DRN-4822946

Financial Ombudsman Service

The complaint

Mr M has complained about the advice given to him by Whiting Group Limited ('WGL') to transfer his occupational defined benefit ('DB') scheme to a personal pension. Mr M believes the advice was unsuitable and has caused financial loss.

The advice was provided by Direct Pensions, an appointed representative of WGL, as such I have referred to WGL throughout the decision below.

Mr M is being represented in this case however for ease of reference I have referred only to Mr M throughout the decision below.

What happened

Mr M received advice from WGL in relation to the DB pension from his previous employer, in a letter dated 6 August 2002.

Mr M's circumstances at the time of advice were recorded in a fact-find completed by WGL.

This confirmed Mr M:

- Was 58 years of age, married, and in good health.

- Needed capital for an "urgent capital purchase" although the notes section where this was to be clarified was left blank.

- Selected a Cautious approach to his investment.

- Was noted as being unemployed with income of £160 (assumed per month) made up of benefits.

- Income was confirmed as being "much lower" than expenses, although no detail was recorded as to what Mr M's expenses were.

- There were no assets or liabilities in place with Mr M not wanting to consider any other sources of capital that may have been available to him.

The WGL advice was documented in their suitability letter.

This confirmed the transfer value of the DB scheme was £37,910 with this including £20,173 of protected rights.

Mr M's objectives were noted as being to generate additional capital without increasing expenditure, it was also noted that any additional income that could be provided would also be useful to Mr M at that time.

The WGL recommended course of action was to split the pot into two. The £20,173 protected rights were to be transferred into a Scottish Equitable personal pension and

invested equally between the UK Fixed interest Fund and the Property Fund line with Mr M's cautious attitude to risk ('ATR').

The remainder of the fund was placed into a Scottish Equitable immediate vesting section 32 plan. These funds were to be placed into a cash fund and then immediately withdrawn, providing Mr M with around £17,000 in cash.

The suitability letter appendix 2 confirmed the level of immediate cash payable to Mr M, appendix 3 confirmed the benefits payable from the DB scheme at "normal retirement age", with appendix 4 providing illustrative figures for benefits payable from the £20,173 protected rights at age 65.

The product illustration confirmed that the charges applicable to the personal pension were a 5% initial charge, fund charges of 1% and 1.85% respectively (giving a weighted average of 1.425%) and an additional charge of 0.5% to cover commission costs payable to WGL.

The illustration also provided examples of the potential benefits payable in retirement based on growth rates of 5%, 7% and 9%, as well as growth rates of 1% and 3% above inflation. The resultant figures were based on a retirement age of 65.

In September 2008 the personal pension was crystallised, with Mr M receiving further tax-free cash of around £6,000 and level annuity income of £1,154 a year.

Having discussed his pension arrangements with old work colleagues at a funeral in 2022 Mr M raised a complaint with WGL in February 2023.

WGL issued their response on 16 May 2023. This stated that the complaint had been made too late and as such would not be considered further.

Mr M referred his complaint to this service in November 2023.

Our investigator looked into things and concluded that the complaint was one which we could consider. WGL did not agree and as such the case was passed to me for a decision.

I concluded that the complaint was one which could be considered further and as such the case was returned to our investigator to consider the complaint made and the suitability of the WGL advice.

The investigator looked into things and upheld the complaint stating that there was insufficient consideration of the financial impact a transfer would have on Mr M, and that the non-financial reasons given in support of a transfer were insufficiently detailed.

WGL did not agree with the investigators outcome however have not provided any additional evidence or commentary to explain this stance.

As no agreement could be reached 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 have noted here that in response the investigator's findings WGL did state that they did not agree and would provide further commentary around this. However, no further commentary or evidence has been provided.

Since the issuance of our investigator's findings both parties have been written to once again, to inform them that the case has been progressed for a final decision, with both parties given a further opportunity to provide any further commentary or evidence they wanted to be considered.

Despite this further letter, no additional information has been provided by WGL. I see no reason to further delay this final decision and as such have based this outcome on the evidence already on file.

There was significant guidance for businesses providing advice in relation to occupational defined benefit advice at the point WGL advised Mr M to transfer.

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. 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 COB rules were introduced in December 2001. Some of the pertinent rules and guidance in place at the time included:

- The regulator expected a "…prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."

- At least one illustration for the personal pension/section-32 plan had to be on a similar basis to the DB scheme, e.g., what spouse's pension and increases in payment were shown.

- A 'reason why' letter or equivalent now had to be issued as soon as practicable after the recommendation. It should:

    - "…explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme." And

    - "…demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

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. I have firstly explained my conclusions regarding the financial viability of the recommendation, before going on to consider the non-financial reasons given in support of the transfer advice.

Financial Viability

No full transfer value analysis was completed at the time of advice, whilst no reason for this was recorded within the advice documentation, this was likely due to Mr M accessing part of the pension proceeds immediately.

Projections for what benefits may have been payable from the transferred funds were contained in both the suitability letter and the Scottish Equitable product illustration.

