DRN-4772935

The complaint

Mr M took benefits from his employer's defined benefit (DB) pension scheme in early 2023. He unexpectedly incurred a Lifetime Allowance (LTA) charge which reduced both his benefits and the ability to take tax-free cash, which Openwork had advised him would be available in full to repay his mortgage.

He complains that Openwork didn't warn him in 2020 that the funds he crystallised at that point to take tax-free cash from his Zurich pension platform with Embark, would directly lead to these complications.

What happened

Mr M had been a client of Openwork for about 20 years. In October 2004 he left his former employer's DB scheme with a pension accrued to that point of about £35,530pa. In a letter the scheme administrator informed him that *"Assuming that future increases in the general level of prices will not be less than 2.75% per annum compound, it is estimated that the pension payable at NRD [normal retirement date] will have increased to £55,304.66 per annum…[and] will increase to £62,681.52 per annum by your 65th birthday*". A tax-free cash sum was payable by reducing ("commuting") part of this pension.

With Openwork's assistance in May 2015 he applied for and obtained transitional protection from the LTA of up to £1.25m (known as Individual Protection 2016 or IP16). Openwork wrote to him at the point explaining that *"at the point of taking benefits you will be liable for a 55% tax liability on the funds that exceed that allowance".* It says that it never actually saw the 2004 quotation from the DB scheme.

My understanding is that in the years leading up to 2019, Mr M had accrued an additional £600,000 in his Embark platform pension. The cash equivalent transfer value of the DB scheme (which is not the same as the value used for assessing against the LTA) was recorded as £945,000 as at May 2015 in Openwork's file.

In August 2019 Mr M has referred to two emails he received from the DB scheme with updates on the level of his benefits. He emailed Openwork on 9 August reiterating that his deferred pension had been projected in 2004 to reach £55,000pa at retirement *"and so the £40,000pa accrual is below what I anticipated"*. (I haven't seen the scheme's email but it may be that the scheme had separately quoted the tax-free cash payable by commutation.) Openwork prepared a cashflow analysis throughout retirement that month on third-party software.

Mr M's wider financial situation at the time was as follows:

- He was age 59 and his wife 55
- He ran his own contracting company and had failed to secure a contract that he expected to yield £150,000pa. His wife earned £21,500pa
- Mrs M had about £20,000 in a cash ISA. Since an earlier fact find in February 2019, their joint bank deposits of £30,000 and Mr M's own cash ISA had been exhausted, using up his emergency funds.
- They also had £50,000 in single company shares and £56,000 in a Venture Capital Trust (VCT).

- Mrs M (as the lower rate taxpayer) had held £158,290 in a Prudential bond which was being used to pay school fees. A withdrawal of £30,000 had been made from that bond.
- They had an interest-only mortgage of more than £500,000 at a 1.69%pa fixed rate due to mature in 2024, on a house worth about £1.7m.
- About £40,000pa was committed to school fees. Based on increasing fees, the amount Mr M was investing would struggle to get his children to age 18. (They were 11 and 13 at the time.)
- He had credit card debt of £10,000 and outstanding income tax liabilities of £33,000 in January 2020 and £11,000 due in July 2020.
- He was likely to draw his pensions in full at around his 62nd birthday in late 2022, which was the NRD of his DB scheme.

Mr M initially contacted the adviser in December 2019 suggesting that he would like to consider drawing down £20-£25,000 of tax-free cash from the Embark platform to *"supplement my C&R salary from 2020"* and *"maybe add to the Prufund pot to be used as appropriate"*. He said the reason for this was the strain on his current account if he paid for a holiday or house repairs, and he didn't want to use what was already in the Prudential bond except for school fees.

