DRN-4000304

The complaint

Mr D complained that he was given unsuitable advice to transfer his defined benefit (DB) Occupational Pension Scheme (OPS), to a type of personal pension plan recommended to him by a financial adviser.

Court Ross Financial Management Limited is responsible for answering this complaint. To keep things consistent, I'll refer mainly to "Court Ross".

What happened

These events relate to quite a long time ago and the information and documentation likely to have been relied on and used at the time is now limited.

However, it seems that in late 1991 Mr D asked Court Ross for advice in relation to transferring the benefits from his existing OPS – a large public sector scheme - to a type of personal pension arrangement. In the spring of 1992, Court Ross recommended that Mr D transfer away from the OPS and he followed that advice. The cash equivalent transfer value of the OPS as of March 1992 was around £7,375.

I've used the information I've been able to get from documents and from Mr D himself to help describe his circumstances of that time:

- At the time of the transfer away from his DB scheme, Mr D was 39 years of age. He was married to Mrs D who had a part-time job. They had two dependent children aged around 15 and 13.

- Mr and Mrs D lived in a mortgaged property with around £28,000 outstanding. There's so suggestion they had any other significant debts, and they had no other relevant assets. Mrs D didn't have a pension of her own and Mr D infers he may have had a small defined contribution (DC) pension in addition to his DB scheme. This small DC pension isn't related to this complaint.

- Mr D worked in the education sector and was, as of 1992, a *deferred* member of the OPS. That's because he'd evidently joined the scheme in September 1981 and left it in December 1987. This means he had accrued 6 years and 122 days pensionable service.

- Although Mr D left the education sector in December 1987, he returned to it in around 1990. However, he didn't take up the option of re-joining the OPS and continuing his DB pension accrual. This means Mr D remained a deferred member of the DB scheme with 6 years and 122 days accrued service, as before. The normal retirement age (NRA) of the scheme was 60 years old.

- Mr and Mrs D were said to be in good health as of 1992.

Mr D complained in 2022 to Court Ross about the suitability of the transfer advice as he now thinks the transfer was unsuitable and has caused him a financial loss.

Court Ross didn't uphold Mr D's complaint and said it thought he'd made it too late under the rules we work to. However, since he's referred his complaint to our Service, I've issued a jurisdiction decision explaining that I think the complaint is one we can look at. One of our investigator's has also looked at the circumstances and said that they think we ought to uphold Mr D's complaint about the transfer away from the OPS being unsuitable. Court Ross still doesn't agree, so I have been asked 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.

As I've said, these events are from over 30 years ago and so there were different rules in place at the time about pensions, and specifically, about the transferring of DB schemes to personal pension arrangements.

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 Court Ross's actions here.

The advice was provided by Court Ross in 1992 and the recommendation was for Mr D to transfer to a personal plan operated by a large and well-known pension provider of that time. A letter from the company that took over the provider confirms Court Ross wasn't 'tied' to the provider at the time of the advice. So, in my view, this means at the time Court Ross was a member of the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA').

The FIMBRA rulebook set out the expectations on members when giving advice. Examples of the key rules applying from April 1988 are set out, *although not limited to*, those below:

- Rule 4.2.1 required an adviser to take reasonable steps to obtain relevant information concerning a client's personal and financial circumstances in order to provide investment services.

- Rule 4.3.1 required FIMBRA members to take all reasonable steps to satisfy themselves that the client understood the risks involved in a transaction.

- Rule 4.4.1 required members to establish, based on their knowledge of the client and 'any other relevant information which ought reasonably to be known' to them, which types of investment that were the most suitable for them.

- The rules also said that advisers must ensure their recommendations were made based on the best interest of the client and were the most suitable for the client. They also provided that no transaction should be recommended if it could secure the objectives of the client more advantageously than the transaction recommended from the same or a different source.

So, Court Ross should have only considered a transfer if it could demonstrate that the transfer away from Mr D's deferred DB scheme was in his overall best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Introductory issues

As I've said, there is only a very limited amount of documentation and evidence available from the time of the advice. However, Mr D says he was recommended to approach Court Ross by a "friend of a friend" and he says that when he met with the firm he was advised to transfer out of the DB scheme and into a personal pension plan. He says he was told that the pension could grow by more outside the OPS and that this would mean it was better for him.

