

The complaint

Mr H complains about the advice given by Niche Independent Financial Advisers Limited ('Niche') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension arrangement. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr H approached Niche in August 2018 to discuss his pension and retirement needs. Mr H said he understood that he could access his pension benefits from age 55, so he requested an early retirement quote from his DB scheme and wanted advice on his options.

Niche completed a fact-find to gather information about Mr H's circumstances and objectives. Amongst other things this recorded that Mr H was divorced; he was on sick leave and due to return to work in September 2018; he rented his home with his partner; and his objectives were to access a cash lump sum to repay some debts, gift some money to his son and go on holiday. Niche also carried out an assessment of Mr H's attitude to risk, which it deemed to be 'cautious.'

On 14 August 2018 Niche advised Mr H to transfer his pension benefits into a personal pension and invest the proceeds in both a cash and a cautious investment fund. In summary, the suitability report said the reason for this recommendation was that Mr H couldn't achieve his objectives without transferring his pension.

Mr H's pension transfer duly took place and around £34,800 was transferred to his new personal pension arrangement from which Mr H took around £8,700 as a tax-free cash lump sum and a one-off £10,000 income payment.

In 2022 Mr H complained to Niche, via a representative, about the suitability of the transfer advice. In summary, Mr H said that the advice failed to challenge or adequately explain that the value of an immediate lump sum payment, whilst appearing attractive, may actually be of less value than a guaranteed future income stream.

Niche didn't respond to Mr H's complaint, but it provided its business file (presumably rejecting Mr H's complaint) when he referred his complaint to this service. One of our investigator's considered the matter and they upheld Mr H's complaint and required Niche to pay compensation.

In summary they said the transfer wasn't financially viable because of the growth rate required to match Mr H's DB scheme benefits and there was no other compelling reason to justify a transfer in the circumstances. They said Mr H had no real need for a cash-lump sum – his objectives of wanting a holiday and gifting money to his son weren't priorities. And while Mr H wanted to repay some debt, Niche didn't explore the alternative available to Mr H to raise the money. They also didn't think different death benefits available through a personal pension outweighed Mr H's need for security in retirement.

Niche didn't respond to the investigator's assessment – so because it is assumed that it disagrees with their findings, the complaint comes to me to make a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. 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 Niche'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 the complaint 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, Niche should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

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

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr H was 55 at the time of the advice and it was recorded that he intended to keep working and retire at 65. The critical yield required to match Mr H's benefits at age 65 was 14.46% if he took a full pension and 12.37% if he took a cash lump sum and a reduced pension.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.7% per year for nine years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr H's 'cautious' attitude to risk and also the term to retirement. In my view there would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here the lowest critical yield was 12.37%. While Niche did not express an opinion as to the likelihood of Mr H's pension achieving the required critical yield, I think given the required return Mr H 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 a cautious attitude to risk.

The return required was far in excess of the discount rate and significantly higher than the regulator's upper projection rate. In my view, even to have come close to achieving this kind of return would've required Mr H to take significant risk with his pension benefits – but this was way outside the risk appetite Mr H said he was prepared to take. I also think Mr H's capacity for loss was low – he didn't have significant other assets to fall back on and his overall private pension provision was really only made up of this and one other small DB scheme.

I can see that Niche produced cashflow models to show how Mr H couldn't meet his retirement objectives by remaining in his DB scheme – but these appear to be based solely on the basis that Mr H could raise a sufficient cash lump sum to meet his short-term objective by transferring. It does not appear to be based on Mr H drawing an ongoing pension income from the transferred pension.

For this reason alone, it is my view that a transfer out of the DB scheme wasn't in Mr H's best interests. 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 – something it appears Niche believes is the case here given the positive recommendation to transfer. I've considered this below.

Flexibility – access to tax-free cash

Mr H's objectives were based around him accessing a lump sum from his pension to enable him to repay some debt, gift money to his son and go on holiday. And I have no doubt that having turned 55, Mr H thought it was a good idea to use his pension monies to achieve

things. But Niche wasn't there to just transact what Mr H might have thought he wanted or seemed like a good idea. The adviser's role was to really understand what Mr H needed and recommend what was in his best interests. I'm not persuaded Niche did that.

Niche recorded that Mr H wanted to clear some debt, including overdue rent which would cost him £3,500. But Niche did not interrogate this further to understand what this debt comprised of – for example how much was due to overdue rent, how much related to other debt and what the terms of the repayment were, including the term and the monthly repayment commitment. Without understanding this, I don't think Niche was in a position to say that it was in Mr H's best interests to access his pension benefits before his normal retirement age and use the money to repay this debt.

I can see that Mr H was currently signed off sick from work and was due back in September 2018. So it seems entirely possible that Mr H's financial position had solely arisen from the fact that he was on sick leave, perhaps on a reduced income, and that once he returned to work the position would quickly improve and he could make good his overdue rent. Niche recorded that Mr H's income was supplemented by overtime / working more hours. In the suitability report it said that, while being off work Mr H was finding the inactivity difficult as he was used to living an active lifestyle *'including working overtime very regularly'* – so it seems this option was likely available to Mr H to improve things.

