DRN-4018214

The complaint

Mr W says the advice given and the arrangements made by LEBC, an appointed representative (AR) of TenetConnect Limited (TCL), to transfer from his defined benefit (DB) pension scheme and to take tax-free cash and a joint life enhanced annuity with Scottish Widows, was unsuitable.

Mr W is represented by Spencer Churchill Law Ltd (SCL).

What happened

Mr W says that he was introduced to LEBC's services by his former employer. As LEBC was acting as AR of TCL, the latter is the principal firm and responsible for the former's acts and omissions. As such, to keep things simple, I'll just refer to TCL throughout the rest of my decision.

TCL gathered information from Mr W about his circumstances, objectives and attitude to risk. It issued a suitability report dated 10 October 2014. His priorities and objectives were recorded in the following terms:

"From our discussion, you explained that you wish to access your pension in order to utilise the maximum tax-free cash [TFC] to pay off your outstanding debts. Your monthly outgoings are predominately made up of loan, mortgage and credit card repayments, therefore by using the lump sum to reduce these outstanding balances you will put less financial strain on your current income."

"The maximum TFC will be used to clear some of your loans and credit cards. You confirmed that the X credit card and Y credit card carry the higher levels of interest and once these are cleared this will reduce your outgoings by almost £250 per month. In addition, you would also have the facility to clear your [bank] loan although you are paying the minimum payment of £50 per month which seems to cover interest only and is not reducing the debt at present."

"As your pension will start and provide you with income this can also be used to repay the remaining loans before your selected retirement age of 66."

"In our discussions of the various options available to you for taking pension benefits, we agreed to consider two types of annuity to compare against the benefits being offered by [your DB] pension scheme. We agreed to consider a level annuity, with no annual increases, alongside an annuity linked to changes in the retail prices index, capped at 5% pa. You understand that a 'level' annuity will not provide any protection from the future eroding effects of inflation, and in real terms, the 'buying power' of your income will be eroded over time."

"You require the addition of a spouse's pension in order to provide an income to your wife in the event you predecease her. You have confirmed that [Mrs W] has limited provisions in her own name and you feel it is vital to provide a spouse's pension in the event of your early death. You understand that this will result in you receiving a lower pension income."

"The 5-year guarantee is equally important to you as you wish to prevent a sudden drop in income in the event of your early demise."

At the time of TCL's advice Mr W was 55 and working as a support worker earning around £14,000 a year. It's recorded that his wife was earning around £30,000 a year. Their monthly household outgoings were around £2,500-£3,000. No figure was derived for net disposable income, although commentary indicated this was used to further pay down debts.

Mr W was said to have £16,000 outstanding on his credit cards. His wife had an outstanding loan of £9,000 and a credit card debt of £2,500. Mr and Mrs W's home was worth £220,000 with mortgages of around £150,000.

Mr W had suffered a heart attack in 2008 that required surgery and he was still under the care of a cardiologist and taking medication. Mrs W was in good health and neither of them smoked.

Mr W was a member of a DB scheme with a former employer and was entitled to deferred benefits. He'd accrued 9-years of service between 1994 and 2003. The scheme had a normal retirement date (NRD) of 65. TCL estimated the value of his annual pension at that point would've been about £5,800, or £4,000 a year if he took TFC of around £27,000. His DB scheme had a transfer value of nearly £71,000.

At the time, Mr W also had a small existing annuity (worth around £300 per year) and was entitled to a state pension. He had no other provision. Other than a state pension, his wife had no retirement provision. Mr W was said to expect to fully retire when he reached 66. No information was captured about what level of income he required in retirement.

TCL's recommendations were recorded in the following terms:

"In making my recommendations, it is important to firstly consider the impact of taking your pension now or whether leaving your pension untouched altogether could be the better option for you, given your circumstances and objectives we discussed."

"You stated that you wanted to consider accessing your pension now to provide an income and lump sum to repay your outstanding debts and liabilities."

"Considering the options available to you, my advice at the current time is to transfer your pension and purchase an annuity."

"I recommend a Joint life Level annuity with a 100% spouse's pension and a 5 year guarantee. I recommend the guaranteed fixed annuity over the index-linked annuity due to the higher income being offered and the length of time it would potentially take you to recoup the level annuity income under the index-linked option…"

"I recommend that you purchase a level annuity as you wish to receive a guaranteed and maximised annuity income. You would benefit more from the increased income in the early years of the contract as your main objective is to reduce your outstanding debts."

