DRN-4055910

The complaint

Mr W complains that he was given unsuitable advice by Buryfield Grange Limited (Buryfield) to transfer the benefits from a defined-benefit (DB) occupational pension scheme he held with a former employer to a personal pension arrangement (PP).

What happened

Mr W had two preserved final salary pensions and, in May 2007, Mr W was referred to Buryfield for advice on these by his ongoing financial adviser. The referral letter said Mr W wanted to buy a house, but his income and outstanding loans made the amount he wanted to borrow and the repayments high. So it said Mr W was interested in accessing his pensions and that he thought an adviser might be able to do this more quickly, having been told by one of his DB schemes that this could take a few months. And that the money would be used to clear loans rather than for a deposit, to help clear the way for a house purchase.

On 22 May 2007, a questionnaire was completed to gather information about Mr W's circumstances and objectives, including an assessment of his attitude to risk. It was noted that Mr W was aged 50, employed and divorced but living with a partner, with no dependent children. And that Mr W wanted to take maximum tax-free cash (TFC) to use as a deposit on a house, as he didn't have any other funds and didn't want further borrowing.

Mr W went on to say on the questionnaire that his DB schemes represented a significant proportion of his pension (50-75%), which should be protected as far as reasonably possible. He also selected that spousal benefits are most important to him, but that he wanted the maximum lump sum possible and anticipated drawing benefits early so was happy to accept a lower pension, albeit he didn't want to risk too much of his capital. Mr W said he had minimal investment knowledge and no significant savings outside of his pension. And Buryfield deemed Mr W to have a moderate attitude to risk.

In early June 2007, Buryfield established Mr W didn't have the right to transfer one of his DB schemes (which I'll refer to as his remaining scheme) or to take benefits from this until he was aged 60. So it provided Mr W with advice on his options for his second DB scheme, which was projected to pay a yearly pension of £3,556.26 from his normal retirement age of 60, although he could commute some of this for a lump sum, which at the date of leaving was calculated as £11,737.11. And if Mr W wanted to retire from this early at aged 50 or over then he'd receive a reduced pension and lump sum.

Later that month, Buryfield advised Mr W to transfer his DB pension benefits into a PP. The suitability report said that if Mr W just wanted to access maximum TFC without drawing an income this then this meant the option available which best fulfilled his requirements was to transfer his benefits in his DB scheme to a PP. Mr W accepted Buryfield's advice, so his DB scheme benefits were transferred to a PP shortly after, for a transfer value of £55,978.52 and he went on to take maximum TFC of £13,994.63.

In July 2009, Mr W's ongoing financial adviser took back over from Buryfield. And, in October 2009, Mr W began to draw an income from his PP, which was paid into a second PP that was set up to receive the income.

In 2010, Mr W emailed his ongoing adviser, concerned about how much he could expect from his pensions and to find out about any lump sums he could take from these. He sent his adviser benefits information he'd obtained from his remaining DB scheme and said he was happy with these but wanted it explained in layman's terms.

In 2011, Mr W told his ongoing adviser he was finding it difficult to 'balance the books' and looking at ways to reduce his outgoings, including stopping making contributions to his second PP. And, in response, he was told he was paying these from the income drawn down from his first PP to build up a pot from which he could take TFC upon turning 55. And Mr W clarified he wanted this income to be paid directly to him instead to help with finances.

In July 2012, Mr W combined his two PPs and purchased an annuity giving him a yearly income of £1,764.24. And, in 2017, Mr W started taking his benefits from his remaining DB scheme.

In December 2021, Mr W complained to Buryfield that its transfer advice was negligent and caused him a loss. Mr W said he was induced to transfer for control and flexibility, but the critical yield was high and he had no investment experience and a low capacity for loss. Mr W said he'd stated that his spousal benefits under the DB scheme were more important to him, so he shouldn't have been advised to transfer. And that Buryfield ought to have explored alternatives, such as a loan or re-financing and what this would have cost compared to what he'd lose by transferring from his DB scheme.

Buryfield sent Mr W its final response letter. It said, in summary, that Mr W referred to it to see if it could access his benefits in his DB schemes quicker. It said its starting point was that the transfer wasn't suitable, but as Mr W had numerous loans he wanted to repay to buy a property this made it suitable. It said that if the transaction had been done in isolation it would have agreed the critical yield was too high. But it was part of future planning and the housing market was strong at the time, so would lead to benefits worth more than his DB scheme. And that Mr W signed to confirm he was happy to accept the risk his pension could be lower as a result of transferring to draw benefits early.

