

The complaint

Mr S complains about the advice given by Liverpool Victoria Financial Advice Services Limited ('LV'). He says that whilst he was given advice not to transfer, he didn't think the benefits he was giving up from his defined-benefit ('DB') occupational pension scheme were fully explained. And he thinks that the DB transfer was unsuitable for him and it has caused a financial loss. He says that he wasn't an insistent customer.

What happened

Mr S was approached by LV in 2017 to discuss his pension and retirement needs. I understand Mr S' employer arranged this and Mr S met with LV at his place of employment along with a group of his colleagues. After this initial meeting there was some contact by telephone so Mr S could receive the advice.

LV gathered some information about Mr S' circumstances and objectives. This showed that:

- He was aged 59 and married with no dependent children.
- He and his wife owned their own home which was subject to a mortgage. This would be fully repaid in 2018.
- Mr and Mrs S were employed, and their income was above their expenditure at the time.
- They both had savings of about £12,000.
- Mr S had defined contribution (DC) pension funds of about £19,000 and he was still contributing to a DC scheme.

LV also carried out an assessment of Mr S' attitude to risk, which it said was 'low medium'. It was recorded that Mr S' attitude to risk in general was higher than this, but this was the risk he was comfortable with taking in respect of his pension arrangements. It was noted that Mr S had limited investment experience.

On 20 October 2017, LV issued its first suitability report, this said that Mr S was considering transferring his pension because:

- He liked the idea of flexibility and 'getting hold of the capital'. He wanted access to his pension fund as and when it was required.
- He wanted to be able to leave his pension to his wife and children on his death.

The report advised Mr S not to transfer his pension benefits into a personal pension. It said that *'I have now reviewed your scheme in full, together with your objective, and I recommend that you remain a member of your scheme and reassess your income and capital requirements when you retire from working.'* This report did explain the benefits that Mr S was giving up and it included information about the risks of the personal pension. It said that Mr S had no need for income or capital from this pension at the time. And he only had the state pension as a guaranteed income for life and so he may have a shortfall in his income if the personal pension didn't perform well. LV said Mr S should keep his options open and think about a transfer later on as he neared retirement.

LV spoke with Mr S on 26 October 2017 and he confirmed that he had received the report and read through it. LV said that its advice was still to remain in the scheme but if Mr S still wanted to proceed it would look at a solution based on him being an insistent customer. This was near the start of the call, the remainder of the call was mainly discussing the investment options Mr S had.

Mr S said that he would still like to proceed and LV agreed to facilitate this. LV again said at this point that Mr S would be taking on the risk of the personal pension rather than the DB scheme bearing the risk of providing his pension benefits. And it said that he would need to complete an insistent client form before the transfer could go ahead.

Mr S completed an insistent customer declaration on 3 November 2017. In this he confirmed that he understood the main parts of the advice and he said in his own words why he wanted to transfer. He said that:

'After reading all the information you sent me and what we talked about on the phone I feel that I would still like to go ahead with the transfer doing this will give me the opportunity to access funds if and when required instead of everything being paid to me in annuities'

Another representative of LV spoke to Mr S on 9 November 2017. It explained the advice and the differences between the two schemes and the risk of the transfer. And LV said that it would send a second report after this call. It described this second report as a set of application forms. Rather than advice documents which Mr S should have carefully considered.

The second suitability letter was issued on the same day. It was similar to the earlier suitability report in that it contained the same advice and information about the suitability of the transfer. It did contain some further detail, as well as a summary of the insistent customer process.

The transfer proceeded in January 2018. The amount transferred was £123,650 and Mr S' money was invested in one of LV's portfolio of managed funds.

Mr S complained in 2022 about the suitability of the transfer advice. He said that:

- He believed LV had a conflict of interest as the pension transfer earned them an ongoing adviser fee.
- He has lost the security of a guaranteed pension income for him and his wife. He has been exposed to investment risk unnecessarily.
- Mr S didn't understand the value of the benefits he was giving up, or the risks of the personal pension. And he didn't think this was fully explained to him.

LV didn't uphold Mr S' complaint. It said the advice it gave was for him to remain in the DB scheme. Mr S signed a declaration after it gave him the advice which confirmed he understood it, but he wanted the opportunity to access his funds early in any event. Mr S has since changed his investment funds and engaged with his pension planning. This suggests he was happy with the advice. He also confirmed that he understood the advice in the telephone calls between him and LV.

