DRN-4020480

The complaint

Mr M says the advice given and the arrangements made by Tavistock Financial Limited, now registered as Sanlam Partnerships Limited (SPL), to transfer his defined benefit (DB) pension into a flexible retirement plan with Prudential was unsuitable.

What happened

Mr M says that he was introduced to SPL's services by a former colleague. He'd received a transfer value for his DB scheme and wanted advice about whether to move his benefits.

SPL gathered information from Mr M about his circumstances, objectives and attitude to risk. It issued a suitability report dated 29 September 2015. His priorities and objectives were to:

- Review his accrued benefits under his final salary pension scheme.
- Review his personal pension arrangements.
- To obtain a higher tax-free cash (TFC) lump sum at retirement.
- Allow him access to the flexibility offered by the new pension freedom rules.
- Improve the Lump Sum payable on his death before retirement.
- To have total control.
- To make investments for the long-term (10 years plus).

At this point I should note Mr M hasn't raised any concerns about the switch of his personal pensions, so the focus of this decision is what happened to his DB pension.

At the time of SPL's advice Mr M was 48 years old. He was married and had one financially dependent daughter. He was in full time employment as a sales manager at an estate agent. His basic salary was £40,000, with bonuses and commission taking his income to over £70,000 a year. His household had a healthy net disposable monthly income.

Mr M and his wife owned their home, which was worth around £120,000, with an outstanding mortgage of that amount. They also had two rental properties, both also with mortgages. No other savings or investments were recorded. Mr and Mrs M had whole of life and term life assurance policies in place providing several hundred thousands of pounds death benefits cover.

Mr M was a member of a DB scheme with deferred benefits. He had two paid-up personal pensions. And he was contributing to a third policy. In total his pension benefits were estimated to be worth around £470,000. By far the most significant element related to his final salary scheme.

Mr M had been a member of a former employer's DB scheme between 1993 and 2007. He'd accrued around 14 years of service. The estimated value of his annual pension at his normal retirement age of 60 was said to be £16,000 per year. His benefits enjoyed guarantees such as annual indexation and the scheme also provided death benefits including a spouse's pension. The quoted cash equivalent transfer value (CETV) of Mr M's benefits was about

£434,000.

SPL’s recommendations were recorded in the following terms:

“After consideration of your aims and objectives and attitude to risk, I would make the following recommendation: transfer your total pension fund of £473,425.22 from your Final Salary and [personal pensions] because: the critical yield of 3.4% shown by the TVAS report is achievable by transferring to a personal pension plan and this in turn could produce a higher Tax Free Lump Sum on retirement as well as a higher annual pension. The lump sum death benefit to your dependent will be paid as a return of fund and will be tax free as opposed to a spouse Pension of 66.67% from the [DB] scheme. The transfer will also allow you access to the new pension freedom rules without the need to transfer to a new contract...”

Mr M accepted SPL’s recommendations and the transfer of his DB funds took place in November 2015, with a slightly reduced CETV of £423,000.

In May 2021 Mr M approached SPL with concerns about what had happened in 2015. These included that:

- The advice to transfer from his DB scheme to Prudential in 2015 was unsuitable.
- He should’ve been advised to wait until he was 55 before considering any decision to transfer.
- He could’ve been advised to take additional life cover as death benefits was cited as one of the main reasons for transferring.
- His risk profile was manipulated to a higher level than was appropriate for him.
- The product recommended was not as flexible as he’d been advised.

SPL sent Mr M its final response on 18 August 2021. It didn’t uphold his complaint. It said the advice he had been given met his objectives and priorities. And it said he would’ve transferred irrespective of its recommendations because he’d made his mind up it was what he wanted to do.

Mr M disagreed and brought his case to this Service. An Investigator upheld his complaint. He concluded there hadn’t been compelling reasons for him to have transferred from his DB scheme. He thought SPL should’ve recommended he remain in the scheme. SPL disagreed, although it didn’t submit any new evidence or arguments.

As both parties couldn’t agree with the Investigator’s findings and conclusions, Mr M’s case was passed to me to review afresh. I issued my provisional decision in February. As neither party provided any new evidence or arguments, I see no reason to depart from my initial findings and conclusions.

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’m upholding Mr M’s complaint. I’ll explain why.

