

## The complaint

Mr W has complained about the advice given to him by Atomos Financial Planning Limited trading as Atomos Wealth ('Atomos') to transfer two occupational defined benefit ('DB') pensions into his employers Group Personal Plan ('GPP').

Mr W now believes this advice may have been unsuitable and caused financial loss.

## What happened

Mr W underwent a fact-finding exercise with Atomos on 4 October 2017. This confirmed:

- Mr W was 48, in good health, living with a partner, had two dependent children aged 19 and 15, with a planned desired age of 60.
- Mr W had an income of £50,000 per year and disposable income of £115 each month – not including his partners income. Joint disposable income was documented as £612 each month.
- Mr W had two deferred DB pension schemes, one with a transfer value of around £302,000 and one with a transfer value of around £42,000.
- Mr W was also a member of his employers GPP, which had a value of around £17,000 and was receiving around £3,000 a year in contributions.
- The family home was valued at £420,000 with an outstanding mortgage of £127,000 payable over the next 17 years.
- Savings and investments were recorded as being £2,500 in cash.

The fact find noted Mr W wanted to retire at age 60, with income of £30,000 a year. Mr W also wanted a tax-free lump sum of around £50,000, and to “*ensure financial security*” for his family.

Additional information around Mr W's attitude to his DB pensions was documented in the 'occupational pension transfer questionnaire'. Within this Mr W stated that he had a partner and children whom he wanted to benefit from these pension plans, and that he wanted control over his investments and retirement age.

The Atomos advice to transfer was documented in their 23 October 2017 suitability letter.

This reconfirmed Mr W's circumstances as per the fact find and documented the fact that Mr W did not wish to disclose full information around his partner, specifically relating to her pension arrangements.

Mr W did not want full information included on the company's internal systems as he believed this information would have been available for members of staff to see.

Mr W's agreed attitude to risk ('ATR') was also documented in the suitability letter. Atomos had seven levels within their risk profile, with these being colour coded. Mr W was assessed as being on the fifth level, with this being colour coded blue. The asset mix was documented as being roughly 65% in equity-based investments and 35% in corporate / government bonds.

A transfer value analysis had been completed with the suitability letter including the critical yield figures for both schemes at their normal retirement age and at Mr W's desired retirement age of 60. The letter stated that:

*"Based upon these figures it is quite likely you will be able to purchase an annuity of equivalent value taking account of your Blue risk profile as you have the potential to achieve the critical yields quoted above."*

The final advice was confirmed as being to transfer both DB schemes into Mr W's existing GPP, invest the transfer proceeds into the 'Active Blue portfolio', and transfer the existing £17,000 in the GPP into the same fund.

The reasons for this were confirmed as being to increase Mr W chances of reaching his target income in retirement and providing Mr W's partner and dependents with improved death benefits.

The advice was accepted with the relevant documentation signed on 31 October 2017.

Having become concerned that the advice given to him was unsuitable, Mr W registered his complaint with Atomos on 8 August 2023.

Atomos issued its complaint response on 29 September 2023. This did not uphold the complaint and stated that they considered the advice suitable as the transfer met Mr W's objectives at that time.

Unhappy with Atomos' response Mr W forwarded his complaint to this service in October 2023.

Our investigator looked into things and upheld the complaint. The investigator concluded that the transfer was likely to lead to Mr W being worse off in retirement with the other reasons given in support of the transfer not sufficient to justify the guarantees lost.

Atomos did not agree. They noted that Mr W had worked within financial services for the majority of his career, as such he could not be considered an inexperienced investor. Atomos remained of the opinion that the critical yield figures were considered achievable at the time and that a transfer was the only way Mr W could meet his objectives.

Our investigator was not minded to change their opinion and as such the case has been passed to me for a final decision.

### **What I've decided – and why**

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

I am aware that Mr W has worked in financial services for several years. At the time of this advice Mr W was noted as being 'Head of Facilities' and not a regulated adviser. As such, whilst Mr W's general proximity to financial services / financial advice may have conferred

some general knowledge, I do not believe this means Mr W should be considered a professional or sophisticated investor.

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 Atomos' actions here.

Principle 6: A firm must pay due regard to the interests of its customers and treat them fairly.

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 interests' 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 DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Atomos' should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

### *Financial viability*

Atomos carried out a transfer value analysis report (as required by the regulator) showing how much Mr W's pension fund would need to grow by each year to provide the same benefits as his DB schemes (the critical yield).

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr W was 48 at the time of the advice and wanted to retire at 60.

For the £42,000 transfer the critical yield required to match Mr W's benefits at age 60 was 7.55% if he took a full pension and 7.16% if he took TFC and a reduced pension. For the £302,000 transfer these rates were 6.79% and 5.43% respectively.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 and was 3.9% per year for 12 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's relatively balanced attitude to risk and the term to retirement. There would be little point in Mr W giving up the guarantees available to him through his DB schemes only to achieve, at best, the same level of benefits outside the scheme.

Within the suitability letter Atomos stated that *"it is quite likely you will be able to purchase an annuity of equivalent value taking account of your Blue risk profile as you have the potential to achieve the critical yields quoted above"* but given the lowest critical yield was 5.43%, I disagree. I think Mr W was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement as a result of investing in line with that attitude to risk.

