DRN-4102799

The complaint

Mr E has complained that Mr M of Grovehouse Financial Services Limited ("Grovehouse"), an appointed representative ("AR") of Openwork Limited ("Openwork"), gave him poor advice to use a defined benefit ("DB") pension in respect of a pension sharing order ("PSO") rather than alternative personal pensions that were available.

What happened

In 2018, Mr E was reviewing his pensions in connection with his divorce proceedings. He had a number of different pensions at the time:

- His "X" DB pension scheme had a transfer value of £153,197;
- His "Y" DB scheme had a transfer value of £27,306;
- His L&G stakeholder pension had a transfer value of £161,252;
- His Zurich personal pension had a transfer value of £113,097.

On 2 July 2018, Mr E emailed Mr M asking for pension advice in light of his upcoming divorce. Mr E mentioned the total value of his pension pots was £454,852. Mr E provided details of his pensions with Zurich, L&G, X and Y. Mr E also mentioned he had just started a L&G pension with his new employer. Mr E said he was looking for advice on how to best to top up his pension pot.

Mr M emailed Mr E on 3 July 2018 asking for details of his current employer's pension so he could best advise on the top up options and which route would suit Mr E best.

On 4 July 2018 Mr E emailed Mr M details of his current employer's pension. Mr E also mentioned that he had a final meeting with lawyers regarding his divorce on 20 July 2018 and so he asked for a reply two or three days before then so that he could provide it to his lawyer to incorporate into the financial discussions.

Mr E says that the following then took place:

- Between 5 July 2018 and 20 July 2018, he had various phone discussions with Mr M in the run up to the final divorce meeting.
- Mr E stated he attended a final collaborative divorce meeting on 20 July 2018 at which final figures were agreed relating to the divisions of all assets. For pensions, Mr E agreed to transfer £76,598.50 to his ex-spouse's pension fund. This amount was the equivalent of 50% of his X DB pension. However, Mr E stated it was at his discretion which pension pot the amount was taken from. Mr E was to seek advice outside of the meeting and confirm the arrangements in the "Heads of Agreement" document (planned to be completed in August).

- Between 20 July 2018 and 2 August 2018 he had further phone calls with Mr M discussing the best option to take. Mr E says he was seeking advice as to the most financially astute route as he did not want to make such an important decision without receiving qualified input. Mr E says that Mr M promised to get back to him by 26 July 2018.

Mr E emailed Mr M on 2 August 2018 to say:

> *"I am signing the heads of agreement tomorrow. Did you work out the most financially astute route for £76k under a pension sharing order? [X], L&G or Zurich pots?"*

On 3 August 2018 Mr M replied saying:

> *"I have been working and looking at the options for the best way forward and having looked at the options, it seems that the simplest and most economical way to proceed would be to assign the [X] pension pot going forward."*

In accordance with the Court sealed PSO, the X DB scheme was thereafter debited in favour of a credit to Mr E's ex-spouse's pension. The debit/credit took place in 2021 and was ultimately for around £98,000. Mr E says the higher amount of the debit/credit was because of the long delay in it being finalised.

In January 2021, Mr E complained to Openwork about the advice he received from Mr M of Grovehouse. Mr E said that he'd learned from other advisers that his X DB pension was "*almost certainly the very last pension*" he should have used for the PSO as he'd lost important protected benefits attached to the money he transferred to his ex-spouse. He said he should have been advised to use one of his other personal pensions instead.

In March 2021, Openwork wrote to Mr E explaining why it wasn't upholding his complaint. It said that it had no record of Mr E as a client of Openwork. Openwork also explained that it was a restricted network of multi-tied financial advisers and that each and every adviser was restricted to recommending products from product providers that have been approved and made available by Openwork. Furthermore, Openwork said that Mr M did not have the relevant qualifications and was not licensed by Openwork to conduct pension transfer business. So it said that any activities undertaken by Mr M as Grovehouse in connection with Mr E's X DB pension weren't ones for which it accepted responsibility. As such, Openwork said that the complaint was not a matter for Openwork.

