DRN-4163976

The complaint

Ms D complains about the advice given by Lifestyle Financial Services (Droitwich) Limited ('LFS') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Ms D contacted LFS in June 2021 to discuss her pension. LFS says Ms D had spoken to another adviser, at the company she worked for, about transferring her benefits. And they had suggested she should not do so. But she wanted advice about this.

I understand LFS had an introductory meeting with Ms D on 29 June 2021, during which it recorded information about her circumstances. It noted she was 58, single, employed earning approximately £23,000 per annum and had two non-dependent children. She owned her own home, unmortgaged, with no other liabilities or debts recorded. And Ms D had approximately £12,500 in savings.

In addition to her DB scheme benefits, Ms D was recorded as having another small pension, valued at just over £6,500. But no other retirement provisions were noted. And, based on the information recorded, the DB scheme, which had a cash equivalent transfer value ('CETV') of £189,669.84, seems to have represented the majority of Ms D's private retirement provisions.

LFS said Ms D didn't intend to retire for at least four years and didn't anticipate needing to draw benefits until then. It said she was interested in transferring to have more flexibility and to provide her the option of leaving her pension to her children if she passed away. There doesn't appear to have been any information recorded about her expected retirement income needs.

LFS says there was a general discussion about attitude to risk ('ATR'). It says that Ms D told it, when she discussed her pension with an adviser from her employer, she'd been told her ATR was too low for a transfer to be worthwhile. LFS says it explained that Ms D would need to be comfortable accepting average to above average risk, which it referred to as an ATR of 'average plus risk', before it provided advice.

On 30 June 2021, LFS sent Ms D a letter. This said that Ms D wanted it to give her advice on the advantages and disadvantages of transferring out of her DB scheme and that ideally she would like to give up these benefits to invest in a flexible arrangement that could pass to her children. It said the normal retirement age of the DB scheme was 60 and at that point it was estimated the scheme would provide a guaranteed escalating pension starting at £4,800 per year. It also said there was the option to take tax-free cash but didn't set out in monetary terms how this would impact the benefits.

It then explained that the CETV could purchase an annuity at that time for someone aged 60 on a single life basis – as Ms D was single – paying £5,143 per year, escalating at 3%. So, it said the transfer value could purchase a better pension than the scheme assuming RPI was equal to 3%. And it said if Ms D transferred to a flexible pension, she'd need to achieve growth of under 3% per year to be able to draw a pension starting at £4,800 and increasing in line with inflation.

LFS said the advantages were the flexibility a transfer would provide but said Ms D would need to be able to tolerate risk and that it would urge her to keep withdrawals within 4% of the fund value to preserve it.

The letter concluded by saying, once Ms D had read the letter, she should let LFS know how she wished to proceed. LFS included client and fee agreements with the letter for Ms D to complete – including an agreement that LFS would provide ongoing servicing of the pension, for a fee, if transferred.

I understand these were signed and returned around 3 July 2021, based on when the signatures were dated.

On 5 July 2021, LFS sent Ms D a further letter. This gave a recommendation for a pension provider and about how the funds should be invested after a transfer. It said Ms D had an 'average plus risk' approach. LFS recommended investment in eighteen different funds, fact sheets for which said they were largely rated around 5 or 6 on a scale of 1-7 in terms of risk.

Transfer paperwork appears to have been signed on 5 July 2021 and I understand the pension was invested in line with LFS' recommendation.

When Ms D came to have her first annual review with LFS in 2022, I understand the value of the pension had fallen to under £160,000. She raised concerns about this and whether the investments were right for her as she was concerned they were too high risk. Ms D then raised a complaint with LFS about the advice it had provided, as she felt transferring was unsuitable adding that what 'average plus risk' meant was never clearly explained to her.

LFS didn't uphold Ms D's complaint. It said it had told Ms D that unless she was willing to accept risk or was looking to buy an annuity, the information she'd been given by her employer was right – that a transfer wasn't suitable. But it said she had indicated she was happy to take 'average plus' risk and the transfer meant the pension could be left to her children. LFS also said that, even though the fund value had fallen, because of market conditions changing, Ms D could still purchase an annuity providing greater benefits than the scheme pension. So, it said she was in a better position and didn't agree the advice was unsuitable.

Ms D referred her complaint to our service. One of our Investigator's considered the complaint. She thought it should be upheld and that LFS should compensate Ms D for any loss the DB transfer had led to. She said she didn't think Ms D needed flexibility and that alternative options for providing a legacy to her children weren't explored and would've been more appropriate, as the pension was intended to provide for Ms D's retirement. She didn't think, given Ms D was an inexperienced investor and the DB scheme made up the majority of her retirement provisions, that she had capacity to lose the pension. And she didn't think the evidence supported that her attitude to risk had been assessed – rather she thought LFS had gotten her to agree to a category that supported the transfer, without her necessarily understanding this. She thought Ms D's attitude to risk was more likely to be lower and that it wasn't clear that investing in line with that attitude to risk would've resulted in her improving her retirement benefits. So, she didn't think the transfer was suitable.

