DRN-4271466

The complaint

Mr D complains about the advice given by Tier One Capital Wealth Management Limited to transfer the benefits from his defined-benefit ("DB") occupational pension scheme to a hybrid self-invested personal pension ("HSIPP"). He feels the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr D approached Tier One in 2014 to discuss his pension and retirement needs. Tier One gathered information about Mr D's circumstances and objectives and carried out an assessment of his attitude to risk – which it deemed to be 4 out of 10 ('cautious to moderate').

On 16 December 2014 Tier One advised Mr D to transfer his pension benefits into a HSIPP and to invest the proceeds in the Prufund Growth fund. The suitability report said the recommendation met with Mr D's key objective to retire at age 60 with a net monthly income of £1,500 for seven years, upon which his retirement income would be boosted by the State pension and he could reduce the income being taken from the HSIPP. It said this objective could be achieved in principle.

In 2022 Mr D complained to Tier One about the suitability of the transfer advice. He'd recently received details of what his DB pension would have been if he'd stayed in it, and projections showed that he will have a shortfall on his current pension compared to the DB pension. Tier One didn't uphold the complaint. It said the advice was suitable and that the HSIPP was recommended as it met Mr D's specific objectives to:

- retire at 60 with a net monthly income of £1,500
- draw a higher income for the first seven years
- reduce income when the State pension became available
- purchase a lifetime annuity at age 67 to supplement the State pension.

Tier One said remaining in the DB pension wouldn't have achieved Mr D's monthly income objective and the DB pension didn't provide the remaining three options. It also said that in addition to the specific objectives, Mr D had raised concerns about the transfer value of his DB pension reducing in the future and about the financial pressure on DB pensions generally. It said the transfer was recommended on the basis of addressing these concerns (alongside the above objectives).

Mr D referred his complaint to our service. An investigator upheld the complaint and required Tier One to pay compensation. In summary, he felt the advice was unsuitable as it was unlikely that the transfer would improve the benefits Mr D was entitled to from the DB pension. Tier One disagreed. It said it took reasonable steps to ensure that the advice provided to Mr D was suitable. It also said the advice was suitable in view of Mr D's circumstances and objectives at the time.

The investigator wasn't persuaded to change his opinion so the complaint has been 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 Businesses ("PRIN") and the Conduct of Business Sourcebook ("COBS"). Where the evidence is incomplete, inconclusive or contradictory, I've reached 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 it provides useful context for my assessment of Tier One'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).

COBS 9: the provisions of which deal with the obligations when giving a personal recommendation and assessing suitability.

COBS 19: the provisions of 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 states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Tier One should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Tier One got a transfer value analysis report (as required by the regulator) which showed how much Mr D'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. As Tier One has noted, businesses weren't required to refer to these rates when giving advice on pension transfers. However, I think they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr D was 45 at the time of the advice and he wanted to retire at 60. The critical yield required to match Mr D's benefits at age 60 was 10.31% if he took a full pension and 8.37% if he took maximum tax-free cash and a reduced pension. The critical yield to match the benefits available through the Pension Protection Fund ("PPF") at age 65 was quoted as 7.71% per year if Mr D took a full pension and 7.52% per year if he took tax-free cash and a reduced pension. This compares with the discount rate of 4.9% per year for 14 years to retirement in this case. For further comparison, 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 D's cautious to moderate attitude to risk and the term to retirement. There would be little point in Mr D giving up the guarantees available to him through his DB pension scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 7.52%, I think Mr D was most likely to receive benefits of a substantially lower overall value than the DB pension at retirement, as a result of investing in line with his attitude to risk. This would be the case even if the scheme moved to the PPF.

For this reason alone a transfer out of the DB scheme wasn't in Mr D's best interests.

Tier one has argued that given Mr D's objectives and what he was attempting to achieve the critical yield didn't provide a direct comparison between the existing scheme benefits and the benefits that he wanted. It also referred to an alert issued by the regulator in 2017 warning financial advisors about placing too much weight on critical yields when recommending a transfer.

I accept that, in the first instance at least, Mr D was look to drawdown on his pension rather than taking a regular income via an annuity. However, I think in order to treat him fairly Tier One needed to provide Mr D with a direct comparison between the benefits he was giving up and what was being recommended. The critical yields provide that comparison. I'm also aware of the alert Tier One refers to. However, I think a significant consideration in complaints of this nature is determining whether a consumer would be better off by transferring their pension. I'm therefore satisfied that the critical yields are relevant here.

However, as Tier One has argued, 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. I've considered this below.

Flexibility and income needs

I think Mr D's desire for flexible retirement income was a 'want' rather than a 'need'. And I don't think that 'want' should have outweighed the fact he would most likely be worse off in retirement if he transferred his pension. I don't doubt that the flexibility on offer through the HSIPP would have sounded attractive to Mr D. But Tier One wasn't there to just transact whatever Mr D might have thought he wanted. The advisor's role was to really understand what Mr D *needed* and recommend what was in his best interests.

