DRN-4055917

The complaint

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

Retirement & Investment Solutions Limited is responsible for answering this complaint. To keep things consistent, I'll refer mainly to "RISL".

What happened

In 2015 Ms T asked her then financial adviser for advice about her deferred DB scheme. Her adviser didn't have the necessary permission to advise on DB pension transfers, so it passed Ms T onto RISL, which did. To be clear, this means RISL is responsible for answering the complaint.

Information gathered about Ms T's circumstances were broadly as follows:

- Ms T was a deferred member of the DB scheme having been a member between 1989 and March 2015.
- The cash equivalent transfer value (CETV) of the pension was around £318,061 and the normal retirement age (NRA) was 62.
- Ms T was 47 years old, divorced and with no-one financially dependent on her. She was in good health.
- Ms T earned around £25,000 per year with a bonus potential on top. She was in private rented accommodation and had no savings or significant assets. Ms T was currently in a type of debt management plan which she was evidently making progress on.

RISL set out its advice in a suitability letter in August 2015. It advised Ms T to transfer out of her DB scheme and invest the funds in a type of personal pension arrangement. Ms T accepted this advice and so transferred from her DB scheme to a personal pension shortly after.

Ms T says that she later became aware of having a cause to complain. She first complained to RISL about its advice, saying she shouldn't have been advised to transfer out of her DB scheme. In response, RISL said it hadn't done anything wrong and was acting on the financial objectives Ms T had at the time.

Ms T then referred her case to our Service. One of our investigators looked into the complaint and said it should be upheld. As RISL hasn't agreed and 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 the final response from RISL dated April 2023. There's a lot of information in this final response and so I'm not going to refer to every point in this decision. But I've considered everything RISL said in the response with great care.

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 RISL'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 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, RISL should have only considered a transfer if it could clearly demonstrate that the transfer was in Ms T's best interests.

I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension arrangement was in Ms T's best interests.

I don't think it was, so I'm upholding her complaint.

Financial viability

RISL referred in its transfer recommendation to a 'critical yield' rate. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a transferred personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

In Ms T's case, I think how RISL portrayed the critical yield to her was somewhat misleading. RISL said, for example, that the critical yield required to match the benefits of the DB scheme she was in at the time, at her NRA of 62, was 5.9%. But it didn't calculate a critical yield if she intended to take a tax-free cash lump sum and a reduced pension for the NRA.

Nor did RISL calculate any critical yield rates if Ms T was to retire earlier, despite it implying, both then and now, that this was a major objective for her. In my experience, the critical yields for an earlier retirement could easily have been higher than 5.9%.

So, as RISL itself based much of its transfer rationale on Ms T potentially taking early retirement or adopting what it implied was greater flexibility in a personal pension, I think omitting other critical yields was a significant gap and one which would have caused Ms T to have less information than she needed to make an informed decision.

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 4.5% per year for 14 years to the NRA (age 62), which is below the critical yield figure of 5.9%. The discount rates for retiring earlier were lower – for example, retiring at 55 had a discount rate of only 3.8%.

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 14 years. I've also kept in mind that the regulator's upper projection rate at the time was 8%, the middle projection rate was 5%, and the lower projection rate was 2%.

At the time, RISL said Ms T's attitude to risk (ATR) was "highest medium". I accept this was completed after she filled out a questionnaire, but I think this ATR categorisation was too high. This mis-categorisation doesn't actually change the overall outcome here, but in my view it helps demonstrates the overall nature of RISL's dealings with Ms T.

I say this because Ms T had no assets. She was in rented accommodation and didn't have any savings. This was her only current pension, other than the state pension payable at 67. Therefore, not only did Ms T have little capacity for loss, there's absolutely no evidence showing she had any money market investment experience to call upon, and she had no such investments at the time. RISL places weight on Ms T being knowledgeable and employed in financial services, but she was working in a specific area, unrelated to pensions or investments. So, I think any reasonable assessment of her financial situation would have caused her ATR to have been moderated down.

As I say, none of this really matters as the evidence strongly implies that when looked at from the perspective of 2015 when this advice was given, Ms T would likely be worse off in the longer term if she transferred away from her DB scheme. I can say this by taking account of the figures I've described above. And I think a future growth assumption towards the lower half of the regulator's projections and close to the discount rate(s) I've described, were the most relevant ones to use.

All these growth assumptions were below the critical yield figure, rather than above it. And as I've said, the critical yield could have actually been higher in Ms T's circumstances. So, I think this shows that achieving 5.9%, year-on-year, upon transferring out was far more unlikely than likely, in Ms T's case.

That no other critical yield figures were supplied to her was misleading. But so was the RISL adviser's view about potential growth if she transferred out. The adviser thought achieving 5.9% was achievable despite what I've set out above. But this was based heavily on recent past performance and they also implied, without any supporting analysis, that the critical yield here of 5.9%was actually very low. In my experience, this comment simply isn't justified.

