

The complaint

Mr C complains about the advice given by Legacy Wealth Management Limited ('LWM') to transfer the benefits from two defined-benefit ('DB') occupational pension schemes to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr C was an existing client of LWM when he approached them in 2017 to discuss his pension and retirement needs – specifically in relation to his two DB pension schemes.

In March 2017 LWM completed a fact-find to gather up to date information about Mr C's circumstances and objectives. Amongst other things this recorded that Mr C was 53; he was divorced; he had his own business; and he was aiming to have enough assets to be able to retire early from 55 onwards with a target income of £50,000 a year. LWM also carried out an assessment of Mr C's attitude to risk, which it deemed to be 'moderately adventurous'.

Following a report in October 2017, which LWM says was issued to promote a discussion on Mr C's retirement objectives and the options available to him to meet them, on 7 November 2017 LWM advised Mr C to transfer both DB pensions into his existing SIPP and invest the proceeds in line with his current investment strategy. In summary the suitability report said the reasons for this recommendation were:

- The shape of Mr C's DB scheme benefits didn't suit his circumstances as he wanted to retire early and he'd have to suffer an early retirement penalty.
- Mr C wanted flexibility around his monthly income and the ability to vary his income.
- Mr C wanted to pass on as much capital as possible to his heirs.

Mr C accepted the recommendation and two amounts - around £38,900 and £91,200 - were transferred into his existing SIPP. According to the recommendation report, the investment of these amounts was staggered – 25% was invested on day one with three further tranches of 25% invested at the end of each month over the following three months.

In 2022 Mr C complained to LWM, via our service, about the suitability of the transfer advice. Mr C also complained that LWM wanted to charge him £5,000 for each transfer.

LWM didn't uphold Mr C's complaint. In summary it said its advice process gave Mr C plenty of time to consider and question the advice he received. It said the advice was suitable because it was aligned to both his risk profile and his low-cost objective.

It said Mr C wouldn't have been able to take his DB scheme benefits early without reduction and his income need in retirement wouldn't have been met by remaining in the schemes. It said a flat fee of £5,000 was suggested at the outset to cover both transfers, but this was discounted further as set out in the suitability report.

Dissatisfied with its response, Mr C asked our service to consider his complaint. An investigator did so and upheld the complaint and required LWM to pay compensation. In summary they said the critical yield or growth rates required to match Mr C's DB scheme

benefits meant he was likely to receive substantially lower overall benefits at retirement as a result of transferring and investing in line with his attitude to risk. They said despite Mr C's high capacity to absorb loss, based on this alone transferring wasn't in Mr C's best interests. They also said there were also no other compelling reasons which meant a transfer was suitable despite providing lower overall benefits. They said LWM told Mr C he couldn't meet his retirement income objective of £50,000 by staying in his DB scheme – but its cashflow analysis showed that Mr C risked running out of money if he transferred and withdrew the amount of income he said he wanted. They said while it might have been nice for Mr C to retire early, LWM should've made him aware it might not have been possible to meet his objective. They also said the lump sum death benefits on offer through a personal pension arrangement shouldn't have been prioritised over what was best for Mr C's retirement. If suitability advised, they said Mr C would've accepted the advice and remained in his DB schemes. And finally, in relation to the advice fee, they said LWM hadn't treated Mr C unfairly. They said there was no evidence Mr C was told he'd have to pay £5,000 for each transfer – the cost of the advice was clear in the suitability report.

LWM disagreed with the investigator's conclusions. I have read everything it has said in detail – but in summary LWM said:

- It provided Mr C with suitable advice – it met all of his objectives and it acted in his best interests.
- It has provided evidence that its starting assumption was not to transfer.
- It has evidenced that Mr C did not place value on his guaranteed benefits and taking no risk was not his objective.
- It provided Mr C with ample time to consider the options available to him and he was in a fully informed position before making his decision.
- Its advice process met all of the regulatory requirements to reach a suitable outcome.
- It does not believe Mr C has suffered a loss.

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 LWM'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. My reasons are set out below.

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, LWM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Firstly, I understand that LWM is unhappy about Mr C's complaint and how the focus of it has changed to the suitability of the advice he received. It says Mr C did not express an issue with the advice in his original complaint about the business in 2020, which the Financial Ombudsman Service did not uphold. It says it feels it has been treated unfairly. It says the written evidence should be relied on more than Mr C's version of events which it says cannot be relied upon.

