DRN-4108180

The complaint

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

What happened

Mr C first became a customer of PKFP in 2006, with it acting as his accountant and assisting with financial planning.

I've been provided a copy of a fact-find that was completed in May 2006, detailing Mr C's circumstances. This noted he was 46, in good health, married with four dependent children and employed full time. He and Mrs C owned their own home with a mortgage at the time of approximately £490,000 (roughly 22% of the value of their property). Their combined disposable income exceeded their outgoings by over £6,000 per month, they held approximately £64,000 in savings and stocks and shares and had no other outstanding liabilities noted. Mr C's intended retirement age was recorded as 60. And his attitude to short to medium term risk (0-10 years) was said to be a two on a scale of one to five, with his attitude to long term risk a four on the same scale.

Mr C says he gave PKFP permission, sometime after initially being in contact with them, to obtain information about his pension arrangements.

PKFP says that Mr C contacted it in early 2010 as he wanted to release money from his DB scheme pension to pay off his mortgage.

Mr C says PKFP contacted him to discuss his pension arrangements in early 2010. He said it had obtained a new valuation of his DB scheme and emphasised the level of tax-free cash ('TFC') he could potentially take. He says PKFP explained that there was to be an imminent change to legislation, in April 2010, where the normal minimum pension age would be raised from 50 to 55, which would impact when Mr C could potentially access his pension.

I can see that PKFP received a letter from Mr C's DB scheme on 24 March 2010, noting that the cash equivalent transfer value ('CETV') of his DB scheme benefits was £1,429,612.00.

On 25 March 2010, a 'servicing review' fact find was completed. This said it updated the information recorded in the 2006 fact find. It was comprised of several 'Yes/No' questions about whether Mr C's circumstances, across several broad groupings, had changed. In respect of "personal details", "pension arrangements", "protection / health / savings", "loans & liabilities" and "capital investments & estates" it was recorded there had been no change. The answer in respect of "income & expenditure" also said there was no change, but it was handwritten in this section that net disposable income was now £15,000 per month. Mr C's attitude to risk for both short to medium and long-term investment risk was now said to be four on a scale of one to five.

The fact find also asked about Mr C's general financial objectives, which he was asked to prioritise on a scale of one to five, with one being high priority and five no priority. Maintaining his standard of living in retirement and investment planning were recorded as one. Everything else, including repaying his mortgage, was recorded as five.

Also on 25 March 2010, PKFP sent Mr C a letter recommending that he transfer his DB scheme pension to a personal pension. It said he'd left pensionable employment in respect of this DB scheme in 2008 and that he was entitled to access his pension from age 50, with no actuarial reduction to his benefits. The letter said Mr C required access to TFC to repay his mortgage but didn't need an income. And, as he was 50, he wanted to take this now, before legislation changed in April 2010, increasing the earliest retirement age. It said that transferring would allow him access to a larger amount of TFC than he could take under the DB scheme. It also said Mr C also preferred a situation where, in the event of his death, his spouse or dependent children could receive a return of his pension fund, less tax that was applicable. The letter recommended a specific pension provider. It noted though that the selected fund for illustration purposes was the deposit fund, which did not meet Mr C's stated attitude to risk, but said investment allocation had not yet been discussed in any detail.

I understand the transfer went ahead in line with PKFP's recommendation, with 25% TFC immediately taken.

Mr C complained to PKFP in 2022 about the suitability of the transfer advice. He also raised that the funds had remained on deposit following the transfer rather than being invested in line with his attitude to risk.

PKFP didn't uphold Mr C's complaint. It said the advice was suitable as it allowed Mr C to meet his objective of accessing TFC without taking a pension income and that Mr C made an informed decision at the time. PKFP also said that Mr C was informed the pension was invested in cash and the intention was that Mr C would manage the investment himself as he was considered highly knowledgeable in this area based on his profession.

Mr C referred his complaint to our service. He said he had no need to access TFC or to reduce his mortgage at the time of the advice and repeated that it was PKFP that approached him about the possibility of doing so. And he still thought the advice was unsuitable and that the impact hadn't been fully explained. He also said he had no experience relating to pension investment, he hadn't indicated that he did, that this was an incorrect assumption by PKFP and it was never his intention to manage the investment of his pension.

One of our Investigator's considered the complaint. She thought it should be upheld and that PKFP should compensate Mr C for any loss the DB transfer had led to. She didn't think Mr C had a need to access his pension at the time and that he was unlikely to improve on the benefits that were guaranteed by the DB scheme by transferring. So, she didn't think the transfer was suitable.

PKFP disagreed, saying Mr C had been clear he wanted to access his pension to reduce his mortgage and that this was a genuine objective. PKFP also felt the returns required to provide equivalent benefits to the DB scheme were achievable. So, it still considered that the advice was suitable.

