DRN-4372149

The complaint

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

What happened

Mr M approached TPWM in March 2019 to discuss his pension and retirement needs. Mr M was looking to semi retire from age 60 before taking full retirement at 67. He also wanted to access the tax-free lump sum from his pension for home improvements and to buy a campervan.

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

On 26 March 2019, TPWM advised Mr M to transfer his pension benefits into a personal pension. The suitability report said the reasons for this recommendation were the need for flexible income and so his wife could inherit any residual funds on his death.

Mr M complained in 2023 to TPWM about the suitability of the transfer advice because he felt he had been incorrectly advised and his pension had suffered losses.

TPWM didn't uphold Mr M's complaint. It said the advice had been suitable and met his needs at the time.

Mr M referred his complaint to our service. An investigator upheld the complaint and required TPWM to pay compensation. The investigator explained the advice to transfer likely meant Mr M would be worse off in retirement. And he didn't think TPWM had demonstrated there was a compelling reason to transfer regardless.

TPWM responded to say it was attempting to provide a loss calculation but that didn't mean it had accepted wrongdoing.

The investigator explained we wouldn't necessarily wait for it to complete the loss calculation and the case would go into a queue awaiting a final decision.

What I've decided – and why

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business

Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

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

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

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

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

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

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, TPWM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

TPWM carried 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).

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

The business calculated a transfer value comparator (TVC) of £1,111,026. This was required by the regulator on transfers after 1 October 2018 - and is a measure of the funds that would need to be invested at the time of transfer on a so-called 'risk-free' basis (government bonds), to provide the same income as the DB scheme at normal retirement age.
This can be compared with the actual transfer value quoted by the scheme of £518,734. The difference between the two represents the amount of additional growth Mr M would have needed to achieve by taking on investment risk if intending to draw benefits at the scheme's normal retirement age.

Mr M was 55 at the time of the advice and self-employed. He was planning to semi-retire (reducing the amount of work taken on) at 60 but felt he would continue working, as he enjoyed the work, until 67 when his state pension would kick in. The normal retirement age of his DB pension was age 65. The critical yield required to match Mr M's benefits at age 65 was 11.34% if he took a full pension and 9.15% if he took TFC and a reduced pension.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.8% per year for 10 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr M's 'cautious' attitude to risk and also the term to retirement. There would be little point in Mr M giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 9.15%, I think Mr M was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

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 TPWM has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

I don't think Mr M required flexibility in retirement. This is because based on the evidence I've seen Mr M's needs in retirement would've been met by the DB scheme. Mr M had said he would like some cash for home improvements and a campervan but I don't think this should've been prioritised ahead of his needs in retirement. And neither did TPWM as they recommended that he didn't make an early tax-free cash withdrawal.

TPWM said that the personal pension allowed Mr M to vary his income, but I don't think it provided any compelling reasons as to why this would be useful to Mr M and at the expense of his guaranteed benefits in retirement. And with the likelihood of overall being worse off in retirement.

I'm satisfied Mr M could have met his income needs in retirement through the DB scheme at age 60 and 65. Mr M estimated that he needed £16,000 per year in retirement according to the information gathered by TPWM. And under the DB scheme, Mr M was entitled to an annual income of £29,581 per annum from the scheme at 65 or £19,217 per annum alongside a lump sum of £128,000. TPWM said he didn't require this level of income, so it had discounted this as an option. But I don't think Mr M would've actively opted to be worse off in retirement just because his income would be in excess of his minimum needs.

TPWM said that Mr M could take his benefits at 55, and receive income at the same level as the scheme (based on the benefit level at 55 and not 65) and his fund wouldn't be depleted until he was 97 if tax free cash is taken on both. However, this relied on growth at 5% per year for many years and I don't think is realistic given the discount rates, regulator's projections and Mr M's attitude to risk. TPWM will be aware past performance is no guarantee for future performance and so I find the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. Furthermore, Mr M wasn't looking to take income at age 55 in any event.

In terms of Mr M's needs or perceived needs for cash for home improvement and a camper-van – TPWM's recommendation wasn't made for these reasons. They said that he should investigate other ways of financing this expenditure. And it noted Mr M looked to have the disposable income to achieve this through finance or a small mortgage.

It is difficult to understand having come to that conclusion, that it still recommended Mr M transfer his benefits at 55 when all indicators pointed to him likely being worse off in retirement in doing so.

TPWM did very little to consider and discuss what benefits Mr M could receive comparatively at age 60 which is when Mr M was considering semi-retirement. Nor did it set out to Mr M whether he could achieve his objectives in retirement whilst retaining his benefits in the DB scheme until age 65. Which would put Mr M in likely the best financial position possible. Staying in the scheme would've allowed him to retain his guaranteed benefits – providing utmost security in retirement and sums likely well in excess of what was likely achievable outside of this arrangement. I think this would've appealed to Mr M given his cautious attitude to risk and his self-employed status which allowed him flexibility in how much he worked.

This was by far Mr M and his wife's most valuable source of income in retirement. Furthermore, Mr M and his wife's joint income exceeded their outgoings and Mr M's wife intended to work beyond his potential semi-retirement at age 60. In terms of income, Mr M said he could earn more if needed, Mr M's wife expected to have a steady income until Mr M was at least aged 63 and she also had pensions she could begin to access if required at that point.

So Mr M and his wife had quite a bit of flexibility and options available to them outside of Mr M's DB scheme. This brings into the question the recommendation to transfer based in part on being able to vary his income in a personal pension. It seems likely they could've met their income needs up to Mr M's normal retirement age in the scheme at age 65. And even if Mr M took his benefits earlier from the scheme their income would likely far outweigh their outgoings, so being able to vary his income seems a fairly irrelevant benefit. Mr M was also set to receive quite a substantial amount of tax-free cash from the scheme, which could finance any big purchases/holidays in retirement.

TPWM didn't believe Mr M had a need for the tax-free cash and he wasn't looking to retire for at least another five years, so recommending a transfer doesn't seem to have been in his best interests.

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr 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 TPWM 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 spouse's pension provided by the DB scheme would've been useful to his spouse if Mr M predeceased her. I don't think TPWM 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, TPWM should not have encouraged Mr M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

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

Summary

I don't doubt that the flexibility of income, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr M. But TPWM 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.

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

Of course, I have to consider whether Mr M would've gone ahead anyway, against TPWM's advice. I've considered this carefully, but I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against TPWM's advice. I say this because Mr M was an inexperienced investor with a cautious attitude to risk and this pension accounted for the majority of Mr M's retirement provision. So, if TPWM had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

In light of the above, I think TPWM should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr 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.

TPWM must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, Mr M has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the 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 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, TPWM 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 TPWM'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, TPWM may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr 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.

Where I uphold a complaint, I can award fair compensation of up to £190,000, 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 £190,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require True Potential Wealth Management LLP to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £190,000.

<u>Recommendation:</u> If the compensation amount exceeds £190,000, I also recommend that True Potential Wealth Management LLP pays Mr M the balance.

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

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 7 December 2023.

Simon Hollingshead

Ombudsman