's window for bringing the complaint had closed.

Mr B brought the complaint to this Service and our investigator found it had been brought in time and fell within our jurisdiction to consider. As TenetConnect didn't agree, the complaint was passed to me.

I issued my provisional findings in January 2023. In summary, while I agreed that Mr B's complaint had been made more than six years after the event complained about, I did not agree that Mr B should've reasonably known he had cause for complaint more than three years previously. I considered the various events that TenetConnect had highlighted, but I

wasn't persuaded that any of them would have set Mr B on the path to discovery that he had a complaint.

Having considered all the other available evidence, I concluded that Mr B's complaint against TenetConnect fell within our jurisdiction. As such, I went on to consider the merits of the complaint.

Having reviewed what we know of Mr B's financial circumstances at the time of the advice, I concluded that the security offered by the benefits Mr B had accrued in the MPS would've been important and valuable to him. As such, I wouldn't have expected Mr B to have been advised to give up these benefits, unless there was a reasonable chance of doing significantly better.

I noted that a Transfer Value Analysis (TVAS) was carried out to calculate how much Mr B's personal pension would need to grow by year on year to allow him to purchase the same benefits at retirement that would've been available to him had he remained in the MPS. TenetConnect advised Mr B that there was a reasonable expectation of achieving returns of more than the benchmark used (9.3%) and that there was a good chance of bettering his pension benefits following a transfer.

However, I also noted that the calculations were all based on a transfer value of £74,000.74, as per the value given in the February 1994 MPS benefit schedule. When the completion of the transfer was confirmed to TenetConnect in September 1994, the total amount was only £61,142.44. Had the calculations been redone with these updated figures, this reduction would've had a significant impact, raising the required yearly investment return from 9.3% to almost 11.3%. This exceeds the 10.8% upper limit for a Financial Viability Test set by the regulator.

As such, based on the actual transfer value in September 1994, and the unlikely prospect of attaining the required yearly investment returns of 11.3%, I found Mr B should've been advised to remain in the MPS rather than taking an investment risk that was unlikely to better the benefits he was giving up. Furthermore, I was minded to conclude that in relying on the February 1994 transfer valuation, rather than obtaining a more accurate, up-to-date transfer valuation, TenetConnect had not advised Mr B with the appropriate skill, care and due diligence required.

Although I was unable to say precisely what the updated transfer valuation would've been in July 1994, on the balance of probability, I concluded it would likely have been closer to the actual transfer value in September 1994 than the higher figure provided almost six months previously. Given the financial analysis appeared to have been the sole basis on which the transfer advice was given, I was minded to conclude that Mr B should've been to stay in the MPS.

Had Mr B been advised against the transfer, I thought he would've most likely accepted this advice and kept his MPS benefits as they were. As such, I provisionally upheld the complaint and explained I intended to instruct TenetConnect to pay Mr B fair compensation. In addition, I explained I was minded to instruct TenetConnect to pay Mr B £400 for the worry and upset caused to him during the course of his complaint.

Mr B has accepted my provisional decision. TenetConnect has not accepted my provisional decision and has reiterated its position that Mr B's complaint does not fall within this Service's jurisdiction to consider, on the basis that it has been brought outside the required timescales. In support of this, TenetConnect has made a number of arguments.

Firstly, TenetConnect has argued that when Mr B started taking his benefits in February 2007, he would've been able to compare this income with the projected income from the MPS at normal retirement date on his original transfer paperwork. Therefore, TenetConnect has said Mr B should've known he had a cause for complaint in February 2007 – almost thirteen years before he raised his complaint on 16 January 2020.

However, as explained in my provisional decision, I've reviewed the available documentation given to Mr B in 1994, and I'm not persuaded it would've provided him with a clear basis for comparison. The recommendation letter didn't specify the benefits Mr B could've reasonably expected to receive in retirement and, instead, simply stated that growth of between 6.5% and 9.3% would be required to match the MPS benefits he was giving up from age 60. Further information was available in one of the appendices to the actuarial report, but again this was based on a retirement date of 60.

I've not seen anything in the documentation from the time of advice which I believe would have clearly indicated to Mr B the level of lump sum and reduced pension he could reasonably expect to have received if he retired at 52, having stayed in the MPS until that point. For clarity, I'm not suggesting that the 1994 documentation *ought* to have provided figures based on a retirement date of 52, as Mr B presumably had not yet formulated these retirement plans at the time – only that without this information, the 1994 documentation was insufficient to be used as a basis for clear comparison in 2007.