However the day after this message matters got worse: Mr M contacted Openwork again to say that he had resigned from his job contract. So, he also wanted to increase the planned withdrawal that month from the Prudential fund (to pay school fees and help towards an income tax bill) from £12,000 to £20,000. In advance of a meeting to take place on 18 December, Mr M confirmed that although a further £11,000 income was outstanding from his job contract, this wasn't enough to repay all of his credit card debt and pending income tax bills. He anticipated that he would need to use both the Prudential bond and tax-free cash from his pension to meet short-term expenses whilst he found further employment.

The day after the meeting Mr M emailed Openwork asking to draw down £30,000 *"so I can ensure all debts etc are fully covered and then from end April onwards it will be on an even keel".* He now suggests that whilst Openwork assisted with him drawing money from his Embark pension, there was *"no follow up client conversation or correspondence from [Openwork] which set out options or explained in detail the LTA/tax implications of drawing down funds from the Embark account."*

However, Openwork has provided a letter dated 3 January 2020 and correctly addressed to Mr M's home address setting out some information he'd requested about the LTA. (All subsequent letters I'll refer to below also bear this address.) The adviser reminded him that he'd applied for IP16, which gave him a maximum LTA of £1.25m. The adviser was going to request a further statement of benefits from Mr M's defined benefit (DB) pension scheme, adding *"If we receive a statement we can discuss further."* Further details were given of the principles of how the LTA excess tax charge worked and what triggered it. However, the adviser said they couldn't be more specific with figures – given the uncertainty about the value of the DB pension, Mr M's retirement date or future revaluation of the LTA.

Openwork has also provided a suitability report dated 16 April 2020 in respect of Mr M drawing down the tax-free cash. £6,750 would be taken monthly from his Embark pension in April, May and June that year. This *was "to meet your short term cash flow requirements as you hope to return to work in the Summer and your expected earnings would fall into the higher rate tax band"*. The platform's value at that time was £607,725. There was no upfront charge for the advice.

The report noted that Mr M's other capital was tied up in the VCT, shareholdings and investment bonds, which he didn't want to access due to the tax implications, and he also didn't want to increase his borrowing. On the impact of taking these funds out of his pension early, the report said:

"You confirmed that you could withstand these risks because you have built up a portfolio of assets valued in excess of £1.25 million in addition you have a deferred final salary pension together with other accumulated pensions which you can draw on when you retire. You have access to other liquid assets but wish to retain these for emergencies.
…
I explained the taxation implications of my recommendation and confirmed that this area will be reviewed as part of my ongoing advice service…We have agreed to meet annually to review your portfolio and the performance of your assets, ensuring your investments remain suitable and continue to meet your needs.
…
Your pension savings will be tested against the lifetime allowance at various times. If your pension exceeds the Lifetime Allowance, you'll pay a 55% tax charge on any lump sum withdrawals and 25% on any income. You have already exceeded the LTA and have registered for Individual Protection 2016."

Openwork followed this up with another letter on 16 July 2020, confirming that Mr M was negotiating a new job role but expected this to take another three months to complete. He therefore wanted to continue drawing the same tax-free cash amounts from the Embark platform for that period. The advice was similar to the April letter and repeated the same explanation about the LTA, but now included (with my emphasis):

*"Whilst receiving this sum now will impact on the value of your residual pension savings, **it is unlikely to cause you longer term problems** because you have built up a portfolio of assets valued in excess of £1.25 million together with a deferred final salary pension and other assets. You also expect to return to full time employment shortly."*

(For clarity, the reference to £1.25m here is I think coincidental. It doesn't appear to be a reference to Mr M's protected LTA under IP16 of that amount.)

Mr M was due to speak with the adviser again in August to update on his job plans. The contact history shows that he then made a double withdrawal of tax-free cash the following month to pay bills, as the start date for his new contract had been pushed back. Although earned income resumed by November 2020, Openwork's notes say *"income from consultancy not being drawn due to tax liability owed. Client stated this would enable him to start paying his credit card bill of c.£10k after Christmas…Specified intention to reduce income [from Embark] to £2.5k per month from January."*

The income reduced to £3,000pm by February 2021 and then fluctuated between £2,000 and £9,000 over the following ten months. On many of these occasions Openwork noted the reason for the income as *"not specified",* whilst on others it was for home improvements and to pay bills or credit card debts. Mr M temporarily stopped drawing income after December 2021.