To summarise the financial viability then, all the signs which I've seen were indicating that Ms T would likely receive lower pension benefits overall as a consequence of transferring away from the DB scheme. Even the proposed personal pension provider itself assumed growth rates substantially below the critical yield of 5.9%. And there would be little point in Ms T giving up the guarantees and benefits available to her through her existing DB scheme only to achieve a lower level of benefits in a personal pension in the long term.

Of course, according to RISL, its recommendation that she should transfer out to a personal pension was not based on the financial comparisons with her current scheme alone. Rather, RISL said Ms T had different 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.

<u>*Other reasons given for the transfer advice*</u>

I've used the documentation from RISL 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. These were:

- There was more tax-free cash available at the age of 55 in a personal plan, than was available under Ms T's existing DB scheme.

- Flexibility and access early to the pension was more attractive in the personal plan.

- She could have ownership and control of the pension funds if she transferred.

- The death benefits were more suitable for her in a personal plan.

So, it seems the supporting reasons that RISL recommended the transfer out to a personal pension was for the flexibility and control it offered to Ms T. I have therefore considered all these issues in turn.

- *Retiring early / taking tax-free cash*

RISL mentioned on several occasions in documents from the time of the advice that Ms T had said her preferred retirement age was 55, rather than the NRA of 62. I don't doubt that Ms T might have genuinely hoped to retire as early as possible. But I've seen nothing that shows this was anything more than something she aspired to do at that stage, as opposed to being part of a formulated plan. I say this because Ms T was only 47 years old at the time. She had no demonstrable assets and was currently renting a home. She'd also experienced recent financial challenges. Against this backdrop, it's simply not credible that she had any realistic and concrete plans for retirement at that point. I therefore don't think this should have influenced a recommendation for her to irreversibly transfer out to a personal pension plan.

However, even if I were to consider the highly unlikely scenario that Ms T's retirement hopes were more fixed than the mere aspirations set out by RISL - and she really did plan to retire early - I think RISL should have better assessed the possibility of achieving this goal whilst being a member of her current scheme. It seems Ms T herself had been given financial scenarios from her pension trustees outlining how much she could get at certain ages if she remained in her DB scheme. We know, for instance, that at 55 she'd have been able to get an estimated annual pension of £8,252 or a reduced pension of £6,117 together with a tax-free lump sum of £40,781.

What we don't know here, is what Ms T's retirement income needs were because these weren't comprehensively assessed at the time of the advice. The 'fact-find' designed to capture Ms T's full financial picture wasn't properly completed by the adviser. Important sections about her specific outgoings and financial liabilities were not completed properly, a significant shortfall of what I'd expect to see when advising someone in Ms T's situation.

So, although early retirement under the DB scheme would still have been an option for Ms T, this was clearly viewed by the adviser in the negative dimension. And so it's hard to see how Ms T, in her situation, would be able to retire at 55 with an income of £6,117 per year. This would have represented a very significant drop in from her current income, but this was not addressed or explained by the adviser.

RISL also promoted to Ms T that she could access more tax-free cash if she transferred to a personal pension plan. It said she'd be able to access 25% of her pension as a lump-sum and then use the remaining funds more flexibly if she transferred away to a personal plan. It's usually the case that more tax-free cash can be accessed from a personal pension when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But RISL should have been telling Ms T at the time that extra tax-free lump sums being removed from a personal pension, potentially from the age of 55 in her case, also came with consequences in that the amount left for her later retirement years would obviously decrease. But instead of exercising caution, which in my view would have been appropriate, the adviser told Ms T that she could get double the DB scheme's lump sum, a prospect I'm sure she would have found appealing.

So, I think retiring early from the existing DB scheme was quickly discounted by RISL as I've seen no evidence it was realistically discussed with a view to assessing whether it was more in Ms T's best interests. The advice simply focussed on her transferring away completely. And whilst I accept the notion of retiring early and / or accessing tax-free cash might have been appealing, this needed to be considered against the other viable options Ms T faced; in my view these options should have included remaining in her DB scheme.

- *Flexibility, ownership and control*

I can't see that Ms T required flexibility in retirement in the way RISL implied. As I've said, RISL did a poor job at identifying what Ms T's retirement income requirements might be and there were already limited degrees of flexibility still available to her around retiring early in her existing scheme.

In my view, there was no evidence to support that Ms T needed flexibility at all and the concept of flexibility wasn't really defined by the adviser. In my view, evidence of why Ms T wouldn't use the DB pension in exactly the way it was designed, is absent.

There's also no evidence showing that Ms T had either the desire or capacity to manage these funds. As I've said, Ms T had no such investments at the time. So, there's nothing to suggest she was knowledgeable enough in these pension related matters or that she had any past investment experience to call upon. She says she hadn't.

