DRN-4533864

The complaint

Ms B's representative has complained, on her behalf, that Quilter Financial Planning Solutions Limited (Quilter) gave her unsuitable advice to transfer defined benefits from her occupational pension scheme (OPS) to a personal pension plan (PPP). The representative says that Ms B will have suffered a financial loss as a result.

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

Ms B was a deferred member of a defined benefit scheme held to which she'd contributed for eight years. Ms B had received a cash equivalent transfer value (CETV) in March 2018 which valued her pension at £145,314 and guaranteed this value until June 2018.

In March 2018, Ms B was introduced to Quilter by a different firm of advisers to look into the possibility of transferring her pension benefits. A fact find was completed, in which it was established that Ms B's circumstances were as followed:

- She had recently turned 65 and was single with no financial dependants.
- She was employed and was planning to retire at 68, in 2021.
- She was recorded as being in good health.
- She was earning £990 pm from her employment and was in receipt of £150 pw from the state pension. Her monthly income was recorded as £1,140 and her outgoings were £650, leaving £490 of expendable income available per month.
- She had access to £6,000 in savings.
- Her property was owned outright, and was valued at £90,000 with no outstanding mortgage.
- No other debts or investments were recorded.
- Her Attitude to Risk (ATR) was recorded as "balanced". She was listed as having some knowledge of financial markets due to previous investment advice she'd received and acted upon.

According to the fact find, Ms B's main objective was to use her Tax-Free Cash (TFC) to help her daughter buy a property. Ms B also wanted the flexibility to access her pension when she required, and she wanted the full benefits to go to her daughter upon her death, versus the £20,000 death lump sum payment she would have been entitled to under the scheme.

A suitability report was generated on 29 May 2018. Quilter set out the disadvantages and risks of moving away from the OPS, but ultimately recommended that Ms B transfer her defined benefits to a PPP with Old Mutual Wealth (OMW). The objectives listed in the fact find remained the same.

The report said that Quilter's initial adviser charge was £3,495 and would be deducted from the pension after transfer. The report also highlighted that Ms B agreed to a yearly review of her pension with the referring firm of advisers. The charge for this was recorded as being 0.75% of the fund value. The annual fund management charges weren't set out in the suitability report, but Ms B was directed to the illustrations to confirm this.

After receiving advice from Quilter, Ms B emailed Quilter and agreed to the transfer. In June 2018, £145,314 was transferred to OMW, enabling a Retirement Account to be set up. However, Ms B didn't access the TFC until March 2020, when she received £33,770. In March 2022, a further £35,000 was withdrawn from her pension plan.

Ms B, through her representative, raised a complaint against Quilter in March 2023, saying that the advice had been unsuitable, and that she'd lost out financially as a result.

Quilter responded to the complaint in May 2023. It maintained that the advice was suitable based on Ms B's circumstances and objectives at the time, and that her actions after the transfer was completed affirmed this.

Dissatisfied with the response, Ms B's representative referred the complaint to this service for review.

Having considered the matter, our investigator thought that it should be upheld. He said the following in summary:

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests.

- It was Quilter's responsibility to analyse, test and challenge Ms B about what was in her best interests for retirement planning – and it shouldn't have simply fulfilled Ms B's wishes.

- At the time of the advice, the pension formed a large part of Ms B's likely income in retirement and those benefits were relatively secure. Ms B had since confirmed that this was her only private pension provision at the time. The security of her defined benefits would therefore have been important to her.

- According to the suitability report, Ms B wished to access her tax free cash to help her daughter buy a property, and leave the remainder until she needed it. But the suitability report said that it was possible for Ms B to do this with the defined benefits and take a reduced pension, or to partially transfer her defined benefits. And so Ms B could have achieved that objective by retaining her defined benefits.

- Quilter noted that the defined benefits were guaranteed and would increase over time, whereas the PPP would be dependent upon investment returns.

- Increased lump sum benefits were recorded as an advantage of transferring, but Ms B had no health issues or financial dependants. And even if Ms B was keen on enhanced lump sum benefits, other options such as life assurance weren't considered.

