

The complaint

Mr M complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a type of personal pension arrangement in 2017. He says the advice has caused a financial loss.

Grove Pension Solutions Limited is now responsible for answering this complaint. To keep things simple I'll therefore refer mainly to "Grove".

What happened

Mr M was a deferred member of the OPS which was a large public sector scheme. He'd accrued several years' worth of benefits and in late 2016, it seems Mr M approached Grove about accessing the benefits of his DB pension. The information gathered about Mr M at the time was broadly as follows:

- Mr M was 59 years old, separated and had no others financially dependent on him.
- He earned around £1,200 per month (net). He was living in a caravan at the time of the advice and didn't have any savings or assets. He had moderate credit card debt which was being paid down gradually.
- The cash equivalent transfer value (CETV) of Mr M's DB scheme was around £79,500 although this increased slightly over the months Mr M was being advised by Grove. The normal retirement age (NRA) was 65.

Mr M eventually transferred out of his DB pension in May 2017 and put the money into a type of personal pension arrangement. However, it seems he's since accessed these funds and spent most of the money. He has engaged a representative which complained to Grove on his behalf, in 2022. It says that Grove had facilitated a transfer away from his DB pension scheme and that this was both unsuitable advice and had caused him a financial loss.

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

The complaint has now been referred to the Financial Ombudsman. One of our investigators looked into it and said we should uphold it. They thought Grove hadn't treated Mr M correctly when categorising him as an 'insistent client'.

As the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The regulator, the Financial Conduct Authority ('FCA'), stated in its Conduct of Business Sourcebook ('COB') at the time, that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Grove should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M's best interests.

Also at the time of the advice, there was some regulatory guidance in place in respect of insistent clients. This had been published fairly recently at around the time of this advice, and so Grove should have been aware there had been regulatory concerns about these types of situations. I'll refer to this further down. But there were also still the comprehensive general rules in the regulator's Handbook, which required Grove to act honestly, fairly and professionally in accordance with the best interests of its client. In addition, COB required Grove to provide information that was clear, fair and not misleading. So, Grove's recommendation had to be clear. I also think it's fair and reasonable to say that Mr M ought to have understood the consequences of going against any recommendation it might have made.

I've also used my inquisitorial remit to think about whether this complaint should be upheld.

Having considered all the circumstances in this case, I've decided to uphold Mr M's complaint.

The financial viability of transferring his pension

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

Grove referred in its transfer analysis and suitability report to the 'critical yield' rate. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same benefits as the DB scheme. In Mr M's case, the critical yield for a retirement at 65 was high, at over 16%, if taking a reduced pension and a tax-free lump sum. If taking a full pension without any lump-sum, the critical yield rate was over 19%. So, if transferring was to be financially viable, I'd need confidence that this type of growth could be achieved over future years until around when Mr M might reach his NRA. In my view, this would be highly unlikely.

However, none of these things really matter in this particular case. This is because Grove said then – and now - that the growth rates needed if he transferred were too high. It said at the time that Mr M ought not to transfer his DB pension. For example, on 6 March 2017 Grove wrote to Mr M in email form. It set out that the adviser didn't think transferring was right for Mr M and recommended he didn't do it. So, having said this both at the time of the advice and when Mr M raised his complaint to our Service, it would clearly be hard for Grove now to say transferring was suitable.

The main crux of this complaint is therefore not whether he'd gain anything by transferring. It's whether Grove did enough to act in Mr M's best interests and specifically, whether it

acted improperly by facilitating the pension transfer, nonetheless, on an 'insistent client' basis.

What was Grove required to do?

At the time, there were no rules to prevent advisers transacting business against their advice if the client insisted. However, businesses should have followed the normal advice rules first. This means Grove needed to obtain the necessary information about Mr M and his investment objectives, his financial situation, and his knowledge and experience so as to enable it to make a suitable personal recommendation. It also needed to act honestly, fairly and professionally in the best interests of Mr M.

Grove should also have understood Mr M's investment objectives before making a recommendation. A request or preference by him for a particular solution – for example accessing cash from a pension – isn't an objective. Grove had to ascertain his actual investment objectives so that it could advise on a suitable course of action to meet them. It was also required to communicate with the client (for example in the suitability report) in a way that is clear, fair and not misleading (see Principle 7).

