DRN-4353536

The complaint

Mr B complained that he was given unsuitable advice to transfer his defined benefit (DB) occupational pension scheme, to a type of personal pension plan.

Gordian Financial Services Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Gordian".

What happened

The pension in question here related to a previous DB scheme which at the time of the advice was in deferment. Mr B had accrued a number of years' service with this scheme and (initially) in 2016 he was given a cash equivalent transfer value (CETV) of £261,059. In early 2017 this was later updated to £262,247. The normal retirement age (NRA) of the scheme was 65.

Mr B went to Gordian for regulated pension advice as my understanding is that he already had an existing relationship with it, having received financial advice for some years. I think it's fair to say Mr B was, at the time, in an agreeable financial situation. Information gathered about his circumstances and objectives were broadly as follows:

- He was 55 years old and married to Mrs B. They still had two financially dependent children at home aged 18 and 22.
- Mr and Mrs B were both directors of an apparently successful business along with another couple. Mr and Mrs B each drew salaries from the business of around £9,000 per year and dividends of over £90,000 per year. Their average combined net income was recorded as around £12,000 per month, which easily covered their normal outgoings.
- They also each had savings in premium bonds (2 x £50,000) and cash ISAs (2 x £55,000). They had no significant debts or liabilities.
- As well as having the DB scheme which is now the subject of this complaint (above) Mr B had another small DB scheme which was also in deferment. However, this second DB scheme isn't being complained about here or dealt with in this decision – Mr B was seeking independent advice about this second DB scheme from a different financial adviser, and this was due to pay around £3,791 per year at the age of 65. Mr B also had some other defined contribution (DC) pensions which had funds totaling around £43,000.
- Mrs B had a small DB pension scheme of her own, again in deferment.
- Mr B's thoughts at the time of seeking this pension advice were that he would probably continue working until his mid to late sixties. After that, he and Mrs B would either continue to draw significant retirement incomes from the business or sell the business entirely. There was an expectation that selling could generate over £2 million, to be divided accordingly.

Gordian set out its advice in a suitability report. In this it advised Mr B to transfer out of the DB scheme and invest the funds in a type of personal pension plan. Gordian said this would allow Mr B to achieve his objectives. Mr B accepted this advice and so transferred to a personal pension in early 2017. In 2022 Mr B complained to Gordian about its advice, saying he shouldn't have been advised to transfer out to a personal pension. In response, Gordian said it hadn't done anything wrong and was acting on the financial objectives Mr B had at the time.

Disagreeing with this, Mr B referred his complaint to the Financial Ombudsman Service. One of our investigators looked into the complaint and said it should be upheld but Gordian still didn't agree.

As the complaint couldn't be resolved informally, it's come 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 also 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 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 Gordian'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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Gordian should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests.

I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension was in Mr B's best interests.

I don't think it was, so I'm upholding his complaint.

Introductory issues

As I've mentioned above, it's fair to say that Mr B could reasonably be termed as a wealthy individual by most people's standards. Gordian makes the point that he was clearly a successful businessperson and indeed, financially and commercially aware. I note also what Gordian says about the DB pension in question here; that it originates from a previous career in financial services (although this relates to a shorter period – and from longer ago – than Gordian alleged). Nevertheless, I do understand the points being made. These are that Mr B was most likely comfortable around money, cashflows and investments. And I think his knowledge and experience of financial affairs would have exceeded that of most people.

Having said this, none of this shows that Mr B was necessarily a pensions expert. And even if his knowledge extended to this field, the regulated party here was Gordian and not Mr B. Gordian was charging Mr B for its advice and the adviser's job wasn't therefore to simply transact what Mr B might have thought was a good idea. Their job was primarily to follow the rules and guidance set by the FCA – and to recommend what was in Mr B's best interests overall.

As I've said, those rules assume that the starting assumption for a transfer from a DB scheme is that it is unsuitable. I've also noted that even in accepting the wealth Mr B had, his pension provisions by comparison were comparatively small. For example, at the time the advice was given, both his DB schemes added together would amount to a small annual income throughout retirement from the age of 65. As for the DC schemes he had, these would have barely lasted more than a few months in Mr B's case, although there was still scope for him to add to these considerably at the time the advice was given.

I'll address all the issues relating to transferring his DB scheme. But a central case for defending the advice to transfer away is that Gordian assumed Mr B's retirement income could come from wealth sources other than pensions. So, the advice was also predicated on using the pension funds he had in a tax-efficient manner.

<u>Financial viability</u>

Gordian referred in its transfer analysis and suitability report to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable. The critical yield required to match Mr B's existing DB benefits for this scheme, at the age of 65, was 6.8% if taking a full pension. If taking a tax-free lump sum upon retirement together with a reduced annual pension the critical yield was 5.2%. Gordian also calculated that the critical yields for retiring early at the age of 60 were 9.3% and 5.1% respectively.

