DRN-4528284

Financial Ombudsman Service

The complaint

Mr H has complained about the advice given to him by one of Pi Financial Ltd's appointed representatives 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 it has caused a financial loss.

Mr H is professionally represented in this matter but for ease of reference I will just refer to Mr H. Similarly, I'll just refer to Pi rather than to the appointed representative.

What happened

The advice was given in 2018. As far as Mr H remembers, he was cold called by Pi and offered a review of his pension.

Pi completed a fact-find document to gather information about Mr H's circumstances and objectives. It also assessed Mr H's attitude to risk as 5 out of 10, which it deemed to be 'low medium'.

On 5 March 2018 Pi advised Mr H to transfer his DB pension to a personal pension and to invest the proceeds in the Royal London Governed Portfolio 5 fund. The suitability letter said this would enable Mr H to meet his objectives – including having flexibility when it came to taking retirement benefits, taking a lump sum tax-free payment at age 55 to repay some of his mortgage, and being able to take the remaining benefits at age 65.

Mr H complained to Pi in February 2023 about the suitability of the advice. He made a number of points but the nub of the complaint was that Pi owed him a duty of care and the advice was negligent. Pi didn't uphold Mr H's complaint. It felt the advisor acted appropriately and that the advice was suitable.

Our investigator concluded that the complaint should be upheld. In summary, she felt transferring the DB pension wasn't in Mr H's best interests and that he should have been advised to remain in the DB pension. Pi disagreed. It made various points but our investigator wasn't persuaded to change her opinion. The complaint was therefore 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 – 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 isn't a comprehensive list of the rules and regulations which applied at the time of the advice, but it provides useful context for my assessment of Pi's actions.

- 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
- the provisions in COBS 19 which specifically relate to a DB pension transfer
- COBS 19.1.6G where the regulator states that the starting assumption for a transfer from a DB pension is that it is unsuitable (the presumption of unsuitability).

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. Given the presumption of unsuitability Pi should have only considered a transfer if it could clearly demonstrate that transferring was in Mr H's best interests. Having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Pi carried out a transfer value analysis showing how much Mr H's new pension fund would need to grow by each year in order to provide the same benefits as his DB pension. This growth is known as the critical yield and was as follows:

Retirement age	Critical yield (if taking full pension)	Critical yield (if taking tax-free cash and a reduced pension)
60	6.96%	5.73%
65	6.65%	5.67%

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.

Mr H was 41 at the time of the advice. Most of the documentation said he wanted to retire (in terms of drawing benefits from his pension) at 60, although the suitability letter said 65. 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. This was 4.4% per year for 18 years to retirement at 60 and 4.6% per year for 23 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 H's 'low medium' attitude to risk and also the term to retirement. There would be little point in Mr H giving up the guarantees available to him through his DB pension only to achieve, at

best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 5.67%, I think Mr H was likely to receive benefits of a substantially lower overall value than the DB pension at retirement, as a result of investing in line with that attitude to risk.

Pi said the pension transfer analysis showed that Mr H's pension funds under a drawdown arrangement were projected to last beyond age 120 if he withdrew the same level of income that was offered by his DB pension at its normal retirement age of 60. I acknowledge the point Pi makes but this makes various assumptions – not least that Mr H will continue to only withdraw the same amount as what his DB pension would have paid. I think this is important because the suitability letter referred to Mr H wanting the option to dip into his pension when needed, which obviously raises the possibility that Mr H could withdraw more than he would otherwise have received from the DB pension. Further, as Pi will know, past performance is no guarantee for future performance.

Accordingly, I consider 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. As the transfer wasn't financially viable, for this reason alone transferring out of the DB pension scheme wasn't in Mr H's best interests.

It needs acknowledging that the advisor recognised this at the time – he said in the suitability letter that the critical yield wouldn't be achievable and on that basis he recommended that Mr H *not* transfer from the DB pension. However, the advisor then immediately went on to recommend the transfer given Mr H's specific objectives. As financial viability isn't the only consideration when giving transfer advice, I've considered other things that might have sufficiently overridden the financial viability so that the transfer was in Mr H's best interests.

Flexibility and income needs

I'm not persuaded that Mr H really needed flexibility in his income needs in retirement. This is because based on the evidence I've seen I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave the remaining funds invested until a later date. I say this because while I understand Mr H's desire to potentially reduce his outstanding mortgage there was no actual need for him to do so.

Pi has argued that Mr H wanted the flexibility to be able to repay or reduce his mortgage at age 55 and this was particularly important given his disproportionately high mortgage. But Mr H was only 41 at the time of the advice and I can't see that he had any concrete retirement plans. And he had 14 years before he could access his pension. Accordingly I think it was too soon to make any kind of decision about transferring out of the DB pension. So, I don't think it was a suitable recommendation for Mr H to give up his guaranteed benefits when he didn't know what his needs in retirement would be. If Mr H later had reason to transfer out of his DB pension (eg to get funds to repay his mortgage) he could have done so much closer to retirement.

Death benefits

Death benefits are an emotive subject and 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 H. But while death benefits are important to consumers, and Mr H might have thought it was a good idea to transfer his DB pension to a personal pension because of this, the priority here was to advise Mr H about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Pi explored to what extent Mr H was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the death benefits attached to the personal pension were overplayed. I say this because the suitability letter referred to Mr H's desire for a lump sum to be paid to his wife or child rather than a regular income, and it compared the benefits between the two pensions on the basis that Mr H died the day after the transfer. Mr H dying shortly after the transfer was an extremely unlikely occurrence – I think a far more likely scenario is that he will live long after the transfer and into retirement. Mr H was married so the spouse's pension provided by the DB pension would have been useful to his spouse if he predeceased her. I don't think Pi made the value of this benefit clear enough to Mr H. It was guaranteed and it escalated – it wasn't dependent on investment performance, whereas the sum remaining on death in a personal pension was.

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 H.

Suitability of investments

Pi recommended that Mr H invest in the Royal London Governed Portfolio 5 fund. As I'm upholding the complaint on the grounds that a transfer out of the DB pension wasn't suitable for Mr H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr H should have been advised to remain in the DB pension and so the investments in the Royal London Governed Portfolio 5 fund wouldn't have arisen if suitable advice had been given.

Summary

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

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. Yet by transferring he 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 Pi should have advised Mr H to remain in his DB pension.

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

I'm not persuaded that Mr H's view about what was best for him was so great that he would have insisted on transferring knowing that a professional adviser, whose expertise he was paying for, didn't think it was suitable for him or in his best interests. If Pi had emphasised that Mr H would likely be worse off and that the objectives he could meet by transferring weren't worth risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr H would have insisted on transferring out of the DB pension.

In light of the above, I think Pi should compensate Mr H 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 Pi to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. As outlined above, I consider that Mr H would have most likely remained in the DB pension if suitable advice had been given.

Pi 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 H has not yet retired, and he has no plans to do so at present. Compensation should therefore be based on the DB pension's normal retirement age of 60, 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 H'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, Pi should:

- calculate and offer Mr H redress as a cash lump sum payment
- explain to Mr H before starting the redress calculation that:
    - his 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 the redress prudently is to use it to augment his defined contribution pension
- offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum
- if Mr H accepts Pi's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr H 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 H's end of year tax position.

Redress paid to Mr H 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, Pi 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 H'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 Pi Financial Ltd to pay Mr H 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 Pi Financial Ltd pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on Pi Financial Ltd. My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. He may therefore 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 H to accept or reject my decision before 1 February 2024.

Paul Daniel
Ombudsman