

The complaint

Mrs B complained that she was given unsuitable advice to transfer her defined benefit (DB) Occupational Pension Scheme (OPS), to a type of personal pension arrangement.

Although trading at the time under another name, Personal Touch Financial Services Limited is now responsible for answering this complaint. To keep things consistent, I'll refer mainly to "Personal Touch".

What happened

Mrs B was a deferred member of an OPS, having previously worked for a company between 1987 and 2003, when she was made redundant. In 2010 she approached Personal Touch for advice about her deferred scheme. Information was gathered about her circumstances and objectives which were broadly as follows:

- Mrs B was 41 years old, married and with two young dependent children.
- She had since moved to a new employer, whereby in 2010, she was earning around £10,500 per year. She was also by then, a contributing member to a new pension scheme with her employer, also a defined benefit scheme. This pension isn't the subject of any complaint.
- She wanted to ask about transferring her 'old' deferred pension. The cash equivalent transfer value (CETV) of the pension Mrs B is complaining about was around £29,406 and the normal retirement age (NRA) was 65. However, this figure had been reduced by 20% due to a current underfunding position within the DB scheme.
- Mr B was 44 and earned around £19,300 per year. They had a mortgage of £21,000 which was on an interest-only basis.

Personal Touch set out its advice in a suitability letter in July 2010. It advised her to transfer out of her deferred OPS and invest the funds in a personal pension. Mrs B accepted this advice and so transferred from her deferred OPS to a personal pension arrangement shortly after.

Mrs B says that it was only in 2021 that she became aware of having a cause to complain. She first complained to Personal Touch about its advice, saying she shouldn't have been advised to transfer out of her DB scheme. In response, Personal Touch said it hadn't done anything wrong and was acting on the financial objectives Mrs B had at the time. However, it also said the complaint was 'out of time' under the rules we operate under.

Mrs B then referred her case to our Service. One of our investigators looked into the complaint and said they thought this was a complaint we could look at. They said the circumstances of what happened showed Mrs B hadn't become aware of having a cause to complain until 2021. They also looked at the merits of her case and said the complaint should be upheld. Personal Touch still didn't agree.

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.

I've considered with great care, the final response from Personal Touch, and in addition, all the points made about whether the complaint is within the time limits we apply. I've also 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'). 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 Personal Touch'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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 (updated version) that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Personal Touch should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs B's best interests.

I've used all the information we have to first consider whether the complaint is within our jurisdiction. Then I've considered whether transferring away from the deferred OPS to a personal pension arrangement was in Mrs B's best interests.

Having done all this, I'm upholding her complaint.

Jurisdiction

I first considered whether I'm able to consider Mrs B's complaint at all. And my decision is that I can.

We can't look at *all* the complaints referred to us. For example, the rules say that where a business objects, I can't consider a complaint made more than six years after the event complained of, or if later, made more than three years from the date the complainant was aware, or ought reasonably to have been aware, of having cause for complaint. A copy of Dispute Resolution rule 2.8.2R can be provided on request or can be found online in the 'DISP' section of the Financial Conduct Authority Handbook.

Personal Touch didn't agree to us looking into Mrs B's complaint, so I need to look at the rules to assess whether or not we can. As Mrs B transferred her pension in 2010, then she is

well outside the six-year part of the rule. Mrs B is too late to bring her complaint in this respect.

I therefore need to also look at the second part of the rule, namely whether Mrs B brought her complaint within three years of being aware, or of her ought to have been reasonably aware, of having cause for complaint.

Personal Touch says it wrote to Mrs B on 18 September 2012 which was a little over two years after she'd transferred. I've seen a draft copy of the letter Personal Touch says it sent to clients like Mrs B and it was basically highlighting that some pension transfers might have been based on flawed advice or analysis. It didn't say hers definitely fell into this category, but the letter offered clients the right to ask for a review to be carried out on their case, to see if flawed advice had in fact been given. Personal Touch said that no reply was received from Mrs B despite the letter explaining what needed to be done to have a review carried out. It therefore sent a reminder letter explaining the same things in late November 2012.

What we now know is that Mrs B had moved home by the time these letters were sent. She's shown us evidence proving she and Mr B moved in February 2012 and she didn't get the letters because they went to the old address. Mrs B also says she'd had further contact with Personal Touch before these letters were sent about another financial matter and this should have made it clear to the business that she'd moved home.

Personal Touch says it can't find evidence that it should have known she'd moved home. However, the evidence about her actually moving is, in my view, very reliable. What I think it's fair to say then, is that the two 'warning' letters about potentially flawed pension transfer advice were not sent to Mrs B's correct address. And whether or not Personal Touch says she ought to have redirected her mail, or otherwise have told financial services providers about moving, is not relevant here.

