

The complaint

Ms P complains about the advice given by Broom Consultants Ltd ('Broom') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension arrangement. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Ms P met with Broom in October 2007, following an introduction from another advice firm, to discuss her DB pension and the possibility of accessing her benefits early to realise a cash lump sum.

Broom completed a fact-find to gather information about Ms P's circumstances and objectives. Amongst other things this recorded that Ms P was divorced; she had no dependents; she rented her home; and she was looking to release funds from her pension to allow her to pursue a change in career, buy a car, repay some debts and fund a holiday. Broom also carried out an assessment of Ms P's attitude to risk, which it deemed to be 'aggressive'.

On 1 November 2007 Broom advised Ms P to transfer her pension benefits into a personal pension arrangement. The suitability report said the reason for this recommendation was that, the adviser believed a transfer was consistent with Ms P's attitude to risk, despite the fact that based solely on the required growth rates the advice would be to remain in the DB scheme.

Ms P duly accepted the recommendation and in December 2007 around £80,000 was transferred to her new personal pension arrangement and Ms P received her maximum tax-free cash entitlement.

Broom carried out annual reviews of Ms P's plan in 2010, 2012 and 2013. In 2015 Ms P's plan was changed from a capped drawdown to a flexi-access drawdown plan. And in 2019 Ms P's pension provider wrote to her to confirm that her pension fund was exhausted.

In 2021 Ms P complained to Broom, using the services of a representative, about the suitability of the transfer advice. Ms P believes the advice she received was negligent given her circumstances at the time and has suffered a loss as a result.

Broom didn't uphold Ms P's complaint.

In summary it said:

- It took account of Ms P's background including her circumstances and objectives.
- It assessed her attitude to risk, which Ms P agreed was 'aggressive'.
- Ms P had a clear aim to generate a lump sum without an income, and without any savings she had limited choices other than releasing money from her pension to meet her objective.

- While Ms P's attitude to risk was assessed as aggressive, due to her capacity for loss it was downgraded and the fund selection was worked on alongside Ms P's own adviser.
- It carried out reviews in the early years with Ms P, but despite its best efforts, Ms P ignored its requests to provide ongoing advice and she made further withdrawals without its advice.

Ms P then referred her complaint to our service. Broom objected to our consideration of the complaint because it said it had been brought out of time. An investigator looked at this and they said they didn't think Ms P had brought her complaint out of time. They said it would've been difficult for Ms P to make any meaningful comparison with the information she received from her provider in the form of annual statements with the information she received from her DB scheme trustees at the time of the advice. They didn't think Broom's annual reviews would've given any reason for Ms P to question the original advice and they weren't persuaded by Broom's argument that it was in 2015 when she ought to have known there was a problem when she failed to respond to its letter telling her to seek advice following the conversion of her plan from a capped to a flexi-access drawdown plan. They also didn't think depleting her plan in 2019 was a trigger point – albeit they said Mr P complained within three years of this happening anyway.

The investigator went on and upheld the complaint and required Broom to pay compensation. In summary they didn't think Broom had gathered sufficient information from Ms P to make a recommendation – there was no information about Ms P's debts she said she wanted to repay, there was no income and expenditure picture and no assessment of what her pension income needs were. They said transferring wasn't in Ms P's best interests from a financial viability perspective because she was unlikely to improve on the benefits she was entitled to from her DB scheme. They also didn't think Ms P's attitude to risk was 'aggressive' and they pointed to the relatively simple assessment Broom had carried out in reaching this conclusion. Finally they said that Ms P's objective of wanting a lump sum wasn't explored in any great detail and was simply taken at face value.

Broom disagreed albeit it didn't provide a detailed explanation as to why. It said it believes the advice was suitable and wants the ombudsman to consider all the points made in its final response letter to Ms P.

Because things couldn't be resolved informally, the complaint was referred to me to make a final decision.

What I've decided – and why

The jurisdiction of this complaint – why I've decided it has been brought in time

The relevant time limits for bringing a complaint to this service are set out in the Dispute Resolution (DISP) section of the FCA's handbook at DISP 2.8. It is these time limits I must apply when considering if Mrs K's complaint was brought in time.

DISP 2.8.2R says:

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

- (1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
- (2) more than:*

(a) six years after the event complained of; or (if later)

(b) 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 the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

It's not disputed that Ms P's complaint was referred to this service more than six years after the event she's complaining about - the advice she received to transfer her DB scheme benefits in December 2007.

