DRN-4191090

The complaint

Mr H complains about the advice given by Wilmot Lynne & Co (Wilmott) 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 H met with Wilmot in 2003 to discuss his pension and retirement needs.

Wilmot says that it completed a fact-find to gather information about Mr H's circumstances and objectives. It hasn't been able to provide a copy of this, however it clearly did gather some information about Mr H's circumstances as the suitability letter contains this. The documentation from the time of sale, and the recent enquiries, show that Mr H:

- Was 49 at the time of advice. He was married with two children.
- Had recently become self-employed.
- Had no knowledge, or experience, of pensions and investments. He currently had no savings or investments.
- He and Mrs H owned their property with an outstanding mortgage.
- Had outstanding credit worth around £10,000 to £11,000
- Was in good health.

In respect of Mr H's pension provision, he had preserved benefits in a DB scheme which had a normal retirement date (NRD) of age 65 which would be in 2018. He had around five years service in the scheme. The deferred benefits statement from December 2002 shows that the total pension at his NRD was £3,758.17. The maximum tax-free cash Mr H could take was £4,003.43.

Wilmot says it carried out an assessment of Mr H's attitude to risk, which it found was cautious or similar. Wilmot hasn't been able to provide this assessment.

In November 2003, Wilmot advised Mr H to transfer his pension benefits into two personal pension arrangements.

The transfer value was £10,649.56 of which £1,956.99 was a guaranteed minimum pension ('GMP'). In October 2003 Mr H took the benefits from the non GMP section of the new pension. He took tax-free cash of £4,581.39 plus an annual income of £185.66.

And in April 2012 he started another annuity with the remainder of the pension. The remaining fund had a value of £2,845.29, and it provided tax-free cash of £711.32 an annual pension of £94.15.

The suitability report provided in November 2003 said the advantages to the transfer were:

- Transferring your pension fund to your own private plan will enable you to raise the lump sum you require.
- This option pays you the highest possible immediate cash settlement.

- You are able to control which funds your remaining pension (the protected rights) are invested in and consequently you will have the potential for a higher pension.

Mr H complained in 2021 to Wilmot about the suitability of the transfer advice. He said the nature of the guaranteed benefits he was giving up wasn't properly explained to him. He says his attitude to risk was low and there was no pressing need for him to transfer, he was not in difficult financial circumstances. He felt the transfer was clearly unsuitable for him.

Wilmot didn't uphold Mr H's complaint as it thought the advice was suitable for him and he was provided with full information about it. And it said that Mr H's complaint hadn't been brought in time as it has been brought too late.

Mr H referred his complaint to the Financial Ombudsman. An Investigator firstly considered whether we could consider this complaint. She thought that the complaint had been brought in time as Mr H wouldn't, or shouldn't, have been aware that he had cause to complain any earlier than he did.

Wilmot didn't agree and this complaint was passed to me initially to consider the jurisdiction of it. I've issued a decision saying that the complaint was brought in time and so is within the jurisdiction of the Financial Ombudsman Service.

An Investigator has also upheld the complaint and required Wilmot to pay compensation. She thought that the transfer wasn't in Mr H's best interests financially as it was likely to provide lower benefits than the DB scheme. And so, if Wilmot had advised Mr H properly it's likely he would have seen this and not transferred.

Wilmot disagreed, saying that:

- The transfer was suitable for Mr H as he had an immediate need for cash to reduce his debt and pay for his son's education costs. He had no access to capital.
- He could build up further pension provision in the future.
- The rules don't say that a consumer's best interests can only be served by maintaining an income. Mr H had other needs that outweighed this.
- Notwithstanding the potential loss of retirement income, it was reasonable to advise Mr H to proceed and make his own decision about the transfer.
- Mr H was given full information about the transfer and in particular he was told that his pension would likely be lower at retirement. He was told about the benefits he was giving up and he understood this
- The purpose of the advice was to take as little risk as possible.
- The compensation makes no allowance for the benefits that Mr H gained from the transaction such as repaying his debts.

The Investigator wasn't persuaded to change their opinion, so 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 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 Wilmot's actions here.

COB 5.3.29A(4):

The regulator expected a *"…prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."*

At least one illustration for the personal pension/section-32 plan had to be on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown.

A 'reason why' letter or equivalent now had to be issued as soon as practicable after the recommendation. It should:

"…explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme." and

"…demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Presumption of unsuitability

COB 5.3.29G specified the information a business should gather from the consumer and the DB scheme in order to assess suitability, in a similar way to the LAUTRO/FIMBRA guidance.

Importantly it also said for the first time that:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

This is known as the 'presumption of unsuitability' and has been renumbered to COBS 19.1.6G in the current FCA rulebook.

Financial viability

Wilmot carried out a transfer value analysis (as required by the regulator) showing how much Mr H's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). It hasn't provided a copy of the analysis it did but there is information about the calculation in the suitability report.

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 about 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 investment return (critical yield) required to match the occupational pension at retirement was 10.5% per year. This compares with the discount rate of 7.3% per year for 15 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

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

Whilst the evidence from the time of sale is not complete, it's clear that that Mr H was a lower risk investor. To achieve an average return of over 10% each year Mr H would have needed to take investment risks significantly in excess of those it's agreed he was likely to want to take. This growth rate is higher than the regulators highest projection rate.

There would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 10.5%, I think Mr H was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk.

