DRN-4164773

The complaint

Miss N has complained that Pi Financial Ltd (Pi) provided unsuitable advice regarding transferring her Defined Benefit (DB) pension to a personal arrangement.

What happened

Miss N was a deferred member of a DB pension scheme. She was referred by a colleague to an appointed representative of Pi in 2016, as she was interested in what 'pension freedoms' meant for her pension.

A fact find meeting took place on 24 October 2016, recording the following:

- Miss N was age 52 and single in good health, with no dependants
- She was employed in the educational sector, which provided her with an ongoing local authority DB pension. The date of joining that scheme wasn't noted.
- She owned her own home valued at £145,000 as well as two rental properties valued at £115,000 and £110,000
- Her residential mortgage of £115,000 was on a repayment basis, ending at around age 70. The mortgages on the buy-to-lets totalled £150,000 and appear to be on an interest-only basis.
- Her annual earned income was £20,000 and rental income £12,000, giving her £1,000 disposable income per month
- Her cash savings were about £2,900

Pi also completed a retirement planning questionnaire which Miss N signed. This recorded that the aim of her seeking advice was *"amalgamation of pensions for ease of administration and flexibility".* It also recorded Miss N's attitude towards an occupational pension transfer with the following answers:

- *"I left my ex-employer on good terms and have no reason to question the security of the company or the manner in which the pension fund is being run."*
- "[The DB pension is] *A major proportion of my overall pension benefits which should be protected as far as reasonably possible."*
- *"A higher lump sum would be nice, but is not a priority for me. I would like the flexibility at retirement to control the way benefits are paid. I would like to make the decision depending on my circumstances."*
- *"I do not feel that I will ever be able to afford to retire early"* - Miss N realistically expected to retire at age 67.
- *"I have no dependents, and therefore a lump sum death benefits [sic] is not important to me."*
- *"I would like the flexibility at retirement to control the way* [death] *benefits are paid. I would like to make the decision depending on my circumstances at the time."* (But, having a spouses/dependant's pension was ranked as the least important to Miss N.)
- Miss N also felt that access to flexi- or phased drawdown was more important to her than a guaranteed income for life or for beneficiaries.

Further, Pi carried out a knowledge and experience assessment which recorded that Miss N had only taken advice on endowments and pension policies in the past. She hadn't dealt on an execution only basis.

The transfer value of Miss N's deferred DB scheme was £122,194 guaranteed until 4 January 2017. The scheme was 90% funded and there was a funding plan to cover that shortfall by 2027. She had about ten years' service and could expect a scheme pension of £6,372 revalued to the normal retirement age of 60, with a 50% spouse's pension. For unmarried members, the benefit on death before retirement was a cash sum of £13,804. In addition, she held an existing personal pension with Standard Life to which she was contributing about £64 per month gross. It had a transfer value of around £16,200.

Based on her answers to 12 multiple choice questions, Miss N was assessed to have a 'moderate' attitude to risk, which was level 3 on a scale of 1 to 5. However, following further discussion it was agreed 'moderately cautious' (level 2) was more appropriate.

A transfer value analysis (TVAS) was carried out for the DB scheme on 19 October 2016 (using a MetLife system). This was based on MetLife's charges of 0.7% initially and 1.1% ongoing, plus Pi's initial and ongoing charge. This established that a critical yield of 9%pa would be required to match the scheme pension, projected to be £5,724pa gross at age 60.

Miss N met with Pi on 24 October 2016 to go through the information, and she signed the fact find and original client agreement on that date. She was due to pay an initial fee of 5% of the amount transferred and ongoing advice fee of 0.75%pa.

Pi set out its recommendations in a suitability report dated 26 October 2016. Based on this and the 'Needs & Expectations' document, Miss N's objectives were as follows:

- Retire at age 67 with an income of £15,000 "in today's terms".
- Consider whether it was appropriate to transfer her DB scheme
- Consolidation of her pensions for ease of administration and flexibility

The report stated that Pi's recommendation was "<u>DO NOT TRANSFER</u>", based on Miss N's answers to the various questionnaires and the TVAS. The report contained the following statement:

> *"The critical yield needed to match your existing benefits at normal retirement age 60 is 9% pa which is the rate of annual growth which would need to be achieved by the insurance company to mirror the benefits being offered by your occupational scheme. This, in my opinion, is not achievable return, based on the 8 years to your 60th birthday and you will therefore receive a smaller pension than that you will enjoy from* [scheme]"

