

The complaint

Mr P complains, via a professional representative, about the advice given by Intelligent Financial Advice Limited ('IFAL') 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 P approached IFAL in February 2017 to discuss his pension and retirement needs. IFAL's records show it first spoke to Mr P on 16 February 2017. He explained his current situation, that he was looking to retire at age 60 and the assets he had available.

A fact-find was completed to gather information about Mr P's circumstances and objectives. It was recorded that Mr P was 59, single, in good health with no dependents. He was employed, with his income exceeding his outgoings by over £600 per month. He owned his own home, mortgage free and had no other debts or liabilities. Mr P also owned a 33% share of his brother's property. He had investments valued at approximately £24,000 and an emergency savings fund of £20,000.

Mr P expected to receive approximately £7,500 per year in state pension from age 66. Details of three private pensions held by Mr P were also recorded. He was a member of a money purchase pension through his employer. He was making an increased contribution to this pension of approximately £2,040 per month, with his employer also contributing £680 per month. And it was noted this pension was valued at roughly £110,000 in February 2017.

Mr P also held two defined benefit pensions. One was from a period of employment between 1989 and 1996 which had a cash equivalent transfer value ('CETV') of £140,998 as of June 2016. In the notes about his pensions, it was recorded that Mr P did not intend to transfer this pension.

His other, larger DB scheme pension was in relation to 18 years of employment from 1996. This had a CETV of £340,556. It was noted that this was the pension Mr P intended to transfer and wanted advice about. And this is the pension that was then reviewed.

The fact find said Mr P intended to retire as soon as possible. He expected to need an income of around £15,000 per year in retirement to maintain his standard of living but noted additional funds could be required for non-regular expenditure on occasions. He wanted to draw this income from a combination of his pensions and savings.

The fact-find also included a section of questions in order for IFAL to assess Mr P's attitude to risk ('ATR').

The fact-find was signed by Mr P on 5 March 2017 to say that the information contained was correct. And IFAL says this was actually sent to Mr P and completed by him independently, ahead of later discussions.

On 19 April 2017, IFAL carried out two transfer value analysis ('TVAS') reports. These gave

an indication of the likelihood of Mr P being able to replicate the benefits the DB scheme offered, by a transfer to two different providers. The reports both set out that at age 65, the normal scheme retirement age, Mr P was estimated to be entitled to a full annual pension starting at £15,976 under the DB scheme. The reports included a calculation of the critical yield - the annual growth rate required of a new pension to allow Mr P to purchase equivalent benefits that would match the guaranteed benefits of his DB scheme at retirement. The critical yield to match the benefits of the DB scheme at age 65 were 6.78% and 7.54% depending on which of the two providers IFAL compared was chosen.

I've also seen evidence that, on the same day, IFAL obtained illustrations and retirement modellers from the two pension providers that it considered in the TVAS reports. It also obtained annuity quotes, showing what level of guaranteed pension could be taken outside of the scheme.

IFAL has provided notes of a follow up meeting held on 20 April 2017. The notes say the content of the fact find was discussed, with it being recorded that Mr P's savings were in fact worth approximately £200,000. IFAL said it had assessed Mr P's ATR as 'moderate'. The discussion then turned to the DB scheme pension. The notes say that the advantages – such as the escalating guaranteed income – and the disadvantages – the relative inflexibility of the benefits – were discussed. It says the critical yield was discussed as well as retirement modellers and quotes for immediate annuities. The notes said that IFAL's recommendation was not to transfer, because the income from the DB scheme was guaranteed for life, regardless of how inflexible it was. And that meant that if Mr P wanted to transfer, this would need to be done on an insistent customer basis. But the notes go on to indicate that the merits of the two pension providers compared in the TVAS reports were then also discussed with Mr P.