The complaint was then referred to our service. One of our investigators concluded that we did have jurisdiction to consider the complaint. Broadly his findings were:

- Mr M had given Mr E advice about which pension to use to meet the PSO and had advised against using Mr E's personal pensions – including the Zurich plan.

- In these types of cases, our service can only look at cases that involve regulated activities.

- The advice from Mr M to use the X DB scheme for the PSO did not constitute a regulated activity under Article 53E of the Financial Services and Markets Act (Regulated Activities) Order 2001 ("RAO") - advising on conversion or transfer of pension benefits. That's because there was no transfer or conversion of pension benefits.

- However, Mr E's complaint was that he'd been unsuitably advised not to surrender funds from his personal pensions (such as the Zurich scheme) for the PSO. Giving advice not to "sell" his personal pensions in this manner was a regulated activity under Article 53 RAO as the advice related to rights under a pension scheme as defined by Article 82 RAO.

- The advice to apply the debit against the X DB scheme was part and parcel of the advice relating to the personal pensions – the two were intrinsically linked. Recent case law showed that we could look at all the activities in such scenarios.

- The Openwork agreement with Grovehouse had restrictions relating to which products could be purchased – only those which appeared on a list of authorised providers could be recommended by advisers. However, this case did not involve the purchase of a new product – only advice about the potential surrender of personal pensions. Surrender advice was permitted if it related an Openwork approved product provider.

- The Zurich pension was an Openwork approved product.

- Therefore, Mr M had given advice about matters that were permitted under Openwork's agreement with Grovehouse. This was therefore business for which Openwork had accepted responsibility under section 39 of the Financial Services and Markets Act 2000 ("FSMA"). As a result, Openwork was responsible for the complaint – and we have jurisdiction to consider it.

- The advice to use Mr E's X DB scheme rather than his personal pensions to meet the PSO was unsuitable as he'd lost valuable guaranteed benefits. A comparison and analysis of the respective pensions would have revealed this.

- So, Openwork should pay Mr E compensation for the unsuitable advice.

Mr E accepted the investigator's findings. However, Openwork didn't agree. It asked for an ombudsman to decide matters and provided the following submissions for me to consider:

- Contrary to the investigator's findings, any advice (it disputed that there *was* any advice – see further below) relating to the X DB scheme was itself a regulated activity under Article 53E RAO. In reality, the giving up of defined benefit rights, where the individual has the option to cede a personal pension alternative is effectively the same as a transfer of those benefits.

- The investigator's own findings reference that for such advice (pertaining to a DB scheme) there were '… specific requirements and guidance relating to transfers, conversions and opt-outs from DB schemes. These were contained in the Conduct of Business Sourcebook ("COBS") at section 19.1.'

- If an adviser is required to conduct analysis to determine the relative benefits of the DB vs personal pension arrangement (as the investigator concluded in his findings with respect to merits in quoting the requirements under COBS) in order to advise which should be given-up, then the adviser is required to perform the same calculations, analysis and consideration prescribed by the regulator where the transfer of a DB scheme is being considered. It thus legally requires the input of a licensed pension transfer specialist ("PTS").

- Mr M was not a PTS and was not permitted by Openwork to give advice on defined benefit schemes. Openwork made it very clear to Mr M (and all its ARs) that advice

involving a DB arrangement must be referred to Openwork's specialist team for consideration. In giving any advice Mr M stepped outside of his Openwork contract. Openwork is thus not liable for any advice given by Mr M or any loss which may result.

- Zurich being on Openwork's approved panel did not mean Openwork gave Mr M broad authority to advise on or discount such a pension. The fact that an AR may have been able to give advice on one of several pensions that a client held, does not mean that he was permitted to give advice to transfer a DB scheme. To claim otherwise is illogical. Openwork had, and has, a very clearly defined process for "Safeguarded Benefits" and all ARs ought reasonably to have been aware of this process.

- The investigator concluded that not advising on a Zurich personal pension for which Openwork did not give its advisers general authority to deal with, is a regulated activity. However, he also concluded that advising on the effective transfer of a DB scheme is not a regulated activity. This is intuitively wrong and is a conclusion the investigator reached via a clumsy misapplication and misinterpretation of the regulations.

