

## The complaint

Mr C complains about the advice given by Tuto Money Limited ('Tuto') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension arrangement. He says the advice was unsuitable for him and believes this has caused a financial loss.

## What happened

Mr C was referred to Tuto in 2017 from another advice firm to discuss his pension and retirement needs. I think Mr C is mistaken when he said he responded to an online advert. Mr C, having recently turned 55, wanted to consider accessing his pension benefits early to raise a cash lump sum. Tuto's advice process was done over the phone.

Tuto completed a fact-find to gather information about Mr C's circumstances and objectives. Amongst other things this recorded that Mr C was 55; he was married, he was employed; he rented his home; other than his preserved DB scheme pension, Mr C was contributing £500 a month to a current workplace pension; and he was looking for a lump sum to consolidate debt, go on holiday and buy a new car. Tuto also carried out an assessment of Mr C's attitude to risk, which it deemed to be 'low / medium'.

On 3 August 2016 Tuto advised Mr C to transfer his pension benefits into a personal pension and invest the proceeds in a managed growth fund, which also had the option of a capital guarantee. The suitability report said the reasons for this recommendation were:

- Mr C wanted to release a cash lump sum to meet his objectives.
- Mr C didn't have any savings and he wanted to use his tax-free cash rather than borrow the money to meet his objectives.
- Mr C believed he had sufficient income provision in retirement from his current workplace pension.
- Mr C wanted to provide lump sum death benefits to his wife rather than an income.
- Mr C wanted flexibility in how he took his income in the future.

Mr C accepted the recommendation and shortly afterwards around £66,000 was transferred to his new personal pension. Mr C received his 25% tax-free cash lump sum and the proceeds were invested as per the recommendation.

In 2022 Mr C complained to Tuto about the suitability of the transfer advice. In summary Mr C said he felt the advice process was rushed and that if the long-term consequences of transferring on his retirement had been explained, he wouldn't have gone ahead.

Tuto didn't uphold Mr C's complaint. In summary it said it didn't believe Mr C was rushed into things and he didn't complain about this during the review meetings it had with him. It said it believed the advice was suitable - Mr C didn't have any savings or other assets and he was in debt by £5,000. It said Mr C was told about the benefits he would be giving up by transferring and all of his retirement options were explained. It said Mr C had a workplace pension that he was contributing to which he felt would provide all of his financial needs in

retirement – so Mr C's financial standing in retirement would not be affected by using his DB scheme benefits to enhance his life at that time.

Because Mr C remained dissatisfied he asked our service to consider his complaint. An investigator upheld the complaint and required Tuto to pay compensation. In summary they said they didn't think the transfer was financially viable given the growth rate required to match Mr C's DB scheme benefits at retirement. And for this reason alone they didn't think a transfer was in Mr C's best interests. They said Mr C's objectives for wanting a lump sum were 'nice to have' and weren't necessary – Mr C was managing his debt and he could already afford a holiday. They said Tuto didn't know whether Mr C's workplace pension would provide the income in retirement he needed because they didn't investigate what it would provide. They said in their view Tuto had failed to demonstrate that transferring was in Mr C's best interests. They said had Mr C been suitably advised, they believed he would've followed that advice and remained in his DB scheme.

Tuto disagreed. In summary it said it believed the case had been decided using a template without looking at the evidence. It said the investigator had not made any reference to the points it made in its final response letter to Mr C's complaint.

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 Tuto'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, Tuto 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.

#### *Financial viability*

Tuto 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 scheme (the critical yield).

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr C was 55 at the time of the advice. I can't see that Tuto recorded when Mr C intended to retire – but the analysis was based on a retirement age of 65. The critical yield required to match Mr C's benefits at age 65 was 13.67% if he took a full pension – no yield was produced assuming Mr C took a cash lump sum and a reduced pension. This compares with the discount rate of 3.7% per year for nine years to retirement in this case.

For further comparison, 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 'low/medium/' 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 critical yield was in excess of 13%, I think Mr C was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of transferring and investing in line with a 'low/medium' attitude to risk. The return required was significantly higher than the discount rate and was far in excess of the regulator's upper projection rate. In my view, to have come close to achieving the growth required would've required Mr C to take a significantly greater level of risk than he indicated he was prepared to take. And even then I think he'd likely still be worse off.