In a subsequent review meeting and emails from the adviser in February-March 2022, the projected benefits from the DB scheme were discussed, in the context of Mr M potentially retiring soon and needing to repay his mortgage by December 2024 when its fixed rate ended. The adviser confirmed in an email dated 16 March 2022 that *"We will therefore continue the plan of using the tax-free cash (invested in Prudential) from your [DB] pension to reduce the outstanding balance at that point".* She confirmed in writing both at this point and on 17 February *"You are correct that you have £303,000 in tax-free cash",* and stated the additional income payable from the DB scheme would be £45,486pa. Mr M recalls her saying that the projected pension looked *"better than expected".*

There was a delay in Mr M drawing his DB pension, the process of which began in August

2022. As a result Mr M had to resume Embark withdrawals of tax-free cash at £4-5,000pm from July to September 2022. In total over a 2½ year period, Mr M accessed a total of £136,000 through successive components of his 25% tax-free cash entitlement from the Embark platform. That involved crystallising four times that amount (£544,000) of funds and using up approximately 43% of his protected LTA.

In a further suitability letter for a £4,000 tax-free cash withdrawal on 7 July 2022, Openwork stated that the DB scheme *"will provide you with a pension of c. £45,000 p.a. together with a tax-free lump sum of £300,000".* It repeated the same explanations I've quoted above that the withdrawal was unlikely to cause longer term problems, and that LTA tests would take place at 'various times' but Mr M had already exceeded the LTA which attracted a 55% tax charge. At this point £349,186 of the Embark pension was crystallised and £278,531 uncrystallised.

When Mr M reached NRD in September 2022 the DB scheme initially quoted him a full pension from the DB scheme of about £56,700 (which is in good agreement with the 2004 projection), or the alternative of a lump sum of about £303,000 and reduced pension of about £45,500. (The latter figures are in good agreement with Openwork's emails.) However these quotes were before Mr M returned his benefit selection forms disclosing that he'd used up 43% of his protected LTA.

The DB scheme administrator explained on 20 January 2023 that the delay in starting his pension was due to further calculations to take the LTA into account. Mr M agrees that by this point Openwork had made him aware that an LTA charge would be payable due to the *"better than expected"* performance of the DB pension. However, he wasn't aware that the revised calculation would directly reduce his tax-free cash rather than the overall benefits in proportion. The scheme's new figures were a tax-free cash sum of £179,500 plus a reduced pension of about £44,700. Mr M maintained in an email dated 1 February 2023 that *"I am especially concerned as to the adverse impact on the tax free amount which feels disproportionate to me."* He found this a *"huge shock"* and wrote to the adviser on 2 March asking to clarify whether this charge could have been avoided.

In unfortunate timing, shortly after this on 15 March 2023, the government announced the abolition of LTA tax charges. There was no indication before this announcement that this was the Chancellor's intention.

Mr M has referred to the adviser calling him on 17 May 2023 (before his formal complaint to Openwork) and admitting that Openwork thought the level of his DB pension was about £30,000pa, based on a statement from the DB administrator. The adviser apparently also said that he couldn't locate the paperwork justifying the 2020 recommendation (even though this has been produced by Openwork). For its part, Openwork denies that there was a phone call in which the adviser made these comments.

Subsequently in June 2023, Mr M complained to Openwork that:

- The financial benefits of his DB pension had been severely compromised as a consequence of lack of advice from Openwork on how to manage his LTA.
- When the Embark plan was vested, the impact of using up about 43% of his LTA in terms of how it would affect the DB pension wasn't explained to him.
- The adviser had not acted in his best financial interest, nor exercised the duty of skill and care expected.

