

The complaint

Mr R states that the advice given by Pi Financial Ltd (Pi) in respect of his pension was negligent and he has lost out financially as a result.

The complaint has been submitted on behalf of Mr R by a claims management company (CMC) but to keep things simple, all correspondence will be referred to as coming from Mr R.

What happened

In 2009, Mr R contacted Pi in order to discuss taking the maximum available tax free cash from his pensions. At the time he was aged 51, and had two pension arrangements, one defined benefit scheme with a previous employer, and the other was a small money purchase arrangement. The transfer values were £38,078 and £868 respectively. Mr R's primary objective at that time was stated to be to access the maximum tax free cash available to him.

Following completion of a fact find, Pi recommended that as Mr R wanted to access tax free cash but no income (because he was still working), he should transfer both his pensions into a new personal pension plan with Winterthur to achieve this. The transfer was completed in 2010.

In 2012, Mr R commenced taking an annual income from his pension via capped drawdown. Following the changes to pensions legislation in 2015, Mr R converted his pension to flexi drawdown. At that time he had withdrawn a total of £20,460 from his pension and had £27,780 remaining.

Sometime in 2022, Mr R saw an advert for a CMC, and commenced a complaint against Pi, stating that the advice that he received in 2009 to transfer his two pensions, was not in his best interests and had been given negligently. Pi did not agree that the advice was negligent, and outlined the steps that had been taken at the time of the advice to ensure that Mr R was in an informed position, and that the advice met his objectives at that time. Furthermore, they stated that they believed the complaint had been made "out of time", as more than six years had elapsed since the advice, and more than three years since Mr R should reasonably have been aware that he had cause for complaint.

Mr R was unhappy with this outcome, and referred his complaint to this service. The investigator considered the facts, and agreed that the timeline of events indicated that Mr R should reasonably have been aware of the difference between the guaranteed nature of the defined benefit scheme and the personal pension following transfer no later than 2012 when he entered capped drawdown. She therefore considered the complaint to be outside of the jurisdiction of the Financial Ombudsman Service.

Mr R did not agree, and the complaint was referred to me for a decision.

Provisional Findings.

I issued my provisional decision on 9 January 2024. It said;

“In order for me to consider Mr R’s complaint, it has to be made within the regulator’s time limits unless exceptional circumstances apply. The rules we must follow are set out in the Dispute Resolution Section (DISP) rules within the Financial Conduct Authority’s (FCA) handbook.

We are entirely bound by these rules and cannot disregard them. Before we can consider the substance of a complaint brought to us, we first need to be satisfied that the complaint has been brought to us within the timescales set out in DISP.

Dispute Resolution (“DISP”) rule 2.8.2R says:

“The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) More than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;

Unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received.”

We can only look at cases that fall outside of this time period if the business consents to us doing so or if there are exceptional circumstances that prevented the complaint from being made sooner. In this case Pi Financial hasn’t consented to us looking into things.

The event complained about was Pi Financial’s advice to transfer Mr R’s pension in order to access his tax free cash. That advice was given to Mr R in 2009, so that’s more than six years before he complained in November 2022. I then have to decide when Mr R became aware or ought reasonably to have become aware that he had cause for complaint and whether that was before November 2019 (three years before he actually complained).

Pi thinks Mr R should have become aware he had cause to complain in 2012 when he commenced capped drawdown. Pi state that at that time, he would have known that the income available to him was not in line with the income he could have expected from his previous employer’s defined benefit pension. Mr R states that he was not aware at that time of the guaranteed nature of the pension benefits having been lost when his previous employer’s scheme was transferred, and therefore did not know he had cause for complaint until he saw the CMC’s advert.

The transfer form signed by Mr R in 2009 outlined the benefits that would have been available under the scheme, and confirmed in the signature box that the benefits would be lost on transfer. It stated the pension available at the time of leaving [active membership] to be £1,580, at 13 May 2009 as being £3,204 and at the scheme retirement age in December 2022 as £6,107. Whilst I take on board Mr R’s comments about not being giving sufficient information about the features of the benefits he was giving up – specifically, the guaranteed benefits provided by his occupational scheme – I’m satisfied he would have been broadly aware of the amount of pension he was giving up. I consider it likely that he would – or ought

– to have been aware of this even prior to the transfer through information provided by his scheme. Information about pensions can be technical of course. But I don't think high level figures about an annual pension at particular points in time falls into this category. I think Mr R would, or ought, to have had a good idea of the amount of pension he was foregoing by transferring.