- If Mr M was not able to advise on all plans then he could not consider all plans and thus could not provide meaningful analysis.

- Openwork agreed that the advice to apply the PSO debit to the X DB scheme was intrinsically linked to the advice not to apply the debit to the personal pension. However, the consideration of the collection of pension arrangements, containing as it does a DB scheme, was not a matter Mr M was permitted by Openwork to advise on. As such, Openwork is not responsible for any advice given.

- A letter from Mr E's solicitors dated 24 July 2018 states

  > *"The pension sharing provision I have drafted along with an annex which assumes you will be making a 50% share of your [X] plan. Please check this with your IFA and confirm if this is the best approach or you prefer to make the share from another fund so we can recalculate the percentage based on half the value of the [X] plan."*

  This suggests that Mr E had already decided to use the X DB scheme. And so it would have been unlikely that Mr E's ex-spouse would have accepted any other scheme in the arrangement.

- Mr M was not provided with any specific instructions as to the analysis to be undertaken and the advice to be given to Mr E. Neither was there any agreement as to the fee to be paid for any advice from Mr M.

- In the circumstances, it was clear that no advice was sought by Mr E and therefore no advice/pension analysis was given/undertaken by Mr M. If advice had been sought, Mr M would have, in accordance with his Openwork contract, referred Mr E to Openwork's PTS team.

- The investigator had assumed that Mr E had lost valuable pension benefits by surrendering funds from his X DB scheme. But he hadn't explained his reasons and so it's not clear that any advice from Mr M was unsuitable as alleged.

I then issued a provisional decision on 6 July 2023. I explained that, having considered Openwork's submissions, my view was that the complaint was within our jurisdiction and should be upheld.

I invited further submissions from both parties, but neither Openwork nor Mr E had anything to add.

Having considered the matter again, my view remains the same as in my provisional decision save for some minor amendments. My findings and conclusion are set out below.

Jurisdiction - Why I can look into this complaint

I have looked at all the evidence and submissions to decide whether this is a complaint we have jurisdiction to consider.

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the Financial Conduct Authority's ("FCA") Dispute Resolution Rules ("DISP") and the legislation from which those rules are derived, whether it's one we have the power to look at.

DISP 2.3.1R says we can:

> *"consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them."*

As set above, this case involves Grovehouse – which was an AR of Openwork. As an AR, Grovehouse isn't itself a *firm* – but Openwork is a firm. We can hold firms responsible for acts of their ARs in certain circumstances. This is set out in the guidance at DISP 2.3.3G which says that:

> *"complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility)."*

And Section 39(3) FSMA says:

> *"The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."*

So, to decide whether Openwork is responsible here, there are three issues I need to consider:

- What are the specific acts Mr E has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Openwork accept responsibility for those acts?

<u>What are the specific acts Mr E has complained about?</u>

Mr E says that he was given unsuitable advice to use his X DB scheme to meet a PSO. He says he should have been advised to use his personal pensions instead.

Are those acts regulated activities or ancillary to regulated activities?

There are essentially two possible regulated activities that are the subject of submissions in this case. The first is an Article 53E activity - advising on the conversion or transfer of pension benefits; the second is an Article 53 activity - advice relating to rights under a pension scheme as defined by Article 82 RAO.

Did an Article 53E activity take place in relation to Mr E's X DB scheme?

To begin with, it's instructive to review this issue in light of what the FCA said in the FCA Finalised Guidance on Advising on Pension Transfers (FG 21/3 para 2.6):

> *"You do not need the permission at all if you are advising a client on whether to join a DB scheme. Similarly, you do not need the permission if you advise an ex-spouse whether to use a pension credit awarded from a pension sharing order to acquire rights in a DB scheme. DWP has told us that where the ex-spouse has the option of becoming a member of a DB scheme, the pension credit is not regarded as safeguarded benefits (or money purchase or cash balance benefits) or a transfer payment but as a right in itself. If you advise an ex-spouse on using the pension credit to acquire rights in a DB scheme, this falls outside FCA-regulation. But if you advise them on acquiring rights in an FCA-regulated DC scheme, you must have the relevant investment advice permission."*