To demonstrate Court Ross's actions, I've seen evidence that it wrote to Mr D's then OPS pension provider in November 1991 asking to see the cash equivalent transfer value of his DB pension. Court Ross also later provided evidence to the DB scheme trustees of Mr D's personal details. I can also see the transfer away from the OPS was probably in around March 1992. And it seems that when he transferred, Mr D's CETV was moved over into two different personal pension policies with the new provider. References issued ended in '499' for the first and '127' for the second. I've assumed this was done to split the pension into two different funds as I've seen mention of a 'balanced' fund and also a 'with profits' fund.

I've also seen evidence of Court Ross providing ongoing financial advice / agency to Mr D in the years after the transfer and it continued to periodically ask for information about the value of the transferred funds in the two plans on Mr D's behalf. For example, Court Ross says it had specific dealings with Mr D around 1995 concerning the industry-wide Pension Review process in that it wrote to the pension provider seeking certain pieces of information. However, as my jurisdiction decision pointed out, it is now unable to provide the relevant paperwork about this.

I also know that in 2009, policy number 499 was made the subject of a Pension Sharing Order (PSO) with 100% being awarded to Mrs D who was divorcing Mr D.

For the other fund, policy number 127, it seems that around 18 years after the transfer, in 2010, Mr D still had this allocated in his own name and this wasn't subject of the 2009 PSO. However, it seems he transferred it from the pension provider to a SIPP (a type of self invested pension operated by another provider). As on 8 April 2010, the value in pension policy number 127 was £30,753 although there is some evidence this had been added to in the intervening years by Mr D.

So, to be clear, I think there's plenty of persuasive evidence that Court Ross acted for Mr D as of late 1991, throughout 1992, and beyond. I'm satisfied it recommended the transfer away from his DB scheme. And my previous jurisdiction decision confirms this complaint is one we can look into.

Financial viability of the transfer

If Court Ross really had put Mr D's pension transfer through the Pension Review process in the mid-1990s I think it's safe to say we'd probably now have much more information available about the financial viability of this transfer. Put another way, I'd expect to see evidence of the adviser having shown Mr D in 1992, some clear and understandable comparisons between either leaving his pension where it is – or transferring away and into a personal pension arrangement. However, because Court Ross can't produce any documents or evidence about Mr D's case going through a Pension Review, there's very little to compare the financial viability of a transfer against. There is nothing showing that this consumer could therefore make an informed decision.

In most cases, such a comparison is usually set out in the suitability report, where the adviser makes his / her recommendations. Reference is also usually made to a 'critical yield'

rate. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity income as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

However, unless we have a case we specifically know went through the Pension Review process and / or that the business carried out a Financial Viability Test (FVT), the 'critical yield' probably won't have been calculated. Instead, any personal pension illustrations the adviser obtained after July 1988 and before June 1994, as in this case, would have probably been based more on the regulator's prescribed growth rates (with charges being taken into account). But Court Ross hasn't been able to show us any information or documents at all from when it provided the advice. In my view, this is a significant failure on Court Ross's part as I'd expect to have seen the evidence of the Pension Review it claims to have applied to Mr D's case, and if it did this, the associated documentation about the financial viability and the case for the transfer. This failure means I can't confirm whether Mr D was able to compare the DB scheme properly or whether it was in his best interests transfer away at all.

Court Ross also hasn't been able to supply the original 'fact-find' that might have been carried out at the time of the advice, nor a suitability report which would have listed the recommendation rationale. However, we do still have access to the DB scheme CETV and general benefit information, along with illustrations about the new proposed personal pension scheme, so I've used these to help me think about what most likely happened.

The advice was given during broadly the same period covered by the subsequent Pension Review process, so the rates the regulator published for FVT are directly relevant here (sometimes these rates are also referred to as Discount Rates). We have no critical yield to show the level of investment return required to match the DB pension at retirement, but when the advice was given, our investigator pointed out that the regulator's upper limit for the FVT was 11.3% per year for 20 years to retirement.

For further comparison, the regulator's upper projection rate at the time was 13%, the middle projection 10.75%, and the lower projection rate 8.5% per year. Without evidence of the critical yield it is, of course, difficult to assess the actual growth required to match the DB scheme. And I can't say what Court Ross told Mr D what assumed growth it was projecting for his transferred funds. However, given the higher investment growth returns which were more common at the time, and as Mr D had about 20 years until retirement, it's likely Court Ross concluded that a personal pension would grow enough to provide a higher pension at retirement than the scheme he was already in.

