

The complaint

Mr S says the advice given and the arrangements made by Towergate Financial (East) Limited (TFE), trading as M2 Financial Limited, to transfer from his defined benefit (DB) pension and to establish a personal pension plan with AXA, was unsuitable.

Mr S is represented by Anthony Philip James & Co (APJ).

What happened

Mr S accepted an invite and attended a group meeting with TFE in July 2007 to discuss his retirement planning. He'd been made redundant from his employer after 17 years of service. During that time he'd accrued benefits in an occupational pension scheme. The Trustees of his pension scheme were offering former employees enhanced payments to transfer into different arrangements. It seems they also paid for TFE's advice to Mr S.

TFE completed a fact-find on 13 July 2007. This captured information about Mr S's circumstances, objectives and attitude to risk.

It's recorded that Mr S was living with a partner with two dependent children. He was 38. He was an HGV driver by trade, unemployed at the time of the advice, but actively seeking work. His partner was working part-time. No information about any benefits received was recorded. The household was said to have a net monthly income of around £600 and outgoings of about £1250. The deficit was being covered from savings and Mr S's redundancy money.

Mr S and his partner owned their home, which was said to be worth around £145,000. They had an outstanding mortgage of around £65,000. They were said to have £6,000 of savings and no liabilities were recorded.

Mr S was asked to respond to a series of questions related to his attitude to risk. Through the box ticking exercise he indicated the following:

- He had serious concerns regarding the financial stability of his ex-employer and didn't want his benefits to remain under its control.
- The benefits under discussion were a major proportion of his pension funding which should be protected as far as was reasonably possible.
- Maximising his tax-free lump sum wasn't a priority for him.
- The spouse's pension and benefits under his DB scheme were most important to him, and he wanted these to continue before and after his retirement.
- He had very little life assurance cover and his dependents could do with extra sums if they could be made available.
- He didn't think he'd be able to retire early, but would like the option of flexibility if his circumstances were to change in the future.
- He didn't mind taking a reasonable degree of risk in the hope his benefits would be higher in retirement.

Mr S confirmed his top three priorities were: the security of his pension fund; to increase his pension; and provision for a spouse's and dependent's pension. On a scale of 1 (lowest) to 10 (highest), TFE assessed Mr S's attitude to risk as 3.

It's recorded Mr S wanted to retire when he reached 60. His DB membership was his only pension provision at the time, aside from any state pension entitlement which wasn't touched on. No information was captured about his income requirements in retirement.

For Mr S's 17 years of service with his former employer, he could've expected an annual pension of around £12,200 a year at 60. Or a pension of £7,400 a year and tax-free cash (TFC) of £49,400. In exchange for these and other benefits, the Trustees of his DB scheme offered him a transfer value of about £33,000. In addition, they were also offering a separate payment of £40,200 if he were to move to another pension arrangement.

TFE provided Mr S with its suitability report dated 13 July 2007. On page 11 of the 21 page report, in a section about how it assessed whether it was in a client's best interests to transfer or not, it said:

"Therefore...we do not recommend that you transfer away from the [DB] Scheme. This is because there is a very real and high risk that you will be worse off. You should not decide to transfer unless you understand the high risks of doing so and you are absolutely sure that it is the right thing for you to do. Based on your answers to the questions in the Pension Transfer Criteria Questionnaire, you expressed that specify factor/criteria was an important consideration for you. There is a slight possibility this factor may be better for you by transferring away and you decided that you wish to transfer away as a result of this possibility, although this would be against our advice. There are no guarantees and you are likely to be better off at retirement by not transferring away from the [DB] Scheme."

"WE HAVE DISCUSSED YOUR SITUATION FULLY AND YOU HAVE DECIDED THAT YOU DO WISH TO TRANSFER OUT OF THE [DB] SCHEME AND BENEFIT FROM THE ADDITIONAL PAYMENT WHICH IS BEING OFFERED BY [DB Scheme]."

"I HAVE EXPLAINED TO YOU AND YOU HAVE UNDERSTOOD AND ACCEPTED THE FACT THAT YOU ARE LIKELY TO END UP BEING WORSE OFF AT RETIREMENT BECAUSE THERE IS A HIGH RISK THE UNDERLYING INVESTMENT FUNDS WITHIN THE NEW PERSONAL PENSION WILL NOT ACHIEVE THE REQUIRED CRITICAL YIELD."