I can't comment here on Mr C's original complaint – that was a separate matter. But just because Mr C might not have expressed an issue with the transfer advice in that complaint, doesn't mean Mr C can't make a separate complaint about the advice if he now believes something went wrong. I don't believe LWM has been treated unfairly - I can assure it that I have carefully considered all of the evidence presented by both parties and as I said above, I've placed appropriate weight on the evidence in reaching my decision.

Financial viability

LWM carried out a transfer value analysis report (as required by the regulator) showing how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB schemes (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 C was 54 at the time of the advice and the advice paperwork recorded that he wanted to retire at some point between 55 and 60 (he wanted to step back from his business gradually), so for comparison purposes a retirement age of 57 was used. I can see Mr C has said that his target retirement age was 62-63 – but all of the references in the advice paperwork refer to 55-60, so I think it's likely this was the basis for the discussions and the advice provided.

Mr C had two DB pension schemes under consideration as part of the advice. The critical yield required to match Mr C's benefits available under the smaller of the two schemes at age 57 was 30.34% if he took a full pension and 25.61% if he took tax-free cash and a reduced pension. The critical yield required to match the benefits available at the scheme's normal retirement age of 65 was 9.04% and 7.87% per year respectively. And for the larger DB scheme, the critical yields to match Mr C's benefits at age 57 were 36.2% and 29.42% respectively, and for the scheme's normal retirement age of 60 they were 17.76% and 14.8%.

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 2.7% per year for two years to retirement (age 57), 3.1% per year for five years to retirement (age 60) and 3.8% for 10 years to retirement (age 65.) 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 C's 'moderately aggressive' attitude to risk and also the term to retirement. In my view there would be little point in Mr C 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 of 7.87%, which was based on a retirement age of 65 – so much later than Mr C intended - I think the opportunity to improve on the benefits available to Mr C through his DB scheme was extremely limited as a result of transferring out and investing in line with a moderately aggressive attitude to risk. Based on Mr C's target retirement age, I think Mr C was likely to receive benefits of a substantially lower overall value than the DB schemes at retirement, as a result of investing in line with that attitude to risk. The growth rates here were substantially above both the discount rate and the regulator's upper projection rate. These were also the growth rates required to effectively stand still – to improve on the benefits required returns consistently in excess of this, which in my view was unlikely.

I can see that LWM said in its suitability report that the critical yields were much higher than actually required because they took into account providing a spouse's pension, which wasn't relevant to Mr C in his circumstances. And while I accept this, the critical yields also took into account the escalating nature of the benefits available under Mr C's DB scheme. In any event, I think they provide a useful indication of the value of the overall benefits provided by the DB schemes.

I can see LWM has pointed to its cashflow modelling produced at the time, which was based on 2% net of inflation growth (which it deemed was conservative) to age 84 (Mr C's life expectancy at the time). It says that, while this shows Mr C might run out of funds at age 81, importantly he would've been able to sustain an annual income of £50,000 a year to that point from age 57. Notwithstanding the fact that this somewhat undermines the argument about Mr C transferring to provide lump sum death benefits for his family, something I'll come back to later on, in my view this analysis is fairly basic. It does not for example include any stress testing to account for periods of poor performance – a sudden drop in the first couple of years – and/or periods of increased inflation. In any event, as LWM's analysis

shows, it was possible for Mr C to run out of money during his lifetime, so for these reasons I'm not persuaded this demonstrates the financial viability of the transfer.

So while I accept Mr C had a relatively high capacity for loss – he had an existing SIPP valued at around £275,000 at the time and he had around £200,000 in cash – as LWM itself acknowledged in its suitability report, I think Mr C's DB pensions accounted for a not insignificant part of his overall wealth. So I'm not persuaded that, solely from a financial viability perspective, a transfer out of Mr C's DB schemes was in his best interests. Of course financial viability isn't the only consideration when giving transfer advice. There might be other considerations, which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

It seems the main reason LWM recommended this transfer was for the flexibility it offered Mr C. LWM has argued that Mr C couldn't meet his objectives by remaining in his DB schemes because they didn't provide him with the flexibility to drawdown income as required, allow him to retire at 55 or allow him to have a £50,000 a year retirement income. But having considered the evidence, I don't think Mr C needed to transfer his DB pensions to his SIPP in order to have flexibility in retirement.