"It is important that you understand that a level income will not be protected from the future eroding effects of inflation and that the 'buying power' of your income will be eroded over time."

"I further recommend you take the full tax free lump sum from the policy of £17,687.25.

"I recommend you include a 100% spouse's pension, as this will provide a required level of income to your wife should you predecease them. I think you would benefit more from the additional spouse's benefit because your wife has no pension provisions in her own name. This will reduce the income by circa £260 per month but will provide a higher income for your wife should you predecease her. I have also taken into account your health."

"I recommend you include a 5 year guarantee period, as this is low cost and will ensure an income is payable to your beneficiaries in the event of your early demise…"

Mr W accepted TCL's recommendations and the transfer of his DB pension funds took place in November 2014. He received the TFC lump sum and an annuity of £2,575.

In November 2021, SCL on behalf of Mr W raised a number of concerns about what had happened in 2014. It said he'd been provided with negligent advice to transfer his safeguarded benefits. It said TCL hadn't complied with regulations about giving advice on DB pensions. And it said TCL's recommendations had resulted in financial detriment to him.

TCL sent Mr W its final response on 6 January 2022. It didn't uphold his complaint. Firstly it challenged his ability to bring his case because it said he was too late for it to be considered. It then went on to rebut all of the complaint points he'd raised, concluding that its advice had been suitable. It also concluded in the following terms:

"I also think it is extremely likely that had LEBC recommended he remained within his existing scheme, your client would have accessed his benefits within the scheme regardless, which would have left him at a financial disadvantage. This is based on his immediate and urgent need for cash to pay as much debt as possible and ameliorate his bleak financial outlook."

Mr W disagreed and brought his case to this Service. An Investigator found his complaint was one this Service could consider. She went on to consider the merits of his case and upheld it, concluding that TCL's advice had been unsuitable.

TCL didn't engage with the arguments the Investigator had made about the merits of the case, although presumably those points it made in its final response letter remained its position. It asked for an ombudsman's decision on the jurisdiction of Mr W's complaint.

As both parties couldn't agree with the Investigator's findings and conclusions, Mr W's case was passed to me to review afresh and to provide a decision. I issued my provisional decision in February 2023. I'm grateful to TCL for its response, which I've considered carefully in arriving at my 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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I consider Mr W's case is within the jurisdiction of this Service. Further, based on the evidence I've seen I'm upholding his complaint. I'll explain why.

Jurisdiction

Our service was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA). It's important to make clear that as a public body we don't have a general, 'at large', power to investigate any complaint. We can only investigate what FSMA and the rules made under it say we can – this sets the boundaries of our scheme. And we have no legal power to investigate complaints that are beyond our jurisdiction.

FSMA gives the Financial Conduct Authority (FCA) the power to say what complaints we can and can't consider. The FCA has set these out in the Dispute Resolution chapter of its Handbook (also known as 'DISP' or 'the DISP rules').

If a business doesn't consent, this Service can't consider a complaint which isn't made within specified time limits. Dispute Resolution rule 2.8.2R says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

More than:

- *six years after the event complained of; or (if later)*
- *three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;…unless:*

In the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.

Mr W is worried he's lost out because of the advice he received from TCL to transfer his DB pension, taking TFC and purchasing an annuity with the proceeds.

Taking the six-year rule first, a complaint is out of time if it's referred to our Service more than six years after the event complained about. That's unless the complaint was referred to the respondent business within that period and the complainant has a written acknowledgement or other record of the complaint having been received.

Mr W's case was raised with a complaint management company in September 2019 (SCL took on his case some months later). His complaint was lodged with TCL in November 2021. It issued a final response to him in January 2022. As the advice complained about happened in 2014, his case is out of time on the six-year limb of the test.

In respect of the three-year test. I need to decide when Mr W became aware, or ought reasonably to have become aware, that he had a cause to complain. And having established that date, determine whether he brought his complaint within three years of it.