Mr R revisited his pension on at least two occasions following the original advice – firstly in 2012 when he commenced taking an income via capped drawdown, then again in 2015 following the changes to legislation when his capped drawdown was converted to flexi drawdown. On both these occasions, Mr R was provided with information clearly showing that the level of income available to him via drawdown was lower than that which would have been available to him by his previous pension. Pi state that this should have been sufficient to have made Mr R aware that he potentially had cause for complaint.

I have considered whether the reviews that took place in 2012 and 2015 should reasonably have made Mr R aware that the income available to him following transfer was less than he would have received had he remained in the scheme and that he had cause for complaint, and therefore start the clock for the three year time limit. In Mr R's case, I think this would need to involve Pi providing him with a clear statement showing that the income he would receive in either capped or latterly in flexi drawdown would be substantially less. In order to reasonably alert Mr R to the fact he may have had cause for concern, this would need to be provided on a like for like basis, or at least be clear enough for Mr R to be able to make a comparison. I am not persuaded that the information provided to Mr R met this benchmark.

A like for like comparison would have been difficult to provide, due to the income being taken by Mr R, the differences in benefits available, and the different projection dates. Nonetheless, in order for Mr R to reasonably have been aware that he had cause for complaint, I would have expected Pi to have provided him with warnings relating to the implications of drawing a similar level of income to that available from the scheme, including the fact that the fund would be likely to be exhausted within a number of years.

The illustration dated 19 May 2009 showed that the maximum available under capped drawdown at that time was £1,713pa, and the annuity that could be purchased was £936pa based on current annuity rates. There are other statements and reviews on file, the latest being 2015, which showed the maximum annual income available to be £2,155. It is not in dispute that these statements and reviews were received by Mr R. However, I cannot find evidence to show a sufficiently clear warning was provided to Mr R, which would have alerted him to the level of difference between the income available under his previous employer's scheme and a sustainable level of income under the new drawdown pension arrangement, and made him aware that he potentially had cause for complaint.

Having considered the evidence provided, I don't think the statements and reviews received by Mr R ought reasonably to have made him aware that he had caused for complaint about the advice he received to transfer his pension in 2009, nor is there any evidence of any discussion leading him to be aware of this. I can also see no other event that ought to have triggered Mr R's awareness more than three years before he raised his complaint."

Responses to my provisional decision

Both Mr R and Pi have responded to my provisional decision. Mr R has confirmed that he accepts the decision. Pi have responded with some further comments. They have drawn my attention to the fact find, and the fact that the notes stated that Mr R wished to pull together his pensions and receive as much tax free cash as possible. The notes further stated that although the previous employers pension "gives great guarantees + is a better choice, [Mr R] still wishes to transfer and take the TFLS". Pi stated in their response that they believe the

above statement, along with the declaration signed by Mr R confirming that he understood that the recommendations made would be based solely on the information given in the review evidences the discussions that took place the Mr R's understanding of the guarantees the ceding scheme offered which he was willing to give up. Pi have also provided a screenshot of a letter dated 17 July 2015, confirming that Mr R had requested to withdraw the full fund value from his pension.

Pi say that Mr R's actions in withdrawing the full value of his pension in July 2015 should have set the three year clock ticking. They've inferred that because in his complaint, Mr R has stated that the advice to transfer was unsuitable, by deciding to withdraw the entire fund, it should've prompted him to complain sooner than 2022.

However, I do not agree that Mr R's actions in withdrawing his fund means that he was aware that he had cause for complaint, or that the original advice provided may not have been suitable for him. Additionally, I don't think that either the withdrawal, or the previous conversions to capped and flexible drawdown would have prompted him to think that something might be wrong with Pi's 2009 recommendation. I don't think that undertaking these subsequent transactions would've given rise to Mr R becoming aware that he'd foregone a guaranteed income for life, which is central to his complaint.