Openwork didn't uphold the complaint. It said the advice was given in good faith to meet his pressing need for money. Furthermore, it said it had assisted Mr M with applying for LTA protection in 2015, and made him aware of a pending LTA charge he could face in the conversations and correspondence. These included standard illustrations from Embark detailing the proportion of the LTA used each time he made a withdrawal.

Mr M referred the dispute to our service. He remained unhappy that:

- Openwork should have provided a detailed options analysis, for his review and agreement, in respect of the pros and cons of taking tax free cash from the Embark pension and the potential negative impact that it could have on his DB pension through exceeding the LTA.
- This should have included drawing down from other savings such as his Prudential stocks and shares, or alternative borrowing to mitigate tax exposure. (At one point he told Openwork "if I had known then what I know now I would probably have borrowed money from one of my sisters as opposed to drawing down from Embark".)
- No financial modelling was undertaken to demonstrate the impact of the crystallisation process and implications on the LTA.
- The advice process catastrophized his "huge debts and desperate need for money".
- Openwork had been unresponsive to his subsequent requests for reassurance and an explanation for the way in it had advised him.
- He sought "a level of financial compensation from [Openwork] that equates to the sum that I would otherwise have been entitled to if properly advised and the Embark Pension not been crystallised."

Openwork added the following points that I think are relevant:

- Mr M failed to mention that he confirmed on mortgage applications that he would repay the outstanding interest-only mortgage through the sale of the property.
- The cash flow modelling reports it completed show an LTA charge at age 75.
- The VCT was not eligible for a buyback until July 2022 at the earliest, without being subject to income tax relief being withdrawn. And Mr M was using the dividends from this to support his expenditure.
- Whilst he was waiting for the DB pension, Mr M actually accessed the ISA put aside for his children from an inheritance, as well as dipping into extra funds from the Prudential bond.

I issued a Provisional Decision on this complaint on 14 March 2024. I'll repeat the overall conclusions I reached in that decision below:

I thought Openwork could reasonably have identified, at the latest by six months into Mr M drawing regular lump sums out of his Embark pension, that he was eating into the tax-free cash he was planning to take from the DB scheme to repay his mortgage. This was because Mr M was limited to a total amount of tax-free cash equal to 25% of his protected LTA.

Openwork should have warned Mr M of this, although I also concluded that Mr M had little option other than to access the amounts from his Embark pension when he did. As Openwork didn't warn Mr M of the consequences, I was satisfied it caused a significant loss of expectation when the true calculation of his DB pension figures emerged, and compensation should be paid for his distress and inconvenience.

Mr M responded saying he had no further comments to make. After asking for an extension of time to respond, Openwork commented as follows:

- Mr M was obviously an intelligent client, holding a very senior position in his industry and high level qualifications. He paid attention to detail, read every document he was sent and often ringing to clarify. Over the year before he left, Openwork provided a significantly higher level of service than it was contracted to provide.

- Some of the more recent correspondence with Mr M could have been more complete in terms of disclosing the LTA impact. However, there was earlier disclosure including at the time of two cashflow reports, and the adviser recalls such discussions.
- Mr M would also have seen the statements on Embark's platform document store regarding the LTA on every drawdown he made, as Embark sent him email alerts.
- Openwork didn't have enough detail to be able to calculate how much of Mr M's LTA would be used up. This was requested from the DB scheme administrators in February 2020 and chased on a number of occasions. Mr M was aware of this.
- *"the [DB] pension was not our responsibility nor down to us to deal with the appalling service offered by [the administrators]".*
- It was unwilling to estimate based on what was known of Mr M's benefits because it often it finds that schemes close, amending benefits due to underfunding. It could only tell Mr M there would be an LTA problem without quantifying it.
- When it became apparent that there would be a longer-term draw on Embark income in July 2020, a discussion on tax planning took place.
- The comment that this drawing of income was *"unlikely to cause longer term problems"* is 'not entirely misleading' as Mr M's LTA usage couldn't be quantified. Also, at no time did the adviser say that the pension was larger than expected, and that conversation is *"being taken out of context."*
- Emails confirming the DB income and tax free cash were written in haste given how long that information had been outstanding, so didn't include the LTA warning.
- It was always Mr M's intention to sell his property to repay the mortgage. As often happens the nearer an interest only client gets to having to repay the loan, they look at more options as the reality of having to sell dawns on the individual.
- Openwork warned Mr M on numerous occasions that he was overspending but he was certain he would get another high paying job. Mr M was aware of the tax charge and has simply chosen to ignore what Openwork told him.