In making its case to time bar Mr W, TCL asserts the warnings it gave him in 2014 were sufficient to put him on notice of the issues he now complains about, for example that his annuity payments wouldn't increase in line with inflation. In its response to the Investigator's view on jurisdiction it said:

"It is evident that there were numerous warnings that would have made the client aware in 2014 that his annuity payments would not increase in line with inflation…"

"Mr W's heart condition meant he qualified for an enhanced annuity and he was provided with a comprehensive report which gave several options. This enabled him to make an informed choice. He had significant debt with no way of repaying this and this position would have added to his health issues. The transfer gave him better benefits at the time due to the enhanced annuity, but it was evident he was clearly warned that the lack of indexation would mean this met his objectives initially but would gradually be affected by inflation…"

"Furthermore, Mr W would have seen his income remaining level every month as it was paid into his bank account. It is unreasonable that he would not have been aware his monthly benefit was failing to keep pace with inflation."

In responding to my provisional decision on jurisdiction TCL said:

"Our opinion differs in that the Ombudsman states he would have been aware of the risks but this is different to having cause to complain, yet his complaint centres around him not being told of any risks, which he clearly was. It was evident from the Suitability Report that he would receive higher benefits initially but this would eventually diminish over time so the client should reasonably have been aware of this at the point of advice."

Firstly, I find Mr W's complaint was made in much broader terms than just his assertion that he hadn't been told about the risks of transferring his pension, to encompass wider matters about the suitability of TCL's advice and issues about the process it followed.

I do accept that the suitability report TCL produced for Mr W did give him various warnings, including that his annuity wouldn't benefit from indexation unlike his DB pension. For example it said:

"By transferring your pension benefit away from the Scheme, you are fully giving up your right to a future pension, including future pension increases, from the Scheme. The same applies to any spouse's, dependant's or dependent children's pensions payable from the Scheme and the increases to those pensions. By choosing a single life pension you are agreeing that there will be no spouse's pension if you should marry in future and no benefits will be paid to your other dependants."

TCL essentially argues Mr W must reasonably have known he'd be worse off in retirement than if he stayed with his DB scheme – and there can be no argument to say he didn't become aware of a cause for complaint at this time. I disagree.

Mr W knew he was transferring his pension to a new provider, and with that accepting certain risks that had been explained to him. But that's different, in my view, to being reasonably aware he had cause for complaint. I don't think it's likely Mr W would have gone ahead with the 2014 transfer if he'd have thought (or likely thought) from the very beginning that the advice process was flawed in some way.

My view here is strengthened when I consider key elements of what Mr W was being told in 2014. TCL recommend he take TFC and an annuity. Its suitability report noted that if he took benefits from the DB scheme immediately, he would be entitled to TFC of £13,107 and an annual pension of £1,967. Whereas, what it recommended would deliver TFC of £17,687 and an annuity with Scottish Widows of £2,575. So, as far as Mr W was concerned by transferring he'd receive more benefits.

TCL maintains Mr W should've noticed that the value of his benefits were being eroded year on year. And that his monthly benefit would've been failing to keep pace with rising living costs.

I don't find this a compelling argument for three reasons. Firstly Mr W's annuity was a relatively small element of his overall income. Secondly, over the period 2014 to 2019, Bank of England data showed inflation running at an average of 1.5%. To keep pace with this his annuity would've needed to have increased to £2,777 – about £200 over five years. So, I don't think this would've been as noticeable as it suggests. And finally, Mr W wasn't provided with information after 2014 which showed him a comparison of his annuity benefits with what he would've been receiving from his former DB scheme.

I think Mr W became aware of cause for complaint in September 2019 when he first responded to an advert by a claims management company about potential issues with DB transfers. SCL raised his complaint with TCL in November 2021 and this was responded to in January 2022.

So, Mr W's complaint is duly made and this Service can consider it. I'll now go on to look into the merits of his case.

The merits of the case

How does the regulatory framework inform the consideration of Mr W's case?

The first thing I've considered is the extensive regulation around transactions like those performed by TCL for Mr W. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to 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.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like TCL. As such, I need to have regard to them in deciding Mr W's complaint.

At the time of the advice TCL gave Mr W, COBS 19.1.6 made the following specific point about advising on a transfer from DB schemes:

"When advising a retail client who is…a member of a defined benefits occupational pension scheme…whether to transfer…a firm should start by assuming that a transfer…will not be suitable. A firm should only then consider a transfer…to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer…is in the client's best interests."