In response Miss N sent an undated handwritten letter to Pi, which Pi says was provided on 8 November 2016. It explained that, with reference to the report, Miss N still wanted to transfer for the following summarised reasons:

- Flexibility to take benefits as and when she desired, and to phase in her retirement
- Access a tax-free lump sum
- The opportunity to retire early without withdrawal penalties
- The opportunity to increase the pension benefits she would receive

Miss N signed a new 'insistent client' agreement on 8 November to transfer on this basis. A second suitability report was issued on 9 November 2016. It began by reminding Miss N (in bold) of the reason I've quoted above that Pi hadn't recommended the transfer. It then gave the reasons Miss N said she wanted to proceed and addressed the ways in which the Scottish Widows pension could meet those objectives.

A brief explanatory sheet was included saying that Scottish Widows' portfolio 4 had been chosen as it was aligned to Miss N's attitude to risk. From a factsheet provided I can see this was invested about 60% in fixed interest assets and 40% equities and alternatives. Pi added:

> *"We discussed the impact of significant downturns in market conditions on your personal pension plan and how this might affect your lifestyle and objectives in retirement. My assumptions, which I shared with you, show this course of action could potentially achieve your objectives, but it is important we keep this under regular review to ensure you are on track."*

Miss N signed the DB scheme's discharge form on 10 November 2016. The total transfers paid were £138,983 by 13 December 2016. An ongoing fee of 0.75%pa has been collected. Miss N applied to make regular contributions of £100pm to the new SIPP which also appear to have been paid.

On 8 October 2018 Miss N's new plan was valued at £144,870 versus the £141,283 paid in. She turned 55 in autumn 2019, and has told our investigator that she withdrew some of the tax-free cash in order to meet an unexpected bill to repair a roof. She's also said that she accessed her local authority DB pension in October 2021 after retiring due to stress. This paid her tax-free cash of £15,000 and a small annuity. She started doing casual work, but due to her financial situation has resumed contracting in the educational sector in late 2022.

Over this same time period, Miss N looks to have sold one of her rental properties (she now has one remaining), and the proceeds appear to have been used to clear a large part of the mortgage on her main residence (which recently had about £22,000 outstanding).

Miss N complained via her representative on 7 March 2022. In its final response of 4 May 2022, Pi rejected the complaint, broadly on the grounds that Miss N had acted against its initial advice, which had been not to transfer. In July 2022, the complaint was referred to us.

One of our investigators spoke with Miss N in December 2022. She said she'd been interested in finding out what the best thing was to do with her pension, as there had been lots in the news about how to draw down at age 55. She accepted she said it would be nice to take some money out of her pension if she could, as she lives on her own and didn't have much in the way of spare funds for unexpected spending. But she didn't agree with Pi's characterisation of the advice, when given verbally, being *not* to transfer.

Her recollection was that the flexible nature of the new plan was strongly emphasised, without warning her she'd be worse off – so she felt 'DO NOT TRANSFER' must have been written by Pi *"to cover themselves"*. Although she couldn't clearly remember writing the 'insistent client' letter, she accepted she probably did.

After speaking to the investigator, in February 2023 Miss N sent several emails to the same Pi adviser asking if he could give advice on paying off one of her mortgages with the pension. She said:

> "*I either want to pay of a* [£]*77,000 mortgage on my rental house or the* [£]*25,000 mortgage on the house I live in. Both mortgages will double in price, one in August and one in Nov which will add £500 to my monthly outgoings. Hence wanting to pay one off."*

The adviser returned the calls the following week, expressing surprise that Miss N was asking for advice whilst making a complaint. According to Pi's notes of the call, Miss N said that the complaint was prompted by a cold-call she received and she wasn't optimistic that it would be successful. The adviser explained that she had about £25,000 tax-free cash left to take, which Miss N considered if used to clear her residential property would make the buy to let mortgage manageable.

The discussions were concluded by email, and on understanding that the tax-free cash didn't need to be taken by the end of the 2022/23 tax year and there were at that time mortgage repayment penalties, Miss N decided to defer taking any action until November this year.

