DRN-4207610

The complaint

Mr H complains, via a professional representative, about the advice he received 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.

The advice that is the subject of this complaint was given by a business, which I'll refer to as 'Firm B'. Aspects of Firm B's business were then taken over by another business, which I'll call Firm I. Capital Professional Limited, trading as Ascot Lloyd, ('CPL') later acquired the business and assets of Firm I through an acquisition agreement. This complaint was made against CPL, and it has provided an answer to Mr H and our service.

What happened

Mr H held benefits in a DB scheme. Mr H says the company he'd worked for, through which the DB pension was accrued, had made a number of people redundant. And he had some concerns about the security of his pension. He'd seen an advert for Firm B indicating it could assist with pension transfers, which also promoted potentially being able to release large sums of tax-free cash. So, he says he approached Firm B for advice about his pension.

Mr H hasn't retained many documents from the time of the sale, which I think is understandable. CPL has said that it is also unable to provide any documentation from the time, such as a fact find or suitability report, which it has indicated is due to the circumstances under which it acquired Firm I.

As a result, we've asked Mr H about his circumstances at the time of taking advice. He's said he was 56 in good health, married with no other financial dependents. He was employed, having joined his new employer in 2000, and was a member of their pension scheme. He said he had no savings or investments, and the DB scheme represented the majority of his retirement provisions and, as a result, he had a low attitude to risk. And I've seen nothing that would lead me to doubt any of this.

I've seen evidence that, in July 2002, Firm B wrote to the DB scheme asking for details of the benefits Mr H was entitled to under the scheme. With it receiving a reply a couple of weeks later.

The information from the DB scheme said Mr H had accrued benefits between April 1982 and October 2000. It said the normal retirement date of the scheme was age 63 and the total transfer value was £55,400.52. The covering letter noted that the last actuarial valuation of the scheme had shown its assets were less than its liabilities. And as a result, Mr H's transfer value had been reduced by £3,747.05. But it said, based on the funding plan the scheme had set out it was estimated the full transfer value would be available by April 2007.

In September 2002, Firm B sent completed documentation, on Mr H's behalf, to enable the transfer of his pension benefits to a personal pension.

Mr H's representative has said the transfer value was split. Some went to a personal pension, which Mr H drew benefits from in 2006. The remainder went into an immediate vesting section 32 plan, from which Mr H took tax-free cash and received an annuity. And this was done on the advice of Firm B.

Mr H referred a complaint about the advice, against Firm B, to the Financial Services Compensation Scheme ('FSCS') in 2021. The FSCS informed Mr H that it understood CPL was responsible for answering the complaint so referred him to it.

Mr H complained to CPL. He said the advice he'd been given to transfer his benefits was unsuitable. He said he hadn't been made aware of the disadvantages of transferring, particularly the guaranteed benefits he was giving up, and the option of releasing a lump sum had been promoted instead.

CPL said, as it didn't hold any records, it could not establish whether or not Mr H had been provided with advice by Firm B. And it said, as the complaint was made more than six years after the event complained about, it was likely made too late, as it could be more than three years from when Mr H ought to have known he had reason to complain. So, CPL said, for those reasons, it didn't uphold the complaint.

Mr H referred his complaint to our service. CPL said, as part of the acquisition agreement, liabilities were generally excluded. And it said a different business was the successor of Firm B and was primarily responsible for the complaints. But it also noted that there had been an agreement under which CPL agreed some liability for a limited time, and that had not ceased so it had agreed to deal with certain outstanding complaints. It reiterated though that, largely because of this set up, it had very limited records from the point of sale.

One of our Investigator's looked into the matter. He thought the complaint was one we could consider, as he hadn't seen any evidence that suggested Mr H should've known he had cause to complain sooner than he did.

The Investigator acknowledged that information was limited, although noted that the business which CPL had said it thought was ultimately responsible had suggested paper records may still be available, but that CPL had made no attempt to obtain or retrieve these. In any event, based on the limited information, the Investigator thought the complaint should be upheld and that CPL should compensate Mr H for any loss the transfer had caused him. He noted that the regulator's position was that the starting assumption for a transfer from a DB scheme is that it is unsuitable unless it can be clearly shown that the transfer was in the customer's best interests. But the Investigator said he hadn't seen anything to suggest that a transfer was in Mr H's interests or was necessary.

CPL did not accept the Investigator's opinion. It repeated that it believed a different business was primarily responsible for this complaint. Despite this though, it again set out that it had agreed with the business it considered responsible that CPL would respond and make relevant payments up to an agreed level.

Turning to the Investigator's opinion, CPL said the Financial Conduct Authority ('FCA') was not the regulator at the time and so what the Investigator had said about its starting assumption should be disregarded. It also said it felt the complaint was speculative and it wasn't clear that Firm B had provided advice to Mr H. In any event though it said it thought the advice was suitable, saying that the employer through which the benefits were accrued was a loss-making company and went into liquidation in 2018, with the DB scheme later being taken over by the Pension Protection Fund ('PPF').

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.