As our investigator also pointed out, the regulator provided some guidance in February 2016 on the steps it expected advice firms to take when treating someone as an insistent client:

1. *You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*
2. *You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
3. *It should be clear to the client that their actions are against your advice."*

The FCA also provided some examples of good and poor practice with regard to arranging transactions on an insistent client basis. It said the following would be examples of good practice:

- *The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.*
- *The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.*
- *Robust warnings were given and documented.*

Did Grove get things right?

Mr M first engaged with Grove in late 2016. A 'fact find' and pension transfer analysis were commissioned in December 2016 and arrangements made for a telephone 'meeting' whereby Grove and Mr M could discuss his financial affairs.

There then appears to have been a gap of quite a few weeks. However, on 6 March 2017 Grove sent Mr M an email which set out:

- if he transferred away from his DB scheme, he would be giving up a likely pension of around £320 per month and a tax-free lump sum of around £25,643. The email pointed out that this was guaranteed whereas investing elsewhere wouldn't be guaranteed
- the critical yield rates were very high
- if he lived to normal life expectancy, he'd probably lose over £31,000 in total as a result of transferring away from his DB pension
- if he needed money – which Mr M had said he did - he may be better of getting a personal loan rather than using his pension.

I think it's fair to say that at this stage Mr M would have been aware that Grove's recommendation was against leaving his DB scheme. But I don't think it was right that this first tranche of advice was issued to Mr M in email format rather than in a suitability report which I'd normally expect to see regulated pension advice in. I accept this may have been a deliberate and shortened form of advice, but the consequences of it were that the advice points were more restricted than one might expect in a full suitability report. For some consumers this may be appropriate but as I'll explain below, it was important here that Mr M, someone with very limited financial knowledge, really understood all the issues he might face if transferring.

I think it's also fair to say the adviser should have known that Mr M appeared to be in a somewhat vulnerable financial position. He had no savings or investments, was living in a caravan and the pension in question appeared to be his only retirement provision other than a possible state pension (at the age of 66).

I've noted there was a prospect of Mr M being rehomed in due course into more substantive housing with the help of a friend, although the circumstances and value of this arrangement seem to me to demonstrate that the property he'd be moving into was of low quality and in need of investment. I say this because the property was apparently being bought by a friend for only £33,000. So, in my view, Mr M's circumstances of that time – as recorded on the December 2016 'fact find' by Grove raise more questions than answers. Mr M had evidently told Grove that his need for cash at the time was based on furnishing this 'new' property – mention was made of getting a wardrobe, furnishings and utensils. He implied he needed £10,000.

I therefore think all these circumstances should have put Grove on notice that it was dealing with someone here with very limited financial resources, no capacity for loss and most likely someone with little understanding of his financial options going forward. Added to this Mr M seems to have been going through a complicated time of his life where he would be dealing with a number of significant changes. I think Grove's dealings with Mr M ought to have reflected this as this didn't appear an ideal time to be reorganising one's pension planning.

I think any reasonable assessment of Mr M's situation would have shown his apparent 'need' for cash was no more than an estimate and potentially even somewhat unrealistic when comparing against his longer-term retirement needs. The adviser did mention in his email the potential for a loan to Mr M as an alternative way of raising some cash. However,

another option, not mentioned, might have been to retain his DB pension scheme and retire from this early at the age of 60, rather than 65, which was by then only a few months away. So, I think there were some shortcomings in the overall advice. Nevertheless, I do accept that the adviser rightly told Mr M that transferring his pension didn't appear to be a suitable course of action.

Having had the email from Grove on 6 March 2017, Mr M emailed the adviser back on 16 March. He told the adviser he still wanted to proceed with a transfer away from his DB scheme and he specifically mentioned his circumstances had changed. It looks very much like there was a call between the parties after this email from Mr M, but we have no recording of it. What then happened was that a suitability report was immediately produced and sent to Mr M the next working day, which was Monday 20 March 2017. Again, I accept that this report largely picked up where the previous Grove email had left off – essentially re-emphasising that transferring from his DB pension wasn't recommended. However, in my view, this report was seriously undermined in that in the same document it went on to recommend a personal pension provider and a specific money market pension fund to which Mr M *could* transfer.

