

The complaint

Mr W complains, via a professional representative, about the advice he received from Westpoint Financial Consultants Limited in relation to the transfer of benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the transfer was unsuitable for him and believes this has caused a financial loss.

Succession Financial Management Limited is responsible for answering complaints about the actions of Westpoint. So, for ease of reading this decision, I'll refer to 'Succession' throughout.

What happened

In early 2009 Mr and Mrs W met with Succession to discuss their pension arrangements. Mrs W has also made a complaint about the advice she received at that time – about the transfer of benefits from the same DB scheme as Mr W to the same pension provider. That complaint has been considered separately by our service.

Succession completed a fact-find to gather information about Mr W's circumstances and objectives. Mr W was 50, in good health, married with two non-dependent children. Mr and Mrs W were both working and indeed worked together. They owned their own home, with a mortgage at the time roughly 45% of the value of their property. They also owned two further properties that they rented out. They had no other outstanding debts and had savings of approximately £4,000. And their monthly income was recorded as exceeding their outgoings.

Succession noted that Mr and Mrs W were looking to move their pension benefits to a personal pension with a view, in the longer term, to using the flexibility and control a self-invested personal pension ('SIPP') afforded to purchase their business property as an asset.

As part of the fact find, Succession asked Mr and Mrs W to indicate which category from a set of risk profiles they'd invest their pension funds in line with. It was recorded that they'd invest in line with the 'moderately adventurous' risk profile. The description of this risk profile in the fact find says such an investor is *"Generally market aware and understands and is willing to accept a higher level of risk (including a small exposure to overseas markets) in return for the potential for higher returns in the longer term. They recognise that this may result in the value of their portfolio fluctuating, possibly significantly, in the short term."*

On 27 March 2009, Succession sent Mr W a report, in which it said it would not recommend a transfer of his existing benefits. The report mentioned the rate of return required to provide pension benefits matching those the DB scheme offered (the critical yield) was unlikely to be achievable.

I've seen evidence that, on 30 March 2009, the Succession adviser sourced information about a conservative and defensive managed portfolio from a pension provider.

A typed letter, addressed to Succession and dated 8 April 2009, was signed by Mr W. This said Mr W had received Succession's advice and noted *"You have recommended against transferring because of the critical yield required to match my existing benefits is 9.6%. You*

have also explained the loss of benefits regarding widow's pension, and benefits paid to my children. I am also aware that the above rate needs to be matched to provide similar benefits, which in the current climate is very unlikely." The letter went on to say "However, I still wish to transfer the money across to my SIPP, as it will add value to the Business, for the purpose of purchasing a property, and the subsequent rental income that will be added to the fund. I believe that the value added to the long term future of the Business is greater than the benefits lost in transferring. Therefore please see this as a letter instructing you to transfer the monies across to the SIPP, I also believe that by transferring into the SIPP, it will allow me with greater choice & flexibility in the running of my retirement affairs..."

Succession sent Mr W a further report on 22 April 2009. This said, in light of his recent letter, he'd now be treated as an insistent client. The letter went on to recommend a personal pension, with the provider that the adviser had researched on 30 March 2009. The letter explained that this personal pension provided the option to convert to a SIPP in the future to potentially enable the purchase of the commercial property when this became available. Succession recommended that Mr W invest in the providers conservative managed index as it felt this reflected his risk profile.

I understand Mr W reviewed the pension with Succession again in late 2009, with a view to releasing some tax-free cash. And Mr W took further advice from Succession in 2015, which resulted in the pension being transferred to a SIPP.

Mr W complained to Succession in 2022, via his representative, about the suitability of the transfer advice he'd been given in 2009. His representative said he was financially inexperienced and the implications of the transfer, in particular losing his guaranteed pension benefits, hadn't been made clear.

Succession said it had advised against a transfer, so it didn't agree that unsuitable advice had been provided. It also said it thought the complaint had potentially been brought too late to be considered.

Mr W referred his complaint to our service. He said he hadn't realised he had reason to complain until he spoke to his representative. His representative also said Mr W had no recollection of writing the insistent client letter and had simply signed a number of documents as part of the transfer process. They also noted that Mr W thought the advice he'd been given in 2015 was also potentially unsuitable based on the recommended investments not being in line with his attitude to risk.

