

The complaint

Mr S complains that the advice given to him by Westpoint Financial Consultants to transfer his occupational final salary pension (OPS) to a self-invested personal pension (SIPP) held with Hornbuckle Mitchell was unsuitable and has caused financial loss.

At the time of advice Westpoint Financial Consultants were an appointed representative of Succession Wealth Management Ltd (Succession) and as such I have referred to "Succession" throughout the decision below.

What happened

Mr S met with Succession in April 2009. At this time a fact find was completed which recorded his financial circumstances and objectives. This confirmed that Mr S was 49 years of age and married with six children. He had been with his current employer for one year working as a Finance Director with recorded income of £227,000 per annum. Current savings were around £30,000 in cash with a family home worth approximately £500,000. A mortgage was in place with an outstanding balance of £120,000 which was due to be repaid when Mr S reached his recorded retirement age of 60. No stocks or shares based investments were recorded as being held at that time, however despite this his investment knowledge and experience was noted as being "strong".

Mr S also had his attitude to risk (ATR) assessed as moderately adventurous. Mr S's OPS scheme details were also recorded. These confirmed the pension had a transfer value of around £158,000.

A transfer value analysis report (TVAS) was completed on 14 April 2009. This looked into the financial viability of the transfer and calculated the critical yield (CY) figure. This is the amount the new pension would have to grow each year after transfer – up to age 60 – for the new scheme to provide benefits equal to those of the ceding scheme. In this case the CY figure was calculated as 5.7% per annum.

The advice to transfer was documented in the suitability letter dated 7 May 2009. This re-confirmed Mr S's circumstances and ATR as per the above and detailed the benefits provided by the OPS.

Alternative options for the OPS were then summarised. These included:

- Do nothing and leave the OPS intact.
- Switch funds within the existing arrangement (although this was simply confirmed as not possible).
- Transfer to a stakeholder pension or personal pension.
- Transfer to a new Section 32 Buyout plan.
- Transfer to a SIPP.
- Transfer the pension to Mr S's current employers pension scheme.

Advantages and disadvantages of each of the options were provided, with the report then going on to discuss the content of the TVAS report. The CY figure of 5.7% per annum was detailed with confirmation that Succession considered the rate as achievable, although this could not be guaranteed.

Other factors to consider prior to transferring the OPS scheme were also documented. These included the potential impact of the transfer on the amount available as a lump sum at retirement, lump sum death benefits before retirement, spouses and dependents pension, potential impact on early retirement and the security of the pension funds.

Following this the advice was confirmed as being to transfer the OPS to a SIPP. The reasons given were:

- “The monies can be invested within a SIPP, which permits investment in a wider range of investments including, shares, unit trusts, and property.
- You will have full control over the investment decisions within your pension.
- You will gain access to a wider choice of investments than under a conventional personal pension arrangement.
- So that you will have more flexibility in the decisions surrounding the taking of your pension benefits.”

It was also confirmed that the recommendation had been made as Mr S wished to have “full control” of the investments and that he would be appointing a stockbroker to invest the monies on his behalf. Additionally, it was noted that Mr S was considering the purchase of preference shares.

An asset allocation model was provided illustrating the types of investments that would be considered a match to the assessed ATR although no actual underlying investments were recommended.

The recommended product was confirmed as being a Hornbuckle Mitchell SIPP. The fees and costs were confirmed as being a 3% adviser fee alongside provider set up and annual management charges of £200 and £250 plus VAT respectively.

The application form was completed on 7 May 2009 and the transfer was completed as per the advice detailed above.

In conjunction with his appointed representatives, Mr S complained to Succession on 20 May 2021.

Succession rejected the complaint stating that they consider the advice suitable. They noted they considered the CY to be achievable and that all the required information was provided to Mr S in order to enable him to make an informed decision about the transfer. Succession also noted that Mr S was responsible for the appointment of a stockbroker to manage the transferred funds on his behalf, and as such any investment losses could not be considered Succession’s responsibility.

As Mr S did not agree with this outcome, the case was referred to this service. Our investigator looked into things and upheld the complaint.

Our investigator noted that whilst the CY figure calculated at the time of advice could be considered achievable, this was the rate required in order to match the benefits provided by the OPS scheme and as such would not actually leave Mr S any better off. In addition, the non-financial reasons given to justify the transfer advice were not considered strong enough.

