

## The complaint

Mr G's complaint relates to the advice given to him by Lanyon Financial Planning Limited ('Lanyon') in 2007 to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. Following a review of the advice carried out by a law firm on behalf of Lanyon, this concluded that Mr G would most likely have still gone ahead with the transfer had the advice been carried out correctly. Mr G disagrees. He says he's been treated unfairly and has lost out as a result of the advice he received.

## What happened

An investigator upheld the complaint and required Lanyon to pay compensation.

I issued my provisional decision saying that, while I intended to uphold the complaint in line with the investigator's overall conclusion, I wanted to expand on my reasoning. A copy of the background to the complaint, and my provisional findings, are below in italics and form part of this final decision.

## What I said in my provisional decision

*In 2007, Mr G's employer offered him an incentive to consider transferring away from his DB scheme pension in the form of an enhanced transfer value. Mr G met with Lanyon and sought advice on his options.*

*Lanyon asked Mr G to complete a fact-find to enable it to gather information about Mr G's circumstances and objectives. This recorded that Mr G was married; he was 48 years old; he had two dependent children; he planned to retire at "60 (approx.)"; and his DB scheme was his only pension.*

*The fact-find also contained a question about Mr G's attitude to investment risk – but this was not completed.*

*On 26 June 2007, Lanyon offered its written advice to Mr G. Its conclusion was that, if Mr G's primary aim was to maximise his retirement income, its recommendation was to stay in the DB scheme. But it went on to say that if any of the following were of greater importance to Mr G, it would recommend he transfer. These were:*

- *Receiving benefits before age 65.*
- *Maximising lump sum death benefits.*
- *Maximising tax-free cash*
- *Receiving a cash bonus now.*
- *Transferring because of concerns about the scheme's under-funding.*

*It asked Mr G what he wanted to do.*

*In a follow up letter of 27 July 2007 after Mr G had completed his personal pension plan application, Lanyon confirmed its recommendation that Mr G should transfer away from his DB scheme. It said that Mr G was unlikely to receive benefits equal to what he could expect from his DB scheme, but it said that Mr G wanted to transfer because, amongst other things he had concerns about the solvency of his employer and he wanted to retire before 65. Lanyon said that it therefore recommended Mr G transfer his benefits to a personal plan based on his current circumstances and the results of the Transfer Value Analysis ('TVAS') report. It said that in terms of fund choice, Mr G had chosen to select his own investment funds.*

*Mr G's pension transfer completed in September 2007 and around £91,000 was transferred to his new personal pension and invested in a 'balanced lifestyle' fund.*

*In 2018, as part of a review commissioned by the Financial Conduct Authority ('FCA') Lanyon instructed a law firm to carry out a review of its transfer advice to consumers who had been offered enhanced transfer values as an incentive to leave their employer's DB scheme. And Mr G opted in to be part of this review.*

*In March 2021 Mr G was issued with the results of this review. It concluded that, while the advice Mr G was provided with by Lanyon was not suitable or compliant, he would've likely gone ahead and transferred anyway had he been properly advised. In summary it said that, based on the available evidence - including the questionnaire Mr G had completed as part of its review as well as a telephone conversation - Mr G understood the implications of transferring and that it was the ability to retire earlier than his scheme would've allowed, and the higher cash lump sum on offer, that influenced his decision to transfer and outweighed any reason for staying in the scheme.*

*Because Mr G was dissatisfied with the outcome of the review, the legal firm responsible for it said it would revisit its conclusions. And having done so, on 28 June 2022 it reconfirmed its conclusions as set out above.*

*Mr G referred his complaint to the Financial Ombudsman Service. An investigator upheld the complaint and required Lanyon to pay compensation. In summary they said the advice was unsuitable and a transfer wasn't in Mr G's best interests. They said the growth rate required to match Mr G's DB scheme benefits meant he was likely to be worse off in retirement. They didn't think Mr G's retirement plans were known – his income needs weren't established by Lanyon and there was nothing to suggest he needed access to a higher tax-free cash lump sum. They said that death benefits shouldn't have been prioritised over Mr G's retirement income need. And while they noted that Mr G's DB scheme didn't provide for a spouse's pension, there was no evidence that the option of life cover was considered. Overall they said there was no compelling reason for Mr G to have transferred his pension – he didn't need to risk his pension benefits at this time when his decision could've been made nearer to his intended retirement age when his needs would've been known.*

*Lanyon disagreed. In summary it said that it was confused by the investigator's conclusions because it had already conceded that the advice provided to Mr G was deficient.*

*It said the disagreement is about causation - specifically its view that, on balance Mr G would've transferred out in any event - which it couldn't see the investigator had properly addressed. It asked the investigator to revisit their assessment.*

