

The complaint

Mr C complains about the advice given by City & Trust Finance Limited ('CTF') 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 contacted CTF in late 1995 to discuss his pension provision and wider financial needs. Mr C met with CTF in early 1996 when CTF completed a fact-find to gather information about Mr C's circumstances and objectives. It noted the following:

- Mr C was aged 36 and married with two dependent children aged 4 and 2. His wife was aged 26.
- He earned an annual income of £20,300.
- Mrs C wasn't working.
- Mr and Mrs C's home was valued at £40,000 with an outstanding mortgage of £14,000.
- Mr C had no savings or investments although he appeared to have had an endowment policy in the past.
- Mr C had accrued 18 years of service in his DB scheme and had paid in some AVC's too.
- His financial goals were noted as retirement planning – with the aim of retiring at age 60 – providing for his family in the event of his death, and debt repayment. It was noted Mr C had taken a loan from his parents.

On a handwritten note from around the time CTF met with Mr C it had noted also that he wanted to transfer his DB scheme to a personal pension plan because he didn't trust his former employer with the future of his pension.

CTF also carried out an assessment of Mr C's attitude to risk, which it deemed to be medium, or between five and six on a scale of one to ten.

CTF contacted the DB scheme administrator for information about the DB scheme. The information provided by the scheme administrator showed that the total cash equivalent transfer value ('CETV') for Mr C's scheme benefits was £36,963.40 which included AVC's of £8,287. The scheme information also showed that at the scheme's normal retirement date ('NRD') of age 60, Mr C's deferred pension benefits would provide him with an annual income of £6,144.58 (or £7,010.94 if taken at age 65). It also provided him with the option, at either retirement age, to take a reduced income and a tax-free lump sum.

CTF contacted a pension provider (which I shall refer to as S) which produced illustrations and a transfer value analysis report ('TVAS'). This information was sent to Mr C by CTF on 26 April 1996 and the covering letter said it was important that he fully understand the report.

Mr C wrote to CTF in May 1996 to say that he wanted to proceed with the transfer because CTF had considered all the relevant factors about the transfer along with the annual

investment return (also known as the 'critical yield') needed to match the benefits of his DB scheme. Mr C also said that the recommendation to transfer was based on reasonable assumptions. He said too that he understood he may get back less but that he considered the critical yield of 9.57% cited in the TVAS report to be achievable and was willing to transfer the CETV to S in view of its good investment record. Mr C said he'd like his money invested 50% in the with profits fund and 50% in the mixed fund.

Mr C completed the necessary paperwork and the transfer of his DB scheme benefits took place at the end of July 1996. A total of £37,630.08 was transferred into a personal pension provided by S.

In or around 2009, Mr C engaged the services of a new independent financial adviser ('IFA') and following the advice he received he transferred his personal pension to another provider.

In March 2022, Mr C complained through his representative to CTF about the suitability of the transfer advice it had given him. He said that as a result of the advice he'd received he'd suffered a financial loss as well as losing all the guaranteed benefits associated with his DB scheme. Mr C said that CTF had failed to assess the suitability and the associated risk of its recommendation to transfer. Finally, Mr C said that CTF had offered unrealistic guarantees in relation to the investment performance of the personal pension and hadn't taken into account all of his goals, objectives and personal circumstances.

CTF looked into Mr C's complaint but didn't think it had done anything wrong. It said it had explained to him the guarantees he was giving up and that forthwith he would be the one to bear the financial risk associated with his pension. It also said it had explained the need for him to supplement his financial planning by taking out other insurance to replace the guarantees he'd had with his DB scheme. CTF said it had adhered to the regulator's requirements as they stood at the time and at no time had it provided Mr C with any guarantees as to the future performance of his new pension. Finally CTF said it had taken Mr C's aims and objectives into account when it was advising him.

