DRN-4365493

Financial Ombudsman Service

The complaint

Mr M complains about the advice given by Landmark IFA Limited 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 M approached Landmark in March 2017 to discuss his pension and retirement needs. Mr M was 59 at the time and was considering retiring soon.

Landmark completed a fact-find to gather information about Mr M's circumstances and objectives. Landmark also carried out an assessment of Mr M's attitude to risk, which it deemed to be 'cautious plus'.

On 16 May 2017, Landmark advised Mr M to transfer his pension benefits into a SIPP and invest the proceeds in a number of funds that overall would match his risk profile. The suitability report said the reasons for this recommendation were that Mr M would be able to access his funds flexibly taking into account other sources of income.

Mr M complained in September 2020 to Landmark about the suitability of the transfer advice as he was concerned about the performance of his fund. And that it would not maintain his income in retirement in line with the benefits he gave up.

Landmark didn't uphold Mr M's complaint. It said its advice met Mr M's objectives recorded at the time and still did. As part of its review it had looked at the guaranteed income Mr M could now receive from the SIPP and this could last until age 99 if Mr M's objective was to maintain his income.

Following this and after meeting with his adviser Mr M decided to purchase an annuity using the funds from the DB transfer and from a much smaller personal pension that had also been transferred to the SIPP. This produced an annuity of around £26,500.

Our investigator upheld the complaint, in summary he said Mr M's objective was to receive £24,000 in retirement and the OPS from age 60 would provide over £21,000 increasing each year, so the need to transfer wasn't compelling. Mr M had other assets he could use to bridge the gap. The other reasons Landmark had put forward didn't outweigh Mr M's main concern which was to maximise his income in retirement.

Landmark disagreed with the investigator's findings. It said Mr M already had sufficient assets in place that he only needed this SIPP to bridge his income gap for a short time until other sources of income became payable. This would maintain a fund that could be used flexibly and would be beneficial upon his death for his family members.

The investigator wasn't persuaded to change their opinion, he restated that the evidence didn't justify a transfer based on the FCA's guidance. And that the OPS pension already met the majority of Mr M's objectives and so a transfer wasn't required.

In response Landmark said whilst it didn't agree with the investigator, it was looking to make an offer in line with the guidance to Mr M. The case was then closed but it was accepted it may be re-opened in the future.

An offer was made to Mr M after being calculated by actuaries instructed by Landmark to consider the case in line with the regulator's guidance. Unhappy with the redress figure offered compared to what Mr M had been told by Landmark about his loss, Mr M asked for the complaint to be re-opened. Mr M felt the calculation had been carried out incorrectly and included incorrect assumptions that had skewed the calculation. In response to these points, I wrote to both parties to set out my initial view on the case and calculation. This is set out below and forms part of my reasoning for this decision:

'Mr M has questioned the validity of the calculation for a number of reasons and the assumptions used within it. I will address here what I see as the relevant points. That I might not address every point that both parties have sent into us, is not meant as a disservice. Its simply that we are an informal dispute resolution service, and my role is to get to the heart of the matter. And part of doing this is to decide what I think the key points are in settling the dispute. Where practical I'll attempt to address the issues either party see as key, but I don't intend to discuss all the issues raised.

As I see it, there are two key issues that have led Mr M to believe the loss calculation hasn't put him back in the position, he ought to have been in. He believes based on Landmark's own calculations that his deficit at purchasing the annuity was approx. £4,000 and the loss would equate to around £61,000. Secondly, he thinks the assumption that he would've taken full tax-free cash from the scheme is wrong and that as he didn't take maximum tax-free cash this money is missing in the calculation. As well as his belief that this has swung the calculation away from being in his favour.

<u>*The advisers' calculation showing that Mr M was/is significantly worse off than the actual loss calculation determined*</u>

Mr M has pointed to Landmark's calculations, and he is comparing them with the loss calculation completed by the actuarial firm. Firstly, it is important to note that I'd place more weight on the calculations carried out by the actuaries using all the relevant scheme info, calculation software and being experts in this field over the IFA's own simplified calculations. Especially as the IFA's calculations were in terms of them being part of a conversation about whether Mr M should annuitize – and not an attempt at providing an offer or settlement. Furthermore, I note the adviser said: 'these calculations were his best estimate based on the data held – and they are not meant to represent anything other than that.'