But the three-year period set out at DISP 2.8.2R (2)(b) can potentially extend the deadline for complaining, depending on when a complainant become aware, or ought to reasonably have become aware, they had cause for complaint. So, I've considered when Ms P was aware, or when she ought reasonably to have been aware, she had cause to complain.

The crux of Ms P's complaint is that the advice was unsuitable for her – she had no investment experience and her capacity for loss was low. She's said that Broom told her she could expect growth in excess of what would occur if she retained her benefits in the DB scheme.

In my view, it is often difficult in DB transfer cases to establish the point at which the consumer ought reasonably to have been aware they had cause for complaint. And I don't think things are any different here.

At the time of the advice in 2007, Ms P would've received a deferred benefit statement, which showed her preserved pension at the date of leaving. It might also have given some information about the likely estimate of what Ms P's pension would be at her normal retirement age taking account of inflationary increases. But I don't know the extent to which this information was clearly set out because I've not seen a copy of this – it doesn't appear to be available. So while I think it's reasonable to expect Ms P to have read this statement at the time, I don't know the extent to which she understood what she was going to get from her pension at retirement if she remained in her DB scheme. And this is the basis on which Ms P would be able to make any future comparison of her income. I'm mindful here that I don't think Ms P was particularly financially sophisticated at the time or well-versed in the subject of pensions.

Ms P would've likely received copies of the annual pension statements sent to Broom from her pension provider. And these would've shown her a fund value and projections of the income she could likely expect. I don't think the fund value and any changes to this over time would've been meaningful for Ms P. And while the likely income projections would be meaningful because it's not clear to me what figure Ms P would've likely had in mind for the pension her DB scheme would provide, I'm not persuaded these statements would've provided her with a useful income comparison that might reasonably have alerted her to the fact there was a problem with the advice she received.

I can see that Broom invited Ms P to annual reviews and that she accepted three of them, which were carried out in 2010, 2012 and 2013. But looking at the paperwork Broom has provided for these, I've not seen anything that says or suggests there was a problem with the original transfer advice she received, or that it was reasonable for Ms P to have believed there was. The conclusion reached in these reviews was that Ms P's attitude to risk remained the same as did her need for maximum income, so things would continue based

on her current investment strategy. The fact that Ms P didn't attend all of the annual reviews does not in my view demonstrate an awareness that something might have gone wrong.

In 2015 I can see that Ms P's pension plan was changed from a capped to a flexi-access drawdown plan and she withdrew a sum of money without advice. Broom says that it wrote to Ms P around this time in which it explained the need for advice and it offered to bring forward the annual review. Broom says Ms P didn't respond. It says that Ms P's actions show that she was not managing her money and she should've realised there was a problem at this time.

But again, I'm not persuaded that Ms P's failure to respond to a request for advice leads me to believe that she ought reasonably to have realised there was a problem with the original transfer advice she received. Broom hasn't provided a copy of the letter it says it sent to Ms P, but I find it unlikely it would've said or indicated there was a problem, which ought to have prompted Ms P into realising she had cause for complaint.

In 2019 I can see that Ms P's pension fund was exhausted. Unlike the investigator, I do think this is the point Ms P ought to have realised there was a problem. If Ms P had remained in her DB scheme it would've paid out an income for life and I think Ms P would've reasonably understood this at the time. So when her pension fund was exhausted and it couldn't pay her an income, she ought to have realised at this point that something might have gone wrong. But because Ms P complained in 2021, which is within three years of this happening, I'm satisfied her complaint has been brought in time and it is one that we can consider.

The merits of the complaint – 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 ('PRIN') and the Conduct of Business Sourcebook ('COBS'). 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 Broom's actions here.

PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 7: A firm must 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.

COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold it for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Broom should have only considered a transfer if it could clearly demonstrate that the transfer was in Ms P's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Before I set out my detailed reasoning, I can see that Broom wants me to consider all the points made in its final response letter to Ms P. But I will deal with the points that I consider are necessary and appropriate in reaching my decision about what I think is fair and reasonable in the circumstances. And this may, or may not, include the points Broom made in its final response letter.

Financial viability

Broom carried out a transfer value analysis report (as required by the regulator) showing how much Ms P's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme (the critical yield).

