DRN-4083036

The complaint

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

Grove Pension Solutions Limited is responsible for answering this complaint. To keep things consistent, I'll refer mainly to "Grove".

What happened

In 2020, Miss H asked Grove to advise her on potentially transferring her DB pension. Information gathered about Miss H's circumstances was broadly as follows:

- Miss H was a deferred member of the DB scheme. The cash equivalent transfer value (CETV) of the pension was around £82,106 and the normal retirement age (NRA) was 60.
- Miss H was 55 years old, single and with no-one financially dependent on her.
- Miss H wasn't working and was evidently managing on state benefits totaling around £650 per month. Miss H was currently in debt. It was recorded on the 'fact-find' that this totaled between £23,000 and £26,000 (different values were recorded in different documents).
- She had no demonstrable savings, investments or assets and lived in rented accommodation.

Grove set out its advice in a suitability letter in November 2020. It advised Miss H to transfer out of her DB scheme and take a tax-free lump sum of 25% from her pension. It said she should invest the remainder in a type of personal pension arrangement. Miss H accepted this advice and so transferred from her DB scheme to a personal pension shortly after.

Miss H has complained to Grove about its advice, saying she shouldn't have been advised to transfer out of her DB scheme. In response, Grove said it hadn't done anything wrong and was acting on the financial objectives Miss H had at the time.

Miss H then referred her case to our Service. One of our investigators looked into the complaint and said it should be upheld. As Grove hasn't agreed and the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've 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 Grove's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Grove should have only considered a transfer if it could clearly demonstrate that the transfer was in Miss H's best interests.

I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension arrangement was in Miss H's best interests.

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

Financial viability

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

Grove said that the critical yield required to match the benefits of the DB scheme she was in at the time, at her NRA of 60, was 10.5%. 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.

The relevant discount rate closest to when the advice was given was only 3% per year, for 4 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 all these things into account, along with the composition of assets in the discount rate, Miss H's "cautious" attitude to risk and also the term to retirement. Given the critical yield was high, 10.5%, I think Miss H was highly likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

Grove provided a cashflow example which said if she transferred the pension now and it grew by just 2.2% per year after inflation then Miss H could be better off. But this was misleading. It wasn't comparing like with like and Miss H would be losing a number of guarantees and benefits in the process. Miss H's DB pension was guaranteed for life and as Grove will know, past performance does not mean future performance will be the same. So, I consider the discount rates and the regulator's lower standard projections to be much more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

I've also noted that if Miss H was to buy a pension on the open market at the time, which had similar benefits and guarantees as her DB scheme, the cost would be £122,000. This was substantially more than the CETV and so, in my view, it provides a revealing window into the value of what Miss H was being advised to give up by transferring away.

To summarise this issue then, all the signs which I've seen here were indicating very clearly that Miss H would likely receive lower pension benefits overall as a consequence of transferring away from the DB scheme. And there would be little point in Miss H giving up the guarantees and benefits available to her through her existing DB scheme only to achieve a lower level of benefits in a personal pension in the long term.

Of course, according to Grove, its recommendation that she should transfer out to a personal pension was not based on the financial comparisons with her current scheme alone. Rather, Grove said Miss H had different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer was suitable for her, despite providing the overall lower benefits I've mentioned.

I've considered these below.

Other reasons given for the transfer advice

Grove's main rationale for recommending the transfer was that Miss H needed the money there and then because of the financial difficulties she was facing. It also said that Miss H wanted the flexibility to take further lumps sums in the future. I've considered these issues in turn.

- *Debt*

Quite rightly, our investigator pointed out that even though Miss H undoubtedly had some financial challenges at that time, irrevocably transferring her DB pension to a personal plan wasn't the only answer. It's clear, for example, that whilst Miss H was indeed in debt to the approximate sum of £23,000 (£26,000 is mentioned elsewhere), all the evidence is that these were being managed under a type of debt management plan. Miss H was paying £350 per month towards this and although I'm sure she found this somewhat restrictive and her desire was to be free of debt, she of course needed to have some sort of plan for her future years.