In short, I think it's much more likely than not that Mrs B didn't receive or see the letters in late 2012. They were clearly sent to an old address and she now says that if she'd seen such a warning letter, then she'd have asked for the pension transfer review to take place.

I agree with this and so having considered all the evidence about this jurisdiction issue, I think the complaint is 'in time'. Mrs B says she only became aware of maybe having a cause for complaint in 2021 when a legal firm brought this to her attention. So, as my findings are that Mrs B didn't know she had cause to complain about her 2010 pension transfer until 2021, this is a complaint I *can* look into.

I'll therefore now address the merits of her complaint.

Financial viability of the pension transfer

Personal Touch referred in its transfer recommendation to 'critical yield' rates. 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 annuity income as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

In Mrs B's case, Personal Touch said the critical yield required to match the benefits of the DB scheme she was in at the time, at the age of 65, was 8.4% if she took a full pension and 7.575% if she took tax-free cash and a reduced pension. Personal Touch based its recommendation on her taking tax-free cash and so says the growth rate that needed to be achieved was the lower one – 7.575%.

Normally, this assumption might not be unreasonable, but of course for Mrs B her retirement was still over 23 years away. So I think saying her pension would only need to exceed the lower critical yield figure of 7.575%, rather than the higher one of 8.4%, was no more than supposition. Predicting what she'd do at her retirement in terms of taking or not taking tax-free cash simply isn't reliable as this was over 23 years away.

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 relevant discount rate published by the Financial Ombudsman Service for the period was only 6.6% per year for 23 years to retirement (age 65), which is well below the critical yield figure of 8.4% and even still significantly below the critical yield figure of 7.575%. It's important to bear in mind that small parts of a percentage point matter in these assumptions as what we're talking about here is year-on-year growth over more than two decades. I've also kept in mind that the regulator's upper projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate was 5%.

At the time, Personal Touch said Mrs B's attitude to risk (ATR) was adventurous. But I've seen nothing to substantiate this. She herself says she knew very little about pensions. I've noted there is reference in the suitability letter to Mrs B having had a stocks and shares ISA. But this isn't listed elsewhere and the evidence here is more of someone with no investment experience and no current investments of that nature. The 'fact-find' is very poor at identifying her ATR, containing as it does, gaps in key places and conflicting information. For example, it also says her ATR is "Realistic" which in my view doesn't really explain much.

So, when thinking here about her ATR, I've also considered Mrs B's circumstances as a married mother with two young dependent children, a modest household income and a mortgage being paid on an interest only basis. I've also noted the eventual fund recommendation from the Personal Touch adviser amounted to more 'balanced risk' funds. Indeed, the projected growth rates referred in the illustration for the recommended funds were well below the critical yield figures – the mid-rate, for example, was only 4.95% per year.

Taking all these things into account, I think a future growth assumption towards the lower end of the regulator's projections and also close to the discount rate was most relevant here. This was below both critical yield figures, so I think this shows that achieving either of the critical yields, year-on-year, upon transferring out just wasn't likely in Mrs B's case. In my view, all these things were clearly indicating that Mrs B would likely receive lower pension benefits overall as a consequence of transferring away from the deferred DB scheme. And there would be little point in Mrs B giving up the guarantees and benefits available to her through her existing scheme only to achieve a lower level of benefits in a personal pension in the long term.

Personal Touch implies Mrs B thought that reaching the critical yield growth rates was achievable. But as I've said, there's no evidence at all to suggest Mrs B really knew enough about investing to say this, if indeed she did. She would have had no experience to base this view on and she went to an adviser looking for advice. So, Personal Touch should have been pointing out here that the chances of her achieving these types of growth rates over a long period – as I've demonstrated - was far more unlikely than likely.

Of course, Personal Touch's recommendation was evidently supported by other reasons to transfer away. So I've thought about all the other considerations which might have meant a transfer was suitable for her, despite providing the overall lower benefits I've mentioned. I've considered these below.

Other reasons for the advice

I've used the documentation from Personal Touch and given to Mrs B at the time to help list some of the themes the recommended transfer away was based on. Our investigator also highlighted some themes when he issued his view. The following themes were present:

- The security of the deferred scheme going forward – it was suggested that Mrs B was nervous about losing her pension altogether because her deferred scheme was then underfunded, and she'd seen negative media stories about pensions in general.
- The adviser suggested the death benefits were better in a personal pension plan.
- It was suggested that flexibility in how and when benefits could be accessed were much better in a personal pension.
- Performance of the recommended funds was historically good.