An 'insistent customer disclaimer' was completed at the time of the meeting. This said IFAL had advised Mr P not to proceed with the transfer. But he had decided to proceed against this advice and, having made that decision, wanted IFAL to recommend a suitable pension provider. The form stated the provider that IFAL recommended. Mr P signed this document on 20 April 2017. It was also signed by an 'independent witness'. But the person that signed as a witness was also a financial adviser associated with IFAL who I understand was party to the advice and subsequently went on to provide ongoing advice to Mr P. I don't think it was reasonable to imply that this person was independent.

An application form was then signed and completed, also on 20 April 2017, for Mr P to transfer out of his DB scheme and take out a personal pension with one of the two providers IFAL had considered. Forms instructing the trustees of the DB scheme to release funds were also completed with Mr P on the same day.

IFAL emailed Mr P on 28 April 2017 saying, as agreed, it hadn't submitted the application to give Mr P a chance to think over the transfer. So, it asked if he wanted to still go ahead. Mr P replied on 2 May 2017 and said he wished to go ahead. And I've seen evidence that IFAL sent the application forms on the same day.

On 4 May 2017, IFAL wrote to Mr P. It confirmed that it had submitted his application for a personal pension. It also enclosed a suitability report which it said confirmed the reasons "*for the 'potentially suitable' recommendation which we have agreed to continue with on an insistent customer basis*".

The suitability report recapped Mr P's circumstances largely in line with the fact find. It again noted though that Mr P had £200,000 of savings, rather than £20,000. It said Mr P's objectives were to retire that year and have flexibility in terms of how he could draw his benefits from this scheme to meet his income needs for the first few years of retirement

before his other DB scheme came into payment from age 65, estimated to provide £9,600 per year, and he began receiving his state pension from age 66. It also said Mr P was interested in leaving any remaining pension benefits to his siblings and nieces. It re-capped the benefits of the DB scheme. And IFAL said it thought the critical yield of 6.78% was unlikely to be achieved.

IFAL said its recommendation was “*That you do not transfer the [DB] Scheme due to the guaranteed income you would be giving up.*” But it went on to say “*However, you have insisted that you wish to transfer out of the [DB] Scheme because a flexible personal Pension meets your priority of being able to take flexible income payments in the early years until your [second DB pension] and State Pension begins. I have therefore, agreed to treat you as a ‘potentially suitable insistent customer’ because we have used cash flow forecasting and established that there is a good chance the transferred benefits and your existing Pensions and assets will meet your income needs in retirement. I will help you to transfer the money out of the [DB] Scheme and advise you on a suitable provider to look after your money.*”

IFAL went on to explain it had recommended a specific pension provider and managed fund which it felt was in line with Mr P’s ‘conservative / moderate’ ATR. It was also recommended that Mr P receive ongoing servicing, at a cost. Which I understand he agreed to.

Mr P complained in 2022, via his representative, to IFAL about the suitability of the transfer advice. His representative said IFAL had contacted him unprompted about a pension review. They said Mr P had been advised to transfer to a personal pension as this would be more beneficial and he’d make more money by transferring. But they felt IFAL hadn’t considered Mr P’s circumstances, the recommendation was not suitable for him and IFAL hadn’t made the risks clear.

IFAL didn’t uphold Mr P’s complaint. It said Mr P had approached it for advice and had formed an opinion about transferring his DB scheme to meet his needs before taking advice. IFAL said it had advised Mr P not to transfer but he had chosen to do so against its advice. It had subsequently recommended a provider to him, and it felt that recommendation was suitable.

Mr P referred his complaint to our service. He said when he’d spoken to IFAL it had only focused on the positives of a transfer and hadn’t discussed the risks in any great detail. He also said he’d been told he needed to complete the insistent client declaration for legal reasons at the end of the process, with the CETV shortly due to expire. He confirmed he had retired within a year of the advice but, if IFAL hadn’t emphasised the positives of the transfer, he’d have likely looked to take benefits under the DB scheme to achieve the same outcome.