I've had a look at the IFA's calculations, I am not an actuary, but I do have experience of evaluating loss calculations at a surface level. And it appears there is one standout oversight. Which I believe demonstrates that using these calculations as a line in the sand comparison with what Mr M could've got from the scheme, is not the complete picture. And in my view likely explains why the loss calculation resulted in a very small loss – compared to Mr M's and the advisers' expectations.
The adviser has carried out calculations in October 22. The calculation has been done at this date as Mr M, with Landmark's advice, was considering annuitizing using his remaining funds. Mr M will have been 65 at this point.

This shows that at Oct 23 (which I believe is a typo and should be Oct 22) the scheme would provide an income of £26,500.19. And alongside the smaller personal pension that had also been transferred would've provided a total income of £29,682.22. As I said before, this is the adviser's best estimate, and so may not be accurate. This figure has then been compared to *the annuity that the current fund value could buy which turned out to be £26,226.72pa – this annuity also increases each year with RPI has a five-year guarantee (a feature it appears Mr M's DB pension income wouldn't have had) and a 2/3rds spouses' pension just like the scheme. The difference between these two figures has been considered the loss. And Mr M believes this to be a fact and therefore cannot understand how the actual loss calculation doesn't reflect this.*

However, by this point in October 22, Mr M had already had access to his funds for a number of years and started making withdrawals by way of income and tax-free cash from May 2018. According to the information we have been provided with, by this point Mr M had already withdrawn approximately £100,000 in benefits from the fund. The spreadsheet shows he'd taken income totalling £63,451.10 and tax-free cash totalling £35,584.77. I cannot see that this has been accounted for in the advisers' calculations when comparing the two positions at the time of looking to purchase an annuity.

Therefore, the comparison is not like for like. It is about £100,000 short on the side of comparing Mr M's actual position to the position he would've been in taking benefits from the scheme. The actual loss calculation completed by the actuaries takes into account the money Mr M had already received – as it should do. Mr M's advisers' calculation doesn't. Therefore, it seems the advisers' calculation has given an unbalanced negative view of Mr M's position at the time of purchasing the annuity as it has not accounted for the fact, he'd already received about £100,000. By my very rough calculations based on the fund size and annuity actually purchased, an extra £100,000 could've produced an annuity of over £30,000.

<u>The assumption that Mr M would've taken tax-free cash from the scheme in the actuarial loss calculation</u>

The regulator recently updated its guidance on how firms should calculate putting customers back into the position they would've been in had they remained in the occupational pension scheme. I am satisfied that this method is appropriate here, this is the exact type of scenario this guidance was produced for. And I think following this guidance is a fair and reasonable method to settling this dispute.

Within this guidance it says:

'Where the retirement date is at or prior to the valuation date, a <u>firm</u> should assume that the <u>consumer</u> would have commuted the maximum <u>pension commencement lump sum</u> permitted by legislation, using the actual lump sum commutation factors at the retirement date, unless:

1. *(a)*

   the <u>consumer</u> has used the full value of their DC pension arrangement to secure a guaranteed annuity income, in which case <u>firms</u> should use the actual <u>pension commencement lump sum</u> taken by the <u>consumer</u> where this is lower than the maximum permitted by legislation from the <u>defined benefit occupational pension scheme</u>; or
2. *(b)*

   a <u>pension commencement lump sum</u> was payable in addition to the pension benefit in which case an adjustment should be made to assume the <u>consumer</u> took the maximum lump sum permitted overall (including the additional lump sum); or
3. *(c)*

   the <u>pension commencement lump sum</u> could have been funded by an additional voluntary contribution fund or a defined contribution section within the <u>defined benefit</u>

occupational scheme, in which case firms should assume that those sources would have been used first to take the maximum permitted under legislation.'

The reason for this assumption being the starting point is that it is what most people do in this situation. It makes sense for tax purposes to maximise the tax-free proportion of the funds received from the scheme as income. And most people will also want the security of some funds upfront, and more funds at the start of their retirement compared to the end. Furthermore, if for example a consumer was to take their benefits without a tax-free cash sum upfront and then sadly pass away shortly after, all that will be left would be the spouse's pension. Whereas, taking the tax-free cash means that it will be available to the spouse, alongside a smaller spouse's pension upon death.

