DRN-4412623

The complaint

Mr M complains about the advice given by Andrew Bourne & Co Independent Financial Advisers Ltd (Andrew Bourne) to take out fixed term annuities in 2011 and 2016.

What happened

The investigator set out the background to the complaint:

In 2011 Mr M was coming up to his 65th birthday and so he sought advice from Andrew Bourne in relation to his Section 32 pension. It was recorded at the time that:

- He was married; his wife being 62
- Their son, aged 35, had a developmental disorder and was financially dependent on him
- Mr M was expecting a state pension of £109 per week
- Mr M owned his home without liability, and had £60,000 in cash savings
- His wife had a 50% share in her mother's home
- Mr M's total net income was less than his outgoings, so he was supplementing the shortfall through savings
- He had a low to moderate attitude to risk (ATR)
- A question asking '*what is the minimum monthly income you require from your pension plans?'* was answered '*as much as practical'*
- Through a selection of questions, requiring 'yes/no' responses, he said he wanted flexibility to review his income needs, he didn't require a dependents pension, and wanted to see how changes in health may increase his income in the future.
- Mr M estimated that a combined income of £23,000 gross should cover regular expenditure
- Mr M had a history of medical issues, for which he took regular medication
- An illustration for Mr M's NPI plan showed his entitlement to the following options at age 65 (based on his accumulated funds of around £134,987):

    1. A lifetime annuity of £6.702 pa which was made up of a guaranteed minimum pension (GMP) of £5,052.96 and an annuity of £1,649.04 pa which would increase by 5% per annum
    2. Tax free cash of £33,746.95 and a lifetime annuity of £5,719.20 pa which was made up of a GMP of £5,052.96 and an annuity of £666.24 pa which would increase by 5% per annum

Both options provided for a spouse's pension of 50% in the event of Mr M's death.

Quotes obtained by Andrew Bourne at the time suggest that Mr M could have received an income of around £6,731 after tax-free cash including a five year guarantee and a 50% spouses pension, as an enhanced annuity due to his health.

Andrew Bourne set out their recommendations to Mr M on 19 May 2011. Their letter noted that Mr M's son would always be a financial dependent, and that had been taken into consideration when making their recommendations.

Mr M's aims and objectives were recorded as:

- To be able to add to savings to provide access to capital if needed
- To increase the amount of regular income received to help cover expenditure
- To take benefits from the NPI pension in the most suitable way which includes important death benefits for a surviving spouse and dependent child.

Andrew Bourne referenced the benefits available from NPI, which were the GMP of £5,052.96 as well as an increasing annuity from excess benefits. They highlighted that those benefits would be lost on transfer, but that Mr M considered potential death benefits and flexibility to be more important.

Andrew Bourne recommended that Mr M take his tax-free cash allowance, and use the residual balance to purchase a fixed term annuity with value protection.

This was to be arranged on a five year term, with level income of around £6,124 pa, and no spouses benefit or guarantee. The plan would have a maturity value of around £79,000 at the end of the five year term. Mr M proceeded with this advice.

When the plan matured in 2016, he reviewed his options with Andrew Bourne, who advised that he roll-over into a further five year fixed-term annuity. This would pay a level income of £6,000 pa, and have a maturity value of around £54,000.

In 2021, the plan matured and Mr M again sought advice on what to do with his fund; this time from a third party IFA. Mr M became concerned to discover his fund of around £54,000 would now only purchase an income of approximately half that of previous years. He felt the advice he'd been given in 2011 and 2016 had been unsuitable and raised a complaint, which wasn't upheld by Andrew Bourne.

A summary of the investigator's findings:

- The benefits from the NPI plan were recorded as allowing Mr M to '*break even'* so this suggests he was highly dependant on this income.
- The advice to give up the guaranteed benefits and take a fixed term annuity introduced the risk that Mr M wouldn't be able to maintain that level of income from the plan.
- One of the main reasons for the advice was that it would allow his son to receive a lump-sum in the event Mr M outlives his wife but there would be a 55% tax charge. Therefore the longer Mr M lives the less likely any meaningful sum will be left for his son.
- The investigator didn't feel these risks were made clear enough to Mr M.
- The investigator understood Mr M would've wanted to provide for his family but the evidence suggests he couldn't afford to do this at the expense of his own income in retirement.
- Mr M had other assets that may have provided his son with an inheritance
- The investigator concluded the potential death benefits under the plan didn't justify the advice to give up the income available at the time from the NPI plan.
- He also felt the Mr M should be awarded £350 for the trouble and upset caused by the advice as Mr M was now worried about his financial future in retirement.
- The investigator said Mr M should've been advised to take his benefits from the NPI plan in 2011 and recommended redress on this principle and so he hadn't gone onto consider the 2016 advice.