In my view Mr C's capacity for loss was low. Mr C didn't have significant savings or other investments. And while he had a workplace pension he was contributing to, there is no supporting evidence to show that Mr C's income needs would be met solely by this pension. I think it's likely that Mr C would be reliant on both this and his DB scheme to meet his income needs through retirement.

For this reason alone a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice – something I assume Tuto believed to be the case given it expressed the opinion at the time that it was '*highly unlikely*' the required growth would be maintained over a period of time. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

#### *Flexibility – access to tax-free cash and income needs*

The main reason Tuto recommended Mr C transfer his DB scheme benefits was to gain access to a lump sum for debt repayment, to buy a new car and a holiday. It also said that Mr C wanted to take his future income in a flexible way.

But I don't think Mr C required flexibility in retirement. This is because based on the evidence I've seen, I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I'll explain why.

The first reason Mr C wanted to use his lump sum for was to repay debt. During the phone call with the adviser, which I have listened to, Mr C said he had two credit cards with outstanding balances of around £3,000 and £1,200. Tuto made no attempt to establish any more information about the debt – for example how much Mr C was paying towards it each month and whether any of it was on special repayment terms such as a zero-interest rate offer. Looking at the income and expenditure analysis in the fact-find, while basic, there's nothing here to suggest the debt was unaffordable or that Mr C might be in arrears. Mr C did not appear to have any intention of retiring or stopping work early - so given his continued earning capacity, I see no reason why Mr C needed to repay what, in my view, was a relatively small amount of debt at this time.

In my view there was no pressing or compelling need for Mr C to access his tax-free cash to repay this debt. It's entirely possible that Mr C could've repaid it from his normal earned income over time. Alternatively Mr C could've used a loan to better structure its ultimate repayment, which I have seen nothing to suggest wasn't a viable alternative. These were things a more detailed interrogation of Mr C's circumstances would've uncovered and which Tuto ought reasonably to have carried out rather than immediately recommending Mr C transfer his guaranteed DB pension benefits to achieve things.

I can see in the advice paperwork, which Tuto referred to in its final response letter to Mr C as evidence of the suitability of the advice he received, that his debts totalled £5,000. But this is not what Mr C told the adviser during their phone call. As I said above, Mr C said his debts totalled around £4,200. The adviser recorded them as £5,000, inflating the figure. It strikes me that, based on what was said in the call, the adviser did this because he was looking to justify the transfer. Not only did they do this, but when they asked Mr C about any savings he had, to which Mr C replied that he had a couple of thousand pounds held with a friend, because it was deemed he didn't have immediate access to them, they dismissed them and recorded them as nil. But this was not the true position. I don't think this was acting in Mr C's best interests. Mr C had savings, which he could've used towards repaying his debt. But in any event, with a net debt position of around £2,000 it demonstrates, in my view, there was no urgency for Mr C to repay his debt.

That said, even if the true position was as recorded in the advice paperwork at the time, I'm not persuaded that Mr C needed to access his pension benefits early to repay debt that was evidently affordable.

Mr C also wanted access to a lump sum to buy a new car and to go on holiday. But neither of these things were compelling reasons to transfer.

Not only did Tuto not establish how much Mr C truly wanted for these things – it was purely based on him accessing the maximum lump sum possible - but it's also clear from the phone call that Mr C didn't *need* a new car. He said he planned to give his current car to his wife and buy himself a new one. So it wasn't the case for example that Mr C urgently needed to replace his only means of transport to allow him to get to work, which might have

demonstrated a need. But either way, Mr C could've explored borrowing the money for this purpose which Tuto ought to have properly discussed with Mr C. And as for going on holiday, I don't think this can reasonably be described as a compelling reason to transfer. In any event, Mr C told the adviser that he put aside money monthly for holidays.

Overall, I don't think Mr C had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date – so I don't think it was in Mr C's best interests to transfer out of his DB scheme.

Tuto also recommended the transfer because it said Mr C wanted flexibility in how he accessed his income in the future. But I can't see evidence that Mr C had a strong, or indeed any need for variable income throughout his retirement. I can't see it was discussed with him. The only discussion about Mr C's retirement income need was around how much he ideally wanted. Mr C said he ideally wanted £2,000 a month but said a more realistic expectation was around £800 a month. But Tuto didn't carry out an assessment of this or interrogate things further to establish what was realistic and achievable.