And this was recognised at the point of sale. The 'disadvantages' section of the suitability letter said, amongst other things, that '*You will in all probability receive a substantially lower pension on retirement from your protected rights fund than if you had left your benefits with your existing scheme.'*

For this reason alone, a transfer out of the DB scheme wasn't in Mr H's best interests. Of course financial viability isn't the only consideration when giving transfer advice. Wilmot has said that Mr H required flexibility and an immediate lump sum. This may mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

The main aim of the advice was so that Mr H could release some capital from his pension plan. This was to repay some debts and fund his son's education. Wilmot has said that this was more important to Mr H than his retirement planning as he had a need to pay these.

I don't agree with this. The primary consideration when giving advice on pension arrangements should be how this advice will affect the persons retirement provision.

As a minimum when giving this kind of advice I would expect to have seen information about what pension provision they had, when they expected to retire and what income or expenditure they would need. Other than the DB scheme information this doesn't seem to have been obtained. I think this is a significant failing on the part of Wilmot and I can't see how Mr H could have considered his options properly without this information.

It's clear that Mr H did want some funds. But the amounts of debt that he wanted to repay, and his son's educations costs, seem to be relatively modest. And I would have expected Mr H to have been able to fund these in other ways in the normal run of things. And the amount of cash he could release wouldn't enable him to fully pay these amounts in any event. In fact, the letter send to Mr H on 28 February 2003 says that he and Mrs H could increase their mortgage or take another loan. Which I think confirms this this would be the right way to do this.

Given all of these factors I don't think it's reasonable to say that Mr H had a well-defined or urgent need to raise cash. And he would have been better looking at raising this elsewhere.

As I said above, the deferred benefits statement from December 2002 shows that the total pension at his NRD was £3,758.17 a year. The maximum tax-free cash Mr H could take was £4,003.43. And I've assumed that Mr H would also receive the state pension. It's not clear if this would have fully met his retirement income needs, whatever these were, and I've no information about what his wife would have received.

But I'm satisfied that it's more likely than not that Mr H could have better met his needs by remaining in the DB scheme until the state pension became payable and he could take the benefits from this plan at its NRD.

Overall, I don't think Mr H required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date.
I also can't see evidence that Mr H had a strong need for a variable income throughout his retirement.

So, I don't think the DB transfer was suitable for Mr H due to the flexibility and cash lump sum it offered him.

Death benefits

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. Death benefits were mentioned in the suitability letter, but I don't think improving on Mr H's provision on death was a main aim for him.

That said, and for completeness, the lump sum death benefits on offer through a personal pension were likely an attractive feature to Mr H. But whilst I appreciate death benefits may have been important to him, and Mr H might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr H about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think Wilmot explored to what extent Mr H was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr H was married and had children and so the spouse's and dependent's pension provided by the DB scheme would've been useful to them if Mr H predeceased them. I don't think Wilmot made the value of this benefit clear enough to Mr H. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Wilmot should not have encouraged Mr H to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr H genuinely wanted to leave a legacy for his spouse or children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Wilmot should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr H. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr H's desire for control and flexibility with his pension benefits was overstated. Mr H 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 H – it was simply a consequence of transferring away from his DB scheme.

As far as I am aware the funding of his employer's DB scheme was not in a position such that Mr H should have genuinely been concerned about the security of his pension.

Suitability of investments

Wilmot recommended that Mr H invest in funds that had an investment risk. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr H should have been advised to remain in the DB scheme and so the investments in the funds wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and the access to funds on offer through a personal pension would have sounded like attractive features to Mr H.

But Wilmot wasn't there to just transact what Mr H might have thought he wanted. The adviser's role was to really understand what Mr H needed and recommend what was in his best interests.

I appreciate that the information from the time of sale does point out some of the disadvantages and some of the accompanying information is generally negative about the transfer. But I don't agree that Wilmot should have been simply providing this information and then transacting what it thought was Mr H's decision. It was the professional adviser here, and it should have acted in his best interests, rather than letting him decide for himself.

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr H was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr H shouldn't have been advised to transfer out of the scheme just to gain access to funds that he could have got elsewhere.

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

Of course, I have to consider whether Mr H would've gone ahead anyway, against Wilmot's advice.

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against Wilmot's advice. I say this because Mr H was an inexperienced investor with a low attitude to risk and this pension accounted for the majority of Mr H's retirement provision. So, if Wilmot had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr H's want for funds was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he was paying for, didn't think it was suitable for him or in his best interests. If Wilmot had explained that Mr H could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr H would have insisted on transferring out of the DB scheme.

In light of the above, I think Wilmot should compensate Mr H 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 Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would have most likely remained in the occupational pension scheme if suitable advice had been given.

Given that the tax-free cash released was relatively modest, and it's not clear if Mr H was able to use this to repay his debts. As is usual I don't think the compensation should explicitly account for this.

Wilmot 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 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, although Mr H is retired, and he took the benefits from the personal pension in stages, and at different times from the DB scheme's NRD. I don't think he would have been able to do this if he had not transferred the DB scheme away. So, compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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

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

- calculate and offer Mr H redress as a cash lump sum payment,
- explain to Mr H before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts Wilmot's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr H for the calculation, even if he ultimately decides not to have any of his redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr H's end of year tax position.

Redress paid to Mr H as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Wilmot may make a notional deduction to cash lump sum payments to take account of tax that Mr Hs would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr H's likely income tax rate in retirement – presumed to be 20%**.** So, making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Wilmot Lynne & Co to pay Mr H 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 Wilmot Lynne & Co pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on Wilmot Lynne & Co.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 August 2023.

Andy Burlinson
Ombudsman