

## **The complaint**

Mr H complains about the advice given by Co-operative Insurance Society Limited (CIS). This advice was to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a Section 32 buy out plan (S32 plan). He says the advice was unsuitable for him and believes this has caused a financial loss.

The Royal London Mutual Insurance Society Limited (Royal London) is now responsible for the policy and the advice given.

## **What happened**

Mr H met with an adviser from CIS in 1992 to discuss his pension and retirement needs.

CIS did gather some information about Mr H's circumstances and objectives, although I can't see that it completed a full fact find, or similar information gathering exercise. But I do know that at the time of sale Mr H was employed and earning between £10,000 and £15,000 a year, he had one dependent child and I understand he was married. He and his partner had a mortgage against the house they lived in. As far as I can see CIS didn't assess Mr H's attitude to risk.

In December 1992, CIS advised Mr H to transfer his DB pension benefits into the S32 plan and invest the proceeds in it's with profits fund. Mr H transferred £10,437.71 from his DB scheme in December 1992 to a CIS personal pension.

Mr H complained in 2021 to Royal London about the suitability of the transfer advice. His representative said that:

- Any fact finding that was done was poor, or didn't happen at all. Therefore, CIS did not have full knowledge of Mr H's circumstances.
- CIS did not properly establish his attitude to risk or any reasons for the transfer.
- CIS did not discuss the risks of the DB transfer, or the investment risks of the S32 plan.
- It also didn't explain the fees and charges Mr H would pay in the personal pension.

Royal London didn't uphold Mr H's complaint. It said that it had contacted him about the personal pension review in 1999. But he hadn't responded to this and so the sale was not reviewed. It said the time to perform a personal pension review had now passed. And so Royal London didn't think it should look at the transfer of Mr H's pension.

Mr H referred his complaint to our service. Royal London said that the Financial Ombudsman shouldn't consider this complaint as Mr H had brought it too late. An ombudsman has considered the jurisdiction of this complaint and decided that it wasn't brought outside of the time limits the Financial Ombudsman must work under. And it is a complaint that the Financial Ombudsman can consider. I won't revisit this Ombudsman's decision about our jurisdiction. I agree this complaint is within the Financial Ombudsman Service's jurisdiction for the reasons already given.

An Investigator went on to consider the merits of the complaint and upheld it. She recommended that Royal London pay compensation. She said that, in respect of the personal pension review, Royal London had said that if it had reviewed the sale it would have conceded liability. And it would have assessed if he had suffered a loss. So, it should do this now.

Royal London has only been able to provide very limited information about the DB transfer sale. And this information doesn't demonstrate that the sale was suitable for Mr H. So, it shouldn't have advised him to transfer.

Royal London disagreed, saying that it was likely that Mr H would have received the review letters and so it was right that it hadn't conducted a review. It didn't think the transfer was unsuitable for Mr H at the time.

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. 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 advice was provided by CIS in 1992. At this time it was a member of the Life Assurance and Unit Trust Regulatory Organisation ('LAUTRO').

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

I've considered the advice given to Mr H with this in mind.

#### *Personal pension review and jurisdiction*

I can see that Royal London did write to Mr H in respect of the personal pension review. An ombudsman has issued a decision about the jurisdiction of this complaint which found that it was more likely than not that Mr H didn't receive these communications. But the ombudsman said that if Mr H had received the communication's, it's likely he would have asked for his pension to be reviewed. As he had done for the other pensions that he had. Royal London has also said that if Mr H's pension had been reviewed it would have conceded liability and assessed if he had suffered a loss.

As I said above, I won't revisit the findings in the decision the ombudsman previously reached. But it is reasonable to say that it's likely that Royal London should have already reviewed this complaint under the personal pension review and assessed if Mr H has suffered a loss. But as it hasn't done this I've looked to see if it can be shown that the sale was in Mr H's best interests.

### *Financial viability*

The information from the time of sale shows that Mr H was provided with illustrations that demonstrate that if his S32 plan grew at 8.5% each year it would provide an annual pension of £10,200. If it grew at 13% a year it would provide a pension of £47,100 each year.