The suitability letter showed that if left in place the DB scheme would provide a deferred pension of £2,651 a year with a lump sum of £17,246 at normal retirement date. The

potential benefits provided via a transfer were based on the initial transfer value of £20,137 and assumed growth rates of 5% and 9% (net of charges). Using these growth rates income in retirement was illustrated to be £1,110 - £2,100 a year respectively.

As per the guidance above these illustrative benefits did include a spouse's pension and index linked income so had been calculated on a similar basis to the benefits provided by the DB scheme in these two aspects.

However, the benefits payable by transferring had been based on a retirement age of 65, whilst the normal retirement age of the DB scheme was 63. As such the comparison provided cannot be considered fair or to have placed Mr M into a fully informed position about the value of the benefits being lost upon transfer. By providing illustrations showing benefits at age 65, two additional years of investment growth had been included, inflating the figures shown and limiting Mr M's ability to accurately compare the two options.

WGL could have produced illustrations including the full transfer value (protected and non-protected rights) showing what benefits could be provided at age 63. This would have allowed Mr M to appropriately assess the long term impact of the transfer on his projected retirement benefits and decide on whether the transfer / access to capital represented good value.

Overall, in line with what our investigator explained, I do not consider there to have been appropriate financial analysis done to sufficiently explain the financial consequences of a transfer to Mr M. It cannot be shown that the transfer was in Mr M's financial interests, nor can it be shown that Mr M was put into a fully informed position about the financial consequences of accepting WGL's advice.

Given this, I do not consider it reasonable to conclude the advice was financially justified.

Having reached this conclusion, I have gone on to consider the non-financial reasons given in support of the transfer.

Other reasons for transferring

The documentation from 2002 is clear that the key driver for the transfer advice was the ability to release capital to Mr M. The fact-find noted that Mr M was unemployed, had outgoings more than his income, and required access to capital for an "urgent" capital purchase.

There are, however, significant gaps in the information collected by WGL. Whilst income of £160 was noted as being from job-seekers allowance, there was no expenditure information recorded to establish any income need Mr M may have had. Also, given Mr M's income was from job seekers allowance, additional information regarding future changes to income levels and the possibility of future employment should have been collected to establish the ongoing suitability of the advice.

Regarding the "urgent" capital need, WGL's own fact-find document had space specifically set aside for recording additional detail to explain what this need was. However, in this case no information was collected. As such there is no contemporaneous evidence to show what Mr M's plans for the released capital were and whether this was actually a "need" or simply an understandable desire to have access to a lump-sum.

The fact-find does note that Mr M had no other assets that he could use, and did record that other options (such as various borrowing options) were discussed but ultimately rejected by Mr M.

However, as above, WGL collected little detail to clarify what the capital was actually for. Mr M has explained that whilst his income was limited to state benefits, he had no debts, and his rent and council tax rates were also covered by additional benefits. Further, whilst Mr M was unemployed at the time of advice, he considered his job prospects as good, and was employed soon after advice.

I consider it entirely reasonable that a person in Mr M's circumstances, having been made redundant with income only from state benefits, would be attracted to the option of a lump-sum payment of around £17,000. However, as his professional advisers it was WGL's role to explain the risks and consequences of accessing the lump sum, and to provide sufficient information to allow Mr M to weigh his (potential) short term desire for access to capital against the long-term negative impact this would have on his retirement provision.

Summary

Whilst the advice file is clear that this advice was given by WGL primarily to release around £17,000 in capital to Mr M, there is no clarification on what this capital was needed for nor how urgent any need may be.

In addition, the calculations completed showing Mr M what his DB scheme would provide in comparison to the WGL recommendations did not put Mr M into a fully informed position regarding the long-term cost of accepting WGL's advice.

I do not doubt that access to a lump-sum of around £17,000 would have been attractive to Mr M, however, if he had been put into a fully informed position about the financial impact of a transfer, and as a result been advised to retain the DB scheme, I believe Mr M would have accepted the advice and left his DB scheme in situ.

This decision has not gone on to assess the suitability of the specific replacement pensions recommended by WGL as my overall conclusion is that if appropriate advice had been given Mr M would have retained his DB pension. The redress recommendations below reflect this.

Putting things right

A fair and reasonable outcome would be for WGL to put Mr M, 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.

WGL 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 M retired at age 65 and as such the calculation should be based on benefits being accessed 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 M's acceptance.

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

- calculate and offer Mr M redress as a cash lump sum payment,

- explain to Mr M before starting the redress calculation that:
    - redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest the redress prudently is to use it to augment the current defined contribution pension.
- offer to calculate how much of any redress Mr M receives could be used to augment the pension rather than receiving it all as a cash lump sum,
- if M M accepts WGL's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

Redress paid directly to Mr M as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, WGL may make a notional deduction to allow for income tax that would otherwise have been paid. Mr M's likely income tax rate in retirement is presumed to be 20%. However, if Mr M 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%.

My final decision

As per the rationale above I have upheld this complaint against Whiting Group Limited. Redress should now be calculated and paid to Mr M in line with the methodology provided.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 19 July 2024.

John Rogowski
Ombudsman