So, it seems to me that the events in 2012 and 2015 wouldn't have prompted Mr R to believe that something was wrong with Pi's advice from 2015, and he only became aware that there might be a problem with Pi's recommendation when he spoke with the claims management company in 2022. I therefore remain of the opinion that this complaint falls within our jurisdiction and is a case that I can consider.

Having determined that this is a complaint that I can look at, I have gone on to look at Mr R's concerns that the advice he received from Pi to transfer his pension wasn't suitable.

On 26 January 2024, our investigator issued her view in relation to the merits of the complaint. Having carried out an investigation, she concluded that she didn't think the advice was suitable for Mr R. She stated that by transferring, Mr R was likely to obtain lower retirement benefits and there were no particular reasons that would justify a transfer.

Following the investigator providing her view in relation to the complaint on 26 January 2024, Pi responded to confirm they do not agree with the conclusion of the adjudication and provided additional comments and information for consideration which I have taken into account in my final decision.

What I've decided – and why

Was the advice to switch Mr R's occupational pension into the Winterthur pension suitable?

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered what I understand to be the key complaint point, namely whether Pi should have recommended Mr R transfer from his DB scheme to a personal pension. Having reviewed the file and considered Mr R's circumstances, my view is that a transfer recommendation was demonstrably unsuitable and the recommendation from Pi should have been for Mr R to retain his benefits in his DB scheme.

When considering whether it was appropriate for Pi to have recommended that Mr R transfer his benefits from his DB scheme to a personal pension, I have considered the relevant rules and guidance in place at the time, alongside Mr R's circumstances and objectives. I have also considered Mr R's role in the process and his apparent desire to transfer.

The Conduct Of Business Sourcebook (COBS) 9 and 19, two sections of the FCA handbook, set out requirements relating to suitability in general (COBS 9) as well as more specific rules and guidance relating to defined benefit pension transfers (COBS 19). I have considered whether Pi acted in line with these provisions. COBS 9 required Pi to obtain necessary information from Mr R to be able to make a recommendation, including ensuring he had the necessary experience and knowledge to understand the risks involved in the transaction. At the time of the advice, Mr R was employed with a relatively low income. There is no evidence of him owning his property, and with the exception of £3,500 in savings, had no other assets or investments in addition to his pensions. There is no evidence of Mr R having any previous investment knowledge or experience which would have supported his understanding of the risks being undertaken, and the implications for his income in retirement. I have considered whether Pi took into account this lack of knowledge, experience and understanding when making their recommendation to Mr R, and on balance, do not believe that they have done so.

Mr R's only objective was stated to be to access the maximum available tax free cash. This is repeated in the fact find completed at the time of the advice, and the letter issued to him explaining the recommendation. However, despite this being the case, I cannot find any information relating to why Mr R wished to access the maximum tax free cash at that time. The suitability report states *"the reason for the transfer is not your dissatisfaction but you wish to gain access to a cash lump sum. You are presently able to, but firstly; after this tax year you will not be able to access your pension until December 2012 secondly; you want access now but wish to continue with the investment of the remaining (75%) pension fund, in line with your attitude to risk as you have no thoughts of retirement at present. However your existing contracts do not allow you to carry out your wishes, Converting both of your pensions into one scheme which allows the above is the obvious solution."*

It is clear that the recommendation was driven by Mr R's apparent desire to access his tax free cash prior to the minimum pension age increasing in the following tax year. However, in order to meet the requirements of COBS 9, Pi was required to obtain further information in relation to this, including the reason Mr R wanted to access the cash, whether there were any alternatives that may have been available to him or order to achieve this, and the impact of not meeting the objective. Having reviewed the evidence provided, I cannot find evidence that Pi took these steps – the file does not include information in relation to the purpose for the tax free cash, the amount required by Mr R, or evidence of any illustrations provided or discussions that took place making clear to him the impact that taking his tax free cash at such an early age would have on the income available to him in retirement

