

## The complaint

Mrs O complains about the advice given by AXG Advice Ltd (AXG) to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to self-invested personal pension ('SIPP'). She says the advice was unsuitable for her and believes this has caused a financial loss.

## What happened

Mrs O approached AXG in 2020 to discuss her pension and retirement needs. I understand that Mr and Mrs O were emigrating to Spain and had contacted an adviser to receive financial advice in relation to this, and her pension planning. As Mrs O's existing adviser didn't have the correct authorisation to give pension advice she was referred to AXG.

AXG completed a fact-find to gather information about Mrs O's circumstances and objectives. This showed that:

- She was 58 years old, married and had one daughter who was not financially dependent.
- She was retired.
- Mr and Mrs O were in the process of selling their UK home and purchasing a property in Spain. They had £330,000 in cash which was largely to be used to fund the move.
- Mr and Mrs O had other investments or savings that had a value of around £50,000.
- The fact find showed that Mrs O had pensions with a value of £221,000, but Mrs O has explained that this was her husband's provision. She didn't have any other pensions herself.

Mrs O was a deferred member of a DB pension. This pension had a transfer value of £65,587.48.

AXG also carried out an assessment of Mrs O's attitude to risk, which it said was 'high-medium'.

On 29 June 2020, AXG advised Mrs O to transfer her pension benefits into a SIPP and invest the proceeds. The suitability report said the reasons for this recommendation were that:

- She wanted the flexibility to control her income in retirement in line with pensions freedom legislation.
- She wanted to enhance the death benefits available for her dependents.
- She wanted the ability to retire early.

In June 2022, Mrs O received a letter from AXG which said that the industry regulator had assessed a sample of its DB transfer advice cases and had raised some concerns. So, it was carrying out a voluntary review of all the advice it gave customers with DB pensions. I've not seen that a review was completed in Mrs O's case.

Mrs O complained in August 2022 to AXG about the suitability of the transfer advice. Mrs O said that she was now having doubts about whether the advice she received was suitable for her. She said that the advice didn't consider what she already had, and AXG didn't ask enough questions about her financial position at the time. She said that how her husband's provision would affect her situation was not properly considered. Mrs O believes she has been left financially worse off in retirement as a result. She says she has little, or no, pension funds left now after the advice from AXG.

AXG didn't uphold Mrs O's complaint. It said that the transfer achieved her motives of flexibility and enhanced death benefits. It noted that the DB scheme did not have any death benefits. And so, the DB transfer improved upon this.

Mrs O referred her complaint to our service. An Investigator upheld the complaint and recommended that AXG pay compensation. She didn't think that Mrs O had a higher attitude to risk and she wasn't persuaded that Mrs O wanted to take the risk of the transfer. She didn't need flexibility and the death benefits from the DB scheme could have been valuable to her partner.

AXG disagreed, saying it was reasonable to say she had a 'high-medium' attitude to risk given the answers she gave to the questions she was asked about risk. The existing DB scheme did not have any death benefits and Mrs O did want flexibility. Mrs O had made investments in her name. All of this was confirmed with Mrs O in a telephone call.

The Investigator wasn't persuaded to change their opinion overall. But she did clarify that even if the DB scheme didn't have significant, or any, death benefits that this wouldn't make the transfer suitable. This is because a DB scheme should be used to provide a pension for the member in any event.

As no agreement has been reached the complaint was referred to me to make 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 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'). And 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 AXG'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the Investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, AXG should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs O's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

#### *Financial viability*

AXG carried out an Appropriate Pension Transfer Analysis (as required by the regulator). This looked at how much it would cost to purchase the benefits Mrs O was giving up when she transferred. It also calculated how much Mrs O's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme (the critical yield).

I understand that, partly due to some incorrect information from the DB scheme, AXG was under the impression that that the DB scheme had a normal retirement date of 65. But it has now been clarified that this is 60. AXG didn't look at financial viability in respect of Mrs O's age 60 and it should have done this. But given the position at age 65, and that providing for an early retirement is normally more expensive, I don't think the financial viability position would be improved at age 60. So, I think it's reasonable to look at the advice as it is.