One of our Investigator's looked into the complaint. He thought that the complaint had been made in time for our Service to consider as he didn't think Mr W ought to have been aware of having cause to complain more than three years before he did so. Turning to the merits of the complaint, he didn't think it should be upheld. He was satisfied Succession had advised against a transfer and that Mr W had chosen to disregard this advice. So, he didn't think Succession was wrong to subsequently process the transfer and felt that Mr W would always have looked to proceed given his stated intentions. In terms of the 2015 advice, he thought the recommend funds were broadly suitable and that they hadn't exposed Mr W to greater risk than his existing pension at the time.

Mr W did not accept the Investigator's opinion. His representative said, while he'd signed a letter indicating he wanted to proceed, the wording and knowledge indicated in the letter didn't match Mr W's, as accepted by the Investigator when concluding that the complaint had been made in time. So, it didn't think he was an insistent client and that this had potentially been facilitated by Succession. It also noted that our findings in respect of Mrs W's complaint, which was largely about the same instance of advice, had been markedly different.

The complaint was referred to me to decide. I issued a provisional decision earlier this month. I felt the complaint had been made within three years of when Mr W ought to have been aware of having reason to complain. And, although using the pension to potentially purchase the commercial property Mr and Mrs W used for their business as an asset was mentioned, this was not a confirmed objective. And was just a possibility at some point in the longer term. So, I was satisfied that Mr W was acting as a consumer. And so, I explained that I was satisfied that the complaint was one we could consider.

I went on to explain that I intended to uphold Mr W's complaint. Below are extracts from my provisional findings, explaining why.

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

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Succession'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. Including COBS 19.1.6G, in which the regulator, the Financial Conduct Authority ('FCA'), states that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Succession should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests.

Was transferring in Mr W's best interests?

Succession carried out a transfer value analysis report (as required by the regulator) showing how much Mr W'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 said that the critical yield for retiring at age 65, the normal scheme retirement age, was 9.3%. Or for retiring at age 60, was 10.9%. And Succession said it didn't consider these rates to be achievable. And I agree.

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 for 14 full years to retirement, which would be the case if Mr W

were retiring at age 65 was 6.9%. And for 9 years to retirement, if he were retiring at 60, was 6.4%. 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%.

Taking this into account, along with the composition of assets in the discount rate and the term to retirement, even if Mr W had a moderately adventurous attitude to risk as recorded, I think he was unlikely to achieve growth matching the critical yield. There would be little point in Mr W giving up the guarantees available through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, I think Mr W 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 that attitude to risk.

So, from a financial viability perspective, I don't think a transfer was in Mr W's best interests. And the information from the time indicates that Succession agreed with this.

Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits.

The recommendation noted that Mr W didn't expect to be able to retire before age 65. And there was nothing recorded about there being a need for an immediate lump sum. But it said Mr W was interested in the flexibility a personal pension provided, in case his circumstances changed and that he expected to take tax free cash when he did come to retire. However, with no confirmed plans to retire early I don't think transferring in order to have flexibility 'just in case' was in Mr W's best interests. Succession's analysis indicated that Mr W was likely to receive more tax-free cash through his DB scheme at the normal scheme retirement age than through a personal pension, even if growth of 9% was achieved. And the guaranteed income the DB scheme would've provided appears to have been the most appropriate way to meet his expected income needs from age 65 – when he realistically expected to retire. This is because he and Mrs W indicated they expected to need an income of roughly 50% of their income at the point of the advice, in retirement. Which their combined guaranteed DB scheme benefits would've exceeded. So, I don't think transferring for flexibility was in Mr W's interests.

It was noted that the additional lump sum death benefits a personal pension would provide would be of interest to Mr W. 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. But whilst I appreciate death benefits are important to consumers, the priority here was what was best for Mr W's retirement provisions. A pension is primarily designed to provide income in retirement. The DB scheme also included existing death benefits – in particular a spouse's pension, which would've been useful to Mrs W in the event Mr W predeceased her. And this was guaranteed, and it escalated. The information from the time also recorded the DB scheme was Mr W's only retirement provision. And 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 W.

Succession said that Mr W wanted to break ties with his former employer and have control over his pension, so that he had the option at a later date to purchase his commercial premises as an asset within the pension.

I understand Mr and Mrs W had left the employer through which they accrued the DB scheme benefits not long before they took advice. And I appreciate that, at that time, they might've felt strongly about ending their relationship with the employer in full, as they were now working on a self-employed basis. But, as I've explained, they were always likely to receive benefits of a lower overall value by transferring away from the DB scheme. And so, I

don't think transferring for this purpose was in Mr W's interests.