Article 53E RAO provides:

> *"53E.— Advising on conversion or transfer of pension benefits*
>
> *(1) Advising a person ("P") is a specified kind of activity if—*
>
> *(a) the advice is given to P in P's capacity as—*
> *(i) a member of a pension scheme; or*
> *(ii) a survivor of a member of a pension scheme;*
>
> *(b) P has subsisting rights in respect of any safeguarded benefits; and*
>
> *(c) the advice is advice on the merits of P requiring the trustee or manager of the pension scheme to—*
>
> *(i) convert any of the safeguarded benefits into different benefits that are flexible benefits under the scheme;*
> *(ii) make a transfer payment in respect of any of the safeguarded benefits with a view to acquiring a right or entitlement to flexible benefits for P under another pension scheme; or*
> *(iii) pay a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the safeguarded benefits."*

I've reviewed this carefully. Having done so, as I'll explain below, my view is that although Mr E had subsisting rights in safeguarded benefits in his X DB scheme (thus meeting the requirement in 1 (a) and (b) above), the application of a pension debit to that scheme for the PSO can't be construed as a conversion or transfer or payment of a lump sum under 1(c).

First, I'm not of the view that there is a conversion under (1) (c) (i). This provision requires the conversion to be from safeguarded benefits into flexible benefits. "Flexible benefits" are defined in Article 53E (2) as:

"(2) In this article—

"flexible benefit" means—
(a) a money purchase benefit;
(b) a cash balance benefit; or
(c) a benefit, other than a money purchase benefit or cash balance benefit, calculated by reference to an amount available for the provision of benefits to or in respect of the member (whether the amount so available is calculated by reference to payments made by the member or any other person in respect of the member or any other factor);"

So, to be a "conversion" the benefits must be converted into different benefits that are flexible benefits under the same scheme. In the circumstances here, I don't think this requirement is met. Firstly, I don't think the pension debit for the pension sharing order is a different "*benefit*" for Mr E in the scheme as required – rather it is, as set out in the Finalised Guidance, the creation of new rights in the hands of his ex-spouse. So, the debit to Mr E's scheme is not converting Mr E's benefits to another form of *benefit* under the same scheme, but rather curtailing his right over that benefit in favour of a credit to his ex-spouse's scheme.

Notwithstanding this, I also don't think the pension debit/credit could be said to be a conversion into flexible benefits as defined. However, given my finding in the preceding paragraph, I don't think it's necessary to go into detail about this.

Secondly, the application of the pension debit and creation of the credit in this case can't amount to a "*transfer*" (1)(c)(ii) either. A "transfer payment" is not defined, however it is generally regarded as a transfer payment from one pension scheme to another scheme. The Finalised Guidance makes clear that, where a pension credit is applied so as to make the ex-partner a member of a DB scheme, this will not be a transfer payment. Although only guidance and therefore not authoritative, it suggests that in these circumstances the pension debit is not a transfer payment.

However, even I'm wrong about this, the "transfer" was not done *with a view to acquiring a right or entitlement to flexible benefits <u>for P</u>* [i.e. Mr E] under another pension scheme. The creation of the pension credit is clearly not done for <u>Mr E</u>, as required, but rather is done for his ex-spouse, in accordance with the requirements of the PSO. So, a pension "transfer" did not take place in accordance with the RAO.

Lastly, the arrangement in this case has not resulted in the payment of a *lump sum*, and so (1)(c)(iii) can't apply either.

So, my conclusion is that an Article 53E regulated activity did not take place in respect of Mr E's X DB scheme.

Did an Article 53 activity take place in relation to Mr E's personal pensions?

Article 53 RAO says:

(1) Advising a person is a specified kind of activity if the advice is—
(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
(b) advice on the merits of his doing any of the following (whether as principal or agent)—
(i) buying, selling, subscribing for [, exchanging, redeeming, holding] or underwriting a particular investment which is a security [, structured deposit] or a relevant investment, or

(ii) exercising [or not exercising] any right conferred by such an investment to buy, sell, subscribe for [, exchange or redeem] such an investment.