I think the suitability report was further undermined because it was accompanied by a cover letter introducing the document. This letter made it clear that all Mr M had to do to get the transfer ball rolling was to sign the enclosed paperwork and return it to Grove. It also enclosed the fact sheet relating to the proposed new personal pension fund, personal pension transfer illustrations, and the provider's Key Facts document. So, it's important to point out that Mr M was being sent significant information about a new pension fund provider to which he could transfer to, and a fund recommended by Grove, all in the same document. And under the same cover, he was being sent transfer-out forms.

The suitability report also set out Mr M's attitude to investment risk (ATR) and its application to potential funds in a personal pension. So, I think all these things show that transferring was by now the predominant direction of travel. All Mr M had to do was to sign some forms and send them back to his adviser.

The regulator has expressed concern about 'insistent client' situations where the apparent recommendation is *not* to transfer from the DB scheme, but where this recommendation is somewhat insincere. The FCA examples of poor practice describes such situations as no more than a 'papering exercise'. In Mr M's case, and at this particular stage in the dialog the parties were engaged in, what Grove effectively did was to introduce him to a new personal pension provider, issue investment fund advice and talk to Mr M about his ATR, all in the same suitability report which had begun by recommending he shouldn't transfer at all.

Whether or not Mr M would have found this confusing is obviously open to debate. However, in my view he was certainly in a vulnerable situation and his financial knowledge seemed very limited indeed. And as I set out above he was already undergoing significant changes to his life. Also, as he'd been sent all the necessary forms to discharge from the DB scheme at the same time as the suitability report, he didn't really have to go through any more onerous procedures to obtain access to the £79,500 his CETV contained.

Mr M had also explicitly said in his email of 16 March that his circumstances had changed. I've taken this to mean changed from Grove's original 'don't transfer' email of 6 March. But the issue here is that we can't really say much about this because Grove doesn't appear to have enquired enough into this change of circumstance. In fact, what we now know, tends to strongly suggest that there was no such change in Mr M's situation; and it's likely he just said this to help justify a change in Grove's recommendation.

Looked at through a certain lens, it's possible to say that Mr M himself was wrong to seek a change in Grove's recommendation. However, given the overall circumstances, I think Grove should have enquired into these so-called changes. I think if Mr M was found to be exaggerating a change to his circumstances, then Grove should have easily seen through this. In many ways, it could be viewed as merely an obvious act of desperation by Mr M to get the pension money quickly and so a comprehensive dialog should have taken place about the risks of this. Grove was the regulated financial adviser here and it was being paid a significant sum for its advice. It should therefore have drilled down into any potential reasons as to why Mr M still wanted to transfer away from his DB scheme, not least because there was still a possibility that what had supposedly changed may well have justified a complete re-look at his situation. On the other hand, I think all this very clearly showed that Mr M hadn't properly digested Grove's advice up to that point.

At this stage, I think Grove should have been taking note of the regulator's stance that these types of transfer are most likely unsuitable. It should have further considered the guidance in place at the time about 'insistent clients', as I've set out above. And it's important to remember that Grove should have been very clear that if it was still not recommending a particular transaction or course of action, then the risks of what Mr M was apparently interested in were pointed out to him during the course of the advice.

In my view, just issuing a suitability report which also contained the recommendations for a new pension provider and a particular money market fund, didn't adequately achieve this. When Grove became aware that Mr M was still interested in transferring away, in my view it should have issued an independent suitability report with all the reasons as to why he shouldn't transfer, without any references to a new personal pension. It should also have provided an opportunity for Mr M to explain why he wanted to transfer and that he fully understood this was against Grove's advice. It should also have discussed with Mr M his reasons for apparently not accepting the advice. And it should have completely clarified whether there were any changes in his circumstances. In short, I think this would have been a good opportunity for Grove to really understand his needs, or indeed, whether he really understood the process at all.

Grove should also have asked Mr M if early retirement from the scheme might have been more suited to his financial and retirement aspirations going forward. However, I think a significant omission here was that Grove didn't really discuss with, or point out to Mr M, the obvious challenges he would face from a substantial reduction in his retirement provision. In my view, it was clear that this needed explaining carefully to Mr M. This might have included, but is not limited to, comparing his financial needs in retirement with the reductions he'd face by leaving this DB pension scheme. His pension provisions were already modest, so I think if Grove had taken some time to really reiterate why all this wouldn't be in his best interests, Mr M would have listened.

