

The complaint

Mr H complained about the advice given by one of Frank Corrigan & Co. Limited's ("Frank Corrigan") advisors to transfer the benefits from his ex-employer's defined benefit occupational pension scheme ("DB pension") to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr H is being represented by a claims management company. For ease I will just refer to Mr H.

What happened

The advice and transfer took place in 2007. Mr H was contacted about transferring the DB pension as his ex-employer was looking to reduce its exposure to future pension liabilities and to finalise their liability. The ex-employer was offering to enhance the transfer value of the DB pension by approximately £57,000 if Mr H decided to transfer it. Mr H was essentially given three choices:

- to remain in the DB pension
- to transfer the DB pension to another pension – with the enhancement being paid into the new pension, or
- to transfer the DB pension to another pension – with the enhancement being paid to Mr H.

A transfer analysis ("TVAS") report was completed which said:

- the DB pension would pay Mr H £8,748 per year from age 65
- the transfer value of the DB pension with the enhancement was just over £114,000
- the critical yield (the amount the new pension needed to grow by in order to match the DB pension benefits) on £114,000 being transferred was 6.7% if Mr H took a full pension (ie without taking any tax-free cash) from age 65.

Mr H approached Frank Corrigan in May/June 2007 to discuss his pension and retirement needs. Frank Corrigan's notes at the time refer to the enhancement and a deadline of the end of June for Mr H to make his decision. I understand several discussions took place. On 15 June the advisor wrote to Mr H. He gave information about transferring – in summary, this was basic information about the consequences of transferring and the suggestion of a particular pension provider. The advisor said the main benefit of transferring would be to negate Mr H's insecurity over the DB pension and to take the incentive being offered.

Frank Corrigan later completed a fact-find to gather information about Mr H's circumstances and objectives. It also carried out an assessment of Mr H's attitude to risk, which it deemed to be 'medium'.

On 5 July the advisor wrote to Mr H to confirm the advice and the reasons for the recommendations. In summary, he said transferring the DB pension without the incentive wouldn't be sensible; but transferring it with the incentive being paid into the new pension made the critical yield more achievable. The advisor again said the main benefit of

transferring was to negate Mr H's insecurity over the DB pension and to take the incentive being offered.

Mr H followed the advice and he transferred the DB pension in August. The incentive was paid into the new pension.

In 2022 Mr H complained to Frank Corrigan about the suitability of the transfer advice he'd received. In summary, he felt the advice was negligent and that he would have been better off in retirement if he'd remained in the DB pension. Frank Corrigan didn't think it had acted unreasonably. It said that prior to contacting it Mr H had already decided to transfer the DB pension with the enhancement to a new pension and he was simply looking for a better deal than that offered by the financial advisor appointed by his ex-employer. It also said it told Mr H about the risks in transferring.

Mr H referred his complaint to our service on 16 June 2022. Frank Corrigan didn't consent to us investigating the complaint as it felt Mr H referred it to us too late.

What I've provisionally decided – and why

I issued a provision decision which explained why I felt Mr H's complaint fell within our jurisdiction and why I felt it should be upheld. I've repeated the relevant parts from my provisional decision below, and they form part of my final decision.

Our jurisdiction

- If a financial business doesn't consent, we can't consider a complaint if the complainant refers it to us:
 - more than six years after the event being complained about happened
 - or, if that six year period has passed, more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint.
- For the six year time limit, as the event Mr H complained about was the advice in 2007 he needed to have referred a complaint to us by 2013. As we didn't receive the complaint until 2022, Mr H referred the matter to us too late in respect of this time limit.
- For the three year time limit, Mr H's complaint would have been referred to us too late if he knew or should reasonably have known before June 2019 that he had cause for complaint.
- Frank Corrigan felt the annual pension statements from 2012 showed that despite the value of Mr H's fund increasing each year his projected pension in retirement was less than what he'd given up (and in some years was less than the year before). It felt this made Mr H aware, or ought to have made him aware, that he had a cause for complaint by July 2015, which in turn meant that the three year time limit for him to complain expired in 2018. Mr H on the other hand said he didn't realise he might have been better off financially if he'd kept the DB pension until 2022 when his representative explained it to him.
- The annual pension statements the pension provider sent Mr H over the years contained the following information which I thought was relevant:

Year	Value of pension fund (rounded to nearest	Estimated value of pension fund at	Projected annual pension at retirement
------	--	---------------------------------------	---

	£1,000)	retirement (round to nearest £1,000)	(without taking tax-free cash)
2011	£127,000	-	-
2012	£124,000	-	£6,820
2013	£141,000	-	£7,010
2014	£159,000	£223,000	£6,680
2015	£168,000	£247,000	£6,670
2016	£177,000	-	-
2017	£202,000	£289,000	£6,670
2018	£217,000	£291,000	£7,220
2019	£204,000	£264,000	£6,570

- The information showed that from 2012 to 2019 Mr H's projected annual pension at 65 fluctuated between £6,570 and £7,220. These figures compared to the DB pension of £8,748. So Frank Corrigan was correct in its argument that the statements consistently showed that Mr H's projected pension in retirement was less than what he would have received from the DB pension.
- But, the issue for me to decide was whether that made, or ought to have made, Mr H aware that he had a cause for complaint about the advice he'd received in 2007. I didn't think it did because:
 - the disparity between the DB pension and the projected pension wasn't particularly large
 - the period in question was one where investment growth was generally low – meaning that Mr H wouldn't have necessarily expected his investment to increase significantly
 - even as late as 2019 Mr H was still 11 years away from retirement – meaning there was still time for his pension investment to grow (particularly given his 'medium' attitude to risk)
 - it wasn't necessarily straightforward for a direct comparison to be made between the two figures as the projected annual pension was "in today's prices" – which meant it had been adjusted to take inflation into account.
- Overall, I didn't think the information in the statements was enough for Mr H to think that something was wrong with the advice he'd received and/or for him to act. I hadn't seen anything to suggest that Mr H was aware, or that he ought to have been aware, of a cause for complaint until 2022.
- I concluded that Mr H referred his complaint to us within the three year time limit.

The merits of Mr H's complaint

- I took into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I considered to have been good industry practice at the time. This included the Principles for Business ("PRIN") and Conduct of Business ("COB") rules, including:

PRIN 2.1.1(6): A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 2.1.1(9): A firm must take reasonable care to ensure the suitability of its advice...

COB 5.3.29(A): When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer,

a firm should: (a) start by assuming it will not be suitable; and (b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests (known as the 'presumption of unsuitability').

- Given the presumption of unsuitability, Frank Corrigan should have only considered a transfer if it could clearly demonstrate that transferring was in Mr H's best interests. I wasn't satisfied that it was.
- Financial viability was an important consideration in me determining whether transfer advice was suitable. Mr H was 42 at the time of the advice and he wanted to retire at 65. The TVAS showed that Mr H's pension fund would need to grow by 6.7% every year in order to provide the same benefits as his DB pension if he took a full pension.
- The advice was given during a period when we published 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Businesses weren't required to refer to these rates when giving advice on pension transfers; but I thought they provided a useful indication of what growth would have been considered reasonably achievable when the advice was given in this case. The discount rate at the time of the advice was 6.6%.
- I took this into account, along with the composition of assets in the discount rate, Mr H's 'medium' attitude to risk and the term to retirement. The difference between the critical yield and the discount rate was only 0.1%. However, the critical yield was the growth needed just to match the DB pension and I thought that was important because there was little point in Mr H giving up the guarantees available to him through the DB pension only to achieve, at best, the same level of benefits outside the scheme. As the critical yield here was 6.7% and the discount rate was 6.6%, I thought Mr H was likely to receive benefits of a substantially lower overall value than the DB pension at retirement, as a result of investing in line with his attitude to risk.
- For this reason alone, I thought a transfer out of the DB scheme wasn't in Mr H's best interests.
- Mr H had concerns over the funding of the DB pension and there were various articles in the press at the time. But I didn't think the DB pension was in a position such that Mr H should have genuinely been concerned about the security of his pension. This was because the ex-employer had said scheme members had no cause to worry about future payments, their pension was secure and the company was honouring all the benefits. Furthermore, if the pension did end up moving to the Pension Protection Fund ("PPF"), I thought Frank Corrigan should have explained to Mr H that this wasn't as concerning as he thought. Mr H was still unlikely to match, let alone exceed, the benefits available to him through the DB pension. So it was possible the benefit provided by the PPF would be similar to the pension provided by the personal pension.
- I could understand how the enhanced payment into his pension might have seemed attractive to Mr H. However, even with the enhanced payment it was unlikely that Mr H would match or exceed the guaranteed benefits available to him through his DB pension if he transferred it to a personal pension.
- Prior to contacting Frank Corrigan Mr H might have had the idea of transferring his DB pension given his concern and the enhancement being offered. But Frank Corrigan wasn't there to just transact what Mr H might have thought he wanted – the advisor's role was to understand what Mr H needed and to recommend what was in his best interests.