- The pension benefits were also primarily intended to provide for Ms B in her retirement rather than provision for others.

- There also didn't seem to be any particular urgency in Ms B helping her daughter with her property purchase. This didn't in fact happen until 2020. Ms B could have waited until then to do anything with her defined benefits, and if she'd taken the scheme benefits, Ms B's income would have increased for the few years until she retired, but this wouldn't have had a great impact on the level of income tax she paid.

The investigator recommended that Quilter undertake a loss calculation in accordance with the regulator's policy statement PS22/13.

If the redress was paid directly to Ms B, Quilter could make a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

Quilter disagreed, however, saying the following in summary:

- Had Ms B retained her defined benefits, she couldn't have accessed her tax free cash without taking the scheme income.

- Ms B had reached the scheme normal retirement date of 65, and this was arguably the ideal time to make a decision on whether to transfer. Ms B's employment meant that she didn't need the additional scheme income and this would have created a further tax liability.

- Her living expenses of £700 pm would be more than covered by the state pension, meaning that she would be in a position whereby guaranteed escalating income would be less important.

- Ms B had the strong objective of helping her daughter get on the property ladder, and although the amount required could have been obtained from the scheme benefits, she would have needed to take income which she didn't need.

- Although lump sum death benefits may not be a strong driver behind transferring, and it wasn't a primary objective here, due to Ms B's situation it seemed reasonable that she would want to leave a legacy to her daughter.

- The transfer gave Ms B the flexibility to take into account lifestyle changes, holidays and home improvements. She would also be able to top up her state pension each year tax efficiently.

- Ms B transferred at a time when CETVs were around 40% higher than they are now, due to an increase in intertest rates. Consequently, the outcome of most redress calculations undertaken now resulted in "no loss" outcomes. This further implied that Ms B was suitably advised to transfer as she was better off as a result.

- Ms B had since taken maximum tax free cash and larger withdrawals than had been advised, and the adviser shouldn't be held responsible for this.

- The correspondence from the time of the advice evidenced that Ms B had understood the nature of the guarantees she was relinquishing, and so this meant that she was able to make an informed decision.

As agreement hasn't been reached on the matter, it's been referred to me for review.

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've reached similar conclusions to those set out by the investigator, and for broadly the same reasons.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The applicable guidance, rules, regulations and requirements

This isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business *to "act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time Quilter advised Ms B were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Quilter, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, Quilter needed to gather the necessary information for it to be confident that its advice met Ms B's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;

(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and

(4) *take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading *"Suitability"*, COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

I've therefore considered the suitability of Quilter's advice to Ms B in the context of the above requirements and guidance.

Quilter's rationale for transferring

Ms B wasn't categorised as an "execution only" or insistent client, and Quilter was taking her through the advice process. Therefore, Quilter could be confident that she would be acting upon its advice.

In accordance with COBS 9.2.2R, fact finding was undertaken for Ms B and her circumstances and objectives were recorded – as I've noted above.

As with the investigator, I've noted above that the FCA's guidance was that the starting assumption for an assessment of Ms B's options was that a transfer would be unsuitable, unless it could clearly be demonstrated that it was in her best interests in order to meet specific objectives.

And so I'll therefore explore these objectives further below. But initially, I'll consider the advice to transfer from a purely financial perspective – so, in broad terms, how likely was it that Ms B would be better off financially as a result of the transfer.

The financial case to transfer

Quilter couldn't obtain a transfer report which included critical yields – the growth rates required to match the scheme benefits - for comparison purposes to determine the viability of the transfer to meet Ms B's objectives from a financial perspective, as she'd passed the normal scheme retirement age.

Bu I do note that in the suitability report, Quilter said that the cost of providing an annuity which would replicate the scheme benefits was £183,162. This compared to the CETV on offer of £145,314.

Quilter itself noted that this figure was high, when compared to the CETV, and said that this reflected the cost of buying an annuity which would escalate in the same way as the scheme benefits.

