

The complaint

Mrs A has complained about the advice given by M2 Financial Ltd (now Towergate Financial (East) Limited – I'll just refer to "Towergate" in my decision) – in respect of transferring the benefits from her defined benefit ("DB") occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

The advice and transfer took place in 2008. Mrs A was a deferred member of a previous employer's DB pension scheme. The scheme offered her an enhanced transfer value if she chose to transfer the DB pension to another scheme. The basic transfer value was £18,929; but the scheme would increase this to £33,490 if Mrs A transferred. The extra £14,561 could either be paid into the new pension or Mrs A could take it (less tax) as a lump sum payment.

Towergate completed a fact-find to gather information about Mrs A's circumstances and objectives. It also carried out an assessment of her attitude to risk – which it deemed to be "cautious", or risk level three.

On 18 March 2008 Towergate issued a suitability report. It recommended that Mrs A not transfer her DB pension benefits because she wouldn't get higher benefits, the new pension was higher risk and the DB pension was more secure. It then went on to explain what Mrs A needed to do if she wished to transfer on an *insistent client* basis ie against the advice.

On 21 April 2008 Mrs A told Towergate that wanted to transfer and take the enhancement as a cash payment. Towergate issued a second suitability report the same day. It initially reiterated the recommendation (and the reasons for it) from the previous report. But it ultimately recommended that Mrs A transfer her DB pension to a personal pension, and to invest the pension funds into a Cautious Lifestyle Profile fund (although it noted that Mrs A wanted to invest in a Balanced Lifestyle fund).

In 2020 Towergate reviewed the advice following a directive from the regulator. In a questionnaire that Mrs A completed as part of the review process she said she decided to transfer because the advisor said she could use the money to pay for her wedding. She also said she could have waited another year to get married. In its review Towergate identified concerns in the advice process about Mrs A's ability to retire on an unreduced DB pension at age 60 not being explained and risk warnings not being present. But it was satisfied these failings didn't affect Mrs A's decision to transfer.

Mrs A referred her complaint to the Financial Ombudsman Service. Our investigator concluded it should be upheld and that Towergate should pay compensation. In summary, she felt transferring the pension wasn't in Mrs A's best interests and Towergate acted unfairly in treating Mrs A as an insistent client. Towergate disagreed with our investigator. It agreed there were some elements of the advice which could have been explained further. But it remained of the view opinion that Mrs A would have still chosen to transfer out of the DB pension and take the additional cash lump sum payment.

The investigator wasn't persuaded to change her opinion so the complaint was referred to me to make 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"). Where the evidence is incomplete, inconclusive or contradictory, I've reached my conclusions on the balance of probabilities ie 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 isn't a comprehensive list of the rules and regulations which applied at the time of the advice but provides useful context for my assessment of Towergate'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).

COBS 9: the provisions of which deal with the obligations when giving a personal recommendation and assessing suitability.

COBS 19: the provisions of 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 our 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, Towergate should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mrs A's best interests. Having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

Towergate obtained transfer value analysis reports showing how much Mrs A's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme. The growth needed is known as 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. Although 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.

Mrs A was 46 at the time of the advice and aimed to retire at 65. If the basic transfer value was transferred to a personal pension the critical yield required to match her benefits at age 65 was 10.5% if she took a full pension and 9.4% if she took tax-free cash and a reduced pension. If the enhanced transfer value was transferred to a personal pension the critical yield required to match her benefits at age 65 was 7.2% if she took a full pension and 6.1% if she took tax-free cash 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 6.5% per year for 18 years to retirement. I've also kept in mind the regulator's projection rates at the time: the upper projection rate was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mrs A's cautious attitude to risk and the term to retirement. There would be little point in Mrs A giving up the guarantees available through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield (with Mrs A taking the enhanced payment as cash) was 9.4%, I think Mrs A 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 her attitude to risk.

For this reason alone a transfer out of the DB scheme wasn't in Mrs A's best interests.