The investigator wasn't persuaded to change their opinion, noting that PKFP's role wasn't just to put in place what Mr C might have thought he wanted, but was to advise him on what was in his best interests. As agreement could not be reached, 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 PKFP's actions here.

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

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

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

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

Having considered all of this and the evidence in this case, I’ve decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority (‘FCA’), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, PKFP 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

The fact find from 2006 noted Mr C intended to retire at age 60. And the documentation from 2010 indicated his opinion on this was unchanged at the time of the pension transfer advice. Mr C was 50 at the time PKFP provided advice.

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. The discount rate for nine full years to retirement, which is what Mr C expected to have here, was 5.8% per year. In addition, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

PKFP was required by the regulator, when giving advice here to carry out a transfer value analysis ('TVAS') report. This needed to compare the benefits the DB scheme provided with those afforded by a personal pension. And this comparison should have regard for the benefits the proposed new scheme would provide. The TVAS also should have included a calculation of 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).

PKFP hasn't provided a copy of the TVAS produced here or evidence of one being carried out when it advised Mr C. So, it appears there was a failing in the advice process and the required analysis was potentially not undertaken. PKFP also says how the pension fund was to be invested wasn't discussed at the time that it gave advice. Without this discussion having happened, PKFP couldn't have estimated potential returns. Nor could it in my view, reasonably say that Mr C was likely to be better off as a result of transferring or that doing so was in his best interests.

PKFP has referred, in response to the complaint, to a 'critical yield' referred to in an illustration by the pension provider it recommended. And this said the critical yield for retiring at age 60 was 5.2%.

However, despite what PKFP has said to the contrary, the information I've seen doesn't support that this was the rate of return required to match the benefits the DB scheme offered at retirement. The illustration explains it was an estimate of how much the fund would have to grow by each year to purchase an annuity at age 60 equivalent to one that Mr C could purchase from the pension provider at the time of the advice, at age 50. And the quotation explained that the annuity it was comparing had a level income, rather than an escalating income like the DB scheme. And there was no reference to the compared annuity providing a spouse's pension, which the DB scheme offered. So, this didn't provide the requisite comparison that PKFP should've included, to the DB scheme benefits. And therefore, while the suitability report said the critical yield had been discussed and Mr C "*understood the principle*" of this, it doesn't appear that the information discussed provided an accurate comparison.

And without the critical yield being correctly calculated and a benefits comparison provided, I don't think Mr C was in an informed position. And again, I don't think PKFP could reasonably conclude that a transfer was in his interests in respect of improving his retirement benefits.

It isn't clear what the critical yield required to match the DB scheme benefits was. And it does appear that the starting income of the annuity used for the comparison was potentially higher than that the DB scheme would've provided. But the spouse's pension and escalation of benefits both to retirement and while in payment mean I think it is a reasonable assumption that the critical yield of the DB scheme was likely to be greater than that for the level term annuity mentioned.

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. And taking this risk unnecessarily, wouldn't, in my view, have been in his best interests. A pension's primary purpose is to provide for the holders income needs in retirement. The information in the fact find showed that this pension accounted for the majority of Mr C's retirement provisions and that Mr C's objective was to maintain his standard of living. And the suitability report noted that these funds were *"Very important as you have no other resources to provide for your retirement"*.

Taking the above into account and considering the discount rate and regulators standard projections, the composition of assets in the discount rate and the term to retirement, even accounting for Mr C's recorded 'balanced to high' attitude to risk, I don't think it can reasonably be concluded that it was more likely than not, at the time of the advice, that he'd achieve returns that would improve on the guaranteed benefits he already had. So, I don't think transferring, from a financial viability perspective, could be argued to have been in his best interests at the time.

Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Access to tax-free cash and flexibility

PKFP says Mr C wanted access to TFC to repay his mortgage and noted he signed the suitability report which recorded this as an objective. It also said he wanted to do this before a change in legislation impacted when he could take pension benefits – potentially pushing this back by five years. It's also referred to the fact that he made an enquiry a couple of years after the advice I'm considering, about potentially accessing funds from another smaller pension, to support that he was comfortable taking money from his retirement provisions.

Mr C says he had no need to access TFC from his pension at the time of the advice or to make a lump sum repayment towards his mortgage. And it was PKFP that suggested he should do this before legislation changed.

I can't see that PKFP gathered any information in 2010 which indicated that Mr C was behind with his mortgage payments or that repayment of the mortgage was necessary. In fact, the information recorded indicated he and Mrs C had a significant income surplus. And Mr C has provided a mortgage statement from around the time of advice which doesn't indicate any arrears or there being any problems with repayment.

I also note that, in the 2010 fact find, when discussing his priorities, repaying his mortgage was recorded as not being a priority for Mr C.

In addition, the amount of TFC that could be released by a transfer wasn't sufficient to clear the mortgage balance. The information recorded in the fact finds I've been provided indicated PKFP was aware of this. And the mortgage statement I've seen supports this. So, a transfer did not achieve the repayment of the mortgage.