- Similarly, although Frank Corrigan pointed out the potential risks of transferring the pension it's responsibility went further than this. It had to recommend what was in Mr H's best interests and show that despite the risks transferring the pension was in Mr H's best interests.
- Ultimately, I didn't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing pension income and by transferring he was likely to receive lower retirement benefits. In my view, there were no particular reasons which would justify a transfer and outweigh the lower pension. Mr H shouldn't have been advised to transfer out of the DB pension just because of the enhanced payment being offered and his fears. I wasn't persuaded it was worth giving up the guarantees associated with the DB pension. And I wasn't persuaded that Frank Corrigan had shown that the transfer was in Mr H's best interests – as per the presumption of unsuitability.
- I thought Frank Corrigan should have advised Mr H to remain in the DB pension. I considered whether Mr H would have gone ahead anyway but I wasn't persuaded that he would have insisted on transferring out of the DB pension, against the advice. I said that because Mr H was an inexperienced investor and his DB pension accounted for the majority of his retirement provision. And I wasn't persuaded that Mr H's concerns about the DB pension were so great that he would have insisted on the transfer knowing that a professional advisor, whose expertise he'd sought out and was paying for, didn't think it was suitable for him or in his best interests.
- If Frank Corrigan had provided Mr H with clear advice against transferring out of the DB pension, explaining why it wasn't in his best interests, I thought it was most likely that Mr H would have followed that advice. So, I didn't think Mr H would have insisted on transferring out of the DB scheme.
- In light of the above, I thought Frank Corrigan should compensate Mr H for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Responses to my provisional decision

Mr H confirmed that he had nothing further to add. Frank Corrigan made various comments in respect of our jurisdiction. In respect of the merits of the complaint and the proposed redress it argued that Mr H didn't take steps to mitigate his loss.

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.

Our jurisdiction

In my view, Frank Corrigan's response to my provisional decision centred on two main strands – the information Mr H received from the annual pension statements; and my comment about not seeing anything to suggest that Mr H was aware, or ought to have been aware, of a cause for complaint until 2022. It made various points, including:

- reference to a decision another ombudsman made in 2014 which said that the projected pension benefits shown in the pension statements should have made the consumer in that case aware of a cause for complaint

- Mr H had the 'mental ability' to understand mathematics and complex topics, and his qualifications and daily work meant he was able to consider the implications of the information contained in the pension statements
- Mr H's decision to not retain its services for ongoing advice implied that he was confident in his ability to monitor his investments and make investment decisions
- Mr H was warned in 2007 that transferring meant he'd lose the guaranteed income provided by the DB pension and that the pension income he'd receive would instead be dependent on other factors eg growth
- Mr H appointed another financial advisor, which led to a further transfer of his pension in May 2019.

I don't think what the ombudsman said in the previous case adds any value to Frank Corrigan's argument. Like my colleague, in deciding when Mr H ought to have realised there was a cause for complaint I looked at the annual pension statements. But there are various factors that need consideration – including:

- what information is contained in the statements and how clear it is
- how easy it was for the consumer to compare the information to their DB pension and/or to previous years
- whether the figures were increasing or decreasing and by how much
- how far away the consumer was from retirement.

As each case is assessed on its own merits, different conclusions might be reached on two seemingly similar complaints. If the circumstances in this case were different – eg if Mr H was much closer to retirement – I might have reached a different conclusion.