Andrew Bourne responded to say it disagreed with the outcome reached by the investigator for the following reasons:

- Mr M's main objective was provision for his wife and son. The NPI pension wouldn't have provided for his son apart from within the guaranteed period.
- Mr M says his main concern was to leave a pension for his wife, but this was not what was discussed at the point of advice. He wanted provision for his wife and son, not specifically pension income.
- Its recommendation of a fixed term annuity and tax-free cash met Mr M's objectives of adding to savings through access to capital; increasing income to cover expenditure and to take benefits in the most suitable way including death benefits for his wife and dependent child.
- Mr M considered death benefits more important than the benefits lost on transfer.
- The 55% charge for benefits withdrawn as a lump sum on death is not correct as it would be subject to current flexi-access rules.
- Had the NPI pension been taken and Mr M and Mrs M died, there would be no provision for their son.
- It believed the investigator had ignored the important objective of provision for their dependant son.
- It says the potential risk of the death benefits being negligible were discussed with Mr M and he signed to confirm his understanding.
- It believed the key document was the suitability report and it was of great importance because Mr M signed it to confirm his understanding and agreement.

The investigator responded to say:

- He didn't agree that provision for the son was the most important objective as the suitability report said to take benefits in the most suitable way which include death benefits for his wife and son. He said this wasn't in his view an over-riding objective to the extent it would impact other areas of need.
- The 55% tax charge was relevant as at the time of advice, flexi access drawdown wasn't an option.
- The investigator said he wasn't disputing that Mr M would've wished to make provisions for his whole family. But his point was that he'd seen nothing to suggest this was an objective even if it put his own retirement income needs at risk.
- He concluded that the advice to take the fixed term annuities in 2011 and 2016 exposed him to risk that if he'd fully understood Mr M wouldn't have wished to take.

Andrew Bourne still didn't agree and said in closing:

- It completely disagreed that providing for Mr M's son wasn't a primary objective.
- It said his objectives and aims were clear and he'd signed to agree to the advice and the maturity values of the fixed annuities.
- It said its suitability reports were in line with regulatory guidance and the investigator has disregarded the customer's choice and acceptance of the advice.

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.

And having done so I agree with the investigator's outcome and for broadly the same reasons.

Andrew Bourne's response focusses on the point that Mr M wanted to provide for his wife and son and the pension available with NPI wouldn't allow for that. And that Mr M was aware in doing so he would lose the benefits available from NPI. And I don't disagree that the evidence recorded at the time showed Mr M wished to provide for his wife and his dependant son and that would've been important for him. But given Mr M's circumstances and the value of his plan, realistically he couldn't do all these things simultaneously as it was also clear that maximising the value of the plan was important for his and his family's needs in retirement. At the time of advice Mr M's outgoings exceeded his income and the benefits from his NPI plan would only allow him to 'break even'. So I agree with the investigator that this income was critical for his needs in retirement. And by taking out the two fixed term annuities, Andrew Bourne put his income in retirement at what I think was unnecessary risk.

I don't doubt the option of a flexible income and the potential for higher death benefits and to provide for his wife and dependant son would have sounded attractive to Mr M. Which I think answers Andrew Bourne's point about why Mr M signed to agree to the advice. But it wasn't Andrew Bourne's job 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. And Mr M was an inexperienced investor, so he was reliant on the expert advice given by Andrew Bourne. Its therefore no surprise he agreed to the recommendation, as he would've thought it to be in his best interests at the time.

Andrew Bourne justified the advice mostly in relation to the death benefits available through its recommended strategy. 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 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 move to an arrangement where the death benefits could include a lump sum of the remaining fund, the priority here was to advise Mr M about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think Andrew Bourne properly explored to what extent Mr M was prepared to accept a lower retirement income in exchange for the potential of higher death benefits.

I also think the existing death benefits attached to the NPI options were underplayed. The spouse's pension provision available through taking an annuity with NPI would've been useful to his wife and dependent son if Mr M predeceased her. Whilst the plan wouldn't directly payout to Mr M's son, indirectly it would help to support him via the pension payable to his wife. Once taken this would be guaranteed – and would not be dependent on investment performance, whereas the sum remaining on death would be. And there may not have been a large sum left as the fund depleted, particularly if Mr M lived a long life. In any event, I don't think Andrew Bourne should've encouraged Mr M to prioritise the potential for higher death benefits over his security in retirement.

I acknowledge that Mr M had a health condition and so appears to have had concerns about his life expectancy. But Mr M not reaching his life expectancy was only a possibility and it was also possible that he would exceed this, in which case Mr M would need his pension to last longer. In not taking a lifetime annuity at his retirement date and instead taking a fixed term annuity, he was relying on market conditions to go in his favour to be able to keep up an income to meet his outgoings in retirement. And the same applies to the fund available on death for his wife.

