DRN-4552811

The complaint

Mr M complains about the advice Pi Financial Ltd ('Pi') gave to him concerning the transfer of benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Professional representatives have helped Mr M to bring this complaint. But, for ease of reading, I will refer to the representatives' comments as being Mr M's.

What happened

In 2014 Mr M approached Pi to discuss his pension arrangements. He said he was considering using some of his tax free cash (TFC) entitlement from his pensions. He said he wanted to enjoy the money now rather than in the future.

Pi conducted a fact-find with him to gather information about Mr M's circumstances and objectives. Amongst other things it noted:

- Mr M was 57 and married. He didn't provide any details about his wife or her circumstances.
- He was working and anticipated doing so until he was age 65.
- He and his wife jointly owned their home, valued at £70,000 subject to an outstanding mortgage of £3,900. Mortgage repayments were £145 a month and it was due to be repaid by 2018.
- He was paying into his current employer's pension scheme.
- Mr M had a regular income of £2,000 a month and regular outgoings of £910 a month.
- He was a deferred member of two former employers' DB pension schemes. I will refer to those as DB1 and DB2. The cash equivalent transfer value (CETV) of DB1 was £309,789 and DB2's was £11,869.
- He also had two other defined contribution (DC) pension policies which were valued at £2,221 and £1,765[1].
- He had a cautious to balanced attitude to risk.
- While conducting the fact-find Pi noted at several points that transferring his DB scheme benefits wasn't in Mr M's best interests because of the guarantees and security he would lose. But it noted Mr M wanted to go ahead with the transfer.

Pi sent Mr M a suitability report setting out its initial analysis on 5 November 2014. Amongst other things it said Mr M wanted to consolidate all of his four pensions in one place, he wanted to access TFC to pay off his mortgage, buy a property and pay for some home improvements. Mr M said he wanted to enjoy the money now as well as increasing his short term savings. Pi said it would not recommend Mr M transfer his DB schemes' benefits to a personal pension. But as Mr M wanted it to assist him in doings so, Pi asked him to put that wish in writing.

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[1] Mr M has not complained about the transfer of these pensions.

Five days later Mr M submitted three letters to Pi. Two were produced on a computer, the third handwritten. All three said Mr M understood the benefits he would be giving up by transferring and that this was against Pi's advice.

On 12 November 2014 Pi sent Mr M a second suitability report. A lot of it was similar to the earlier report. However, the new report had more detail concerning Mr M's options to transfer.

The transfer went ahead. Both of Mr M's DB schemes and his two small DC schemes were transferred to a named personal pension. The total amount transferred was £325,733. Mr M received around £81,400 TFC from the transfers.

In 2022 Mr M complained to Pi that its advice wasn't suitable for him. He said Pi had advised him to transfer. He added that Pi told him a personal pension would perform better and provide greater retirement income than his DB schemes. He said he wasn't prepared to take risks with his pensions and if he'd been aware of the implications of transferring out of his DB schemes he wouldn't have gone ahead with the transfers. He said he believed that Pi hadn't acted in line with its regulatory obligations.

Pi didn't uphold Mr M's complaint. It said:

- It's advice to Mr M was he should not transfer his DB pensions as he would be worse off by doing so.
- The funds it advised him to invest in in were in line with his 'balanced to cautious' risk profile.
- He was aware of how his DB schemes operated.
- Pi gave him numerous warnings about the disadvantages and loss of guarantees transferring would entail. And Mr M signed statements to that effect.

Pi added that it believed Mr M had brought his complaint outside of the timeframes the regulator allowed to do so.

Mr M brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He initially explained why Mr M had not brought his complaint too late and this was a matter we could consider.

The Investigator also considered the merits of the complaint. He felt that there were flaws in the process Pi followed and that but for those flaws it was likely Mr M would not have transferred out of his DB schemes. The Investigator said Pi should establish if Mr M has suffered a loss as a result of the transfer and if so compensate him accordingly.

Pi disagreed with our Investigator's complaint assessment. In brief it said that Mr M had always said he wanted to go ahead with the transfer regardless of the consequences.

The investigator wasn't persuaded to change his 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.

In responding to this complaint and our Investigator's assessment of it Pi has made a number of points. I've considered carefully everything on file. But in this decision I don't intend to address each and every issue or point raised. Instead I will focus on the matters that are at the heart of Mr M's complaint and the reasons for my decision.

