DRN-4876679

Financial Ombudsman Service

The complaint

Miss S is unhappy with the advice she received from Capital Professional Limited trading as Ascot Lloyd (referred to herein as CPL) to transfer benefits from her employer's defined benefit (DB) scheme to a self-invested personal pension (SIPP). She believes the advice was negligent and has caused her to suffer a financial loss.

Miss S is represented in bringing this complaint. But for ease of reading I will generally refer to all complainant representations as being made by Miss S.

What happened

The history leading up to this complaint is well known to the parties and therefore I have only summarised events below.

In 2017 Miss S, following a recommendation from a friend who had used their services previously, approached CPL to discuss her pension and retirement needs. She'd received a valuation from her DB scheme indicating the potential transfer value had increased significantly and she wanted advice on how to proceed.

CPL completed a fact-find to obtain Miss S's circumstances and objectives at the time, which included the following:

- she was aged 56, in good health;
- married with two adult children, and no financial dependents;
- employed full time earning approximately £69,000 gross;
- held assets including - £320,000 main home (no mortgage), £70,000 in chattels and other property, around £100,000 in savings and investments and £26,000 additional pension benefits;
- she was an experienced investor due to her profession and past investments; and
- she planned to retire at age 60.

CPL also carried out an assessment of Miss S's attitude to risk (ATR), which it deemed to be '5 out of 10' equating to a low medium ATR.

On 19 February 2018 CPL advised Miss S to transfer her DB scheme benefits and invest half of her investment to a Prudential Retirement Account and invest the balance of the funds into a Parmenion Retirement Account, utilising a discretionary fund manager (DFM). The suitability report said the reasons for this recommendation were that Miss S needed immediate access to cash to fund the purchase of a holiday home in Spain; that she wanted to have flexibility regarding her income withdrawals; and she wanted to pass her remaining pension fund to her children. The transfer completed, but Mrs S's benefits, after taking tax-free cash were invested solely with Prudential as Mrs S became concerned about market volatility and decided to forgo higher growth levels associated with the Parmenion recommendation.

Miss S complained in November 2023 to CPL about the suitability of the transfer advice. She said she lost out on important guaranteed benefits and as a result of the advice does not have sufficient funds for her retirement.

CPL didn't provide Miss S with a final response to her complaint, so she referred her concerns to the Financial Ombudsman Service. An investigator upheld the complaint and required CPL to pay compensation, including £250 for the distress and inconvenience this has caused Miss S. The investigator reasoned that there was no compelling reason to transfer from the DB scheme. He said the benefits available from Miss S's DB scheme met her objective of maintaining her standard of life at retirement, it provided valuable guaranteed benefits that should not have been given up to purchase a holiday home, when other options were available, and he considered Miss S had adequate cover for her family in the event of her death, noting that the fact find recorded:

> *[*Miss S*] feels comfortable that her family will be adequately catered for in the event of her death through [*Death in Service*] provisions and small policy. Transferring benefits to a [*Defined contribution] *scheme is appealing to [*Miss S*] as this further increases death benefits for her family.*

Given all of this, the investigator concluded the advice wasn't suitable.

CPL disagreed, saying that Miss S urgently needed the tax-free cash to complete a purchase of a property in Spain and that Miss S wanted "to ensure her pension benefits went to her children and not her 'new' husband as he was financial comfortable." CPL said that Miss S was fully aware of all the risks associated with the transfer and was desperate to complete it.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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'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 applicable rules, regulations and requirements

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 CPL's actions here.

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

PRIN 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, CPL should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Miss S's best interests. And having looked at all the evidence available, I'm not satisfied that it was in this case.

Financial viability

CPL carried out a transfer value analysis report (as required by the regulator) showing how much Miss S's pension fund would need to grow by each year in order to provide the same benefits as her DB scheme (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.

Miss S was 56 at the time of the advice and wanted to retire at 60. The critical yield required to match Miss S's benefits at age 60 was 3.62% for the Parmenion plan and 3.34% for the Prudential plan if she took a full pension and 1.26% and 0.98% for the plans respectively, if she took tax-free cash and a reduced pension.

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 2.8% per year for 3 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, Miss S's low medium attitude to risk, and also the term to retirement. Although the analysis does indicate that the transfer might be financially viable, the use of a DFM would increase the cost of the investments recommended to be held in Parmenion, and I can't see that this was taken into account in this analysis. And Miss S had a small capacity for loss, and these returns would not be guaranteed. CPL also produced a cash flow analysis which demonstrates that Miss S's funds would be depleted by age 81 if she were to take benefits of the same amount provided by her DB scheme – the DB scheme benefits were guaranteed for life. Therefore, I'm not persuaded that Miss S wasn't likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of investing in line with her attitude to risk.

For this reason the transfer out of the DB scheme likely wasn't in Miss S's best interests. Of course financial viability isn't the only consideration when giving transfer advice, there might be other considerations which mean a transfer is suitable. I've considered this below.