"AS A RESULT OF YOUR DECISION YOU HAVE ASKED ME TO RECOMMEND A SUITABLE PRODUCT AND PROVIDER TO WHICH TO TRANSFER YOUR [DB] BENEFITS."

"You have decided to...transfer the pension fund and take part of the additional payment being offered as a cash payment now. You require a cash payment of £25,000. As explained, this amount will be liable to income tax and National Insurance and will therefore be reduced accordingly to around £18,100. This is going against the advice of M2 Financial Ltd...You have elected to do this for the following reasons: home improvements."

"This action is against the advice of M2 Financial, which is to take the transfer value with the full Additional Payment transferred into a pension as well, so that it is not reduced by tax and NI. In addition, by taking the Additional Payment as cash and not as an additional pension contribution, you will be worse off at retirement in terms of pension provision, as your funds will obviously be worth less than they would have been if you transferred the full amount into a pension. Although you may be better off in the short term due to repaying debts and not having to meet the monthly repayments, in the long term, there is a risk that you will suffer a shortfall in income at retirement. However, you have decided to act against our advice and

have asked me to recommend a suitable product to transfer your basic [DB] Scheme benefits into.”

Under a section titled *Recommendation* TFE went on to say Mr S should place his funds in an AXA personal pension and invest in funds that were aligned to his cautious attitude to risk.

Mr S decided he wanted to transfer his DB pension benefits to a personal pension with AXA into investments consistent with his risk appetite. This took place in October 2007.

In July 2014 the FCA published its findings into financial advice given to people who were offered enhancements to incentivise them to leave their employers' DB pension schemes. It identified a risk of customers losing out on retirement income due to poor advice. It followed up its concerns with firms to ensure they reviewed previous transactions and put things right where problems were identified.

In 2015 TFE appointed an accountancy business (X) to look into transactions like those it had conducted with Mr S. X considered his case in 2015. The initial assessment found the advice had been unsuitable. A subsequent peer review 'passed' the advice. It wasn't until later that X managed to get in contact with Mr S to tell him about the work it was doing and to ask whether he wanted to take part in the review. He agreed to do so and provided further information about what he remembered from the time of the advice.

On 24 August 2020 TFE wrote to Mr S with the outcome of the review. In summary it said:

“Having now had the opportunity to review your file in full, we did identify some concerns around the explanation of your ability to retire on an unreduced pension from [your former employer] at age 60. We also identified that you were not provided with the correct Critical Yield for your intended course of action.”

“In this regard, whilst we note, from your response of February 2020, that you told us you had not understood that you would receive unreduced benefits by leaving the [DB] Scheme at age 60, we also note that when acting against advice in July 2007, you told us: “I had a meeting with [Mr Z], a Financial Adviser for M2 Financial. I am going against his advice and moving my pension from [DB] Scheme. We would like some home improvements done and are going to take £25,000 before tax.”

“...Accordingly, overall, whilst we have concluded that you were not placed in an entirely informed position, overall, we are satisfied that the course of action you selected was not impacted in this instance.”

Mr S, represented by APJ, contacted this Service in December 2021. He raised his concerns about the advice he received in the following terms:

“I received a letter from financial advisors to move my pension. I went to meet at a hotel when we were all told to go into a room for an explanation. It was explained to me that it was a good thing to do at the time and that I would receive £27,000 at the time of the transfer. I wasn't told of any risks associated with the transfer. I was told over the course of about 30 minutes that it wouldn't affect my original pension as it would just be transferred over so I believed it would act the same.”

“I did not understand what was going on at the time of the advice to transfer so I didn't feel pressured as such, but the transfer was sold to me as a good thing to do so I just trusted the financial advisors.”

“I thought as the advice had come from a financial advisor that they would know what they were talking about and that it was the right thing to do at the time.”

“I only realised a couple of years ago that I had lost the benefit of my previous pension scheme and I was absolutely gutted as I could have retired at 58 and now I can only retire at age 65. It has been awful for me and I feel terrible, I entered another pension a few years ago but have nowhere near as much money as my previous pension that I have lost.”