Because of the financial assets Mr B enjoyed, I think it's fair to say that he would always have considered taking a tax-free lump sum a sensible thing to do. We also know he didn't plan to retire early, so in my view all this means the most relevant critical yield was 5.2%. I've therefore thought carefully about what this meant at the time.

The relevant discount rate - which is a measure of how much an investment is likely to grow by – closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before October 2017. This was only 3.7% per year for just under 9 years to retirement. Had he wanted to retire earlier, the discount rate for the age of 60 was only 3%, for just under 4 years to retirement. 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. In my view, this was already implying that reaching an annual growth rate outside the DB scheme to make transferring worthwhile, would most likely be very difficult when looked at through the lens of that time.

We know, for instance, that we were in a sustained period of very low interest rates and bond yields and buying a pension on the open market with similar benefits would have been expensive. 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%.

Gordian recorded Mr B's attitude to risk (ATR) as "aggressive" or 6/7. This was based on the answers given to questions about share buying and investments in general. However, it's not clear that Mr B had any such investments which would help justify such a high ATR categorisation. From what was recorded on the 'fact-find' he and Mrs B actually held a lot of cash-based funds with the majority of their wealth tied up in the business. Their ISAs were in cash, rather than in shares or funds and whilst Mr B held some DC pension funds, there's no evidence these were comprised of anything other than 'off the shelf' investment strategies which required little or no personal involvement from Mr B himself. It's my understanding no contributions had been made to these DC schemes for some time in any event.

So, on the face of it, Mr B was categorised as an "aggressive" investor whilst holding no such investments. His current preference was certainly to hold cash. I note his DC schemes evidently held some "far east" funds. But it's just as likely these were moderately risked funds investing in large trans-national companies or funds which in all reality carried only a modest risk. In my view, the level of experience Mr B could call upon to justify such a high ATR was not evidenced. I'd have expected to see much more investment experience or aggressive portfolio building over a period of time to justify such a high ATR. In my view, the ATR was judged on his business acumen – and impressive though this was – building a business in a particular sector in England differs substantially from stock picking and taking aggressive investment risks.

What the transfer recommendation provided, from a financial comparison perspective, was the need for Mr B to transfer away and then match an assumed growth rate of over 5.2% for every year until he reached the age of 65. I say over 5.2% because as Gordian itself acknowledges now, the fees associated with a personal pension (as opposed to a DB scheme) are considerably higher. There would be little point in transferring to achieve broadly similar benefits to a scheme he was already in. So, to make transferring worthwhile, the annual assumed growth would probably need to be approaching 6.5% every year just to maintain parity with the eventual benefits he'd get in the DB scheme at retirement. To do this in the investing environment I've set out above would have looked, in my view, quite unlikely.

I've considered the analysis Gordian carried out for Mr B which it says showed he'd be able to still retire and draw a reasonable income late into his life, if he transferred to a personal pension arrangement. But I think Gordian's analysis relied on past performance and growth assumptions that were far from certain. In reality, Mr B was a more medium risk investor and what he was also being shown were comparisons with a different type of pension which lacked the benefits and guarantees of his DB scheme which he'd otherwise have for the rest of his life.

Gordian said in its suitability report that a transfer to a personal pension arrangement would allow Mr B to exercise more control over the investments held within his pension. It specifically said this "*should help you generate a better benefit… than the DB scheme*". But I don't think this was right or justified. The above shows that growing his transferred funds to that extent probably wasn't realistic, for all the reasons I've set out above.

However, Gordian's recommendation that he should transfer out to a personal pension was not predicated on the financial comparisons with his current scheme alone. Rather, Gordian said Mr B had different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer *was* suitable for him, despite providing the overall lower benefits mentioned above over the longer term.

I've considered these below.

Other reasons to transfer

Gordian listed a number of themes as supporting the recommendation to transfer away. I've summarised these as follows:

- It said the benefits could be taken from a personal pension arrangement at the age of 55 whereas there were *"penalties for early access to your money"* if retiring early from the DB scheme which had an NRA of 65.

- Gordian said he could take tax-free cash if he transferred, and this would be higher than from his DB scheme.

- There would be more flexible access to his pension if transferring to a personal pension arrangement.

- The death benefits were more suitable for Mr B in a personal pension arrangement.

So, it seems the supporting reasons that Gordian recommended the transfer out to a personal pension was for the flexibility and control it offered to Mr B. I have therefore considered all these issues in turn.