Secondly, TenetConnect has commented on a point discussed in my provisional decision, namely the question of whether Mr B's ongoing pensions statements should've reasonably alerted him that he might have cause for complaint, due to returns being lower than those illustrated at the time of the 1994 advice. I have stated that – in the absence of copies of these documents - we do not know what information was provided to Mr B, nor the format in which it was presented.

TenetConnect has argued that it is only reasonable to assume that the format would've been clear and accessible. However, even were I to accept this, it would have no bearing on the wider argument. As stated in my provisional decision, the 1994 projections covered a relatively long time period, and so any year-on-year discrepancies seen in statements – however clearly presented - might've reasonably been assumed to be fluctuations that would self-correct by the time Mr B retired many years in the future.

Lastly, TenetConnect has pointed to the advice Mr B received in 1997 when he switched his pension plan to a second new provider, and has reiterated its argument that Mr B would've been made aware he had a cause for complaint at this time. Specifically, TenetConnect has said, *“It is reasonable that his new IFA ought to have made him aware he had cause for complaint before he transferred his pension. Tenet shouldn't be held responsible for the performance of the pension after this point.”*

I don't think it is reasonable to assume that Mr B's adviser in 1997 would've commented on the suitability of advice given by a different adviser some years previously. Instead, the 1997 adviser's focus would've been on what was suitable for Mr B in light of his current circumstances in 1997.

Furthermore, even if one were to argue that the 1997 adviser should've been expected to comment on the quality of the previous advice (which I do not accept), I've seen no evidence that they actually did so in this case. Yet we do have evidence to the contrary; namely that Mr B has specifically told us he was not made aware of any cause for complaint until many years later. So, on the balance of probability, I find it unlikely that the 1997 adviser did anything to set Mr B on the path to discovery that he might have cause for complaint about the earlier advice from TenetConnect.

Neither party has made any further comments or submissions, and the deadline for responses has now passed.

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.

Having reconsidered the complaint again in its entirety, along with the additional comments that have been provided by TenetConnect, I have reached the same decision as before, and for the same reasons.

As such, I am upholding the complaint and instructing TenetConnect to put things right, as set out below.

Putting things right

A fair and reasonable outcome would be for TenetConnect to put Mr B, as far as possible, into the position he would now be in, but for the unsuitable advice. I think he would have remained in the occupational scheme. I therefore instruct TenetConnect to 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.

This calculation should be carried out as at the date of my final decision, 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 B's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into a pension plan for Mr B. 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 B 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 B within 90 days of the date TenetConnect 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 TenetConnect to pay Mr B.

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

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.

For clarity, Mr B purchased an annuity and took tax-free cash with his personal pension at the age of 52. Whilst I understand he hasn't fully retired, it is reasonable to assume that he would've taken benefits from the MPS at the same time instead, and so this date should be used as the basis for the calculations.

In addition, I instruct TenetConnect to pay Mr B £400 for the worry and upset caused to him, during the period he believed he would be materially worse off in retirement and that his wife would receive substantially lower pension benefits if he predeceased her.

As stated above, I consider a fair and reasonable way to redress Mr B is for TenetConnect to undertake a calculation in line with the guidance set out by the Financial Conduct Authority ("FCA") in its **Finalised Guidance (FG) 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.**

In my provisional decision I noted that on 2 August 2022 the FCA launched a consultation on changes to this guidance. This was followed by a policy statement, published on 28 November 2022, which set out the new rules and guidance that will come into effect on 1 April 2023.

I also noted that 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 that, 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.

In my provision decision, I explained that I considered it fair for me to give Mr B the same choice. As such, I asked Mr B to let me know in response to my provisional decision whether he wished for TenetConnect to calculate any compensation that may be owed to him:

- a) in line with the guidance in FG17/9
- or**
- b) in line with any new rules or guidance that will come into force on 1 April 2023.

Mr B has responded that he would like his compensation to be calculated in line with FG17/9. I am satisfied that this will provide fair redress for Mr B, and, as such I instruct TenetConnect to carry out its redress calculation in line with FG17/9.

Further information

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

My provisional decision is that TenetConnect should pay Mr B the amount produced by that calculation – up to a maximum of £160,000 plus any award of interest and/or costs/ interest on costs.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that TenetConnect pays Mr B the balance.

This recommendation will not form part of my final determination or award. TenetConnect doesn't have to do what I recommend. It's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept this decision.

My final decision

This Service can consider Mr B's complaint against TenetConnect Limited as it falls under our jurisdiction.

I uphold Mr B's complaint. My final decision is that TenetConnect Limited should pay the amount calculated as set out above. TenetConnect Limited should also provide details of its calculation to Mr B in a clear, simple format.

In addition, TenetConnect should pay Mr B £400 for the worry and upset caused to him during the course of this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 12 April 2023.



Ellie Clare
Ombudsman