“I do not believe the advice from Towergate Financial was appropriate for me I was not advised about the benefits of sticking with my original pension it was all focused on the transfer across to AXA. The change over to AXA was as a result of a heavy sales pitch, I paid 18 years’ worth into my [DB] pension as I worked there from a very young age. My wife and I have been very upset with the money lost as a result of their poor financial advice.”

In February 2022, TFE issued its final response to Mr S rejecting his case. It said it had conducted a review in August 2020 of the transaction from 2007 as required by the FCA. It had concluded that although there were some problems with the process it had followed, this hadn’t made a difference to what would’ve happened. It said it had warned him at the time not to transfer his DB pension. But that because he wanted access to money from the cash enhancement being offered by the Trustees he went ahead.

An Investigator considered Mr S’s case and upheld it. She found there were weaknesses in the insistent client process TFE had followed.

TFE rejected the Investigator’s findings and conclusions. Firstly, it challenged this Service’s jurisdiction to consider Mr S’s complaint. It said the outcome of its review of the advice it gave Mr S in 2007 wasn’t a regulated activity. It then went on to question whether he’d brought his complaint within the allowable time limits.

In terms of the merits of the case, TFE’s position was that its suitability report to Mr S had been clear that he shouldn’t transfer his pension. But he wanted to proceed because he’d wanted funds for home improvements. And he did so on an insistent client basis.

As both parties couldn’t agree with the Investigator’s view, Mr S’s case was passed to me to review afresh. I issued my provisional decision in March 2023. Neither party has provided any new evidence or arguments for me to consider, as such I see not reason to depart from my initial findings and conclusions.

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.

Where there’s conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what’s most likely to have happened.

I’ve not provided a detailed response to all the points raised in this case. That’s deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I’ve taken into account all submissions, I’ve concentrated my findings on what I think is relevant and at the heart of this complaint.

I consider Mr S’s case is within the jurisdiction of this Service. Further I’m upholding his complaint. I’ll explain why.

Jurisdiction

Our service was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA). It's important to make clear that as a public body we don't have a general, 'at large', power to investigate any complaint. We can only investigate what FSMA and the rules made under it say we can – this sets the boundaries of our scheme. And we have no legal power to investigate complaints that are beyond our jurisdiction.

FSMA gives the Financial Conduct Authority (FCA) the power to say what complaints we can and can't consider. The FCA has set these out in the Dispute Resolution chapter of its Handbook (also known as 'DISP' or 'the DISP rules').

TFE says Mr S's complaint is about the outcome of a Past Business Review (PBR) carried out by a skilled person appointed by the Financial Conduct Authority (FCA) under s.166 of FSMA). It said that isn't a regulated activity and so not something this Service can consider.

I don't agree with TFE. Although I accept a PBR isn't a regulated activity, I think Mr S is complaining about the advice he received in connection with the transfer of his DB pension, not the outcome of the PBR. So, I'm satisfied I can consider the case on these grounds.

Next I've thought about TFE's challenge to our jurisdiction based on time limits. If a business doesn't consent, this Service can't consider a complaint which isn't made within specified time limits. Dispute Resolution rule 2.8.2R says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

More than:

a. six years after the event complained of; or (if later)

b. three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;...

unless:

In the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.

Mr S is worried he's lost out because of the advice and arrangements made by TFE in 2007, which he says led to the transfer of his DB pension, opening a personal pension with AXA and investing his funds in line with his assessed attitude to risk.

Taking the six-year rule first, a complaint is out of time if it's referred to our Service more than six years after the event complained about. That's unless the complaint was referred to the respondent business within that period and the complainant has a written acknowledgement or other record of the complaint having been received.

Mr S's complaint was raised through this Service in December 2021. TFE provided its final response to Mr S on 7 February 2022. As the advice complained about happened in 2007, his case is out of time on the six-year limb of the test.

In respect of the three-year test. I need to decide when Mr S became aware, or ought reasonably to have become aware, that he had a cause to complain. And having established that date, determine whether he brought his complaint within three years of it.