Looking at the reasons not to apply this assumption, none of these apply to Mr M's situation. Mr M didn't use the full value of his transferred funds to purchase an annuity. He took income and tax-free cash for a number of years before annuitizing. The pension commencement sum wasn't payable in addition, it was only available with a reduced pension. And the third point doesn't apply either. So, I think the actuaries were correct in applying this assumption.

I appreciate that Mr M didn't maximise his tax-free cash amount in reality. He took a smaller proportion than the maximum, taking approximately £35,000. However, he wouldn't have had this option under the scheme, he was able to do this because he'd transferred into a flexible pension arrangement. And the likely reason he didn't continue to take tax-free cash up to the maximum here, is that he later decided to annuitize his remaining pot – at a point when annuity rates had improved significantly compared to recent history. Had he remained taking his funds flexibly, it would've made sense to use up all his tax-free cash entitlement. It looks like the plan was to spread this across the years for tax-efficiency purposes.

So, I think it is a fair assumption that Mr M would've taken the maximum permitted tax-free cash had he remained in the scheme.

I note that Mr M has questioned the treatment of tax-free cash in the calculation and believes not taking it in reality has meant the calculation is missing this sum and this is part of the reason the loss calculation shows such a small loss. However, this is not the case. The comparison compares what he could've got from the scheme (maximum tax-free cash plus the reduced pension) against what Mr M received in reality (income and tax-free cash plus the annuity payments received) to the date of calculation. This gave the position at the date of calculation in terms of what Mr M had lost or gained. And it showed quite a significant loss at this date – almost entirely down to the fact that the tax-free cash had been applied to what he could've got from the scheme. So, it is not missing in the calculation – and Mr M's actual tax-free cash was taken into account as well. Had Mr M taken the maximum amount of tax-free cash from the flexible arrangement this would've most probably meant a past gain.

It then worked out Mr M's future loss or gain. And due to the fact, the pension Mr M had secured in reality was ahead in terms of income going forward in comparison to the scheme benefits (on the basis of taking tax-free cash and a reduced income) – it showed Mr M's current income from the annuity was at a level that it would claw back the past loss over time.

Summary

I am not an actuary, so I am unable to verify the calculations produced by the actuarial firm who are experts in this area. However, I have checked the assumptions used, the data input and considered whether it reflects the circumstances of this case. And I have seen nothing to suggest there is an error in the calculation. I don't agree with Mr M that this method of *redressing the situation isn't putting him as closely as possible back into the position he would've been in had he taken benefits from the scheme. I think his belief here is unfortunately founded on the calculations provided by the adviser that didn't take into account the complete picture.'*

In response Landmark said it had carried out two loss calculations, one for taking income and one for taking maximum tax-free cash. It accepts the calculations were simplistic and were only used as a guide. It agreed with the treatment of the tax-free cash in the calculations.

Mr M made a number of points, the key ones, I've summarised below:

- The current calculation does not put him back into the position he ought to be in.
- The key assumption is he would've taken the maximum lump sum of around £100,000 from the scheme. In reality from the SIPP he took around £35,000 in tax-free cash.
- He believes this assumption to be flawed and irrational.
- He has produced evidence which unequivocally invalidates this assumption.
- Had Mr M not been advised to transfer his OPS arrangement he wouldn't have taken tax-free cash.
- Mr M would've received over £100,000 in income had he taken his benefits from the scheme in any event. And this income wouldn't have impacted his future payments.
- In not taking the tax-free cash when purchasing the annuity, from what he understands today, he's in a worse position.
- He believes Landmark knew the implications of this and ought to have advised him of this before advising him to purchase the annuity.
- He has contacted the FCA and they've informed him the actual lump sum paid should be used in the calculations.
- Mr M says the figures used initially by Landmark represent his loss and what was required to bring him back into the position he ought to have been in.

What I've decided – and why

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of BUSINESS's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. I must state at this point that whilst I've read all the submissions sent in by both parties, my findings concentrate on what I consider to be the heart of the matter. This isn't meant as a dis-service it is just a reflection of my role here. And to set out and discuss every issue raised would mean an extremely lengthy decision for little benefit to either party.

