

## **The complaint**

Mr R complains about the advice given by Direct Pension Services an appointed representative of Whiting Group Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension and a Section 32 Buy-out plan. He says the advice was unsuitable for him and believes this has caused a financial loss. For clarity I shall refer to the respondent business throughout this final decision as 'Whiting'.

## **What happened**

Mr R had some deferred DB scheme benefits with a former employer he'd worked for until 1999. In mid-2003 Mr R approached Whiting 'out of interest' to discuss his pension and retirement needs.

On 11 November 2003, Whiting completed a fact-find to gather information about Mr R's circumstances and objectives noting that Mr R had recently separated from his partner and was looking to purchase a property for which he needed cash for the deposit. It also noted that Mr R wasn't sure how much his future property would cost and that he had spare income to afford a mortgage. Whiting also carried out an assessment of Mr R's attitude to risk, which it deemed to be 'cautious'.

On 21 November 2003, Whiting sent Mr R its recommendation report along with its technical report. Whiting's recommendation report said that Mr R's objective was to obtain cash immediately to assist with a property purchase and whilst the exact amount wasn't quantified it noted that Mr R needed at least the amount that could be released as tax-free cash ('TFC') from his transferred pension (an amount of £19,374.89).

Whiting recommended Mr R didn't transfer his DB scheme because it would leave him worse off in retirement as a consequence. It recommended that Mr R should leave his deferred DB scheme benefits where they were until his normal retirement date ('NRD'). Whiting also said Mr R should consider taking out a personal loan to fund the house deposit instead and it provided an illustration of how much the loan may cost Mr R.

Whiting agreed to arrange the transfer of Mr R's DB scheme on an 'insistent client' basis and it provided him with a letter to sign. The letter stated that Mr R understood that Whiting had made him fully aware that he could achieve his financial planning objectives without immediately releasing his pension benefits and that he would be left with a lower retirement income. Mr R signed the letter on 27 November 2003.

In January 2004, the cash equivalent transfer value of Mr R's DB scheme - £88,551.76 – was transferred to an immediate vesting Section 32 Buy-out plan and a personal pension plan with a provider I shall refer to as 'S'. Mr R received £19,524 in TFC and immediately drew a single life level annuity of £1,856 per annum from the personal pension. The sum of £17,842.68 invested in the Section 32 Buy-out plan remained invested in a cautious lifestyle fund with S until 2015. In 2015 Mr R purchased another annuity which provided him with an annual income of £1,100.

Mr R, through his representative, complained to Whiting in September 2022. Specifically Mr R complained that:

- the 'insistent client' process had not been correctly followed by Whiting;
- the advice he received to transfer his DB scheme wasn't in his best interests and he lost the guarantees associated with his DB scheme;
- the transfer was inappropriate for someone who had no wish to take any risk with his pension;
- his personal situation was such that he had no capacity for loss;
- had he left his DB scheme where it was it would now have a cash equivalent transfer value of £249,610.37;
- Whiting had provided him with negligent advice, as a result of which he had suffered a financial loss.

Whiting looked into Mr R's complaint but didn't think it had done anything wrong. It said it made Mr R fully aware of the benefits he would be giving up and it advised him about the risks and told him not to proceed. Whiting said it had told Mr R that he would be acting against its advice should he choose to proceed but he ignored the advice he was given. Whiting said it had followed the regulatory processes applicable at the time and had provided Mr R with detailed information so that he could make an informed decision. It also said it had made Mr R aware that any future value of his pension if he transferred would be dependent on investment performance which wasn't guaranteed.

Unhappy with the outcome of his complaint to Whiting, Mr R complained to the Financial Ombudsman Service. One of our Investigators looked into the complaint and recommended that it was upheld. He thought that the process followed by Whiting didn't mean that Mr R could truly be regarded as an insistent client. And he thought that Whiting's communications weren't clear or fair nor that it had acted in Mr R's best interests. Our Investigator also thought that the transfer was unlikely to have been financially viable. Finally, our Investigator recommended that Whiting compensate Mr M in line with the regulator's (the Financial Conduct Authority – 'FCA') guidance for redress for non-compliant pension transfers.