Under COBS 19.1.2, TCL was required to:

- Compare the benefits likely to be paid under the ceding arrangement with the benefits afforded by the proposed arrangement.
- Ensure that the comparison included enough information for Mr W to be able to make an informed decision.
- Give Mr W a copy of the comparison, drawing his attention to the factors that do and don't support its personal recommendation, in good time.
- Take reasonable steps to ensure that Mr W understood its comparison and how it contributed towards the personal recommendation.

In simple terms, TCL had to assess the benefits likely to be paid and options available under the DB scheme and compare this with those available under the new arrangements proposed before it advised Mr W on what to do.

Did TCL adhere to the regulatory requirements placed on it?

In short, I don't think TCL met the regulatory requirements placed on it. I'll explain why.

There are a number of documents relating to TCL's transaction with Mr W that are important to my consideration, these include the fact-find and the suitability report.

I think it's of note that Mr W's interest in transferring his pension benefits seems to have been sparked by his former employer. It wasn't something he was thinking about until it introduced him to TCL's services.

Mr W's recorded objectives when he took advice in 2014 appear to have been fairly narrow and largely focussed on releasing benefits from his pension to pay down some of his debts. I think it's a fundamental problem for TCL that from the outset of the advice process and throughout, retirement planning seems to have played second fiddle to Mr W accessing benefits.

Mr W has confirmed to this Service that he was struggling financially in 2014. He had recently lost his job and had started new employment on a salary which was half of what he was accustomed to earning. He had two mortgages to pay and some credit card debt and he was left with no surplus income at the end of the month. So, the option of accessing the tax-free sum of nearly £18,000 was attractive to him.

However, I think TCL stretches the actuality when it said in its final response to Mr W that he was in immediate and urgent need of funds. I say this because its fact-find recorded that incomings to the household exceeded outgoings. And that any surplus was to be used to pay down debt. Further in its suitability report, in recommending the annuity it noted:

"Although the additional income is no immediate requirement, you may benefit from a maximised level income in order to help clear your current debt situation."

In responding to my provisional decision TCL says:

"The customer has confirmed he was struggling financially in 2014 having lost his job, taken new employment on half of salary, had 2 mortgages and credit card debt. Was left with no surplus income every month and accessing benefits was attractive to him. The client file evidences he was making minimum repayments and his debt would be increasing as a result of this. Whilst we acknowledge there is no evidence the customer was defaulting on his debt he was clearly struggling to "keep his head above water" and given his financial position it would be unreasonable to suggest he would have been able to consolidate his debt, particularly on a lower income than he'd been on previously."

While Mr W faced financial difficulties in 2014, as TCL accepts, there's no evidence he was defaulting on his payments, or at risk of doing so. This would've been captured in the fact-find had it been the case. There are many options available to people who are having short-term difficulties managing their finances, for example rescheduling, consolidation, payment holidays and so on.

The problem for TCL in now asserting it would be unreasonable to suggest Mr W wouldn't have been able to consolidate his debt on a lower income is that there's no evidence it did the work to demonstrate that was the case at the time. Further, there were other alternatives available to him such as restructuring and rescheduling with his existing credit providers, which were also not explored. In any event, as established, he was meeting his debt payments.

While on the face of it, accessing his pension benefits appeared a good match with Mr W's immediate priorities, I don't think trading off his long-term retirement needs against short-term financial pressures was appropriate given his circumstances. I note that one of the main drivers of his financial predicament was resolved around six months after the advice when he secured a new job and a significant increase in his pay.

The regulator's position on DB transfers at the time was clear - the starting position was for TCL to have presumed that such a transaction wouldn't be suitable. Based on the available evidence, I don't think it reached a threshold that made its recommendation to Mr W to transfer away from his DB scheme safe.

TCL needed to have analysed, tested, challenged and advised Mr W about what was in his best interest for retirement planning. It knew pension pots built up over many years are to provide for an income in retirement. And when a transfer and early access to benefits are recommended, there need to be compelling reasons. In terms of Mr W's stated objectives, I find these didn't provide a sufficiently strong rationale for TCL recommending he transfer from his DB scheme.

Leaving Mr W's objective to access his benefits early to one side, I've thought about whether there were any other strong reasons for him to proceed with the transfer. The cash equivalent transfer value of about £71,000 wasn't particularly attractive. It represented around 27 times the annual pension he'd accrued up until 2014, without allowing for any indexation from that point.