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

Financial viability

Landmark usually would be required to carry out a transfer value analysis report (as required by the regulator) showing how much Mr M's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

However, as the advice was given just six months before Mr M intended to retire, the yields produced aren't particularly relevant.

The cornerstone of the advice was that Mr M required £24,000 per annum in income in retirement. Remaining in the scheme would've initially provided him with over £21,000 and this would increase each year, so it wouldn't be too long until the scheme provided Mr M with the £24,000 he required and this would be guaranteed for life. Mr M had other assets he could use to bridge the gap in income in the early years. The starting position should've been transferring wasn't in Mr M's bests interests. And given the fact that the scheme was already close to meeting his income needs immediately; would meet them in the future and provided guaranteed benefits for life, I think a very compelling argument would be required to consider that transferring was in Mr M's best interests.

Furthermore, the initial analysis and recommendation to transfer was based on the scheme providing an income of around £15,000 a year, a note said this was based on a calculation done in 2005 and couldn't be guaranteed to be accurate. The initial recommendation letter said: *"Given the fact that the projected scheme income at age 60 that would be £15,042 it is relatively simple to conclude that at that point we would need a sum of £626,777 to buy this income by way of an annuity. It is plain, therefore that if a guaranteed income is your sole or main priority, a transfer is possibly going to be able to match these benefits, again these calculations are based upon projections made in 2005"*

The fact that a recommendation was made to transfer on such an important matter without being sure it was based on accurate information, calls into question whether Landmark had started with the assumption that transferring wouldn't be in Mr M's best interests.

Later updated information was received about Mr M's benefits from the scheme and in fact he could receive over £21,000 per annum from the scheme. An updated suitability report was produced this said '*that it would be unable to match the guaranteed benefits from the scheme by way of an annuity purchase, based on the annuity rates at the time. However, by using income drawdown we are likely to be able to match your income needs.'* So despite the big change in the known income from the scheme of over £6,000 a year the recommendation remained the same to transfer.

Landmark produced cashflow models which it said shows Mr M would've been able to receive the £24,000 in retirement. But what this doesn't do is compare how transferring could match the income payable from the scheme. The advice appears geared to transferring ignoring that the pension in question if left in place would've provided in excess of the £24,000 in the future anyway.

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

Retaining funds for his spouse and daughters through the use of flexible income.

I understand Landmark have argued that the advice to transfer was based on plugging the gap and then using other sources to leave funds in place for future provision for Mr M's significant others. However, Mr M had other assets with which he could use to plug this gap and transferring his DB scheme with its guaranteed benefits ought to have been only considered if there were no other solutions to meet Mr M's needs. I don't think Landmark considered the alternatives available sufficiently before recommending transferring, nor did it focus its advice on the key objective of increasing income in retirement.

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 M. But whilst I appreciate death benefits are important to consumers, and Mr M 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 M about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Landmark explored to what extent Mr M 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 M was married and so the generous spouse's pension of 2/3rds his income provided by the DB scheme would've been very useful to his family if Mr M predeceased her. I don't think Landmark made the value of this benefit clear enough to Mr M. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Landmark should not have encouraged Mr M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr M genuinely wanted to leave a legacy for his spouse and children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Landmark should've looked into life insurance. I appreciate that the suitability report did mention this but it wasn't part of the recommendation. And I can't see it was sufficiently considered or explained. This would've allowed Mr M to keep in place his guaranteed benefits and with some additional expenditure provided a significant sum upon his death whilst keeping the valuable spouse's pension in place.

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

Landmark have argued that it was a clear objective of Mr M to leave as much funds as possible to provide for his partner and daughter(s) – and this was a need that surpassed the requirement for taking the guaranteed and likely higher income in retirement provided by the scheme. It was recorded that one of Mr M's daughters had needs that had to be met by care and the other had left home and was not dependant. But that Mr M would like to make sure there was provision for them and his wife within his retirement benefits.

However, this is disputed by Mr M and I think this is in part supported by the evidence from the time. There is evidence that Mr M was concerned with leaving sums to his daughters and wife but of course when asked I'd expect any parent and husband to want to provide for their significant others. And this doesn't necessarily have to be in the way of providing a lump sum on death. As I said above, the scheme already provided a generous spouses pension which could be used for Mr M's wife own needs but she could've also used the income to support their daughters as well if required. And life insurance was another option.