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'). And where the evidence is incomplete, inconclusive or contradictory, I reach 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

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. And the Conduct of Business rules had also contained rules about how firms should treat insistent clients. These requirements were not replicated in the Conduct of Business Sourcebook ('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 adviser'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, the COBS rules required Pi to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Pi to provide information that was clear, fair and not misleading. So, Pi's recommendation had to be clear and Mr M had to have understood the consequences of going against the recommendation.

The Principles for Businesses ('PRIN') were also in place and the following principles are of relevance:

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.

Although the regulator's handbook doesn't include a definition of 'insistent client', 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.

Having considered the above and all the available evidence I've decided to uphold the complaint for broadly similar reasons to those our Investigator gave.

The nature of Pi's advice

I'm mindful that, when Mr M put his complaint to Pi. He said it had advised him to transfer his DB schemes' benefits to a personal pension because that would produce better returns. But the written evidence from the time doesn't support that stance.

There's clear evidence from an early stage that Pi told Mr M that he should leave his DB benefits within the scheme. The suitability reports also said that transferring would most likely be detrimental to Mr M's income in retirement. So I'm satisfied that, overall, the nature of Pi's advice was that a transfer would not mean Mr M would be better off in retirement. Instead, Pi treated Mr M as an insistent client who was going against its recommendation. So I've gone on to think about the manner in which it went about that.

Was Pi's insistent client process robust?

There's evidence on file that Mr M had been considering his pension provision for some time before approaching Pi. So it seems that when he asked it for advice he had a preferred outcome in mind. That was that he would like to transfer his DB schemes' funds to a personal pension and access the TFC.

However, while that was what Mr M wanted to do Pi's role went beyond just facilitating what he wanted. Pi was required to discern what Mr M's wants and needs were and why he wanted to transfer his DB schemes. It had to give him clear, suitable advice and had to act in his best interests.

Pi's communication with Mr M did set out that its recommendation was not to transfer. I think that was the correct stance for it to take. But, I think this was seriously undermined by the process it followed in offering advice and the significant gaps in the advice itself. For example, it's clear that Pi discussed the merits of transferring with Mr M while it was still gathering information during the fact-find. During that process Pi made notes saying a transfer wasn't in Mr M's best interests because of the guarantees he would be giving up. Mr M signed to show he'd read those notes.

But, at that time, Pi hadn't done any detailed analysis of Mr M's situation. And, it seems to have been on the basis of those discussions that Mr M made an early decision that he wanted to go ahead with the transfer regardless of the consequences. So, as this was against Pi's recommendation, it decided to treat Mr M as an insistent client. But at that point Pi hadn't yet produced its suitability report setting out its recommendation. That means any information it gave to Mr M could only have been presented in a raw state, that is without any detailed analysis or a written presentation of the benefits Mr M would be giving up by transferring. I find this seriously weakens the advice process. That's because I don't see how Pi could expect Mr M to make an informed decision about going against its recommendation when it hadn't given him all the information he needed in order to make that decision.

Further, when advising on a DB transfer the regulator required Pi to compare his DB schemes' benefits with those he could receive from a personal pension using reasonable assumptions. But Pi didn't ever do this appropriately. At the time, the common practice for advising firms was to obtain a transfer value analysis report ('TVAS'). A TVAS would then compare the benefits from the DB scheme(s) with the likely benefits a consumer could receive by transferring. And that comparison would typically include a measure, known as the critical yield, which is the growth rate required to match the DB scheme benefits from a transfer to a personal pension. And that can give a clear snapshot of whether or not a transfer is likely to be financially viable.

But there's simply no evidence Pi did this important work which the regulator required it to do. Instead the only critical yield Pi referred to was one comparing the growth rate required between Mr M taking his funds by capped drawdown with buying an annuity from the same personal pension provider. But the annuity Pi referred to was for considerably less than Mr M would have been entitled to from just DB1, without considering the benefits of DB2. So it wasn't a helpful comparison in terms of giving Mr M enough information on which to make an informed decision concerning whether or not to transfer.

