DRN-4247078

The complaint

Mr W complains about the advice given by Tuto Money Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr W approached Tuto Money in May 2016 to discuss his pension and retirement needs. Tuto Money completed a fact-find to gather information about Mr W's circumstances and objectives. Tuto Money also carried out an assessment of Mr W's attitude to risk, which it deemed to be 'lowest medium'.

On 19 October 2016, Tuto Money advised Mr W to transfer his pension benefits into a personal pension and invest in the Vanguard Life Strategy Fund. The suitability report said the reasons for this recommendation were to access tax-free cash and use this to pay off debts, refurbish a buy-to-let home and for his children's tuition. And for the ability for death benefits to be paid to his family as a lump sum.

Representatives on Mr W's behalf complained in 2022 to Tuto Money about the suitability of the transfer advice. They said that giving up guaranteed benefits in retirement wasn't in Mr W's best interests. And that there had been failings throughout the advice process.

Tuto Money didn't uphold Mr W's complaint. It said Mr W had been given the appropriate risk warnings and he wanted to clear his debts. It also said the complaint had been made out of time.

Mr W referred his complaint to our service. An investigator upheld the complaint and required Tuto Money to pay compensation. Tuto Money had argued it was out of time as it was more than six years after the advice had been given. But the investigator explained to be out of time it also needed to have been more than three years since Mr W ought reasonably to have known he had cause for complaint. The investigator said he couldn't see anything to say Mr W ought to have complained earlier than he did.

In terms of merits the investigator said Tuto Money ought to have discussed Mr W's circumstances in more detail – to explore whether he needed to pay the debt off then as he was making the payments. The investigator felt the advice had been unsuitable, giving up guaranteed benefits to pay for things that at the time were appealing but not essential.

Tuto Money didn't respond. And so the complaint has been passed to me for 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.

<u>jurisdiction</u>

Tuto Money say the complaint was made out of time as the transfer took place in October 2016 and the complaint wasn't made until November 2022. So it is more than six years after the event. However, our time rules are two pronged, I agree the complaint is out on six years. But the second part of our time rules is that the complaint also has to have been made more than three years after it should reasonably have been raised. I've seen nothing to suggest Mr W ought to have been aware of his cause for complaint more than three years before he did complain.

The evidence Tuto Money has provided shows there was a review two years after the transfer which showed a small decrease in value compared to the original transfer value. However, there was no estimated pension figures given and there was still time for the funds to grow before retirement. So I don't think it would have, or ought to have, caused Mr W to be aware of his cause for complaint then. I don't think the three-year part of our time limits applies here – and so I'm satisfied Mr W has brought his complaint in time.

merits of the 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 Businesses ('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 Tuto Money'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Tuto Money should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Tuto Money 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).

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 W was 55 at the time of the advice and according to the suitability report he was looking to retire at 65 but take tax-free cash immediately. The critical yield required to match Mr W's benefits at age 60 (this was the scheme retirement age) was 14% per year if he took a full pension. These figures are based on a lower transfer value than what was actually transferred as Mr W's initial transfer quote expired. And the value that was actually transferred was approximately £30,000 larger than the original quote, at just under £200,000. Whilst, this would have an effect on the critical yield calculation, I don't think the difference is such that the initial yields aren't representative of the broad amount of risk taken onboard when transferring.

The relevant discount rate closest to when the advice was 3% per year for four years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's lowest medium attitude to risk and also the term to retirement. There would be little point in Mr W giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield was 14% a year, 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.

For this reason alone a transfer out of the DB scheme wasn't in Mr W's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Tuto Money has argued 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 and income needs

Mr W wanted to take his tax free cash early to repay loans and debts, refurbish a buy to let property and put funds towards his child's education. But I'm not satisfied these needs were such that he should have been advised to have put his only source of guaranteed benefits in retirement at risk.

I say this because the debts/loans Mr W had, came to approximately £15,000 which sounds a lot but there was no indication he couldn't meet these repayments. And Mr W was still working, in good health and he had paid off a substantial amount of his mortgage on his residence. It was recorded Mr W had explored other forms of raising finance but wished to clear his debts and didn't want to take out further loans. But no further exploration or discussion of this matter is recorded – other than this line.