In February 2022, Mr W brought his complaint to our Service. And Buryfield said it has been made too late. It said Mr W complained more than six years after the advice and that he knew the benefits were a significant part of his retirement provision in 2007. It also said Mr W went on to regularly review his pensions with his ongoing adviser, including drawing an income from his PP, requesting to take lump sums and buying an annuity. Buryfield said that, in 2010, Mr W enquired about accessing his benefits in his remaining DB scheme and sought information about it. And that Mr W would have understood when he was able to take benefits from this in 2017 that this type of scheme provides a guaranteed pension to know he'd given up similar benefits in 2007.

Mr W said he didn't become aware he had cause to complaint until September 2021, when informed of this by his representative. And that, as he doesn't have knowledge of pensions or the death benefits and guarantees attached to a DB scheme, he had no idea he'd been given negligent advice. Mr W said the annual reviews didn't explain the benefits he'd lost. He said he wasn't receiving PP statements for a while as he'd moved house. And that, in any case, these only show the amount he receives rather than what he's lost out on. And he had no reason to connect these with the loss he's incurred as a result of the transfer advice.

One of our Investigators said Mr W's complaint had been made in time, so our Service can consider it. He also said the transfer wasn't financially viable. And that Buryfield hadn't shown it fully explored Mr W's circumstances, needs and aims, or that it had considered alternatives. He said if Buryfield had advised Mr W against the transfer then it's likely he'd have listened to its expert advice and remained in his DB scheme. And that it should pay Mr W £300 compensation to make up for the distress and inconvenience caused to him.

Buryfield didn't agree. It added, in summary, that Mr W didn't need to know something had definitely gone wrong, just that matters hadn't transpired as expected. And that it was reasonable to think that in 2007 and then at the latest in 2017 when Mr W took benefits from his remaining DB scheme, that he would have been aware that the benefits in the DB scheme he'd transferred from in 2007 had been expected to pay an income in the thousands each year and have increases that weren't available with his annuity. It also said Mr W discussed his pension provision with it and then his ongoing adviser over the years, being made aware of the difference. And that our Service has said other complaints are out of time where an annuity has been purchased that's clearly less than what the DB scheme benefits would have been.

So the complaint's been passed to me for a 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.

Jurisdiction

The rules our service is bound by, known as the Dispute Resolution (DISP) Rules - found in the Financial Conduct Authority's handbook - say in DISP 2.8.2R that, unless the business consents (Buryfield hasn't), we can't consider a complaint if it's referred to us:

- More than six years after the event complained of; or (if later)
- more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) they had cause for complaint.

The event complained of – the advice Mr W was given to transfer his DB scheme to a PP, which he says resulted in a loss – took place in 2007. And, as he didn't raise this with Buryfield until 2021 and then our service until 2022, it has been referred to us more than six years after the event occurred. This means I have to decide if Mr W was aware, or ought reasonably to have been aware, he had cause for complaint more than three years before he complained to Buryfield.

Buryfield has said Mr W ought to have been aware he had cause for complaint from 2007, as its suitability letter said he'd be worse off in retirement if he transferred. And that as Mr W signed a declaration confirming everything had been fully explained, he understood the transfer was to allow him to buy a property. But I wouldn't expect Mr W to have had cause for concern at the time Buryfield gave him the advice that something might have gone wrong, considering he'd just been given this by an experienced adviser and was relying in it.

Buryfield's TVAS appears to have been based on projections from age 65 onwards, when it appears Mr W could actually take reduced benefits from his DB scheme at age 50 or at his normal retirement age of 60. As well as taking TFC, Mr W went on to draw down income from his PP. And, while he later took an annuity, he did so from age 55. So, as time went on, I think it was hard for Mr W to compare the DB scheme benefits he had given up to what he now had in his PP, particularly given he doesn't have expert knowledge. I also note that Mr W's PP statements – which he doesn't appear to have always received – projected his benefits to age 75. So, again, I don't think it would have been easy for Mr W to compare the position he was in with what he'd given up, in order to know if something might have gone wrong with the transfer advice.

I recognise Mr W obtained information about his remaining DB scheme in 2010 and asked his ongoing adviser for an explanation of this in 'layman's terms'. But the adviser's response doesn't show me that he was given one. And, while Mr W continued to review his retirement provision with that adviser, I think it's likely the focus was on future planning given I can see Mr W was concerned to know how much he could reasonably expect from his pensions at retirement, rather than on the DB scheme benefits hfe had already given up.