Further, depending on the situation it would be usual for the TVAS to include a number of comparisons. So, for example, where a consumer was considering taking benefits immediately the TVAS would make comparisons showing their pension entitlement if the consumer were to remain in their DB scheme and take those benefits immediately. It would also usually include comparisons at the consumer's normal scheme retirement age and/or their preferred retirement age and effects of taking TFC and a reduced pension. But Pi didn't produce any such analysis. So, I don't think it painted a clear picture which showed a likely side-by-side comparison of how Mr M’s investments would need to perform in order to match the benefits from his DB schemes.

Similarly, Pi did no real analysis of what Mr M’s income needs in retirement would be. It’s plain that Mr M didn’t wish to share his wife’s details with Pi. But when asked what his minimum income needs in retirement would be he simply answered “unsure”. But I can’t see that Pi probed him on that point to establish if in fact he could meet his income needs by transferring to a personal pension. And there’s no cash-flow model or similar tool which shows whether or not Mr M’s pension income would be depleted, and so his pension funds (other than state pension) would be exhausted before his likely life expectancy.

Without doing the appropriate analysis and establishing whether or not the transfer could meet Mr M’s needs in retirement I don't think Pi gathered enough information to robustly challenge Mr M’s understanding of his likely position in retirement if he transferred. So, in order to advise Mr M clearly, fairly and without misleading him Pi needed to do an analysis of what Mr M’s likely income in retirement actually would be and then compare that with his needs. But I’ve seen no evidence that Pi did the appropriate analysis or made a reasonable challenge to Mr M’s assumptions. I think that was something it needed to do in order to ensure it was providing suitable advice.

Pi said it discussed other ways Mr M could have access to cash immediately. Those things included releasing equity from his home; an unsecured loan, borrowing from friends or family and downsizing. But Mr M said he wasn’t comfortable taking on further borrowing and in fact wanted to pay off his mortgage. He also said he was happy where he lived. So Pi didn't explore any alternative methods of raising cash with Mr M. But I don't think it did enough to investigate exactly why Mr M wanted to give up his safeguarded benefits from his DB scheme in order to raise TFC and to really present him with viable alternatives.

For example, Pi said Mr M wanted to pay off his mortgage. But Mr M held more in savings than the outstanding sum on his mortgage so he didn’t need to transfer to be able to pay that off. Also other than his mortgage Mr M didn’t have any other debts or liabilities. His mortgage payments were relatively low and clearly affordable, so he had no real need to pay off his mortgage that would justify giving up his DB safeguarded benefits for. But I can't see that Pi put this to Mr M and challenged him on this point.

Similarly Pi said Mr M wanted to use TFC to buy another property and do home improvements. But there’s no evidence Pi established how much these things would cost and whether or not transferring from a pension was a viable method of raising the cash. For example, it appears Mr M wanted to buy and then rent out a new property. But I can't see that Pi looked to find out what:

- The new property would cost.
- What its rental income would be.
- Whether Mr M could meet the purchase costs with a buy-to-let mortgage and whether that would have been a cheaper method of raising cash than giving up the guarantees from his DB schemes.

If it had established those things it’s possible Mr M could have identified that he could buy the new property without giving up his DB benefits. But as Pi didn’t further investigate that, I can't now know whether or not that was the case.

In addition, as I've said above I can't see that Pi explored with Mr M what home improvements he wanted to make or how much those would cost. And I don’t see how Pi could actually give Mr M suitable advice in respect of his objectives without knowing the basic facts about what he wanted the cash for.

It follows that, while Pi did advise Mr M not to transfer, it did so based on limited information which didn't allow Mr M to make a like-for-like comparison with what he was giving up by transferring. Instead it gave him basic information and treated him as an insistent client without giving him enough detail to reasonably make that decision.

A much clearer process would have been for Pi to provide its advice and recommendations as a whole, taking into account Mr M's objectives and attitude to risk. That advice should have considered the overall picture – both of transferring out of the DB schemes together with the choice of pension and Mr M's desire to take TFC immediately. That information should have included Mr M's DB scheme entitlement at the relevant dates and also the critical yields. That would have enabled Mr M to see, in one place, exactly how his personal pension would need to perform to be able to match what he was giving up.

Only then should Pi have clearly set out why transferring out of the schemes wasn't in Mr M's best interests. Instead, it's apparent that it first discussed the matter with him and while it recorded that its advice was not to transfer it seems that it told him it could facilitate the transfer anyway. And doing so would give Mr M access to a large TFC lump sum as soon as the transfer concluded.