When discussing potential uses for TFC in the event of a transfer, Mr C might've mentioned repaying his mortgage and he might even have been drawn to this during the discussion. But PKFP's role was to advise him about what was in his best interests. And the suitability report even noted *"extracting a tax free lump sum from your pension before you require the income in retirement, is normally only appropriate as a last resort"*. But I can't see that Mr C had a *need* to make a lump sum repayment to his mortgage at the time of the advice or that he was by any means in a position of needing to use a 'last resort'. And I don't think giving up the guaranteed benefits of his DB scheme, which was his main retirement provision, to achieve this was in his best interests.

I also can't see that Mr C had a need for a variable income in retirement. He also didn't intend to retire until age 60 and again had an income that exceeded his outgoings. So, I can't see that accessing pension benefits at age 50 as opposed to at age 55, following a change in legislation, was something he needed either.

So overall, I don't think transferring to access TFC or for additional flexibility was something that Mr C required, was in his best interests or better helped him achieve his retirement objectives.

Death benefits

PKFP says Mr C preferred the idea of his dependents receiving a return of the pension fund in the event of his death. And 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. 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, again 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.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr C was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr C predeceased her. I don't think PKFP 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 and would also have been impacted by any income Mr C drew which, given his apparent good health, could've significantly reduced the amount the pension would provide as a lump sum legacy.

I also think, if Mr C genuinely wanted to leave a legacy for his spouse and children, which didn't depend on investment returns or how much of his pension fund remained on his death, life insurance could've been explored as an alternative. It appears Mr C already held some life insurance to cover the repayment of his mortgage. But there was no reason additional cover could not have been discussed. Again, Mr C appears to have had significant surplus income with which to pay for such a policy. And, based on his recorded good health, I can't see that this would've been unaffordable.

Overall, PKFP should not have encouraged Mr C to prioritise the potential for alternative death benefits through a personal pension over his security in retirement. I don't think different death benefits available through a transfer justified putting his retirement provisions at risk here.

Control

PKFP says Mr C wanted to control his investments and the intention was that he'd do so, using his experience from his profession. But Mr C has said he had no experience relating to managing pensions or their investment and this was an assumption by PKFP.

While Mr C's profession likely gave him a greater general understanding of risk and investments than the average consumer, I haven't seen anything in the information from the time of sale that supports that he had experience in managing pensions. And overall, I think Mr C's desire for control over his pension benefits was likely overstated. And even if he did indicate an interest in this, I don't think this meant a transfer was in his best interests.

Suitability of investments

PKFP's suitability report noted that how the pension would be invested wasn't discussed before it recommended a transfer. As I've already explained, without understanding how the pension would be invested, I don't think PKFP could reasonably conclude that a transfer was in Mr C's interests. But as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr C, it follows that I don't need to consider the suitability of the investment. This is because Mr C should have been advised to remain in the DB scheme and so the investments, or lack thereof, wouldn't have arisen if suitable advice had been given.

Summary

Accessing TFC at the time before a change in legislation potentially delayed doing so, flexibility, control and the alternative death benefits given by a personal pension may well have sounded like attractive features to Mr C when they were discussed. But again, PKFP wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income and, by transferring, placing the pension, which made up the majority of his retirement provisions, at additional risk. And I don't think the information from the time supports that he was likely to be better off as a result of taking this risk. 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 repay debts that were affordable – as the mortgage appears to have been here.

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

Of course, I have to consider whether Mr C would've gone ahead anyway, against PKFP's advice. And I've considered this carefully. But I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme, against PKFP's advice.

There is a dispute over who initiated the advice and why. But either way, as I've explained, I don't think Mr C had a genuine need to transfer. And even accounting for Mr C's 'balanced to high' attitude to risk and the general knowledge he had from his profession, if PKFP had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests to place the pension which formed the majority of his retirement provision at risk to achieve goals that were not urgent, I think that would've carried significant weight. I'm not persuaded that Mr C would've insisted on the transfer knowing that a professional adviser, whose expertise he had trusted for several years and for which he was paying, didn't think it was suitable for him or in his best interests. So, I don't think Mr C would have insisted on transferring out of the DB scheme.

In light of the above, I think PKFP 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.

PKFP 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, compensation should be based on Mr C taking benefits from the normal scheme retirement age of 60, as I understand he didn't retire prior to this.

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, PKFP should:

- calculate and offer Mr C redress as a cash lump sum payment,
- explain to Mr C before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment 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 PKFP's offer to calculate how much of his 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 his 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, PKFP 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 40% here**.** So, making a notional deduction of 30% 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 PK Financial Planning LLP 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 PK Financial Planning LLP pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on PK Financial Planning LLP.

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 4 July 2023.

Ben Stoker
Ombudsman