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Ms P was 53 at the time of the advice. Broom doesn't appear to have recorded what age Ms P intended to retire – the recommendation letter simply said she anticipated retiring early. The analysis Broom carried out was based on Ms P's DB scheme benefits at her scheme's normal retirement age of 60 and early retirement at age 55. The critical yield required to match Ms P's benefits at age 60 was 14% if she took tax-free cash and a reduced pension. At age 55 the critical yield was 34%.

This compares with the discount rate of 5.8% per year for six years to retirement in this case (retirement age of 60) or 5.6% for one year to retirement (retirement at 55.) For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Ms P's assessed 'aggressive' attitude to risk and also the term to retirement. In my view there would be little point in Ms P giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 14%, I think Ms P was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk. The growth rate required was more than twice the discount rate and significantly higher than the regulator's upper projection rate.

Broom assessed Ms P's attitude to risk as 'aggressive'. But I have some serious concerns about how Broom arrived at this. The risk assessment appears to have been based on a questionnaire containing eight questions. But in my view it was rudimentary and it did not take into account Ms P's individual circumstances.

For example Ms P was 53, her retirement was looming, she had no or minimal investment knowledge or experience, and this pension represented a significant part of her overall future

pension provision. So I think it's clear that her capacity for loss was low. Taking all of this into account, which is what I think Broom ought reasonably to have done, I think a cautious or low attitude to risk was more appropriate here and more in line with the level of risk I think Ms P was reasonably prepared to take with her pension.

Given this, I think it was clear Ms P was likely to receive benefits of a substantially lower overall value than those provided by her DB scheme if she transferred to a personal pension arrangement, as a result of investing in line with a low or cautious attitude to risk. Because of the required sustained growth rate, I think it's evident the transfer was not compatible with Ms P's attitude to risk. To have come close to achieving the level of growth needed, in my view it would have required Ms P to take significant risk and a higher level of risk than I think she was prepared to take.

So for this reason alone, a transfer out of the DB scheme wasn't in Ms P's best interests. And interestingly I can see this is the conclusion Broom reached in its advice as set out in the suitability report. The adviser said here that based on the required yield alone, they would recommend that Ms P leave her benefits in the DB scheme. But they went on to say that based on their analysis of the retirement planning questionnaire (Ms P's broad objectives) and discussions with Ms P, they felt a transfer was compatible with Ms P's attitude to risk.

Notwithstanding the fact that I don't think the way Broom's suitability report is worded conveys a positive recommendation to transfer, based on my findings above that I don't think Ms P was prepared to take an aggressive investment approach with her pension, I disagree a transfer was consistent with her attitude to risk. But I accept that 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. And I assume Broom believes this is the case given the suitability report's reference to Ms P's objectives. I've considered this below.

Flexibility - access to a cash lump sum

It appears that the key reason Ms P wanted to transfer her pension and why Broom recommended it, was because she wanted access to the maximum possible cash lump sum to fund a new career. Broom recorded that Ms P needed £19,000 for a new car, to repay some debts and to help start her business.

But I'm not persuaded that Broom has clearly demonstrated that transferring the benefits from Ms P's DB pension scheme to a flexible personal pension arrangement to achieve things was in her best interests. I say this because the figure of £19,000 appears to have been arrived at solely on the basis that this broadly represented the maximum amount of tax-free cash available to Ms P. There is no evidence that Broom interrogated this figure to establish and understand if this was truly the amount Ms P needed. The fact-find Broom completed can at best, in my view, be described as sparse. For example there is no breakdown of how much Ms P needed for a car, what costs were involved in helping start her business, and crucially Broom does not appear to have understood what debts Ms P wanted to repay.

So Broom didn't know the amount of the outstanding debt, the nature of it, the term, whether it needed to be repaid (no income and expenditure analysis was carried out.) In the liabilities section of the fact-find, Broom simply recorded: '*other adviser dealing.*'

In my view, without understanding this important information, Broom was not in a position to determine whether it was in Ms P best interests to make the irreversible decision to transfer her guaranteed pension benefits to an arrangement that was not guaranteed, to achieve things.

Furthermore Broom appears to have made no attempt to explore the alternatives that might have been available to Ms P. For example, it might have been possible for Ms P to borrow some or all of the money she needed and/or to restructure her outstanding debt. Did Ms P need a new car immediately or could this wait? Was it possible for Ms P to delay some of her expenditure plans until age 55 when she could take the benefits from her DB scheme early (I understand Ms P didn't qualify for immediate ill health early retirement.) I think Broom ought reasonably to have considered these things before going ahead and recommending Ms P transfer out of her guaranteed pension.

