DRN-4433987

The complaint

Mr W has complained about the actions of Tuto Money Limited ("Tuto") which advised him on, and facilitated, the transfer of his two occupational pension schemes in 2018. One of Mr W's occupational pensions was a defined benefit (DB) scheme; the other pension was a defined contribution (DC) arrangement.

What happened

In April 2018, Tuto issued a "Personalised Pension Report" (which I will refer to as the "advice report") which advised Mr W against transferring the benefits from his DB occupational scheme to a personal pension. Tuto had previously gathered information about Mr W, and his scheme benefits, including a fact-find exercise that was completed in December 2017. He had been referred to Tuto from another firm, which I will refer to as "Firm B". Mr W had been interested in transferring his DB pension because he had seen his transfer value increase substantially and because he wanted to replace his kitchen and bathroom.

In response to Tuto's advice to *not* transfer, Mr W emailed Firm B saying he nevertheless wanted to proceed with the transfer despite Tuto's advice. Firm B forwarded Mr W's email to Tuto which then issued an addendum to its advice report which covered which personal pension scheme Mr W should transfer to (a self-invested personal pension, or "SIPP"). In its covering letter to the amended advice report, Tuto included an application form for the SIPP, which Mr W completed. Mr W's DB pension was transferred to the SIPP on 15 June 2018.

Mr W also had a far smaller DC occupational scheme from the same employer. This was transferred to the SIPP on 17 July 2018.

Mr W was close to 55 in the run-up to the transfers. He was working but intended to retire when he reached 55. He had left the sponsoring employer of his occupational schemes several years previously. Following the transfer Mr W took some tax-free cash and invested the remainder in a global equity fund. He transferred from the SIPP to another provider in 2020.

Mr W, who is represented by a claims management company, complained to Tuto in 2022. His complaint, in brief, was that Tuto's advice had been unsuitable because insufficient attention had been given to how his pension was going to be invested after the transfer. Tuto pointed out that it had advised against the transfer and had only facilitated the transfer on an insistent client basis. Mr W nevertheless felt Tuto hadn't acted in his best interests, and had breached various Financial Conduct Authority ("FCA") rules, in facilitating the transfer. He referred his complaint to us. Mr W has subsequently confirmed his complaint is about the transfer of both of his occupational pension schemes.

I issued a provisional decision last month. I upheld Mr W's complaint, saying the following:

<u>The transfer from Mr W's DB scheme</u>

Firms such as Tuto are subject to the FCA Handbook, and under that to the Principles for Businesses and to the Conduct of Business Sourcebook ("COBS"). The following is not a comprehensive list of the relevant rules, regulations and principles. But I consider them to be particularly relevant here:

- *Principle 2 – A firm must conduct its business with due skill, care and diligence;*
- *Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;*
- *Principle 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);*
- *COBS 4.2.1R – which states (amongst other things) that a firm must ensure that a communication or a financial promotion is fair, clear and not misleading;*
- *COBS 9.5A – which provides additional guidance on insistent client transactions to help firms meet their obligations under the Principles, COBS 2.1.1R and COBS 4.2.1R (and other rules).*

Tuto advised Mr W against transferring in its advice report dated 12 April 2018. It sent the report to Firm B the same day. In its covering letter it said the following:

"We have recommended not to transfer in this case.

"That said, it may be that he respects our advice, but wants to do it anyway. If this is the case, please can [Mr W] confirm this to us with his reasons for pursuing a transfer. This needs to be in writing (although we will accept an email), from him and in his own words.

"We also need to receive the client declaration (enclosed) confirming he has read and understood the report."

On 1 May 2018, Mr W emailed Firm B to say he wanted to transfer and his reasons why, which were: more tax-free cash than he otherwise could take by remaining in his occupational scheme; to consolidate his pensions to allow easier management and control; and because he had enough to cover his living expenses. Firm B forwarded on Mr W's email to Tuto 24 minutes later.

On 3 May, Tuto emailed Firm B with an addendum to its advice report which covered its recommendation for the SIPP it thought Mr W should transfer to. The email included an application form to open the SIPP, which was signed by Mr W on 4 May. Tuto forwarded the completed application form, and ceding scheme discharge forms, to the SIPP provider on 16 May. On the same day, Mr W signed the declaration saying he understood Tuto's amended advice.

