

## The complaint

Mr D complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a type of personal pension arrangement, in 2007. He says the advice was unsuitable and has caused him a financial loss.

A.P. Financial Services UK Ltd is responsible for answering this complaint. To keep things simple I'll therefore refer mainly to "APFS".

## What happened

Mr D was a deferred member of the OPS which was operated by his previous employer, a large company. He'd accrued 14 years' worth of benefits and in 2007, it seems that Mr D enquired about whether he ought to consider transferring out to a different scheme, such as a personal pension plan or annuity provider. He was also interested in drawing some tax-free cash from the pension in due course.

APFS completed a fact-find analysis in August 2007 to establish Mr D's circumstances and financial objectives:

- He was aged 49 when the advice process commenced. He was also employed in a new role earning £19,000 per year plus more in overtime and bonuses.
- Mr D had no demonstrable financial assets and no financial dependents. He had no debts recorded.
- The cash equivalent transfer value (CETV) of Mr D's DB scheme at the time was around £39,164. This was adjusted up slightly, a few weeks later, to £39,433. The normal retirement age (NRA) of the scheme was 65.

Mr D transferred away from his DB scheme in November 2007. He complained to APFS in 2022 saying that it had facilitated a transfer away from his DB pension scheme and this had caused him a financial loss.

However, APFS says that in its dealings with Mr D, it initially told him that transferring away from his DB scheme wasn't recommended. It says it issued a suitability letter with a recommendation against transferring away. It says Mr D was an 'insistent client' – a term used within the industry when a client wants to go against what was recommended to them by their adviser. APFS maintains that transferring away on this basis was Mr D's decision and that he was given warnings about what he was doing.

The complaint was then referred to our Service. One of our investigators looked into it and first confirmed this was a complaint we could look into. He later assessed the merits of the case and said we should uphold it. He thought APFS hadn't treated Mr D correctly when categorising him as an 'insistent client'.

As the complaint couldn't be resolved informally, it's come to me for 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 and the Code of Business rulebook ('COB'). 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 APFS's actions here. The regulator's guidance, set out in its rulebook (COB - 5.3.29) was:

*“When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:*

*(a) start by assuming it will not be suitable, and*

*(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests.”*

Having considered all the circumstances in this case, I've decided to uphold Mr D's complaint. My decision is along broadly the same lines as given by our investigator.

### The financial viability of transferring his pension

Normally when examining a DB pension transfer, I'd start off the process by assessing whether transferring away could be justified from a financial comparison perspective. This would usually involve looking at and considering the growth assumptions that were reasonable at the time and whether the transferred funds could grow to such an extent to make the transfer worthwhile.

APFS seems only to have properly retained a certain number of documents from the time of the advice. This is unfortunate: we see many cases from this time period and my own experience is that businesses are usually able to supply us with most of the relevant documentation when a pension is involved. However, as our investigator pointed out, no transfer analysis document seems to have been retained by APFS in this case and so we can't determine what the 'critical yield' was here.

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 benefits as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension arrangement could achieve the necessary investment growth for a transfer-out to become financially viable. Because APFS hasn't got a transfer analysis document, we don't know what the critical yield was.

We do know the type of pension Mr D had though. And again, using my experience, I think it's fair to say that it contained a number of valuable guarantees and benefits, including index-linking with inflation and a pension for life. There were also next to no investment risks for members of the scheme.

However, none of these things really matter in this particular case. This is because APFS said in its recommendation that Mr D ought not to transfer his DB pension because it was most likely unsuitable for him. There's no dispute about that. APFS has maintained this stance after Mr D raised his complaint, in 2022.

So, to be clear, APFS's position here is that transferring away from Mr D's DB scheme was unsuitable for him back in 2007. And having said this both at the time of the advice and when Mr D raised his complaint to our Service, it would clearly be very hard for it now to argue that transferring was suitable.

Instead, the main crux of this complaint is whether APFS acted improperly by facilitating the pension transfer, nonetheless, which it did in November 2007. For this, I've looked at what happened and whether what APFS did was fair and reasonable.

### What happened during the advice process?

I think there were a number of failures by APFS in its dealings with Mr D.

