DRN-4141449

The complaint

Mr L complains that Tuto Money Limited provided him with unsuitable advice to transfer his defined benefit pension to a personal pension. He said it caused him a financial loss.

What happened

One of our investigators considered Mr L's complaint. He sent both parties his assessment of it in April 2023.The background and circumstances to the complaint and the reasons why the investigator thought it should be upheld were set out in his assessment. However in summary, Mr L was discussing his pension requirements with Tuto Money in May 2016. Mr L completed a client questionnaire for it which recorded that Mr L didn't know details about his pension, but that he was planning to take his tax-free cash *'…to be used to move abroad'.*

A section of the questionnaire asked a series of questions about Mr L's attitude to risk. This recorded that Mr L 'agreed' that he'd rather put his money in cash than invest in shares, would prefer guaranteed returns than uncertainty, and was more concerned with possible losses than possible gains. It also confirmed only limited losses (0-5%) could be incurred before having a significant impact on Mr L's standard of living. In its Pension Report Tuto Money said it had been agreed that Mr L's attitude to accepting risk was 'Low'.

Mr L had a deferred annuity policy with a cash equivalent transfer value of £40,892. During a call between Mr L and Tuto Money Mr L said that he'd returned paperwork to his pension provider and although he didn't understand it he'd taken the lump sum and a small pension.

Tuto Money's adviser told Mr L that by transferring away he could obtain double the amount of tax-free cash. This would leave him with a pot of around £30,000 which could be dipped into if required, as opposed to taking the smaller pension. The adviser agreed to contact the pension provider to retract his instruction. And Tuto Money subsequently discussed with Mr L about him applying to transfer his pension.

A Pension Transfer Report noted that to mirror the benefits which would be payable if Mr L retained the existing pension, a yearly growth rate of 3.57% would be required. This took into account some charges that reduced the growth by 0.5% per year. But no adviser charges were included in the analysis.

An illustration was also provided based on a cautious investment fund, where the gross yearly return was illustrated as 4.45%. It showed the costs of running the plan and investment fund were expected to reduce the growth rate by 1.25% per year. The adviser initial charge of £1,695 and ongoing costs of 1% per year were expected to reduce the growth by a further 1.4% per year. So the total charges were expected to reduce the growth rate by 2.65% per year, meaning a projected growth rate of 4.45% would be lowered to 1.8% per year after charges.

Tuto Money recommended Mr L transfer his pension benefits to a personal pension as he required cash to aid his transition in moving abroad. It said Mr L would also like to leave the full value of the pension to his wife in the event of his death and to take income flexibly.

Tuto Money recommended that Mr L transfer the deferred annuity to another provider into a flexible drawdown arrangement and invest in a flexible cautious fund.

The transfer took place in June 2016. The amount transferred was £40,892. After the tax-free cash and Tuto Money's initial charge had been deducted, approximately £28,900 was invested.

Mr L complained about the advice he received and subsequently referred the matter to us. In his assessment our investigator referred to the FCA's (Financial Conduct Authority's) Conduct of Business Sourcebook (COBS) rules which provided:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then 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 client's best Interests." (COBS 19.1.6).

The investigator said it was clear from the contemporaneous notes and call recordings that Mr L was interested in accessing his funds at that time. It was recorded that Mr L had been made redundant and wanted cash to pay for a move abroad. However there was no record of how much he required or by what date. The investigator said without knowing those details it wouldn't have been possible to say if Mr L should have waited to see what would occur regarding finding new employment, or if the existing scheme could provide the lump sum to meet his needs.

The investigator said 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, the investigator thought they provided a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investigator said that when Tuto Money advised Mr L it referred to the figure in the Pension Transfer Report showing a return of 3.57% was the required growth to mirror the existing benefits in retirement. He said this compared to the discount rate of 4.1% per year given Mr L's term to retirement. However the investigator said this wasn't an accurate comparison. He said the Pension Transfer Report didn't include the investment fund charges, nor advisory costs, both initial and ongoing. The investigator said the reduction in yield quoted in the Pension Transfer Report was 0.5% per year, compared to the recommended plan illustration of a reduction quoted as 2.65% per year. He said the difference of 2.15% would increase the required growth to around 5.72% per year, which was approximately 1.62% greater than the discount rate.