And I agree – I think the disparity demonstrates that the CETV would be unable to match the overall benefits which would be provided by the scheme

From a financial perspective, there needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, the guidance was that it needed to be clearly demonstrated that the transfer would be in Ms B's best interests. As such, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Ms B would be relinquishing.

But financial feasibility wouldn't in any case by itself indicate suitability of a transfer, as set out in COBS 19.1.7B.

Other objectives – including helping Ms B's daughter buy a property

Before I assess these objectives in greater detail, I think it's firstly fair to say that Quilter did provide warnings on the guarantees which would be relinquished, but as Quilter will be aware, risk warnings alone wouldn't render unsuitable advice suitable. And irrespective of the detail contained in a recommendation report, this also wouldn't make otherwise unsuitable advice suitable. Quilter needed to be satisfied, before providing its recommendation, that relinquishing the guarantees and taking the investment risk was a suitable course of action for Ms B.

Part of Quilter's rationale for the recommended transfer, despite the likely inability of the transferred benefits to match those which would have been produced by the scheme, was that Ms B didn't need to replicate the income which would be produced by the scheme. And so I've given this argument careful consideration.

Quilter said that it was often the case that individuals could obtain a higher tax free cash sum by taking 25% of the transferred benefits, and it said that in this instance, the tax free cash from the PPP would be £36,328, compared to £31,988 which was being offered by the scheme.

It also said that, by taking an income in a format which was better suited to Ms B's situation - a single life, non-escalating annuity - she would receive £6,428 pa as opposed to £4,798 pa from the scheme.

It further noted that, whilst the scheme income would escalate, Ms B would initially have a higher income, and that it was often the case that this kind of enhanced income in the early years of retirement was preferred.

However, I note that, as an annuity didn't seemingly provide Ms B with the flexibility she required, which I address further below, this wasn't in any case the ultimate recommendation. I would also say that, at around ten years of escalation at, say, 3% pa, the scheme income would have matched the annuity income quoted by Quilter, and then surpassed it at an ever increasing amount each year thereafter. And I note that Ms B had no health concerns which might have meant that she had a shortened life expectancy.

A key reason for the recommendation was that Ms B take the tax free cash with which she said she wanted to help her daughter buy a property, and to not yet take income as she didn't envisage needing it for another three years.

Quilter repeated the warnings that Ms B would be giving up guarantees associated with the scheme benefits. And I think it's fair to say that, even without significant investment experience or other assets, Ms B may have understood the principle of risk/reward which would be associated with flexible income drawdown.

But Quilter still needed to give Ms B suitable advice. And I can't see why Ms B needed to access her benefits at that point at all. It doesn't seem to be the case that Ms B's daughter had identified a property which she wished to buy, and indeed didn't then do so until 2020. I think the more suitable advice would have been to wait until there was a realistic prospect of Ms B's daughter buying a property and then begin to access the benefits.

But I also don't think the rationale for transferring for the alternative of flexible income bears much scrutiny either. Ms B may not have needed the additional income which the scheme benefits would provide once she accessed the tax free cash, but she could simply have reinvested it as she saw fit. And tax would in any case need to be paid on the benefits at some point. If Ms B deferred the income, she would simply pay tax on the higher amount when she did take it. Or if she was able to leave a pot of money for her daughter and, as seemed a realistic prospect at the time, lived beyond age 75, her daughter would need to pay tax on it at her own marginal rate.

However, Ms B in any case envisaged retiring in three years' time. And so there wouldn't have been a prolonged period of time in which she would have been receiving surplus income. But it would have been guaranteed income, and would have escalated each year.

Ms B wasn't a high risk investor and, other than her state pension, had no other pension assets. I therefore think the guarantees attached to these benefits would have been of considerable value to her. And I don't think Quilter should have advised her to transfer them without there being an immediate need for her to do so. Further, I can't see that the need for future flexibility was so great that it would supersede the benefit of a guaranteed, escalating income, especially when Ms B had no other pension assets upon which to rely.

Death benefits

I've carefully considered what Quilter has said about the different format of the death benefits being appealing to Ms B and that she could leave a legacy to her daughter.