Two of our investigators have considered the complaint and both concluded that it should be upheld, broadly for the following reasons:

- Both the DB transfer and switch of the other pension didn't meet Miss N's objectives.
- Miss N shouldn't initially have been classed as a moderate risk investor, as her answers given on the risk questionnaire pointed to her being more cautious.
- The first suitability letter Miss N received wasn't clear, fair and not misleading as it was expected to be under the regulator's rules. It didn't explain that Miss N's objectives could be achieved without transferring.
- Although Pi said at the time that the DB transfer was inadvisable due to the high critical yield, it didn't explain clearly enough why.
- Pi should also have properly explained that the early retirement reduction from the DB scheme at age 55 simply reflects the longer time payments would be made for.
- The adviser didn't lay out any recommendations for the switch of the Standard Life pension at all, or consider the alternatives.
- This didn't provide an adequate basis for Miss N to be treated as an insistent client. The process had the impression of a 'papering exercise', rather than a genuine attempt to persuade Miss N that transferring wasn't in her best interests.
- The fee basis gave Pi had a conflict of interest, as its fee was contingent on the transfer going ahead.

Pi hasn't agreed with either investigator – for the following reasons in summary:

- Miss N's circumstances were taken into account, the advice provided was not to transfer, and this was clearly detailed in the suitability report.
- Miss N's recorded income objective of £15,000 from age 67 was realistic. After an assumption of £9,000 state pension and £12,000 from rental properties, it's reasonable to conclude she could have met her objectives without transferring.
- No transfer analysis/comparisons were run from age 67 as Pi considered it would have been more beneficial for Miss N to remain in the DB scheme.
- All the risks were explained to her and she fully understood the consequences of going against the advice, as was her right. She took 13 days to consider it.
- Miss N did not and still does not want a guaranteed income for life. She was adamant she wanted to access her pension from age 55 to clear some or all of her mortgages.
- Miss N went back to the adviser on 22 February 2023 for further advice, showing that she valued his expertise and advice. This was at odds with the complaint which had been made up by her representative.
- It's evident that if Miss N hadn't transferred in 2016, she would have done at the latest by age 55 in 2019 in order to have flexible access to her pension.

The second investigator pointed out to Pi that Miss N was an inexperienced investor, and this pension accounted for the majority of her retirement provision. As she had gone to Pi for advice, had suitable, clearly explained advice been given not to transfer, they thought it was unlikely she would then disregard it. And had Miss N not transferred from the DB scheme, the tax free cash sum that she might now consider using to repay her mortgage would still be significant.

Pi disagreed that Miss N was inexperienced, on the basis that she owned three properties *"and is fully aware of investing and the risks involved"*. It also said its client agreement explained that Miss N would have to pay a fee if the transfer didn't go ahead. Pi remained of the view that Miss N wanted to make the transfer as it better met her plans for clearing her mortgages, either on retirement or death.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

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

The applicable rules, regulations and requirements

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

Dealing with an insistent client

Pi says that it gave suitable advice for Miss N *not* to transfer her DB scheme to Scottish Widows, and it then fairly treated her as an insistent client. My starting point for assessing this is the FCA's guidance on insistent clients issued in February 2016[1]:

> *"1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*

[1]https://webarchive.nationalarchives.gov.uk/ukgwa/20160907175959/https://www.fca.org.uk/firms/pension-reforms-insistent-clients

2. You should be clear with the client what the risks of the alternative course of action are. Where the advice includes a pension transfer, conversion or opt-out, there may be additional requirements such as ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).

3. It should be clear to the client that their actions are against your advice.
…
You must ascertain the client's investment objectives before making a recommendation. A request or preference by the client for a particular solution – for example accessing cash from a pension – is not an objective. You must ascertain the client's actual investment objectives so that you can advise on a suitable course of action to meet them. You must also communicate with the client (for example in the suitability report) in a way that is clear, fair and not misleading (see Principle 7 and COBS 4.2.1)."

This guidance went on to specifically say that for DB transfers, the suitability report should not view suitability in the light of the critical yield alone, but explain the extent of the potential loss of benefits. So the first things for me to consider were what were Miss N's objectives, would a transfer meet those objectives and – even though Pi advised Miss N not to transfer – did it initially explain this outcome in a clear, fair and not misleading manner. If it didn't, then it becomes more difficult for Pi to demonstrate that it treated Miss N fairly as an insistent client.

Was a transfer of Miss N's DB pension suitable?