Mr S referred his complaint to our service. An Investigator upheld the complaint and recommended that LV should pay compensation. She said that he didn't think that the transfer was in Mr S' best interests. And she didn't think the insistent customer process was robust. She didn't think that Mr S was driving the transaction. If LV had acted correctly, she thought it was likely that Mr S wouldn't have transferred.

LV disagreed saying that it gave Mr S the correct advice not to transfer his personal pension. It also said that it had given Mr S clear information about the DB transfer and there were periods in the advice process when he could think about this information without pressure. Mr S had made the decision to transfer against its advice.

The Investigator wasn't persuaded to change their opinion, so 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 LV'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, LV should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr S' best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

It's not disputed that the transfer was likely to leave Mr S worse off in retirement. To show this was the case LV carried out a transfer value analysis report (as required by the regulator) showing how much Mr S' pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

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.

Mr S was 59 at the time of the advice and wanted to retire at age 65. The critical yield required to match Mr S' benefits at age 65 was 11.2% if he took a full pension.

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 3.4% 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, Mr S' 'low to medium' attitude to risk and also the term to retirement. There would be little point in Mr S giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 3.4%, I think Mr S 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 his attitude to risk.

And LV did acknowledge this was the case. And the written information does explain that Mr S would likely achieve lower retirement benefits due to the transfer, and why this was.

For this reason alone a transfer out of the DB scheme wasn't in Mr S' best interests. Of course financial viability isn't the only consideration when giving transfer advice as LV has said in this case. There might be other considerations which mean that it was reasonable for LV to assist with the transfer, despite it providing overall lower benefits. I've considered these below alongside thinking about whether Mr S was an insistent customer.

Death benefits

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 personal pension were likely an attractive feature to Mr S. But whilst I appreciate death benefits are important to consumers, and Mr S might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr S about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think LV explored to what extent Mr S was prepared to accept a lower retirement income in exchange for higher death benefits.

Mr S was married and so the spouse's pension provided by the DB scheme would've been useful to his wife if Mr S predeceased her. This was guaranteed and it escalated – it was not dependent on investment performance. Again, it was noted that this was a valuable benefit and Mr S shouldn't give this up.

And LV explored life insurance which was the right thing to do if Mr S genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death. Mr S didn't want to start a life insurance policy.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr S. I can't see that LV recommended that Mr S transfer for this reason.

Control or concerns over financial stability of the DB scheme

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

The funding of his employer's DB scheme was not in a position such that Mr S should have genuinely been concerned about the security of his pension

Suitability of investments

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

Flexibility and income needs

Mr S said that he wanted to transfer to potentially increase the flexibility he would have when he came to take his pension benefits. In the telephone calls he consistently talks about taking the tax free cash and placing this in a bank account and investing the remainder. And he wanted to do this on the basis he might want to use the money in the future. That said, it's clear Mr S had no immediate need for the money. He wanted to transfer on the basis that he thought it was a good idea for the future.

So, I don't think Mr S required flexibility at the time of the advice, in fact he essentially said that he didn't have any need for the money straight away. I also can't see evidence that Mr S had a strong need for variable income throughout his retirement. This doesn't seem to have been discussed.

The suitability report shows that Mr and Mrs S' current income met their needs. They didn't need to repay any debt urgently. And the analysis LV did showed that if Mr and Mrs S both took their state pension, and used their existing pension provision, then they would have a surplus income in retirement. There were a number of scenarios considered that show that, even if Mr S took early retirement, their current arrangements would meet their potential income and expenditure needs at retirement. I won't detail as all of this, as both parties to the complaint are aware of it and don't dispute it.

So, I'm satisfied Mr S could have met his income needs in retirement through the DB scheme at age 65, and probably earlier if this is what he wanted.

Again, LV did say that Mr S shouldn't make any decision about transferring at the time of advice. It said he should wait to do this until his needs were clearer.

But I think that LV should only have facilitated this transfer if it was clear that Mr S was an insistent customer. So, I've considered this next.

Was Mr S an insistent customer

LV says that Mr S was an insistent customer and he confirmed that he wanted to proceed with the DB transfer despite LV advising him not to do this. I've looked to see if this is the case.

In February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There are three key steps, which it set out on its website as follows.

1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.
2. You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).
3. It should be clear to the client that their actions are against your advice.

