DRN-4908376

The complaint

Mrs R complained that she was given unsuitable advice to transfer a defined benefit (DB) pension scheme to a type of personal pension, in 2020. She thinks that as a result, she has suffered a financial loss.

Haven Protect Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "HPL".

What happened

The pension in question here related to a DB scheme from a previous employment but which had grown in value over the years. At the time of the advice this DB scheme was in deferment. In 2020, Mrs R was given a cash equivalent transfer value (CETV) of around £369,613. The normal retirement age (NRA) of the DB scheme was 60.

Information gathered about Mrs R's circumstances was broadly as follows:

- She was 58 years old, divorced but living with a partner.
- Mrs R owned a home outright with no mortgage outstanding. She earned around £30,700 (net) per year as a self-employee. Her net outgoings were recorded as £12,000 per year.
- Mrs R had cash ISA savings of around £50,000 and £2,000 in another savings account. She had £8,000 in a business account.

HPL set out its advice in a suitability report in April 2020. In this, it advised Mrs R to transfer out of the DB scheme, move the funds to a personal pension, and invest the money in a selection of market funds.

In August 2023, Mrs R complained to HPL about its advice, saying she shouldn't have been advised to transfer out to a personal pension and that she had lost out as a result. In response, HPL said it hadn't done anything wrong and was acting on the financial objectives Mrs R had at the time.

Disagreeing with this, Mrs R referred her complaint to the Financial Ombudsman Service in February 2024. One of our investigators looked into the complaint and issued a 'view' saying it should be upheld in Mrs R's favour. But HPL still didn't agree.

It therefore falls 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 also 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'). 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 HPL'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.

I have further considered that the regulator, the Financial Conduct Authority (FCA), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, HPL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs R's best interests.

Having fully considered all these issues with great care, I don't think the advice to transfer was suitable or in Mrs R's interests.

I'm therefore upholding her complaint.

Introductory issues

I've noted that HPL makes the point that Mrs R came to it with a somewhat preconceived idea about transferring away from her DB scheme. It also makes several points that she was 'looked after' by several FCA qualified advisers and given a lot of information about the guarantees found in the DB scheme she would be giving up if she transferred away. HPL also says that when bringing her complaint, Mrs R has since changed the estimated date she was hoping to retire at.

I've considered the points made by HPL and will be addressing things like her retirement age, later. However, it's very important to state that it was HPL which was the regulated party here and *not* Mrs R. As I'll explain, she wasn't a pensions expert, and she was paying a substantial fee to HPL for regulated financial advice. It was therefore HPL's duty to provide her with information that was clear, fair and not misleading, and this needed to be in her best interests.

Whilst noting HPL's comments, it still ultimately recommended that she should transfer away. And even if Mrs R did have initial thoughts about what she might like to do, the HPL adviser's job here wasn't to just follow what Mrs R thought was a good idea. She was in effect, a relative amateur with no knowledge or experience in these areas. So, she had every right to expect that HPL would use its expertise and regulatory permissions to the best effect and recommend what was in her best interests overall.

Financial viability

I looked carefully at whether I thought transferring was worthwhile from a financial comparison perspective.

Here, I first considered the 'critical yield' rates. These rates were set out by our investigator when he issued his 'view' letter, which recommended the complaint should be upheld. A critical yield is the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same benefits as the DB scheme. In Mrs R's case these rates were high: the critical yield required to match Mrs R's DB scheme benefits at the NRA of 60 was over 21% if taking all the benefits in an annual pension form. If taking a reduced pension and the maximum allowed tax-free lump-sum, the critical yield was over 9%.

Whilst these rates were high and, in most scenarios, almost certainly not achievable, I'm not persuaded the critical yields were particularly relevant to Mrs R's situation. This is because as she was already in her 59th year, comparing how much her transferred funds would need to grow by to make transferring worthwhile, was somewhat 'skewed' by the fact her scheme's NRA was 60. As this was only just over 1 year away, I don't think it was a meaningful comparison.