Unhappy with the conclusion of CTF's investigation into his complaint, Mr C complained to this service. Our Investigator looked into Mr C's complaint and recommended that it was upheld. He thought that Mr C was unlikely to be able to improve on his DB scheme benefits as a result of investing in the way CTF had advised him to and thus was more likely to receive benefits at retirement of a lower overall value than those he was giving up. Our Investigator also thought that Mr C had little capacity for loss, nor did he think there were really any other compelling reasons to justify the transfer. Finally our Investigator noted that CTF hadn't provided Mr C with a recommendation so hadn't acted with due care, skill or diligence. Our Investigator recommended that CTF compensate Mr C in line with the regulator's rules for calculating pension redress.

CTF disagreed with our Investigator's findings. It said: -

- it thought the recommendation to transfer, and that the choice of investments, was suitable for Mr C's target investment growth.
- that based at the information available at the time, and in the early years after the transfer, the investment growth exceeded the critical yield of 9.57% identified in the TVAS.
- that the security of Mr C's pension, in an era before the existence of the Pension Protection Fund, was very important to him. CTF explained that a couple of years after the advice, Mr C had called to say he had changed employers and had negotiated a higher salary in exchange for not joining his new company's pension scheme. CTF said it advised him against this but that Mr C had explained that a family member had seen his pension benefits disappear in a scandal. As a result, Mr C wanted his own plan that he

was in control of so that he never found himself in a similar situation. CTF said that the problems that had befallen Mr C's family member may well have pre-dated its 1996 advice to him and had thus underpinned Mr C's objective of transferring and taking control of this pension himself.

- It hadn't wished to influence Mr C's decision so had set out the information for him in an objective manner whilst retaining impartiality.
- Facts about the transfer were discussed during the advice process and it made sure Mr C understood what he was giving up.
- That the robustness of files and the information included in suitability letters has changed a lot since the 1990's.
- It disputed that accepting advice about the provision for protection indicated a prudent approach on the part of Mr C. CTF said this was because having recommended suitable protection plans for him, none were put in place which shows that it can't really have been a particular priority for him. CTF listed all the plans it had set up and/or recommended and which had been cancelled shortly after inception or were never taken up.
- Mr C's approach to security and financial planning demonstrated that he didn't want to be in a DB scheme.
- It disputed that Mr C had no capacity for loss. CTF said that at 36, Mr C had most of his working life ahead of him so had the opportunity to accrue more pension benefits.

Our Investigator thought about what CTF had said but wasn't persuaded to change his mind.

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. 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 advice was provided by CTF in late 1995 to early 1996. At this time it was regulated by the Personal Investment Authority ('PIA'). CTF was a previous member of the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA'). When the PIA took responsibility for FIMBRA businesses in 1994, it adopted the FIMBRA rules. And these adopted rules applied at the time of the advice in this case.

What follows 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 CTF's actions here.

The FIMBRA rulebook set out the expectations on members when giving advice. The key rules applying from April 1988 were as follows:

- Rule 4.2.1 required an adviser to take reasonable steps to obtain relevant information concerning a client's personal and financial circumstances in order to provide investment services.

- Rule 4.3.1 required FIMBRA members to take all reasonable steps to satisfy themselves that the client understood the risks involved in a transaction.
- Rule 4.4.1 required members to establish, based on their knowledge of the client and 'any other relevant information which ought reasonably to be known' to them, which types of investment that were the most suitable for them.

In July 1988 an amendment to the guidelines on best advice required members to ensure their recommendations were made on the basis of the client's best interest rather than the income generated for the member. In July 1994, in a further amendment to the guidelines, members were required to produce a Transfer Value Analysis ('TVAS') and a 'reason why' letter to explain the recommendation being given and why the advice is suitable. It was possible for a pension provider to carry out the TVAS on behalf of an IFA.

The regulator, the PIA, also indicated in July 1994 that it expected firms to find that many customers would be better advised to remain in their occupational schemes, however, it should be presumed that it would be unsuitable for an active member to opt-out of their occupational DB scheme.

I've considered the advice given to Mr C with this in mind.

