DRN-4264902

The complaint

Mrs L complains about the advice given by Fairstone Financial Management Limited ('Fairstone') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. The crux of Mrs L's complaint is that she believes the original transfer advice was unsuitable for her and it didn't meet her needs. Mrs L feels she's lost out as a result.

What happened

Mrs L approached Fairstone towards the start of 2020 to discuss her pension and retirement needs.

In February 2020 Fairstone completed a fact-find to gather information about Mrs L's circumstances and objectives. Amongst other things this recorded that Mrs L was 52 years old; she was married; she was working part-time; she jointly owned her home; she had no liabilities; she had around £5,000 in savings; and she wanted to retire early at age 55 on a joint income of around £2,000 a month. Fairstone also carried out an assessment of Mrs L's attitude to risk, which it deemed to be 'balanced'.

On 1 April 2020, Fairstone advised Mrs L to transfer her pension benefits into a personal pension and invest the proceeds in a portfolio of funds Fairstone deemed matched Mrs L's attitude to risk. In summary, the suitability report said the reasons for this recommendation were

- To enable Mrs L the flexibility to draw the level of income she required to bridge the gap in the early stages of retirement before reducing it once her state pension and her partner's pension were payable.
- To provide better death benefits than the DB scheme could provide by allowing any unutilised funds to be left to her named beneficiaries.

In 2022 Mrs L complained to Fairstone. She said that it had failed to carry out a recommended fund switch following her annual review and she asked for a refund of her advice fees. Mrs L also said that the matter had led her to question whether all the advice she received from Fairstone was suitable and appropriate for her needs.

Fairstone didn't uphold Mrs L's complaint. In summary it said that the fund switch was a recommendation, which needed Mrs L's acceptance before it could happen. It acknowledged that it should've followed things up when it didn't receive Mrs L's acceptance of the recommendation, for which it apologised – but it said it didn't constitute negligence. It said because there was no evidence that the advice Mrs L received was in any way negligent or inappropriate, it would not be refunding the advice fees.
It apologised that Mrs L was offered this refund by the adviser prematurely and before an investigation into matters had taken place. It offered Mrs L £150 by way of apology.

Dissatisfied with its response, Mrs L referred her complaint to our service.. An investigator deemed that Mrs L's complaint was, at the heart of it, one about the suitability of the original advice to transfer her DB pension, so they let Fairstone know and asked it for copies of the advice paperwork. The investigator upheld the complaint and required Fairstone to pay compensation. In summary they said the advice wasn't suitable. They said Mrs L could've met her objective of wanting to provide her sons with a lump sum each when she was 55-60 by remaining in her DB scheme; they didn't think Fairstone had done enough to explore the option of Mrs L taking early retirement from the DB scheme; death benefits shouldn't have been prioritised over providing Mrs L with advice about what was best for her retirement – there are other products available to cater for this such as whole of life or term assurance; and because the critical yield was high, Mrs L wasn't going to improve on the benefits available to her through her DB scheme. The investigator added that they'd considered the cashflow forecast produced at the time of the advice – but they said this was only a forecast and wasn't guaranteed. They said Mrs L didn't have the capacity for loss and she shouldn't have been exposed to investment risk. They said if suitable advice had been given to Mrs L to remain in the DB scheme, she would've likely followed that advice.

The investigator also clarified that, because they were upholding the complaint about the suitability of the transfer advice, they didn't need to consider Mrs L's complaint about the alleged failure of Fairstone to carry out the pension investment fund switch.

Fairstone disagreed. It provided a substantive response. And while I have read it in full, I haven't set out everything here. It said its primary objection was to our consideration of a complaint about the suitability of the original transfer advice. It said Mrs L made no mention of this in any of her correspondence. It said it isn't fair that Mrs L complained about one issue, and then complained to us about a different issue without it being given the opportunity to investigate first. It said for this reason, it doesn't believe the complaint is within our jurisdiction and it asked this to be determined prior to any merits decision.

Fairstone also set out why it disagreed with the investigator's conclusions. In summary it said:

- The critical yield isn't relevant in this case because Mrs L wasn't looking to match her DB scheme benefits. In any event, the shortfall shown in the TVC was discussed with her.
- Mrs L and her husband's spending was covered from other secure sources. She had a need for £6,000 a year from age 55 – the cashflow analysis based on matching the scheme pension showed as its most pessimistic the funds would run out at age 86. But this was only for illustrative purposes because Mrs L didn't need this level of income.
- Mrs L's needs would not have been met by taking the scheme pension at 55. Mrs L had a stated income need below the scheme's pension and she wanted to pass funds to her children – she was happy to trade the guaranteed income for flexibility.
- Mrs L didn't accept a lower level of benefits, it was her preference.
- It did provide life assurance quotes an alternative means of providing death benefits – albeit this was of secondary importance to Mrs L as her primary objective was flexibility.
- It disagreed with the investigator that Mrs L's capacity for loss was low.
- It believed Mrs L was familiar with investments and their associated risk given her previous occupation
- It believes Mrs L was in a fully informed position to accept the advice.
- It doesn't believe the investigator can speculate on what Mrs L would or wouldn't have done if it had advised against the transfer and so doesn't believe this is relevant.