- *Retiring early / tax-free cash*

Although Gordian promoted the access to his pension at the age of 55 if he transferred away from the DB scheme, I don't think this was well explained by the adviser. The evidence here is that Mr B already earned a very significant income – and he expected to do so for some time. As the 'fact-find' clearly showed, his and Mrs B's net income comfortably exceeded their outgoings and there was a clear steer from Mr B that he wasn't ready for retirement any time soon. It was set out in the documentation that retirement for him was in his mid to late sixties. In this context, access to his pension at 55 was a poor rationale for transferring.

I also don't think it was right to portray the DB scheme as having "penalties" if accessing the scheme early. It's true Mr B could probably think about retiring early if remaining a member of his DB scheme. But although he'd get less in pension, this didn't mean he was incurring a penalty. There would have been an actuarial reduction if starting to draw from his DB scheme earlier than the NRA of 65. But this only reflects that he was accessing his scheme much earlier and probably drawing upon it for many years more than he would normally, if the starting point was 55. So this needed explaining better, although as I've said, retiring early seemed largely irrelevant to his situation.

As regards access to the tax-free cash element from his pension, I accept the advice was correct to say that he'd probably be able to get a higher element tax-free from a personal scheme. But this again needed a careful explanation. It's often the case that the tax-free lump sum from a personal pension would be higher than from a DB scheme. But removing 25% of the pension doesn't come without consequences as it means the remaining pension for future years would be lower and I don't think enough thought was given as to what Mr B would live off when retired, or how much he and Mrs B would need. I've already explained that despite being relatively wealthy, together they had few pension provisions at that time. And I haven't seen any comprehensive analysis of how much they'd need as a retirement income. The adviser referred only in very general and unspecific terms to Mr and Mrs B having a lot of money which meant pensions weren't that important.

Whilst in general terms having a lot of money in retirement might have looked plausible, it also demonstrated that Mr B didn't need to access his pension anytime soon. He was still only 55 years old and the main purpose of a pension is to fund one's retirement; and Mr B's retirement still looked firmly around a decade away. Therefore, without any need to either access taxed or untaxed funds, the more suitable advice in my view was not to transfer away from his DB scheme at that point. Mr B didn't yet need to make a decision about irreversibly transferring. He could have waited until his thoughts about retiring were more defined before taking such an important step. This should have been reflected in the advice.

- *Flexibility*

This generally sounds good and I'm sure the adviser telling Mr B that he could more flexibly manage his pension affairs probably sounded very positive.

However, using the evidence I've seen from this complaint, there was simply no case made out for a flexible income in retirement and I've seen absolutely nothing showing why Mr B wouldn't want to draw a regular, guaranteed and index-linked pension in exactly the way the DB scheme originally intended. He could use this to complement his more flexible financial resources which already existed.

We know if Mr B retired at the NRA, the annual pension was estimated as £8,399 and a tax-free lump sum of over £55,000. Gordian simply didn't (and still hasn't) explained why this wouldn't have been suitable for Mr B. If truly interested in tax efficient saving, Mr B could have contributed very significant amounts via his business and personal contributions to a new DC scheme going forward, or add to those he already had. So I think by retirement, whenever it came, he would have been in a very satisfactory position. On one hand he'd have been able to build up substantial DC funds by the age of 65, but on the other he'd still retain one (or two) DB schemes which complemented his retirement income with guaranteed pension(s) for life.

I've also seen no compelling evidence that Mr B really wanted personal control over these funds. The picture of Mr B is of an energetic and fully occupied business owner who had little interest in personally managing stock or fund investments. The savings he currently had were shown to be in cash and so I think the scale, responsibility and complexity of managing over £260,000 in transferred funds would have probably been onerous for him in the years ahead. He would have likely used the adviser to manage his funds going forward which would cost him money. Mr B incurred no such costs with the DB scheme which was managed for him by the scheme trustees.

- *Death benefits*

Gordian says that death benefits were discussed at the time and that a personal pension arrangement would better enable the retention of the value of the funds if Mr B died. This was also reflected in the 'fact-find' where Mr B expressed a preference that his pension shouldn't just 'die with him'. But I'm afraid I don't agree this represented enough of a reason for him to transfer in this particular case.

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 probably made to look like an attractive feature to Mr B. I think the discussion centred around Mr B being able to leave the full value of his funds to a relative, potentially tax-free, if he died before the age of 75. But there were a lot of assumptions here. Mr B was still only 55 and in good health and whilst I appreciate death benefits are important to consumers, and Mr B might have thought it was a good idea to transfer to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

An obvious drawback with a personal plan's death benefits is that the amount left to pass on – to anyone – may be substantially reduced as the pensioner starts to withdraw his or her retirement income. To this end, if Mr B lived a long life there could be nothing left at all in his personal pension plan.