It's not in dispute that Mr E's personal pensions were the kind of investments that are securities/relevant investments (Article 82). It is also not in dispute that advice not to apply the pension debit to the personal pensions would qualify as "advice on the merits of buying or selling". Nevertheless, for the avoidance of doubt, I think it's clear that the words "holding" and "not exercising" in Article 53 mean that advice on the merits of selling would include advice on the merits of simply holding on to the investment.

However, what Openwork does appear to dispute is whether *advice* was given by Mr M at all. It says that no real instructions were given by Mr E, no fee agreed and therefore no advice was given by Mr M. Openwork effectively says that all Mr M did was assent to an arrangement to use the X scheme that had already been agreed by the solicitors and other parties involved in the divorce.

I don't agree with Openwork and I'm satisfied that Mr M did give advice when he responded to Mr E's request for Mr M's view on the "most financially astute" method of meeting the PSO. No element of the definition of advice in the RAO requires there to be a fee agreement or formal instructions. In any event, there was clearly a short history of correspondence and contact between Mr E and Mr M about the pension sharing order. And the most relevant exchange, as set out above, is as follows:

Mr E emailed Mr M on 2 August 2018 to say:

"I am signing the heads of agreement tomorrow. Did you work out the most financially astute route for £76k under a pension sharing order? [X], L&G or Zurich pots?"

And Mr M replied on 3 August 2018 to say

"I have been working and looking at the options for the best way forward and having at the options, it seems that the simplest and most economical way to proceed would be to assign the [X] pension pot going forward."

I think on any plain reading of the emails, this was a recommendation by Mr M given to Mr E (in his capacity as an investor) to use the X DB scheme to meet the PSO and not to use (i.e. hold on to) the personal pensions.

I'm strengthened in my view by the FCA's perimeter guidance – PERG. PERG 8.28 sets out guidance from the FCA on the difference between advice and information. At the time, PERG 8.28.1G said:

"In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of facts or figures".

By saying he thought the "simplest and most economical way to proceed" was the use of the X DB scheme – Mr M discounted the use of the personal pensions and gave his opinion as to the course of action to take.

As a result, I'm satisfied that the complaint involves an Article 53 regulated activity in relation to the personal pensions.

Was the advice about the personal pension ancillary to or intrinsically linked to the advice about the X DB scheme?

As set out above, the advice relating to the X DB scheme does not, in itself, involve a regulated activity. But the regulated activity of giving advice was carried out in respect of Mr E's personal pensions.

I am of the view, and it appears Openwork agrees, that the advice about the X DB scheme was intrinsically linked with the advice not to sell Mr E's personal pensions and that it was effectively part and parcel of that activity. As such, we are able to assume jurisdiction for the advice as a whole and consider the loss suffered by giving up benefits in the X DB scheme.

Our capacity to assume jurisdiction in this manner was approved by the court in *Tenet Connect v FOS [2018] EWHC 459 (Admin)*. In that case, the court held that a complaint about advice to purchase unregulated products was so closely linked to the advice to sell regulated products (in order to finance the purchase) that the two strands were effectively part and parcel of the same advice and the complaint was in turn within our jurisdiction.

I think the facts in this case are analogous to that in *Tenet Connect*. It appears clear to me from the emails Mr E has provided that in asking Mr M to advise on the best means of applying his pension debit following his divorce, Mr E was expressly asking Mr M to consider which of three potential pension pots was the best target for the debit.

I think this was a single braided stream of advice that incorporated both regulated and unregulated investment advice. The advice to apply the debit to the X DB scheme was intrinsically linked to the advice not to apply the debit to the personal pensions. In other words, the advice not to give up any of the personal pensions was given so that the alternative advice to give up benefits in the X DB scheme could be made. The three options were compared by Mr M who concluded the economic advantages of applying the debit to the X DB scheme outweighed the advantages of applying it to the personal pensions. All the strands of the advice were therefore intrinsically linked.

As such, my view is that we are able to assume jurisdiction over Mr E's complaint, notwithstanding that it comprised strands of advice that were both regulated and unregulated.

So, having now answered the question about whether the complaint involves regulated activities, I must go on to consider whether these were acts for which Openwork accepted responsibility.

