

The complaint

Mr C complains that GSI Wealth Management Limited ('GSI') gave him unsuitable pension transfer advice in 2009. After which he chose to transfer deferred benefits in a defined benefit (DB) pension scheme to a personal pension. He says he has lost his guaranteed benefits and will have lower benefits in retirement.

What happened

Mr C had deferred benefits in a DB scheme and in late 2009, when he was 51, he received pension advice from GSI regarding the suitability of transferring his pension in order to access tax free cash early.

GSI produced two suitability reports for Mr C.

The first, dated 15 December 2009, advised Mr C on the suitability of transferring his DB scheme pension to a personal pension. That report explained that it was providing a recommendation on whether or not to transfer this pension. And explained that the advice was limited to this area of financial planning. It recommended that Mr C did not transfer his DB scheme. And set out its reason for making that recommendation. In summary the basis of this recommendation was that the DB scheme offered guaranteed benefits and that Mr C was likely to be financially worse off by transferring, based on the transfer analysis it carried out.

The second report, dated 16 December 2009, was entitled "*Report and recommendations on pension arrangements*". This report started by referencing the first report and again highlighting that its overall recommendation was against transferring. But referred to Mr C's wish to transfer in order to access an immediate cash lump sum. And said that Mr C had asked that it advise on the most appropriate course of action in order to do that. And this report then went on to provide a recommendation on a suitable way to transfer his DB scheme to a personal pension that would enable him to do what he wished, in a way that considered his attitude to risk.

This report included a declaration at the end. It required Mr C to confirm that he understood the recommendations and risk warnings in the report. And the declaration, "*I understand that by transferring there is no guarantee that I will end up with higher benefits than those that would have been provided by the Scheme and it is possible that the benefits I receive will be lower*". Mr C signed and dated this declaration on 18 December 2009.

Mr C's DB scheme pension transferred to GSI's recommended personal pension in February 2010. The cash equivalent transfer value was £75,353 and Mr C took the maximum tax-free cash lump sum of £18,838. Mr C then proceeded to take a drawdown income from this personal pension each year until 2015. In 2015, his remaining pension fund was around £54,000 and he took the remaining pension fund as a taxable lump sum benefit.

Mr C complained, via professional representation, in July 2022. Mr C's complaint was that GSI's advice to transfer his DB scheme pension was unsuitable and that he wasn't informed

of the benefits that he'd be giving up and was advised that he would be able to access tax-free cash early.

GSI didn't uphold Mr C's complaint. It explained that it had advised Mr C not to transfer his DB scheme benefits. But that Mr C was an *insistent client* and had gone against its recommendation about his DB scheme.

Mr C's complaint was referred to our service. This referral reiterated that GSI failed to ensure that Mr C received and understood the risks involved with transferring his DB scheme pension. It suggested he was vulnerable at the time as he had debts and he believed transferring was the only way he could repay those debts. The referral also explained that providing the declaration at the same time as the suitability report indicated that transferring was a predetermined outcome.

Following referral to our service GSI questioned whether or not Mr C had made his complaint in time for us to be able to look into it. So our investigator explained why he thought Mr C had made his complaint in time. And also went on to give his opinion on the merits of the case.

GSI disagreed with our investigator and asked for an ombudsman to decide whether the case is in our jurisdiction. And, if so, to give a decision on the merits of the case taking into consideration the representations it made.

I issued a provisional decision to let both parties know why I agreed with our investigator about why Mr C's case was in our jurisdiction. I gave my rationale to explain why I decided Mr C had made his complaint within three years of becoming aware of an issue. Which meant that the three-year rule in DISP 2.8.2R gave our service jurisdiction to consider Mr C's complaint.

In my provisional decision I also explained why I didn't think Mr C's complaint should be upheld. I summarise my reasons as follows:

- I explained that I didn't think that GSI advised Mr C to transfer his DB scheme to a personal pension. I thought its overall recommendation was that he would have more valuable retirement benefits by retaining the existing DB scheme.
- I also thought that GSI's recommendation clearly explained the existing benefits that Mr C had in his DB scheme so it was likely that Mr C understood what he was giving up by transferring.
- I considered whether GSI had given Mr C enough information to enable him to make an informed decision. And was minded to say that it hadn't. I thought that GSI ought to have paid more attention to Mr C's overall circumstances giving particular attention to the reasons that he had for wanting to transfer. This conclusion meant that I was of the opinion that GSI didn't treat Mr C fairly as an insistent client.
- I then considered what I thought was the failing in the advice GSI provided Mr C. And whether GSI providing more comprehensive advice in that regard would, more likely than not, have convinced Mr C to follow its recommendation not to transfer. And I was of the opinion that Mr C would, more likely than not, have still transferred his pension. I explained why I didn't think that an explanation from GSI about why transferring wasn't necessary to clear his existing debt, would have been something that would have changed his mind.