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've revisited the earlier conclusions in my Provisional Decision and added further arguments or clarification below to address the further points Openwork is raising.

Could Openwork foresee that drawing the DB pension in 2023 would exceed the LTA?

Mr M says that Openwork had a copy of the 2004 DB quotation. It says it can find no record of ever having a copy. It reiterates in response to my Provisional Decision that the scheme didn't reply to its requests for that information. However, in May 2015 Openwork assisted Mr M with applying for IP16. It would be reasonable to assume that Openwork either saw the 2004 quotation, or otherwise obtained equivalent information about the DB pension to substantiate this application. Mr M was paying for this level of service from Openwork.

I'm fortified in this conclusion by Openwork's suggestion that it didn't want to rely on out of date information if the scheme had closed or reduced benefits. This suggests it *could* have given estimates to Mr M based on that information (which, as I say above, is likely to be the basis on which it supported the IP16 application. When Mr M actually reached NRD his unreduced DB pension came close to the original £55,000 estimate, so I'm not convinced the potential for the scheme to reduce benefits was as much of an issue as Openwork suggests.

In January 2020 the adviser had told Mr M in writing that they couldn't be more specific with figures, given the uncertainty about the value of the DB pension, Mr M's retirement date or future revaluation of the LTA. So more reasons were being given than just a concern that the scheme might reduce future benefits. And I don't think those reasons precluded prudent estimates being made.

Financial planning is about making assumptions. The value of the DB pension was projectable with a fairly high degree of accuracy, with only inflation for three more years to take into account. I have nothing to suggest Mr M wasn't going to put the DB pension into payment at his NRD in 2023. And future indexation of the government's standard LTA was essentially irrelevant over such a short period: by then it stood at £1.055m and inflationary increases were highly unlikely to take it above Mr M's IP16 protected amount of £1.25m within three years.

It's not sufficient for Openwork to argue that the DB scheme information is not its responsibility if it has agreed to provide Mr M with the ongoing service he was getting. If Openwork now feels that it devoted too much time to that service, that was a matter for it to manage better at the time. It doesn't change that Mr M was entitled to an ongoing understanding of how his current, and future, actions would likely affect the LTA. I say likely, as Openwork could if necessary have covered this off with caveats, such as 'assuming your benefits are unaltered from past quotes'.

Notably the transfer value of the DB scheme was recorded as £945,000 in May 2015 in Openwork's file. But the DB pension would only be assessed for tax charges based on the tax-free cash amount plus income multiplied by the valuation factor when benefits are drawn. In 2015 the NRD of the DB scheme was still some seven years away, so any future tax planning needed to consider the value of the DB pension at retirement rather than any interim point.

Using the 2004 projection the 'base' value of Mr M's DB pension for LTA purposes at NRD would be calculated at 20 times the revalued pension, so 20 x £55,000 = £1.1m approximately. That estimate would be most likely increased by Mr M taking tax-free cash with a reduced pension – because the tax-free cash is valued as the actual amount taken for LTA purposes. If Mr M had been expecting to take £300,000 of tax-free cash with a reduced income of around £45,000pa (which I think is reasonable), it can be seen that this would have actually contributed £45,000 x 20 + £300,000 = £1.2m towards his LTA.