However, as I've said, Court Ross can't show us this now as there's no evidence of the critical yield or any other comparator growth figure being given to Mr D. It therefore cannot be demonstrated that the level of growth outside the OPS would be sufficient to have exceeded the level of income the DB scheme would have provided at retirement. And there would be little point in Mr D transferring from a DB scheme only to receive long-term financial benefits of a lower, or even similar, value. That's because Mr D would also be giving up the valued guarantees and benefits normally associated with a DB scheme. I explain more about these benefits below.

With the limited information available I've also seen no evidence that Court Ross assessed Mr D's attitude to risk (ATR). This is important because it could reflect how much Mr D might expect his transferred pension to grow by allocating the money into funds with certain risk profiles. His ATR might also help reveal whether he fully understood his situation enough to ensure a transfer away from a DB scheme at all was in his best interests. But I've not seen anything to show Court Ross made it clear to Mr D what the risks were of him transferring. It

had a responsibility to make it clear to him that by transferring out of his DB scheme he would be giving up a guaranteed and index linked income in retirement and instead would be investing in a product that was subject to investment risk and the volatility of the financial markets.

I've noted at the time that Mr D was married, he had a mortgage, and he and Mrs D had two dependent children. There's also no evidence of them having any financial assets to fall back on such as savings, investments or other properties and his only other pension was described as small. Mrs D evidently had no pension. So, in this context, I don't think Mr D's situation merited an ATR of anything more than "low". On the upside, one could say he still had 20 years of working and therefore, some time for his new pension funds to grown in. However, in the absence of anything else, I also think his capacity for loss was low. This pension appeared to be his only meaningful retirement provision and I think there were already gaps in that provision given he'd left his profession and become self-employed. He had also declined to re-join the DB scheme in 1990 upon re-entering the profession and I think this would have meant losing out on valuable employer pension contributions.

These things therefore also lead me to fairly conclude that Mr D wasn't experienced in these types of pension matters, that he had a low ATR, and a low capacity for loss. Court Ross has produced no evidence that transferring away from the DB scheme was in Mr D's best interests from a financial comparability perspective.

Nevertheless, it's possible that the recommendation to transfer away wasn't based on financial comparisons alone. Court Ross hasn't put forward any other rationale for the transfer, but I have considered other possible reasons below. However, I start from the premise that Mr D was a deferred member of a large public sector pension scheme with secured funding.

Other possible factors that should have been considered in the transfer

- *His age / retirement plans*

I've considered Mr D's age at the time - we know he was still only 39 years old. Therefore, in good health and with a young and growing family, I think it's safe to say Mr D was barely even 'mid-career' and there's simply no likelihood of him having concrete retirement plans, or indeed any idea at all of what his retirement income requirements might be.

For the same reasons, there's also no indication or evidence that Mr D might have required any specific financial flexibility in retirement which merited him changing his pension at such a young age. In any event, he would have already had limited flexibility in his existing scheme which would have included the ability to retire early, or the choice between taking a retirement lump-sum or taking a full pension with no lump-sum. So, I don't think there's any evidence why Mr D's best interests wouldn't be served by him using his DB pension in exactly the way it was originally intended. Even if Mr D's preference was to embrace DC pensions from that point forward, I think that maintaining his existing DB scheme would have complemented such a strategy. And by contributing to a DC scheme for many more years, he'd have still been in a position where some of his retirement income was guaranteed through his 'original' pension.

Mr D was given some illustrations about the possible pension he might have with the new scheme. But this was still over 20 years away from his NRA. So, there was no apparent need for his retirement income to be flexible and Court Ross couldn't realistically say transferring met his income needs in retirement because it didn't know what these were. In my view, the illustrations were without any context as they were based on future market

performance and they were not 'like-for like' comparisons with Mr D's existing scheme and the values could have turned out lower. So, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits so young. If Mr D later had reason to transfer out of his DB scheme he could have done this much closer to retirement.

- *Control over his pension*

There's no evidence that Mr D was an experienced investor or that he had the interest or desire to manage his own pension funds going forward. I've considered that Mr D says he 'probably' had another small DC pension. However, there's no evidence this involved investment decisions from him or that he'd ever had other investments linked to the stock market (or similar). So, I don't think that obtaining personal control over his pension was a genuine objective for Mr D.

Mr D's OPS was already managed for him by trustees and I think the charges and costs associated with a personal pension would have been higher. I think that Mr D would have required ongoing financial support and guidance in managing his funds – the evidence tends to support this – and as this might have had to last for 20 more years, these costs would have been quite considerable, compared against the low costs likely found in his existing scheme.