LFS disagreed and said Ms D's pension fund could still purchase an annuity that provided benefits exceeding the DB scheme.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

LFS then said, while it didn't agree with the Investigator's opinion, it would carry out a loss calculation and *if* that showed a loss it *may* decide to make a without prejudice offer. But it indicated that this could take several months. So, in the circumstances, as I'm in a position to do so, to bring finality to the matter I feel it is appropriate to issue my 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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of LFS's actions here.

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

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

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

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

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

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, LFS should have only considered a transfer if it could clearly demonstrate that the transfer was in Ms D's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

LFS says it told Ms D that unless she was looking to buy an annuity or was willing to take risk then a transfer was not suitable for her. And its letter of 30 June 2021 did say that the transfer value would purchase a better pension than the scheme on the open market and that if purchasing a personal pension Ms D would need to be able to tolerate risk and have an *"Average Plus (Average to Above Average) risk tolerance"*.

LFS has provided an annuity quotation from the point of sale. This was based on purchasing an annuity then, using the whole transfer value. With the policy being a single life annuity, with income increasing at 3% per year. But this quote was obtained on the basis that Ms D was 60 at that point, when she was only 58.

LFS has also said that an annuity paying the same annual amount, £4,800, as the DB scheme was estimated to provide from age 60 would've cost £177,020 at that time. Which was less than the CETV. But this again was on the basis of Ms D being 60 at that point, which wasn't the case.

These quotations weren't therefore based on Ms D's actual circumstances – specifically her age. I understand what LFS was aiming to achieve with these quotations – comparing what the DB scheme offered with the open market. But the amounts quoted weren't available to Ms D at the time of the advice. Because she was 58, not 60.

And the FCA prescribed a way for such a comparison to be carried out and presented. It required adviser to produce an appropriate pension transfer report and to calculate a transfer value comparator. But I haven't been provided evidence that LFS did so here. I think this was a significant failing on its part and meant that Ms D wasn't provided with all of the information that she should've been in order to make an informed decision.

LFS has said that it believes Ms D would be able to purchase an annuity now that exceeds what the DB pension would've provided, so its advice was suitable. But I'm looking at what happened at the time. And the analysis I've seen isn't sufficient to say, at the time, Ms D was likely to be better off.

In any event though, LFS didn't recommend that Ms D take an annuity. So, as LFS has acknowledged, unless Ms D was willing to take average to above average risk, the transfer would not have been suitable.

LFS has said that it had a general discussion about risk with Ms D when it first spoke to her – which I understand was the day before it issued its recommendation. And that it said she'd need an 'average plus' attitude to risk and that she agreed to this. But Ms D says what this meant was not explained to her.

I can't see that a detailed assessment of Ms D's attitude to risk was carried out. There is no record of explanations of risk, with subsequent questions, having been asked or recorded in order to actually establish Ms D's thoughts on the subject. Rather it appears that Ms D was told a level of risk that would make the transfer, in LFS' view, suitable, and asked to agree to this. But I don't think, given Ms D appears to have been an inexperienced investor, that she would've had the knowledge to decide this or that simply gaining her agreement represented an appropriate assessment of her actual thoughts relating to risk.

Looking at Ms D's circumstances, like our Investigator, I don't think this did likely reflect her actual attitude to risk. The DB pension made up the significant majority of her private retirement provisions. She had a small personal pension and some savings. But these were significantly smaller in value than her DB scheme pension. And as a result, I'm satisfied she didn't have the capacity to bare much loss at all to her pension scheme. I also haven't seen anything to suggest that Ms D was an experienced investor. And so, overall, I think it's likely that her real attitude to risk was low and certainly not at the level of 'average plus'. And indeed LFS has said that, during its 'general discussion' about risk with Ms D, she'd indicated that the previous adviser she'd spoken to had said her attitude to risk was too low for a transfer to be worthwhile.

With that in mind, given that LFS said that without Ms D having an 'average plus' attitude to risk the transfer would not be suitable, it appears that a transfer was unsuitable for her, based on her actual attitude to risk. And I can't reasonably conclude, a transfer was likely to result in her improving her retirement benefits, based on investing in line with her actual attitude to risk. So, it doesn't appear to have been in her best interests.

LFS has said that the transfer gave Ms D flexibility in how she could draw her retirement benefits, which it says she was interested in. But LFS' role wasn't to put in place what Ms D might've thought she wanted. It was to look at her circumstances and advise her on what was in her best interest. And I can't see that she had a specific need for flexibility.

LFS recorded that Ms D didn't intend to retire for several years – possibly after the normal retirement age of her scheme. But the scheme information indicates she could've deferred taking her benefits under the DB scheme had she wanted to. Or she could've drawn benefits and used these to supplement her income.

There doesn't appear to have been anything recorded about Ms D's income needs in retirement. And, given the primary function of a pension is to provide for the holder's retirement needs, I think this ought to have been considered. But there is nothing that supports that Ms D needed to transfer, in order to meet these needs or that drawing benefits under the DB scheme would not have met her needs.