However, the most obvious issue here, in my view, was Mrs B's age. Mrs B was only 41 years old at the time and unsurprisingly, she had no concrete plans for retirement. Her NRA was over 23 years away and it simply isn't credible that she had an idea of what her retirement might look like. I think this was also evidenced by her personal circumstances. She and her husband had young children who had their whole life ahead of them so planning Mrs B's pension arrangements so far in advance was always going to be subject to change.

Our investigator also pointed out a failure in the analysis to realistically assess Mrs B's financial needs in retirement. In all likelihood this would have been substantially hampered anyway by her comparatively young age at the time and retirement being such a distant concept. But Personal Touch made misleading attempts to predict the income she might need and implied there would be a shortfall unless she did something now. It failed, for example, to take into account that Mrs B was contributing to a new pension and had many years more of employer and employee contributions to benefit from.

Personal Touch, in my view, took little account of her age. Even if Mrs B had aspirations to retire early and therefore closer to the age she was in 2010, she could have retired early as a member of her existing scheme. I still don't think this applied here because even this would have been some years away, but even if it did, in these circumstances there would have been an 'actuarial reduction' caused by early retirement from the scheme. This would have meant Mrs B's pension benefits would have been somewhat different due to her accessing the pension earlier and for longer. But I've seen no evidence this existing flexibility was really discussed with a view to assessing whether it was more in her best interests, rather than her just being advised to transfer away from her existing pension completely.

- *The security of the deferred scheme*

The evidence about the perceived weaknesses in the deferred scheme are contradictory. On one hand, Mrs B seems to have expressed a worry that her scheme could be in financial difficulties and she might lose everything. But this seems based on no more than media

coverage at the time relating to unconnected schemes and a perception that the current underfunding of her scheme was more serious than it actually was.

Personal Touch had a responsibility here. Its job wasn't simply to transact what Mrs B might have thought she wanted. Its job was to really understand her needs and provide her with professional advice. This included interpreting her apparent anxiety and advising accordingly. Personal Touch itself referred in writing to her scheme being part of a large European and multi-national company with significant assets. There was also a suggestion that it was addressing the pension shortfall, a shortfall the adviser should have known was not uncommon in DB schemes at that time. Personal Touch needed also to explain the UK Pension Protection Fund (PPF) and in my view it should have been providing a detailed analysis of what this meant specifically for Mrs B if her deferred scheme fell into this category.

However, even if there was a chance her underfunded scheme was in danger, I think that Personal Touch should have reassured Mrs B that the scheme moving to the PPF wasn't as concerning as she thought. I think the income available to Mrs B through the PPF would have still provided a significant portion of the income she would have needed at retirement. But Personal Touch didn't carry out any analysis on this and I certainly don't think that these concerns should have led to Personal Touch's recommendation to Mrs B to transfer out of the DB scheme altogether, without a detailed comparison.

In short, Mrs B was paying for this advice. So, the adviser needed to be thoroughly addressing all her concerns in the process. But what Personal Touch did instead was to simply recommend she transfer away. As a consequence of this it knew she would suffer a material reduction in the value of her CETV. This was caused by the likely short-term / temporary underfunding position of the pension. What wasn't taken into account was that the scheme was evidently addressing these funding issues in the longer-term.

- *Death benefits*

In my view, what Personal Touch said about the death benefits of both types of schemes was misleading. It implied that Mrs B's DB scheme would pay out 50% to her spouse upon her passing away, but that a personal pension would "*return the full value of the fund as a tax-free lump sum apart from any protected rights portion which must be used to provide a spouses/dependents pension*".

This may have sounded good, but it needed careful explanation, particularly as Mrs B was still only 41 years old and in good health. For example, as a deferred member, there would have been some benefits payable, most likely to Mr B, if Mrs B passed away before she started drawing from her DB pension scheme. If she died after starting to draw her pension, the pension payable to Mr B would have been around 50% of the annual amount Mrs B was receiving. There may have also been wider child-related benefits. So these were good benefits and they increased in value annually through indexation with inflation measures.

On the other hand, whilst the whole value of a pension in a personal scheme could be passed on, the whole point of a pension is to pay for one's retirement. If Mrs B had lived a long life, it's highly likely there would be very little left in the personal pension fund to pass on. The amount in a personal scheme was also at risk to market volatility and it wasn't index linked.

So, although Personal Touch implied that the death benefits were discussed at the time and the personal pension arrangement would better enable the retention of the value of the funds if Mrs B died, this isn't strictly the full picture. I therefore think the likely death benefits attached to the DB scheme were substantially underplayed. The spouse's pension provided

by the DB scheme would have been useful to Mr B if Mrs B predeceased him and I don't think Personal Touch made the value of this benefit clear enough. Personal Touch should not have encouraged Mrs B to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

I also can't see whether, or the extent to which, life insurance was discussed in this case. But at 41 years old, this may have been a reasonably affordable product if Mrs B really did want to leave a legacy for Mr B and her children.