Financial viability isn't the only consideration when giving transfer advice and at this point I would normally look at other considerations (eg flexibility in taking benefits, death benefits) which might mean the transfer was suitable despite providing overall lower benefits. I don't think that's necessary in this case though because, like me, Towergate also felt that transferring wasn't in Mrs A's best interests – hence its advice in the initial suitability report (although I think the messaging was mixed – see below). It also didn't dispute this point when replying to our investigator's assessment.

I've therefore gone on to consider whether or not Towergate treated Mrs A fairly and acted in her best interests in ultimately recommending the transfer and investment on the basis of her being an 'insistent client'.

Insistent client

There had previously been rules in place relating to insistent clients when the Personal Investment Authority ("PIA") was the regulator and the *PIA Adopted Rules* applied. The Conduct of Business rules had also contained rules about how businesses should treat insistent clients. These requirements weren't replicated in the COBS rules, which came into force in 2007. But at the time the advice was given I think it was good industry practice for firms to ensure that customers who wanted to go ahead with a transaction against an advisor's recommendation should have it clearly documented that the consumer was acting against the recommendation and that they wanted to proceed in any event.

Furthermore, as outlined above, COBS required Towergate to *act honestly, fairly and professionally in accordance with the best interests of its client* and to *provide information that was clear, fair and not misleading*. So, Towergate's recommendation had to be clear and Mrs A had to have understood the consequences of going against the recommendation. PRIN was also in place and PRIN 6 and PRIN 7 that I've outlined above are also of relevance.

Although there was no set definition of 'insistent client' in the regulator's handbook, it was generally understood to be a term used to describe a customer who wanted to proceed with a transaction against the advice they had been given.

Towergate's role was to discern what Mrs A's wants and needs were and why she wanted to transfer her pension. Its role wasn't simply to facilitate what Mrs A wanted. It had to act in her best interests. There was clearly some discussion at the time about Mrs A potentially using the lump sum payment to pay for her wedding, but there is no reference to this in either suitability report. I'm not therefore persuaded that Towergate carried out any, or sufficient, analysis of why Mrs A wanted to transfer and whether it was in her best interests to do so. Rather, it seems that it simply facilitated what she wanted to do.

While Towergate's suitability reports set out that its recommendation was that Mrs A *not* to proceed with the transfer, I think this was seriously undermined by the reports as a whole. For example, the first report said *if Mrs A was in any doubt* Towergate's recommendation was that she not transfer. This, in my opinion, wasn't a clear recommendation – as it effectively meant that if Mrs A didn't have any doubt the recommendation was to transfer. Further, the ultimate recommendation under the 'Recommendation' heading was to not transfer, but that was immediately followed by an explanation that Mrs A could still transfer if she wanted to and of what Mrs A needed to do. This 'mixed message' approach was a pattern throughout the advice process. So, I think Mrs A could have misunderstood or believed that overall, Towergate was recommending she should go ahead with the transfer.

I also think it ought to have been clear to Towergate that Mrs A had little knowledge or experience of financial matters based on the information available at the time of the advice. I say this because Mrs A said in the attitude to risk questionnaire things like her knowledge of financial terms is very limited and she doesn't have sound financial experience to help her make an investment decision. The Fact Find also doesn't record any investments that Mrs A held. I think this should have put Towergate on notice that it had to be careful if it was to take matters through the insistent client route.

Although Mrs A confirmed by email that she wished to proceed with the transfer against Towergate's advice, she's told us that she simply wrote what the advisor told her to say. I've seen a few complaints involving this DB scheme and Towergate and what Mrs A has said here is consistent with what other consumers in those complaints told us. It's also clear that the first suitability report told Mrs A precisely what she would need to say in order for Towergate to proceed with the transfer. So I think Mrs A's testimony carries some weight, and I'm not persuaded that Mrs A's 'insistent client' email was her own words. Given Mrs A's level of experience, I think it was important for Towergate to ensure she understood what she was getting into; and a good way to have done this would have been to see in her own words (without prompting) that she understood the recommendation being made and why she wanted to proceed. In the absence of this, I'm not persuaded that Mrs A was able to make an informed choice here.