In addition, as the suitability report noted, the transfer value had been reduced by the trustees by around £3,000 because the DB scheme's assets were at that point insufficient to pay full values. Further, TCL recorded that the cost of replacing his existing benefits with an insurer would be about £3,300 more than was being provided by the scheme.

We know Mr W had a cautious attitude to risk. TCL defined this in the following terms:

"You want the amount of income you receive to be guaranteed and for the amount not to reduce in the future. You understand that this may mean your income in the future will be less in real terms as it will not be guaranteed to be protected against the future effects of inflation."

I think TCL also needed to have assessed his capacity for loss. Given what we know about his and Mrs W's other pension provision, their assets, savings and investments, it's reasonable to deduce he had no capacity for loss in terms of his retirement planning.

Although Mr W was using his final salary fund to buy an annuity, which meant he wasn't being exposed to investment risk in the future, he was taking on the risk of being locked into a contract for life from the age of 55, for perhaps nearly 30 years. A contract that didn't provide for any increases to offset the effect of rising prices. So he was taking a significant risk given his circumstances.

On the other hand, his DB scheme provided for annual indexation on one-third of his pension of 3% a year and on the other two-thirds of up to 5%. These were risk-free adjustments to be borne by the scheme.

In its final response to Mr W, TCL acknowledged that the annuity it had recommended to Mr W would only have provided a higher income for him, compared to what he would've received had he taken benefits early from his DB pension, for about ten years. After this the indexation of his DB scheme would've meant those benefits exceeded his annuity.

Another weakness in TCL's position is that there's no evidence that it got to the bottom of what income Mr W required in retirement. This question was fundamental to him being able to make fully formed decisions about what he should do about his deferred DB scheme. I note the fact-find indicated Mr W's intention was to continue working until the age of 66. The NRD of his DB scheme was 65.

Had Mr W remained in his DB scheme until the NRD (another 10 years), TCL estimated he would've been entitled to an annual pension of around £5,800. In the event of his death after retirement his wife would've received a pension from 2024 worth £2,900 and index linked thereafter. This is significantly more than the annuity put in place. Alternatively, he could've taken a tax-free lump sum of about £27,000 and a reduced pension of around £4,000 a year.

It was TCL's role to discern what Mr W's wants and needs were and why. Its role wasn't simply to facilitate what he wanted without any critical thinking. While he may've been focussed on his immediate financial pressures, which we've established we not at that point a critical matter, its role was to position the discussion around his income needs in retirement. It had to use due care and skill. It had to do these things because it had to act in his best interests. I don't think it demonstrably met these obligations.

TCL says that Mr W's health was a significant factor in its recommendations. He'd had a heart attack in 2008, was still under the consultant and was taking medication. It says it secured Mr W an enhanced annuity to reflect his position and this was a joint policy providing his wife with access to 100% of the benefits in the event of his passing.

TCL relied on Mr W's health condition in rebutting his complaint. For example it said:

"The Fact find noted that Mr W had suffered a heart attack in 2008 and had been on medication since. It is therefore reasonable to conclude he had a reduced life expectancy."

"Whilst it is true that your client has lost out on inflationary protection, I don't think this was an over-riding concern given his life expectancy was lower than average and due to his immediate need for a higher lump sum in the short term."

In responding to my provisional decision TCL also said:

"Our main concern is that the Ombudsman feels there is no evidence the customer's life expectancy would be limited because of his health, which was a major part of the advice at the time. The customer acknowledged to FOS that he chose 100% spouses benefit on the annuity and is aware the annuity was enhanced, yet he had no concerns about his health."

"The client file confirms he had a serious heart attack in 2008, was still under a consultant and was on medication. We are not in possession of the actuarial calculations made by the annuity provider nor the medical report obtained by the Ombudsman, but would argue that this is a key issue and this information should be obtained before a decision is made. We would also refer to the two websites below that would suggest an Enhanced Annuity would not be granted if the product provider did not anticipate a lower life expectancy. Scottish Widows obviously expected the customer's life expectancy to be reduced. Taking a 100% spouse benefit is unusual and would also suggest the customer was concerned about his health and wanted to provide for his wife knowing he had a reduced life expectancy."

The Investigator spoke to Mr W about his health. He said he had no concerns at the time of the advice. He'd suffered a heart attack in 2008 but since then his lifestyle and health had improved.