<u>Did Openwork accept responsibility for these acts?</u>

It's clear that Mr M was dealing with Mr E in his capacity as a Grovehouse adviser. Grovehouse has been an AR of Openwork since 2005.

As I've said above, under Section 39(3) of FSMA:

> *"The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility".*

So, Openwork is responsible for complaints arising from anything done or omitted by Grovehouse in the carrying on of business for which Openwork has accepted responsibility.

But under section 39(3) FSMA, Openwork isn't responsible for everything done by Grovehouse. Openwork is only responsible for the business for which it has accepted responsibility. Furthermore, the Court of Appeal case of Anderson & Ors v Sense Network Ltd [2019] EWCA Civ 1395 makes it clear that a principal may accept responsibility for only part of the business conducted by an AR.

So, I need to decide whether Openwork accepted responsibility for advice given by Grovehouse as per the requirements of section 39(3) FSMA.

In considering this, I've carefully reviewed the AR agreement between Openwork and Grovehouse. The documents Openwork has provided are:

- the Franchise Contract;
- the TCF Manual; and
- the Financial Manual.

The TCF Manual provides:

> *"The terms of your appointment as a Financial Adviser are set out in the Franchise Contract or the Practice Financial Adviser Section 39 Contract respectively and the Manual. (1.01.i)*
>
> *Your appointment is restricted to obtaining applications for the Plans and Services arranged through Openwork. (1.01.ii)*
>
> *You have no authority from Openwork to sell any other financial services or products or to carry on any other investment business other than those offered through Openwork (1.01.iii)"*

"Plans" are defined as *any policy or investment contract offered by Product Providers via Openwork (or, where the context permits, its competitors)*. These are further outlined in Openwork's Brand Wheel. "Services" are defined as *any services offered or arranged via Openwork (or where the context permits, its competitors).*

In this case, no advice was given to Mr E to make an application for a new Plan. However, as I've set out above, advice was given to hold on to and therefore not surrender Mr E's personal pensions.

There is a specific section of the TCF Manual that deals with surrenders.

> **"6.02 Plan surrenders and fund switches**
>
> *i. You must not advise Clients as to the timing or amount of any surrender.*
> *ii. You must not advise a client on the timing or nature of any fund switch decisions.*
> *iii. You must obtain a Client's explicit written permission to transact a surrender or fund switch on their behalf.*
> *iv. You must not calculate tax liabilities on surrenders but you must warn that surrenders may be taxable.*
> *v. You must not complete the surrender or fund switch forms on behalf of the Client. This must be completed by the Client and sent by them to the relevant Product Provider.*
> *vi. You must not hold signed, blank surrender forms or fund switch forms on behalf of a Client."*

This is a standalone section that contemplates surrenders that do not necessarily have a corresponding replacement Plan in mind. It outlines various restrictions on the manner in which surrenders are to be effected – for instance - the adviser must not advise clients as to the timing or amount of any surrender. But implicit in this section is that surrender advice – including advice to hold on to and *not* surrender plans - is authorised provided that the "Plan" that is the subject of such advice is an Openwork Plan. One of the personal pensions involved in this complaint was with Zurich. It's not in dispute that the Zurich plan was a Plan.

Any breach of the precise terms of this section by Grovehouse was, in my view, a breach of requirements about *how* certain activities are performed rather than *what* activities can be performed by an adviser. In the *Anderson* case, the Court of Appeal drew a distinction between these types of restriction. The breach of the latter kind of provision takes the AR's conduct out of the principal's ambit of responsibility under section 39(3) FSMA, but breach of the former doesn't.

So my conclusion is that the advice given by Mr M of Grovehouse to Mr E to hold on to the Zurich plan and not apply the debit to it for the PSO was authorised under the AR agreement. As I've mentioned above, the advice to use Mr E's X DB scheme instead (and also discount other personal pensions) was intrinsically linked to the advice relating to the personal pensions. As such, I'm satisfied that the advice that is the subject of this complaint was authorised by Openwork.