I've had responses from both parties to my provisional decision. Neither party has put forward any comments or additional evidence regarding my provisional jurisdiction decision. GSI had no further comments to make regarding the finding I'd provisionally reached on the merits of the case. Mr C's representative disagreed with my provisional outcome for reasons

that I'll broadly summarise as:

- Mr C was not experienced in investments or pensions and relied on the advice GSI gave him.
- Mr C would not have transferred his pension if GSI's advice had been suitable.
- Mr C thought that accessing his pension was his only option regarding his existing debt. And GSI failed to discuss alternatives with him.
- Mr C's representative stated that it is not the role of the Financial Ombudsman Service to make unfair assumptions and speculate that Mr C might have transferred even if advised differently, where it is agreed that a business made a mistake.
- GSI should also have highlighted the risks to Mr C of accessing his pension in large increments.
- GSI failed to comply with the insistent client process and Mr C didn't understand that he was being treated as an insistent client.
- GSI were under no obligation to facilitate the transfer if they didn't think it was in Mr C's best interests which emphasises its negligence.

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.

Why I think that Mr C's complaint was made in time for our service to investigate

Before issuing this decision I've again considered whether this case is in our jurisdiction. I've had no additional evidence or comments in response to my provisional finding regarding this. But have reconsidered the evidence I have. I have reached the same decision that I provisionally gave and the following explanation repeats the reasoning both parties have already seen in that provisional decision.

The relevant rule for this is DISP 2.8.2R. It tells us that consumers have an absolute right to complain about an event within six years (the 'six-year rule'). Or, if complaining later than that, we can still consider a complaint that is made within three years of the point that the consumer was aware, or ought reasonably to have become aware, that he had a cause for complaint (the 'three-year rule').

The event complained about is the advice that Mr C was given by GSI in 2009. So Mr C's complaint in 2022 was more than six years after the event. So his complaint was made too late under the 'six-year rule' part of DISP 2.8.2R.

I have to also consider here whether the 'three-year rule' allows us to help with this complaint. For the purposes of this I need to be clear about what I consider Mr C's complaint to be. In the original complaint made to GSI it was alleged that Mr C had received negligent advice and suffered a loss as a result. The complaint went on to detail specific issues where Mr C's representative considered the advice had been negligent – referencing regulatory rules. But these issues are likely to have only been apparent to Mr C when alleged by his representative.

The issue of whether or not he suffered a loss as a result of transferring is something that I think would have given Mr C cause to complain. So I've considered whether there was a point, more than three years before he complained, when he ought to have considered he may be worse off by having transferred.

I've looked at what I think Mr C ought to have known about the benefits he'd given up from his DB scheme. I have seen a copy of the transfer analysis report that GSI provided Mr C. It

set out the benefits available in his scheme at that time. But also the likely revalued benefits he'd receive at age 60. And explained that the scheme didn't provide the option of earlier retirement. It means that in 2009 Mr C ought to have understood that retaining his benefits would give him a pension in the region of £5,550 at age 60.

After transferring though, Mr C accessed his maximum tax-free cash straight away. So the residual pension that was re-invested was only 75% of the pension he had. And he also took regular drawdown from that personal pension up until 2015. It meant that he'd taken his benefits in a completely different way than were available from the scheme. It meant that a comparison of the benefits he received with what he'd have had was very difficult to make.

Nonetheless, I've had a look at the statements he was given to see whether they provided information that would have made it clear. The statements that he received from his personal pension provided projections of benefits in the policy up to the schemes selected retirement age. But that appears to have been age 75. In the 2011 statement for example, it projected a likely annuity of £14,400 at age 75 without adjusting for inflation. This was a lot more than his DB scheme had been projecting to age 60. But I think it would have been hard for Mr C to compare the relative values of one against the other. The subsequent statement up until 2015 didn't make this comparison any clearer. So I don't think these statements ought to have given Mr C cause to complain.

I've also considered whether Mr C could have considered that taking his benefits in the way he did ought to have highlighted to him whether he was financially disadvantaged. But I don't think it did. He took a drawdown income of £3,594 a year in 2012, 2013, and 2014. His pension fund after his tax-free cash and adviser fees would have been just under £51,000. And by his 2015 statement, having taken three years' worth of drawdown income, his fund was valued at £52,210. I think it's likely that Mr C considered his fund was able to sustain his level of income drawdown at that point. And GSI provided no illustration of what he might be able to take as drawdown income. So again I don't think, on a balance of probability, that Mr C ought to have been dissatisfied with the position he was in or, the advice he'd received.