I have considered that cash flow modelling was also completed at the time of advice however this must be placed into context. Whilst the cash flow modelling did show that Mr W may be able to meet his needs via a transfer, this was within the same report that stated Mr W would be able to purchase an annuity which would provide benefits equal to those provided by the DB scheme – something which I disagree with.

As such I do not believe Mr W was put into a fully informed position regarding the financial impact of the transfer before agreeing to it.

Based on this reason alone, a transfer out of the DB scheme wasn't in Mr W's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Atomos has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

### *Death benefits*

I would note here that since advice Mr W has married his long-term partner and as such, she would now be eligible for the spousal benefits payable by the DB schemes had they not been transferred. This was not the case at the point of advice, and I have thought carefully about the extent to which Atomos should have explored this as a future possibility.

It is certainly the case that a business should look to establish if there are any foreseeable changes in circumstances that would impact on the suitability of the advice, however in this case it must also be considered that Mr W actively sought to limit the amount of information divulged around his long term partner.

I do not consider it reasonable to hold Atomos accountable for the impact of information Mr W did not want to provide; however I remain of the opinion that the provision of benefits in the event of Mr W's death was not sufficiently discussed at the time of advice.

Death benefits are an emotive subject and when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr W. But whilst I appreciate death benefits are important to consumers, and Mr W might have thought it was a good idea to transfer his DB scheme because of this, the priority here was to advise Mr W about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

I have considered carefully that the existing DB schemes would not have provided Mr W's partner with any benefits upon his death as they were not married however if Mr W genuinely wanted to leave a legacy for his partner and children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Atomos should've instead explored life insurance.

I appreciate that the suitability report mentioned a whole of life policy and that – this was discounted by Mr W because of the cost (around £320 per month). But I don't think that this was a balanced way of presenting this option to Mr W.

Basing the quote on the transfer value of Mr W's pension benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Mr W was relatively young and noted as being in good health.

Ultimately, Mr W wanted to leave whatever remained of his pension to his partner and children, which would have been entirely dependent on the length of his life, investment returns, income requirements, inflation etc. So, the starting point ought to have been to ask Mr W how much he would ideally like to leave to his beneficiaries and then this level of cover could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr W and I don't think that insurance was properly explored as an alternative.

#### *Investment control*

The advice file also makes mention of Mr W wanting control over his investments and retirement age.

Regarding investment control, I cannot see Mr W has exercised any control over the investments made within the GPP. The transfer was placed into a fund which matched his ATR which was then managed on his behalf. Whilst Mr W would have been able to change this underlying investment if he wished (something which he would not be able to do had the DB schemes been retained) I do not believe this should be considered a material benefit in support of the transfer.

In consideration of the noted desire to control retirement age, this is something which was also available within the DB scheme. Whilst taking benefits early from the DB schemes would have resulted in actuarial reductions to the benefits payable, early retirement from the GPP was not without consequence. A proportion of the funds would be encashed earlier than expected – giving them less time to benefit from investment growth, and the funds themselves would have to support a longer than anticipated retirement. Again, I do not consider this to be a material benefit in support of the transfer.

#### *Summary*

Within their response to the investigators findings Atomos quoted paragraph 4.47 the FCA finalised guidance (FG21/3) for advising on pension transfers which states:

*4.47 It's unlikely you will be able to recommend a solution that meets all the client's needs and objectives. The recommendation you make will be based on an overall consideration of whether the client can bear the risk of transfer to achieve their objectives. So you will need to help the client to prioritise their objectives, based on what you have discussed about their plans for retirement and financial situation. You will need to explain and justify how you*

*reached your conclusion. We also expect you to explain to the client any significant disadvantages from meeting an objective. You will need to give a full and clear explanation of the guarantees they are giving up if they transfer. . .*

Whilst I appreciate the content of the above, I do not consider this to be relevant in this case. Atomos' advice file told Mr W that he could meet all his objectives by transferring, and that the transferred monies were "*quite likely*" to match the benefits lost upon transfer – something which I do not believe was correct.

Overall, I have concluded that the outcome previously communicated by our investigator is reasonable and that the advice given to Mr W was not suitable.

The evidence shows that the advice was not likely to lead to Mr W being better off in retirement with the other reasons given in support of the transfer not deemed sufficient to justify the transfer advice.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr W, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr W would have most likely remained in the occupational DB pension schemes if suitable advice had been given.

Atomos must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:

<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, Mr W has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement ages of 63 and 65, 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 W'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, Atomos should:

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

Redress paid to Mr W 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, Atomos 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 W's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £190,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £190,000, I may recommend that the business pays the balance.

### **My final decision**

**Determination and money award:** I uphold this complaint and require Atomos Financial Planning Limited trading as Atomos Wealth to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £190,000.

**Recommendation:** If the compensation amount exceeds £190,000, I also recommend that Atomos Financial Planning Limited trading as Atomos Wealth pays Mr W the balance.

If Mr W accepts this decision, the money award becomes binding on Atomos Financial Planning Limited trading as Atomos Wealth.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 21 May 2024.

John Rogowski  
**Ombudsman**