I remain of the view that by making (and declaring) estimates if necessary, Openwork should have been aware that Mr M was already nudging very close to his protected LTA of £1.25m, based on his DB pension alone. I would *also* expect any financial adviser giving pensions advice to also be aware that Mr M lost the right to take further tax-free cash once he had crystallised funds in total that exceeded this £1.25m figure. The Chancellor's announcement in March 2023 didn't change this either: tax-free cash sums are still limited to 25% of the LTA enhanced by any protection (in this case IP16).

Due to Mr M's income tax position when he resigned from his job contract, he sought to avoid drawing an income from the Embark pension that would be taxed at a higher (or additional) rate of income tax. I assume this was because that would be higher than his marginal rate of tax once he'd retired. So, in order to draw out instalments of only the 25% tax-free cash entitlement, it was necessary to move four times those amounts into to the crystallised portion of the pension, and those became the sums tested against Mr M's LTA.

That basically means Mr M would probably only need to crystallise £100,000 of further funds (this is a very broad estimate) before he started eating into the future tax-free cash he was expecting to take from the DB scheme.

Mr M's initial suggestion to Openwork for a tax-free cash withdrawal of about £20,000 as a lump sum (from December 2019 onwards) became an equivalent amount to that spread over three months from April 2020 onwards. Either way, I think that by the time Openwork sent its suitability report to Mr M in April 2020 it ought to have been able to predict that by taking this sum now, Mr M was on the cusp of starting to incur the impact of the LTA at his intended NRD for the DB pension.

Did Openwork explain all the consequences of this to Mr M?

I'm not persuaded that the April 2020 suitability report did enough to explain that Mr M now needed to factor LTA charges into his short-term financial planning, rather than at some distant point in the future. 2023 was three years away - it wasn't something that may or may not happen in many years' time. Crucially, the report also didn't warn Mr M that any more tax-free cash he chose to take from the Embark pension would likely reduce what was later available from the DB scheme.

Openwork only referred in the report to a test being made against the LTA at "various times". Confusingly it said Mr M had already exceeded the LTA, when so far only about £20,000 x 4 = £80,000 had been tested against the LTA. What the adviser meant was that he was expected to exceed the LTA cumulatively over the course of drawing his benefits in future. But no detail was given on how that would impact the shape or amount of his DB pension, by which I mean less tax-free cash being available and more of the pension being taxed, separately to what the LTA tax charge actually was.

The adviser believes this was covered off by the warning Mr M was given at the time of applying for IP16 in 2015 that he would incur the tax liability on funds above the LTA *"at the point of taking benefits".* Indeed many of its points relate to the occasions on which the usage of his LTA was disclosed, such as when it provided cashflow analysis and when percentage LTA figures were provided on Embark's website.

However, all of this misses the point that I'd expect to see very specific disclosure that Mr M's total amount of tax-free cash was limited, in order to be persuaded on the balance of probabilities that this was actually discussed. And Embark couldn't tell Mr M this, as it didn't know what other pensions he held.

I explained in my Provisional Decision why I also don't think the cashflow modelling reports provide the detail Mr M would have needed – there's no actual reference to the LTA on these documents, and it seems more likely to me that what the graphs were modelling is the assumed payment of any undrawn tax-free cash at age 75. The subsequent cashflow report of February 2022 also seems to take no account of the impact on the LTA caused by the tax-free cash Mr M had already accessed, as it plans for him taking another £300,000 at age 62 (the DB lump sum) and the remaining tax-free cash from the Embark policy at age 75.

By the time Mr M confirmed in July 2020 that he would need to continue drawing out of the pension at the rate of £6,750pm, I don't think the adviser could reasonably have avoided a full discussion with him – to keep him fully informed of how his withdrawals were affecting his ability to take tax-free cash from his DB pension. Even if I accept the adviser's assertions that they cautioned Mr M that he was spending too much, this doesn't satisfy me that there was a more specific discussion about how much tax-free cash could be accessed in future. Indeed in some respects, the adviser's claims that Mr M *hadn't* been seeking to use tax-free cash to repay his mortgage indicates why it might not have been discussed.