From what Pi recorded of Miss N's situation and what Miss N has told us, she was essentially interested in finding out whether she should change her pension arrangements to benefit from the freedoms that had been announced in 2014-5. Pi initially recorded that her aim was to consolidate her pensions for ease of access. This is consistent with Miss N's comments to our service that she was worried about being able to access a larger sum if the unexpected happened. The first suitability report said that *"if appropriate"* she would like to investigate a transfer to achieve her objectives – i.e. they weren't paramount.

The regulator states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Pi should have only considered a transfer if it could clearly demonstrate - on contemporary evidence - that the transfer was in Miss N's best interests. I can't fairly say that a desire to amalgamate pensions 'just in case' access was needed, when Miss N couldn't access them for another three years, would justify giving up the guarantees in the DB pension.

To my mind, there would need to be a reasonable prospect of Miss N gaining a benefit from the transfer *at that time*, rather than deferring and revisiting the question of transferring until at least age 55. Miss N had no dependants, and any outstanding debts in excess of her estate would die with her, so I also can't fairly say that provided a reason to transfer either. However as Miss N was single, she could potentially unlock the value of spouse's benefits from the DB scheme into the transfer value and use this to increase her own pension.

I can therefore see why Pi focused on the critical yield. That is, if Miss N took the cash equivalent transfer value of all the benefits (including spouse's benefits) at age 52, was there a reasonable prospect of the fund growing enough by the time she retired to purchase a comparable annuity that exceeded the DB pension she was giving up. If there wasn't any reasonable prospect of this happening either, I return to the point above that there was no logical basis for making the transfer at that time.

The critical yield is directly relevant to Miss N's situation as it's based on buying an annuity – and the suitable advice would likely be for her to buy an annuity at retirement, both because of her attitude to risk and her reliance on this pension for income. On Pi's attitude to risk questionnaire, Miss N agreed that she was an inexperienced, cautious investor who was concerned and anxious about volatility, and looked for safer investments even if that meant lower returns. She disagreed that she was comfortable with investing in the stock market, or that she found investment matters easy to understand, saw risk as an opportunity, or was willing to take substantial risk.

For Pi's scoring system to produce the result of a balanced risk profile with those answers suggests to me that something was wrong with the weightings used. She looks to me like a fairly cautious investor – as reflected by the fact that Miss N also wanted to lower the score when she discussed it with the adviser. Pi now says that, contrary to her own view at the time, Miss N was an experienced investor because she owned buy to let properties. That says very little to me about her ability to understand and accept the transfer of all investment and annuity rate risks from the DB scheme trustees to her individually.

A significant part of Miss N's income in 2016 was based on rent from investment properties, and if at least some were retained into retirement, that already exposed part of her income to risk. Miss N desired income of £15,000pa (in 2016 terms), so that would become somewhat more than this with inflation up to age 60 or beyond. It's generally recognised that the state pension alone won't provide a comfortable standard of living. Miss N's other pensions outside the deferred DB scheme were also relatively small. As she said herself at the time, this DB pension was a major proportion of her benefits and wanted to protect it as far as reasonably possible.

Pi's TVAS was based on a different plan than the one Miss N transferred to – it cost 0.3% more per year than the Scottish Widows plan and 0.7% more initially (which over an eight year term to age 60 would slow the growth down by about another 0.1%pa). So the critical yield for Scottish Widows would have been a little lower than 9%; in the region of 8.6%.

This critical yield also allows for Pi's initial fee, which Pi says Miss N would have had to pay whether she transferred or not. As the client agreement says *"Please note a minimum charge **may** be applied even if you choose not to invest in a product"* [my emphasis] it's not entirely clear that Pi would have charged 5% of the transfer value (over £6,000) if she hadn't transferred. It would have been fairly obvious to Pi that Miss N had insufficient savings to pay such a sum. But even if this had applied, it wouldn't make a difference to the fact that the critical yield was still plainly unachievable.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The discount rate at the time of Miss N's advice was 3.4% for 7 years to the normal retirement age (60) of the DB scheme she was transferring from. For further comparison, the regulator's upper projection rate at the time was 2%, the middle projection rate 5%, and the lower projection rate 8%. So taking this into account, along with the composition of assets in the discount rate, Miss N's moderately cautious attitude to risk and also the term to retirement, I think she was very likely to receive lower benefits as a result of transferring. That was the conclusion even though she was benefiting from the transfer value from the spouse's benefits. Unsurprisingly, Pi reached the same conclusion.