Buryfield said Mr W ought to have realised what a DB scheme was, as well as the guaranteed nature of the benefits he'd given up, when he took benefits from his second DB scheme in 2017 given this was thousands per year. But I don't think this means Mr W ought reasonably to have appreciated something might have gone wrong with the advice he was given in the particular circumstances. It was a different scheme with likely different benefit amounts. And even if this had prompted Mr W to look at the statement of DB scheme benefits he'd given up then, for the reasons I've already given, I don't think he would have been able to easily compare it with his PP benefits to know if he had cause to question if something might have gone wrong with advice.

Buryfield suggested Mr W set up his second PP to recycle the benefits to boost his retirement provision, as he knew he'd get less as a result of the DB transfer. But looking at the emails between Mr W and his ongoing adviser, these support that he instead did this as a way of accessing more TFC – he was reinvesting the income into the second PP to allow him to build up a pot to take TFC from at a later date – rather than because he thought he needed to rebuild his pension following the transfer.

Mr W says he became aware he had cause for complaint about the advice after his representative got in touch, in September 2021. I haven't seen anything that makes me think Mr W ought reasonably to have been alerted to a problem with this before then. And, as Mr W referred his complaint to Buryfield and then our Service within three years that, I think it has been made in time.

In summary, I think Mr W's complaint about the advice Buryfield gave him in 2007 has been made in time, which means our Service can consider it.

The advice

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. This includes the regulator's Conduct of Business (COB) rules.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the Investigator.

Under COB 5.3.29A(4) the regulator expected a *"…prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."*

It also expected at least one illustration for the personal pension/section-32 plan had to be given on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown.

Also, a 'reason why' letter or equivalent had to be issued as soon as practicable after the recommendation, which should:

"…explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme…"

"…demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Presumption of unsuitability

COB 5.3.29G (renumbered to COBS 19.1.6G in the current FCA rulebook) specified the information Buryfield should gather from the consumer and the DB scheme in order to assess suitability. Importantly it also said that:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

Financial viability

Buryfield doesn't appear to have suggested the transfer was likely to result in higher retirement benefits for Mr W, rather that it was suitable for him to meet his other objectives. The suitability report said the critical yield at 10.8% was highly unlikely to be achieved. So, as Buryfield seems to accept Mr W was likely to be worse off in retirement as a result of transferring from his DB scheme I haven't considered this any further. Instead I've focused on whether it was right for it to recommend the transfer in spite of this for other reasons.

Flexibility and income

I think the general information Buryfield provided Mr W with about pension types in the suitability report gave a negative view of DB schemes from the outset, before it had even gone on to consider Mr W's circumstances and give its recommendation. For example, more than half the information it provided about DB schemes on pages five and six of the suitability report focused on concerns about the financial stability of these, even though I can't see anything to suggest Mr W had any concerns about this or that Mr W's scheme was in financial difficulty. In particular it said that the problem of funding these rests with the employer and many are in difficulty. And that it isn't possible to quantify the level of protection the Pension Protection Fund might provide in that case. And instead of explaining that DB schemes provide valuable guaranteed benefits at retirement that aren't dependent on investment performance and will be lost on transferring, Buryfield went on to express this as a disadvantage of such schemes on page 34 of the suitability report.

While Buryfield's starting position ought to have been that the transfer wasn't suitable, on page six, before going on to give its conclusions about whether or not it recommended the transfer on page 12, it had already told Mr W to see its '*specific recommendations later on how your stated objective of drawing tax free cash now and deferring pension income can be met*'. And when Buryfield did give Mr W its conclusions, I think it phrased these in such a way that it largely left it to him to decide for himself which option was most suitable based on his needs – and that this led him towards transferring to access TFC – when it said:

‘*If for any reason you decide not to draw benefits at this time then you should remain under the existing occupational schemes…because of the critical yield.…If however you do require access to your tax free cash entitlement….then you should transfer.*’

The information shows that Mr W’s objective was to access TFC to help him purchase a property, seemingly by either using this as a deposit for a house or by clearing debts to increase his borrowing ability. But Buryfield’s job was to interrogate Mr W’s needs and look at his options, including considering whether there were any alternatives, rather than just facilitating what he thought he wanted. And I can’t see that it did this.

