DRN-4316317

The complaint

Mr L complains about the advice given by True Potential Wealth Management LLP ('TPWM') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr L approached TPWM in January 2018 to discuss his pension and retirement needs. TPWM completed a fact-find to gather information about Mr L's circumstances and objectives. It noted the following:

- Mr L was aged 60 and married with two grown-up non-dependent children. Mrs L was aged 57.
- Mr L was employed with a net monthly income of £2,500. Mrs L was also employed and earned £1,000 per month.
- Mr and Mrs L's joint monthly outgoings were £1,075. They anticipated needing an income in retirement of £1,500 per month as they planned to keep busy and take extra holidays.
- Mr and Mrs L owned their own home valued at £70,000 which was mortgage free. Mr L had no other debts.
- Mr L had £20,000 in a savings account and £47,403 held in ISA's.
- In addition to his DB scheme, Mr L had an e-SIPP with TPWM worth £128,206.52.
- Both Mr and Mrs L expected to receive the full state pension at age 67. Mrs L had an occupational pension scheme of her own forecast to provide her with a monthly income of £500 from age 60.
- Mr L wanted to retire at age 67 and have enough income from both his and Mrs L's pensions to cover their monthly expenditure which they anticipated would largely be met from their state pensions.

TPWM also carried out an assessment of Mr L's attitude to risk, which it deemed to be 'balanced'.

TPWM contacted the DB scheme for information. The information provided by the scheme administrator showed that Mr L had 17 years 5 months of pensionable service in the scheme and that the total cash equivalent transfer value for Mr L's scheme benefits was £124,492. The information also showed that at the scheme's normal retirement date ('NRD') of age 65, Mr L's deferred pension benefits would provide him with an annual pension of £4,758 or a tax-free lump sum of £22,083 and a reduced annual pension of £3,312. At age 67 Mr L could get an annual income of £5,689 or a tax-free lump sum of £25,978 and a reduced annual income of £3,896.

In February 2018, TPWM issued Mr L with a suitability report in which it advised Mr L to transfer his pension benefits into an e-SIPP and invest the proceeds in a plan on the True Potential Investment Platform. The plan was to be split between a number of funds: 42% in cautious funds, 30.5% in growth funds, 24% in aggressive funds and 3.5% in a defensive account. TPWM advised Mr L that its platform was a financial planning system that consolidated all his savings and investments into one convenient location so he could look at his finances as a whole and keep his investments working together. The suitability report said the reasons for this recommendation were, in summary:

- Mr L wanted to retire at age 67.
- He wanted more funds in retirement to use on holidays.
- He wanted to leave his funds to his adult children should he pass away.

TPWM charged Mr L £3,734.76 for the advice. There was an ongoing annual advice charge too of £622.46 per year along with annual fund charges.

In November 2022 Mr L, through his representative, complained to TPWM about the suitability of the transfer advice he had received. He said TPWM had induced him into transferring and had told him that he would make more money by doing so than his DB scheme would provide him with. Mr L said TPWM had failed to show that it had undertaken an adequate assessment of his expertise, experience, financial situation and knowledge and had recommended an unsuitable pension scheme. Additionally, Mr L said that TPWM had failed to properly assess his needs and objectives or to advise on the costs of the transfer in comparison to other alternative product options. Consequently, Mr L said he had suffered a financial loss.

TPWM looked into Mr L's complaint but didn't think that it had done anything wrong. It said that at the time of the advice Mr L was an experienced investor with a good capacity for loss for whom it had undertaken a full fact-find to ascertain his financial situation. In addition, TPWM said that it had deduced at the time that Mr L had no need to fully replicate the benefits provided by his DB scheme because he didn't need the income it would provide or the tax-free cash ('TFC'). Consequently, TPWM said that the DB scheme structure wasn't suitable for Mr L so it didn't agree that it had done anything wrong.

Unhappy with the outcome of his complaint to TPWM, Mr L complained to this service, Our Investigator looked into the complaint and recommended that it was upheld. She thought that the transfer wasn't financially viable and that the different way death benefits were available under a SIPP didn't justify the lower overall retirement benefits Mr L would receive as a result of transferring. Our Investigator also thought that as the DB scheme was Mr L's only remaining such pension then it would have had greater significance for his retirement planning that TPWM had suggested. Overall our Investigator thought TPWM's recommendation to Mr L that he transfer his DB scheme was unsuitable so she recommended that Mr L be compensated in line with the regulator's (the Financial Conduct Authority – 'FCA') guidance.

As TPWM didn't reply to our Investigator's view the complaint was 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.

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

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr L was aged 60 at the time of the advice and wanted to retire at 67. TPWM carried out a transfer value analysis report ('TVAS' – as required by the regulator) showing how much investment growth (known as the 'critical yield) Mr L's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme.

The critical yield required to match Mr L's benefits at age 67 was 9% if he took a full pension and 6.81% if he took TFC and a reduced pension. If Mr L retired at the scheme's NRD of age 65 the critical yield was 10.14% if he took a full pension and 7% if he took TFC and a reduced pension. The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.3% per year for 6 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 L's 'balanced' attitude to risk and also the term to retirement. There would be little point in Mr L 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 lowest critical yield was 6.81%, I think Mr L 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. Indeed I can see too from the suitability report that TPWM accepted that the critical yields required to match Mr L's scheme benefits at both NRD and age 67 *"would appear to be very unlikely for a balanced investor to achieve, and would be considered unrealistic".*

I've thought too about Mr L's capacity for loss and, as can be seen from what I've set out above, Mr L had other savings, investments and pensions. I can see too that the suitability report said that Mr L's financial position was such that any loss of capital would not impact his standard of living or affect his objectives. And I can see that the report said Mr L's retirement income needs were such that they were more than covered by Mr and Mrs L's state pension, Mr L's existing e-SIPP and Mrs L's own pension expected to be £500 per month.