I have considered Mr R's income requirements in his retirement. The fact find includes a section titled "Retirement Plans" which is designed to capture information relating to a client's preferences relating to their retirement age and the amount of income required in retirement. This section has been left blank, as has the following section titled "Financial Goals". Whilst it is acknowledged that this may have been difficult to ascertain due to Mr R's age, I have considered whether Pi went far enough in attempting to identify Mr R's needs in retirement, and the part that his DB pension would have played in supporting this as required by COBS 19. I do not believe that they have gone far enough in this respect. Nonetheless, regardless of the income required, it is clear that the DB pension would have provided a secure underpin to his income in retirement alongside his state pension. Mr R's DB pension was his main asset which would have provided a guaranteed level of income from the time he retired until his death. He did not have any other pension provision or assets on which he

could rely upon to support his standard of living in retirement meaning that he did not have the capacity for loss to be able to forego the guaranteed income available from his DB pension.

I have considered whether it was reasonable for Pi to make a recommendation to Mr R to access the majority of his pension provision at age 51 in order to access his tax free cash for a non disclosed purpose. When considering this I have taken into account Pi's obligations as an adviser making a recommendation alongside Mr R's rights to access his pension in line with the options available to him and his wider circumstances. I do not believe that Mr R was in a position to be able to take a risk with his benefits such that a transfer recommendation was suitable. As noted above, the suitability report provided to Mr R outlined the fact that if he did not access his tax free cash at that time (ie before the start of the next tax year) that he would not be able to access it until 2012 (when he would turn 55). It therefore seems to me that at least part of the rationale behind Mr R's desire to access his tax free cash in 2009 was the fact that he "could" do, and that the option was being removed, rather than it being in line with his objectives for his retirement.

I have considered the statements from Pi that Mr R wanted to transfer and take the tax free cash. I do not disagree that this does seem to suggest that Mr R was extremely interested in exercising his rights in relation to his pension and accessing his tax free cash as early as possible. Pi have pointed out that the handwritten notes in the fact find state "[name of scheme] which although it gives great guarantees and is a better choice, [Mr R] still wishes to transfer and take the TFLS [tax free lump sum]. Whilst I don't doubt that having access to a lump sum of cash would've likely sounded like an attractive benefit to Mr R, Pi weren't there just to transact what Mr R wanted. Pi were in the position of a professional financial adviser who had a duty of care to provide a recommendation that was in Mr R's best interests. In all cases, a recommendation meeting the requirements and in line with Pi's duty of care as an adviser should have been made, regardless of the fact that Mr R had stated he wanted to access his tax free cash, I am not satisfied that Pi met this requirement. I therefore uphold Mr R's complaint.

In his complaint, Mr R states that Pi have put in place "post sale complaint barriers" and failed to treat him fairly. This is based on his assertion that Pi have not forwarded relevant information to the third party dealing with his complaint on his behalf. In response to this, Pi have stated that they were instructed by Mr R not to forward information by them, and that he was "very happy with the business" that was done on his behalf, and have questioned whether Mr R was placed under duress in relation to his complaint. I have not been party to the conversations that have taken place between the respective parties, nor do I have any evidence to support what may or may not have been said. Due to this, and the fact that I am upholding Mr R's complaint based on the suitability of the advice, I do believe it would be beneficial to make assumptions in relation to this additional complaint point, or what may or may not have been said.

Putting things right

A fair and reasonable outcome would be for Pi to put Mr R, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have likely remained in the occupational scheme.

Pi should 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.

For clarity, Mr R commenced taking an income in October 2012, two months before he

turned 55. So, compensation should be based on Mr R taking these benefits at this age.

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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance.

If the redress calculation demonstrates a loss, as explained in PS22/13 and set out in DISP App 4, Pi should:

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

It is my understanding that Mr R extinguished the pension arrangement to which his DB pension was transferred in or around July 2015. If this is the case, it is therefore most likely that any redress calculated above would be paid to Mr R as a cash lump sum. Redress paid directly to Mr R 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 allow for income tax that would otherwise have been paid. Mr R's likely income tax rate in retirement is presumed to be 20%. However, if Mr R would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%. It is noted that Mr R accessed his maximum tax free cash when he transferred the funds, therefore it is unlikely that this notional reduction will apply.

My final decision

I uphold Mr R's complaint and direct Pi Financial Limited to pay compensation to Mr R in line with the approach detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 22 April 2024.

Joanne Molloy
Ombudsman