There are also a lot of anomalies in Grove's recommendation, which was for Miss H to take a 25% tax-free lump sum from the pension and invest the rest.

For the first element, the tax-free lump-sum amounted to £20,526. This was still short of the amounts she owed. If one uses the £26,000 figure which is set out in a form *"submission 97"* and dated 21 September 2020 then Miss H would be using her whole pension tax-free allowance and still be falling significantly short of the debt she owed. Even the lower figure would leave over £2,400 in credit card debt – and for someone not in work and on state benefits – this represented quite a sum. In my view, it's also possible that the credit card companies may have then taken a different view to recovering the debts which might have meant Miss H's debt management plan would need to be reconsidered.

In short, I think it was obvious that this was a very short-term outlook. Not only was she giving up a quarter of her only pension (other than the eventual state pension), there was no assurance that part-paying the debts in this way was the right thing for Miss H at that time. There's no suggestion that her creditors were 'closing in' on Miss H, in fact the reverse was true as she seems to have reached an amicable repayment plan.

Grove also seemed to take no real account of what Miss H's retirement might look like from a financial point of view. She's intimated she could eventually live on the state pension but we don't really know how much this might have been in her case. I say this because much of Miss H's history did seem to comprise of self-employment, so achieving the full state pension might not have been certain.

Grove's acceptance of certain uses for the remainder of the pension also seems somewhat ill considered. I say this because Miss H intimated she would like to buy a property overseas with what was left. However, with only around £61,000 left this lacks credibility. This element would have been subject to tax and national insurance. And that Grove said she also wanted to use the same money to invest in further business ventures, stretches credibility even further.

The reality here was this was a very modest pension and Grove's poor assessment of what the money was to be used for shows, in my view, that the adviser wasn't dealing with Miss H in a comprehensive way. By withdrawing further lump sums, Miss H would be facing a tax liability but also placing her state benefits at risk. The adviser mentions this only fleetingly before moving on to other matters.

So, all this means I don't think advising Miss H to leave her DB scheme was suitable. The principal rationale seems to have been to leave her debt free. Not only did the transfer not fully achieve this, but I also believe it could have caused as many problems as it solved for Miss H. And ultimately, leaving her DB scheme left Miss H facing an uncertain financial future.

- *Flexibility*

I've mentioned above the many uses the adviser seems to have accepted for a relatively small pot of money. The adviser thought 'flexibility' was an objective for Miss H but this was poorly defined and if he was accepting any possibility that Miss H would just spend everything, then her having nothing left to retire on would seem to be an area he ought to have further explored.

Indeed, Miss H already had some limited flexibility to retire early from her current scheme. But the adviser said the resultant tax-free lump-sum of around £10,800 wasn't enough to address all her debts. But of course, we know his recommendation to leave the scheme and take a tax-free sum of £20,526 wasn't enough to address all her debts either.

I think the evidence is also persuasive that Miss H had neither the desire nor the capacity to manage these funds going forward. Everything I've seen shows she'd suffered a traumatic personal and abusive relationship. She was also left in a very challenging financial situation. She had no savings, no property, no other assets and no investment experience. So I think she'd have had difficulties in managing the scale and complexity – even of this relatively modest fund – given what she'd been put through. Looked at through the lens of that time, I therefore think it was obvious that Miss H would either need help in managing the funds, or that she would access and spend them. We now know the latter happened.

- *Other issues*

I've also considered the other benefits Miss H had with her DB scheme, with death benefits being the main one. This wasn't a key theme in the advice Grove gave to Miss H as she wasn't currently married and had no-one financially dependent on her, so the death related pension benefits associated with her existing scheme were of less use. In addition to spousal benefits, there were likely wider child-related benefits whilst children remained within full-time education. For many consumers, these things are of great reassurance, and therefore great value, in a pension. I accept Miss H didn't need them.