Succession did not agree and in response stated that Mr S had extensive investment experience who prior to the transfer advice had explored the possibility of using the pension funds to purchase a ski lodge. Mr S presented himself as a sophisticated individual who had been given all of the required information for him to make an informed decision regarding the transfer. Succession stated they believed they had provided Mr S with an appropriate level of service and duty of care. Additionally, Succession noted that they believed Mr S would have sufficient capacity for loss given his high income and additional years of employment which would have allowed for further retirement provision to be built up, as well as the pension provision Mrs S would have accrued as a teacher.

Whilst Mr S had agreed with the outcome reached by our investigator, he did provide additional commentary in response to Succession's reply. Mr S disagreed with some of the information within the point-of-sale documentation which had been referenced in Succession's reply. Firstly, he noted his income was £24,000 pa and not the £227,000 noted, whilst he was operating as a Finance Director at the time of advice and had been a director of two other companies historically, this did not confer any actual investment experience. Whilst he had undergone some training at an accountancy firm, he was not a qualified accountant with his degree being in Social Sciences. In addition, whilst Succession had questioned whether all six children were dependent when only two lived with Mr S, he noted two were having university costs covered by Mr S and two were being supported financially whilst living with Mr S's ex-wife. Finally, whilst Mrs S was a teacher, this was a part time position with limited pension provision as a result.

Overall, as no agreement could be reached the case was passed to me.

I issued my Provisional Decision in February 2023 which stated:

"There has been significant guidance and regulation issued in relation to the transfer of defined benefit pensions and this has formed a significant part of this decision. Some of the key areas of regulation considered here include COBS 9 which details a business's obligations when making personal recommendations and assessing the suitability of advice and COBS 19 which specifically covers a business's responsibilities when recommending the transfer of occupational pension schemes.

Additionally, I have taken into account COBS 2.1.1R which confirms a business "must act honestly, fairly and professionally in accordance with the best interests of its client" and PRIN 6 which states a firm must "pay due regard to the interests of its customers and treat them fairly".

Having considered the evidence available and the relevant regulation I have reached the same conclusion as our investigator and have decided to uphold the complaint. I have explained why below.

Financial Viability.

I have firstly considered whether the transfer could be considered in Mr S's best financial interests.

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

The investment return (critical yield) required to match the occupational pension at retirement was quoted as 5.7% per year. This compares with the discount rate of 6.7% per year for 11 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr S's attitude to risk and the term to retirement. I think Mr S was likely to receive benefits of a higher overall value than the occupational scheme at retirement, had the transferred funds been invested in line with his attitude to risk.

Whilst this may be considered to support the advice to transfer it needs to be stressed that the advice was given with full knowledge that the transferred funds were not going to be invested in line with Mr S's ATR, with there being no detail at all as to what investments were actually going to be made.

As such, whether the transfer was going to financially benefit Mr S or not was impossible to assess at the time. Given this, Succession stating the CY figure was achievable was not relevant to the suitability of the advice.

In January 2013 and April 2014, the FCA issued updates confirming that they were concerned around the transfer of pensions into SIPP's where the adviser was not fully aware of the underlying investments that were to be held within the SIPP. The 2014 alert stated that:

"The initial alert outlined our view that where advice is given on a product (such as a SIPP) which is intended as a wrapper or vehicle for investment in other products, provision of suitable advice generally requires consideration of the overall transaction, that is, the vehicle or wrapper and the expected underlying investments (whether or not such investments are regulated products)".

I appreciate that this alert was primarily focussed on a growing issued around Unregulated Investments that was prevalent at the time however the sentiment remains the same – if an adviser is going to be recommending a SIPP to a customer, the underlying investments that are going to be held within that SIPP need to be considered and assessed.

I accept that the FCA commentary above was issued after the advice in this case, however, the commentary was not new guidance issued to businesses at that time, it was a reminder of a business's responsibilities to its consumers in order to ensure they were being provided with suitable advice in line with COBS 2.1.1R and the wider principles of business in general. In other words, it articulated what businesses should have been doing all along.

I have additionally gone on to consider whether Mr S had the required investment experience and capacity for loss that would be required for the recommendation to be deemed suitable.

Whilst Succession have provided a model portfolio based on their Moderately Adventurous ATR assessment, it is clear that the advice was given based on Mr S appointing a stockbroker to manage the monies with the additional potential for the purchase of preference shares (company unknown).