The regulator said the advice should be set out clearly in the suitability report, and that a business needed to be clear with its client about the risks of their chosen course of action and that they are acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this would normally be clear.

The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

"The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.

The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.

Robust warnings were given and documented."

Whilst this was guidance, and not rules, I would've expected LV to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

LV's role was to find out what Mr S' wants and needs were and why he wanted to transfer his pension. Its role wasn't simply to facilitate what Mr S wanted. It had to act in his best interests.

And I think in this case for Mr S to be an insistent customer it needs to be clear that he had a definite want or need to transfer. And he was set on gaining the advantages he perceived he would from the transfer. And he understood he was going against the advice of LV when he did this and what the implications and risks of this were.

LV's communications, both written and oral, with Mr S did set out that its recommendation was *not* to proceed with the transfer, but I think this was undermined by the process itself. I think LV didn't do enough to ensure Mr S understood what he was giving up. And accepted that he wanted to transfer with very little challenge.

I think it ought to have been clear to LV that Mr S had little knowledge or experience of financial matters based on the information available at the time of the advice. He doesn't seem to have been an experienced investor. I've not seen any evidence that he had considered his retirement, or the DB scheme benefits, in any detail before the advice. This should've put LV on notice that it had to be careful if it was to take matters through the insistent client route. I don't think that LV was careful here, it seems to have accepted Mr S aims and his desire to transfer with very little challenge. Particularly in the telephone calls.

Mr first concern is that Mr S didn't seek advice himself. The transfer came about due to Mr S meeting an adviser from LV at his place of employment. Mr S now says the LV adviser spoke very favourably about the DB transfer and Mr S says he was persuaded to transfer by LV saying the funds would be readily available and the investment was safe like a government bond or gilt. Of course, there is no written record of what was discussed at this first meeting but it doesn't seem unreasonable to say that Mr S left it with a favourable impression of the transfer. This wouldn't be right as LV hadn't given personalised advice yet.

Mr S did complete and insistent customer form. Part of this was templated in respect of the risks of the transfer. Given Mr S' level of experience, I think it would've been important for LV to ensure Mr S understood what he was getting into fully, but I don't think the insistent customer form adequately demonstrates this. I'm not persuaded Mr S was able to make an informed choice here.

Mr S did say in his own words why he wanted to transfer. But this was simply a repetition of why he thought the transfer was a good idea. I'm not persuaded this was enough to show he was an insistent customer.

Mr S seems to have transferred as he wanted better access to his money in the future. But this isn't a good reason to transfer given the likely financial loss it would cause him. And I don't think this was properly explained to him. So, I don't think there was a real driver for the transfer that came from Mr S.

In summary while LV acknowledged the transfer of Mr S' DB scheme benefits *wasn't* suitable for him, I don't think the process was robust enough here. It looks to me like Mr S made his decision to transfer at an early point, possibly after the first meeting. And he didn't understand what he was giving up. Even though I accept LV did include risk warnings and explanations in the documentation, I'm not sure Mr S understood them. LV should have taken this on board and changed how it advised Mr S. I think it's more likely than not that the provision of full information and better analysis would've influenced his decision making.

LV say that their insistent client process follows the FCA's guidance, especially as Mr S put in his own words why he wanted to proceed with the transfer. But the FCA had said client disclaimers should be clear what the advice is, the risks of the client's chosen actions and that the action is against the recommendation being made. But I don't think Mr S' response adequately demonstrates that Mr S knew and understood the risks involved in the transfer and the benefits he'd be losing by doing so. So, as I've said above, I don't think that document alone sufficiently showed Mr S was an insistent client.

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

If LV had followed the guidance for an insistent client process correctly, I don't think Mr S would've insisted on going ahead with the transfer

Summary

I don't doubt that the flexibility and control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr S.

Ultimately, I don't think Mr S transferring away from his DB scheme was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr S 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. I don't think Mr S was an insistent customer

So, I don't think LV should have facilitated this transfer.

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

LV 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, Mr S has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, 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 PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr 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, LV should:

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

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

My final decision

Determination and money award: I uphold this complaint and require Liverpool Victoria Financial Advice Services Limited to pay Mr S the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Liverpool Victoria Financial Advice Services Limited pays Mr S the balance.

If Mr S accepts this decision, the money award becomes binding on Liverpool Victoria Financial Advice Services Limited.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 4 July 2023.

Andy Burlinson
Ombudsman