One of our Investigator’s considered the complaint. He recommended that it be upheld and that IFAL compensate Mr P for any loss the transfer had led to. The Investigator said he thought it was unlikely Mr P would improve on his DB scheme benefits by transferring and he didn’t think Mr P had a need to transfer as he could’ve achieved his objectives through other means. But, while IFAL said it had advised against a transfer, he thought the process it followed was flawed and didn’t allow Mr P to make an informed decision about whether to proceed as an insistent client. And he felt, if clearer information had been given, Mr P would not have proceeded with the transfer.

IFAL said it did not agree with the Investigator’s opinion. As a result, 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 Businesses ('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 IFAL'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. This includes COBS 19.1.6G which says that the starting assumption for a transfer from a DB scheme is that it is unsuitable, and should only be considered if it can be clearly demonstrated that the transfer was in the consumers best interests.

Was a transfer suitable for Mr P?

IFAL carried out a transfer value analysis report (as required by the regulator). This said, in order to purchase equivalent benefits to those the DB scheme guaranteed to provide at age 65, Mr P's new pension would need to grow by 6.78% per year (the critical yield that would need to be achieved). Or indeed 7.54% had he chosen the other provider IFAL compared.

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 at the point of the advice was 3.1% per year for 5 years to retirement. Which would've been the case if Mr P took benefits at age 65. 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%. Suggesting achieving the required critical yield was unlikely. And indeed, I note that IFAL acknowledged in the suitability report that a consistent return of 6.78% was unlikely to be achievable.

Mr P was interested in retiring imminently at the time of the advice. Early retirement was

possible under the DB scheme. And I've seen a copy of a quote from December 2016, that said at that time Mr P could take immediate retirement under the scheme and draw either an annual pension starting at £11,412.64 or take tax-free cash ('TFC') of £54,458.35 and a reduced starting pension of £8,168.75 per year.

By comparison, using the CETV he could've purchased an annuity paying £7,799.04 per year. Or taken tax-free cash of £85,660.54 and an annuity paying £5,822.04.

There would be little point in Mr P 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 I think Mr P was always likely to receive benefits of a lower overall value than the DB scheme as a result of transferring.

IFAL noted that Mr P was said to be interested in being able to access his pension flexibly, to meet his stated income needs of £15,000 per year in retirement until his other guaranteed pensions began.

The TVAS report estimated that the pension Mr P would be entitled to at age 65 would start at £15,976 per year. The suitability report said that Mr P could take his benefits from age 60 without incurring an actuarial reduction. So, this suggested that Mr P could've deferred his retirement by less than a year and met his income needs from his DB scheme alone. However, I'm not sure the statement in the suitability report that this could be taken without actuarial reduction from age 60 is accurate. The scheme information suggests benefits could be drawn from age 62 without actuarial reduction but only for active members – whereas Mr P was a deferred member.

But this notwithstanding I still don't think Mr P needed flexibility to meet this goal. As I've said, Mr P could've drawn immediate pension benefits under the DB scheme, as I've set out. These benefits wouldn't have been sufficient to meet his income needs on their own. But Mr P was recorded as having a significant amount of savings – in excess of £200,000. Which he could've used to supplement the benefits from his DB scheme to meet his income needs until his other DB scheme came into payment. And I note the fact-find even suggested that this was Mr P's intention, to supplement his pension income with savings.

And in fact, given Mr P's level of savings and relatively modest income needs, he could've used his savings to meet his income needs entirely for the five years until the normal retirement age of this DB scheme and his other DB pension. Which would've then combined to more than exceed his expected needs.

And that is not even accounting for the money purchase scheme he was a member of through his employer at the time of the advice. This could've been accessed flexibly through early retirement and, based on its value and before even accounting for further growth, would've been enough to meet his income needs until age 65, had Mr P wanted to leave his savings intact.

So, I don't think Mr P needed to transfer to meet his income needs.

I note that IFAL said another of Mr P's objectives was to potentially be able to leave his pension fund as a legacy to his siblings and nieces. But while death benefits are an emotive subject the priority here was to advise Mr P about what was best for his retirement provisions. And I don't think transferring for this purpose was in his best interests given he was likely to see his pension benefits reduce – particularly when he could've taken life insurance to provide a legacy to his extended family had he so chosen.