Flexibility

Miss S planned to retire at 60 and wanted tax-free cash to fund a holiday home in Spain. But I'm satisfied she could have achieved this by staying in the DB scheme. This is because she had savings and investments, along with a mortgage-free home she could use to help fund the Spanish property. And as noted by the investigator, this was not an urgent need but rather a "like to have." Furthermore, the usual way to purchase a house is to borrow. I can see that this was discussed with Miss S, and she didn't want to do this. Of course, the DB transfer would have seemed like a far easier way to get what she wanted. And she would not have to worry about a mortgage. So this isn't surprising.

But I think CPL should have fully considered, and looked into how, Miss S could fund the house purchase another way. It doesn't seem to have investigated this in any detail at all. In fact, I've not even seen evidence of the exact amount Miss S needed, though I am aware it was less than the full tax-free cash amount released after the transfer. Borrowing funds was dealt with very briefly in the suitability report, but was "discounted' because Miss S's children "will not be able to benefit from the funds on [her] demise"

Miss S needed £36,000 per year in retirement according to the information gathered by CPL. If she took benefits from the DB scheme at 60, she would be entitled to an annual income of £36,837 (increasing at RPI) – this would have met Miss S's retirement needs as noted in the fact-find.

Death benefits

It was recorded that Miss S wanted to improve on the death benefits she could provide to her adult children.

Death benefits are an emotive subject and of course 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 Miss S. But whilst I appreciate death benefits are important to Miss S, and Miss S might have thought it was a good idea to transfer her DB scheme to a SIPP because of this, the priority here was to advise Miss S about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think CPL explored to what extent Miss S was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Miss S was married and so the spouse's pension provided by the DB scheme would've been useful to her spouse if Miss S predeceased him. I don't think CPL made the value of this benefit clear enough to Miss S. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a SIPP was. And as the cashflow analysis shows, there may not have been a large sum left or the fund may have been depleted, particularly if Miss S lived a long life. In any event, CPL should not have encouraged Miss S to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Miss S genuinely wanted to leave a legacy for her children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think CPL should've instead explored life insurance.

Overall, I don't think different death benefits available through a transfer to a SIPP justified giving up the guaranteed benefits provided by the DB scheme up. And I don't think that insurance was properly explored as an alternative.

DFM recommendation

CPL recommended that Miss S use a DFM to manage a portion of her pension funds. I understand that Miss S subsequently invested all of the funds remaining after the tax-free cash payment with Prudential. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Miss S, it follows that I don't need to consider the suitability of the investment recommendation, though I note that it would have increased the cost to Miss S after the transfer.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Miss S. But CPL wasn't there to just transact what Miss S might have thought she wanted. The adviser's role was to really understand what Miss S needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Miss S was suitable. She was giving up a guaranteed, risk-free, and increasing income and in my view, there were no compelling reasons which would justify a transfer and outweigh this. Miss S shouldn't have been advised to transfer out of the scheme primarily to fund a holiday home purchase, and the potential for control and higher death benefits wasn't worth giving up the guarantees associated with her DB scheme.

So, I think CPL should've advised Miss S to remain in their DB scheme.

Of course, I have to consider whether Miss S would've gone ahead anyway, against CPL's advice.

I've considered this carefully, but I'm not persuaded that Miss S would've insisted on transferring out of the DB scheme, against CPL's advice. I say this because although Miss S was an experienced investor, she had a low medium attitude to risk and this pension accounted for the majority of Miss S's retirement provision. So, if CPL had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

I'm not persuaded that Miss S's desire for a holiday home and flexible benefits was so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If CPL had explained that Miss S could meet her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Miss S would have insisted on transferring out of the DB scheme.

In light of the above, I think CPL should compensate Miss S for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice.

Putting things right

A fair and reasonable outcome would be for the CPL to put Miss S as far as possible, into the position she would now be in but for the unsuitable advice. I consider Miss S would have most likely remained in the occupational pension scheme if suitable advice had been given.

CPL 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, Miss S retired at age 60. So, compensation should be based on her taking 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, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Miss S'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, CPL should:

- calculate and offer Miss S redress as a cash lump sum payment,
- explain to Miss S 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 Miss S receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss S accepts CPL's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Miss S for the calculation, even if she 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 Miss S's end of year tax position.

Redress paid directly to Miss S as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), CPL may make a notional deduction to allow for income tax that would otherwise have been paid. Miss S's likely income tax rate in retirement is presumed to be 20% In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

CPL should also pay Miss S £250 compensation for the distress and inconvenience she has experienced after discovering the majority of her pension was unsuitably transferred and for the significant time and effort this matter has taken to be resolved.

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 CPL pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Capital Professional Limited trading as Ascot Lloyd to pay Miss S 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 Capital Professional Limited trading as Ascot Lloyd pays Miss S the balance.
If Miss S accepts this decision, the money award becomes binding on Capital Professional Limited trading as Ascot Lloyd.

My recommendation would not be binding. Further, it's unlikely that Miss S can accept my decision and go to court to ask for the balance. Miss S 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 Miss S to accept or reject my decision before 28 October 2024.

Jennifer Wood
Ombudsman