Mr R accepted our Investigator's findings but Whiting disagreed.

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

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business rules ('COB').

Having done so, I've decided to uphold this complaint and I require Whiting to put things right. My reasons are set out below.

#### *The applicable rules, regulations and requirements*

What follows 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 Whiting'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.*

COB 5.3.29A(4): where the then regulator expected a “...prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up.”

At least one illustration for the personal pension/section-32 buy-out plan was expected to be on a similar basis to the DB scheme, e.g. what spouse’s pension and increases in payment were shown.

COB 5.3.22R which said:

- 1) *A firm must ensure that a transfer value analysis is carried out in accordance with COB 6.6.87 R - COB 6.6.93 R (Projections) before it makes any recommendation to a customer to transfer out of a defined benefits pension scheme.*
- 2) *A copy of the analysis must be delivered with the key features document or otherwise provided to the customer before he gives consent to the application to transfer.*
- 3) *The firm must take reasonable steps to ensure the customer understands the analysis, drawing attention to factors which do and do not support the recommendation to transfer.*

COB 5.3.23R which said:

*A firm must provide a projection of the possible future benefits of the proposed individual pension contract before it makes any personal recommendation to a customer to opt out of, or transfer from, an occupational pension scheme.*

- 1) *The format and nature of the benefits given in the projection must, so far as possible, be the same as those which apply under the occupational pension scheme of which the customer is, or is eligible to become, a member.*
- 2) *If it is not possible for the benefits shown in the projection to replicate those of the occupational pension scheme, an explanation must be given.*
- 3) *If the customer has expressed an interest in changing the structure of his eventual benefits, an additional projection may also be prepared on that basis.*

COB 5.3.24R which said:

*A suitability letter relating to a personal recommendation to opt out of or transfer from an occupational pension scheme must include:*

- 1) *a summary of the disadvantages as well as the advantages of opting out or transferring; and*
- 2) *in the case of a pension opt out, a financial analysis explaining the decision to opt-out.*

COB 5.3.25R which said:

If, contrary to the advice of the *firm*, a *private customer* instructs the *firm* to arrange a *pension opt-out* or *pension transfer*, the *firm* must:

- 1) make and retain a clear record of the *firm's* advice that the *private customer* should not proceed with the *pension opt-out* or *pension transfer* and the *private customer's* instructions to proceed with the transaction; and
- 2) provide a further confirmation and explanation, in writing, to the *private customer* that the *firm's* advice is that the *private customer* should not proceed with the *pension opt-out* or *pension transfer*.

#### *Insistent client*

A key aspect in this case is Whiting's categorisation of Mr R as an insistent client – although COB didn't define this at the time this was generally understood to be a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its own advice.

At the time of the advice, the rules, specifically COB 5.3.25R (as set out above), required financial firms with customers that wanted the firm to arrange a pension transfer to keep a clear record of the advice not to proceed, along with the customer's instructions to proceed. Financial firms were also required to provide a further confirmation and explanation in writing to the customer that its advice was not to proceed.

In its recommendation report, Whiting recommended that Mr R should not transfer away from his DB scheme. It said this was because Mr R could achieve his objective (of raising a sum for a house deposit) by other means and because the transfer would reduce his long-term retirement income. The report then said that Mr R had decided he wanted to go ahead on an insistent client basis in any event. It went on to recommend a solution that allowed for Mr R to receive payment of a maximum lump sum plus an immediate annual pension by splitting his transferred benefits between two pension plans. This meant that the Guaranteed Minimum Pension element of the transferred benefits remained invested until it became available at age 60 (Mr R being aged 52 at the time of the advice).

Mr R says that he doesn't recall being treated as an insistent client nor did he understand the implications of being classed as such. He also said that if Whiting intended to treat him as an insistent client then it should have explained this to him in detail and provided him with paperwork to sign to confirm that he agreed to being treated as 'insistent'. Whiting has said that it did just that, having Mr R sign a templated letter on 27 November 2003.

Having considered all of the evidence presented, and whilst Whiting's recommendation and technical reports did set out that its recommendation for Mr R was *not* to proceed with the transfer, I think there were weaknesses and failings in the advice process which meant Whiting didn't pay due regard to Mr R's interests, information needs or treat him fairly. And I think it's more likely than not that Mr R understood or believed overall that Whiting was recommending he should go ahead with the transfer.

