

The complaint

Mr G complains about the advice Perspective (North East) Limited (PNEL) gave to him concerning transferring 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 him a financial loss.

The firm that gave Mr G advice was operating under a different name to PNEL. But as PNEL has confirmed it is responsible for responding to the complaint I will only refer to it in this decision.

Professional representatives have helped Mr G to bring his complaint. But, for ease of reading, I will refer to the representatives' comments as being Mr G's.

What happened

Mr G was a deferred member of his former employer's DB scheme. In March 2010, the employer wrote to him and said that – in order to ease funding pressure – it was offering deferred members of the DB scheme either an enhanced transfer value; or a reduced transfer value and a one off cash payment. It included a pack of documents. Amongst other things it said Mr G's pension had a cash equivalent transfer value ('CETV') of £16,657 although this had been reduced by £7,068, as the scheme had insufficient assets to cover its liabilities to members. But, if he took the employer's offer he could either:

- transfer an enhanced sum of £23,726 into an alternative arrangement; or
- take a cash sum of £7,068, which would be subject to tax and national insurance deductions and transfer £16,657 to a different provider.

The employer said it had arranged for PNEL to "run presentations" and give advice. Mr G then contacted PNEL. Four days later he completed PNEL's fact-find questionnaire. Amongst other things he said he was 42 years old, divorced with no dependents. He was self-employed earning around £33,000 a year. He had two other personal pensions, but he didn't give any figures for what those were worth. He said he wasn't paying into one of them but didn't comment on whether or not he was making contributions to the other. He owned his own home which was worth around £167,000 with an outstanding mortgage of £67,000. He said he wanted cash and was unconcerned about his pension. He added that he had a cautious attitude to risk.

In May 2010 PNEL obtained a pension transfer value analysis report (TVAS). Soon after, on 10 May 2010 it sent Mr G its suitability report setting out its analysis and recommendations. It recommended that Mr G should not transfer out of his DB scheme. In brief it said the growth rates required (the critical yields) to match the benefits from the DB scheme were 9.2% if Mr G transferred the enhanced amount of £23,726 to a personal pension; that would rise to 11% if Mr G took the enhancement as cash and transferred the lower sum of £16,657. PNEL said those rates were unlikely to be met by investing in a personal pension. It said Mr G's benefits in retirement could be significantly reduced by transferring. It also said death

benefits would be lower and he would effectively be transferring the risk from his former employer to himself.

Nine days later Mr G sent PNEL an email that said:

“I confirm receipt of the pension report from your company. I also confirm your advice to stay in the pension fund, but I still wish to take the lump sum offer plus transfer the pension into another.”

PNEL wrote to Mr G again on 24 May 2010. It repeated the warnings from its suitability report about why it thought a transfer wasn't suitable for him. It noted that he wanted to go against its advice and take the £7,068 cash sum (subject to deductions). It said that in doing so Mr G understood that: he would be giving up guaranteed benefits, he would have a lower income in retirement; death benefits would also be lower, and that he would be accepting the investment risk himself. It then proposed a named personal pension plan for Mr G to transfer the CETV into. The transfer then went ahead.

In 2022 Mr G complained to PNEL that its transfer advice wasn't suitable for him. Amongst other things he said:

- PNEL had treated him as an insistent client¹ without explaining what that was.
- It hadn't informed him of the guarantees he would be losing by transferring.
- It had told him that a personal pension would provide better growth than his DB scheme
- At the time he had savings and didn't need the cash sum.
- His wife had lost valuable death benefits because of the transfer.

PNEL replied. It didn't uphold Mr G's complaint. In brief it said that it had twice given clear warnings that a transfer wasn't in his best interests, including saying that he would have lower income in retirement. It had also told him death benefits would be lower. Mr G had chosen to go against its advice

Mr G brought his complaint to us. One of our investigators looked into it. He didn't think PNEL had treated Mr G fairly, so recommended it pay him compensation.

PNEL didn't agree with our investigator's assessment of the complaint. The investigator wasn't persuaded to change his 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. 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.

¹ Where a client chooses to go against a financial adviser's recommendation, they are often referred to as an insistent client.

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 PNEL'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.

At the time of the events Mr G complains about there was no regulatory advice or guidance in place in respect of insistent clients. But the client's best interests rule (COBS 2.1.1R) and PRIN 7 are particularly important when considering treating a client as insistent. So, PNEL's recommendation had to be clear and Mr G had to have understood the consequences of going against the recommendation.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for broadly similar reasons to those our investigator gave.