I think a business, acting with the Principles and COBS rules outlined above in mind, shouldn't have acted in the way Tuto did. I say this because:

1. *In its covering letter enclosing its advice report, Tuto's explained to Firm B exactly what needed to happen in order for it to accept Mr W as an insistent client and facilitate the transfer on his behalf. The email came before Mr W had confirmed his intentions. Tuto shouldn't have set out exactly what steps needed to be taken to become an insistent client before their client had even confirmed such an interest. Doing so undermines the advice being given and gives the impression that the insistent client process is just an additional administrative step that needs to be completed rather than something more significant – the rejection of financial advice given by a qualified professional and the execution of a transaction that had been assessed as unsuitable.*

2. *The tone of the covering letter enclosing the advice report suggests Tuto expected Mr W wanted to proceed as an insistent client. This suggests to me Tuto hadn't done enough to establish Mr W's understanding of its advice. He was, after all, paying fees to Tuto for its professional advice. Choosing to go against that advice would, at face value, seem a counterintuitive thing to do. This is especially so considering Tuto had advised Mr W that transferring wouldn't be in his financial interests and his objectives – which it had established as part of its fact-find process – could be met through alternative means. Given there appeared to be such a limited rationale for the transfer, I think Tuto should have done more to work out why Mr W was not engaging with its advice rather than treat it as a "given" and a prompt to smooth the path to him transferring as outlined in point 1 above.*

3. *Tuto should have done more to question why Mr W wanted to proceed with his transfer once he had given his reasons for wanting to do so. I say this because Mr W's reasons for transferring didn't raise anything that Tuto wouldn't previously have had knowledge of or been able to consider. And the reasons given by Mr W weren't, in my view, compelling. I don't consider easier management and control of a pension to be a good reason for giving up valuable benefits. Likewise, it's not clear why someone would want to give up valuable benefits just because they could meet everyday expenses. And accessing a larger tax-free lump-sum didn't fit with Mr W's objectives as recorded in the fact-find and wasn't information that Tuto hadn't already been aware of. I don't need to labour the point – Tuto's amended advice report also found the transfer to be unsuitable.*

   So I think Tuto should have done more to probe Mr W's motivation for transferring and his understanding of the repercussions of doing so. It didn't do so. Instead, Tuto appears to have acted on Mr W's email almost immediately – just two days later it had sent Firm B its advice on the SIPP it thought Mr W should open along with an application form for that SIPP. Tuto did all this before Mr W had even confirmed he had understood the amended advice, which he didn't do until 16 May when the application form was sent to the SIPP provider. Mr W said he had no direct contact with Tuto in this period. That seems likely to me given the documentary evidence. But, for the reasons given above, I think some direct contact was merited here.

4. *Although the advice report recommended Mr W shouldn't transfer, the messaging is mixed. In the conclusions section, before it goes on to say why Mr W shouldn't transfer, the report says: "We believe that the reasons you have to consider transferring out…are valid, reasonable and in your best interest." This undermines the advice to not transfer.*

   Similarly, the opening paragraph of the "Insistent Client Warning" in the advice addendum says: "We are prepared to facilitate this transfer as although we feel it is not suitable at this time ***the action does not go against your best interests****" (my emphasis). I think this is the wrong message to give. Transferring wasn't in Mr W's* *best interests – if it had been, Tuto should have recommended it. It also undermines the other messages in the addendum, which is that transferring wasn't a suitable course of action.*

I recognise Mr W confirmed he had understood the advice report, and the amended advice report. And he emailed to say he wanted to go against Tuto's advice. It also looks like some of the urgency behind the transfer may well have been driven by the imminent expiry of Mr W's transfer value. So I recognise that Tuto was, at face value, acting on its client's wishes to transfer and to do so quickly. But, for the reasons given above, Tuto's role here wasn't just to expedite its client's wishes.

I think if Tuto had acted as it should have done, Mr W wouldn't have proceeded with the transfer. Either Tuto would have declined to act on Mr W's behalf or it would have done more to establish why Mr W wanted to transfer given doing so appeared to be both unnecessary and contrary to his best interests. Either way, I think it would have been clear to Mr W – in a way that it hadn't been because of Tuto's mixed messages, hands-off approach and demonstrable willingness to transact – that transferring wasn't a good idea. I don't think it likely Mr W would have proceeded in that context.

It follows from the above that I uphold this part of Mr W's complaint. Tuto should put things right for Mr W in line with the approach outlined below. In coming to this conclusion, I've taken into account the fact that Firm B had a part to play here because it acted as a conduit between Tuto and Mr W. But Tuto was the regulated business in relation to DB transfer advice. It was Tuto that advised Mr W. And it was Tuto that accepted Mr W as an insistent client. In short, if it hadn't been for Tuto's actions, Mr W wouldn't have transferred. So I'm satisfied it is fair and reasonable for Tuto to compensate Mr W in full.