How does the regulatory framework inform the consideration of Mr M’s case?

The first thing I’ve considered is the extensive regulation around transactions like those performed by SPL for Mr M. 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 SPL. As such, I need to have regard to them in deciding Mr M’s complaint.

At the time of the advice SPL gave Mr M, 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, SPL 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 M to be able to make an informed decision.
- Give Mr M 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 M understood its comparison and how it contributed towards the personal recommendation.

In simple terms, SPL 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 M on what to do.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of “designated investment business” includes “arranging (bringing about) deals in investments”.

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer’s knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

Did SPL adhere to the regulatory requirements placed on it?

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

There are a number of documents relating to SPL’s transaction with Mr M that are important to my consideration, these include the fact-find, the attitude to risk questionnaire, the pension transfer analysis report and the suitability report.

I’ll start with Mr M’s recorded top three priorities for retirement planning: tax-free cash (TFC) lump sums at retirement; lump sum benefits upon death before retirement; and the ability to retire early (from the age of 55).

It’s a reasonable assumption Mr M could’ve secured a higher level of TFC and more flexibility in how he took such benefit if he transferred away from his DB scheme into a personal pension. And similarly, in the event of his death prior to retirement, it’s possible his dependants would’ve been in a stronger position financially than if he’d remained in the scheme. He could also have started to take benefits from the arrangement proposed by SPL as soon as he reached 55.

So, on the face of it, a transfer of Mr M’s DB pension appeared a good match with his priorities. But the regulator’s position was clear - the starting point was for SPL to have presumed that such a transaction wouldn’t be suitable.

Based on the available evidence, I don’t think SPL reached a threshold that made its recommendation to Mr M to transfer away from his DB scheme safe. I say this because while his objectives were reasonable, they didn’t need to be realised in 2015.

At the time of the advice Mr M was 48, so it was seven years before he could take any TFC from a pension and several years before he needed to take the decision. By transferring early he was leaving a situation where the scheme bore most of the risk to one where his retirement income was being exposed to investment risk.

Further, there were other options to meet some of his objectives. For example, in terms of providing for his family in the unfortunate circumstance of his passing, he could’ve increased his life cover. Although, I note that he had over £400,000 in protection policies and so arguably this was well provided for already. And the transfer of his DB funds had the potential to expose his estate to increased inheritance tax had he died within two years of the transaction. And in terms of retiring early, Mr M’s DB scheme provided for taking his benefits prior to the normal retirement age of 60, albeit with an actuarially reduced pension.

I don’t think the timing of Mr M’s decision making, nor the other options for achieving his objectives were effectively explored.

SPL needed to have analysed, tested, challenged and advised Mr M 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 is recommended, there need to be compelling reasons. In terms of Mr M's stated objectives, I find these didn't provide a sufficiently strong rationale for SPL recommending he transfer from his DB scheme.

It was SPL's role to discern what Mr M's wants and needs were and why. Its role wasn't simply to facilitate what he wanted without any critical thinking. 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 because it ended up recommending the transfer to him.

Leaving Mr M's objectives to one side, I've thought about whether there were any other strong reasons for Mr M to proceed with the transfer. The CETV of £434,000 he was offered appeared attractive. It represented around 44 times the annual pension he'd accrued up until 2015. But such values can fluctuate significantly, it wasn't possible to know whether the equivalent offer he might receive in a year, five years or seven years would be more or less.

The broader financial case does help understand better what was on the table for Mr M to consider. The critical yield is the level of return his new pension plan would've needed to have achieved in order for the transfer to match his OPS pension benefits at retirement (aged 60). The pension transfer report indicated that an annual return of not less than 3.4% would be required.

SPL's advice was given during the period when this Service published '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, I consider they provide a useful indication of what growth rates would've been considered reasonably achievable when the advice was given in Mr M's case.

So, the critical yield required to match Mr M's OPS benefits was 3.4%. When the advice was given, the relevant discount rate was 4.4% for someone with 11 years to retirement. The comparable growth rates this Service used were based on a typical investment spread across shares and bonds. So, it's arguable, depending on Mr M's assessed attitude to risk, reaching the critical yield could've been achievable.