I say this because in the recommendation report immediately underneath the summary of why Whiting recommended Mr R should not transfer away from his DB scheme, it explained the steps Mr R needed to take to do just this, including completing and signing the documents listed on the document checklist. So I think that the recommendation not to proceed was seriously undermined by advice in the same report about how Mr R could still go ahead and what benefits he would receive if he did so. And although I have not seen the

checklist referred to in the report, it is not unreasonable to assume that one of those documents was Whiting's insistent client templated letter. I say this because I can see that the two reports were dated 21<sup>st</sup> November 2003 and that Mr R signed the letter six days later on 27 November 2003.

I don't think Whiting met with the requirements laid out in COB 5.3.25R. I say this because despite asking Mr R to sign a letter instructing Whiting to proceed with the transfer, it didn't then go on to provide a further confirmation and explanation that its advice was that he should not proceed with the transfer. Had it done so, I think that would've helped Mr R understand that he was proceeding against Whiting's advice

I think if Whiting was confident in its advice and recommendation, and it was treating Mr R fairly, it wouldn't have told him at the same time as delivering its recommendation how he could readily put it aside and bypass it. I think the wording and the emphasis placed on how Mr R could ignore Whiting's recommendation was unfair to Mr R and wasn't in his interests.

I don't think it was in Mr R's interest to go against Whiting's recommendation – yet I consider Whiting made it very easy for him to do so. I also think, given the context and the emphasis placed on this, that Mr R could reasonably have interpreted that overall that Whiting was recommending he go ahead and transfer.

I say this partly because I can see that there was a telephone call between the adviser and Mr R before the reports were sent to him. The call note from that call states:

*'He was originally enquiring about his pension "out of interest". He has since split up with his partner & will be looking to buy a home in the New Year. This cash will be used for the deposit/expenses and he can afford to raise a mortgage. Not sure of prices yet. We discussed lower [pension] benefits by taking early, which he understood. Send figures and he will decide for sure...'*

But I'm not satisfied that this note demonstrates that Whiting clearly explained to Mr R the benefits of his DB scheme, the value of them in retirement and all the risks associated with transferring. I think the note implies the conversation was brief and that Whiting left the decision with Mr R rather than to clearly explain that it was advising him that he shouldn't transfer. I think it would have been better had Whiting set out in writing its recommendation not to proceed before exploring other ways he could proceed. That would have allowed Mr R to digest the recommendation fully before making any decisions.

My view on this point is further strengthened by the fact the recommendation report states that Mr R had already instructed Whiting to proceed with the transfer. So it seems to me that Mr R had instructed Whiting that he wanted to proceed before it had provided him with its written recommendation. But I can't see that Whiting made and retained a *clear* record of Mr R's instructions to proceed with the transaction. I don't think the note on the fact-find can be said to be such a record and, in any event, it predates the recommendation. There is no such instruction that post-dates the recommendation.

And I also say this because the templated 'insistent client' letter that Whiting provided to Mr R to sign made no mention of the fact that Whiting had recommended Mr R *did not* proceed. Rather Mr R was asked to put his signature to a document that confirmed that he had received Whiting's recommendation and its reports and that they contained a fair representation of his financial planning objectives and his available options. The letter also confirmed that Mr R had received illustrations from S and that he had received full details of the charges and fees that would be applied. Nowhere in the letter did Whiting plainly set out

that it had recommended that Mr R didn't transfer, that he understood what its recommendation was and that he wished to proceed regardless.

So the letter Mr R signed was short and contained no detail about what he understood about the recommendation that Whiting had made. But I think it would've been important for Whiting to ensure Mr R understood what he was getting into. And while I acknowledge it wasn't a requirement at the time, given Mr R's apparent financial inexperience, a good way to have done this would've been to see, in his own words, that he understood the recommendation being made and why he wanted to proceed. In the absence of this I'm not persuaded that Mr R was able to make an informed choice here.