I mentioned above that certain documentation hasn't been retained. However, I also think that the other evidence we still do have access to, gathered during the 'fact find' process for example, ought to have been clear to APFS that Mr D most likely had very limited pensions knowledge and certainly no experience of investing. He's told us this was the case and I think his general financial circumstances and attitude at the time, as recorded on a 'fact-find' seem to solidly back this up. Mr D also had no wider financial assets and told APFS that he had no interest in making a will. So, I think it should have been obvious that Mr D wasn't at all 'financially aware' and he needed to be advised very carefully. The information he was given needed to be explained in a way that was clear, fair and not misleading.

APFS also says the adviser concerned had been told by Mr D that he "desperately" needed money, but that he was unwilling to expand on *why* this money was needed. However, given Mr D's recorded circumstances at the time, I can see no obvious need for cash that was so urgent or desperate as to make transferring his pension the right thing to do. APFS failed to record any rationale that substantiated an apparent desperate need for cash. And even though the 'fact-find' section about his finances was very poorly completed by the adviser, his earnings, to me, looked very much like they supported a moderate degree of discretionary spending.

All these things show me that even if I were to accept the very vague references APFS now makes to Mr D somehow urgently requiring cash, there would probably have been numerous other ways of achieving his objectives in getting it. None of these seem to have been explored.

However, it seems that the adviser went on, nonetheless, to facilitate the transfer away from the DB scheme, mainly to secure for Mr D, a 25% tax-free lump sum from the transferred pension. The apparent plan was to spend the cash on something unknown and invest the remaining amount in an annuity, from which Mr D could draw an annual sum.

In my view, this was quite a remarkable failure by the adviser. I think by any reasonable standards of the profession, it is fair to say that when faced with such a situation the adviser should have explained to Mr D that he could only really ascertain what was in his best interests – and so provide advice to him - if the adviser was in possession of all the relevant facts. Why cash was evidently 'needed' was certainly a very relevant fact, and not knowing why someone wants to irreversibly transfer away from a DB scheme to access cash is not, in my view, fulfilling the obligations APFS had as regulated financial advisers.

In any event, Mr D was aged just 49 and so was unlikely to have any concrete retirement plans or a realistic idea of what his financial needs in retirement might be. That none of these types of things were even recorded by APFS was another significant failure.

Was Mr D really an 'insistent client'?

APFS says it categorised Mr D as an insistent client; this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its own advice. APFS carried this out for Mr D.

The suitability letter was issued on 19 September 2007. In my view this was a poor document. It was unduly short and contained no real information which would have allowed Mr D to make an informed choice. It made reference to Mr D's existing scheme having benefits which he'd lose, but it failed to comprehensively set out what these were. So Mr D wouldn't have been able to really see the whole value of what he was giving up. The letter said, "*you engaged my services to obtain as much tax-free cash as possible, for reasons best known to yourself from your [pension fund]. You had no other matters you wished to discuss*".

I don't believe the evidence is plausible that Mr D even was an 'insistent client'. The evidence I've seen is strongly suggestive of him not being experienced in these types of financial matters and so was heavily influenced by his advisor.

APFS's explanations were poor and its communications about what it was really recommending for Mr D were unclear. It told Mr D, for instance, that transferring "*wasn't necessarily*" in his best interests which I think could have been clearer. And, as I've implied above, it didn't comprehensively explain why. In the same short letter, APFS recommended a fund provider which he could use to transfer to anyway, thus seriously undermining its principal advice at the head of the letter.

I think all this would have been confusing for Mr D. On one hand APFS was saying that leaving his scheme wasn't the right thing to do (although it used language which could have been much clearer). But on the other hand, it was recommending how – and to whom - he could transfer.

Of course, it's hard to say what influenced these shortcomings although I've seen evidence that Mr D was considering retaining the paid services of APFS as his ongoing financial adviser after the transfer took place. However, there was an opportunity here for APFS to deliver the 'no transfer' advice clearly to Mr D and to allow him the space and time to digest this.