Income need

In my view Broom's advice centred solely on Ms P's immediate and short-term needs. Ms P's DB pension was designed to provide her with an income in retirement, yet Broom made no attempt to establish her future income need. The advice paperwork simply said: "You stated that you anticipate retiring early and are happy to accept a lower pension." But what that 'lower pension' was, wasn't determined. I accept it's possible that Ms P's retirement income need couldn't be satisfied solely by her DB scheme income, but I think she stood a better chance of achieving her future retirement income need by retaining her guaranteed and escalating income available through her DB scheme.

Overall I don't think Broom did enough here to show that it was in Ms P's best interests to transfer her pension benefits to a flexible arrangement to enable her to access her tax-free cash earlier than her normal scheme retirement age and the leave the remainder invested until a later date.

Death benefits

Although Broom did not specifically refer to the lump sum death benefits on offer through a personal pension arrangement as a reason for the transfer, I have nevertheless considered this because the advice paperwork referred to Ms P wanting flexibility to decide how benefits were paid in terms of a spouse's and dependant's pension.

Ms P was divorced, so I accept the spouse's pension available through her DB scheme wouldn't have been important to her at this time. So Ms P might have thought it was a good idea to transfer her DB scheme to a personal pension because of the flexibility it provided in this regard. But the priority here was to advise Ms P about what was best for her retirement provision. A pension is primarily designed to provide an income in retirement – not as a legacy planning tool. So I don't think different death benefits available through a personal pension was a compelling reason to transfer and justified the likely decrease of retirement benefits for Ms P.

Suitability of investments

I think Broom recommended that Ms P invest in unsuitable funds based on what I consider her true attitude to risk was at the time.

But because I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Ms P, it follows that I don't need to consider the suitability of the investment recommendation. This is because Ms P should've been advised to remain in the DB scheme - so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the availability of a cash lump sum, flexibility and control on offer through a personal pension arrangement would've sounded like attractive features to Ms P. But Broom wasn't there to just transact what Ms P might have thought she wanted. The adviser's role was to really understand what Ms P needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Ms P was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Ms P was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. In my view Ms P shouldn't have been advised to transfer out of the scheme just to meet a short-term objective that Broom didn't properly grasp the extent of or explore whether there were other realistic alternative ways of achieving things.

So, I think Broom should've advised Ms P to remain in her DB scheme.

Of course, I have to consider whether Ms P would've gone ahead anyway, against Broom's advice.

I've considered this carefully - but I'm not persuaded that Ms P would've insisted on transferring out of the DB scheme, against Broom's advice. I say this because Ms P was an inexperienced investor, who in my view neither possessed the requisite skill, knowledge nor confidence to go against the advice they were given. I believe Ms P was a cautious investor and this pension accounted for the majority of her retirement provision. So, if Broom had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests to risk her guaranteed pension to achieve a short-term need, I think that would've carried significant weight. I think she would've accepted that advice – so I don't think Ms P would have insisted on transferring out of the DB scheme.

In light of the above, I think Broom should compensate Ms P 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 Ms P, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Ms P would have most likely remained in the occupational pension scheme if suitable advice had been given.

Broom 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, if suitable advice had been given and Ms P had remained in her DB scheme, given her circumstances I think she would've most likely taken early retirement and accessed her benefits at age 55. So, compensation should be based on her taking benefits at this age.

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 Ms P'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, Broom should:

- always calculate and offer Ms P redress as a cash lump sum payment,
- explain to Ms P 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 Ms P receives could be augmented rather than receiving it all as a cash lump sum,
- if Ms P accepts Broom's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Ms P for the calculation, even if she 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 Ms P's end of year tax position.

Redress paid to Ms P as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Broom 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 Ms P'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 Broom Consultants Ltd to pay Ms P 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 Broom Consultants Ltd to pay Ms P any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Broom Consultants Ltd to pay Ms P any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Broom Consultants Ltd pays Ms P the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Ms P.

If Ms P accepts this decision, the money award becomes binding on Broom Consultants Ltd. My recommendation would not be binding. Further, it's unlikely that Ms P can accept my decision and go to court to ask for the balance. Ms P 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 Ms P to accept or reject my decision before 31 May 2023.

Paul Featherstone

Ombudsman