In making its case to time bar Mr S, TFE said:

“We believe that the case may also be outside of your jurisdiction under DISP 2.8.2. The advice in question occurred in 2007 and the client will have received annual statements outlining his personal pension benefits.”

TFE hasn't provided any evidence to support its case. It hasn't said exactly what it was about the annual pension statements Mr S received that should've put him on notice that there was an issue. It seems his pension pot has grown over time, and seemingly in line with what might be expected from a cautious managed investment strategy.

Further, a problem for TFE is that I haven't seen a personal pension statement which shows a customer in Mr S's position how much their benefits would've been worth had they remained in their DB scheme. So, without such a comparison, it's difficult to see how an annual statement, which captured the performance of a fund that was in line with expectations would've alerted him to a potential issue. TFE hasn't done enough to demonstrate Mr S's complaint should be time-barred.

I think Mr S became aware, or ought to reasonably have become aware, of cause for complaint when he received the outcome of TFE's review of the advice it gave him. This acknowledged there had been problems with its advice, even though it asserted this had made no difference to him. The outcome was sent to him in August 2020. TFE acknowledged his complaint in January 2022. So, based on the information available to me, his complaint is duly made and this Service can consider it.

I'll now go on to consider the merits of Mr S's case.

The merits of the case

How does the regulatory framework inform the consideration of Mr S's case?

The first thing I've considered is the extensive regulation around transactions like those performed by TFE for Mr S. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to 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.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like TFE. As such, I need to have regard to them in deciding Mr S's complaint.

At the time of the advice TFE gave Mr S, COBS 5.3.29G made the following specific point about advising on a transfer from DB schemes:

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.*

Under COBS 5.3.22, the following requirements applied to TFE:

- 1) *A firm must ensure that a transfer value analysis is carried out in accordance with COB 6.6.87 R - COB 6.6.93 R (Projections) before it makes any recommendation to a customer to transfer out of a defined benefits pension scheme.*
- 2) *A copy of the analysis must be delivered with the key features document or otherwise provided to the customer before he gives consent to the application to transfer.*
- 3) *The firm must take reasonable steps to ensure the customer understands the analysis, drawing attention to factors which do and do not support the recommendation to transfer.*

Under COBS 5.3.23, the following requirements applied to TFE:

A firm must provide a projection of the possible future benefits of the proposed individual pension contract before it makes any personal recommendation to a customer to opt out of, or transfer from, an occupational pension scheme.

- 1) *The format and nature of the benefits given in the projection must, so far as possible, be the same as those which apply under the occupational pension scheme of which the customer is, or is eligible to become, a member.*
- 2) *If it is not possible for the benefits shown in the projection to replicate those of the occupational pension scheme, an explanation must be given.*
- 3) *If the customer has expressed an interest in changing the structure of his eventual benefits, an additional projection may also be prepared on that basis.*

Under COBS 5.3.25, the following requirements applied to TFE:

If, contrary to the advice of the firm, a private customer instructs the firm to arrange a pension opt-out or pension transfer, the firm must:

- 1) *Make and retain a clear record of the firm's advice that the private customer should not proceed with the pension opt-out or pension transfer and the private customer's instructions to proceed with the transaction; and*
- 2) *Provide a further confirmation and explanation, in writing, to the private customer that the firm's advice is that the private customer should not proceed with the pension opt-out or pension transfer.*

Did TFE adhere to the regulatory requirements placed on it?

In short, I don't think TFE met the regulatory requirements placed on it. I'll explain why.

There are a number of documents relating to TFE's transaction with Mr S that are important to my consideration, these include the fact-find, the pension transfer analysis, the suitability report and matters relating to the insistent client process it followed.

TFE says it clearly advised Mr S not to transfer his DB pension. But he wanted to proceed, nonetheless.

Mr S wrote a letter dated 18 July 2007 in which he said that following his meeting with TFE and its advice not to move his pension, he wanted to proceed with the transfer. He wanted to access £25,000 from the enhancement offered by the DB Trustees to carry out home

improvements. There's another 'insistent client' letter on file signed and dated by him on 3 August 2007. This provides a more detailed description of his decisions.