The suitability letter showed that it would cost Mrs O £124,095.51 to obtain a comparable level of income to the DB scheme at age 65. This was £55,508.02 more than the transfer value. This gives a good idea of the 'cost' of the benefits she was giving up at the time which I think it's reasonable to say this is significant.

And the advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mrs O was 58 at the time of the advice and wanted to retire at 65 at the latest. She was considering taking her benefits before this. The critical yield required to match Mrs O's benefits at age 65 was 11.09% if she took a full pension. AXG didn't show the situation if Mrs O took some tax-free cash, it also should have done this.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.3% per year for 6 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mrs O's 'medium high' attitude to risk and also the term to retirement.

Mrs O was recorded as having a medium high attitude to risk. I'm not persuaded that this is right. Mrs O did answer some questions that indicated she was able to take some risk. But, on the other hand, she seems to have very little investment experience herself and the DB scheme was her main pension provision above her state pension.

But the return needed to match the DB scheme benefits was significantly above what the regulator thought was reasonable for even a higher risk investment to provide. So, I don't need to fully determine what her attitude to risk was to say the transfer wasn't suitable for Mrs O. This is because there would be little point in Mrs O giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield was 11.09%, I think Mrs O was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with her recorded attitude to risk, and this would be magnified if her tolerance to risk was lower. And I think this would be the case if the analysis was done to her age 60 as well.

AXG has provided cashflow models which it says show that Mrs O would've been able to meet her needs despite the high critical yields. I've considered these, but AXG's models show that if Mrs O took the same income benefits as the DB scheme had provided then the fund would run out at her age 81. This was noted as being below her life expectancy of 85. And if the fund had period of poor performance then it could run out much earlier than this.

Also, as AXG will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

For this reason alone, a transfer out of the DB scheme wasn't in Mrs O's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as AXG has said in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

#### *Flexibility and income needs*

One of the reasons that Mrs O wanted to transfer was that she said she wanted some flexibility in how she took her money. It seems that she wanted to provide some funds for her daughter in the near future.

But I think it's reasonable to say that AXG accepted what Mrs O said about this without any challenge. There was no analysis about whether Mrs O could get the funds she wanted elsewhere, and I do note that Mr and Mrs O already had a significant amount of cash. And at 34 their daughter was financially independent. So, this aim seems to me to have been a 'nice to have' rather than a definite need.

And even though Mrs O described herself as retired she wasn't at state pension age and she hadn't taken the benefits from this DB scheme yet. AXG should have fully looked into how Mrs O reducing her income from this pension would have affected her retirement. I can't see that it did this here so I can't say that it fully considered Mrs O's circumstances. I think this is a serious failing and I can't see how AXG could have properly given retirement advice without fully considering her actual retirement plans and income needs.

So, I'm not persuaded that Mrs O required flexibility in retirement. This is because based on the evidence I've seen; I don't think she had a genuine need to access her tax free cash earlier than the normal scheme retirement age and leave her funds invested until a later date. I also can't see evidence that Mrs O had a strong need for variable income throughout her retirement. Neither of these seems to have been fully discussed.

And I'm satisfied Mrs O was likely to have been best placed to meet her income needs in retirement through the DB scheme. It wasn't recorded exactly what Mrs O needed. But she was entitled to an annual income of £3,941.60 at 60 and £5,405.96 at age 65 from the DB scheme. Adding this to her state pension may have met her income objectives. In any event, I don't see why she should have been advised to risk this income.

And lastly Mr and Mrs O were moving abroad at the time of sale and whilst this wasn't fully completed, this was a significant change in their circumstances. But other than an acknowledgment of this there is almost no mention of it in the point of sale documentation. I think this should have formed a central part of the advice and the fact that it didn't is another failing on the part of AXG. That said I doubt whether considering this issue would have made the advice suitable, but AXG still should have fully looked into it.

