DRN-4032066

The complaint

Mr B complains about the advice Whiting Group Limited ('WGL') gave in connection with a potential transfer of benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Professional representatives have helped Mr B to bring this complaint. But for ease of reading, I will refer to the representatives' comments as being Mr B's.

The advising firm in this case was an appointed representative of WGL operating under a different name. But, as WGL is responsible for responding to the complaint, I will only refer to it within this decision.

What happened

Mr B approached WGL in 2003 to discuss his pension and retirement needs. It sent Mr B a fact-find document which Mr B completed himself. This was to gather information about his circumstances and objectives. I understand WGL then spoke with Mr B and ran through the fact-find information again. Amongst other things WGL recorded:

- Mr B was nearing age 50 at the time of the advice, he was married to Mrs B with one dependent daughter.
- Together they had a net household income of around £21,600 a year.
- Mr and Mrs B had regular outgoings of around £15,000 a year leaving a disposable income of around £6,000 a year.
- They owned their own home, valued at around £170,000 and they had an outstanding mortgage of £37,000
- Mr B was paying off a car loan of £8,000.
- He was a deferred member of his former employer's DB scheme. He was considering transferring funds from that scheme in order to release tax free cash (TFC) to pay off his loan and buy a new car.
- His DB scheme had a cash equivalent transfer value of £74,690.
- He wanted to retire at 55.

On 18 June 2003 WGL gave Mr B a suitability report together with a "*technical report*" setting out its analysis and recommendations. It recommended that Mr B should not transfer out of his DB scheme. It said Mr B could raise the cash he wanted by borrowing. It added that he could reduce his debt by using some of his surplus income to make overpayments. It said that despite its advice, Mr B had told it he wanted to proceed with the transfer. It added that it "*strongly advised*" Mr B, after he'd taken his TFC, to reinvest it. It recommended that if Mr B proceeded he should transfer £44,880 to a Section 32 Buyout Plan (a type of personal pension) with a named provider which he could access immediately. And to transfer the remaining £29,810 – made up of "*protected rights*" – to a personal pension plan, with the same provider, which he could access at a later date.

Mr B went ahead with the transfer. He received TFC of £17,164 and bought an annuity paying him £955 a year. In 2008 Mr B took further benefits from his other personal pension.

In 2022 Mr B complained to WGL that its advice in 2003 wasn't suitable for him. Amongst other things he said:

- WGL had incorrectly calculated his benefit entitlement if he'd remained in the DB scheme until age 65.
- He had no specific need for TFC at the time of the advice.
- WGL didn't explain the value of a guaranteed income or the advantages and disadvantages of transferring out of a DB scheme.
- It had treated Mr B as an *insistent client*[1].

WGL didn't uphold Mr B's complaint. In brief it said its advice was that Mr B should not transfer. It added that Mr B had made his complaint too late.

Mr B brought his complaint to us. One of our Investigators looked into it. He said he didn't think Mr B had made his complaint too late and went on to consider its merits. Having done so he recommended upholding it. He said he didn't think WGL's advice was suitable for Mr B. Our Investigator said WGL should pay compensation for any losses Mr B suffered because of its unsuitable advice.

WGL didn't agree with our Investigator's assessment. It continued to argue that the complaint was out of time. It also disagreed that its advice was unsuitable. As our Investigator wasn't persuaded to change his opinion, the complaint's been passed to me to decide.

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.

In bringing the complaint and replying to it both Mr B and WGL have made a number of points. I've carefully considered everything on file. But in this decision I don't intend to address each and every issue raised. Instead I will focus on the issues I see as being the key matters at the heart of Mr B's complaint and the reasons for my decision.

Is this a complaint we have the authority to look at?

We don't have a free hand to consider each and every complaint we receive. Our rules as set out in the FCA Handbook, are commonly referred to as DISP. DISP 2.8.2R says that where a business doesn't consent (as WGL hasn't here), I can't consider a complaint made more than six years after the events complained of, or if later, more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint.