I'm also mindful that, in advising Mr H he should maintain an emergency fund of at least three months' income, Niche recorded that he planned to do this as soon as possible. So it appears to me that Mr H might have had the capacity to save excess income (when he returned to work) which in my view would also mean that his debts were likely manageable or could be with better budgeting for example – things I think it was reasonable for Niche to have explored / grasped. Furthermore I can see that Mr H was co-habiting with his partner. But nothing was recorded about the extent to which they were contributing to the household budget and able to help with Mr H's financial position. I think this was also something Niche ought to have explored and recorded.

Notwithstanding the above, if some of Mr H's debt related to a loan or a credit card, then I would've expected Niche to have explored this in more detail and discussed the alternatives for repayment with Mr H. For example, advising Mr H to firstly talk to his lender about things, consider a payment holiday, and/or if necessary discuss the possibility of restructuring the debt, which might have made things more affordable. I don't think it was the right thing for Niche to have seemingly defaulted to recommending Mr H access his guaranteed DB scheme benefits to pay off his debts when it's not clear that he really needed to at this time.

Mr H also wanted some money to gift to his son – around £2,000 – have some surplus cash to visit his son and spend around £4,000 on a holiday. In my view none of these 'objectives' can reasonably be described as pressing or priority needs to justify Mr H accessing his DB scheme pension benefits early by transferring out. Niche recorded that Mr H's son was financially independent, so it doesn't appear the gift was necessary. And in my view a holiday, is a 'nice to have' – it is not essential. So I don't think these things justified a transfer and outweighed the likely fall in Mr H's overall retirement benefits as a result of transferring out of his DB scheme.

In my view all of Mr H's objectives recorded by Niche were short term pre-retirement objectives that did not justify Mr H relinquishing a guaranteed and escalating pension in retirement for. And an income that along with his other pension provision, including his state pension, would've likely met his retirement income needs. Overall I don't think Niche's advice was suitable in the circumstances and I don't think it acted in Mr H's best interests.

Death benefits

While as I indicated above, it appears Niche's advice was predominantly based on Mr H wanting access to a cash lump sum, the suitability report also referred to Mr H's feelings that, an added benefit of the transfer to a personal pension arrangement was the flexibility of the death benefits - Mr H could nominate his son for example to receive any remaining pension upon his death.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr H. But whilst I appreciate death benefits are important to consumers, and Mr H might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr H about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – it is not a legacy planning tool. And I don't think Niche properly explored to what extent Mr H was prepared to accept a lower retirement income in exchange for higher or different death benefits.

I accept that Mr H was divorced, so the spouse's pension provided by the DB scheme was likely not of interest to him. That said, Mr H had a partner and it's possible that he might marry again in the future. In which case this benefit would become useful. In any event, I don't think Niche should've encouraged Mr H to prioritise the potential for different death benefits through a personal pension over his security in retirement.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr H.

Summary

I don't doubt that the flexibility, access to a higher tax-free lump sum and the potential for higher or different death benefits on offer through a personal pension would have sounded like attractive features to Mr H. But as I explained earlier on, Niche's role wasn't simply to facilitate what Mr H might have thought he wanted. The adviser's role was to really understand what Mr H needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr H was very likely to obtain lower overall retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. I don't think Mr H should've been advised to transfer out of the scheme to repay debts that Niche didn't establish the details of or understand whether they really were unaffordable, or to use funds for purposes which could not reasonably be considered as necessary. And the potential for higher or different death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Niche should've advised Mr H to remain in his DB scheme.

Of course, I have to consider whether Mr H would've gone ahead anyway, against Niche's advice if things had happened as they should have.

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against Niche's advice. I say this because Mr H was an inexperienced investor with a low attitude to risk, who neither possessed the requisite skill, knowledge nor confidence to go against the advice they were given – particularly in a complex pension matter. Mr H's pension accounted for a not insignificant proportion of his private retirement provision - so, if Niche had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr H was wedded to his objectives such that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Niche had explained that Mr H's desire for a lump sum to meet short-term objectives was not a compelling reason to risk his guaranteed pension for at this time, I think that would've carried significant weight. So, I don't think Mr H would have likely insisted on transferring out of the DB scheme.

In light of the above, I think Niche should compensate Mr H for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Niche to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would have most likely remained in the occupational pension scheme if suitable advice had been given.

Niche 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, while Mr H withdrew the balance of his pension plan as taxable income in 2019, I consider this was only because he could access his funds by virtue of the unsuitable advice he received. Mr H actually retired in November 2022 at age 59 due to poor health. So, if suitable advice had been given, I think Mr H would've taken his DB scheme benefits at age 59. Compensation should therefore be based on a retirement age of 59.

This calculation should be carried using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr H's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Niche should:

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

Redress paid to Mr H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Niche may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr H's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Niche Independent Financial Advisers Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Niche Independent Financial Advisers Limited pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H may want to consider getting independent legal advice before deciding whether to accept any final decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 19 June 2023.

Paul Featherstone
Ombudsman