*The investigator wasn't persuaded to change their opinion and they clarified that they believed if Mr G had been suitably advised he would've followed that advice and remained in his DB scheme.*

*Lanyon replied. In summary it said the investigator had unfairly refused to engage with its request to re-visit the assessment of the complaint and that they'd ignored the strength of evidence which shows that, amongst other things, Mr G's desire to retire early was instrumental in his decision to transfer. It maintains that the weight of evidence demonstrates Mr G would've transferred in any event and regardless of the unsuitable advice he received.*

### ***What I've provisionally 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 ('COB'). 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 Lanyon'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.*

*COB 5.3.29A(2):*

*"When the firm is recommending a customer to transfer or opt out of any other type of occupational pension scheme, the suitability letter should include:*

*(a) a clear explanation why transferring or opting out is more suitable than remaining in the occupational scheme."*

### ***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. And importantly it also said 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. So, Lanyon should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr G's best interests. And having looked*

*at all the evidence available, I'm not satisfied it was in his best interests.*

*I can see from Lanyon's response to the investigator's assessment of the complaint that, it is not disputed there were failings in the advice it provided to Mr G at the time and so wasn't suitable. What is in dispute is whether those failings have resulted in Mr G losing out – Lanyon says Mr G would've likely still gone ahead if things had happened as they should have, while Mr G disagrees. This is therefore the crux of the complaint. But before I address this point, for the sake of completeness I think it is appropriate and necessary for me to firstly explain why I think the advice Lanyon provided to Mr G was unsuitable – albeit perhaps in less detail than I would ordinarily do given the broad agreement on this matter.*

#### *Financial viability*

*Lanyon carried out a transfer value analysis report (as required by the regulator) showing how much Mr G'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 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.*

*Mr G was 48 at the time of the advice and he indicated that he wanted to retire at '60(approx.)'. Lanyon produced analysis to show the critical yields required to match Mr G's benefits at both age 60 and 65, which were:*

- Age 60 - 11.60% if he took a full pension and 10.5% if he took a lump sum and a reduced pension.*
- Age 65 – 9.8% if he took a full pension and 9.2% if he took a lump sum and a reduced pension.*

*The critical yield to match the benefits available through the PPF at age 65 was quoted as 8.7% per year if Mr G took a full pension and 8.5% per year if he took a lump sum and a reduced pension.*

*This compares with the discount rate of 6.5% per year for 16 years to retirement (age 65) and 4.1% for six years to retirement (age 60) 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 G's assumed attitude to risk of 'balanced' given his fund choice, and also the term to retirement.*

*In my view there would be little point in Mr G 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 9.2%, which was significantly above the discount rate and above the regulator's upper projection rate, I think Mr G was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of transferring his pension to a personal arrangement and investing in line with a balanced attitude to risk. This would also be the case even if the scheme moved to the PPF.*

*I've said that I have assumed Mr G's attitude to risk was 'balanced', which is based on the investment fund selection Mr G's pension monies were ultimately invested in. This is because as I indicated earlier on, Mr G did not complete the attitude to investment risk section of the questionnaire prior to his discussions with Lanyon. And I can't see that Lanyon made any attempt to question or make an assessment of Mr G's attitude to risk in formulating its advice, which is something I would've expected it to do. Mr G might have chosen his own investment fund as recorded on the advice paperwork (I'll discuss this later on) – but I still would've expected Lanyon to have carried out this assessment so it could make a recommendation on the whole transaction envisaged – not simply whether to transfer or not.*

*I can see that Lanyon's suitability report said that it was unlikely the growth rate required to match Mr G's DB scheme benefits was unlikely to be achieved and based on income levels alone it would recommend Mr G retain his DB scheme benefits. And in my view this is where Lanyon's recommendation should've stopped – for this reason alone I think a transfer out of the DB scheme wasn't in Mr G's best interests.*

*Nevertheless I accept that financial viability isn't the only consideration when giving transfer advice – something Lanyon argues in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.*

*Flexibility - early retirement possibility and access to a higher cash lump sum*

*It appears that the key reason for the recommendation to transfer was to provide Mr G with the option of taking his benefits before his scheme's normal retirement age of 65 – Mr G's DB scheme didn't appear to allow Mr G to access his benefits early other than on ill health grounds. But while Mr G might have said he liked the idea or the option of retiring early, I think this is the answer the vast majority of working people would give if asked the question about when they wanted to retire. The advice paperwork recorded that Mr G wanted to retire at "60 approx" - I'm not persuaded this demonstrates he had any concrete retirement plans.*