Further, there are some parts of the suitability reports which I don't think are clear. For example, Pi appended an illustration from the personal pension provider. And under a heading of 'points to consider' in its suitability report Pi said the attached illustration would compare the effect of the product charges between continuing with Mr M's current scheme or transferring. But, as far as I can see the illustration didn't do that. In fact there's no comparison anywhere in Pi's advice between Mr M's entitlements from the DB schemes and his likely income from transferring.

Also, Mr M didn't have to pay any fees for his DB schemes, as those costs were met by his former employers. But the suitability reports didn't make this clear.

Pi also said that it would recommend investment funds which were aligned to Mr M's requirements. It then went on to say it 'would point out that your current providers do not provide access to such funds'. But that somewhat misses the point. Any and all investment risk in Mr M's DB schemes were born by the scheme trustees and the employers. So, which funds they did or didn't choose to invest in was irrelevant to Mr M. And there's no indication on file that Mr M had a burning desire to invest in any specific funds which would warrant giving up his DB benefits in order to be able to do so.

But I think comments in the suitability reports like those above gave a mixed message that, overall, a transfer could be beneficial for Mr M and in his best interests.

Pi was in a good position to have analysed, tested, challenged and advised Mr M about what was in his best interests for retirement planning. It knows valuable pension pots like Mr M's DB schemes were paid into with the intention of providing for retirement. But Mr M's chosen path was to give up that guaranteed income in retirement for the chance of getting hold of a large lump sum of cash, for which he had no obvious need, rather than long-term planning.

And I don't think that applying an insistent client label to someone when they express that their preference is not to follow advice, is the same as applying the rigorous process of arriving at a fair determination of who an insistent client really is. So, given the flaws described above in Pi's advice process, I don't think it fully and accurately informed Mr M about his position. On balance, given these failings, I don't think it would be reasonable for me to conclude the process Pi followed meant that it's fair to truly regard Mr M as an insistent client. And I don't think Pi acted in his best interests.

It follows that I don't think Pi did enough to fully advise Mr M of his options before it showed him down the insistent client road. And I think Mr M could have misunderstood or believed that overall, he might benefit from going ahead with the transfer. So I don't think Pi treated him fairly. And, if it had done so and provided the level of advice I think it should have, I think it's unlikely Mr M would have transferred out of his DB schemes.

Pi argues that the notes in the fact-find and Mr M's letters show that he clearly understood what he would be giving up but simply chose to go against its advice not to transfer. It's also said that Mr M had said, on more than one occasion, that he wanted to go ahead with the transfer regardless of the consequences of doing so. In essence it's saying Mr M always wanted to go ahead with the transfer irrespective of its advice.

I've thought about this very carefully. While there's evidence Mr M realised he would be giving up some guarantees, I don't think - given the omissions in Pi's advice process described above - he had a true understanding of the extent of the safeguards he would be losing. Nor that he most likely had viable alternatives to transferring. And, if Pi had presented that information in a clear format bringing all of his options to his attention I'm not persuaded that Mr M would've insisted on transferring out of the DB schemes, against Pi's advice if it had done so.

I say this because Mr M was not an experienced investor and he had a cautious to balanced attitude to risk. But he was taking a significant risk of losing the guarantees from his DB scheme by transferring out of it.

Had Pi's advice gone further I think it's likely Mr M would now be in a different position. So, if Pi had provided him with clearer advice against transferring out of the DB scheme, I think he would have accepted that advice. It follows that I don't think Pi treated Mr M fairly.

In light of the above, I think Pi should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Pi to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice process. I consider Mr M would have most likely remained in the DB schemes if Pi's advice process was more robust.

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.

Compensation should be based on the relevant 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 Mr M'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 M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - 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 redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Pi's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

Redress paid to Mr M 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 M'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 £170,000, 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 £170,000, 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 take the steps set out under the 'putting things right' heading above and pay Mr M any compensation due, up to a maximum of £170,000.

<u>Recommendation:</u> If the compensation amount exceeds £170,000, I also recommend that Pi Financial Ltd pays Mr M the balance.

If Mr M accepts this decision, the money award becomes binding on Pi Financial Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 Mr M to accept or reject my decision before 12 March 2024.

Joe Scott
Ombudsman