It's also contradictory to Mr M's recorded priority in retirement which was increasing his income when retired. All other requirements such as '*providing for family in your death'*, '*savings for specific purposes'* and '*planning for long term care'* were recorded as low priority. Had securing sums for his daughter's future needs been important (in terms of the funds flowing from this pension) to Mr M at outset I'd have expected this to be evidenced in his initial answers in the fact-finding process.

Furthermore, I note that subsequently Mr M has on the advice of Landmark annuitized the remaining funds. Whilst I appreciate objectives and circumstances can change and I can't rely on hindsight, I think this still is indicative of Mr M's recorded objectives at the time. Had it been so important for Mr M to keep funds back invested flexibly for his family upon his death, then he wouldn't have taken this course of action regardless. It was Landmark's job to really understand the requirements and needs of its client where there were contradictory elements to the answers given. And I don't think it did that here.

I think Landmark's advice was intended to try and provide a holistic solution for Mr M that gave him everything he might need but obviously this had risk inherent in it. And the advice wasn't tailored to Mr M's main recorded objective to maximise his income in retirement. The advice also didn't in my view give enough consideration to the importance and value of the guaranteed benefits provided within the DB scheme.

So looking at the evidence I don't agree with Landmark's position that Mr M would've wished to prioritise this above maximising his income in retirement.

I'm satisfied Mr M could have met his income needs in retirement through the DB scheme at age 60 using other assets to bridge any income gap if required. Mr M needed £24,000 per year in retirement according to the information gathered by Landmark. And under the DB scheme, Mr M was entitled to an annual income of over £21,000. I can't see how the figure of £24,000 was reached other than Mr M putting it forward. I would've expected to see some analysis of his expenditure to validate this figure. But if this was the minimum figure required, the income gap in the years before the DB pension increased and/or other sources of income became payable, would've been fairly small. And this could've been covered by Mr M's other assets, it was recorded Mr M had around £80,000 in assets that could be cashed in if required.

summary

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

Ultimately, I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr M 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 M shouldn't have been advised to transfer out of the scheme just for the potential for higher death benefits, this wasn't worth giving up the guarantees associated with his DB scheme. And if this was really important other options were available that could've kept in place the valuable benefits within the DB scheme.

In light of the above, I think Landmark should compensate Mr M for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice. As set out above, Landmark had already agreed to do so and made an offer to Mr M but he thinks this hasn't put him in the position he ought to have been in and so rejected the settlement. Mr M has put forward arguments as to why this was the case.

Is the redress methodology and the assumptions made within suitable for the circumstances of this case?

I've already set out my thoughts on this above but I've reconsidered this in light of Mr M's comments. Having done so I haven't changed my view. I'll explain why.

It should be stated that the redress method, using the FCA's specific guidance relating to pension transfers, was designed exactly for situations such as this. And I can see nothing to suggest it shouldn't be used here. Mr M argues it doesn't put him in the position he ought to be in, but I think it does as closely as possible put him back into the position he would've been in if he hadn't transferred. He cannot be put back into exactly the same position as we cannot turn back time and Mr M cannot re-join the scheme. But I think the FCA's guidance represents the next best option.

Mr M argues that the calculation has a flawed assumption that he would've taken full tax-free cash from the scheme. He says he wouldn't have ever done this, and he's submitted evidence that he says corroborates this. This evidence includes his answers in the fact-finding document and a retirement options questionnaire prior to the advice taking place. These are in the form of tick-box or short answers. The questions asked are about the requirement for an additional lump sum or capital which Mr M has said '*no*', Mr M also ticked that releasing tax-free cash was a low priority. It appears that following this another meeting was held and some of the answers were amended but, in any event, I don't think this evidence alone invalidates the assumption made in the guidance that he would've taken the maximum-tax-free lump sum available from the scheme upon retirement.

The questions answered here are about his requirements in relation to his pension benefits in general and were a starting point for discussion about transferring or not. They aren't specific to what option Mr M would choose if he was taking benefits from the scheme.

But what I think is more relevant here is what Mr M actually did. Mr M says that he hasn't taken full tax-free cash from the SIPP so this shows he didn't require it. And he says the FCA agrees with him that the actual tax-free cash taken should be reflected in the calculation.