I've thought carefully about what TFE has said about Mr S being an insistent client. Where a firm decides to transact with a customer on an insistent client basis, it should communicate with them:

- In terms that are clear, fair and not misleading.
- Having regard for the information needs of the client such that the client can understand.
- That it hasn't recommended the transaction and that it will not be in accordance with the personal recommendation.
- The reasons why it isn't in accordance with that personal recommendation.
- The risks of the transaction proposed by the client.
- The reasons why it didn't recommend the transaction.

TFE also needed to obtain Mr S's acknowledgement that the transaction wouldn't be in accordance with the personal recommendation given by it; and the transaction was being carried out at his request. I think this acknowledgement should be in Mr S's own words.

Although it might be argued that these regulatory requirements post-date the advice TFE gave Mr S in 2007, I don't think such a position is tenable. I would draw attention to the specific FCA principles I've already set out. They were in place well before TFE gave its advice. The principles are the keystone from which most other guidance flows. I think a firm adhering to the principles should've ensured any insistent client process it operated could stand up against what was clearly being provided for in them.

I have concerns about the insistent client process TFE followed with Mr S. And on balance, I've concluded it was flawed because:

- There's no evidence Mr S was knowledgeable in pension or investment matters. The insistent client letters he wrote and/or signed don't demonstrate his understanding of the risks he was taking on the benefits he was giving up.
- While it's suitability report for Mr S did say proceeding would be against its advice, this was somewhat undermined by information it provided in the same communication about how he could proceed.
- The suitability report was difficult to navigate, unnecessarily nuanced and contained material inaccuracies. For example, the critical yield and its own transfer assessment rating were incorrect. As a key deliverable, it didn't provide a sound basis for his decision making.
- There are significant gaps in the information Mr S received in the advice process, for example in terms of planning for his income in retirement. So how could his decision making be said to be fully informed?
- Mr S's decision to transfer wasn't rationale. As TFE itself noted, transferring his DB pension and taking some of the enhancement on offer would likely mean he was worse off in retirement. The only reason for proceeding was his desire to secure cash for home improvements.
- There were failings by the firm in following its own insistent client process. For example, it failed to provide a second suitability report or arrange a further meeting prior to the transfer application being completed.

I'll now consider some of these matters in a little more detail.

There's no evidence Mr S had knowledge and experience of pension and investment matters. I think this should've been clear from the information TFE gleaned. This should've put it on notice that it had to be careful if it was to take matters through the insistent client route. And its important context when I consider what happened to him.

There's no dispute TFE's suitability report stated that it was against its advice for Mr S to transfer from his DB scheme. But his desire to do so is made clear from the outset of the report, under objectives on the second page it said:

"TRANSFERRING AND TAKING CASH - You wish to transfer and take the Additional Payment being offered as a cash payment to you (as opposed to transferring the Additional Payment into another registered pension scheme) ... You wish to use this for the following reason(s): home improvements

In some areas the suitability report implied Mr S could be better off by transferring:

"Whilst it might be potentially beneficial for a deferred member of the [DB] Scheme to transfer away from the [DB] Scheme, your pension will depend upon investment returns in the future and these cannot be guaranteed."

But TFE would've known given Mr S's circumstances and attitude to risk, any transfer was highly likely to erode the value of his benefits in retirement.

The suitability report arguably fed into Mr S's existing concerns that his DB pension was insecure:

"The pension you will receive from [DB Scheme] is not dependent upon investment returns, but it is dependent upon the employer's ability to continue funding the...Scheme.

"...these "guarantees" [of his DB pension] are reliant on the financial solvency of the [Scheme] and the Trustees being able to meet the [Scheme's] liabilities."

While TFE's report did also note the existence of the Pension Protection Fund, it didn't explain that even in a worst case scenario this would protect 90% of his benefits.

The only section of the suitability report clearly signposted with recommendations advised Mr S how he should move his benefits:

"Recommendation

In order to streamline efficiencies and obtain very competitive terms for individual members, we researched the pensions market to find a plan provider who would offer an extremely cost effective product together with a wide range of available investment funds and full flexibility...."

"Therefore, I would recommend that you transfer out your benefits, into a Personal Pension Plan using the AXA Individual Pension Plan..."