The file says that Mr S has strong knowledge of investments and a good understanding of investment markets because of his training and occupation, however there is limited detail to back this up. Whilst his role as a Finance Director may indicate a level of financial acumen there is no detail of any current or historic investment decisions made by Mr S which would

prove any investment or pension experience. Mr S for his part has confirmed he is not a qualified accountant and had limited investment experience.

Overall, I consider there to be insufficient evidence to support the idea that Mr S was an experienced and sophisticated investor. As such I have concerns that Mr S was recommended to transfer his OPS pension on the basis the funds would be invested by a stockbroker without any further clarification or due diligence being done on Succession's part.

I have also considered Mr S's capacity for loss in relation to the advice given. Succession have stated they consider Mr S had adequate capacity to take such risk as he had a high level of income, would likely have had other pension provision from his other years in work, and would have had additional household pension provision from Mrs S - who was a teacher.

There is limited discussion of Mr S's capacity for loss in relation to the advice in the paperwork produced at the time, with Mr S disagreeing with some of the information now quoted by Succession in support of their advice.

There is no evidence on file of any other pensions being held by Mr S at the time of advice. Mr S has confirmed this was his only pension provision and I consider this to be believable given this is what was recorded on the documentation completed and signed at the time of advice. As such, this advice moved Mr S into a position where the entirety of his pension provision was transferred from a relatively risk-free OPS into a SIPP where it would be invested at an unknown risk level.

The point-of-sale documentation does document Mr S as having a significant income with Succession using this to support their suggestion that Mr S did have adequate capacity for loss. For his part Mr S disagrees with the amount shown in the fact find stating it was £24,000 pa rather than £230,000. What I would note is that with whatever income Mr S did have, he had only managed to save up a relatively modest cash reserve figure. If Mr S's income was the higher level indicated by the fact find, this income was being otherwise utilised and as such would not be available to replenish any losses incurred on the pension fund once transferred.

Given the file supports the OPS as being Mr S's only pension provision, and given he had relatively little savings, I don't believe he could afford to lose the guaranteed benefits lost as a result of this transfer.

Succession's reliance on other pension provision either being in place already - or being built up over future years – to provide capacity to take risk is not considered appropriate. No additional pension provision was noted on the fact find and it is not safe to make such an assumption without detailed, documented discussions with the consumer prior to giving advice. Similarly, to assume Mr S would be able to rely on Mrs S's teachers' pension is also unsafe. There are no details as to Mrs S's pension benefits and as such no way to establish whether sufficient pension provision had been built up. Subsequent submissions from Mr S state that Mrs S had in fact been a part time teacher and as such had not built up significant pension provision. Again, without detailed documented discussion around this it is not reasonable to rely on any pension provision Mrs S may have had to justify the advice given to Mr S.

Overall, I do not consider the file has sufficient information to support the advice being in Mr S's best financial interests.

It may have been the case that had the transferred funds been invested at his assessed ATR, Mr S would have had higher pension provision at retirement. It may also have been the case that Mr S had a good income level, did have some modest financial experience and may well have thought he wanted to control of his investments – but the fact remains that Succession still had to take adequate steps to ensure their advice was suitable which I do not believe to be the case in this instance.

Mr S's other needs and objectives at that time.

As above, I do not consider there to be financial justification to support the advice to transfer. However, there can be other non-financial objectives which could deem a transfer suitable and as such I have gone on to consider the other reasons noted within the file. A number of the reasons given in support of the advice to transfer relate to increased control over the pension. These related to control of the underlying investments made by the pension fund and control over when and how benefits were taken.

In relation to the level of control Mr S wanted over the underlying investments I have a number of concerns. Firstly, as above, there is limited evidence to support the idea that Mr S had the required experience to control such a significant proportion of his retirement provision. Secondly, whilst there is mention of a stockbroker being appointed, the advice file does not document what sort of investments Mr S intended the stockbroker to make nor how he made those investment decisions; this information would have been required in order to assess the suitability of the transfer.

Alternatively, if the stockbroker was to make the investment decisions on behalf of Mr S, then this simply places the stockbroker in charge of the underlying monies – at Mr S's expense – rather than the OPS trustees who managed the monies at no cost to Mr S.

Regarding the control over when and how benefits were to be accessed, again I have concerns. Mr S was 49 at the time of advice with an anticipated retirement age of 60 and as such there were around 10 years before any of this control was required. Wanting to access pension monies in a way that an OPS would not allow can be considered a reasonable justification for a transfer if it is an immediate, and legitimate, need, however by transferring Mr S's pension in 2009, Succession exposed him to 10 years of investment risk and cost for a future need that may in fact not end up being required at all. This, alongside the fact there is limited information in the file as to what sort of flexibility or control of access was foreseen by Mr S leads me to deem this as an inadequate justification for transfer.