CPL suggested in its final response that Mr H's complaint might've been made too late. Our Investigator agreed that the complaint had been raised more than six years after the event complained about – the transfer and advice around this from 2002. But he didn't think it had been raised more than three years after Mr H ought to have been aware of having cause to complain. He noted that CPL hadn't provided any evidence to support when it thought Mr H should've been aware of having cause to complain. And, as Mr H had taken his pension benefits under the personal pension before the normal retirement date of the DB scheme, the Investigator didn't think there was enough evidence to say that Mr H could've made a like for like comparison or realised he was potentially worse off. Mr H had explained that he hadn't been aware of any potential problem until he spoke to former colleagues in 2021, who had remained members of the DB scheme. The Investigator thought this explanation was reasonable and so, as Mr H had complained within three years of that point, he thought Mr H's complaint had been made in time.

CPL provided no further comments in relation to whether the complaint had been made in time, in response to the Investigator's opinion. So, it appears to have potentially accepted the Investigator's findings on this. For the avoidance of doubt however, I agree with our Investigator's opinion that the complaint has been made in time, for largely the same reasons. I can't reasonably conclude, based on the very limited information available, that Mr H was in a suitably informed position such that he ought reasonably to have been aware he had cause to complain about the advice he received more than three years before he did.

CPL has also said it hasn't been able to establish if Firm B provided advice, as evidence from the time is limited. I note though, as our Investigator indicated in their opinion letter, that the business which CPL says it believes is primarily responsible for this complaint has separately told our service that it holds paper records of some sale documentation from the former Firm B, but CPL has made no effort to retrieve this. It isn't clear however if that includes information in relation to Mr H.

Where evidence is incomplete or conflicting, I need to decide, on balance, what's most likely to have happened. Mr H has been consistent in his testimony that he was advised by Firm B. And, as I've mentioned, I've seen evidence that Firm B wrote to the DB scheme to gather information about Mr H's existing benefit entitlement. And that Firm B, specifically it's 'pension transfer department', submitted application forms and other required documentation, on behalf of Mr H, to enable the transfer to be concluded. Based on this, and in the lack of any evidence to the contrary, I think it's likely, on balance, that Firm B did advise Mr H in relation to the transfer of his pension.

Again, CPL has said another business was the successor to Firm B and is primarily responsible for the complaint, while also saying the terms of the acquisition agreement relating to its purchase of Firm I's business and assets excluded liabilities generally. At the same time though it has also said that the acquisition did include CPL having a contingent liability for some complaints.

CPL has given some additional commentary in respect of the contingent liability – saying this was time limited, although later extended for a further period, CPL understood it would no longer be liable if Firm B was dissolved, which has now happened, but on further consideration, this wasn't expressly provided for so it has agreed to continue dealing with outstanding complaints, in line with the acquisition arrangement.

Our service hasn't been given a copy of an acquisition agreement that sets out the definitive position which CPL has referred to. So, it hasn't provided any persuasive evidence that it isn't liable to answer this complaint. And Mr H received a letter from the FSCS indicating that it understood that CPL was liable for this complaint. But ultimately, while CPL has been keen to stress it doesn't consider itself ultimately responsible, it has also been clear that it has agreed to deal with this complaint – indeed it provided a final response. It has also said it agreed with the business that it believes is ultimately responsible that CPL would continue to deal with outstanding complaints and make any relevant payments (subject to its understanding of that agreement).

So, while it has given a lot of information around the context of why it is answering the complaint, it does seem to have been accepted that CPL should answer the complaint – as it has done to this point. So, for ease of reading the decision, I'll now largely just refer to CPL.

As a result, I've gone on to consider the advice given to Mr H. When doing so, 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.

CPL has said that the starting assumption that a transfer from a DB scheme is unsuitable, should be disregarded, as the FCA was not the regulator at the point advice was given here. CPL is correct that it was the predecessor to the FCA, the Financial Services Authority ('FSA') that was the regulator at the time of the advice. But its rules, applicable at the time of the advice here, in addition to requiring an adviser to take into account the circumstances, objectives and risk profile of the investor and make a suitable recommendation, also included the same presumption of unsuitability in relation to DB transfers.

COB 5.3.29G said;

"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."

So, I don't agree with CPL that this should be disregarded as it formed part of the regulations that were in place at the time of the advice.

And based on the evidence available here, I don't think it has been demonstrated that a transfer was in Mr H's best interests.

The information provided by the DB scheme to CPL said that, at the point Mr H left the DB scheme in October 2000, his deferred pension was £5,657.24. This would continue to escalate until retirement and when in payment, with the normal retirement date being in 2009, when Mr H would be 63. And the information also indicates he could take a maximum tax-free lump sum under the DB scheme of £22,617.67.

Alternatively, Mr H could accept a transfer value of £55,400.52, which included a deduction, to move his benefits elsewhere.

Mr H has said he was advised to transfer and use some of the funds, approximately 55%, to immediate benefits, including a lump sum, with the rest put into a personal pension and invested, making it subject to market risks.