As an alternative, I've considered all the issues about Mr B's apparent wealth being strong and him effectively having no real need for a pension income in the future. But again, I think too many unfounded assumptions were made about this, including that in retirement he'd have so much wealth as to not need to dip into any pension related funds at all. But given the actual liquid financial resources he had available at the time I don't think this assumption was yet justified. As I've said, much of this apparent wealth was locked within his business at the time, and in my view assumptions were made about its overall value that weren't yet confirmed. These included real possibilities that the business, if sold, might not be worth as much as thought, or that the amounts which could be liquidated would likely need to be distributed to the other three directors. I think it also had to be considered that whilst successful at the time, the economic situation could turn and that profits could suffer a downturn. So, overall I think the adviser talked in very vague terms about Mr B's wealth including assuming his business could be worth as much as £2 million. However, there was no indication that selling the business was a concrete plan at that time or that Mr B would personally benefit from such a large sum.

What all this area does demonstrate is that there was an emphasis on Mr B treating his entire pension savings not as investments for the future, but as 'unrequired wealth' to pass down to Mr and Mrs B's children and / or avoid inheritance tax. For example, after our investigator issued their 'view' of this complaint, Gordian responded in considerable detail citing inheritance tax planning as being the predominant and in effect the *real* rationale for the transfer advice. A case was made out by Gordian showing Mr B subsequently invested heavily with the firm after the initial pension advice and entrusted it with over £600,000. This included very substantial pension contributions designed specifically with the intention of eventually passing down wealth.

But I've looked at the transfer reasoning given by the adviser at the time, rather than what Gordian says happened later. And I maintain my view that Mr and Mrs B's pension provisions were very modest given their other apparent financial resources.

I accept, of course, that Mr B would have wanted his children to inherit money and also that if he died first then Mrs B could distribute the funds as she saw fit. But it's been a theme of this complaint that the pension wealth wasn't that great, when everything else was considered. In my view, Mrs B and their children still stood to inherit wealth. Mrs B also had virtually no pension provision of her own so I think the spouse's pension of 50% of his DB scheme(s) if he died first would have been of use. Their need for lump sum cash upon his death was less clear.

However, if more cash was sought upon death, at 55 years old and in good health, a modest 'term' life insurance policy may have still been a reasonably affordable product if Mr B really did want to leave a legacy for a specific relative or someone else. But more so, it doesn't appear that Gordian took into account the fact that Mr B could have nominated a beneficiary of any funds remaining in his DC schemes. I've mentioned how these could have been built up meaningfully between 55 and 65 and so to this end, Mr B already had some options ensuring part of his pension wouldn't just 'die with him'.

Overall, in this case I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr B

Summary

I've considered all the issues in this case with great care.

I accept that Mr B was an accomplished businessperson and probably had a solid knowledge of investments and financial affairs; he may have even gone to Gordian with a general idea of what he wanted to achieve. I also acknowledge that Mr B was wealthy, by the standards of most, and he may have been motivated to legally pay as little tax as possible whether in income or through inheritance when he eventually passed away. In this context, his situation was somewhat different to a man of 55 approaching retirement.

However, as I've said, the adviser's role was to really understand what Mr B needed and recommend what was in his best interests. Despite his apparent wealth, Mr B had comparatively little pension provision and nor did his wife. Much of their wealth existed within their business.

I agree with our investigator who commented on the generic rationale used to justify the transfer advice. What Mr B was irreversibly giving up was a guaranteed pension which had substantial index-linking attached. Although small, this pension made up an important minority of his security in retirement, providing as it did a pension for the rest of his life. By transferring this to a personal pension arrangement, the evidence shows Mr B was likely to obtain lower retirement benefits and I don't think there were any other particular reasons which would justify the transfer and outweigh this.

On this basis, I think Gordian should have advised Mr B to remain in his DB scheme.

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

Gordian 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.

Compensation should be based on the scheme's normal retirement age of 65, 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 B'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, Gordian should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
    - the 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 B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts Gordian's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr B 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 B's end of year tax position.

Redress paid to Mr B 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, Gordian 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 B's likely income tax rate in retirement – presumed to be 40%. So making a notional deduction of 30% 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. *I should say this is a maximum limit which I set out here for information only. It may be much higher than the redress actually due.*

I have considered the £200 additional payment recommended by our investigator for the distress and inconvenience he thought might have been caused by bringing this complaint. Whilst I certainly wouldn't wish to imply this hasn't been an issue of concern for Mr B, I've been provided with no evidence to support such a payment. I've also considered the value of the funds and the evident financial resources attributable to Mr B at the time. I therefore make no additional award.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Gordian Financial Services Limited to calculate and if appropriate pay Mr B 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 Gordian Financial Services Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on Gordian Financial Services Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 21 March 2024.

Michael Campbell
Ombudsman