<u>The transfer from Mr W's DC occupational scheme</u>

Although Tuto's advice report said it was addressing both of Mr W's occupational schemes, it did relatively little analysis on Mr W's DC pension. As such, it appears that the DC pension was transferred just because the DB scheme was transferred and keeping the two pensions together made intuitive sense to the parties at the time, rather than because the transfer was suitable in its own right. However, for the reasons given above, I don't think Mr W should have transferred his DB scheme. So, without any compelling evidence to show why the DC transfer was suitable, I'm not persuaded this transfer should have taken place. I think Tuto has breached Principles 2, 6 and 7, COBS 2.1.1R and COBS 9 (which covers suitability). If Tuto had acted as it should have done, I'm satisfied Mr W wouldn't have transferred his DC occupational scheme.

<u>Mr W's two personal pensions</u>

I'm aware that Mr W also transferred two personal pensions, with the combined value of approximately £30,000, to the same SIPP. Tuto doesn't appear to have advised on these (which may have been Firm B's responsibility), so I've limited my findings to the transfer of Mr W's two occupational schemes. Mr W has also confirmed that it is the occupational schemes that are the subject of his complaint.

In my provisional decision, I also outlined what steps I thought Tuto should take to put things right for Mr W.

Mr W agreed with my provisional findings. Tuto's response referred to the redress arrangements on a different, unrelated, complaint. This appears to have been a mistake. This was pointed out to Tuto. It didn't make any further comments.

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.

Having reviewed the case once again, and having taken on board the lack of substantive comments from either party in response to my provisional findings, I see no reason to reach a different decision on Mr W’s complaint. Therefore, for the reasons outlined in the previous section, I uphold the complaint. Tuto must now put things right for Mr W in line with the approach I’ve outlined below.

Putting things right

My aim in awarding redress is to put Mr W as far as possible in the position he would be in now if Tuto had acted as it should have done. I think Mr W would have remained in the DB scheme. I also think he would have retained his occupational DC scheme.

What should Tuto do?

To compensate Mr W fairly, Tuto must determine the ***combined fair value*** of his transferred pension benefits as outlined in Step One and Step Two below. If the ***actual value*** is greater than the ***combined fair value***, no compensation is payable.

actual value

This means the actual amount payable from Mr W’s personal pension arrangement at the date of the calculation in respect of the sums transferred from his occupational schemes.

fair value – step one

If Tuto had acted as it should have done, I think Mr W would have remained in the DB scheme. Tuto must therefore calculate the value of the benefits Mr W lost as a result of transferring out of his DB scheme 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 W planned to retire at age 55. So, the calculation should be based on him taking benefits at this age.

This calculation should be carried out using the most recent financial assumptions in line with 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 W’s acceptance of a final decision.

fair value – step two

Tuto must use the benchmark shown below to determine the fair value of Mr W's occupational DC scheme if he hadn't transferred.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Value of the occupational DC pension transferred	Liquid	Notional value of occupational DC scheme had Mr W not transferred (obtained from the trustees of that scheme)	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 90 days of the business receiving the complainant's acceptance)

In the event that it isn't possible to obtain a notional value for the occupational DC scheme, Tuto should use the following benchmark: For half the investment – FTSE UK Private Investors Income Total Return Index; for the other half – average rate from fixed rate bonds.

To arrive at the fair value when using the fixed rate bonds as the benchmark, Tuto should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sums paid into the pensions Mr W's transferred to should be added to the fair value calculation from the point in time when they were actually paid in. Any withdrawal, income or other payment out should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Tuto totals all those payments and deducts that figure at the end instead of deducting periodically.

The combined value of the sums produced by the above two steps is the ***combined fair value***.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Tuto should:

- always calculate and offer Mr W redress as a cash lump sum payment,
- explain to Mr W 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 pension
- offer to calculate how much of any redress Mr W receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr W accepts Tuto's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr W 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 W's end of year tax position.

Redress paid to Mr W 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, Tuto 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 W'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. The tax rate assumption is not an actual payment of tax to HMRC but an adjustment to ensure that Mr W receives fair compensation.

The payment resulting from all the steps above is the 'compensation amount'.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr W wanted capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr W's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr W into that position. It does not mean that Mr W would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr W could have obtained from investments suited to his objective and risk attitude.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £170,000 plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £170,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Tuto Money Limited should pay Mr W the amount produced by that calculation – up to a maximum of £170,000 plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £170,000, I recommend that Tuto Money Limited pays Mr W the balance.

This recommendation is not part of my determination or award. Tuto Money Limited doesn’t have to do what I recommend. It’s unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr W to accept or reject my decision before 20 December 2023.

Christian Wood
Ombudsman