Overall, by April 2015 at age 56, Mr C had taken benefits totalling over £83,000 from his personal pension. If he'd used that to clear debts then he'd have additionally benefitted from saving interest payments on that debt. And may have benefited in other ways from this accessible income that he couldn't have received from his DB scheme. So, even though he ought to have understood that by 2018 his DB scheme would instead have started to pay him around £5,550 a year, I don't think it would have been apparent whether or not the benefits he took early were, overall, more or less valuable than he could instead have received.

He received no further information about his pension from 2015. So I haven't identified any further point that he ought to have considered he'd been unsuitably advised until informed that may have been the case by his representative. Which I accept was within three years of when the complaint was made. So the 'three-year rule' part of DISP 2.8.2R means Mr C's complaint was made within the time limits in our rules. And is a complaint that is in our jurisdiction.

The merits of Mr C's 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'). 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 below is not a comprehensive list of the rules and regulations which applied at the time of the advice but provides useful context for my assessment of GSI's actions here.

- PRIN 2.1 - Principle 6: A firm must pay due regard to the interests of its customers and treat them fairly.
- PRIN 2.1 - 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 interest's rule).
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a defined benefit pension scheme transfer.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a defined benefit pension should be that it is unsuitable. So, GSI should have only recommended a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests.

Of additional specific relevance in this case are the rules and industry practice regarding 'insistent clients' at the time of the advice. 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 in the regulator's Handbook required GSI to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required GSI to provide information that was clear, fair and not misleading. So, GSI's recommendation had to be clear and Mr C had to have understood the consequences of going against the recommendation.

Although there was no set definition of 'insistent client' in the regulator's handbook at the time, 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.

Mr C's representative originally brought this complaint on the basis that GSI recommended that Mr C transferred his DB Scheme to a personal pension. But, taken as a whole, I don't think that is a fair or reasonable conclusion to make. GSI went to some length to draw attention to the fact that its overall recommendation was that Mr C shouldn't transfer his benefits. It was the conclusion in the first suitability report and reiterated as the overriding recommendation in the second suitability report.

Mr C's representative also alleged that GSI failed to make Mr C aware of what he was giving up by transferring. But I'll explain why this isn't fair criticism either.

The suitability report of 15 December 2009 showed the value of Mr C's benefits. And it referenced the transfer analysis that it said was included. So, on balance, I think Mr C would more likely than not, have had that too. And that document showed Mr C what benefits his DB scheme would likely provide at age 60. And I think that the recommendation given in the report of 15 December 2009 also made it very clear that transferring was likely to leave Mr C with lower benefits overall. It clearly explained that the investment returns needed to be able to match his DB scheme benefits could not be achieved. And GSI provided illustrations of what a comparable personal pension might provide. So in this regard I think GSI's advice was clear and the conclusion reached about the financial impact of the transfer was reasonable.

I can see that GSI had regard for COBS 19.1.6 and it resorted very quickly to the presumption that this transfer wasn't suitable. The financial viability test indicated that transferring would likely leave Mr C with benefits of a lower overall value. So this didn't support a transfer as GSI rightly said. But there are other reasons that consumers might have for transferring. And COBS 19.1.6 recognised that GSI could consider whether the contemporary evidence meant that the transfer was in Mr C's best interests.

COBS 19.1.2 required GSI to compare the benefits between the schemes with enough information for Mr C to be able to make an informed decision. But COBS 19.1.3 indicated that the comparison GSI provided should take into account all of Mr C's relevant circumstances.

Whilst I think that the immediate financial comparison that GSI provided Mr C with included a lot of the information that it needed to I don't think the recommendation demonstrated much consideration of Mr C's relevant circumstances. For instance, GSI knew that Mr C had debts of £20,000 and that his motivation to transfer was to enable him to access a cash lump sum to address that. This was obviously a relevant consideration. And advising on the transfer without ascertaining a better understanding of this issue or how it affected the suitability of a transfer wasn't reasonable. And was a shortcoming in the advice.

GSI was aware that Mr C thought that the transfer was in his best interests. And GSI knew why he thought that was the case. So, to treat him fairly, and comply with COBS 19.1.2, it should have commented on his reason for wanting to transfer. It should have established if there was another viable way of Mr C clearing his debt. And whether that was more in his interests than taking benefits from his pension scheme in a way that devalued his income in retirement. And I've seen no evidence that it did that.

Having identified a shortcoming in the information that GSI provided Mr C in its recommendation I have to consider the consequences of that failing. I can see that Mr C's representative appears to disagree that I should be making this determination. But I don't agree with its argument. This is the issue of causation, which is whether GSI's act or omission caused subsequent loss or harm. And it is a crucial element of my role in determining, not simply if a business has done something wrong, but what the consequences of that mistake, most likely, were. Put simply, I've decided that GSI's recommendation lacked specific information or advice about Mr C's objective of accessing tax-free cash. But, as it never gave advice on that, I can't know what would have happened if it did. So I have to make a determination of what I think the most likely consequence would have been. And I have to do that by weighing the evidence and making a decision, on a balance of probability.