The events Mr B complains about took place in 2003. Mr B didn't complain until 2022. That is clearly outside of the six years allowed to bring a complaint to this Service. And WGL has argued that Mr B should have been aware of his grounds for complaint sooner. So, I have to consider whether he brought his complaint within three years of when he became aware, or ought reasonably to have been aware he had cause for complaint.

WGL said that there were three points at which Mr B ought reasonably to have been aware he had cause for complaint:

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[1] Where a client chooses to go against a financial adviser's recommendation, they are often referred to as an insistent client.

- In 2003, when he took TFC and bought an annuity.
- In 2008 when he took further benefits from his other personal pension.
- In 2018 when he would have reached the DB scheme's normal retirement age.

I'll address each in turn. When doing so the key question for me is when ought Mr B reasonably to have become aware that there was a problem, whether that problem had potentially caused him a loss, and what caused that potential loss to arise.

We asked Mr B what prompted him to complain in 2022. He told us that, at that time, he'd been speaking to former colleagues who had kept their DB scheme membership. And at that point he became concerned that WGL's advice had been unsuitable. This prompted him -– after seeing an advert from professional representatives – to contact them. They looked into his pension and submitted a complaint on his behalf about the unsuitability of WGL's advice for him.

2003

Mr B sought advice from WGL and then acted on its recommendations to transfer his benefits to two personal pensions. He took TFC and an annuity from one and invested the other. If Mr B had reasonably understood that WGL's advice might not have been right for him at that time, giving him cause for complaint, I don't believe he would have gone ahead with the transfer and the process would have ended at that point. But as he didn't realise the advice might not be suitable, he proceeded. And given that he'd asked for advice about how to raise cash, and that was what WGL had recommended, I can understand why he did so. So I don't think he ought reasonably to have known in 2003 that he had cause for complaint.

2008

Mr B chose to take benefits from his second personal pension in 2008. But I don't see how this would have alerted him to a concern about WGL's advice in 2003. WGL's suitability and technical reports didn't make any comparison with benefits from the DB scheme against benefits from a personal pension if he took those in 2008. And without being able to make a like-for-like comparison I don't think he'd have had any cause to understand what he was potentially missing out on following the transfer in 2003. So I don't think Mr B accessing his pension in 2008 should have prompted him to be reasonably aware that WGL's advice some five years earlier might not have been suitable for him.

2018

Had Mr B remained in his DB scheme he would have been entitled to take full benefits from it in 2018. So, WGL has argued that he should have been able to compare the benefits from what his DB scheme would have been worth in 2018 against what he was receiving from his personal pensions. And, as this was more than three years before he complained in 2022, it thinks he brought his complaint too late. But I'm not persuaded by WGL's arguments.

WGL had given Mr B advice in 2003, some fifteen years earlier. And while WGL did provide an indication of what Mr B could receive from the DB scheme in 2018, I wouldn't necessarily have expected Mr B to retain that information for 15 years. So I think it's unlikely he would have remembered what his likely DB pension entitlement was in 2018.

Further, Mr B told us that it wasn't until speaking with former colleagues in 2022 that he became aware he might have lost out. So, I'm satisfied it was only at that point, in 2022, that Mr B reasonably became aware he had cause for complaint. That means he brought his complaint in time. So this is a complaint we have the authority to consider. And I've gone on to consider its merits below.

Was WGL's advice suitable for Mr B?

When considering what is fair and reasonable, I'm 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.

Having done so, I've decided to uphold the complaint for reasons broadly similar to those our investigator gave.

The regulator's position

The regulators have been clear for many years that an adviser should start by assuming a DB transfer is unsuitable and only consider it to be suitable if they can clearly demonstrate it's in the client's best interest. This is known as the 'presumption of unsuitability' and has been renumbered to Conduct of Business Sourcebook ('COBS') 19.1.6G in the current regulator's handbook.

At the time of the advice in Mr B's case there was no regulatory advice or guidance in place in respect of insistent clients. But the regulator expected WGL to act honestly, fairly and professionally in accordance with the best interests of its client. In addition, WGL was required to provide information that was clear, fair and not misleading. So, WGL's recommendations had to be clear and Mr B had to understand the consequences of going against its recommendation.