The investigator said that for further comparison the regulator's upper projection rate at the time was 8%, the middle 5%, and the lower rate 2%. He said that the illustration rates from the pension provider were a little over half a percent lower than these rates reflecting the cautious investment fund selected.

The investigator said Mr L's deferred annuity was his sole recorded pension provision aside from his state pension. With no other assets to rely on, he said Mr L had a low capacity for loss, which would've likely meant the security of the guaranteed benefits offered by the deferred annuity would've been very important to him. He said the deferred annuity offered valuable benefits with virtually no risk. And he thought this would have been more appropriate for Mr L given his circumstances at the time. He said he thought Mr L was likely to receive benefits of a materially lower overall value than the deferred annuity at retirement given the circumstances.

The investigator said that at the time the advice was given Mr L wasn't in a good financial position. He had recently been made redundant and had no income, savings or other investments. He acknowledged Mr L was keen to access his funds, although as he'd already noted, it wasn't recorded how much he required and when.

The investigator said that the adviser had explained to Mr L that as well as the greater tax-free cash he would be able to withdraw ad-hoc sums from his pension following the transfer. However the investigator said it wasn't explained that by drawing higher amounts than would have been payable though the deferred annuity Mr L would likely exhaust his fund. Mr L did subsequently make further withdrawals from his pension.

The investigator noted that one of the objectives for the transfer was to enable Mr L to improve on the pension's death benefits – both in terms of amount and flexibility. Mr L nominated his wife to benefit from 100% of the remaining funds. The investigator noted that the deferred annuity provided a 50% spouse's pension which would also have been paid to Mr L's wife. And although the personal pension paid out 100% of the fund value the annuity provided the significant benefit of a guaranteed income.

The investigator didn't think that Tuto Money had demonstrated there was a compelling need that meant transferring was in Mr L's best interests. He acknowledged that Mr L was keen to access the higher lump sum available following a transfer. And that the income that would have been payable from the deferred annuity was modest. However he said that Mr L was risk averse and didn't want to lose any money. And it was clear that Mr L didn't understand pension issues and was reliant on the advice he was being given. He said it wasn't clear what sum Mr L required or when. And Mr L had already started to arrange to take the deferred annuity before Tuto Money cancelled it.

The investigator thought, on balance, that if the adviser had recommended that Mr L retain the deferred annuity Mr L would likely have accepted that advice. He said Mr L was clearly relying on the adviser's advice given his lack of understanding of pensions. And he didn't want to risk his funds. He thought if the risk had been appropriately explained Mr L would have been more comfortable with the lower risk presented by the deferred annuity and kept it. The investigator said he therefore thought that Mr L's complaint should be upheld.

Tuto Money didn't agree with the investigator's findings. It said although the investigator had said it wasn't clear how much money Mr L required and when, it was clear from the Fact Find and its report that Mr L wanted the maximum tax-free cash and as soon as possible. It said on all the pension withdrawal documentation all the expected caveats and warnings had been provided about Mr L's fund running out (and it provided copies of the documentation).

Tuto Money said that although the investigator had quoted the critical yield the FCA had itself said this was less important than making sure a client was able to meet their objectives. It said Mr L was quite clear, as he had no access to any other funds and needed the money to move abroad.

Tuto Money also said the transfer did provide additional flexibility, and especially on death. Although Mr L may have nominated his wife to benefit from 100% of the remaining funds he could change his beneficiary at any time if, for example, his wife pre-deceased him. And in *those circumstances* the remainder of the funds would be paid out but if he kept the deferred annuity nothing further would be paid on death.

Mr L, through his representative, agreed with the provisional findings.

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.

Having done so, I've come to the same conclusions as the investigator, and largely for the same reasons.

It's clear from the contemporaneous documentation that Mr L had very little experience or understanding of pensions or investments and so relied on the recommendation provided by the adviser. It's also clear that he was a low-risk investor, and had a low capacity for loss. His answers to the questions posed in the risk questionnaire were consistent with someone who was not comfortable with and didn't want to take any appreciable risks.