Financial viability

In its suitability report PNEL set out that the critical yields were too high to be achieved by reinvesting the DB funds in a personal pension. It said for that reason it didn't recommend that Mr G should transfer out of his DB scheme. I agree with PNEL's analysis. That is, it was more likely than not that Mr G would be worse off in retirement by transferring. And as this isn't disputed by either party to the complaint, I see no reason to further analyse the financial viability of the transfer when it clearly wasn't viable.

Did PNEL fairly treat Mr G as an insistent client?

PNEL's said that, on more than one occasion, it gave Mr G clear advice not to transfer out of the DB scheme. But, because he chose to go against that advice, it treated him as an insistent client.

There's no doubt PNEL's suitability report said its advice was that Mr G should not transfer out of his DB scheme. But I think there were flaws in PNEL's process which mean it wouldn't have been fair for Mr G to rely on its recommendation not to transfer.

It's notable that PNEL's initial suitability report didn't include specific details of an alternative personal pension for comparison purposes. I find this undermines the advice process. That's because the information PNEL provided in its suitability report was limited and essentially relied on saying that the critical yield was too high to be met. And while PNEL said what the relevant critical yields were, it didn't show what growth rate Mr G could expect from a personal pension or what that would mean to him in monetary terms in retirement. I think it would therefore have been very difficult for Mr G to make a direct comparison between what he would be giving up by transferring and what he was likely to receive if he did. So, I think Mr G had insufficient information to go off in order to decide if going against PNEL's advice was truly in his best interests. And I don't see how PNEL could expect Mr G to make an

informed decision about going against its recommendation when it hadn't given him all the information he needed, in one place, in order to make that decision.

A clearer process would have been for PNEL to provide its advice and recommendations as a whole, taking into account Mr G's objectives and attitude to risk. That advice should have considered the overall picture – both of transferring out of the DB scheme together with the choice of alternative pension and Mr G's desire to take the enhancement payment as a lump sum immediately. Only then should PNEL have clearly set out in one document why transferring out of the scheme wasn't in Mr G's best interests.

PNEL's recommendation was that it wasn't in Mr G's best interests to transfer. But it made it easy for him to do so anyway. I say this because Mr G simply sent it an email saying that he wished to go ahead with the transfer but he didn't give any reasons for why he wanted to go against PNEL advice. However, PNEL did nothing to challenge why he would want to do that. It didn't ask him what his reasons for going ahead with the transfer were. So it didn't find out why he wanted the cash lump sum at that time, what he intended to do with it or to see if there were other ways of raising the money that didn't involve compromising his security in retirement. This is something I'd have expected to see as part of a robust advice process.

Further, Mr G had said in the fact-find questionnaire that he intended to take the enhancement as cash immediately. So, he'd made it clear from an early stage he was already leaning towards transferring in order to have access to some instant cash. But, again, I've seen no evidence PNEL probed why Mr G wanted to do that. It didn't ask him what he wanted to achieve by taking the enhancement as cash. And, as I've said above, I can't see that it explored whether he could raise the cash by some other means.

Also, PNEL didn't gather any information about what Mr G's regular outgoings were. But, from the information on file it didn't appear that he had any unmanaged debts. So, while I don't doubt that the opportunity to receive some ready cash was a mouth-watering prospect, there's no evidence he had any actual need for it. But, while PNEL did warn him he'd likely be worse off in retirement by transferring, I can't see that it made a concerted attempt to explain to Mr G that giving up guaranteed pension benefits for a cash lump sum that wasn't obviously needed was not in his best interests.

Similarly, PNEL didn't gather any information about what Mr G's likely income needs would be once he retired. So, it didn't find out how Mr G intended to fund his retirement after he'd given up the guaranteed benefits from his DB scheme. And while it said the critical yield was unlikely to be met it didn't make it clear to him in its suitability report – in terms of actual figures – how much worse off he could potentially be.

Further, given PNEL was well aware there was very little prospect of a personal pension matching the DB scheme benefits in monetary terms, it needed to spell out to Mr G that, before transferring, his other reasons for doing so needed to be compelling. But PNEL didn't explore this with Mr G in any detail. In its suitability report PNEL has recorded that Mr G's objective was to "*obtain sufficient information to be able to make an informed decision on [his] transfer options*". But PNEL should have known that that is not a financial objective in terms of retirement planning. That is simply an extremely short term wish. So I think PNEL should have gone back to Mr G and found out what his plans were for his retirement and how he intended to fund those. But it didn't do so. And I don't see how PNEL could give Mr G suitable advice in respect of his objectives without knowing the basic facts about what he wanted the cash for. Neither have I seen evidence that PNEL effectively advised Mr G

about the long-term nature of pension planning – such as the need for a pot of funds to provide an income for many years ahead.