Did Pi explain a transfer wasn't suitable in a fair, clear and not misleading manner?

The first suitability report clearly stated Pi's recommendation was not to transfer because the critical yield wasn't achievable, and it said that the eventual pension she'd receive would be dependent on investment growth and annuity rates. But it didn't explain, in terms I think Miss N would have understood, the potential amount she could stand to lose. There's a single reference to the revalued DB pension at age 60 (estimated by the TVAS software) as £5,724pa, but Pi only emphasized this was guaranteed for five years – a reference to the death benefit which was somewhat irrelevant in her situation.

If it was acting in her best interests, Pi should have reiterated clearly that the entire DB pension was guaranteed for the whole of Miss N's life, and was the best way of meeting her objective of a secure income in retirement. Investing at a moderately low level of risk would mean a significant part of this would be lost. That could have been illustrated if personal pension projections at lower growth rates had been shown to age 60 (the same age as the figure of £5,724pa) in either the TVAS or on the Scottish Widows illustration, but they weren't. Pi muddied the waters further by referring to a Guaranteed Minimum Pension (GMP) which would be lost on transfer. But the DB pension was never going to be as low as just the GMP. Miss N was putting her entire pension at risk and not just the GMP.

In the same suitability report Pi then went on to list nine options Miss N had been asked to rank in order, which it then presented as objectives. The top five of which were access to drawdown, lump sums, early retirement, increasing her pension and phased retirement, all of which I appreciate might have seemed attractive to her. But as the FCA's guidance on insistent clients made clear, none of these were objectives in and of themselves – without being quantified in terms of how they would fit into her retirement planning.

But of more concern, in a report which was meant to be advising Miss N *not* to transfer, Pi presented several of these 'objectives' – even those such as death benefits which Miss N had said weren't important to her – as being more easily achieved from a transfer. (But notably not increasing her pension, which was highly unlikely to be achieved.) Pi said:

- Lump sum: this 'could' be available from the DB scheme but would be 25% from the personal pension
- Early retirement: *"The normal retirement age of the* [DB scheme] *is 60, whereas if you transfer you will be able to take benefits from the age of 55"* [it didn't say this option was likely also available under the DB scheme subject to trustee agreement]
- Death benefits: the personal pension could offer up to £125,000 in 7 years' time versus £24,300 from the DB scheme

The letter also made further comments as if the transfer was going ahead – for example stating that an income of £15,000 per annum was, in the view of the adviser, potentially achievable following transfer to a personal pension. Reference was made to an investment proposal (although this wasn't included), and the letter concluded by saying *"Turning to my specific recommendation"* where the retirement age for the new plan and charges for transferring are discussed.

Collectively, these support Miss N's recollections that the benefits of a transfer were being discussed in more specific terms than the preliminary warning that she should not transfer. Miss N believes the adviser was 'covering himself' and I can see how it might reasonably have come across this way. At the very least, the letter seems to have been poorly edited from a template used for recommending a transfer.

The letter also didn't discuss whether it was suitable advice to transfer the Standard Life policy at all. There appears to have been no intention to give that advice, as the adviser later obtained a letter from Miss N saying that she didn't require it. I'm therefore not persuaded that Pi presented its advice not to transfer in a clear, fair and not misleading manner. And that has implications for whether it has fairly treated Miss N as an insistent client.

The insistent client letter

This letter is in Miss N's own handwriting and although she can't remember much about it, she accepts she probably wrote it. It is similar to the other written instructions she gave the adviser at the time. I'm mindful that the regulator's guidance for insistent clients set out that ideally clients should use their own words to explain why they wanted to act against the firm's advice. So it's likely that the adviser would have asked her to write this letter, however she had been motivated to apparently act against his advice.

But what Miss N wrote in the letter weren't her own, alternative, reasons for wanting to transfer against Pi's advice, anyway. They are a repetition of the attractive features of flexibility, a tax-free lump sum, early or phased retirement 'without penalties' and the possibility of increasing her pension – all of which had already been highlighted to her in the suitability letter. So I can't fairly say Miss N was demonstrating in this letter that she was a genuine 'insistent client'. It was a product of the muddled advice process itself.

The letter shows that Miss N hadn't understood that she *wouldn't* improve her pension by transferring, and therefore what the significance of the critical yield – the reason Pi gave for not transferring – was. This is consistent with her recollection that she believed Pi's overall advice *was* to transfer, notwithstanding any warning she may have been given in writing. On balance, I think it's likely that Miss N would have seen this letter at the time as another of several instructions Pi was asking her to give in order for the transfers to go ahead.