In my view, a more comparable metric was shown in HPL's suitability letter. To demonstrate the financial comparisons between her DB scheme and transferring out to a personal pension arrangement, HPL was required to show the 'transfer value comparator' (TVC). The TVC is essentially a measure of what sum of money a consumer would need to buy an annuity providing equivalent benefits to the DB scheme at retirement. The idea is to give consumers a lump-sum figure which can be compared directly with their CETV. HPL said the TVC was £477,044. This figure is substantially above the CETV which was only £369,613 at the time – or put another way – over £107,000 more to just get the same benefits. So, in my view, the TVC in this case provided a revealing window into just how much Mrs R could be giving up by leaving her DB scheme.

It's important to remember that Mrs R wasn't an experienced investor, and she had no personal history whatsoever of buying shares. She had reasonable savings, but I think it's telling that these were all held in no-risk cash accounts. She'd also told HPL she wasn't comfortable with the stock market and didn't find these types of investments easy to understand; nor did she want risk in her pension funds.

Mrs R was being advised by HPL to transfer from a DB scheme which wasn't affected by stock market performance in as much as her pension was guaranteed for life and index linked. So, if transferring to a pension that *was* directly affected by market conditions, her risk appetite was clearly, at best "low" or "cautious". I've therefore kept in mind that the regulator's upper forward growth projection rate was 8%, the middle projection rate was 5%, and the lower projection rate was 2%. The Bank of England base rate was only 0.1%. These things show that market growth conditions could be benign, and the stock market had recently entered unchartered territory relating to the Covid epidemic.

I've taken these things into account, along with Mrs R's expected term to retirement. Everything I've seen was strongly showing that transferring simply wasn't viable from a financial comparison perspective. The data showed that Mrs R was likely to receive lower retirement benefits in the longer term as a result of transferring.

I've considered whether, as a divorced person, Mrs R might not have thought she needed some of the death benefits found in her DB scheme. Typically, these benefits mean that dependent children and / or a spouse could receive something from the DB scheme if the pension holder dies. And as Mrs R could be said not to 'need' these benefits, then buying an equivalent annuity could be considerably cheaper. A financial case could possibly be made for transferring on this basis.

But Mrs R was still only 58 at the time and whilst her children were adults (and not able to receive any benefits from her DB scheme) it's possible she could re-marry in the future. And even if applying the financial comparisons with a 'single life' annuity, the critical yields for this were still implying that transferring probably wasn't worth it, if choosing to use that metric.

By transferring Mrs R was also taking on significant annual charges and personal pension platform costs which she didn't currently have with her DB scheme. I've also noted that the adviser wrote down that Mrs R might draw future capital sums from her pension if she transferred to a type of personal plan. Although no further details emerged of when this might occur and how much would be involved, this would clearly affect the accuracy of any calculations and the viability of any long-term income drawdown plan. I therefore don't think any assumption that a personal pension plan would last Mrs R well into old age – or be more sustainable than her existing DB scheme – was credible.

Having thought about all these things, I don't think there were any reasons to transfer Mrs R from her DB scheme to a personal pension, based on the financial comparisons alone. I think HPL underplayed the importance of the comparisons with the TVC, despite this being a regulatory requirement at the time.

Nevertheless, I accept that HPL's recommendation that she should transfer out to a personal plan was not only predicated on the financial comparisons with her current scheme alone. Rather, HPL augmented its recommendation with some additional and different reasons to transfer away. I've therefore thought about all the other considerations which might have meant a transfer *was* suitable for her, despite probably providing the overall lower financial benefits mentioned above, over the longer term.

I've considered these below.

<u>*Other reasons to transfer*</u>

I've summarised Mrs R's financial objectives and the recommendations discussed between her and the adviser as follows:

- Mrs R apparently wanted flexibility of income in a pension and the ability to draw capital.
- Transferring would generate more tax-free cash.
- The adviser said she could *"take control"* of her pension *"and invest in line with your attitude towards investment risk, targeting growth"*.
- Moving into a personal pension was said to produce much better transferrable death benefits in the event of Mrs R's death.

So, it seems the supporting reasons that HPL recommended the transfer out to a personal pension were largely for issues connected to the flexibility and control it offered to Mrs R. I have therefore considered all these issues in turn.