There also doesn't appear to have been anything recorded about Ms D having any planned large expenditure that meant she had a genuine need to access tax-free cash earlier than the normal scheme retirement age, and leave her funds invested until a later date, or at all. Ms D was recorded as not having a mortgage or any other outstanding debt. And she had a reasonable amount of savings and a small personal pension that could've been used as an alternative.

So, I don't think achieving flexibility meant that a transfer was in Ms D's best interests.

LFS said that Ms D was interested in the option of leaving her pension to her children. And Ms D has confirmed this was one of her motivations for considering a transfer. Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. And the lump sum death benefits on offer through a personal pension might well have been an attractive feature to Ms D. But whilst I appreciate death benefits are important to consumers, and Ms D might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Ms D about what was best for her retirement provisions. Again, a pension is primarily designed to provide income in retirement.

In addition, I've seen nothing to suggest Ms D was not in good health. And given the sum remaining on death in a personal pension is dependent on both investment performance and withdrawals made by the pension holder during their lifetime, it was entirely possible there may not have been a large sum left to leave as a legacy, particularly if Ms D lived a long life. In any event, LFS should not have encouraged Ms D to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Ms D genuinely wanted to leave a legacy for her children, which didn't depend on investment returns or how much of her pension fund remained on her death, life insurance could've been explored as an alternative. But I can't see that this was discussed or considered. This option would've enabled Ms D to tailor her choice based on how much she would've ideally like to leave to her children, and this could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide. And given there was no indication Ms D was in ill health, was likely to have been an affordable alternative that did not require her to give up her security in retirement.

So, while Ms D might've thought transferring to achieve alternative death benefits was a good idea, I don't think different death benefits available through a transfer to a personal pension meant that this was in her best interests. And I don't think that insurance was properly explored as an alternative.

Ms D has also questioned the appropriateness of the investments which LFS recommended. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for her, it follows that I don't need to consider the suitability of the investment recommendation. This is because Ms D should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility and the potential for alternative death benefits on offer through a personal pension would have sounded like attractive features to Ms D. But, as I've already explained, LFS wasn't there to just transact what Ms D might have thought she wanted. The adviser's role was to really understand what Ms D needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Ms D was suitable. She was giving up a guaranteed, risk-free and increasing income. LFS acknowledged a transfer was likely unsuitable if Ms D didn't take an annuity, which it didn't advise her to, or if she wasn't willing to accept average to above average risk, which I'm satisfied was likely not in line with her actual attitude to risk. And, as I've explained, in my view there were no other particular reasons which would justify a transfer and outweigh this.

So, I think LFS should've advised Ms D to remain in her DB scheme.

Of course, I have to consider if Ms D would've gone ahead anyway, against LFS' advice.

I've considered this carefully, including the fact that Ms D had already spoken to an adviser from the business for which she worked, who had indicated a transfer was potentially unsuitable, but she still went on to speak to LFS. But I'm not persuaded that Ms D would've insisted on transferring out of the DB scheme, against LFS' advice. I say this because, whilst I appreciate this was the second opinion she had sought, I haven't seen anything to suggest that the discussion she'd had previously with her employer had resulted in formal advice or that she had paid for this service. And Ms D was an inexperienced investor with, in my view, a lower attitude to risk that LFS recorded and this pension accounted for the majority of her retirement provision. So, if LFS had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

I'm not persuaded that Ms D's thoughts about flexibility and the potential death benefits of a personal pension meant she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. Particularly if it had been explained that it didn't appear flexibility was a necessity or if alternative ways of providing a legacy had been correctly explored. If LFS had done this, as I think it should, I think that would've carried significant weight. So, I don't think Ms D would have insisted on transferring out of the DB scheme.

In light of the above, I think LFS should compensate Ms D for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Ms D, as far as possible, into the position she'd now be in but for the unsuitable advice. I consider Ms D would have most likely remained in the occupational pension scheme if suitable advice had been given.

LFS 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 Ms D has not yet retired. So, compensation should be based on her normal retirement age under the scheme 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 Ms D'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, LFS should:

- calculate and offer Ms D redress as a cash lump sum payment,
- explain to Ms D before starting the redress calculation that:
    - her 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 her redress prudently is to use it to augment her DC pension
- offer to calculate how much of any redress Ms D receives could be augmented rather than receiving it all as a cash lump sum,
- if Ms D accepts LFS' offer to calculate how much of her redress could be augmented, request the necessary information and not charge Ms D for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Ms D's end of year tax position.

Redress paid to Ms D 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, LFS 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 Ms D'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 £375,000, 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 £375,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Lifestyle Financial Services (Droitwich) Limited to pay Ms D the compensation amount as set out in the steps above, up to a maximum of £375,000.

Recommendation: If the compensation amount exceeds £375,000, I also recommend that

Lifestyle Financial Services (Droitwich) Limited pays Ms D the balance.

If Ms D accepts this decision, the money award becomes binding on Lifestyle Financial Services (Droitwich) Limited.

My recommendation would not be binding. Further, it’s unlikely that Ms D can accept my decision and go to court to ask for the balance. Ms D 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 Ms D to accept or reject my decision before 18 August 2023.

Ben Stoker
Ombudsman