Overall, I don't think the wording and emphasis in the suitability reports – including that a significant option given to Mrs A was to ignore Towergate's recommendation – was fair to Mrs A or in her best interest. I say that because I don't think it was in Mrs A's best interest to

go against Towergate's recommendation but the reports and information she was given made it very easy for her to do so.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process Towergate followed meant that Mrs A can truly be regarded as an insistent client. Towergate's communications weren't clear or fair, it didn't act in Mrs A's best interests and it failed to act with due care and skill. While Towergate acknowledged that transferring Mrs A's DB pension wasn't suitable for her, the failings in the advice process which meant she wasn't fully informed about her position.

I think it's more likely than not that the provision of full information and better analysis would have influenced Mrs A's decision making.

Would Mrs A have transferred anyway?

Towergate argues that Mrs A would have transferred anyway, in order to get the enhanced lump sum payment to pay for her wedding.

I've considered this argument but I'm not persuaded that Mrs A would have insisted on transferring out of the DB scheme against Towergate's advice had the advice been clear and had Towergate not made transferring an easy process. I say this because Mrs A was an inexperienced investor with a cautious attitude to risk and this pension accounted for a significant part of her retirement provision. I'm also not persuaded that Mrs A wanting to use the lump sum payment to pay for her wedding meant she would have transferred regardless. Although discussions in this respect took place, the fact it wasn't mentioned in either of Towergate's suitability reports in my view suggests it wasn't that important to Mrs A at the time. I'm also mindful that Mrs A said in the 2020 questionnaire that she could have waited another year and saved more money before getting married.

So, if Towergate had provided Mrs A with clear advice against transferring out of the DB scheme, explaining clearly why it wasn't in her best interests, I think she would have accepted that advice.

Suitability of investments

As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs A and Towergate treated Mrs A unfairly in proceeding on the basis that she was an insistent client, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs A should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

Although Towergate initially recommended that Mrs A not transfer her pension, ultimately its recommendation was that she transfer. Towergate wasn't there to just transact what Mrs A might have thought she wanted. Its role was to really understand what she needed and recommend what was in her best interests.

I don't think the advice given to Mrs A was suitable or that the advice process Towergate followed was fair. Mrs A was giving up a guaranteed, risk-free and increasing income and by transferring she was very likely to obtain lower retirement benefits. And in my view there was no other particular reason which would justify a transfer and outweigh this. I also don't think Mrs A should have been treated as an insistent in the way she was.

So, I think Towergate should have clearly advised Mrs A to remain in her DB pension.

In light of the above, I think Towergate should compensate Mrs A for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs A, as far as possible, into the position she would now be in but for the unsuitable advice. As outlined above, I consider she would have most likely remained in the DB scheme if suitable advice had been given.

Towergate 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, Mrs A hasn't yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, 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 Mrs A'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, Towergate should:

- calculate and offer Mrs A redress as a cash lump sum payment
- explain to Mrs A before starting the redress calculation that:
 - her 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 her redress prudently is to use it to augment her defined contribution pension
- offer to calculate how much of any redress Mrs A receives could be augmented rather than receiving it all as a cash lump sum
- if Mrs A accepts Towergate's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs A for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs A's end of year tax position.

Redress paid to Mrs A 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, Towergate 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 Mrs A'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 £160,000, 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 £160,000, I may recommend that the

business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Towergate Financial (East) Limited to pay Mrs A the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Towergate Financial (East) Limited pays Mrs A the balance.

If Mrs A accepts this decision, the money award becomes binding on Towergate Financial (East) Limited. My recommendation would not be binding. Further, it's unlikely that Mrs A can accept my decision and go to court to ask for the balance. Mrs A 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 Mrs A to accept or reject my decision before 21 February 2024.

Paul Daniel
Ombudsman