I can see Tuto has placed great weight on what Mr C said about him not needing to rely on his DB pension for his income in retirement because he felt that his current workplace pension would meet his needs. But Tuto appears to have just accepted what Mr C said - I don't think it was reasonable for Tuto to make this conclusion in giving its advice. The adviser made no attempt to establish what income Mr C's pension might likely provide him with – they simply said it was a good scheme. The adviser only knew that Mr C was contributing £500 a month towards it. But this doesn't give any indication of the scheme's likely benefits at Mr C's normal retirement age. I can see in the suitability report Tuto said it recommended that Mr C seek financial advice on his workplace pension – but in my view this should've formed part of the advice Tuto was providing Mr C with. In acting in Mr C's best interests, Tuto ought to have properly considered Mr C's retirement income needs looking at what pension provision he had, to determine whether it was a suitable recommendation for him to transfer his DB scheme benefits to a personal pension arrangement. In my view Tuto's advice was purely focused on Mr C's short-term needs and paid little attention to his overall income retirement needs, which it ought to have done.

If Mr C took benefits from the DB scheme at 65, according to Tuto's analysis he'd be entitled to an annual income of around £5,400. In my view this was a not inconsiderable annual income and would've provided Mr C with a solid income foundation upon which his current workplace pension, and ultimately his state pension, in my view would've likely meant Mr C could achieve his retirement income need. In my view, Mr C stood a better chance of achieving his retirement income needs by remaining in his DB scheme.

### *Death benefits*

The other reason Tuto gave for recommending the transfer was to provide lump sum death benefits over providing an income.

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 was likely an attractive feature to Mr C.

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 scheme to a personal pension 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 – it is not a legacy planning tool. And I don't think Tuto explored to what extent Mr C was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr C was married, so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr C predeceased her, despite what it's recorded about him not wanting to rely on an income. I don't think Tuto made the value of this benefit clear enough to Mr C. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Tuto should not have encouraged Mr C to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr C 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, I think Tuto should've instead explored life insurance. And the starting point for this needn't have been for the full transfer value amount - essentially this would assume that he would pass away on day one following the transfer, which isn't realistic - it ought to have been to ask Mr C how much he would ideally like to leave to his spouse. And this could've been explored on a whole of life or term assurance basis, which was likely to be cheaper to provide.

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 C. And I don't think that insurance was properly explored as an alternative.

### *Summary*

I don't doubt that the flexibility and the potential for higher or different death benefits on offer through a personal pension would have sounded like attractive features to Mr C. But Tuto wasn't there to just transact or facilitate what Mr C might have thought he wanted or seemed like a good idea. Yet I think the evidence indicates this is precisely what happened. From listening to the phone calls between Mr C and Tuto, on more than one occasion they referred to being able to '*facilitate*' what Mr C wanted. But the adviser's role was to really understand what Mr C needed and recommend what was in his best interests. I don't think Tuto did that.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C 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. Mr C shouldn't have been advised to transfer out of the scheme just to achieve a short-term objective, which included repaying debts that were affordable. And the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

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

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

I've considered this carefully, but I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme, against Tuto's advice.

I say this because Mr C was an inexperienced investor who in my view neither possessed the requisite knowledge, skill nor confidence to go against the advice they were given – particularly in what was a complex pension matter. Despite what Tuto believed, this pension accounted for a not insignificant percentage of Mr C's retirement provision. So, if Tuto had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr C's desire for a cash-lump sum now that he reached the age of 55 was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Tuto had explained that there was no pressing need for Mr C to access his benefits now or risk his guaranteed pension to achieve things, I think that would've carried significant weight. So, I don't think Mr C would have insisted on transferring out of the DB scheme.

In light of the above, I think Tuto 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 the occupational pension scheme if suitable advice had been given.

Tuto 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 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 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, Tuto 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 Tuto'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 includes compensation in respect of benefits that would otherwise have provided a taxable income.

So, in line with DISP App 4, Tuto 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 Tuto Money 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 Tuto Money Limited pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on Tuto Money 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 22 June 2023.

Paul Featherstone

**Ombudsman**