In deciding this complaint I'm required to consider what a reasonable person of Mr H's background and experience would have concluded from the information available to him. Mr H may well have a degree of intelligence and mathematical ability. However, I don't think that automatically means he had experience in making financial investments or in understanding pensions. I note that the Fact Find recorded that apart from his DB pension Mr H didn't have any investments other than savings. So, despite what Frank Corrigan argues, I don't think it's fair to assume that Mr H was an experienced investor or had a significantly higher level of knowledge on these matters than an average consumer.

I don't think Frank Corrigan telling Mr H about the potential risks of transferring the DB pension is sufficient to say that he ought to have known that he had a cause for complaint about the advice. That's because if he'd known or suspected that the advice was unsuitable I think it's very unlikely that he would have followed it. And knowing that the pension income is no longer guaranteed isn't the same as knowing or suspecting that the advice to transfer was unsuitable and is actually going to cause a financial loss.

Frank Corrigan has raised the fact that Mr H might have received further advice in/around 2019. In order to establish precisely when he was told that he might have grounds to make a complaint, it said it's trying to get information from the new pension provider. It also suggested that I get Mr H to provide copies of correspondence between him and the new financial advisor.

This complaint has been with us for around 12 months so I think Frank Corrigan has had enough time to get any information from other parties to support its case. I'm therefore going to decide the complaint based on what's currently available. I'm not going to get copies of any correspondence between Mr H and his new advisor. That's because, in my experience, where a consumer receives further advice in respect of a later pension transfer the advice concentrates on the later transfer. I've never seen a case where the new advisor has

commented on the suitability of a previous transfer from a DB pension. So I think it's unlikely Mr H's new advisor would have done so in 2019.

I explained in my provisional decision why I didn't think the information in the statements was enough to put Mr H on notice that he had a cause for complaint about the advice he'd received. I also said I hadn't seen anything to suggest that Mr H was aware, or ought to have been aware, of a cause for complaint until 2022. The comments Frank Corrigan has made in response don't persuade me to change my conclusion.

I therefore conclude that Mr H referred his complaint to us within the three year time limit.

The merits of Mr H's complaint

The only argument Frank Corrigan made in response to my provisional decision in this respect concerns Mr H not mitigating his loss. It said Mr H didn't retain its services as his financial advisor and had he done so it would have drawn his attention to the shortfall every year. It feels that Mr H's actions mean his losses are greater now than they would have been if they'd been addressed 15 years ago so it's inequitable for it to be held liable for all the financial losses.

I don't think it's possible for someone to mitigate a loss they didn't know they were suffering or would suffer. I make that point as I've concluded above that it wasn't until 2022 that Mr H was aware of, or ought to have been aware of, a problem/cause for complaint in respect of the advice he received. So I think it's difficult to conclude that he should/could have taken any mitigating action before 2022.

In any event, Mr H's decision to not retain Frank Corrigan for ongoing advice wasn't unusual or unreasonable. Many consumers only seek advice for the initial pension transfer and many won't seek further advice until they want to transfer the pension again or take their pension benefits. I'm not therefore persuaded that Mr H failed to take reasonable action to mitigate any loss, or that he took any unreasonable action which increased the loss.

Summary

For the reasons outlined above, I conclude that:

- Mr H's complaint falls within our jurisdiction, and
- Frank Corrigan's advice to transfer the pension was unsuitable.

Putting things right

A fair and reasonable outcome would be for Frank Corrigan to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would have most likely remained in the DB pension if suitable advice had been given.

Frank Corrigan 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 H has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr H'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, Frank Corrigan should:

- always calculate and offer Mr H redress as a cash lump sum payment
- explain to Mr H 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 his defined contribution pension
- offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum
- if Mr H accepts Frank Corrigan's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr H for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr H's end of year tax position.

Redress paid to Mr H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Frank Corrigan 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 H'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 Frank Corrigan & Co. Limited to pay Mr H 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 Frank Corrigan & Co. Limited pays Mr H the balance.

If Mr H accepts my final decision, the money award becomes binding on Frank Corrigan & Co. Limited. My recommendation won't be binding. Further, it's unlikely that Mr H could accept my final decision and then go to court to ask for the balance. He 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 H to accept or reject my decision before 5 July 2023.

Paul Daniel

Ombudsman