Did WGL make its advice clear enough?

WGL did recommend that Mr B should remain in the DB scheme. It said he could access cash from other means, for example by borrowing. But I think WGL's recommendation was undermined by the process it then followed and also in the statements made in its suitability report.

For example WGL set out that Mr B's objectives were to:

- Reduce his debts to also reduce his outgoings.
- Reduce borrowing on buying a new car.

It said that methods of achieving those objectives included:

- Applying for a personal loan.
- Increasing his repayments towards his existing loan to repay it sooner.
- Releasing cash from the DB scheme.

In terms of taking out a personal loan it said that if Mr B borrowed £18,000, he could repay that at £226.45 a month, over 15 years. That would be a total cost to Mr B of over £40,700. But it's anything but clear why WGL said Mr B might want a loan for £18,000. It's not documented anywhere on file that Mr B said he wanted or needed £18,000. He'd said he had an existing loan of £8,000 and was considering a new car. But he hadn't specified an amount of TFC that he needed.

It seems likely that WGL quoted a loan figure of £18,000 as that was around the amount Mr B could receive from his DB scheme in the first year following a transfer; made up of

£17,164 TFC and an annuity income of £955. But Mr B hadn't said he needed anything like that sum. And, given that he was clearly managing to repay his current loan, with a considerable amount of disposable income remaining, he had no reason to give up his guaranteed retirement income in order to pay off a loan he was managing to pay comfortably already. Instead WGL should have looked at how much he actually needed and then produced a realistic figure for what that could cost him to borrow. But instead the figures included in the suitability report are excessive in terms of his needs and no doubt looked an unattractive prospect in terms of affordability to Mr B. So I don't think the information WGL presented to Mr B was appropriate for his situation.

WGL also said Mr B could reduce his borrowing by using his disposable income to make overpayments on his current loan. But it added that some lenders would charge early repayment penalties for doing so. However, I can't see that it looked to find out if that was indeed the case for Mr B's loan. So this might not have applied to his situation in any event. Further, even if it did, taking an early repayment penalty would only affect him in the short term, whereas transferring out of his DB scheme would have an effect on his pension entitlement until his death. I think WGL should have made this clear to Mr B but there's little evidence it did so.

WGL then looked at the possibility of Mr B releasing cash from his DB scheme. It said:

"*By taking early release of the pensions we have investigated, the cash sum is available without borrowing any additional money in order to achieve your current financial planning objectives. However, your long-term pension income will be reduced.*"

I think this sent a mixed message to Mr B. While warning of the effects in the long-term, it said it was a way for Mr B to meet his current financial objectives. And while that might have been the case, in order to act in Mr B's best interests WGL needed to challenge Mr B's motives for those objectives, explaining why they weren't in his best interests in terms of retirement planning. But I don't think WGL went far enough to make that clear.

Further, as I've said above, WGL's recommendation in its suitability report was that Mr B should remain in his DB scheme. But, it also said that Mr B had instructed it to continue with the transfer. So it's apparent from that comment that WGL had previously discussed with Mr B what his options were and what he intended to do before it gave him its suitability report. It's on the basis of that discussion that WGL says Mr B decided he wanted to go ahead with the transfer. And, as this was against WGL's recommendation it – essentially – decided to treat Mr B as an insistent client. But at that point WGL hadn't yet given Mr B its suitability report. So any information it gave to him could only have been presented in a raw state, that is without the analysis contained within the suitability report. I find this undermines the advice process. That's because I don't see how WGL could expect Mr B to make an informed decision about going against its recommendation when it seems unlikely it had given him all the information he needed in order to make that decision. That is, it gave him some limited information and expected him to make a determination that started him down the road of the insistent client process without giving him all the detail he needed reasonably to make that decision.