*Lanyon didn't carry out any assessment of Mr G's likely future income need (no income and expenditure analysis was recorded.) So Lanyon couldn't determine if early retirement was a realistic possibility for Mr G and so whether it was suitable for him to transfer his pension to achieve things. In my view, early retirement before age 65 was not a true objective of Mr G's – it was simply a feature or consequence of transferring to a personal pension arrangement.*

*Similarly the advice paperwork refers to the possibility of Mr G accessing a higher tax-free cash lump sum through a personal pension.*

*But again, Lanyon didn't determine why the larger tax-free cash available from a personal pension was necessary - what he needed it for and when - or why the amount on offer through Mr G's DB scheme at age 65 wouldn't have been sufficient to meet any future need.*

*So, I don't think it was a suitable recommendation for Mr G to give up his guaranteed benefits now when he didn't know what his needs in retirement would be.*

## *Death benefits*

*The recommendation also referred to Mr G's desire for lump sum pre-retirement 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. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr G. But whilst I appreciate death benefits are important to consumers, and Mr G 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 G about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – it is not a legacy planning tool. In my view Lanyon should not have encouraged Mr G to prioritise the potential for higher death benefits through a personal pension over his security in retirement.*

*I accept that based on Lanyon's analysis, Mr G's DB scheme did not provide any pre-retirement death benefits and post retirement there was no spouse's pension (Mr G's pension would've continued to be paid for five years from the date of retirement.) But if Mr G genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Lanyon should've instead explored life insurance. And the starting point for this ought to have been to ask Mr G how much he would ideally like to leave to his spouse, 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.*

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

## *Control or concerns over financial stability of the DB scheme*

*Reference was made in the suitability letter to Mr G's concerns about his employer and the solvency of the pension scheme – it said he wanted to "break all ties with his employer and would prefer to move your funds to an individual plan that is under your control."*

*I think Mr G's desire for control over his pension benefits was overstated. Mr G 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 G – it was simply a consequence of transferring away from his DB scheme. And as far as the funding of his employer's DB scheme, I'm not persuaded this was in a position such that Mr G should have genuinely been concerned about the security of his pension. Furthermore, if the scheme did end up moving to the PPF, I think Lanyon should have explained that this was not as concerning as Mr G thought. As I've shown above, Mr G was still unlikely to match, let alone exceed the benefits available to him through the PPF if he transferred out to a personal pension.*

## *Summary*

*I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr G. But Lanyon wasn't there to just transact what Mr G might have thought he wanted or sounded like a good idea. The adviser's role was to really understand what Mr G needed and recommend*

*what was in his best interests.*

*Ultimately, I don't think the advice given to Mr G was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr G 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 G shouldn't have been advised to transfer out of the scheme just for the option of early retirement when he had no plans to do so, and/or when no assessment was carried out as to whether it was realistic or achievable. And I don't think the potential for higher death benefits was worth giving up the guarantees associated with his DB scheme.*

*So, I think Lanyon should've advised Mr G to remain in his DB scheme.*

*Of course, and as I set out earlier on, it is necessary for me to consider whether, if things had happened as they should have, Mr G would've gone ahead anyway against Lanyon's advice. Lanyon argues, in detail, that this is the case. It's said that the weight of evidence, including the advice paperwork, the questionnaire Mr G completed as part of its review of the advice and the phone conversations it had as part of that review, demonstrate Mr G would've gone ahead with the transfer in any event. In particular Lanyon points to Mr G's desire for early retirement, amongst other things, as being instrumental in his decision to transfer.*

*I've considered this carefully, but I'm not persuaded that Mr G would've likely insisted on transferring out of the DB scheme, against Lanyon's advice. I say this because firstly and foremostly Mr G was an inexperienced investor and there is no evidence to support Mr G being someone who possessed either the requisite knowledge, skill or confidence to go against the advice they were, particularly in complex pension matters. I think Mr G relied solely on the advice Lanyon provided. There is nothing to indicate that Mr G was a significant risk taker and this pension accounted for the majority of Mr G's retirement provision. So, if Lanyon 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 can see from the advice paperwork that Mr G chose his own investment fund for his transferred pension monies and this might suggest Mr G had the knowledge or confidence in investment matters. But I'm not persuaded this is the case here. In my view the fact Mr G chose his own funds stems from Lanyon's failure to assess Mr G's attitude to risk and advise him on the suitability of the whole of the transaction being considered. I think it's likely that because Mr G didn't complete the attitude to risk section of the fact-find, Lanyon believed (wrongly in my view) that Mr G wanted to make his own investment decisions. In any event, choosing to invest in a balanced lifestyle fund does not, in my view, demonstrate Mr G was a skilled investor who has the knowledge and confidence to take control of his own investment decisions.*

*I'm not persuaded that Mr G's desire for the option of taking his pension benefits before 65 or his concerns about his employer were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests.*