PNEL's role was to discern what Mr G's wants and needs were and why he wanted to transfer his pension. It wasn't simply to do what he wanted without appropriate analysis and challenge of his motives for doing so whilst discussing the implications of those actions with him. While it did give him risk warnings, I've seen little evidence of such a challenge even though that would have been in Mr G's best interests. Indeed, as I've said above, I've seen no evidence PNEL explored with him exactly what he wished to do with the enhanced payment and why. So, I don't think PNEL met its obligations to challenge Mr G's objectives in light of what he would be giving up. That also meant it didn't appropriately consider whether Mr G's aims could be met through other means without giving up the benefits from his DB scheme.

PNEL did give Mr G advice not to transfer out of his DB scheme and did warn him that he could be worse off in retirement by doing so. But I don't think it can fairly rely on its recommendation for Mr G not to transfer. That's because he apparently made his initial decision to go against its advice without having all the facts available to him.

Also, after he said he wanted to go ahead PNEL then made a recommendation to transfer to a personal pension. But I can't see that it gave him a side-by-side comparison of what he was likely to receive in retirement from his DB scheme against what he'd likely receive from the personal pension. That would have been particularly helpful as PNEL's TVAS showed that Mr G's DB scheme would pay him a yearly pension of £4,484 – after taking tax free cash of £16,442 – but that yearly income was estimated to fall to £1,686 by transferring to a personal pension (after taking tax free cash of £15,386). That is a reduction of around 62%. But I can't see that PNEL made this clear to Mr G in its suitability report.

Similarly, while Mr G's former employer said it was offering to pay him a cash enhancement, in reality the amount it was offering – £7,080 – was an identical sum to the amount the DB scheme trustees had *reduced* his CETV by because the scheme was currently underfunded. So, the enhanced sum was only returning Mr G to the position he would have been in if the employer sorted out the underfunding issue. But I don't think PNEL did enough to bring this to Mr G's attention.

PNEL was in a good position to have analysed, tested, challenged and advised Mr G about what was in his best interests for retirement planning. It knows valuable pension pots like Mr G's DB scheme were paid into with the intention of providing a guaranteed income for retirement. But Mr G's chosen path was to give up that income in retirement for the chance of getting hold of a lump sum of cash, for which he had no obvious need, rather than long-term retirement planning. And I don't think that applying an insistent client label to someone when they express that their preference is not to follow advice, is the same as applying the rigorous process of arriving at a fair determination of who an insistent client really is. So, given the flaws described above in PNEL's advice process, I don't think it fully and accurately informed Mr G about his position.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process PNEL followed meant it was fair to truly regard Mr G as an insistent client. So, I don't think PNEL acted in his best interests. Neither do I think it treated him fairly.

I've thought about whether Mr G would have transferred out of the DB scheme had he been given all the information essential to him making an informed decision. But I'm not persuaded he would have insisted on transferring out of the DB scheme, against PNEL's advice if it had brought all of the important points to his attention. I say this because Mr G

was an inexperienced investor and described his attitude to risk as “cautious”. But he was taking a significant risk of losing the guarantees from his DB scheme by transferring out of it. So, I think if PNEL’s advice had been suitably robust Mr G would have remained in the DB scheme.

For completeness I’ll add that PNEL’s referred us to another complaint where an ombudsman colleague did not uphold a complaint. PNEL said the circumstances are similar. So it’s effectively argued that case should set a precedent for my decision when considering this complaint. But this Service considers complaints on an individual basis. That means I must look at each individual case before me on its own facts and merits. And I am not ‘bound’ by any previous decisions issued by our ombudsmen, as those decisions don’t set a precedent. And, in any event, having looked at the other decision PNEL referred to, it’s clear that the individual facts and circumstances are quite different, so it hasn’t persuaded me that this complaint should not be upheld.

In light of the above, I think PNEL should compensate Mr G 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 PNEL 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 DB scheme if PNEL had given suitable advice.

PNEL 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 his 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 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 view.

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

- calculate and offer Mr G redress as a cash lump sum payment,
- explain to Mr G 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 personal 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 PNEL’s offer to calculate how much of his 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 his 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, PNEL 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 Perspective (North East) 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 recommend that Perspective (North East) Limited pays Mr G the balance.

If Mr G accepts this decision, the money award becomes binding on Perspective (North East) Limited.

My recommendation would not be binding. Further, it's unlikely that Mr G can accept my 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 21 August 2023.

Joe Scott
Ombudsman