The investigator wasn't persuaded to change their opinion. In relation to Fairstone's point about our powers to consider the complaint, they said that email correspondence between Mrs L and the adviser showed that she was questioning whether the advice was suitable. So while poor customer service might have been the trigger for Mrs L's complaint, they said it was not a different complaint that was referred to our Service or from that received by Fairstone.

The complaint was therefore referred to me to make a final decision.

I can see that Fairstone indicated that it wanted to make further representations – but despite being reminded of the deadline for responses of 15 August 2023, it hasn't sent us anything more. I think if Fairstone wanted to say anything more it would've done so by now – so in the circumstances I think it is safe for me to proceed with my 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 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 BUSINESS'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. My reasons are set out below.

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, Fairstone should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs L's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Firstly, I'd like to address Fairstone's point about the investigator not addressing the complaint Mrs L made but instead went on to consider the suitability of the advice, which was not a concern Mrs L had raised or something it had been given the opportunity to respond to. It says this complaint is therefore not in our jurisdiction.

I think the investigator has explained the position clearly. But to clarify - I'm satisfied this is a complaint I can look at. Our role is to look at the whole picture and think about what lies at the heart of a complaint. And I'm satisfied that the crux of Mrs L's complaint is about the suitability of the advice she received to transfer her DB scheme pension benefits to a personal pension. Just because Mrs L might not have articulated her complaint fully or used the language Fairstone might have expected her to use when complaining about the suitability of the original transfer advice (notwithstanding that I think Fairstone ought to have reasonably understood this from what Mrs L said in her emails to the adviser during the course of her complaint) this doesn't mean we can't consider what we feel Fairstone should've looked at when it considered Mrs L's complaint.

Notwithstanding our inquisitorial remit, I can see the investigator told Fairstone that they would be looking at the suitability of the transfer advice well before they issued their assessment, allowing, in my view, sufficient time for it to investigate and consider the matter. While Fairstone chose not to do that, it has set out the reasons why it believes the advice it provided to Mrs L was suitable in response to the investigator's assessment - so it has provided its defence of the case. I'm therefore satisfied I can decide this case fairly based on the evidence provided by both parties. And I'm also satisfied, for the reasons above, that it is not necessary for me to separately consider the matter of 'jurisdiction' of this complaint before providing my final decision about the merits of it.

Financial viability

While I agree with the investigator that the transfer wasn't financially viable because it was highly unlikely the annual growth rate of 16.62% required to match Mrs L's DB scheme benefits at her preferred retirement age of 55 was achievable, as Fairstone has said, it didn't recommend the transfer to try and improve on Mrs L's benefits or because it thought Mrs L would be better off in retirement by doing so. It recommended it for other reasons, which I will discuss below. So I don't think it is necessary for me to expand on my reasons why I don't think the transfer was financially viable.

But I want to take the opportunity here of highlighting my concerns about Fairstone's assessment of Mrs L's willingness to adopt a 'balanced' attitude to risk with her pension monies and its classification of her as an experienced investor. I'm not persuaded Mrs L was either given her circumstances at the time. It's not entirely clear to me how Fairstone assessed and arrived at Mrs L's attitude to risk - but she had no prior direct investment experience, any money she had was in cash and at 52 approaching the tail end of her career based on her preferred retirement age, she had limited opportunity to replace capital. It strikes me that Mrs L's circumstances better described someone who ought to be taking a cautious or low risk approach.

As for Mrs L being an experienced investor and Fairstone's argument that Mrs L was familiar with investments and their associated risk - despite its belief this was the case, the advice paperwork also records that Mrs L didn't see herself that way. And based on Mrs L's circumstances as I've described above, I think the evidence supports that.
Fairstone appears to have placed significant weight on Mrs L's previous occupation within the financial services sector and her job title. But this was around 10 years prior to the advice and Mrs L has said her role did not involve her giving advice on or discussing investments. She said anything related to that was referred to a specialist because she wasn't qualified to do so. So while Mrs L might have had a basic understanding of investments and the concept of risk, I don't think it is fair or reasonable for Fairstone to have assumed Mrs L was an experienced investor purely based on her previous role and job title.

In any event, as I will go on to explain below, I'm not persuaded there was any real need for Mrs L to take any risk with her DB scheme benefits to achieve her retirement objectives.