In order to consider what difference it would most likely have made I've considered what additional information GSI ought to have provided and commented on in its recommendation if it had complied with COBS rules better.

The fact-find that GSI completed was done by sending Mr C a basic questionnaire. And in it he volunteered the amount of his debt. So I think it's more likely than not that, if GSI asked further about his debt, he would have provided the information. He wasn't asked about his expenditure or whether that debt was already affordable. If GSI had done more to understand his debt then I think it would have established that Mr C had a debt management plan in place. So I think it would still have reached the conclusion that transferring in order to clear debt wasn't in Mr C's best interests either.

This also means that GSI ought to have commented on this in a way that made it clear to Mr C that his debt was manageable with the debt recovery plan he already had. But I don't think GSI ought then to have reviewed or commented on other options further. Had there been any, I think it's unlikely the debt management plan would be in place. It would likely have been enough for GSI to point out that clearing the debt wasn't a necessity that warranted the transfer.

Having considered what GSI may instead have told Mr C I have to consider how likely it is that the additional commentary would have made a difference. I think that being told that his debt management plan already made his debt affordable would have been information that Mr C most likely knew. Even if his preference was to clear that debt sooner, he'd have known that he had a perfectly good option already for dealing with that debt. It is for this reason that I am not persuaded that the omission in GSI's recommendation was likely to have been of enough impact to Mr C to change his mind.

It was Mr C who contacted GSI with a view to releasing money from his pension having already obtained a cash equivalent transfer from his scheme. Even though he understood that he had a debt management plan in place he wanted to transfer anyway. The key information that he didn't know until he received advice was the extent to which he may be worse off in retirement by transferring. And that was information that I think GSI were clear about. And didn't dissuade Mr C from transferring.

I also explained in my provisional decision that I think the timing is relevant here. Again, I can't know what considerations were most important to Mr C in 2009. But I think that it's likely that Mr C was aware that the minimum pension age was changing from 50 to 55 in April 2010. And it was referenced in the suitability report. It meant that Mr C had a small window of opportunity to access this cash this early. And I think this was likely to be a big motivator. I should also make it clear that I do not think that anything in the recommendation could be construed as using this fact as a lever to encourage Mr C to transfer. But I think that this would have existed as a motivator to transfer at that time that was outside of the scope of any omission in GSI's advice.

Mr C's representative had argued that GSI should have done more to inform Mr C of the risks in taking his pension in lump sums in the way he did. But, as I explained in my provisional decision GSI would not have known exactly what Mr C might do with his pension after transferring. He had indicated that he had no need of income from it. And that clearing his debt with the tax-free cash would mean he could afford to join his new pension scheme. None the less, GSI provided him with information about the advantages and disadvantages of taking income drawdown in its recommendation. But didn't include the risks involved in taking large increments. Which wasn't an option until Pension Freedoms in 2015 so couldn't have been commented on by GSI. The only option available was through capped drawdown which was explained to Mr C. So I don't agree that GSI should have been clearer about a drawdown income plan that was never a recognised objective that Mr C gave. Therefore I find no omission here that would have a bearing on the outcome of this complaint.

Insistent client

I can see that GSI obtained a written declaration from Mr C documenting his acknowledgement and understanding of the recommendation not to transfer. Which on the face of it was what was required at the time for insistent clients. But I've explained why I think the recommendation that GSI provided was lacking in detail on the very issue that Mr C was considering transferring. And the failure to provide Mr C with the information that he needed to be able to make his decision didn't comply with the rules I've referred to. And didn't comply with principle 6 or principle 7.

I acknowledge Mr C's representative's comment regarding GSI's decision to proceed with the transfer on an insistent basis. But nothing in the regulatory framework or industry practice at the time prevented a firm from assisting a client with a transfer against its recommendation. So this argument doesn't change my mind on what GSI did wrong and whether it caused Mr C to transfer.

Summary

I need to also acknowledge that the decision to transfer was Mr C's to make. Even though taking benefits early would likely mean lower benefits later. The benefits in the scheme were, in many ways, more valuable in the original format than could be obtained by transferring. But I think that this fact was something that GSI's recommendation made in a clear way. It provided much of the information that was necessary for a recommendation of this type. So I've decided that it was, more likely than not, clear to Mr C that the transfer was likely to leave him with lower overall benefits later in retirement. And this information wasn't enough to dissuade Mr C from his preferred course of action of transferring his pension. Even though he already knew that his existing debt was affordable without doing so.

Mr C was of an age where pension rules allowed him to access his benefits. And even though I've identified a short coming in GSI's recommendation I have to consider whether that specific failing was likely to have been something that would have made a difference. And for the reasons I've given, I don't think in this case that it was.

My final decision

For the above reasons I am not upholding Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 16 February 2024.

Gary Lane
Ombudsman