How Pi responded to the insistent client letter

If Miss N was genuinely an insistent client, the regulator expected Pi to explain, by writing to her again, why her proposed course of action was against its advice. This should have meant challenging the misconceptions Miss N had that transferring might increase her pension benefits, when this was highly unlikely to be the case. That the 'penalty' for early retirement under the DB scheme was simply an adjustment to account for the pension being paid for longer, and was offset by the lower growth she'd achieve if she drew her personal pension earlier. And that giving up the guaranteed benefits under the DB scheme for more flexible options, before she needed them, wasn't a sensible basis for transferring and putting her lifetime income at risk.

Pi didn't challenge these misconceptions in its second suitability letter for the simple reason that it had prompted them in the first place. It was largely a repetition of the first suitability letter, this time without the investment recommendation omitted. Again the possibility of increasing her pension benefits was entertained, despite the same warning at the outset that this was highly unlikely. And the more flexible options were promoted as reasons for transferring. Overall, Pi was agreeing with the implied advice it had already given Miss N and which had prompted her to want to transfer. This was an unsuitable course of action for all the reasons I've given above, many of which Pi didn't explain to her at all.

Pi says that *"We have a robust Pension Transfer process within the network and all advice is reviewed by Pension Transfer Specialists before any case is authorised (whether the advice is to transfer or not)."* If this case had been reviewed properly, the two suitability letters would not have been sent in this form and Miss N should not have been treated as an insistent client. She should have been given clear, reasoned advice as to why remaining in the DB scheme would better meet her long-term needs. If Pi had done this rather than promoting the premature access to lump sums, I'm persuaded that Miss N would have followed its advice – just as she, not unreasonably, thought she was doing when she transferred.

Furthermore, COBS 2.1.2R sets out that *"A firm must not, in any communication relating to designated investment business seek to: (1) exclude or restrict; or (2) rely on any exclusion or restriction of; any duty or liability it may have to a client under the regulatory system."*

Amongst the letters I believe Miss N was asked to write to Pi was a request *not* to receive advice on the suitability of transferring her Standard Life pension. I think this was likely because Pi had already prepared a report at the time of the first suitability letter, on 27 October 2016, showing that a transfer to a Scottish Widows plan would only benefit Miss N very slightly if Pi didn't take its ongoing advice charge (which it actually did take) and the funds remained invested until age 67 so that the initial charge could be recouped. (The Standard Life charges were already fairly low, at 0.7%pa.)

I find it unlikely that Miss N would have declined advice on the Standard Life transfer of her own accord, when she had sought advice from Pi in the first place. I consider Pi treated Miss N unfairly here and in breach of COBS 2.1.2R and the clients best interests rule at COBS 2.1.1R. This also resulted in an unsuitable transfer of the Standard Life plan when she had no need to make that transfer.

Finally, I don't find it makes a difference to the outcome of this complaint that Miss N has returned to Pi for advice. Clearly, she is worried about the impact of current interest rates on her mortgage and is an ongoing client. If Pi is willing to advise her I don't see why she wouldn't take advantage of this. As it noted from its phone call, she wasn't yet sure if the advice subject to this complaint would be found to be unsuitable.

Putting things right

A fair outcome would be for Pi Financial Ltd to put Miss N as far as possible, into the position she would now be in but for the unsuitable advice. I consider she would have remained in the DB scheme. I also think she would also have retained her existing Standard Life pension arrangement.

To compensate Miss N fairly, Pi Financial Limited must determine the combined fair value of her transferred pension benefits from Step One plus Step Two below. If the actual value is greater than the combined fair value, no compensation is payable.

Actual Value

This means the actual amount payable from the Scottish Widows personal pension at the date of the calculation.

Fair value – step one

Pi must calculate the value of the benefits Miss N lost as a result of transferring out of her DB scheme 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.

I appreciate that Miss N has drawn her small local authority pension, but she was able to accommodate the small level of income this produced whilst also accessing a lump sum she required at that time. My understanding is that Miss N hadn't yet accessed all of the tax-free cash that she could have done from her larger Scottish Widows pension – and hasn't drawn an income, as she has returned to work. Where a consumer hasn't substantially drawn their benefits, applying the regulator's guidance will normally mean an assumption that they would have accessed the DB pension at the scheme's normal retirement age, in this case at 60 next Autumn.