And it's fair to say that, if Ms B remained single, the death benefits offered by the transfer would likely be more beneficial to her daughter.

But the investigator made the point that accrued pension provision is intended to provide for an individual's retirement rather than a desire to leave a legacy in the form of a lump sum. And I agree - the recommendation needed to be given in the context of Ms B's best interests rather than any lump sum legacy for her family.

I therefore think that Ms B more likely than not had an entirely understandable desire to leave a financial legacy for her daughter, but I can't see that, beyond helping her daughter with her property purchase whilst still alive, the lump sum death benefit which would have derived from transferring was essential, and certainly not to the extent that it would justify Ms B compromising the security of her own financial future whilst still living.

So for the reasons given, I don't think the prospect of a lump sum benefit by way of transferring her defined benefits constituted sufficient reason to transfer and lose otherwise valuable guaranteed benefits for Ms B personally.

What should Quilter have done – and would it have made a difference to Ms B's decision?

I don't think there was a pressing need for Ms B to make any decision about transferring her OPS benefits at this point in time and it was the responsibility of Quilter to explain to Ms B why she didn't need to make any irreversible decision on relinquishing valuable scheme pension guarantees until her daughter had identified a property which she wished to buy. As was in fact the case, this may have been closer to her own retirement date, and so the combination of tax free cash and guaranteed income from the scheme would have suited Ms B well.

I also don't think the perceived advantage of flexibility and control of income outweighed the guaranteed benefits in the scheme, and I'm satisfied that Ms B's overall benefits from the scheme would have been higher.

Tax free cash for whatever purpose, including helping her daughter buy a property, would have been available from Ms B's defined benefit pension funds.

The cost to replace the scheme benefits is usually a telling indicator of the value of the benefits being relinquished compared to the value of the transferred benefits. As I've set out above, and as also noted by Quilter, this was comfortably higher than the CETV.

Taking account of Ms B's circumstances, including her recorded attitude to risk, her circumstances and the guarantees which the OPS offered, my view is that Quilter should have advised against the transfer.

And I think that, had this happened, Ms B would have followed that advice and not transferred her benefits to the PPP.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to the conclusion that the recommendation to transfer wasn't suitable for Ms B, nor was it in her best interests.

Putting things right

A fair and reasonable outcome would be for the business to put Ms B, as far as possible, into the position she would now be in but for the unsuitable advice.

I consider that Ms B would most likely have remained in the OPS if suitable advice had been given.

I've noted what Quilter has said about the CETV being relatively high at the time of the advice. That this was the case, compared to that which might be paid now, may mean that any redress calculation required due to the unsuitable advice may now result in a no loss outcome. But that doesn't alter the fact that, at the time of the advice the advice wasn't, in my view, suitable.

Quilter Financial Planning Solutions Limited 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.

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 Ms B's acceptance of my final decision.

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

- calculate and offer Ms B redress as a cash lump sum payment,
- explain to Ms B before starting the redress calculation that:

- its 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 her defined contribution pension

- offer to calculate how much of any redress Ms B receives could be augmented rather than receiving it all as a cash lump sum,
- if Ms B accepts Quilter Financial Planning Solutions Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Ms B for the calculation, even if she ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Ms B's end of year tax position.

Redress paid to Ms B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses 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 Ms B'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.

Determination and money award: I require Quilter Financial Planning Solutions Limited to pay Ms B the compensation amount as set out above, up to a maximum of £190,000.

Recommendation: If the compensation amount exceeds £190,000, I would also recommend that Quilter Financial Planning Solutions Limited pays Ms B the balance.

If Ms B accepts this final decision, the award will be binding on Quilter Financial Planning Solutions Limited.

My recommendation wouldn't be binding on Quilter Financial Planning Solutions Limited. Further, it's unlikely that Ms B could accept my decision and go to court to ask for the balance. Ms B may want to consider getting independent legal advice before deciding whether to accept my final decision.

My final decision

My final decision is that I uphold the complaint and direct Quilter Financial Planning Solutions Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 12 March 2024.

Philip Miller
Ombudsman