In reaching this conclusion, I've considered Openwork's argument that there was a "very clearly defined process for Safeguarded Benefits". It says the consideration of the collection of pension arrangements, containing as it does a DB scheme, was not a matter Mr M was permitted by Openwork to advise on. However, having reviewed the contractual documentation provided, I can't see that there are specific prohibitions on Grovehouse advising Mr E on his X DB scheme in the manner undertaken here.

When I asked Openwork to point me to the prohibition(s), it said there were relevant provisions in the Sales Advice Framework ("SAF") that is referred to in the TCF Manual. But it hasn't provided the SAF and so I can't draw any conclusions about this document and what it stipulates.

Openwork has also highlighted sections of the Financial Manual that it says indicates that advisers need to be a PTS to give pension transfer advice and get such advice approved by Openwork's Retirement Planning Service ("RPS") team. It says Mr M was not a PTS and didn't approach the RPS team. It also says that there is a general requirement in the Franchise Contract for advisers to comply with all laws and regulations and Mr M didn't do this if he gave advice on the DB scheme. However, my view is that:

- It isn't clear when and for what services the contract requires an adviser to be a PTS.

- Requirements that certain advice is pre-approved are, in my view, requirements about how certain activities are performed rather than what activities can be performed by an adviser.

- Similarly, a breach of a general provision that an adviser must comply with all laws and regulations was held not to be the type of breach that affects a principal's responsibility under section 39(3) FSMA in *Ovcharenko and another v Investuk ltd and another [2017] EWHC 2114 (QB).*

- Most importantly, the provisions highlighted by Openwork appear to relate to pension transfer advice. For the reasons I've already mentioned above in the section dealing with Article 53E RAO, this case does not involve a pension transfer at all.

So, my conclusion is that Openwork did authorise Grovehouse to give advice about the surrender of the Zurich personal plan. This authority extends to or includes advice to hold on to and not apply a debit to that plan as part of Mr E's pension sharing order. And this advice was intrinsically linked to advice that Grovehouse gave to use Mr E's X DB scheme instead (and also intrinsically linked to advice not to use any other personal pension). As such, Openwork is responsible for this complaint under section 39(3) FSMA.

My decision on jurisdiction

We can consider Mr E's complaint about the advice to use his X DB scheme to meet the PSO rather than his personal pensions.

What I've decided on the merits of the complaint – and why

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

As set out above, I'm satisfied that Mr M of Grovehouse advised Mr E to apply a debit to his X DB scheme and not use his personal pensions. So, was his advice suitable?

The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook).

These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.

- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

- Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client.

The above provisions were of general application and Grovehouse was required to have regard to them when advising Mr E.

COBS 19 set out some requirements for advisers dealing with DB schemes. For transfers, conversions and opt outs from DB schemes the rules set out that a firm must:

> *(1) compare the benefits likely (on reasonable assumptions) to be paid under the ceding arrangement with the benefits afforded by the proposed arrangement;*
>
> *(2) ensure that that comparison includes enough information for the retail client to be able to make an informed decision;*

(3) give the retail client a copy of the comparison, drawing the retail client's attention to the factors that do and do not support the firm's personal recommendation, in good time, and in any case no later than when the key features document is provided; and

(4) take reasonable steps to ensure that the retail client understands the firm's comparison and how it contributes towards the personal recommendation.

The rules also stated that:

19.1.6

(2) When a firm is making a personal recommendation for a retail client who is, or is eligible to be, a member of a pension scheme with safeguarded benefits and who is considering whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable.

(3) A firm should only consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the retail client's best interests.

I acknowledge that COBS 19 only applies to pension transfers, conversions and opt outs and this case does not involve any of these things. So Grovehouse did not have to have direct regard to the COBS 19 rules. But I still think the rules in COBS 19 are relevant in so far as they illustrate that advisers should carefully consider the implications of clients giving up DB entitlements and that – generally - the starting point is that it's a good idea to retain a DB scheme unless it is in the client's best interests not to do so.

In this case, there is no evidence that Grovehouse carefully considered the options available to Mr E and presented him with reasons why it was appropriate for him to use the X DB scheme to meet the PSO rather than use his personal pensions. I don't have full details of the X DB scheme but I think it's reasonable to proceed on the basis that it likely had a guaranteed lifetime income and protections against inflation. The benefits attached to his personal pensions will likely not have been as advantageous.