### *Death benefits*

I understand that Mrs O's DB scheme didn't automatically provide death benefits. Mrs O needed to pay for these, and she hadn't done this. So, I understand the DB scheme didn't provide any dependents benefits. This is noted in the suitability report although this report still contains information about the 'generic' death benefits a DB scheme would provide which would be confusing to Mrs O.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a SIPP were likely an attractive feature to Mrs O. But whilst I appreciate death benefits are important to consumers, and Mrs O might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs O about what was best for her retirement provisions. A pension is primarily designed to provide an income in retirement. And I don't think AXG explored to what extent Mrs O was prepared to accept a lower retirement income in exchange for providing death benefits.

Furthermore, if Mrs O genuinely wanted to leave a legacy for her spouse or children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think AXG should've instead explored life insurance. Although considering that she 'opted out' of the DB scheme providing these benefits it's questionable that this was a real aim for her.

Overall, I don't think death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mrs O. And I don't think that insurance was properly explored as an alternative.

### *Control or concerns over financial stability of the DB scheme*

I think Mrs O's desire for control over her pension benefits was overstated. Mrs O was not an experienced investor, and I don't think that she had an interest in or the knowledge to be able to manage her pension funds on her own. So, I don't think that this was a genuine objective for Mrs O – it was simply a consequence of transferring away from her DB scheme.

I can see that it was noted that the scheme had a funding deficit. But I've not seen any reason that the funding of her employer's DB scheme was in a position such that Mrs O should have genuinely been concerned about the security of her pension. And I've seen no indication that she was.

### *Suitability of investments*

AXG recommended that Mrs O invest in a third-party investment portfolio. This was a cautious portfolio, and it was described as being suitable for Mrs O as a 'low risk investor'. This is clearly in direct contradiction to what AXG said at other times about Mrs O's attitude to risk.

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

### *Summary*

I don't doubt that the flexibility, control and potential for death benefits on offer through a personal pension would have sounded like attractive features to Mrs O. But AXG wasn't there to just transact what Mrs O might have thought she wanted. The adviser's role was to really understand what Mrs O needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs O was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs O was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mrs O shouldn't have been advised to transfer out of the scheme just to provide funds to her daughter and, the potential for death benefits wasn't worth giving up the guarantees associated with her DB scheme.

So, I think AXG should've advised Mrs O to remain in her DB scheme.

Of course, I have to consider whether Mrs O would've gone ahead anyway, against AXG's advice.

I've considered this carefully, but I'm not persuaded that Mrs O would've insisted on transferring out of the DB scheme, against AXG's advice. I say this because Mrs O was an inexperienced investor and this pension accounted for the majority of Mrs O's retirement provision. So, if AXG 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've accepted that advice.

I'm not persuaded that Mrs O's want to access funds was so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out, didn't think it was suitable for her or in her best interests. If AXG had explained that Mrs O could meet all of her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs O would have insisted on transferring out of the DB scheme.

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

AXG 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, although Mrs O is retired, and she has taken some of the benefits from the DB scheme this was only a very short time away from the schemes NRD of age 60. So, compensation should be based on the scheme's normal retirement age of 60.

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 Mrs O'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, AXG should:

- calculate and offer Mrs O redress as a cash lump sum payment,
- explain to Mrs O before starting the redress calculation that:
  - her 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 her redress prudently is to use it to augment her DC pension
- offer to calculate how much of any redress Mrs O receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs O accepts AXG's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs O for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs O's end of year tax position.

Redress paid to Mrs O 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, AXG may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from her pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mrs O'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 £375,000, 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 £375,000, I may recommend that the business pays the balance.

## **My final decision**

Determination and money award: I uphold this complaint and require AXG Advice Ltd to pay Mrs O the compensation amount as set out in the steps above, up to a maximum of £375,000.

Recommendation: If the compensation amount exceeds £375,000, I also recommend that AXG Advice Ltd pays Mrs O the balance.

If Mrs O accepts this decision, the money award becomes binding on AXG Advice Ltd.

My recommendation would not be binding. Further, it's unlikely that Mrs O can accept my decision and go to court to ask for the balance. Mrs O 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 O to accept or reject my decision before 5 July 2023.

Andy Burlinson  
**Ombudsman**