Overall in this case, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mrs B. I think this objective, listed in the suitability letter, was no more than a generic comment used to help justify the transfer away advice. It was not meaningful to Mrs B's situation.

- *Flexibility and the potential performance of the funds*

I can't see that Mrs B required flexibility in retirement in the way Personal Touch implied. Personal Touch did a very poor job at identifying what Mrs B's retirement income requirements might be. But as I've said, this was probably made difficult by the fact that she was so far away from retirement and it was far too early to be considering moving from a DB scheme in her circumstances. There were already limited degrees of flexibility still available to Mrs B around retiring early which Personal Touch failed to comprehensively explore.

I have noted that Personal Touch said at the time that Mrs B liked the idea of having flexibility to grow her funds and the diversity of funds on offer. However, as I've said, there was no real evidence that she'd be able to grow the funds to a value greater than the DB scheme ultimately gave her and to do so would involve much more risk. I've also seen nothing showing Mrs B had either the desire or capacity to manage and grow her funds. I think these comments were 'stock objectives' again used to justify the transfer recommendation.

Summary

In this decision I've first explained why Mrs B complaint is one we can look into.

As regards the merits of her complaint, Mrs B was only 41 years old and still over 23 years from her NRA. I explained why, in her circumstances, I thought it was far too early to recommend that she transfer away from her deferred DB scheme. There were no justified financial reasons for doing so, since the evidence shows she would be more likely to receive lower benefits in the longer-term as a result of transferring away.

Mrs B's scheme was underfunded as of 2010. But this wasn't unusual and there's no evidence showing the underfunding at the time was so serious as to merit the immediate withdrawal from the scheme. In any event, Personal Touch failed to comprehensively assess any other options that might have been available.

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have all sounded like attractive features to Mrs B. But Personal Touch wasn't there to merely transact what Mrs B might have thought she wanted. The adviser's role was to recommend what was in her best interests but instead, they recommended the transfer based on 'stock objectives' which I believe bore little resemblance to Mrs B's situation.

Ultimately, I don't think the advice given to Mrs B was suitable. She was giving up a guaranteed, risk-free and increasing income within her current deferred scheme. By

transferring to a personal pension, the evidence shows there was very limited opportunity to improve on her existing benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this. I think Personal Touch ought to have advised her against transferring out of her DB scheme.

In my view, Mrs B's circumstances were much more aligned to her retiring from the DB scheme when she was ready to do so and drawing a regular income. In this context, the suitable option was for her to access her DB pension in the way it was originally intended.

I have considered, given the circumstances of the time, whether Mrs B would have transferred to a personal pension in any event. I accept that Personal Touch disclosed some of the risks of transferring to Mrs B and provided her with a certain amount of information. But ultimately it still advised Mrs B to transfer out, and I think Mrs B relied on that advice. I'm not persuaded that Mrs B would have insisted on transferring out of the DB scheme, against Personal Touch's advice. I say this because Mrs B was an inexperienced investor and this pension accounted for almost all of her retirement provision at the time. So, if Personal Touch had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would have accepted that advice.

I'm also not persuaded that any concerns Mrs B might have had about the PPF were so great that she would have insisted on transferring her pension, knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. So if Personal Touch had explained Mrs B was also unlikely to exceed the benefits available to her through the PPF if she transferred out, and that she probably could meet her income needs in retirement without risking her guaranteed pension, I think that would have carried significant weight.

In light of the above, I think Personal Touch should compensate Mrs 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 the business to put Mrs B, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs B would have most likely remained in the occupational pension scheme if suitable advice had been given.

Personal Touch 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, Mrs B has not yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with 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 Mrs 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, Personal Touch should:

- always calculate and offer Mrs B redress as a cash lump sum payment,
- explain to Mrs B 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 Mrs B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs B accepts Personal Touch's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mrs B for the calculation, even if she 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 Mrs B's end of year tax position.

Redress paid to Mrs B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Personal Touch 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 Mrs 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.

My final decision

Determination and money award: I've decided to uphold this complaint and require Personal Touch Financial Services Limited to pay Mrs B 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 would additionally require Personal Touch Financial Services Limited to pay Mrs B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Personal Touch Financial Services Limited to pay Mrs B any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Personal Touch Financial Services Limited pays Mrs B the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs B.

If Mrs B accepts my final decision, the money award becomes binding on Personal Touch Financial Services Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs B can accept my decision and go to court to ask for the balance. Mrs 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 Mrs B to accept or reject my decision before 26 May 2023.

Michael Campbell
Ombudsman