I don't think the content of the letter Mr R signed adequately demonstrates that he knew and understood the risks involved in the transfer and the benefits he'd be losing by doing so. So, I'm not persuaded that the templated letter alone sufficiently showed it was fair for Whiting to treat Mr R as an insistent client.

And I can't ignore either that Whiting failed to have regard to Mr R's information needs (as required by COB 5.22R) such that he was able to make a fully informed decision. That's because Whiting failed to provide Mr R with a transfer value analysis report ('TVAS') for his consideration (contrary to COB 5.3.22R). A TVAS is essentially a comparison between the benefits being offered by the DB scheme and the investment return (also known as the 'critical yield') the transferred pension would need to attain in order to be able to match the scheme benefits at NRD. For the consumer, the TVAS is an essential component of the advice stage as it provides essential information so that an informed decision can be taken. But there is no record of any such report being provided to Mr R. Indeed, when the Financial Ombudsman Service asked Whiting for a copy of its TVAS (or some evidence of the critical yield) it replied to say that there was no requirement at the time for it to produce one.

So I consider that Whiting failed to provide Mr R with sufficient, clear information so that he could make an informed decision based on a firm understanding of the risks involved and the full knowledge of what he was giving up.

I think it should have been clear to Whiting that Mr R had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr R was an experienced investor – in fact there's nothing to indicate he had any prior investment experience. I think this alone should've put Whiting on notice that it had to be careful if it was to take matters through the insistent client route.

Overall I'm not persuaded that Mr R was able to make an informed choice here. I also think that given Mr R's explanation about why he wanted to proceed – he said he had an immediate need for a lump sum for a property deposit but that he had no idea about how much he might be spending on a property or when that might be – ought to have prompted Whiting to ask further questions.

Whilst I can see that Whiting recommended that Mr R could achieve his objective by taking out a personal loan I've seen no evidence it interrogated Mr R's sole objective in any detail before considering how to fund it, or if it was an objective that needed funding at all. Had it done so I think it would have further strengthened its view that transferring his DB scheme wasn't suitable for Mr R's, as least not at that point in time. That Whiting didn't do so has been highlighted by the fact that Mr R never did purchase a property and has remained in rented accommodation ever since. So I'm not persuaded that his objective was a real one or set in stone. No actual plans to purchase a property appear to have been in the pipeline.

I think that at the very least, Whiting should have recommended, in the alternative, that Mr R defer thinking about transferring until he had found a property to buy and knew what size deposit he might need. If the house deposit was a true objective I think Whiting should have gathered more information from Mr R about his intended property purchase to better understand the position – if only to understand if it was a true objective – before continuing to facilitate an irreversible transaction to transfer his pension.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Whiting followed meant that Mr R can truly be regarded as an insistent client. Whiting's communications overall weren't clear or fair, it failed to have regard to Mr R's information needs and I think it failed to act with due care and skill.

If Whiting had acted fairly and reasonably, fully interrogating Mr R's objective, I don't think Mr R would've insisted on going ahead with the transfer. As I've outlined above, I think Mr R was an inexperienced investor who didn't possess the requisite knowledge to fully understand the consequences of going against the advice he was given. I'm also not persuaded that Mr R's alleged plans to buy a property was something he had firm plans for at the time, such that he would have gone ahead and transferred in any event. I think Mr R relied *solely* on the advice and process Whiting employed – so if things had happened as they should have, I don't think Mr R would have insisted on going ahead with the transfer.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr R would have most likely remained in the occupational pension scheme if suitable advice had been given.

Whiting 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, although Mr R started taking benefits directly after the transfer he didn't retire at that time. And I don't think he would've taken his benefits from the DB scheme any earlier than his normal retirement age. 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 Mr R'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 Whiting should:

- calculate and offer Mr R redress as a cash lump sum payment,
- explain to Mr R 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 DC pension

- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr R accepts Whiting's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr R for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr R's end of year tax position.

Redress paid to Mr R 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, Whiting 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 R'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 Whiting Group Limited to pay Mr R 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 Whiting Group Limited pays Mr R the balance.

If Mr R accepts this decision, the money award becomes binding on Whiting Group Limited.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 16 November 2023.

Claire Woollerson  
**Ombudsman**