It was a requirement at the time that the adviser carry out a transfer value analysis report, including calculating 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). A copy of that report is not available – even though the FSA rules at the time said information relating to a pension transfer should be retained indefinitely. Nor is a copy of the suitability report available – which I'd have expected to reference this figure. So, it isn't clear how much the new pension arrangements would've needed to grow by in order to exceed the benefits the DB scheme would've provided at retirement – as there would be little point in giving up the guarantees available only to achieve, at best, the same level of benefits outside the DB scheme.

As a result, it can't be demonstrated that a transfer was likely to improve the pension benefits Mr H would receive.

Taking immediate benefits in respect of some of the pension, reduced the risk. But a significant portion of Mr H's pension was still subject to market risk. Mr H has said that the DB scheme represented the majority of his pension provisions, so was important to him. And based on what he's said about his circumstances at the time – which I haven't seen any evidence to disprove – he doesn't seem to have had much capacity for losses to this pension, as it appears he didn't have any savings or other assets. He's also said his attitude to risk was low – which I think is supported by the reason he says he first contacted CPL, because he had concerns about the security of this pension. And it hasn't been demonstrated that taking on this risk, was in Mr H's best interests.

Mr H has said that he was working at the time he was advised to transfer. And it hasn't been shown that he had a need for a further income at that time. So, I can't reasonably conclude that it was necessary for him to begin drawing benefits immediately or that doing so was in his best interests. And I haven't seen anything to suggest that Mr H had a genuine need to access his pension benefits before the normal retirement age of the DB scheme or that he had a strong need for flexibility in retirement.

Mr H was married and the DB scheme would've provided a guaranteed spouse's income in the event Mr H predeceased his wife. I think this would've been a useful and valuable benefit to Mr H and I haven't seen anything to support that transferring to achieve alternative death benefits was in his interest.

Mr H has said that he approached CPL for advice, because he had concerns about the security of his pension as there had been redundancies at the time. It is worth noting that, at the time of the advice, the PPF had not been established. So, there was not the same 'safety net' for members of DB schemes that later came into effect. And the limited available information from the time does indicate that the DB scheme was underfunded as the letter from the DB scheme to CPL confirmed the schemes assets were less than its liabilities. And because of this, the transfer value was reduced.

The reduction in the transfer value was though only 6.3%. It isn't clear if that is equivalent to the margin by which the DB scheme was underfunded. But the scheme information at the time indicated that there was a funding plan in place and the scheme expected the shortfall to be addressed in under five years.

CPL's role wasn't just to facilitate a transfer because Mr H may've entered into discussions with it thinking that it was a good idea. It was to provide unbiased, expert advice about what was in Mr H's best interests. To do that I'd have expected it to research the position of the

DB scheme at the time, assess this and establish if Mr H had any reason to genuinely be concerned about the security of his pension and address those concerns. But again, I haven't seen any evidence of such an assessment being carried out.

CPL has said it believes the advice was appropriate because the employer later went into liquidation and the DB scheme was taken over by the PPF. But it is worth noting that the employer did not fall into administration until 2019. And the DB scheme was not taken over by the PPF until 2020. Given the length of time after the advice that these two things took place this indicates, in my view, that the situation in 2002 was likely not as serious as Mr H feared. And I don't think there is enough evidence to support that the DB scheme was in a position such that Mr H should have genuinely been concerned about the security of his pension or that transferring because of this was in his best interests.

Summary

I don't doubt that Mr H may've been concerned about the security of his pension when he first asked for advice or that he might've thought, because of this, a transfer was potentially a good idea. But CPL 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, having regard for the regulator's position that its starting point should've been that a transfer from a DB scheme will not be suitable, and recommend what was in his best interests.

Ultimately, based on the limited information available, I don't think there is sufficient evidence to clearly demonstrate that a transfer was in Mr H's best interests. He doesn't seem to have had a genuine need to transfer and there isn't any evidence that supports he was likely to improve his pension benefits by doing so.

So, I think CPL 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 CPL's advice. And I've considered this carefully. But I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against CPL's advice. I say this because Mr H was an inexperienced investor, was likely in my view to have a low attitude to risk and this pension accounted for the majority of his retirement provision. I don't doubt he was concerned about the security of his pension. But if CPL, a professional adviser, whose expertise he had sought, had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think that would've carried significant weight. And I think he would've accepted that advice.

The DB scheme did move to the PPF in 2020, but I think Mr H's pension benefits would've been in payment under the scheme by that point. So, he would've moved with the scheme and been covered by the PPF from that point onwards, based on its applicable rules.

In light of the above, I think CPL 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.

CPL must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:

https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, I understand that Mr H retired at age 60. So, compensation should be based on him taking benefits at this age.

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, CPL 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 CPL'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, CPL 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 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 £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 Capital Professional Limited, trading as Ascot Lloyd, to pay Mr H 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 Capital Professional Limited, trading as Ascot Lloyd, pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on Capital Professional Limited, trading as Ascot Lloyd.

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 16 August 2023.

Ben Stoker
Ombudsman