So I think it is fair to say that Mr L had some capacity for loss. However, the fact that he did doesn't make an unsuitable transfer suitable. I say this because the DB scheme was the only such scheme left to Mr L. It was a risk-free scheme and formed a significant element of his retirement provision. Indeed he had only one other pension plan (aside from his state pension) and that was subject to investment risk so he was highly reliant on his DB scheme for retirement. And even if he thought he wouldn't need his DB scheme in retirement, the fact is his retirement was seven years away so it was too early, in my view, to decide that. Mr L's view of what retirement income he needed may have changed by the time he reached retirement age so the DB scheme could have assisted him had it been retained. And if Mr L reached his retirement age and still felt that his DB scheme was surplus to his needs then he could have transferred it at that point.

So I don't think the fact Mr L had moderate other financial assets meant he had the capacity to bear the loss of his DB scheme. If it was acting in his best interests, I think TPWM should have made that clear to Mr L when it was advising him.

And the pension from the DB scheme would have helped Mr L meet his retirement income needs and any shortfall he had and any capital expenditure he needed to meet in retirement, could have been met from his existing e-SIPP. The e-SIPP already afforded Mr L with any retirement income flexibility he needed without having to transfer his DB scheme and expose it to investment risk and charges.

TPWM has also said that that the TVAS shows that if Mr L takes his benefits as a drawdown from the SIPP at the same amount as the pension offered by his DB scheme then his funds wouldn't be depleted until he reached age 97. However, this is based on his pension achieving an annual growth rate of 5%. As TPWM will know, past performance is no guarantee for future performance and so I consider the discount rates to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. TPWM said in its suitability report that critical yields are of little significance because they only demonstrate the annualised return required to match the benefits of the DB scheme (and Mr L had no need to match the benefits he was giving up). But, for the reasons given above I disagree.

For this reason alone a transfer out of the DB scheme wasn't in Mr L's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as TPWM 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.

Deferred retirement

I've seen no evidence that TPWM explained to Mr L that his retirement objective of retiring at age 67 could be achieved by remaining in his DB scheme. He didn't need to transfer out of his DB scheme in order to achieve it. As I've said, as Mr L had seven years before he thought he would retire, 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 L to give up his guaranteed benefits when one of his objectives was already being met by his DB scheme. If Mr L later had reason to transfer out of his DB scheme he could have done so closer to retirement.

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 L. But whilst I appreciate death benefits are important to consumers, and Mr L 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 L about what was best for his *retirement* provisions. A pension is primarily designed to provide income in retirement not a legacy for loved ones after death. And I don't think TPWM explored to what extent Mr L 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 L was married so the spouse's pension provided by the DB scheme would've been useful to Mrs L if Mr L predeceased her. I don't think TPWM made the value of this benefit clear enough to Mr 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 the TVAS shows, there may not have been a large sum left particularly if Mr L lived a long life. In any event, TPWM should not have encouraged Mr L to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr L genuinely wanted to leave a legacy for his family, which didn't depend on investment returns or how much of his pension fund remained on his death, I think TPWM should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr L. And I don't think that insurance was properly explored as an alternative.

Suitability of investments

As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr L, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr L should have been advised to remain in the DB scheme and so the question of the appropriateness of investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that having more funds to use on holidays, the option to retire at age 67 and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr L. But TPWM wasn't there to just transact what Mr L might have thought he wanted. The adviser's role was to really understand what Mr L needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr L was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr L 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 L shouldn't have been advised to transfer out of the scheme because he wanted to retire at age 67 when this was an objective that could have been achieved by remaining in it. And the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme for. Nor can I ignore that Mr L already possessed a degree of retirement income flexibility through his existing e-SIPP from which he could have achieved his objective of taking more holidays. Even had he found the DB scheme income surplus to his requirements come his retirement, then he could have used that to put towards the additional activities and holidays he wished to embark on.

The objectives identified by TPWM to justify the transfer of Mr L's DB scheme are generic. I've seen no evidence that they were of such importance to Mr L, or that the only means of achieving them was through the transfer of his DB scheme, that they can be said to justify that the transfer was in Mr L's best interests. This is especially the case given that Mr L was likely to be financially worse of – as I've explained above – as a result of the transfer. So, on balance, I've not been persuaded that TPWM has been able to show that the transfer was in Mr L's best interests, as required by the FCA.

So, I think TPWM should've advised Mr L to remain in his DB scheme.

I've thought too about whether Mr L would have gone ahead in any event. But I'm not persuaded that Mr L's objectives were such that he would've 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 TPWM had explained to Mr L that he was always unlikely to exceed the guaranteed benefits available to him by transferring, that he shouldn't be prioritising death benefits over retirement benefits, that he could stay in his DB scheme and retire at age 67, that the flexibility he sought could be met by other means, I think that would've carried significant weight. So, I don't think Mr L would have insisted on transferring out of the DB scheme. It follows that I think that the unsuitable advice TPWM gave Mr R was causative of his loss.

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

TPWM 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 L plans to retire at age 67. So, compensation should be based on him taking benefits at this age.

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 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, TPWM should:

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

Redress paid to Mr 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, TPWM 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 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 £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 True Potential Wealth Management LLP to pay Mr L 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 True Potential Wealth Management LLP pays Mr L the balance.

If Mr L accepts this decision, the money award becomes binding on True Potential Wealth Management LLP.

My recommendation would not be binding. Further, it's unlikely that M L can accept my decision and go to court to ask for the balance. Mr 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 Mr L to accept or reject my decision before 20 October 2023.

Claire Woollerson
Ombudsman