This could have allowed Mr D to think carefully, and if he still wanted to transfer, APFS could have re-engaged with the objectives Mr D had. It could also have explained why going against its advice was against his best interests. If he'd simply needed to borrow money, for instance, then it could have recommended a loan. Nothing was recorded in any of APFS's documents suggesting this simple route wouldn't have been more appropriate and possible. But the information simply wasn't clear enough and APFS immediately went into 'transfer mode' and facilitated him leaving his DB scheme.

If APFS had followed a much better process, I don't think Mr D would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mr D what he would be losing out by transferring his deferred benefits.

- There's no evidence that Mr D, an inexperienced investor, desired any input or control over pension. It's also difficult to see why moving to an annuity was right for him, given the type of pension he already had.
- Mr D was paying for independent financial advice, and if that advice had been much more persuasive about the suitability of remaining in his DB scheme, I think it's more likely that he'd have followed that advice, rather than being pushed immediately down an 'insistent client' route.

### Other issues

I've thought a great deal about the points APFS made following our investigator's 'View'. APFS says that it thinks Mr D was given enough warnings about transferring. It also says he signed some documents showing he understood the risks. APFS even says that Mr D signed a document effectively abrogating it of responsibility.

However, I'm afraid I take a different view to all these claims. It was APFS that was the regulated adviser here. It was being paid for advice – and its job wasn't simply to transact what Mr D thought he wanted. APFS's job was to really understand Mr D's needs and provide advice that was in his best interests. I've described above how it failed to do this, primarily neglecting to even understand what the tax-free cash was for.

As far as Mr D signing some forms is concerned, I've seen nothing that shows he really understood the magnitude of what he was signing. As I've explained, Mr D wasn't ever put in a position where he could really make an informed choice. Nor am I satisfied the words used on these forms were *his* words, rather than the adviser merely seeking to justify his own actions.

For example, in August 2007, Mr D signed what appears to have been a client declaration. In my view, this is no more than an acknowledgement that the 'fact-find' to which this was attached had taken place and that he confirmed it was accurate. Whilst I accept the adviser inserted their own words about Mr D wanting to transfer, in my view this is of no relevance to the complaint. It does not indemnify the adviser of his significant failings up until that point.

On 19 September 2007, Mr D signed a "Pension Vesting Agreement" which I doubt he would have understood. In any event this was a pre-formatted and short document which only confirms again that he'd been given a certain amount of information. It does not negate the failure to provide Mr D with the information he needed to make an informed decision.

### Summary

In this decision I have set out why I don't think Mr D met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by APFS simply to transact what Mr D may have thought he wanted to achieve at the time – to transfer his pension away from his DB scheme.

APFS's recommendation not to transfer was not comprehensive, meaningful, or easy to understand. It did not adequately explain why transferring out was not in Mr D's best interests, in a way that was personal to him or with reference to his objectives. There was no corroborating evidence that Mr D required immediate and urgent access to cash and the adviser failed to ask appropriately searching questions about what the money was for.

APFS then immediately offered Mr D a very easy route to transferring his pension anyway, via a series of signatures on pre-populated forms. In this respect, the advice did not meet the

standard I mentioned at the beginning of this decision about being clear, fair and not misleading.

If Mr D had been given clear and persuasive reasons why transferring wasn't in his best interests, I think he would have followed advice to remain inside the DB scheme. Mr D went to APFS seeking advice. I think it's much more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

APFS failed in its duty, so I'm upholding Mr D's complaint.

### **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 - [CP22/15-calculating redress for non-compliant pension transfer advice](#).

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 D, through his representative, whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. He didn't specify a preference, so I am therefore satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr D.

Compensation should be based on his scheme's 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 D's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D'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 D 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 D within 90 days of the date APFS 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 APFS to pay Mr D.

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.

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 APFS 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 am upholding this complaint.

I now direct A.P. Financial Services UK Ltd to pay Mr D 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 A.P. Financial Services UK Ltd to pay Mr D any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only order A.P. Financial Services UK Ltd to pay Mr D any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that A.P. Financial Services UK Ltd pays Mr D the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts my final decision, the money award becomes binding on A.P. Financial Services UK Ltd. 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 21 April 2023.

Michael Campbell

**Ombudsman**