It's understandable that Mr W would've wanted to clear his debts and put money towards his child's schooling, but I don't think this should've been done at the expense of his likely main source of income in retirement. It was recorded Mr W had other pensions which he could use in retirement but no attempt was made to understand more about them and get a valuation. Mr W had said he'd need to trace them, so didn't know anything about them. Had this information been sought prior to the recommendation being made, it may have been that one of these plans was better used to meet Mr W's cash needs. And he could've retained his guaranteed benefits in the scheme in question which comprised of 11 years' service. This was a very important part of Mr W's retirement planning but it seems no effort was made to find out more about these additional pensions.

The evidence does suggest Mr W's finances were stretched and an influx in cash would've been very attractive. But Tuto Money in advising Mr W to transfer, risked Mr W's only known guaranteed source of income in retirement (bar his state pension). Mr W planned to use his buy to let property for income in retirement – but the income here isn't guaranteed like Mr W's DB pension. And represents a high-risk retirement strategy that doesn't fit with Mr W's risk profile. And nowhere was it considered whether Mr W could retain his benefits and find other ways of funding the work on his buy to let property. Nor was it recorded whether Mr W could start renting the property out without these refurbishments. Tuto Money should've done more to explore Mr W's circumstances and finances before recommending transferring his DB pension.

Furthermore, Mr W said he didn't plan to retire until 65, he had ten years left of employment and so he had time to construct his plans and finances for retirement over those years. Transferring his benefits at this point was irreversible and it was used to repay debt that he was meeting at the time. And to refurbish a property, that wouldn't be his only form of non-pension income for some ten years. I note his main residency had a value of £300,000 with only £48,000 remaining on the mortgage. But this wasn't explored and neither were his other pensions that may have been more suitable to provide the cash required for his immediate plans.

I don't think any of the reasons given for taking his tax-free cash made transferring in Mr W's best interests. Tuto Money should've done much more to challenge Mr W's requirements and set out the downsides of this course of action. Tuto Money's forecasting of income in retirement showed that retaining his DB pension would provide him with a surplus of income alongside his state pension and expected rental income. However, the rental income wasn't guaranteed and there are many variables between the time of advice and his retirement that could come into play. Mr W's DB pension income was guaranteed and I think this should have formed the cornerstone of his retirement planning.

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 W. But whilst I appreciate death benefits are important to Mr W, and Mr W 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 W about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Tuto Money explored to what extent Mr W was prepared to accept a lower retirement income in exchange for higher death benefits.

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

I would've also expected to see the adviser explore the possibility of Mr W taking out a life insurance policy if he genuinely wanted to leave a legacy for his family.

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.

Summary

I don't doubt that the immediate influx of cash that could be gained through a personal pension would have sounded attractive to Mr W. But Tuto Money wasn't there to just transact what Mr W might have thought he wanted. The adviser's role was to really understand what Mr W needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr W 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 W shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme. Furthermore, there were other potential avenues in which Mr W may have been able to get an influx of cash without risking what appears to be his main source of guaranteed income in retirement. But these avenues were not explored by Tuto Money. So, I think Tuto Money should've advised Mr W to remain in his DB scheme.

Of course, I have to consider whether Mr W would've gone ahead anyway.

I've considered this carefully, but I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against Tuto Money's advice. I say this because Mr W was an inexperienced investor with a lowest medium attitude to risk and this pension accounted for the majority of Mr W's retirement provision. So, if Tuto Money 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.

In light of the above, I think Tuto Money should compensate Mr W 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 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 occupational pension scheme if suitable advice had been given.

Tuto Money 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, 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 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, Tuto Money should:

- calculate and offer Mr W redress as a cash lump sum payment,
- explain to Mr W 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 W receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr W accepts Tuto Money's offer to calculate how much of their 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 their 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, Tuto Money may make a notional deduction to cash lump sum payments to take account of tax that Mr Ws 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

<u>Determination and money award</u>: I uphold this complaint and require Tuto Money Limited to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £170,000.

<u>Recommendation:</u> If the compensation amount exceeds £170,000, I also recommend that Tuto Money Limited pays Mr W the balance.

If Mr W accepts this decision, the money award becomes binding on Tuto Money 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 6 November 2023.

Simon Hollingshead
Ombudsman