One of Tier One's main arguments is that transferring to the HSIPP would enable Mr D to achieve his desired income of £1,500 net per month in retirement for the first seven years. The transfer value analysis report showed that if Mr D took benefits from the DB pension at 60 he would be entitled to an annual income of £16,402. So I agree with Tier One that this wouldn't have met Mr D's desired net annual retirement income of £18,000. It's possible that with sufficient growth Mr D would have been able to draw his desired income during these seven years from the HSIPP. However, given what I've said above about the critical yield needed just to match (let alone exceed) the DB pension benefits, I think if he did this he was most likely *overall* to receive benefits of a substantially lower value than from the DB pension.

Furthermore, Mr D was only 45 at the time of the advice and while I note his wish to retire at 60 I'm not persuaded that this was a concrete retirement plan or that Mr D knew it was achievable. As Mr D had 10 years before he could think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits at age 45 when he didn't know what his actual needs 15 years later would be. If Mr D later had reason to transfer out of his DB scheme he could have done so closer to retirement.

Tier One noted that one of Mr D's concerns was the potential for the transfer value of his DB pension to reduce in the future. I can see how this might be a concern for Mr D – although of course it could work the other way and the transfer value might increase over time – particularly if he had plans to use a lump sum withdrawal for a specific purpose (which he didn't here – at least it's not noted in anything I've seen). But I don't think a possible future lower transfer value is sufficient to outweigh all the other factors. This is because the transfer value (whether it increases or decreases) has no effect on the benefits Mr D was entitled to under the DB pension. It's also because I'm looking at the position as it was in 2014 – not what it might have been in the future eg when Mr D turned 55 (the minimum age he could access his pension) or 60 (his desired retirement age).

Concern over financial stability of the DB scheme

The funding of Mr D's DB pension wasn't in a position such that he should have genuinely been concerned about the security of his pension. Furthermore, if the scheme did end up moving to the PPF, I think Tier One should have explained that this was not as concerning as Mr D thought. As I've explained above, Mr D was still unlikely to match the benefits available to him through the PPF if he transferred out to a personal pension.

Suitability of investments

Tier One recommended that Mr D invest his pension funds in the Prufund Growth fund. As I'm upholding the complaint on the grounds that a transfer out of the DB pension wasn't suitable for Mr D, I don't need to consider the suitability of the investment recommendation. This is because Mr D should have been advised to remain in the DB scheme and so the investment in the fund wouldn't have arisen if suitable advice had been given.

Summary

For the reasons outlined above, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income and by transferring he was very likely to obtain lower retirement benefits. In my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr D shouldn't have been advised to transfer out of the DB pension just so he could receive his desired retirement income at 60 – particularly when doing so would most likely leave him in a worse position overall.

So, I think Tier One should have advised Mr D to remain in his DB pension.

Tier One commented that Mr D made a fully informed decision to proceed with the transfer. I don't think this argument carries much weight. It's true that Mr D was in receipt of all the facts as presented to him by Tier One. However, his decision to transfer was simply in line with what his professional advisor had recommended. I think it's harsh to criticise him for following that advice or to use that as a reason to not uphold the complaint.

I've considered whether Mr D would have gone ahead anyway, against Tier One's advice to remain in the DB pension. I'm not persuaded that he would have insisted on transferring out of the DB pension. I say this because Mr D was an inexperienced investor with a cautious to moderate attitude to risk and this pension accounted for the majority of his retirement provision. So, if Tier One had provided him with clear advice against transferring out of the DB pension, explaining why it wasn't in his best interests, I think he would have accepted that advice. I'm not persuaded that Mr D's wish for £1,500 a month retirement income from age 60 was so great that he would have insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Tier One had explained that Mr D couldn't achieve his desired objectives without risking his overall pension, I think that would have carried significant weight. So, I don't think Mr D would have insisted on transferring out of the DB scheme.

In light of the above, I think Tier One should compensate Mr D 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 Tier One to put Mr D, as far as possible, into the position he would now be in but for the unsuitable advice. As above, I consider that Mr D would have most likely remained in the DB pension scheme if suitable advice had been given. Tier One 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 D hasn't yet retired and he has no plans to do so at present. So compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the regulator'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 D'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, Tier One should:

- calculate and offer Mr D redress as a cash lump sum payment
- explain to Mr D before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum
- if Mr D accepts Tier One's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr D for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr D's end of year tax position.

Redress paid to Mr D 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, Tier One 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 D'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 Tier One Capital Wealth Management Limited to pay Mr D 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 Tier One Capital Wealth Management Limited pays Mr D the balance.

If Mr D accepts this decision, the money award becomes binding on Tier One Capital Wealth Management Limited. My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 2 October 2023.

Paul Daniel
Ombudsman