Taking all of this into account, I don't think a transfer was in Mr P's best interests here.

Was Mr P insistent and would he have acted differently?

In February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There are 3 key steps, which it set out on its website as follows.

- 1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*
- 2. You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
- 3. It should be clear to the client that their actions are against your advice.*

The regulator said the advice should be set out clearly in the suitability report, and that it needed to be clear with its client about the risks of their chosen course of action and that he or she is acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this would normally be clearer.

The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

“The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.

The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.

Robust warnings were given and documented.”

Whilst this was guidance, and not rules, I would've expected IFAL to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

IFAL says it agreed that a transfer was not suitable and didn't recommend a transfer to Mr P. But he chose to proceed despite that advice, as an insistent client. The summary notes of the meeting on 20 April 2017 do include a line that its recommendation is not to transfer. And the same is repeated in the suitability report. But I think there were flaws in the process that IFAL followed that undermined this.

The meeting of 20 April 2017, which was attended by two financial advisers associated with IFAL and Mr P, was where the recommendation was first discussed. The meeting notes indicate that Mr P's circumstances and objectives were discussed, comparisons of the benefits the DB scheme offered with alternatives talked about and that IFAL then said it didn't recommend a transfer. So, this would appear to suggest a potentially balanced discussion taking place. But Mr P's recollections are that the positives of transferring were given significantly greater emphasis than the negatives.

The reasons for not recommending a transfer recorded in the meeting notes are also sparse – simply that the income was guaranteed. There was no other commentary recorded at that point about the reasons for IFAL's recommendation. But, as I've explained above, there

were several other things that in my view meant a transfer was not in Mr P's best interests. And these should've been considered and explained to Mr P so that he could make a fully informed decision. And I can't say that they were at that stage.

The notes also indicate that, immediately on saying a transfer was not recommended, it was explained to Mr P that he could proceed on an insistent client basis. And Mr P has said that this was positioned as simply being part of the process that he needed to follow. This being presented immediately as part of the same discussion, didn't in my view provide Mr P with sufficient time to consider the recommendation itself.

The notes also say that the meeting then went on to discuss potential providers for Mr P's new pension and said that the two advisers had chosen a provider that they believed was suitable for Mr P. This recommendation of a provider having been prepared in advance of the meeting and then immediately put to Mr P, as part of the same discussion, in my view undermined the significance of the recommendation not to transfer.

During the same meeting Mr P completed application forms to enable the transfer. And he was asked to sign a pre-prepared declaration that he wished to proceed on an insistent client basis. The fact that this declaration had clearly been drafted in advance of the meeting indicates IFAL always intended to give Mr P the immediate option to disregard its advice. I don't think by doing that it was acting in his interests. And completing the application forms at the meeting again in my view undermined the apparent recommendation.

The declaration that Mr P completed didn't include any explanation as to his reasons for wanting to proceed. Nor did it ask Mr P for an explanation in his own words why he wanted to go ahead. And there is no evidence that IFAL sought clarification as to why he was apparently disregarding its advice or that it challenged these reasons. Given the regulator says the starting position is to assume a transfer from a DB transfer will be unsuitable, and IFAL said it thought that was the case here, I'd have expected to see some evidence of this happening. Because by not, at the very least, recording Mr P's reasons or addressing these, I don't think IFAL was acting in his best interests.

IFAL did follow up with Mr P by email to ask him if he wanted to proceed. But by that point it hadn't provided any further information for him to consider. And Mr P's response to this was a one line email saying he did want to go ahead. No further reasons were sought from him and IFAL made no attempt to handle his apparent objections to its initial advice.

The other thing that I think was a significant flaw in the process that IFAL followed is that the suitability report was not provided until after all of this had happened and the application had been submitted. So, Mr P wasn't given the option to consider IFAL's written advice at all, prior to a decision to proceed on an insistent client basis having been made and the application submitted. And even when the suitability report was provided, it referred to the recommendations as being that a transfer was 'potentially suitable' because IFAL thought *"there is a good chance the transferred benefits and your existing Pensions and assets will meet your income needs in retirement"*. The report also didn't provide any real further context why the transfer was not in Mr P's best interests.