- *Flexibility*

In my view, this was an area which was heavily promoted by the adviser in the suitability report as a good reason for Mrs R to transfer away from her DB scheme. The HPL adviser implied that her existing DB scheme was inflexible in that it paid out a regular amount from the age of 60, whilst a personal type of plan would allow her to delay commencement and draw different amounts as and when needed. Examples were given by the adviser, such as Mrs R having no apparent need for a pension income commencing from the age of 60, which in her case, was the point when the DB reached its NRA. It's therefore fair to say that the implication here was that Mrs R didn't *need* her pension to start at the age of 60 because she anticipated still working full-time.

The other flexible feature promoted was, that after reaching her preferred semi-retirement age of 63, she would be able to draw more flexible amounts from a personal pension plan because semi-retirement was likely to be less reliable in terms of earning potential. The adviser's rationale for drawing larger or smaller pension amounts was that this flexible method would support and complement her intention to continue working beyond the age of 63, but on a part-time basis.

Mrs R estimated she'd need £20,000 (net) (or £21,785 (gross)) to maintain a comfortable semi-retirement from the age of 63 onwards. She told the adviser that she was confident her earnings potential at the age of 63 onwards could be £12,000 per year as a semi-retiree. But the adviser said that to achieve her preferred total income she would therefore be £9,785 short of what she needed.

A further need for having a more flexible 'pot' of money in a personal type of pension was a remark recorded at the time, concerning Mrs R's apparent desire to buy an investment property from which she could derive a rent, or otherwise renovate and sell the property at a profit. I've therefore considered these apparent needs for flexibility to determine whether they made transferring to a personal pension plan to be in Mrs R's best interests.

However, I don't think Mrs R really needed the financial flexibility generally found in a personal pension plan and I think this area was overplayed by the HPL adviser. 'Flexibility' generally sounds like a very good thing, and I think Mrs R was heavily influenced by this. But it's important to remember that the financial comparisons were already showing that transferring to a personal pension plan was probably going to leave Mrs R with less retirement benefits over the longer-term. We also know that the regulator's stance at that time was that transfers from DB schemes are more likely to be *unsuitable* for many people. Against this backdrop, there needed to be very good reasons to support an argument for transferring away, if based on pension flexibility.

The first point here is that, in my view, Mrs R simply didn't appear to need any flexibility in a pension to meet her financial needs in retirement. Her plan was to commence semi-retirement at the age of 63. I accept that at the age of 60, her DB scheme would crystalise and commence its payments. And at this point Mrs R would need to decide how to have her DB scheme paid. The scheme was forecast to pay either £9,977 per year when she reached 60 or Mrs R could have taken a tax-free lump sum of over £48,000 and drawn a reduced pension of £7,249 per year.

As Mrs R didn't specifically need her DB scheme pension for income at the age of 60 then she could have saved it until the age of 63 when she did. I think it's more likely Mrs R would have opted for the latter option – around £48,000 would be taken tax-free and the remaining annual pension would be paid and then subject to ongoing income tax. Mrs R already had disposable income every month according to HPL's 'fact-find'. And she also had reasonable cash savings of £52,000 (not including her business account). So, Mrs R would enter her DB scheme's NRA of 60 with a range of savings, her current salary, and her new annual DB pension.

This meant that by the age of 63 she would have been able to build up further savings to add to the £48,000 tax-free lump sum (above) and the £52,000 she had already saved in other areas. With modest growth therefore, I don't think it would be unreasonable to assume that Mrs R would reach her 63rd year with potential cash savings in the region of £125,000.

I then examined her ability to meet her semi-retirement income requirement of around £21,785 (gross) per year having reached the age of 63. In my view, this was broadly achieved by adding Mrs R's anticipated part-time employment (around £12,000 per year) and her DB scheme, which would have been paying out since the age of 60. I think it's reasonable to assume the by the age of 63, this annual DB pension would have increase to around £9,000 per year (if opting for a reduced pension with a tax-free lump sum). So put simply - in this context Mrs R didn't need any income flexibility. Her annual retirement income was mainly met by remaining in the DB scheme and she still had very meaningful savings behind her, as shown above.