*If Lanyon had explained that because Mr G had no concrete plans to retire early, there was no need for him to risk his guaranteed pension at this time, and his concerns about his employer were not sufficient justification for transferring out of the scheme, I think that would've carried significant weight. So, I don't think Mr G would have insisted on transferring out of the DB scheme.*

*Lanyon appears to have placed great weight on the review questionnaire and the phone call (the transcript of which Lanyon has provided) in which Mr G was asked about his recollections of the advice he received 2007. In particular, Lanyon argues that it was Mr G's desire to retire early that was instrumental in his decision to transfer.*

*I've already set out earlier on why I'm not persuaded Mr G had any firm plans for early retirement – I think he simply liked the idea of having the option of retiring early, which was a feature of transferring to a personal pension arrangement. It was not, in my view, a firm objective of Mr G's. And I think Mr G's answer on the review questionnaire supports this. I say this because, Mr G might have ticked the box to indicate that wanting to retire early was relevant to his decision to transfer. But underneath this he also wrote:*

*“another topic at the time was, if you stayed in the scheme you could not take anything from your pension until 65, however transfer and you could access funds at 50.”*

*In my view this shows that Mr G simply liked the idea of retiring early – it is not persuasive evidence that Mr G had an overriding desire to retire early such that he would've gone against the advice he received and would've transferred his pension in any event.*

*I can see that Lanyon refers to Mr G being 'advised' by a family member's accountant that he should transfer. But I'm not persuaded he received advice – not in the formal sense. Mr G indicated in Lanyon's review questionnaire that he had not sought advice from anyone else about his pension. In my view Mr G describes a casual conversation, so I'm not persuaded he would've placed greater weight on this conversation over the formal advice he received from Lanyon – advice as I said above he had sought out.*

*More generally I'm not persuaded that I can place much weight on what Mr G said in the review phone call Lanyon had with Mr G around 2018 to support the view he would've transferred in any event. This phone call was 11 years after the advice was given and I'm mindful that at this stage Mr G was unaware of the failings in the advice he received so he had no cause to question that advice or believe that he might have lost out as a result of transferring. In my view many of Mr G's comments appear based on his circumstances at the time of the phone call and aren't reflective of his thoughts or his likely actions at the time of the advice in 2007. For example his comment about it being important he has a fund now that if he needed to access he could, was said in the context of him “coming 60 years of age”.*

*It is clear from the phone call that Mr G did not know or remember the value of his DB pension benefits he was giving up by transferring – an annual income of around £17,200 a year at age 65 based on Lanyon's analysis – or understand that the investment return of 9.8% the representative referred to as being the growth rate required to match his scheme benefits was required each and every year until pension age. Mr G referred to his pension having achieved a 17% return over two years and appears to have misunderstood that he'd exceeded the return required. And I think this is why he said he made the right decision to transfer – he didn't believe anything had gone wrong at this point.*

*Overall, for the reasons I have detailed above, if things had happened as they should have and Mr G was advised to remain in his DB scheme, I'm not persuaded that Mr G would have gone against that advice and insisted on transferring out of his scheme.*

*In light of the above, I think Lanyon should compensate Mr G for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.*

*Finally I can see that the investigator recommended Lanyon pay Mr G £300 in recognition of the distress and inconvenience this matter has caused. But having thought carefully about*



*this, I'm not currently persuaded that Mr G has suffered to the extent that an award is warranted in this case. So I don't intend on making an award here.*

Both Mr G and Lanyon said they had anything further to add.

### **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.

Having done so, because neither party has given me anything new to consider, I see no reason to change mind – so I've reached the same conclusion and for the same reasons as set out in my provisional decision, which as I said above forms part of my final decision.

I uphold this complaint and I require Lanyon to do the following to put things right.

### **Putting things right**

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

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

This calculation should be carried 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 G's acceptance of my final decision.

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

- always calculate and offer Mr G redress as a cash lump sum payment,
- explain to Mr G 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 G receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr G accepts Lanyon Financial Planning Limited's offer to calculate how much of their redress could be augmented, request the necessary information and not charge

Mr G 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 G's end of year tax position.

Redress paid to Mr G 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, Lanyon 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 G'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 Lanyon Financial Planning Limited to pay Mr G 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 intend to recommend that Lanyon Financial Planning Limited pays Mr G the balance.

If Mr G accepts my final decision, the money award becomes binding on Lanyon Financial Planning Limited.

My recommendation would not be binding. Further, it's unlikely that Mr G can accept any decision and go to court to ask for the balance. Mr G 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 G to accept or reject my decision before 14 July 2023.

Paul Featherstone

**Ombudsman**