I appreciate that without the ability to draw some tax-free cash from the Scottish Widows pension earlier on, the problem Miss N faces this year with her mortgages would have been more acute. However from what Pi says, Miss N still has £25,000 tax-free cash to take and has followed its advice to defer until November this year. That suggests she is not rushing to access all the lump sums she can, and it will bring her to within a year of the normal retirement date of her DB scheme.

Taking tax-free cash from the DB scheme early would have triggered an income when Miss N didn't need it, which would then be lower for the rest of her life. So I can't safely conclude that Miss N would have chosen to early retire from the DB scheme at age 59, for the sake of waiting one further year. Although she would incur more mortgage interest in the meantime, she would also have had more certainty about what pension and tax-free cash she could expect from the DB scheme than she has now. Miss N is also back in employment and still receiving rental income from her second property.

I therefore find it most likely that, if the transfer hadn't happened, Miss N would have remained in the DB scheme until age 60. That is the assumption that should be used. The guidance does of course make allowance for the earlier payment of any tax-free cash sum.

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 Miss N's acceptance of the decision.

Fair value – step two

Pi Financial Ltd must contact Standard Life to obtain a notional value of Miss N's former policy, assuming the higher contributions she paid to Scottish Widows were instead paid to Standard Life.

In the event that Standard Life cannot provide this value, or it isn't possible to value the portion representing the increase to Miss N's contributions, Pi may use an alternative benchmark for some or all of this value. The benchmark is for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. For the fixed rate bonds benchmark, Pi should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

I've chosen this method of calculating a fair value where the notional value isn't available from Standard Life, because Miss N wanted capital growth with a small risk to her capital. The average rate for fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital. The FTSE UK Private Investors Income Total Return index is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

I consider that Miss N's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Miss N into that position.

Any additional sums paid into the SIPP should be added to the fair value calculation, or notional value from Standard Life (if available) from the point in time when they were actually paid in.

Tax-free cash, to the extent that this would have been available, should also be deducted from the fair value, or notional value from Standard Life (if available) at the point Miss N drew a tax-free cash sum from her Scottish Widows policy – so that it ceases to accrue any return in the calculation from that point on. Any remaining tax-free cash that Miss N *wouldn't* have been able to take from the notional or fair value or the Standard Life policy should be treated as a past gain in line with the regulator's guidance in policy statement PS22/13 and DISP App 4 when carrying out *fair value – step one*.

The total value of the sums produced by steps one and two is the ***combined fair value***.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Pi Financial Ltd must:

- always calculate and offer Miss N redress as a cash lump sum payment,
- explain to Miss N before starting the redress calculation that:
    - its 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 the Scottish Widows pension
- offer to calculate how much of any redress Miss N receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss N accepts Pi's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Miss N 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 Miss N's end of year tax position.

Redress paid to Miss N 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, Pi may make a notional deduction to cash lump sum payments to take account of tax that Miss N would otherwise pay on income from her pension.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Miss N'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.

DISP App 4 sets out the mechanism for updating the loss amount for the lapse of time between the valuation and payment date. For the avoidance of doubt, this must be used for the combined loss resulting from the transfer of the DB *and* Standard Life benefits.

Again, for the avoidance of doubt, I've made no assumption that Miss N would still have paid a fee if she'd followed advice not to transfer. Pi's argument is based on its client agreement which suggests it might have sought to charge what, in all likelihood ,would have been a reduced fee in cash. But I'm looking here at the remedy for advice that was unsuitable. I don't consider it's fair or reasonable to give credit for a fee Miss N might have paid in order to receive the clear fair and not misleading advice she was entitled to receive from Pi, but didn't in fact receive.

The payment resulting from all the steps above is the ‘compensation amount’.

My final decision

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.

Determination and money award: I uphold this complaint and require Pi Financial Ltd to pay Miss N 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 Pi Financial Ltd pays Miss N the balance.

If Miss N accepts this decision, the money award becomes binding on Pi Financial Ltd.

My recommendation would not be binding. Further, it’s unlikely that Miss N can accept my decision and go to court to ask for the balance. Miss N may want to consider getting independent legal advice before deciding whether to accept my decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss N to accept or reject my decision before 30 October 2023.

Gideon Moore
Ombudsman