The adviser has suggested that the comments on 16 July 2020 that continued withdrawals were *"unlikely to cause you longer term problems"* weren't misleading as the LTA impact couldn't be quantified. But as I've found that it should have been possible to estimate the LTA (and more importantly tax-free cash) impact, I think those comments were misleading.

In my Provisional Decision, I noted that using the tax-free cash to repay the mortgage seemed to have been Mr M's plan for some years because the adviser alluded to the same when she emailed him on 16 March 2022. She didn't say that Mr M was going to sell the property to repay the mortgage, even if that was what Mr M might have written on the original application. So I haven't been persuaded by the response to the Provisional Decision that Mr M's intentions had changed. Perhaps they had, but Openwork had evidently had time to react to this and factor in that the steps Mr M was taking in drawing down income in 2020 were going to impact on those future plans.

Essentially, the problem was that the more Mr M ate into the total tax-free cash he had available using Embark withdrawals, the more he would need to look to access other (taxable) sources of income in order to clear enough of his mortgage to keep the repayments manageable in retirement. He didn't have a repayment vehicle for his mortgage other than this anticipated tax-free cash sum. Mr M was fortunate enough to be getting a significant DB pension, but this would itself be reduced by an LTA charge and then income tax.

Openwork has already recognised a similar issue when investigating the complaint. It asked the adviser to explain why she didn't refer to the pending LTA charge, even by 2022. The adviser's answer was that she did mention it in a meeting on 20 July 2022, but as no documentary evidence has been provided of that meeting I don't find it plausible that the adviser focused on the impact of the LTA on Mr M's plans to repay his mortgage to the extent necessary.

I say this because within a month she had issued very similar suitability letters to those previously sent about ongoing withdrawals, and the information given was identical about the benefits Mr M would receive from the DB scheme and the LTA being tested at "various times". If the adviser had fully considered the LTA, I would expect these explanations to refer to the lower tax-free cash and warn of the LTA excess charge reducing the pension.

The adviser says that Mr M's recollection of being told the DB pension was larger than expected was taken out of context, but hasn't explained what the correct context for this comment was. This comment isn't the sole reasoning for my upholding the complaint, but taking everything in the round I've found Mr M's account of events to be credible and supported by the other evidence.

Would better explanation of the consequences have made a difference to what Openwork advised, or what Mr M chose do to?

I think it's clear that Mr M had very little alternative but to start accessing his Embark pension in early 2020. The £20,000 in Mr M's cash ISA had effectively become their emergency fund as other assets had been spent, even though I understand this ISA was actually earmarked as a gift for their children. I accept Openwork's points that it was inadvisable to obtain potentially poor value from accessing the single company shares and VCT at short notice.

This basically left the sum in the Prudential bond which was already earmarked for school fees. At a rate of £40,000pa and after the cessation of his income, I'm not surprised that Mr M was concerned about his continuing ability to afford these fees. I've also seen enough evidence to confirm his debts also played an ongoing part in how much income he sought from the pension. Mr M did in any event dip into the ISA and bond to meet some of his and

Mrs M's living costs, before accessing the Embark pension.

Mr M says that if he'd known about the LTA issue, he'd have increased his borrowing instead. I assume the reason he's referred to borrowing from his sister is that he realises taking a further advance against his home without a current job contract was likely to be difficult. In any event, taking this course of action would only defer the problem to a later date, without the hindsight we have now that LTA charges have been abolished. The Embark policy was already in a flexible form (unlike the DB scheme), and that allowed it to be dipped into for small amounts.

Although the main aim of a pension was to provide income in retirement, I think that given Mr M was close to his exhausting his non-pension assets, it would always have been suitable (if not the only) advice Openwork could give for him to access this policy. It's more common for a taxable income to be drawn alongside tax-free cash from the pension during periods of unemployment, but Mr M had a more unusual problem because of already being in the higher/additional rate tax band for that year. That led Openwork to advise him to draw out tax-free cash only, which involved crystallising more funds. I think this is the only aspect of Openwork's advice that is open to more debate.