Openwork has said that the correspondence from the solicitors suggests that the X DB scheme was the only one that would have been acceptable to Mr E's ex-spouse as part of the PSO. Effectively it says that Grovehouse's hands were tied when giving the advice. I don't agree. The letter from Mr E's solicitor from the time says:

"The pension sharing provision I have drafted as standard along with an annex which assumes you will be making a 50% pension share of your [X] plan. Please check this with your IFA and confirm if this is the best approach or you prefer to make the share from another fund so we can recalculate the percentage based on half the value of the [X] plan. Once you confirm the fund to be used, I will need to write to them with the draft annex to secure their agreement to the pension sharing order before the papers can go to court."

I think this demonstrates that it was really up to Mr E which pension fund he actually used to meet the PSO – it was likely only the amount to be credited to his ex-spouse that was pre-agreed.

So, taking this all into account, I don't think the advice Grovehouse gave to Mr E in August 2018 was suitable or in his best interests. I think he should have been advised to use one of his personal pensions to meet the PSO – not the X DB scheme.

Putting things right

A fair and reasonable outcome would be for Openwork to put Mr E, as far as possible, into the position he would now be in but for the unsuitable advice. I think that Mr E would have retained his benefits in the X DB scheme. For the purposes of the compensation calculation, I consider it reasonable to assume that he would have used the Zurich plan instead.

Openwork should 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.

While that method is normally used for transfers, I believe it can be used in the same way here, as Mr E has essentially lost the DB scheme benefits in favour of the Zurich defined contribution benefits.

Rather than comparing the notional value of ceding DB scheme benefits with the actual value of receiving defined contribution scheme benefits, the comparison should be between the notional value of those benefits Mr E used from the X scheme (calculated according to the method) with the current value of the Zurich units he would have sold to fund the credit to his ex-spouse, assuming proportional sale of units if the plan was invested in more than one fund.

I understand that Mr E switched his Zurich plan to a Royal London plan some time ago. Therefore, the calculation would involve Zurich confirming the value of the notionally assigned units at the point of the switch to Royal London - and Royal London would need to then confirm the current value of that proportion of the transfer value. If it is not possible for the third parties to confirm these values, Openwork should use an investment performance benchmark which aligns with the risk profile of the funds as they were actually invested.

I also understand that Mr E has taken some retirement benefits from the Royal London plan. The current value of the notionally assigned benefits should not be reduced to account for those; in other words, it should be assumed that they would have been taken from the other part of his pension.

For clarity, Mr E plans to retire at age 60. So, compensation should be based on Mr E taking these benefits at this age.

In accordance with the regulator's expectations, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr E's acceptance.

If the redress calculation demonstrates a loss, as explained in PS22/13 and set out in DISP App 4, Openwork should:

- calculate and offer Mr E redress as a cash lump sum payment,
- explain to Mr E before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment the current defined contribution pension

- offer to calculate how much of any redress Mr E receives could be used to augment the pension rather than receiving it all as a cash lump sum,

- if Mr E accepts Openwork's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr E for the calculation, even if he ultimately decides not to have any of the redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr E's end of year tax position.

Redress paid directly to Mr E 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, Openwork may make a notional deduction to allow for income tax that would otherwise have been paid. Mr E's likely income tax rate in retirement is presumed to be 20%. However, if Mr E would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

In addition, I believe that Openwork should pay Mr E £300 for distress and inconvenience. I believe this sum should be due because Mr E has lost guaranteed pension benefits as a result of the advice and this will have been the cause of much concern.

My final decision

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Openwork Limited to pay Mr E the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Openwork Limited pays Mr E the balance.

If Mr E accepts my decision, the money award is binding on Openwork Limited. My recommendation is not binding on Openwork Limited. Further, it's unlikely that Mr E can accept my decision and go to court to ask for the balance. Mr E may want to consider getting independent legal advice before deciding whether to accept this decision.

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

Abdul Hafez
Ombudsman