- *Death benefits*

Again, there's no evidence suggesting this was a prominent feature of the transfer advice in Mr D's case. However, I think the death benefits attached to his existing DB scheme were likely to have been underplayed. Mr D was married and had children and so the spouse's and dependent's pension(s) provided by the DB scheme would have been useful to Mrs D if Mr D predeceased her. I think there were also benefits would have helped provide for support with their children whilst still in full-time education. I don't think it's credible that Court Ross made the value of these benefits clear enough to Mr D. This is because I think he would have considered them as being of great reassurance, especially as Mrs D didn't apparently have a pension of her own.

- *Suitability of investments*

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

Summary

It's unfortunate in this case that we have relatively little documentation to refer to. However, what I can say is that Court Ross is responsible for answering this complaint. The evidence clearly shows it was acting as Mr D's adviser and that it sought out information about his DB scheme from the trustees at the time. It then provided Mr D with advice, which recommended he should transfer away from his DB scheme to a personal pension arrangement. The evidence also shows that Court Ross maintained agency thereafter and continued to act as Mr D's adviser in the years after he followed its transfer-out recommendation.

Nonetheless, even without the information and documentation I'd expect to see in a case like this, I clearly think the advice given to Mr D was unsuitable. He was giving up a guaranteed, risk-free and increasing income with his existing DB scheme. And there were no financial comparisons which indicated he'd receive better, or even similar, financial benefits upon retirement as a result of transferring away. Mr D's transferred funds would need to grow very substantially, year-on-year, for over 20 years, just to match what he already had.

There were no other particular reasons which would justify a transfer and outweigh this. For example, he was still too young to have any retirement plans and his income needs in retirement simply couldn't be judged so early in life. Similarly, he had no real desire or capacity to manage his funds and would only incur higher costs in the future in being helped to do so. Finally, I don't think the death benefits associated with his DB scheme were worth giving up.

So, I think everything points to this DB pension being best used in the way it was intended. Mr D was still young, was married, had children, a mortgage and all the demands that come with family life. At the time, this pension was his main retirement provision by some way and it contained guaranteed benefits which I think were probably underplayed. In my view, Court Ross should have advised Mr D to remain in his DB scheme.

Of course, I have to consider whether Mr D would have gone ahead anyway, against Court Ross's advice. But I'm not persuaded that Mr D would have insisted on transferring out of the DB scheme, against Court Ross's advice. I say this because Mr D was an inexperienced investor most probably with a low attitude to risk. He likely paid for the advice. So, if Court Ross 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.

I've considered with great care, the fact we have so little documentation to refer to in this case. I've considered whether, in particular, it is fair to use my experience and opinion to determine what *most likely* happened, in the light of that lack of documentation. However, Court Ross ought to have kept some paperwork. The firm itself made a substantial challenge that Mr D's case would have been thoroughly reviewed under the Pension Review process. Of course, if that were true, then this Review was a significant event for regulated financial advisers in the pensions landscape and we see many cases where firms are able to produce the assurance I've been looking for above. Court Ross is at fault for being unable to produce the records we normally expect to see.

In my view, transferring away from a safe and guaranteed pension at the age of 39 would have required powerful, clear and documented rationale. Given Mr D could have had no real knowledge of what the future looked like, he had no need to change his pension strategy at that point.

It simply wasn't in his best interests.

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

Putting things right

A fair and reasonable outcome would be for the Court Ross to put Mr D, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr D would have most likely remained in the occupational pension scheme if suitable advice had been given.

Court Ross 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.

Compensation should be based on the scheme's normal retirement age of 60, as per the usual assumptions in the FCA's guidance. My understanding is that Mr D has depleted most of the pension fund.

This calculation should be carried out 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 Mr D'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, Court Ross should:

- calculate and offer Mr D redress as a cash lump sum payment,
- explain to Mr D before starting the redress calculation that:
    - their 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 their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts Court Ross's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr D for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr D's end of year tax position.

Redress paid to Mr D as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Court Ross may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr D's likely income tax rate in retirement – presumed to be 40%. So making a notional deduction of 15% overall from the loss adequately reflects this.

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 Court Ross pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Court Ross Financial Management Limited to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Court Ross Financial Management Limited pays Mr D the balance.

If Mr D accepts this decision, the money award becomes binding on Court Ross Financial Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 28 June 2023.

Michael Campbell
Ombudsman