I acknowledge that a case could be made against paying tax on the DB income for three years. But I think paying a modest amount of income tax on the annual pension was still worthwhile between the ages of 60 - 63, particularly as she was retaining a guaranteed and indexed linked pension, and no income tax was due on the lump sum. But there were also ways of mitigating tax. Mrs R could have retained the option to pay limited amounts into a new personal pension of her own under the money purchase annual allowance rules, thus minimising income tax payments on any additional income she wasn't using for these three years.

I next considered any capital requirements Mrs R might have had and whether these mean a more flexible pension was needed. An issue that has been raised by HPL is that Mrs R wanted to buy an investment property and so pension flexibility was a way of achieving this. However, this in my view is a somewhat moot point as there was only evidence that this issue was being *"considered"*. It was noted at the time that this wasn't certain. So, although briefly mentioned as a consideration, no property appears to have been identified, no costs included, and no funding arrangements were discussed. I've therefore taken the view that this was nothing more than a vague aspiration and, in any event, we know Mrs R may have had other options or ways of funding this rather than permanently withdrawing from a guaranteed DB scheme. Irreversibly transferring away from a DB scheme based on an uncosted, unspecific and uncertain aspiration would, in my opinion, likely be against her best interests.

Overall, it's my view that the use of flexibility as a rationale for transferring was no more than a 'stock' objective with little or no real meaning to Mrs R's situation. There was simply no need to transfer away in order to achieve retirement at 60 or 63. Mrs R's expectation was to earn a semi-retired consultant's wage of around £12,000 to which her DB annual pension could be added. Given her good health and skills set, I think there was every reason to assume her plans to support her post-63 pension with working income were credible. This met her needs, and from the age of 67 Mrs R's index linked state pension 'kicked-in' with a current value of £9,110 per year.

What all this should have been demonstrating to the adviser was that Mrs R already had the financial capacity she needed for her retirement. I've therefore seen nothing showing why she couldn't leave her DB scheme where it was and use it in exactly the way it was originally intended.

- *More tax-free cash*

It’s often the case that the amount of tax-free cash available upon crystalising a personal pension plan is above that which is achievable from a DB scheme. This is because the value and calculations used in the two types of schemes are quite different. In this case, I think the higher amount was discussed and probably used as a positive reason for transferring away.

However, it’s important to remember that removing tax-free cash doesn’t come without consequences. Removing a larger tax-free cash element will, of course, mean that the remaining pension left to live on in the future is also reduced. I’ve seen many cases where this remaining amount is overlooked and means there is much less left than the pensioner needs for a comfortable income in their retirement. In nearly all cases, I would say caution is required for these reasons.

As I’ve said, Mrs R already had a sufficient amount of cash. Interest rates at the time were at an historic low and cash earned only modest sums whilst on deposit. I’ve already mentioned the lack of any credibility around the investment property issue raised by HPL, and there is no other rationale I can see for wanting to increase cash holdings at the expense of reducing one’s retirement income and security.

- *Control of pension*

I’ve also seen no evidence that Mrs R had either the capacity or desire to exercise control over her funds. There was no evidence she was an experienced investor and I think she would have found the complexity, scale and responsibility of managing over £369,000 of her own transferred funds from her DB scheme to be onerous in the years ahead. What I’ve seen tends to show Mrs R would have required ongoing financial advice and support over the long term, all of which would cost her money which her DB scheme didn’t require from her. She simply didn’t have the experience to personally manage the funds and had been recommended to a fund manager and ongoing financial adviser at additional cost.

- *Death Benefits*

I can see that HPL and Mrs R discussed the death benefits in her deferred DB scheme. I have already explained what I think about Mrs R’s marital status and how that could still change. I think from the evidence I’ve seen, a personal pension arrangement was also portrayed as being better owing to the retention of the full value of Mrs R’s funds if she died. In her case this might have involved passing up to 100% of the value of her transferred funds held in a personal pension to her adult children. I note Mrs R had made such a beneficiary nomination after the transfer to the new plan.