The only reason given for Mr S wanting to transfer his DB pension was to take advantage of the cash payment on offer from Scheme Trustees to conduct home improvements. This wasn't a strong argument for him doing so. TFE hasn't done enough to satisfy me that it provided him with an effective advice service to ensure he was fully informed and understood the potential consequences of his actions. Instead it failed to challenge his decision making and facilitated a transaction knowing it was highly likely to cause him financial harm in retirement.

I find there was insufficient separation between delivery of its advice and notification of how Mr S could still proceed despite its recommendation that he shouldn't. Indeed, this was all contained in the same letter.

Another telling problem for TFE in this case are important process and information weaknesses. I note that in its own review in 2020 of what happened in 2007, it concluded there were failings with its advice process, its insistent client process and the disclosures it made to Mr S. It concluded in the following terms:

*"...the client has a planned retirement age of 60 in the Fact-find, however in the AXA Application form, his planned retirement age is recorded as 65. There is therefore a mismatch. Additionally, the client was only provided with the [critical yield] (of 6.4%) to age 65, which is not his intended course of action, as per the FF. Also, the client was not provided with Income forecasts in the SL. Ultimately, it is noted that the Client was a 'Post 1991' Scheme leaver, and accordingly, was entitled to 'Unreduced Benefits', at age 60 (*58 years and 8 months approx. in his case). To this end, the disclosures provided to him, should have included a clearer explanation of what this meant in practice, and importantly, that this benefit would be lost on transferring. The tables used in the suitability letters were not sufficiently clear to achieve this."*

Without overstating the problems TFE identified, it is clear that such weaknesses meant Mr S was never placed into a position where he could take fully informed decisions about a matter that had substantial ramifications for his life in retirement.

For example, I can't see that TFE effectively moved from high level assertions about the possibility for Mr S to be worse off after the transfer, into the realms of practical monetary implications for his retirement, over his lifetime.

I've not seen how he was given the right information at the right time to be able to weigh properly how far his retirement benefits could be eroded or to appreciate the medium and long term consequences of such. I've not seen evidence that TFE effectively advised Mr S about the long-term nature of pension planning. The need for a pot of funds to provide an income for many years ahead.

TFE's focus was on facilitating a transaction for Mr S rather than providing him with the fully formed advice about his retirement planning. It's approach more likely than not reinforced what was in his mind about transferring his retirement provision, rather than acting as a bulwark against precipitous action.

So, TFE hasn't satisfied me that it treated Mr S fairly by helping him to understand the significance of the decision he was about to make. He may have signed an insistent client letter, but this doesn't absolve it from acting with due care and skill.

TFE concluded the transfer of Mr S's DB pension wasn't suitable. I agree.

Considering the financial case alone. TFE's advice was given during the period when this Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Businesses weren't required to refer to these rates when giving advice on pension transfers, but I consider they provide a useful indication of what growth rates would've been considered reasonably achievable when it advised him in 2007.

The pension transfer analysis report commissioned by TFE noted that the investment return (critical yield) required to match Mr S's deferred benefits was around 9.6% per year, if he were to retire at 65, taking all the benefits as an income (he wasn't informed of this). This

compares with the discount rate of 5.8% for 27 years to retirement. This doesn't even factor in matters such as his cautious appetite for risk, which would've meant lower returns. Mr S was more likely than not to receive benefits of a materially lower overall value than provided for in his DB scheme.

From the available evidence, there was no pressing need in 2007 for Mr S to move away from his DB scheme. But there were significant risks in him doing so. His benefits in the scheme were guaranteed, with provision for increases each year. And it was his only pension aside from any state pension entitlement.

Mr S had a low appetite for risk. And given what we know about his pension provision, and the situation of his household with respect to assets, savings and investments, it's reasonable to deduce he had no capacity for loss in terms of his retirement planning.

Yet, Mr S ended up transferring away from a DB scheme where he was guaranteed pre and post retirement indexation of his pension income. And where he had death benefits for dependants. This was a situation where any risks were largely borne by his DB Scheme. And in place of this arrangement he opened a personal pension, which was projected to provide him with a materially lower pension and which exposed him to investment risk.