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.

Financial viability

S carried out a TVAS report on behalf of CTF (as was permitted by the regulator at the time) showing 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).

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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 for a typical investor at the time the advice was given in this case.

Mr C was aged 36 at the time of the advice and wanted to retire at age 60. The critical yield required to match Mr C's benefits at age 60 was 9.57% if he took a full pension. No critical yield was produced for taking a tax-free lump sum and a reduced pension. This compares with the discount rate of 9.9% for 24 years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate was 6%.

I've taken this into account, along with the composition of assets in the discount rate, Mr C's attitude to risk and also the term to retirement.

In order to achieve benefits that were better than those offered by the DB scheme he was giving up, Mr C's personal pension fund had to provide a greater annual return than 9.57% each year. This figure is very slightly lower than the discount rate of 9.9% but slightly higher than the regulator's middle growth rate.

CTF assessed Mr C's ATR to be five to six on a scale of one to ten but I'm unable to agree with that assessment. There is nothing in the fact-find to support the conclusion that Mr C was an individual whose ATR was bordering on aggressive (or level six on a scale of one to ten). I would expect someone whose ATR is assessed at a level six to be able to display

some evidence of previous investment experience. However, aside from a mention that an endowment policy had been surrendered (there are no details for how long it was held etc.) there is no evidence that Mr C had any investment experience; indeed he had no savings or investments at all. So there was nothing in his profile that, in my view, could lead to the conclusion that Mr C, someone with no experience of investing in the stock market, should reasonably be classified as someone whose ATR was bordering on aggressive and who was willing to take the investment risks necessary to achieve the returns needed so that his personal pension fund grew to a point that it was able to match his DB scheme benefits.

I think that Mr C's ATR, given his personal circumstances at the time, should more reasonably have been assessed as no more than medium/moderate (or level 5 on CTF's fact-find). Indeed the with-profits fund in which Mr C invested 50% of his transferred pension benefits is generally regarded as a lower risk investment and thus was likely to achieve returns nearer the lower end of the regulator's projection rates. And whilst I note CTF's comment that at the time of the advice, and in the early years after the transfer, that the investment growth exceeded the critical yield of 9.57%, the fact remains that the pension needed to achieve annual investment growth of 9.57% throughout its entire term just to match the benefits Mr C was giving up in his DB scheme.

So I think that it's unlikely that someone with a medium ATR (or no more than 5 on a scale of 1 to 10) would, if it was fully explained to them, be willing to take the investment risks necessary to achieve an annual investment return in excess of 9% just to match the scheme benefits being given up. In any event, there would be little advantage to giving up the guarantees associated with a DB scheme just to be able to match – not even exceed – the benefits being given up.

Nor do I think that the length of time Mr C had to go to retirement means his capacity for loss was significant. I can see that Mr C had no savings at the time of the advice. He had a mortgage but I don't know how long it had left to run. But it can't be assumed that just because Mr C had 24 years to go until he retired that he could afford to 'gamble' by transferring his DB scheme. The income he was forecast to receive at retirement from the scheme (if he remained) is, I think, one he didn't have the capacity to lose.

So given the critical yield was 9.57%, that Mr C's ATR should more reasonably have been assessed at no more than level 5/medium, that the regulator's middle projection rate was 9% and that Mr C had invested half his pension on CTF's advice in a lower risk (and therefore likely to give lower returns) with-profits fund, I think Mr C was likely to receive benefits of a lower overall value than from his DB scheme at retirement, as a result.

For this reason alone a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as CTF has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Other considerations

From the available evidence it appears that Mr C had no specific objectives in making the transfer beyond wanting to do so because he didn't trust his former employer with the future of his pension. There was also a reference in the fact-find to Mr C wanting to provide for his family in the event of his death but I'm not persuaded that this was a reason for Mr C transferring his DB scheme. There certainly is no reference to it in the evidence I've seen.