Unhelpfully, SPL's suitability report for Mr M faces in different directions in terms of its assessment of his attitude to risk. It summarised his outlook in the following terms:

"Your risk is 'highest medium'. Your priority is likely to be making higher returns on your investments but you are still probably concerned about losing money due to rises and falls. Your preferred investments are likely to contain mainly higher-risk investments such as shares with a few lower- and medium-risk investments such as bonds and property."

"We established that the attitude to risk for this particular investment could realistically be described as 'Highest Medium Risk' (Profile 7 out of 10). After discussion we have therefore agreed I would use this risk level when making my recommendation."

And yet later in the suitability report when recommending how Mr M's funds should be invested SPL said:

"Based on current market conditions, I recommend the following fund for your Prudential pension. The Prufund Growth Fund matches your attitude to risk as it is classed as cautious which was highlighted when we discussed your attitude to risk. This provides a mix of funds which will give the potential for growth and also match your capacity for loss which we agreed was that "small medium losses could be tolerated".

"To choose the Prufund Growth we used a mapping tool which was produced by Distribution Technology and links the Prudential's fund range and products to the risk profiles used on the Dynamic Planner platform. The fund is designed for someone who has a cautious or moderately cautious attitude to risk like you."

I'm giving SPL the benefit of the doubt here. I think that while the questionnaire Mr M completed returned a result which suggested he had a significant appetite for risk. It didn't take matters at face value. It did the right thing by exploring his wider circumstances and what laid behind his responses.

So, rather than being someone open to taking a high level of risk, actually Mr M was quite cautious. This is important to bear in mind for several reasons. The level of risk he wanted to take would determine the investment returns he would make from the new arrangement. So, this begins to undermine the financial case for the transfer.

Further, we also need to think about Mr M's capacity for loss. His DB pension benefits were his main provision for an income in retirement. While he had three personal pensions, by comparison these were small. I'm mindful he also had rental properties, but these appear to have been significantly encumbered at the time. There's nothing recorded in the fact-find about significant savings or other investments. So, Mr M's capacity for loss was actually low. This undermines the financial case for transfer again.

And finally, as I've already mentioned, Mr M was moving from a position where his DB scheme bore the risks of providing his income in retirement to a situation where he was taking on that risk by exposing his fund to the market. And he was doing so several years before he even needed to take such a decision.

Mr M had been offered a good CETV and the initial financial analysis might've suggested there was a good chance he'd be better off in the long-run by transferring his funds. But given what we know about his cautious attitude to risk and his limited capacity for loss, it seems the financial case for transfer was finely balanced. And that was a precarious basis on which to recommend a transfer in the circumstances.

Other reasons have been advanced to support the transfer of Mr M's pension away from his DB scheme. For example, to take advantage of new pension flexibilities and to have control over his benefits. But as I've already set out, he was several years away from being able to take benefits from his pension. And his attitude to risk was cautious, so why would he want to wrest control over his funds away from the scheme?

These supplementary reasons are flimsy. None of them are sufficiently compelling for me to think that on balance the transaction was to his advantage.

SPL set out its main argument for rejecting Mr M's complaint in the following terms:

"Having reviewed the documentation available to me it is evident that as an ex-adviser you were more knowledgeable regarding pensions, investing and the guarantees within a final salary pension scheme than most clients. It also seems clear that you were determined to transfer away from the pension scheme and only sought advice because you were required to do so and that you wanted to transfer to the Prufund Growth Fund. As a result, I would conclude that you would have transferred regardless of the advice you were given and had already signed the forms to allow the transfer to take place even before you received the advice."

I understand the points being made here by SPL. Elements of its argument are plausible. But ultimately I haven't seen enough evidence to persuade me that Mr M would've ignored advice not to proceed.

I'd observe SPL didn't recommend that Mr M 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.

I think SPL should've provided Mr M with fully formed and unequivocal advice not to proceed with the transfer from his DB scheme to a personal pension. 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 to a personal pension where he was exposed to unnecessary risk.

SPL could've advised Mr M against the transfer and then if he'd still wanted to proceed it could've transacted with him on an insistent client basis. To do this it would've needed to communicate with him:

- In terms that were clear, fair and not misleading.
- Having regard for his information needs such that he was able to understand.
- That it hasn't recommended the transaction and that it will not be in accordance with its personal recommendation.
- The reasons why it wasn't in accordance with that personal recommendation.
- The risks of the transaction proposed by the client.
- The reasons why it didn't recommend the transaction.