If Miss H transferred away, then any value in her new personal pension plan could be passed on, most likely tax-free, to a nominee. This may have sounded good, and Miss H did indeed nominate someone. But this needed careful explanation because whilst the entire value of a pension in a personal scheme could be passed on upon death, the whole point of a pension is to pay for one's ongoing retirement. Therefore, if Miss H had lived a long life, it's highly likely there would be very little left in the personal pension fund to pass on. The amount in a personal scheme was also at risk to market volatility and it wasn't index linked. Similarly, if her intention was to spend the money, there would be nothing left to pass on to anyone.

So, although Grove implied that the death benefits were discussed at the time and the personal pension arrangement might better enable the retention of the value of the funds if Miss H died, this isn't strictly the full picture. In my view, Grove should have strongly discouraged Miss H from prioritising the potential for higher death benefits through a personal pension over her security in retirement.

Overall in this case, I don't think different death benefits on their own justified transferring from the DB scheme.

I've noted Miss H also told the adviser that her father had passed away at 65 and 'lost' pension benefits with him. She didn't want this to happen in her situation. But again, the adviser should have discouraged this. Miss H had what appears to be mixed health, but there was certainly no indication then of her not reaching close to her life-expectancy, which was in her 80s.

- *Use and suitability of investments*

Grove makes the point now that by accessing and spending the full pension amount, this shows that Miss H really did have an urgent and genuine need to access these funds. I've considered this. However, the wider aspect of accessing 'everything' never formed part of Grove's original recommendation. And if this was known to the adviser at the time, I'd have expected a very full picture to emerge about what his thoughts and recommendations about this were.

In reality, the only reason Miss H was able to access the money and do what she did with it, was simply because of Grove's unsuitable advice. In my view, the much more suitable option was for Miss H to continue with her debt management plan and to eventually access the pension in the way it was originally designed. Put another way, if Grove hadn't recommended that she transfer away and therefore get immediate access to her pension funds, then she obviously couldn't have ever spent the money. It would still be contained within her DB scheme.

- *Warnings given to Miss H*

Grove asks me to consider the warnings Miss H was given about transferring. It says she was told about the guarantees and benefits she'd be giving up. But to be clear, even though I accept Miss H was given a certain amount of information, Grove still recommended that she should transfer out.

Grove was also being paid a significant amount of money for this advice. As a regulated adviser, Miss H had every right to expect that she'd be guided about what was in her best interests.

Summary

I don't doubt that paying off some of her debts and also having more flexibility and control within a personal pension would have sounded like attractive features to Miss H. But Grove wasn't there to just transact what Miss H might have thought she wanted. The adviser's role was to really understand what Miss H needed and recommend what was in her best interests.

I don't think the advice given to Miss H was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Miss H 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. Miss H shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable and already managed in an existing repayment plan.

So, I think Grove should have advised Miss H to remain in her DB scheme.

Of course, I have to consider whether Miss H would have gone ahead anyway, against Grove's advice. However, I'm not persuaded that Miss H would have insisted on transferring out of the DB scheme, against Grove's advice. I say this because Miss H was an inexperienced investor with a cautious attitude to risk and this pension accounted for the vast majority of Miss H's retirement provision. So, if Grove had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would have accepted that advice.

In light of the above, I think Grove should compensate Miss H 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 Grove to put Miss H, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Miss H would have most likely remained in the DB scheme if suitable advice had been given.

Grove 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.

Compensation should be based on the scheme's normal retirement age as per the usual assumptions in the FCA's guidance.

This calculation should be carried 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 Miss H'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, Grove should:

- always calculate and offer Miss H redress as a cash lump sum payment,
- explain to Miss H 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 Miss H receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss H accepts Grove's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Miss H for the calculation, even if she ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Miss H's end of year tax position.

Redress paid to Miss H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Grove 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 Miss H'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.

My final decision

Determination and money award: I uphold this complaint and I direct Grove Pension Solutions Limited to pay Miss H 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 Grove Pension Solutions Limited pays Miss H the balance.

If Miss H accepts this decision, the money award becomes binding on Grove Pension Solutions Limited.

My recommendation would not be binding. Further, it's unlikely that Miss H can accept my decision and go to court to ask for the balance. Miss H 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 Miss H to accept or reject my decision before 15 June 2023.

Michael Campbell
Ombudsman