Openwork should have taken into account that Mr M had a finite limit on tax-free cash, which was the only way of accessing lump sums from his pensions without causing a knock-on effect with income tax. Yet if he didn't have enough tax-free cash left to repay his mortgage in 2024, he could face an income tax problem at that point and so would be exchanging one problem for another. Having to take too much income from the Embark pension in the second year of his retirement for a downpayment on the mortgage, which (when added to the DB pension income) could take him into a higher tax bracket.

From what I can see, Mr M was without most of his earned income for about a year from December 2019 to November 2020. This straddled two tax years. I find it unlikely the comments would have been recorded about Mr M already being a higher/ additional rate taxpayer in respect of his 2019/20 income, if that wasn't what he'd told Openwork. So there likely wasn't any tax efficiency that could be exploited by taking income as well as tax-free cash from the Embark plan before the end of the 2019/20 tax year.

After that, there was an ongoing assumption (which again I don't consider unreasonable) that Mr M would find a similarly well paid contract to that which he had in the past. So, taking a significant amount of taxable income from the Embark plan in advance of that income starting, could potentially store up a further income tax problem by the end of that year. Mr M was paying income tax in twice-yearly instalments on a self-assessment basis, and was already struggling to fund those amounts. So in fact taking income rather than just tax-free cash from the Embark plan could exacerbate that problem and mean Mr M was trapped in a cycle of needing further tax-free cash later on to pay his tax bills.

Openwork might have been able to explore Mr M obtaining his benefits from the Embark plan more as a combination of tax-free cash and income, to reduce the reduction of the tax-free cash he might need all in one go from the DB scheme. However I've taken into account that whilst Mr M was undoubtedly shocked when he learned the figures payable from the DB scheme were lower than he expected, he actually objects to Openwork catastrophizing his debts and wants me to think he can cope in the long term with the changed position he is now in with his mortgage. He's not commented on these findings which I reached in the Provisional Decision.

So from what I've seen, if Openwork advised that Mr M took more of a combination of tax-free cash and income from the Embark plan, I'm not persuaded on the balance of probabilities either that i) he would have agreed to do so, or ii) if he did, it would be possible to quantify any difference in the overall tax burden he'd have suffered. I say this noting that it would not be the intention to award compensation for Mr M fortuitously avoiding more of the LTA charges after the Chancellor abolished these.

Putting things right

I have to separate out that part of the disappointment of suffering an LTA charge that was inevitable, noting also that Openwork isn't responsible for the unfortunate timing of Mr M paying this charge immediately before the LTA was abolished. Nevertheless I'm satisfied Openwork significantly and unnecessarily added to the shock Mr M experienced.

Later on 1 Feb 2023, Mr M told the adviser he and his wife would not be able to live off the (now reduced) DB pension alone, so it's clear to me that greater forewarning of the greater financial problems they would face – even if these couldn't be avoided – would have reduced the shock Mr M later experienced.

I've taken into account the size of the funds Openwork was managing for Mr M on an ongoing basis, and that it should have been a clear benefit of that service to get full advice on how the LTA featured in his financial planning. Openwork simply didn't give sufficient advice on this.

On our website we give examples of the ranges of awards we make in different circumstances. The long-term financial implications of the position Mr M is in are an effect of the LTA taxation regime that he wouldn't (before March 2023) have been able to avoid. But I agree that the effect of Openwork's poor advice will in the short term have caused both serious upset and worry and significantly disrupted his financial planning.

In my Provisional Decision I proposed that an award of £1,000 would be appropriate to take into account the impact of Openwork's actions on Mr M. Neither party has specifically commented on the level of this award and I see no reason to revise it.

My final decision

I uphold Mr M's complaint and require Openwork to pay him £1,000 in compensation.
Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 May 2024.

Gideon Moore
Ombudsman