If it had done this Mr M could've set out in his own words why he still wanted to proceed with the transfer, acknowledging also it was against advice. But no such insistent client process was followed.

Instead, SPL is asking me to accept arguments it makes about Mr M's experience of the financial services sector and the strength of his motivation and conclude irrespective of what it did, he'd have proceeded with the transaction anyway.

Considering Mr M's experience as a financial adviser. I think SPL makes a reasonable point when it says that he was likely to be more knowledgeable about pension and investment matters than the average person. However, I think it's a leap too far to say he understood what there was to know about pension transfers at the time of the advice.

I say this because Mr M joined the firm where he built up his DB pension in 1993. At the time he was able to give advice on basic pension products. Around 1995 he moved into management and wasn't involved in giving advice. And he says from 1998 his employer moved out of giving pension advice and focussed on mortgage and protection products. He was made redundant in 2007 and by 2011 he says he did explore becoming a financial adviser again, but found a role with financial protection products and then moved into management. His financial services qualifications related to mortgage products. He had no qualifications related to DB transfers.

SPL hasn't done enough to demonstrate that Mr M had the relevant and up to date knowledge and experience in 2015 to fully appreciate the complexities of a DB transfer. He sought out professional expertise and I think he was entitled to rely on that.

Mr M told this Service he'd obtained CETV's for his DB pension in the years prior to the disputed recommendation from SPL. He explained he'd discussed transferring from the scheme with advisers before 2015 but was advised at those points not to transfer, and listened to that advice.

SPL says it gave Mr M all the necessary risk warnings indicating he was required to take responsibility for the decision to transfer. As the Investigator noted, while Mr M would've understood those warnings, disclosure of risks doesn't of itself make the advice suitable.

SPL has given other examples it says shows Mr M would've proceeded with the transfer irrespective of its advice. It points to him signing transfer documentation before he'd received the finalised suitability report. And it says that even though the CETV value reduced by around £11,000 towards the end of the advice process and that he sought a 'kick-back' from it to offset this effect which it rejected, he still went ahead.

I don't think these are telling points from SPL sufficient to disturb my overall conclusion. I say this because Mr M was given the transfer forms in advance and likely had positive conversations with the adviser about the transfer. If after signing the forms, he'd received advice not to transfer, I think he'd have followed that recommendation.

Further, I don't find the reduction in CETV to have been material to his consideration. And while Mr M may've sought to use the reduced value as leverage to negotiate a reduced fee, even if he'd been successful this again would've been at the margins of any decision making about the significant transaction he was undertaking.

I've concluded it's more likely than not, had SPL given Mr M appropriate advice, he wouldn't have gone ahead with the transfer from his DB scheme to a personal pension plan. It's unusual for someone to seek professional advice and then go against the recommendations received.

To conclude I don't think the recommendation by SPL to transfer Mr M's occupational pension scheme benefits 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 SPL 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. Sanlam Partnerships Limited should pay Mr M 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 Sanlam Partnerships Limited pays Mr M the balance.

This recommendation is not part of my determination or award. SPL doesn't have to do what I recommend. It's unlikely that Mr M 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 M 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. He would like his complaint to be settled in line with new guidance /rules. I consider it's fair that Sanlam Partnerships Limited calculates Mr M's redress in line with new guidance and rules when they come into effect.

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the DB scheme.

The basic objective of the amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and policy statement, I'm satisfied that the changes still reflect a fair way to compensate Mr M.

Sanlam Partnerships Limited must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.

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

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Mr M'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 M 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 M within 90 days of the date Sanlam Partnerships 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 SPL to pay Mr M (excepting that arising from delays with DWP SERPS adjustment data or related to his choice to wait for updated FCA redress guidance – see below).

Income tax may be payable on any interest paid. If Sanlam Partnerships Limited deducts income tax from the interest, it should tell Mr M how much has been taken off. It should give Mr M 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.

My final decision

For the reasons I've set out, I'm upholding Mr M's complaint. I now require Sanlam Partnerships Limited to put things right as directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 11 April 2023.
Kevin Williamson
Ombudsman