Flexibility and income need

The primary reason Fairstone appears to have recommended the transfer was to provide Mrs L with flexibility - the ability for her to draw the level of income she required to bridge the gap in the early stages of retirement before reducing it once her state pension and her partner's pension were payable.

But I'm not persuaded Mrs L had a genuine need for flexibility – I think it was simply a feature or a consequence of moving to a personal pension arrangement.

Mrs L indicated that she wanted to retire at 55, so before her DB scheme's normal retirement age of 60. Firstly, Mrs L didn't need to transfer her DB scheme benefits to enable her to retire early – she already had that option available to her. I accept Mrs L couldn't take her DB scheme benefits flexibly. While she could opt to take a cash lump sum and a reduced income, she had to take these at the same time. But Mrs L doesn't appear to have had a genuine need to access her tax-free cash and leave her funds invested until a later date.

Fairstone recorded that Mrs L wanted to give her children some money – around £10,000 each. But because this was a gift as such and not something that was timebound – i.e. there wasn't a fixed time or date by which Mrs L had to do this - I see no reason why she couldn't have done this at the same time as taking her income from her DB scheme – whether that was at age 55 or anytime up to her normal retirement age. I think Mrs L could've commuted some of her DB scheme income for a £20,000 lump sum and still had sufficient income to meet her needs, as I will set out below. So I don't think Mrs L needed flexibility this way.

While Fairstone didn't carry out what I consider to be a comprehensive income and expenditure analysis in retirement, Mrs L's initial (joint) income need at 55 was deemed to be £1,500 net a month - £1,000 of which would come from her husband's earning as he still intended to continue working. So Mrs L needed around £500 net a month from her pension. Because Mrs L's income need was lower than her DB scheme income would provide, Fairstone recommended the transfer as it would allow Mrs L to only draw the income she needed to bridge the gap until her state pension and her husband's DB pension were payable, whereupon she could reduce it further (or cease it altogether based on Fairstone's cashflow modelling.)

I accept that transferring to a personal pension would allow Mrs L to control the level of income she took and that it appears she needed less than her DB scheme pension would pay her at 55. While Mrs L's DB scheme trustees wouldn't provide an early retirement quote, Fairstone's analysis using reasonable assumptions indicated she'd likely be entitled to around £10,200 a year. But just because Mrs L's DB scheme income was greater than her initial need and that when her state pension, her current occupational pension and her husband's pension became payable it would result in surplus income, this is not in my view, a compelling reason to justify a transfer out of the scheme.
I do not consider that surplus income is detrimental. This is because Mrs L could use that extra income to improve her standard of living, she could save it, or she could use it to gift to her children as it appears was her wish.

Ultimately I think Mrs L's needs could've been satisfied by remaining in the DB scheme – I see no reason why Mrs L needed to take on investment risk by transferring out of the scheme altogether to achieve things.

I can see that Fairstone's cash modelling showed that by having control over the amount of income she took, it was possible for Mrs L to cease drawing an income altogether from her fund once her state pension became payable at 67. But as I will go on to discuss in more detail below, this appears to have been produced to demonstrate how Mrs L could also meet her objective of wanting to pass on any unused pension monies to her children / family. But I don't think this was a suitable reason for the transfer either.

Overall, I'm not persuaded it was in Mrs L's best interests to transfer her DB pension benefits to achieve flexibility that I'm not persuaded she really needed.

Death benefits

Fairstone says that better death benefits was a secondary objective of Mrs L's. But it nevertheless appears to have been a key reason why it recommended Mrs L transfer her DB scheme benefits. The suitability report recorded that Mrs L was aware she could leave her DB scheme as she didn't need immediate access to it – but that if she was to die, this would leave her husband with a 50% spouses pension, which would not be sufficient for his income needs once he retires and little or no provision for the benefit of her children, which was one of the *"key drivers behind you wanting to secure the transfer value now."*

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 Mrs L. But whilst I appreciate death benefits are important to consumers, and Mrs L might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs L about what was best for her retirement provisions. In my view, a pension is primarily designed to provide income in retirement – not as a legacy planning tool.

I also think the existing death benefits attached to the DB scheme were underplayed. Mrs L was married and so the spouse's pension provided by the DB scheme would've been useful to her spouse if Mrs L predeceased him. And unlike the adviser, I think it would've provided a sufficient income to meet his needs once he retired. It might not have fully met his needs, but he had his own DB pension, his state pension and likely a spouse's benefits from Mrs L's current workplace pension. I don't think Fairstone made the value of this benefit clear enough to Mrs L. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as one of the scenarios Fairstone produced in its cashflow analysis shows, the potential existed for there not to have been a large sum left/the fund may have been depleted - particularly if Mrs L lived a long life. In any event, Fairstone should not have encouraged Mrs L to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

I'm mindful that Mrs L already appears to have had lump sum death benefits available through her current workplace pension. And ultimately her children likely stood to inherit the family home. But if Mrs L genuinely wanted to leave a legacy for her children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think Fairstone should've instead explored life insurance.
I appreciate that the suitability report mentioned a whole of life policy as well as a term assurance policy both with sum assureds of around £422,000.