If a transfer wouldn't improve on the benefits of the scheme, there had to be some other strong justification for Mr S relinquishing the valuable guarantees that it provided him – what was this? In concluding its review of the advice it had given Mr S in 2007, TFE said:

“Ultimately then, having now considered ALL information available to us in connection with this case, it is TF’s belief, that at the time the advice was provided to the client, on the balance of probability, his desire to take a proportion of the available enhancement as a taxable lump sum (in order that he could carry out some home improvements, and thus improve the quality of his family’s life) was far greater, than his desire to remain in the [DB Scheme.]”

So, TFE's case is that even if it had got everything right in the advice it gave Mr S in 2007, he'd still have gone ahead with the transfer because he wanted to make some home improvements.

In responding to TFE in 2020 Mr S took a different view. He said:

“I don’t remember being advised not to change but I do remember [the adviser] offering me money to change, he said I could have a lump sum and what I could do with that sort of money.”

Mr S said he didn't realise he could've retired at 58 and still have received an unreduced pension under his former arrangements, nor did he understand the benefits available to him from his DB Scheme. He says the adviser was more interested in telling him about the lump sum on offer.

I'm mindful of the benefit of hindsight here. But given the failings identified with TFE's advice approach and my concerns about the insistent client process it followed, it hasn't done enough to satisfy me that Mr S would've gone ahead with the transfer irrespective of the role it played.

I say this because it was TFE's role to discern what Mr S's wants and needs were, and why. Its role wasn't simply to facilitate what he wanted without any critical thinking. It had to do these things because it had to act in his best interests. Even though it told Mr S the transfer would be against its advice, I don't think it's demonstrably met these obligations.

TFE was in a good position to have analysed, tested, challenged and advised Mr S about what was in his best interest for retirement planning. It can't rely on the risk warnings provided in its letter covering its suitability report to escape responsibility for what happened to him.

While TFE acknowledged the transfer of his DB pension wasn't suitable, there were failings in the advice process which meant Mr S wasn't fully informed about his position and I think it's more likely than not the effect of fuller information, better analysis and an effective advice process would've been significant to his decision making.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process TFE followed meant Mr S can truly be regarded as an insistent client. Its communications weren't clear or fair. It didn't act in his best interests. And it failed to act with due care and skill.

I think that if TFE had given Mr S unequivocal, clear and fully formed advice, it's more likely than not he wouldn't have gone ahead with the transfer of his deferred benefits. It's unusual for a lay person to seek professional advice and then go against the recommendations received.

It is also the case, given what TFE knew about Mr S's circumstances and that by transferring he'd be eroding the value of his pension benefits, it could've decided against facilitating the transaction. But it decided to proceed.

I think it's of note that Mr S's interest in transferring his pension benefits seems to have been sparked by the Trustees of his DB Scheme. It wasn't something he was thinking about until it introduced him to TFE's services.

To conclude I don't think the transfer of Mr S's DB pension could sensibly be regarded as fair to him. As such I think TFE failed to meet the regulatory requirements placed on it when providing him with such advice and making the arrangements.

So, taking all the circumstances of the case into account, it's reasonable to uphold this complaint against TFE and for it to put things right.

Putting things right

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out below. Towergate Financial (East) Limited should pay Mr S the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Towergate Financial (East) Limited pays Mr S the balance. This recommendation is not part of my determination or award. TFE doesn't have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance. He may want to get independent legal advice before deciding whether to accept this decision.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

A fair and reasonable outcome would be for Towergate Financial (East) Limited to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr S would've remained in his DB scheme had he received fuller information, better guidance and effective advice.

Towergate Financial (East) Limited should therefore undertake a redress calculation in line with the pension review methodology, as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

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

Towergate Financial (East) Limited may wish to contact the Department for Work and Pensions (DWP) to obtain Mr S's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Mr S's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr S within 90 days of the date Towergate Financial (East) Limited receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes TFE to pay Mr S.

Income tax may be payable on any interest paid. If Towergate Financial (East) Limited deducts income tax from the interest, it should tell Mr S how much has been taken off. It

should give Mr S a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

My final decision

For the reasons I've already set out, I'm upholding Mr S's complaint. Towergate Financial (East) Limited should now put things right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 1 May 2023.

Kevin Williamson

Ombudsman