I think a fairer process would've been for IFAL to present its advice to Mr P, verbally and through a suitability report, and allow him the opportunity to go away and consider this. If he had then come back to IFAL, it could've explored his reasons for still wanting to proceed and looked to address these, given it says it didn't recommend a transfer. And then, if Mr P still wanted to proceed and it agreed to assist, given a recommendation about a potentially suitable provider.

But the process IFAL followed here means I don't think it gave Mr P sufficient information

about its recommendation to make an informed decision. Or sufficient time to think about this. It then in my view undermined that recommendation by immediately presenting what it deemed to be a suitable new pension provider. Which was further compounded by later referring to this as a 'potentially suitable transfer'. And by presenting the option of proceeding on an insistent client basis, and preparing that option in advance, I think shows that IFAL made it altogether far too easy for Mr P to agree that he was an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer. So, I don't think he truly could make an informed decision about this. And I don't think therefore he can reasonably be said to have truly been an insistent client.

Would Mr P have acted differently?

While I think there were failings in the advice process by IFAL, I have to consider whether Mr P would've gone ahead anyway as an insistent client, if clearer advice had been provided and a more appropriate process followed.

IFAL has said that Mr P approached it with the idea of transferring his DB scheme pension already in mind. It also says he'd obtained a transfer value before contacting it. And in the fact-find, which IFAL says he completed independently, Mr P referred to his DB scheme as the pension he intended to transfer. But IFAL's role wasn't to facilitate what Mr P might've thought he wanted, it was to advise him on what was in his best interests.

The meeting notes refer to the reason for the discussion as being Mr P wanting to establish if a transfer out of the scheme would benefit him and to review his pension to see if it is right for him. The suitability report also refers to the meeting between the parties having been arranged because Mr P "*would like to know what benefits the Pension Scheme provides, how the Pension Scheme compares to a Personal Pension and the options available to you*". So, these don't reflect that he was as unequivocal in his intentions as IFAL now claims.

From the information I've seen Mr P doesn't appear to have been an experienced investor. Or that he had any specific knowledge relating to pensions, above that of a normal consumer. And as I've said, I can't see that IFAL did enough, or anything for that matter, to address why Mr P apparently wanted to proceed with the transfer against its recommendation. If this had been properly addressed, and a more appropriate process - which made the advice clearer and allowed Mr P to make an informed decision having fully considered the advice - followed, I'm not persuaded that Mr P would've insisted on transferring out of the DB scheme, against IFAL's advice.

I'm not persuaded that Mr P's preconceived thoughts on transferring, if he had any, were 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, with all of the reasons for this having been explained. Rather I think more fully formed advice would've carried significant weight if he'd been given the appropriate opportunity to consider this, rather than immediately being directed towards proceeding as an insistent client. So, I don't think Mr P would have insisted on transferring out of the DB scheme.

As a result, I think Mr P's complaint should be upheld and that IFAL should compensate him 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 P, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr P would have most likely remained in the occupational pension scheme if suitable advice had been given.

IFAL 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, I understand Mr P retired at age 60 and, in the circumstances, I think he'd have likely drawn benefits from the DB scheme at that point had he remained in the scheme. So, I think compensation should be based on him taking benefits at this age.

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 P'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, IFAL should:

- calculate and offer Mr P redress as a cash lump sum payment,
- explain to Mr P 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 his DC pension
- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr P accepts IFAL's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr P 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 P's end of year tax position.

Redress paid to Mr P 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, IFAL 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 P'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 Intelligent Financial Advice Limited to pay Mr P 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 Intelligent Financial Advice Limited pays Mr P the balance.

If Mr P accepts this decision, the money award becomes binding on Intelligent Financial Advice Limited.

My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P 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 P to accept or reject my decision before 1 September 2023.

Ben Stoker
Ombudsman