This was apparently discounted by Mrs L for around eight reasons bullet pointed in the suitability report. In addition Mrs L didn't want an additional cost. But I don't think that this was a balanced way of presenting this option to Mrs L.

Basing the quote on the transfer value of Mrs L's pension benefits essentially assumed that she would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mrs L wanted to leave whatever remained of her pension to her children, which could be a lot less than this if she lived a long life, if investment returns were poor and/or she did draw more income than was modelled. So, the starting point ought to have been to ask Mrs L how much she would ideally like to leave to her children, after taking account of the existing means listed above, and this could've been explored on a whole of life or term assurance basis, which was likely to be cheaper and more affordable to provide. I think this is what ought to have been ultimately recommended to Mrs L to meet this objective.

Overall, I don't think different death benefits available through a transfer to a personal pension was a compelling reason to transfer. And I don't think that insurance was properly or fairly explored as an alternative.

Suitability of investments

Because I'm not persuaded that Mrs L was a truly balanced risk investor, I don't think the investment recommendation was suitable. But as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs L, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs L should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Likewise, and as the investigator clarified, Mrs L's complaint about the alleged failure of Fairstone to carry out the recommended fund switches falls away in light of my findings above.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs L. But Fairstone wasn't there to just transact what Mrs L might have thought she wanted. The adviser's role was to really understand what Mrs L needed and recommend what was in her best interests.

I accept that the suitability report provided detailed information and Fairstone says that Mrs L watched several videos so she understood the pros and cons of transferring. But ultimately Fairstone's advice needed to be suitable and I don't think the advice given to Mrs L was suitable. Mrs L was giving up a guaranteed, risk-free and increasing income. And in my view, there were no particular reasons which would justify a transfer. Mrs L shouldn't have been advised to transfer out of the scheme just to have flexibility that I'm not persuaded she really needed, and the potential for higher death benefits wasn't worth giving up the guarantees associated with her DB scheme. I think Mrs L could've met her objectives by remaining in the DB scheme – I'm not persuaded she needed to accept investment risk and transfer her scheme benefits to achieve things.

So, I think Fairstone should've advised Mrs L to remain in her DB scheme.

Of course, I have to consider whether Mrs L would've gone ahead anyway, against Fairstone's advice.

I can see in response to the investigator's assessment Fairstone said it doesn't believe the investigator can speculate on what Mrs L would or wouldn't have done if it had advised against the transfer and so doesn't believe this is relevant. But it is relevant because it is necessary for me to consider causation. And rather than speculate, I've considered all of the relevant evidence to determine what I think would most likely have happened had Fairstone provided Mrs L with suitable advice.

Having done so, I'm not persuaded that Mrs L would've insisted on transferring out of the DB scheme, against Fairstone's advice. I say this because, as I said above, despite Fairstone's assessment of Mrs L, I'm not persuaded she was an experienced investor or someone who possessed the requisite skill, knowledge or confidence to go against the advice they were given, particularly in complex pension matters. Mrs L's pension accounted for the majority of her private retirement provision and I think her true attitude to risk was lower than that assessed by Fairstone. So, if Fairstone had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

I'm not persuaded that Mrs L's concerns about her death benefits were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If Fairstone had explained that Mrs L could meet all of her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs L would have insisted on transferring out of the DB scheme.

In light of the above, I think Fairstone should compensate Mrs L 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 Mrs L as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs L would have most likely remained in the occupational pension scheme if suitable advice had been given.

Fairstone 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, Mrs L has not yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 60, 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 Mrs L'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, Fairstone should:

- calculate and offer Mrs L redress as a cash lump sum payment,
- explain to Mrs L 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 Mrs L receives could be augmented

rather than receiving it all as a cash lump sum,
- if Mrs L accepts Fairstone's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mrs L for the calculation, even if she 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 Mrs L's end of year tax position.

Redress paid to Mrs L 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, Fairstone 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 Mrs L'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 £375,000, 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 £375,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Fairstone Financial Management Limited to pay Mrs L the compensation amount as set out in the steps above, up to a maximum of £375,000.

Recommendation: If the compensation amount exceeds £375,000, I also recommend that Fairstone Financial Management Limited pays Mrs L the balance.

If Mrs L accepts this decision, the money award becomes binding on Fairstone Financial Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs L can accept my decision and go to court to ask for the balance. Mrs L 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 Mrs L to accept or reject my decision before 15 September 2023.
Paul Featherstone
Ombudsman