As explained by the investigator, COBS rule 19.1.6 provides, in summary, that when advising a retail client about transferring safeguarded benefits a firm should start by assuming that a transfer will not be suitable. And that a firm should only then consider a transfer to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best Interests.

The suitability report said that an investment return of 3.57% was required on the transfer value to match the benefits that would otherwise have been provided by the annuity at age 65. It went onto say "it is **likely** that this level of growth would be maintained over a period of time. **Because this would rely on investment growth, it may be that you will be giving up a more valuable benefit in favour of taking the tax-free cash now."**

However as explained by the investigator, this 3.57% figure didn't reflect all the charges that were associated with the transaction. In reality something around 5.5% would have been required every year. So this was more consistent with the middle growth rate used in the regulator's illustrations. Whilst I accept the firm did say that Mr L *may* be giving up a more valuable benefit, I think the investment return actually required was significantly higher than Mr L understood he had agreed to accept. And given the cautious nature of the funds that Mr L was invested in I think it was more the case to be *unlikely* that such a level of growth would be maintained over time. So I think this was misleading, and I don't think Mr L was in a position to make an informed decision.

I accept the yield required on the investment is only one factor to consider in deciding if a transfer is in the client's best interests. But it does give *some* indication of the degree of risk being presented.

In making his complaint through his representative Mr L has said if he'd known the transfer of his pension would have resulted him losing money in retirement he would not have gone ahead with it. And his representative said that Mr L's temporary need for cash should not have taken priority over the future of his retirement. Mr L said that the firm didn't ask him about alternative ways to generate cash to meet his objectives. And that he could have borrowed money from his wife's parents which he now thinks was a better option.

Clearly this is said with the benefit of hindsight and so has to be considered in that context. However, it is consistent with the documentation that was completed at the time recording Mr L's low risk profile, consistent with Mr L's responses to the risk questionnaire and consistent with his very limited capacity for loss. Tuto Money didn't explain to Mr L that in reality the investment risk was higher than he had initially agreed to accept, but that it provided other benefits that might make taking that greater degree of risk worthwhile to enable him to make an informed decision. So the transfer wasn't consistent with either Mr L's appetite or capacity for risk.

Tuto Money said that Mr L's wife's circumstances were discussed, and Mr L made no mention of his wife's parents being able or willing to lend them money. However I've seen no record of alternative options to raise cash (over and above the £4,500 provided by the deferred annuity which I accept he was taking) having being discussed outside of Mr L's existing financial provision or his wife's, as Tuto Money was obliged to explore.

As explained above, COBS 19.16.6 required that the firm demonstrate on contemporary evidence, that the transfer was in Mr L's best Interests. Taking all the above into account and for the reasons set out by the investigator, I don't think Tuto Money has demonstrated it was in Mr L's best interests, and so I think the investigator's recommendation that the complaint should be upheld is reasonable.

Putting things right

A fair and reasonable outcome is for the business to put Mr L, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr L would likely have retained the deferred annuity if suitable advice had been given.

Tuto Money must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, Mr L had applied to take benefits from the deferred annuity in May 2016. And he took benefits shorty after. Compensation should be based on him taking benefits at the same time.

This calculation should be carried out using the most recent financial assumptions in line with 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 L's acceptance of this decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Tuto Money limited should:

- calculate and offer Mr L redress as a cash lump sum payment,
- explain to Mr L before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their personal pension
- offer to calculate how much of any redress Mr L receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr L accepts Tuto Money's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr L for the calculation, even if he ultimately decides not to have any of their redress augmented.

Redress paid to Mr L as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Tuto Money 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 L's likely income tax rate in retirement – presumed to be 20% here. So making a notional deduction of 15% overall (where some of it could be paid as tax free cash) from the loss adequately reflects this.

Income tax may be payable on any interest paid. If Tuto Money deducts income tax from the interest, it should tell Mr L how much has been taken off. Tuto Money should give Mr L a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My final decision is that I uphold Mr L's complaint.

I order that Tuto Money Limited calculates and pays Mr L compensation as outlined above under "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 July 2023.

David Ashley
Ombudsman