A much clearer process would have been for WGL to provide its advice and recommendations before asking Mr B if he wanted to proceed. That advice should have considered the overall picture – both of transferring out of the scheme together with the choice of pension(s) and other methods of raising cash. WGL should have clearly set out why transferring out of the scheme wasn't in Mr B's best interests. Instead, it's apparent that it first discussed the matter with him and while it recorded that its advice was not to transfer, it also apparently told Mr B that it could arrange the transfer for him anyway. It then recommended two separate personal pensions for him to transfer into. So, alongside its recommendation not to transfer, WGL also told Mr B it would arrange a transfer for him. In doing so it told him he would receive a large lump sum immediately; achieving his objectives and without further borrowing. So on the one hand it told him not to transfer while, at the same time, telling him he could meet his objectives by making a recommendation to transfer. I can understand why Mr B later believed WGL had actually recommended that he should go ahead with the transfer, as WGL's comments indicate that the transfer was a positive benefit for him.

Further, WGL didn't obtain a transfer value analysis report and it didn't calculate the growth rate required to match the DB scheme benefits being given up (the critical yield). So it didn't show Mr B just how much his personal pensions would need to grow by in order to match the benefits from the DB scheme. Also Mr B could have taken benefits directly from the DB scheme at age 50, although those would have been reduced as he was taking them early. However, there's little evidence WGL brought this to Mr B's attention at the time or gave him a comparison of what he could receive from the DB scheme immediately against what he would receive from transferring out of it.

That said, WGL did say Mr B would be worse off in the long term by transferring. And it said that, at his scheme's normal retirement age was 65 he could be giving up £5,206 a year in income. Although it softened that comment by saying he would be making a saving of £2,717 a year in debt repayments. But, that figure – £2,717 – is based on WGL's quote for a loan of £18,000. As I've already indicated, that was a sum that Mr B didn't say he wanted or needed. So, it's unlikely, if the advice process had played out differently, that he would ever have borrowed that sum and so had to make such high repayments. Therefore, I don't think that figure was relevant to Mr B's circumstances.

In addition, I don't think WGL accurately reported the extent to which Mr B would be worse off by transferring. That's because Mr B's DB pension would increase each year in line with the scheme's inflation indexation. But the whole of his pension entitlement didn't increase at the same index rate. The different rates applying to pension entitlements accrued over different years are sometimes known as slices. Mr B had entitlement to what's known as a guaranteed minimum payment (GMP)[2]. Around 38% of Mr B's DB scheme entitlement was made up of GMP. The information from the DB scheme administrators showed that the GMP would revalue each year at a fixed rate of 6.25%. But, when WGL calculated what Mr B's DB pension entitlement would be at age 65, it only increased the GMP slices of his pension entitlement by 2.5%, which was the same figure it assumed the non-GMP slice would grow by. So, its calculation wasn't accurate.

WGL's suitability report showed Mr B could be entitled to a DB scheme pension, at age 65 (net of tax) of £7,557.62 a year. But that was based on the incorrect calculation described above. In response to Mr B's complaint WGL recalculated this figure, using the correct GMP revaluation rate, and arrived at a figure of £9,693 a year. An increase of over 28%. Although it used the actual inflation rates applied historically for the non GMP slice, rather than an assumed inflation rate (of 2.5%) as it had in its initial calculation. And it said that it couldn't have known that actual inflation would outstrip its previous assumptions. But if WGL had used the assumed inflation rate of 2.5% for the non GMP slice, and the correct index rate of 6.25% for the GMP slices, the difference in figures between what WGL gave at the time of its advice and the correct calculation would still have been almost 24%. That's a significant difference and is something that could have persuaded Mr B to think again about his chosen

[2] GMP is the minimum amount a pension scheme must pay where, as is the case with most DB schemes, the members have opted out of paying into State Earnings Related Pension Scheme (SERPS or S2P). GMP is generally only payable when a scheme member reaches a certain age. When transferred to a personal pension the sums involved are often referred to as "protected rights".

course of action. But because WGL didn't give him accurate figures Mr B didn't have all the information he needed in order to make such an important decision.

That said WGL acknowledged that Mr B was likely to be worse off in the long-term by transferring. So, it was all the more important that the other reasons for transferring were sufficiently compelling. In particular Mr B's desire for a cash lump sum. But WGL didn't explore this in detail with Mr B. Indeed it said Mr B hadn't told it how much cash he required. I don't see how WGL could give Mr B suitable advice in respect of his objectives without knowing the basic facts about exactly how much he needed and what that was for.