It's evident that Mr C couldn't take his DB pension scheme benefits flexibly. Although he could choose to take a tax-free cash lump sum and a reduced annual pension, Mr C had to take those benefits at the same time. But Mr C already had an existing SIPP valued at around £275,000, ISA investments as well as around £200,000 in cash assets – held personally and in his business. So Mr C already had significant assets he could draw on flexibly to meet his retirement needs. It was recorded that Mr C's intention was to step down gradually from his business meaning he wouldn't likely need to draw as much income in the early years. And in my view, Mr C's existing flexible assets would've allowed him to achieve this taking income and/or lump sums to supplement his earned income as and when required.

Furthermore it was recorded that Mr C's intention over the coming years was to continue to contribute to his SIPP - around £40,000 each year – as well as invest around £20,000 in ISAs. So Mr C was planning to continue to build and increase, quite significantly in my view, the value of his existing flexible retirement provision assets. So just because Mr C's DB pensions didn't provide flexibility, I don't think this meant he couldn't achieve his objective of wanting to retire early over a phased period and have flexibility around the amount of income he could draw. In my view Mr C could use his existing significant flexible assets to support his objective allowing him to retain his DB scheme pensions, which he could defer accessing until the respective normal retirement ages.

LWM recorded that Mr C wanted to maintain his standard of living in retirement and he ideally wanted to target a higher annual income of £50,000. It says Mr C couldn't achieve this objective by remaining in his DB schemes. But I don't think that demonstrates that it was in Mr C's best interests to transfer to a personal pension arrangement.

Firstly I question whether a retirement income of £50,000 a year was realistic over a sustained period given Mr C's available pension assets. And secondly, I'm not persuaded that Mr C really needed this level of income despite his recorded desire for it. I say this because Mr C's current monthly expenditure recorded by LWM in the fact-find it completed, was around £2,200. So it seems that Mr C's standard of living could be maintained around this level – his excess disposable monthly income of around £2,000 appears to be what Mr C intended to direct towards the additional savings I referred to earlier on.

In my view it would be unusual for someone to need or expect a greater level of income in retirement than when they were working – expenditure more likely than not tends to be lower overall. Mr C said he could reduce his expenditure if needed and I can see his mortgage would be repaid in around 10 years' time. So I would've expected LWM to have interrogated Mr C's target retirement income and to have questioned whether it was necessary or realistic, rather than conclude that a transfer was in Mr C's best interests because his income target couldn't be achieved by him staying in his DB schemes.

Notwithstanding the above, I've already said that I think Mr C was unlikely to obtain benefits of the same value at retirement if he transferred his funds to a personal pension arrangement. So I still think Mr C had a better chance of achieving his target retirement income (and certainly a more realistically achievable target retirement income based around his existing expenditure) by remaining in his DB schemes - the benefits under which were guaranteed and escalated rather than relying on the investment growth in a personal pension.

At age 60 Mr C could draw an annual income from the larger of his DB schemes of around £3,700 according to LWM's analysis. And at 65, a further amount of just under £2,000 a year from his smaller scheme. Mr C was entitled to his state pension at age 67, at which point he would have, in my view, a not insignificant guaranteed foundation income of around £15,000 a year. Mr C could've then used his SIPP and other savings to top up his income flexibly to meet his needs at the time.

Overall I don't think it was in Mr C's best interests for him to transfer his pensions just to have flexibility. I believe Mr C already had flexibility through his SIPP and other savings to allow him to achieve his objective. I also think Mr C's retirement income need could likely be met by him retaining his DB schemes.

Death benefits

LWM's other reason for recommending the transfer was to enable Mr C to pass on his remaining pension funds to his children – because he was divorced he had no need for the spouse's pension provided by the DB scheme and he didn't want the value of his pension to be lost on death.