And I have noted that CTF endeavoured to address the issue of life insurance with Mr C through a series of recommended protection plans (including life assurance policies) that were either not taken up or the direct debits were stopped shortly after inception. I can see that CTF put together a package of protection plans in June 1996 that provided Mr C with £157,602 of life insurance cover (which included £50,000 of critical illness cover) at a cost to him of £50 per month. So I can't reasonably say that the death benefits associated with a personal pension plan were one of Mr C's objectives for transferring.

That said, I do think that CTF failed to highlight the death benefits Mr C had under his existing DB scheme. Mr C was married so the spouse's pension provided by the DB scheme would've been useful to his wife (and indirectly his dependent children) if Mr C predeceased her. I don't think CTF made the value of this benefit clear enough to Mr C. It was guaranteed and it escalated – it was not dependent on investment performance – whereas any sum remaining on death in a personal pension was.

I think Mr C's desire for control over his pension benefits because he didn't want to entrust them to his former employer (or feared they would be lost in a pension scandal) was overstated. Mr C was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr C – it was simply a consequence of transferring away from his DB scheme. And based on what I've seen the funding of his employer's DB scheme was not in a position such that Mr C should have genuinely been concerned about the security of his pension. And if it was acting in Mr C's best interests I think that CTF should have done more to allay any fears Mr C had in this respect or, at the very least, explored with him why he felt that way. But I've seen no evidence that it did so.

Nor have I seen any evidence that CTF explained to Mr C that his retirement aim of age 60 could be achieved by remaining in his DB scheme. In any event, Mr C was only aged 36 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr C had 24 years before he thought he would retire, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr C to give up his guaranteed benefits when he didn't know what his needs in retirement would be. If Mr C later had reason to transfer out of his DB scheme he could have done so closer to retirement.

From 1994, the then industry regulator, the PIA, required advisers to provide consumers with a 'reason why' letter to explain the recommendation being given and why the advice to transfer was suitable. There is one letter from CTF to Mr C on file dated 29 April 1996. The letter set out the four options Mr C had and enclosed the TVAS and pension illustration. At no point in the letter did CTF make a recommendation or explain to Mr C why the transfer was suitable for him. And as CTF has told us since, it hadn't wished to influence Mr C's decision so had set out the information for him in an objective manner whilst retaining impartiality. But CTF doesn't deny that it gave Mr C advice or recommended the alternative pension arrangement so I don't think it met the requirements of the PIA regulations. It should have been advising Mr C on the best course of action and explaining to him why it was in his best interests to take it. But I can't see that CTF discharged its responsibilities in this respect at any point in the advice process.

Suitability of investments

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 recommendation. This is because Mr C should have been advised to remain in the DB

scheme and so the investments he made wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the control of his pension sounded like an attractive feature to Mr C. But CTF 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. By transferring, Mr C was likely to obtain lower retirement benefits given his ATR and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

Mr C's only objective was to remove control of his pension from his former employer but I don't think CTF interrogated this objective in any meaningful way – it didn't establish (at the time) why Mr C felt that way, nor did it challenge any preconceived ideas he had on the matter. I appreciate the PPF was yet to be established, and that there were some contemporary pension scandals happening but that didn't mean that Mr C's DB scheme was similarly at risk. A robust conversation about this ought to have reassured Mr C that remaining in his DB scheme was in his best interest.

So I'm not persuaded that Mr C's concerns about his former employer 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; I think that would've carried significant weight. So, I don't think Mr C would have insisted on transferring out of the DB scheme.

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

In light of the above, I think CTF 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 CTF 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.

CTF 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 C 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 of 60, 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 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, CTF should:

- calculate and offer Mr C redress as a cash lump sum payment,
- explain to Mr C 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 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 CTF's offer to calculate how much of their 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 their 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, CTF 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 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 City & Trust Finance Limited to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that City & Trust Finance Limited pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on City & Trust Finance Limited.

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 27 September 2023.

Claire Woollerson
Ombudsman