Further, I've not seen evidence that WGL effectively advised Mr B about the long-term nature of pension planning. That is the need for a pot of funds to provide an income for many years ahead. WGL's role was to find out what Mr B's wants and needs were and why he wanted to transfer his pension. Its role wasn't simply to do what Mr B wanted without appropriate analysis and challenge of his motives for doing so whilst discussing the implications of taking those actions with him. But I've seen little evidence of such a challenge even though that was in Mr B's best interests. So I don't think WGL met its obligations to challenge Mr B's objectives in light of what he would be giving up.

WGL did give Mr B advice not to transfer but I don't think it can fairly rely on that recommendation. That's because Mr B apparently made his initial decision to go against its advice before WGL had given him its suitability and technical reports. It then followed up its advice not to transfer with information about how he could do that anyway. And it did that together with recommendations about accessing TFC and an annuity together with another recommendation to invest his "protected rights" funds in a personal pension, which he could access at a later date. As I've already said, I think that sent mixed messages about what WGL's recommendation actually was.

WGL was in a good position to have analysed, tested, challenged and advised Mr B about what was in his best interests for retirement planning. It knows valuable pension pots like Mr B's DB scheme were paid into with the intention of providing for retirement. But Mr B's chosen path was to give up a guaranteed, risk free and increasing income in retirement for the chance of getting hold of a large lump sum of cash, together with the prospect of far less generous annuity payments. That wasn't something he needed to do or was in his best interests.

And I don't think that WGL – essentially – treating Mr B as an insistent client when he expressed preference not to follow its advice, is the same as applying the rigorous process of arriving at a fair determination of who an insistent client really is. So, given the flaws described above in WGL's advice process, I don't think it fully and accurately informed Mr B about his position.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process WGL followed meant that it was fair for it to treat Mr B in the manner of an insistent client. So I don't think WGL acted in his best interests.

It follows that I don't think WGL did enough to fully advise Mr B of his options before it began treating him as an insistent client. I think Mr B could have misunderstood or believed that overall, WGL was recommending that he might benefit from going ahead with the transfer. So I don't think it treated him fairly. And, if it had done so and provided the level of advice I think it should have, I think it's unlikely that Mr B would have transferred out of his DB scheme.

WGL argues that Mr B would have transferred out of the scheme regardless of what it told him. But I'm not persuaded that Mr B would have insisted on transferring against WGL's advice if it had sufficiently brought all of the options and risks to his attention. I say this because Mr B was an inexperienced investor with a cautious attitude to risk. But he was taking a significant risk of losing the guarantees from his DB scheme and reducing his income in retirement by transferring out of it. So, if WGL had provided him with clearer advice against transferring out of the DB scheme, explaining in detail why it wasn't in his best interests, before giving him the option of acting as an insistent client, I think he would've accepted that advice.

WGL's said that Mr B had spoken with another advising firm before seeking WGL's services. So it says that shows Mr B was definitely looking to transfer. But I disagree. Mr B's interaction with another advising firm simply indicates he was looking for experts to give him advice. And there's a comment on file that he chose WGL because it provided a better service than another named advising firm. So there's no evidence on file that the other firm had actually given him advice or if so what that advice was. Instead it appears he simply preferred WGL as advisers because of the level of service it offered. So there's no evidence he approached WGL for its expert advice after receiving a recommendation not to transfer from another firm. And in those circumstances I don't accept WGL's arguments that, if its advice had been more robust, Mr B would have simply found another adviser to make the transfer for him.

In light of the above, I think WGL should compensate Mr B 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 WGL to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would have most likely remained in the DB scheme if suitable advice had been given.

WGL 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, as Mr B took his pension benefits from age 50, and retired shortly after, compensation should be based on him taking benefits at this age.

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 B'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, WGL should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr B accepts WGL's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B 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, WGL 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 B'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 Whiting Group Limited to pay Mr B 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 Whiting Group Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on Whiting Group Limited. My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 3 July 2023.

Joe Scott
Ombudsman