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 arrangement was likely an attractive feature to Mr C in his circumstances. But whilst I appreciate death benefits are important to consumers, and Mr C might have thought it was a good idea to transfer his DB schemes to his SIPP because of this, the priority here was to advise Mr C about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – not as a legacy planning tool. And I don't think LWM explored to what extent Mr C was prepared to accept a lower retirement income in exchange for higher or different death benefits.

I accept Mr C's circumstances meant the spouse's pensions provided by the DB schemes were not important at this time. But the lump sum death benefits on offer through a personal pension arrangement were dependent on investment performance. As I referred to earlier on, LWM's cashflow modelling shows Mr C's pension fund would be depleted by age 81 based on the assumptions it used, so there may not have been a large sum left, if any at all, to pass on when he died. In any event, LWM should not have encouraged Mr C to prioritise the potential for higher or different death benefits through a personal pension over his security in retirement.

Furthermore, if Mr C genuinely wanted to leave a legacy for his children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think LWM should've instead properly explored life insurance. Arguably, Mr C's children already stood to inherit a large sum of money – if nothing else Mr C had a property worth around £300,000 at the time. But if he wanted an extra sum specifically for his children, he could've taken extra cover out on a whole of life basis and written it in trust for the benefit of his children.

I appreciate that the suitability report mentioned a whole of life policy with a sum assured of the combined pension transfer values at a cost of around £169 a month. This was discounted because Mr C didn't see this as an appropriate way to pass on capital and because passing his pension on to his children upon his death was a secondary reason for transferring.

To my mind, this suggests to me that greater death benefits wasn't a genuine objective for Mr C – instead, it was simply a consequence of transferring his pension. If it was I would've expected LWM to have explored this option in more detail – for example establishing how much Mr C really wanted to leave his children and looking at both whole of life and term assurance options – and to have ultimately recommended the cover. As LWM said in the suitability report, it was affordable for Mr C.

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

Summary

I don't doubt that the flexibility and potential for higher or different death benefits on offer through a transfer of Mr C's DB pensions to his SIPP would have sounded like attractive features to Mr C. I can also see that LWM says Mr C didn't value his guaranteed DB scheme benefits and it's provided evidence from its files to support this, including an extract from a fact-find in 2007, which says as much. But LWM wasn't there to just transact what Mr C might have thought he wanted or seemed like a good idea. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income, which although individually they might have appeared small, combined with Mr C's state pension would've provided a solid guaranteed income foundation. By transferring, Mr C's entire private pension provision was invested in at-risk assets when I don't think they needed to be and in my view he was very likely to obtain lower overall retirement benefits as a result. I also think there were no other particular reasons which would justify a transfer and outweigh this. Mr C already had the flexibility he needed to retire early, or over a phased period as he intended. And the potential for higher or different death benefits wasn't worth giving up the guarantees associated with his DB schemes.

So, I think LWM should've advised Mr C to remain in his DB schemes.

Of course, I have to consider whether, if things had happened as they should have Mr C would've gone ahead anyway against LWM's advice.

I've considered this carefully. And having done so, I'm not persuaded that Mr C would've insisted on transferring out of the DB schemes, against LWM's advice. I say this because although it was recorded that Mr C was an experienced businessman and he had a good understanding of investments, crucially it's recorded that his investment decisions were guided by LWM.

So although Mr C might have had a moderately adventurous attitude to risk, I'm not persuaded this meant Mr C possessed the requisite skill, knowledge or confidence to go against the advice he was given, particularly in complex pension matters.

So, if LWM had provided Mr C with clear advice against transferring out of the DB schemes, explaining why it wasn't in his best interests, notwithstanding his apparent views on the guaranteed benefits through his DB scheme, I think that would've carried significant weight. I think on balance Mr C would've accepted that advice, so, I don't think he would have insisted on transferring out of the DB schemes.

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

For each scheme, LWM 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 C 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 ages of 60 and 65 respectively.

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 C'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, LWM should:

- calculate and offer Mr C redress as a cash lump sum payment,
- explain to Mr C before starting the redress calculation that:
 - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
 - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr C receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr C accepts LWM's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr C for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr C's end of year tax position.

Redress paid to Mr C as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, LWM may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr C'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 Legacy Wealth Management Limited to pay Mr C 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 Legacy Wealth Management Limited pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on Legacy Wealth Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 21 June 2023.

Paul Featherstone

Ombudsman