This information also shows that Mr H was giving up a pension of £3,582.90 per year (and a spouse's pension of half this). This seems to be at the time of transfer, rather than a projection of the benefits he would receive at his retirement date. I don't have the projected amounts he would have received at his retirement date.

The advice was given during the period of the industry-wide pensions review, so the rates the regulator published for Financial Viability Tests are directly relevant here. But I can't see that CIS calculated the investment return (critical yield) required to match the occupational pension.

But the upper limit the regulator gave for a Financial Viability Test of comparable growth is 11.5% each year for 33 years to retirement in this case. And for further comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate 10.75%, and the lower projection rate 8.5%.

I don't have full information about the required return to match the benefits Mr H was giving up, or indeed the benefits he did give up. But it is clear is that Mr H was taking a significant risk here. This was his only pension outside of the state provision and it was guaranteed and would increase in payment. It would also provide valuable death and spouses benefits. It was assumed that the S32 plan would need to provide a relatively high growth rate to match the benefits he was giving up. I've thought about whether it was clear he wanted to take this risk.

CIS doesn't seem to have assessed Mr H's attitude to risk at all. It recommended that he invest in a with profits fund which is usually regarded as having a lower risk. But the illustrated returns were reasonably high. So, there was a material risk that the S32 plan may not perform as expected, whereas the DB scheme benefits were guaranteed.

I can't say for certain whether Mr H was likely, or unlikely, to receive benefits of a materially lower overall value than the occupational scheme at retirement, due to the advice. But there isn't enough information to say that Mr H wanted to take the risk associated with the transfer and so I'm not persuaded that it was in his best interests that CIS advise him to do this.

For this reason alone, a transfer out of the DB scheme probably wasn't in Mr H's best interests. Of course financial viability isn't the only consideration when giving transfer advice.

There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

#### *Flexibility and income needs*

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 say this because there isn't any evidence that this was discussed. I also can't see evidence that Mr H had a strong need for variable income throughout his retirement. This also doesn't seem to have been discussed.

Mr H has said that the reason the transfer was recommended to him was so he could improve on his pension benefits. Other than that, I've not seen any kind of rationale, or reasoning, behind the advice.

I think it's reasonable to say that it's likely Mr H could have better met his income needs in retirement through the DB scheme at 65. Whilst the DB scheme benefits may not have entirely meet his requirements they were guaranteed, and I've seen no persuasive reasons as why he needed to change this to meet any income or flexibility needs he may have had.

Furthermore, Mr H was only 32 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr H had another 32 years before he would think about accessing his 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.

#### *Control or concerns over financial stability of the DB scheme*

It could have seemed attractive to Mr H to control his pension benefits. But 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.

I've not been made aware that the funding of his employer's DB scheme was in a position such that Mr H should have genuinely been concerned about the security of his pension

#### *Suitability of investments*

CIS recommended that Mr H invest in a with profits 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 wouldn't have arisen if suitable advice had been given.

#### *Summary*

I don't doubt that the potential for a higher income through a personal pension would have sounded attractive to Mr H. But CIS 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'm not persuaded that advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr H could possibly obtain lower retirement benefits and in my view, there were no particular reasons which would justify a transfer and outweigh this

So, I think CIS 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, if CIS had advised him not to.

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against CIS' advice. I say this because Mr H was an inexperienced investor who probably had a lower tolerance for risk. And this pension accounted for the majority of Mr H's retirement provision. So, if CIS 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 any concerns or needs Mr H may have had were so great 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 CIS had explained that Mr H could probably 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 Royal London should compensate Mr H 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 business to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would have most likely remained in the occupational pension scheme if suitable advice had been given.

Royal London 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, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's 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 Mr H'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, Royal London should:

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

Redress paid to Mr H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Royal London 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 H'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.

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 The Royal London Mutual Insurance Society Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that The Royal London Mutual Insurance Society Limited pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on The Royal London Mutual Insurance Society 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 29 June 2023.

Andy Burlinson  
**Ombudsman**