I therefore think the issue of flexibility was used to merely help justify the transfer-away recommendation. And at £318,061 in total value, I think Ms T would have needed significant help and advice to manage the scale and complexity of the funds. Given their value, this would have come at an ongoing and considerable cost which she didn't have with the scheme she was already in.

- *Death benefits*

A key theme in the advice RISL gave to Ms T was that she wasn't currently married and had no young dependent children, so the death related pension benefits associated with these things in her existing scheme were of no use to Ms T.

I do understand the point being made. In addition to spousal benefits, there were wider child-related benefits whilst children remained within full-time education. For many consumers, these things are of great reassurance, and therefore great value, in a pension. I accept Ms T didn't need them and there's no indication she was with a partner at the time or intended to marry again.

However, what RISL told Ms T is that if she transferred away, then any value in a personal pension plan could be passed on, most likely tax-free, to her adult son. This may have sounded good, but it needed careful explanation, particularly as Ms T was still only 47 years old and in good health. And whilst the entire 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. So, if Ms T 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 RISL 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 Ms T died, this isn't strictly the full picture. RISL should not have encouraged Ms T to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

I'm also not clear whether, or the extent to which, life insurance was discussed. However, at 47 years of age, a term cover policy may have been a reasonably affordable product if Ms T really did want to leave a legacy for her son if she passed away.

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 Ms T. Overall, it was not helpful to her situation and it wasn't in her best interests.

Suitability of investments

As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Ms T, it follows that I don't need to consider the suitability of the investment recommendation. This is because Ms T should have been advised to remain in the DB scheme and so the investments in the funds wouldn't have arisen if suitable advice had been given.

Summary

In this decision I've explained why I don't think the advice to transfer away from her DB scheme was in Ms T's best interests. She was giving up a guaranteed, risk-free and increasing income within her current deferred scheme.

Ms T was still over 14 years from her NRA. I've explained why, in these circumstances, I thought it was too early to recommend that she transfer away from her DB scheme and there were no other justified financial reasons for transferring. The evidence shows she would be more likely to receive lower pension benefits in the longer-term as a result of transferring away.

As for the flexibility RISL says Ms T required, I don't doubt that this and the control RISL said she could have over the transferred funds, would have all sounded like attractive features to Ms T. Similarly with the death benefits, where RISL implied these suited Ms T's situation much better in a personal pension plan, rather than the DB scheme she was a deferred member of.

But RISL wasn't there to merely transact what Ms T might have thought she wanted. Ms T wasn't experienced in these matters and she went looking for regulated financial advice. She was also paying a substantial amount for it. So, even though RISL says Ms T was given a number of warnings about transferring, it's important to remember here that it was RISL which was the regulated adviser. The adviser's role was to interpret Ms T's circumstances and to use their skills, training and professional experience to recommend what was in her best interests. Instead, they clearly and specifically recommended an irrevocable transfer based on a series of 'stock' objectives which I believe bore very little resemblance to Ms T's situation.

I therefore think RISL ought to have advised her against transferring out of her deferred DB scheme. In my view, Ms T'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.

In light of the above, I think RISL should compensate Ms T 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 Ms T**,** as far as possible, into the position she would now be in but for the unsuitable advice. I consider Ms T would have most likely remained in the occupational pension scheme if suitable advice had been given.

RISL 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, Ms T 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 (62), 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 Ms T'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, RISL should:

- always calculate and offer Ms T redress as a cash lump sum payment,
- explain to Ms T before starting the redress calculation that:

- the 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 Ms T receives could be augmented rather than receiving it all as a cash lump sum,

- if Ms T accepts RISL's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Ms T 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 Ms T's end of year tax position.

Redress paid to Ms T as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, RISL 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 Ms T'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.

I have also considered the impact on Ms T of the unsuitable advice and transfer. Our investigator recommended that a sum of £200 should be paid to Ms T by RISL for what they referred to as the trouble and upset caused by this unsuitable transfer. I've taken into consideration Ms T's age, circumstances and the substantial amount she'd built up in her pension to that date; Ms T had built up her pension over a long time. Also, by retirement this DB pension would have been a very substantial part of her overall pension entitlement so I think the thought of losing any benefits would have negatively impacted Ms T.

So, I agree that RISL should also pay Ms T £200 for the distress and inconvenience caused by the unsuitable advice which has likely had an impact on her retirement planning.

My final decision

<u>Determination and money award</u>: I uphold this complaint and I direct Retirement & Investment Solutions Limited to pay Ms T the compensation amount as set out in the steps above, up to a maximum of £170,000.

<u>Recommendation:</u> If the compensation amount exceeds £170,000, I also recommend that Retirement & Investment Solutions Limited pays Ms T the balance. If Ms T accepts this decision, the money award becomes binding on Retirement & Investment Solutions Limited.

My recommendation would not be binding. Further, it’s unlikely that Ms T can accept my decision and go to court to ask for the balance. Ms T 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 Ms T to accept or reject my decision before 6 June 2023.

Michael Campbell
Ombudsman