Suitability of investments

Grove ultimately recommended that Mr M invest in funds within a personal pension arrangement. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M, and he wasn't treated correctly regarding the 'insistent client' rules and guidance, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr M should have been more comprehensively advised to remain in the DB scheme and so the investments in the new personal pension funds wouldn't have arisen if Grove had followed the correct procedures.

Summary

I accept that Grove began this process by correctly saying that transferring away from his DB scheme wasn't in Mr M's best interests. I also accept it provided a certain amount of information explaining why it had arrived at that view. Also, when Mr M expressed an apparent interest in transferring anyway, Grove did issue some written warnings.

However, I've described above why I think Grove also got a number of things wrong in this case. I don't think Grove took enough note of Mr M's obvious lack of pensions knowledge and his financial vulnerability. In my view, there were obvious inconsistencies in his financial profile and motives. For example, his housing costs moving forward seemed very unclear and what he apparently wanted money for in no way justified exiting a DB pension scheme.

I also think the advice Grove provided to Mr M about his alternative options to transferring his pension was unduly limited. Although it discussed the possibilities of a personal loan, I think the option of maintaining membership of his DB scheme and retiring early was very much worth considering and this may have encouraged Mr M to view his options in a completely different light from the outset. Mr M was over the age of 59 and this might have been suitable for him as it may have generated a lump-sum close to the amount Mr M thought he needed at the time.

It's easy to think that Grove gave Mr M strong words on two different occasions to *not* transfer away from his DB scheme. However, the first of these was in an email. Whilst this did clearly 'headline' the main disadvantages, it was limited in its scope. So, by 6 March 2017, Mr M hadn't really been told about all his alternative options and the real problems he would likely face in generating a reasonable retirement income if he transferred away.

As for the second occasion, on 16 March 2017, whilst he was given a more comprehensive suitability report, I've explained how this was undermined by the accompanying paperwork. Not only did this comprise of the detailed recommendations about a new pension provider and its funds, there was an opportunity presented to Mr M for him to transfer away from the DB scheme in a quick and easy manner; all he needed to do was merely sign a few forms and return them to Grove. In this context, I don't think he was given genuinely robust warnings which he would have understood the seriousness of.

That Mr M was keen on transferring is not in doubt. However, I think Grove failed to gain assurance that Mr M really understood the consequences of what he was considering. Grove failed to understand whether he had any investment objectives. And it failed to get him to explain why he really needed £10,000 for items that didn't appear to merit that value. In my view, and of course with great respect to Mr M himself, it simply wasn't clear that he'd understood or considered even the most basic alternative means of generating money, as opposed to irreversibly leaving a DB scheme which contained valuable benefits and guarantees for the rest of his life.

Against this backdrop, I think Grove had a responsibility to treat his case with great care. Its job wasn't to simply transact what Mr M, a man with no investment experience, thought he wanted. Whilst this was Mr M's own money and he could use it as he pleased, Grove needed to reiterate all the risks and check his understanding, which on the face of it appeared very poor. I also think an obvious risk here was that Mr M would continue to access the transferred funds, rather than keep them invested for his retirement, which is mainly what a pension is for. We know this is what subsequently happened.

For the reasons I've set out above I'm upholding this complaint.

Putting things right

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

Grove 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>.

Compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the FCA's guidance. My understanding is that Mr M has depleted most of the pension fund.

This calculation should be carried out 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 M'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, Grove should:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M 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 M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Grove's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr M 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 M's end of year tax position.

Redress paid to Mr M as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Grove 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 M's likely income tax rate in retirement – presumed to be 40%. 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 Grove pays the balance.

My final decision

Determination and money award: I uphold this complaint and direct Grove Pension Solutions Limited to pay Mr M 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 Grove Pension Solutions Limited pays Mr M the balance.

If Mr M accepts this decision, the money award becomes binding on Grove Pension Solutions Limited.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 7 July 2023.

Michael Campbell
Ombudsman