However, Mr M did take tax-free cash from the SIPP, he was able to take this flexibly as he'd transferred to a flexible arrangement – rather than having to take it all in one go as would've been required if he'd not transferred.

The evidence suggests had Mr M remained in the SIPP (and not taken an annuity) its more likely than not that he would've over time withdrawn more income from it (as was the plan) and in doing so eventually would exhaust the tax-free cash element. This plan allowed him to withdraw his funds in the most tax-efficient manner and it appears this was the strategy he was taking before he chose to annuitize the remaining funds. It was also a recorded priority of Mr M's to make his pension provision tax-efficient, as it is for most people. This is part of the reason for the assumption in the regulator's guidance that customers will take tax-free cash unless specific circumstances occurred that counter-act this.

I've considered again the rebuttal reasons listed previously to the assumption maximum tax-free cash would've been taken. And the only one that could be seen as relevant is the first rebuttal reason:

1. (a)
'*the consumer has used the full value of their DC pension arrangement to secure a guaranteed annuity income, in which case firms should use the actual pension commencement lump sum taken by the consumer where this is lower than the maximum permitted by legislation from the defined benefit occupational pension scheme;*'

But as I said Mr M hasn't used the full value of his pension to secure a guaranteed income. He periodically took sums from his drawdown fund equating to approximately £100,000, (some of this was tax-free cash) before he took further advice and annuitized. And had he not annuitized, I think he would've likely continued to take tax-free cash up to the maximum. Therefore, I think the assumption that he would've taken maximum tax-free cash from the scheme isn't unreasonable and doesn't constitute an error in the redress methodology.

Mr M also says that he believes he should've been advised to take tax-free cash when Landmark recommended he take out an annuity. And in not doing so it has purposely skewed the loss calculations in its favour. But I disagree, taking his tax-free cash here would have the same effect or similar effect to taking the tax-free cash from the scheme. The annuity or income paid going forward would be less. I've seen nothing to suggest Landmark purposely steered the advice to produce the smallest loss but at the same time it's fair that any loss or reason for complaint is mitigated by a customer. Mr M was unhappy due to the projections of his fund performance going forward indicating he'd lose out on income in the future when compared to what he could've got from the scheme. But taking the maximum amount of annuity available, replicates the scheme benefits given up and mitigates this loss of income. In terms of whether tax-free cash was or wasn't taken this would be still recorded for in the loss calculation. I'm not an actuary so I'm unable to say what the exact monetary result of taking more tax-free cash would've been on the calculation. But as I've said, I've nothing to suggest Landmark did this to produce a particular result in the loss calculation.

Mr M believes the loss calculation hasn't put him in the position he would've been in. But as I noted before, at the point Mr M annuitized, if he'd not already taken £100,000 from the SIPP, due to the up-turn in annuity rates he could've purchased an annuity that it seems would've been in excess of the annual income of the scheme at that point.

Mr M argues that this is not a fair comparison as he would've received income from the scheme for years before this point. This is true but over time this gap would be reduced by any additional yearly income he secured from the annuity in relation to the scheme income payable. And it also needs to be noted at this point that both he and I are working from figures that the adviser has admitted were an estimate.

This brings me to the next point that Mr M says that the figures produced by Landmark initially should represent his loss but I disagree for the reasons already explained. There is a reason the FCA requires a suitably qualified firm to carry out these complex calculations. And as I've said I've seen nothing to suggest the calculations carried out are incorrect or that the assumptions within are unreasonable.

Overall I am satisfied that the redress methodology recommended by the investigator previously represents a fair way to resolve this case.

Putting things right

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

Alongside the loss calculation set out below, the investigator recommended that Landmark pay Mr M £300 for the distress and inconvenience caused due its unsuitable advice. I don't think this is unreasonable, had the initial advice been to remain in the scheme Mr M wouldn't have had to worry about whether he'd been worse off or not and he's told us that this situation has caused him a lot of anxiety.

Landmark 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.

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 M'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, Landmark should:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Landmark's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr M 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 M's end of year tax position.

Redress paid to Mr M 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, Landmark 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 M'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.

My final decision

I uphold this complaint and require Landmark IFA Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 19 February 2024.

Simon Hollingshead
Ombudsman