Buryfield has told us Mr W had numerous debts with total monthly repayments of around £389, including a personal loan, finance and credit cards. But it hasn’t been able to provide information from the time detailing this, for example a full fact find and income and expenditure document. While Buryfield said it had a lot more information at the time which is no longer available, the adviser has said they aren’t sure they ever had the full story about Mr W’s finances. And there’s nothing to show Buryfield explored – or at least tried to explore – this with Mr W, including whether or not his debts were up to date and manageable, to see if repaying these was a genuine need. And, if so, whether there were any alternatives to achieve his aims. For example, taking early retirement from his DB scheme, when it appears he could have done this from age 50.

I recognise it appears Mr W was eager to access TFC based on the referral to Buryfield from his ongoing adviser, but Mr W’s said this just went into his savings account and wasn’t used to clear his outstanding balances as these were up to date, or as a deposit to buy a property. So there doesn’t appear to have been an urgent and genuine need to justify transferring to take the increased TFC that a PP would allow for. And if Mr W was genuinely concerned about his debts impacting his ability to purchase a property and having a deposit then it seems he could have taken early retirement from his DB scheme and repaid some or all of these with the TFC, reducing his monthly repayments and increasing his disposable income to allow him to save for a deposit.

I recognise page nine of the suitability report shows Mr W said he didn’t need to draw an income at the time, when taking benefits early from his DB scheme would have provided him with one. But, to my mind, the income from his DB scheme would have only increased his income and borrowing ability to allow him to get a mortgage in line with his objectives.

So there doesn’t seem to have been any genuine need for Mr W to transfer to a PP. And, while Mr W might have been willing to take some risk, I don’t think he wanted to take a large amount of risk or that he had the capacity to do so. Not least because he said in the risk questionnaire that his DB scheme represented a significant proportion of his overall retirement fund, which should be protected as far as reasonably possible. And that he had no investment experience or savings outside of his pension. So I think it’s unlikely Mr W would’ve given up the guaranteed benefits his DB scheme offered if Buryfield had advised him to remain in it.

Overall, I don’t think it was suitable advice for Burfield to recommend Mr W transfer his DB benefits to a PP. For the above reasons, I think that taking his DB scheme benefits early would’ve enabled Mr W to meet his stated objectives and been in his best interests. So, on balance, I think Buryfield should’ve advised Mr W to remain in his DB scheme and take benefits from this early instead, if he had a genuine need to access funds.

Summary

I don’t doubt that having access to a larger amount of TFC through a PP would have sounded attractive to Mr W. But Buryfield wasn’t there to just transact what Mr W might have thought he wanted. Its role was to really understand what Mr W needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr W was likely to obtain lower retirement benefits and I don't think it was in his best interests. As I've said above, I think suitable advice in Mr W's circumstances would've been to remain in his DB scheme, where he could have looked in to taking the benefits early, if he had a genuine need to maximise his income.

I'm not persuaded Mr W would've insisted on transferring out of the DB scheme anyway, against Buryfield's advice. I recognise that in 2010 Mr W was concerned about any further lump sums he could take and went on to enquire with his ongoing adviser about how else he could access these, including if he could access benefits in his second DB scheme early. And in 2011 he also said to his ongoing adviser that he was struggling to 'balance the books' and wanted to maximise his income. But this is with the benefit of hindsight and doesn't mean Mr W would have gone ahead to transfer to a PP against Buryfield's advice if it had advised him to remain in this.

Whilst Mr W may've been engaged in the process, he was an inexperienced investor with a low to medium risk profile and this pension accounted for a significant proportion of retirement provision at the time. So, if Buryfield had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests and how he could meet his objectives by instead taking his benefits from the DB scheme, I think he would've accepted that advice.

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

Buryfield should also pay Mr W £300 compensation to make up for the distress and inconvenience caused to him by the unsuitable advice. I think this is a fair and reasonable amount in the circumstances because, while the advice was unsuitable and I think it's likely Mr W would've remained in DB scheme had it been otherwise, he's only found this out more recently and still had the benefit of using his fund.

Putting things right

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

Buryfield 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 W took an annuity showing he was reliant on the funds for an income at that point, compensation should be from the date he took the annuity as per the FCA's guidance.

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 W'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, Buryfield should:

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

Redress paid to Mr W 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, Buryfield may make a notional deduction to cash lump sum payments to take account of tax that Mr W would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr W'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.

Buryfield should also pay Mr W £300 compensation for the distress and inconvenience caused to him by the unsuitable advice.

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.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Buryfield Grange Limited to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Buryfield Grange Limited pays Mr W the balance.

If Mr W accepts this decision, the money award becomes binding on Buryfield Grange Limited.

My recommendation would not be binding. Further, it's unlikely Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 29 August 2023.

Holly Jackson
Ombudsman