Turning to the control over the future investment of the pension, and using this to purchase their business premises, this seems to have been something that was being considered for the future but wasn't set in stone. The fact find described it as a longer-term aim. And again, there is no indication that the business premises were even available for purchase or would be in the future. And I can't see that Succession undertook any analysis about the potential cost of this, whether it could be achieved through the pension or whether this would be an appropriate investment for the pension – such as looking at the returns that could be expected.

Transferring from the DB scheme was irreversible and involved giving up guaranteed benefits. And so, I don't think to do so for a speculative future use of the fund was in Mr W's interest, particularly bearing in mind he would've likely been able to transfer at a later date, if this had become a more certain objective.

Taking all of this into account, I don't think a transfer was in Mr W's best interests.

The advice given by Succession and whether Mr W was an insistent client

In its recommendation of 27 March 2009, Succession said it didn't recommend that Mr W transfer. And it set out that the critical yield was unlikely to be achievable and talked about how much tax-free cash was likely to be available in the DB scheme compared to after a transfer as well as the ways death benefits would differ. But it's fair to say that a great deal of the information in the report was fairly generic – as a great deal of it was repeated verbatim in later recommendation letters and didn't relate specifically to Mr W. And I think, in the circumstances, additional information and analysis ought to have been included to ensure that Mr W was in an informed position.

Again, the suitability report didn't include any analysis of the viability of using the pension to purchase commercial premises – one of the apparent key motivators for Mr W considering a transfer. And ultimately whether this was in Mr W's interests wasn't addressed.

I'd have expected to see more in-depth analysis of this. First, I'd have expected some information to have been recorded about the potential cost to establish if this was even viable. I'd also have expected to see some evidence of Succession asking Mr and Mrs W if they'd made any enquiries about this with the prospective seller, to see if the property was to be made available.

With the apparent intention being that this asset would be held by the SIPP, if this went ahead, it would've formed a key part of the investment of the pension and impacted the returns that would be provided. Succession said, in the recommendation that it felt returns of 9% per year were likely unachievable. And this wouldn't anyway have matched the critical yield – Mr W would've needed to exceed this level of return, every year.

It seems unlikely, given that context, that the returns a SIPP would provide, with the commercial premises as the core investment, would've reached those levels. So, I'd have also expected to see analysis of the return this might provide to the pension fund and what that might mean for the level of income that the pension could provide in retirement. With a comparison to what the DB scheme provided. And I'd also have expected to see some analysis about whether this being the investment vehicle was in line with Mr W's attitude to risk.

Without this having been addressed in any great detail, and with this being one of core objective Mr W hoped to achieve, I don't think he was in a position to make a fully informed

decision about transferring.

I'm also not sure that Mr W was in a position to decide to proceed against this advice or that he truly was an insistent client.

Mr W says he doesn't remember drafting this letter or proceeding on an insistent basis and says he was simply provided a lot of paperwork by Succession to sign and complete. The advice obviously was given a number of years ago and memories can and do fade. But the letter Mr W signed indicating he wanted to proceed, dated 8 April 2009, wasn't handwritten. It was typed. The contents and wording of the letter also, in my view, appear to be presented in a manner similar to the advice. And reflect someone with a good understanding of pension transfers. But I don't think Mr W was an experienced investor.

I'm also conscious that evidence I've seen indicates that the adviser began researching the pension fund that he ultimately recommended to Mr W on 30 March 2009. A couple of days after the advice was given but over a week before Mr W indicated, via the letter I've mentioned, that he had any intention of not accepting that advice. The timing of that research, in the circumstances, appears odd.

Taking this into account, I think it seems likely that the idea of potentially disregarding Succession's advice was put forward prior to the letter in question being signed and likely at the time of the initial recommendation not to transfer – as otherwise I see no reason why the relevant research would've been undertaken at that time. If this was put forward by Mr W, I'd have expected Succession to recommend that he take additional time to consider its written recommendation. In which case I'd have expected it to await further instruction before undertaking research. But, as it didn't do this and immediately began researching a fund to recommend, I can't rule out that this was put forward by Succession – potentially undermining the advice itself.

I also think the wording of the letter which resulted in Mr W being treated as an insistent client suggests that the adviser assisted with its drafting. And at the very least suggests that Succession facilitated Mr W proceeding as an insistent client. I'm not sure therefore it truly reflects that Mr W had taken an informed decision to proceed on an insistent basis. And as I've said, I think there was important analysis omitted from the recommendation – around the viability of the apparent long term investment aim. So, I don't think Mr W was in a position to make an informed decision to proceed on an insistent basis.

Would Mr W have acted differently?