Andrew Bourne believes a key point is that its recommended strategy meant that the plan would pay out to the son upon the death of Mr M and Mrs M, whereas outside the guaranteed period there would be nothing due from the options available with NPI or other providers when taking a lifetime annuity. However, at the time of advice any sum would've been subject to a 55% tax charge and as the investigator pointed out any sum left following the death of both parents even before the tax charge could be very small. I don't think this was a sufficient reason to put at risk a key source of income for Mr M in retirement.

Looking at Mr M and Mrs M's other assets, I think a home with no mortgage and a 50% share in Mrs M's mother's property were far more likely to provide a sum that would be beneficial to their son upon their death. In my view this strengthens the point that Mr M's pension fund ought to have been used to secure an income for the rest of his life in retirement, instead of prioritising death benefits. Especially as Andrew Bourne was aware Mr M needed this income to break even in retirement. Andrew Bourne's advice put this income at risk.

Ultimately, I don't think the advice given to Mr M was suitable. He gave up the ability to secure a lifetime annuity that was guaranteed for the rest of his life and a 50% spouses pension that would meet his needs in retirement. By taking out the fixed term annuity instead of securing the best available annuity at the time, Mr M was very likely to obtain lower retirement benefits in the future and in my view, the potential for better death benefits didn't outweigh this.

So, I think Andrew Bourne should've advised Mr M to take his benefits immediately and to secure the highest annuity possible on the basis quotes were sought in 2011 instead of taking out the fixed term annuity.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr M as close as possible to the position he would probably now be in if he had been given suitable advice.

I think Mr M would have taken benefits from his NPI plan based on the highest annuity amount available including enhancements. I am satisfied what I have set out below is fair and reasonable, and it will take account of any losses Mr M has suffered to date, as well as any potential losses going forward. Mr M took 25% of the fund as tax-free cash ahead of the fixed term annuity starting and so I think it is fair to assume he would've chosen to take his benefits from the NPI policy whilst utilising the tax-free cash available.

Past loss

Andrew Bourne should establish any past loss by establishing:

A) Total of all the notional payments which Mr M should have received from his NPI pension taking into account the enhanced annuity available, net of his marginal rate of tax, from the date his first fixed term annuity payment was received up to the date of the final decision.

B) Total of all the payments which Mr M has actually received from his pension, net of his marginal rate of tax, from the date of the first payment up to the date of final decision

C) Past Loss = A – B. If the answer is negative, there's a past gain and no redress is payable in terms of past loss.

Where there is a loss, Andrew Bourne should add interest of 8% per year simple to each income payment from the date of receipt to the date of final decision.

In working out the net payments, Andrew Bourne should assume that Mr M was a 20% rate taxpayer.

Future loss

D) The notional gross pension per year which Mr M should have been receiving from his NPI scheme from the date of the final decision onwards.

E) The actual gross pension per year Mr M could currently receive from the date of final decision onwards using his residual funds from his matured FTA. The gross pension per year he could receive from it is determined by applying the rate from step G below.

F) Future Gross Loss per year = D – E. If the answer is negative, there's a future gain and no redress is payable.

G) Andrew Bourne must then work out what it would cost to replace any lost income in F) if Mr M was to buy an annuity on the open market on the same basis. It will need to refer to published annuity rate tables and get a quote from a competitive provider.

H) The purchase price of the annuity found in G) is Mr M's gross future loss. This should be paid directly to him as a lump sum after making a notional reduction to allow for income tax that would otherwise have been paid at his likely rate on the income in F – presumed to be 20%.

Any income from the NPI plan used in the above calculations should be based on the option that would provide the highest annuity for Mr M and taking Mr M's health into account.

The basis of that annuity should be the same as Mr M's adviser sought quotations for in 2011.

If Andrew Bourne identifies that Mr M has suffered a past loss and a future gain, or vice versa, they can offset one against the other. Any off-setting can only be done after any tax adjustments have been made to the future loss, so that it's on a net-for-net basis.

Andrew Bourne also should pay Mr M £350 for trouble and upset caused by the uncertainty over his retirement income following the firm's advice. I think finding out his income would substantially reduce going forward will have caused him undue distress that wouldn't have occurred had suitable advice been provided at outset.

If payment of compensation is not made within 28 days of Andrew Bourne receiving Mr M's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Andrew Bourne should provide the details of the calculation to Mr M in a clear, simple format.

Income tax may be payable on any interest paid. If Andrew Bourne considers that it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr M how much has been taken off. It should also give Mr M a tax deduction certificate in respect of interest if Mr M asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

I uphold Mr M's complaint for the reasons explained in this decision. And I require Andrew Bourne & Co Independent Financial Advisers Ltd 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 18 April 2024.

Simon Hollingshead
Ombudsman