In addition to the control issues noted, the suitability letter also describes some of the differences between the OPS and the recommended pension. Whilst these differences are not specifically noted as Mr S's objectives, I have covered them here for completeness. Firstly, it is documented that after transfer the lump sum available at retirement could be higher. Whilst this is the case, I would note that this is dependent on the investment performance of the funds after transfer and is not guaranteed. In addition, the file makes no mention of what level of lump sum was required by Mr S at retirement nor what this may be used for.

It was also noted that should Mr S die after the pension was transferred, the fund value would be available to Mr S's beneficiaries whereas the OPS scheme would provide a spouse's pension for Mrs S. It is true that how the funds would be treated upon Mr S's death are very different, however Mr S was relatively young with no mention of ill health and as such how the funds behave upon death should be considered secondary to the primary function of a pension – namely to provide an income to the policyholder / scheme member in retirement. In addition, if providing a lump sum to chosen beneficiaries was a key requirement for Mr S, I would have expected Succession to discuss life cover policies as a

way of meeting this need whilst retaining the valuable lifelong guarantees provided by the OPS.

Early retirement was also noted as a benefit with the SIPP allowing retirement at any age after 55. However, the OPS would also have allowed early retirement, albeit with amended benefit levels. Mr S had not stated he intended to retire early with this only being noted as a possible future option, as such I do not consider this to be a strong reason in favour of transferring the OPS.

Overall, having considered the file as a whole, I have reached the same outcome as our investigator, the advice is considered unsuitable, and the complaint upheld. Before I document the redress required, I have considered Succession's point that the funds were invested by Mr S – and possibly a stockbroker – and as they did not make any investment recommendations, they should not be held responsible for the investment decisions of Mr S.

However, Mr S would not have been able to make such investment decisions without Succession recommending the OPS transfer. The advice to transfer was given by Succession in full knowledge that Mr S was going to be self-investing and as such I do not consider it reasonable that they are not held accountable for losses they allowed Mr S to make.

Had Succession given suitable advice and told Mr S to retain the OPS, I see no reason to doubt that Mr S would have followed the advice and retained his occupational pension benefits."

Both Mr S and Succession have confirmed receipt of the Provisional Decision. Neither have provided any additional commentary or evidence they wish to be taken into consideration. As such I see no need to change the decision detailed above which I believe remains a fair outcome.

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.

As neither party have made any further comments or submissions, I see no reason to depart from the Provisional Decision already issued.

Both the outcome and redress instructions remain unchanged.

Putting things right

My aim is that Mr S should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

The redress instructions below remain unchanged from those included in my Provisional 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 S 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 has chosen not to wait for any new guidance to come into effect to settle his complaint. I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr S.

A fair and reasonable outcome would be for the business to put Mr S, 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 occupational scheme. Succession Wealth Management Ltd must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr S's acceptance of the decision.

Succession Wealth Management Ltd may wish to contact the Department for Work and Pensions (DWP) to obtain Mr S'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 S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr S'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 S 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 could have been taken as tax-free cash 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 S within 90 days of the date Succession Wealth Management Ltd 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 Succession Wealth Management Ltd to pay Mr S.

Income tax may be payable on any interest paid. If Succession Wealth Management Ltd deducts income tax from the interest, it should tell Mr S how much has been taken off. Succession Wealth Management Ltd should give Mr S a tax deduction certificate in respect of interest if Mr S 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.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Succession Wealth Management Ltd to pay Mr S the compensation amount as set out in the steps above, up to a maximum of £160,000. Where the compensation amount does not exceed £160,000, I additionally require Succession Wealth Management Ltd to pay Mr S any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Succession Wealth Management Ltd to pay Mr S any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Succession Wealth Management Ltd pays Mr S the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S accepts my decision, the money award is binding on Succession Wealth Management Ltd. My recommendation is not binding on Succession Wealth Management Ltd. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to consider getting independent legal advice before deciding whether to accept this decision.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Succession Wealth Management Ltd to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

I uphold the complaint. My decision is that Succession Wealth Management Ltd should pay the amount calculated as set out above.

Succession Wealth Management Ltd should provide details of its calculation to Mr S in a clear, simple format.

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

John Rogowski

Ombudsman