While I think there were failings in the advice process by Succession, I have to consider whether Mr W would've gone ahead anyway as an insistent client, if clearer advice had been provided.

As I've noted, Mr W did sign a letter indicating that he wanted to proceed with a transfer. But the primary basis explained in the letter for doing so was Mr W's apparent thoughts on the future use of a SIPP to purchase a property being more beneficial than what was being given up. But again, notwithstanding that I'm not sure this did truly reflect Mr W's thoughts, no analysis had been undertaken by Succession to give Mr W any real context to form that opinion. So, I don't think Succession did enough to address this.

If this had been properly addressed, with clearer context given about the likely levels of return this would provide, that this was still likely to fall short of the critical yield – which Succession said it felt was unachievable – and the monetary impact this would have on Mr W's income in retirement, I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against Succession's advice. I say this because Mr W was again, in

my view an inexperienced investor. And although he was recorded as having a moderately adventurous attitude to risk, this pension accounted for the majority of his retirement provision. And, as I've explained, appears to have been best suited to meet his retirement income needs.

I acknowledge that Mr W proceeded to draw tax-free cash, several months after the transfer. And indicated the purpose of doing so was to repay some business debts. But at the time of the advice to transfer, no such debts were noted. So, I don't think this was necessarily a motivation for seeking the transfer advice. And I don't think this would've meant he would always have sought to transfer.

So, if Succession had provided him with clearer advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, and not facilitated the insistent client process in the way that it did, I think he would've accepted that advice.

As a result, I said I thought Mr W's complaint should be upheld and that Succession should compensate him using the regulator's defined benefits pension transfer redress methodology, on the basis that he'd have likely taken benefits under the DB scheme around age 56. This was because while, Mr W took some benefits from his pension, specifically tax-free cash, shortly after the transfer, at the time of the transfer there was no recorded need for accessing these benefits. So, I didn't think he'd have begun drawing benefits immediately (at age 50). And when the tax-free cash was subsequently drawn, several months after the transfer, I've seen no evidence that alternatives were explored. Rather tax-free cash seems to have been accessed because the transfer had taken place. And I didn't think Mr W would've accessed pension benefits at that time from his DB scheme.

By the time of the advice in 2015 though, it was recorded that Mr W had begun drawing benefits from his pension. The information at that time recorded that Mr and Mrs W were still working and receiving a salary. But had begun taking a pension income to support their desired lifestyle. It was also noted that they lived within their means and didn't have any disposable income, even with this supplemental income. So, I thought it was likely, had Mr W remained in the DB scheme, he'd have sought to access his benefits around this time, at which point he was 56.

With regards to the concerns the representative had expressed on behalf of Mr W about the suitability of investments following the transfer and the 2015 advice, I said:

Mr W's representatives have said that the recommended investments in 2009 and subsequently in 2015, were too high risk for him and not suitable. As I intend to uphold the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr W, it follows that I don't need to consider the suitability of the subsequent investment recommendation. This is because, If Succession had acted correctly in 2009, I think Mr W would have remained in his DB scheme. So, none of the subsequent investments would have arisen if suitable advice had been given. And the regulator's defined benefit redress methodology will account for this.

I gave both parties an opportunity to make further comments or send further information before I reached my final decision.

Neither Succession or Mr W provided any further comments for me to consider.

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, as neither party have provided anything further for me to consider, I see no reason to depart from my provisional findings. So, for the reasons summarised above, based on the available information and evidence, I don't think a transfer was in Mr W's best interests. I don't think Succession did enough to explain why this was to Mr W. So, in my view, he wasn't in a position to make an informed decision about this or whether he wished to proceed as an insistent client. And if clearer advice had been provided, I don't think he'd have gone ahead with the transfer. So, I think Succession should compensate Mr W, in line with 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 W, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr W would have most likely remained in the DB scheme if suitable advice had been given.

Succession 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 the reasons I've already explained, I think it would be fair for redress to be based on Mr W having begun taking benefits from the DB scheme at age 56, his age at the time of the advice in 2015.

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 W'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, Succession should:

- calculate and offer Mr W redress as a cash lump sum payment,
- explain to Mr W 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 W receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr W accepts Succession's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr W 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 W's end of year tax position.

Redress paid to Mr W 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, Succession 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 W'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 Succession Financial Management Limited to pay Mr W 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 Succession Financial Management Limited pays Mr W the balance.

If Mr W accepts this decision, the money award becomes binding on Succession Financial Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 31 July 2023.

Ben Stoker
Ombudsman