Although I've seen a medical report on file for Mr W, it doesn't indicate whether his heart attack was likely to have a significant impact on his life expectancy. And if so, to what extent. These things needed to have been assessed rigorously at the time of the advice.

While I can see that Mr W secured an enhanced annuity with Scottish Widows, I've not seen what assumptions were made which underpinned that contract. TCL hasn't produced such in support of its case.

Without this evidence it isn't reasonable to assume Mr W's life expectancy, as assessed at the time of the advice in 2014, had been substantially impacted by his heart attack in 2008, especially given the subsequent management of his health including medications. And certainly not to the extent that would've made a clear case for transfer from his DB scheme in its own right. As TCL accepted, even if he'd taken his pension early from his occupational pension, that would've started to exceed his annuity income after around ten years.

I've concluded that TCL's recommendation for Mr W to transfer his pension was mainly driven by his financial position. And I've already set out why I think that was an unsafe foundation from which to work.

TCL has said it gave Mr W all the necessary risk warnings indicating he was required to take responsibility for the decision to transfer. While I think he would've understood those warnings, disclosure of risks doesn't of itself make the advice suitable.

In responding to Mr W's complaint, TCL told SCL:

"I also think it is extremely likely that had LEBC recommended he remained within his existing scheme, your client would have accessed his benefits within the scheme regardless, which would have left him at a financial disadvantage. This is based on his immediate and urgent need for cash to pay as much debt as possible and ameliorate his bleak financial outlook."

I understand the points being made here by TCL. But TCL didn't recommend that Mr W shouldn't transfer his pension. So it's on the backfoot here. He followed its advice. However strong his motivation was to move his pension provision, that was certainly reinforced by its actions, which would've also given him reassurance it was the right thing to do.

Ultimately I haven't seen enough evidence to persuade me Mr W would've ignored advice not to proceed with the transfer. Nor to ignore fully formed advice about better ways to manage his short-term debt pressures, avoiding his desire to make use of funds which were intended for his household's long term retirement income.

I think TCL should've provided Mr W with unequivocal advice not to proceed with the transfer from his DB scheme to take TFC and buy an annuity. I say this because it failed to reach the required threshold to demonstrate based on contemporary evidence that such a transaction was clearly in his best interests. Instead, it recommended that his benefits be transferred and he was exposed to unnecessary risk.

I've concluded it's more likely than not, had TCL given Mr W appropriate advice, he wouldn't have gone ahead with the transfer from his DB scheme, taking TFC and purchasing an annuity. It's unusual for someone to seek professional advice and then go against the recommendations received.

I don't think the recommendation by TCL for Mr W to transfer from his DB scheme could sensibly be regarded as fair to him. As such I think it failed to meet the regulatory requirements placed on it when providing him with such advice and making the arrangements.

So, taking all the circumstances of the case into account, it's fair and reasonable to uphold this complaint against TCL and for it to put things right.

Putting things right

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.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out below. TenetConnect Limited should pay Mr W the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that TenetConnect Limited pays Mr W the balance. This recommendation is not part of my determination or award. TCL doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. He may want to get independent legal advice before deciding whether to accept this decision.

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 W 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. As he hasn't responded on this point, in accordance with the Investigator's view, and my subsequent provisional decision, I've assumed he doesn't want to wait for the new guidance to come into effect to settle his complaint.

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

I consider Mr W would've remained in his DB scheme. TenetConnect Limited should therefore undertake a redress calculation in line with the pension review methodology, 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, 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 W's acceptance of the decision.

Mr W has had the benefits of TFC and a stream of income from his enhanced annuity. These facts will need to be taken into account in the redress. As will any evidence about the impact of his heart attack on his longevity.

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

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Mr W'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 W 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 would be tax-free 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 W within 90 days of the date TenetConnect Limited 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 TCL to pay Mr W.

Income tax may be payable on any interest paid. If TenetConnect Limited deducts income tax from the interest, it should tell Mr W how much has been taken off. It should give Mr W a tax deduction certificate in respect of interest if he 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.

If there hasn't been full and final settlement of the complaint by the time any new guidance or rules come into effect, I'd expect TenetConnect Limited to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

For the reasons I've set out, I'm upholding Mr W's complaint. I now require TenetConnect Limited to put things right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 14 April 2023.
Kevin Williamson
Ombudsman