Most people would like their loved ones to be taken care of when they die and the lump sum death benefits on offer here through a personal pension were probably made to look like an attractive feature to Mrs R as her children might have inherited the value of her transferred funds tax-free in such circumstances. However, Mrs R was only 58 years old and still in good health, and so an obvious drawback with a personal pension’s death benefits is that the amount left to pass on – to anyone – may be substantially reduced as the pensioner starts to withdraw his or her retirement income. In this case, the adviser was clearly intending Mrs R to use her transferred funds for her retirement after the age of 63 and therefore to drawdown most or all of the funds if she lived a long life. Mrs R’s total pension amount wasn’t particularly large, so there was every chance that the amount left to pass on would realistically be depleted.

I don’t know if, or to what extent, life insurance was discussed in this case. But at 58 years old, a ‘term’ life insurance policy may have still been an affordable product if Mrs R really did want to leave a reasonable lump sum legacy for her adult children in the event of her sudden death. I can’t see this was ever properly discussed. So, to this end, Mrs R already had plenty of options ensuring part of her pension wouldn’t just ‘die with her’.

Overall, in this case I don’t think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mrs R. I think this objective, listed as it was in the suitability report, was no more than a generic comment and not meaningful to Mrs R’s situation.

- *Other issues*

Funding of the scheme – I’ve considered the overall funding of the DB scheme in the light of information supplied by HPL that it was underfunded. However, as HPL ought to have known, it wasn’t unusual at that time for DB schemes to be in this situation and in this case, I noted the level of funding was 96%. Looking at this and the size of the fund, I don’t think the failing of the pension was ever a credible fear and even if it had been, I would have expected a comprehensive explanation about this in the suitability letter. This would have featured detailed reasoning for transferring on this basis and an analysis of the pension protection fund alternatives. As none of this was carried out, I don’t think this threat was relevant in this case.

Timing of the transfer – I’ve noted that the suitability letter stated that Mrs R was out of contract and currently not earning, so I’ve considered whether this affected anything. However, I’ve concluded that this feature was not a predominant one within the suitability report and the adviser didn’t promote it as a main reason to recommend a transfer. I do accept that April 2020 was a difficult time for people and a period of uncertainty. But transferring because of this was not used to any extent and so I don’t consider it relevant to the outcome of this complaint.

<u>*Suitability of investments*</u>

HPL recommended that Mrs R invest in funds within a personal pension plan. As I’m upholding the complaint on the grounds that a transfer out of the DB scheme wasn’t suitable for her and I don’t think she would have insisted on transferring out of the scheme if clear advice had been given to her, it follows that I don’t need to consider the suitability of the investment recommendation. This is because she should have been advised to remain in the DB scheme and so the investment in the new funds wouldn’t have arisen if suitable advice had been given.

<u>*Summary*</u>

I don’t think the advice given to Mrs R was suitable.

She was giving up a guaranteed, risk-free and increasing income within her existing DB scheme. By transferring to a personal pension, the evidence shows that Mrs R was likely to obtain lower retirement benefits. I don’t think there were any other particular reasons which would justify the transfer and outweigh this. On the basis of what I’ve comprehensively explained above, I think HPL ought to have advised her against transferring out of her DB scheme.

I accept that HPL disclosed some of the risks of transferring to Mrs R, and provided her with a certain amount of information. But ultimately it advised Mrs R to transfer out, and I think she relied on that advice. So, if HPL 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 have accepted that advice.

In light of the above, I think Mrs R should be compensated for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

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

HPL must therefore now 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.

Compensation should be based on the scheme's normal retirement age of 60, 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 Mrs R'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, HPL should:

- calculate and offer Mrs R redress as a cash lump sum payment,
- explain to Mrs R before starting the redress calculation that:
    - the 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 DC pension
- offer to calculate how much of any redress Mrs R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs R accepts HPL's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mrs R for the calculation, even if she 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 Mrs R's end of year tax position.

Redress paid to Mrs R as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, HPL 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 Mrs R'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.

Our investigator recommended that HPL should pay Mrs R for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mrs R in her particular circumstances. This pension at the time represented a substantial proportion of her retirement provision. In her situation I think the thought of losing material benefits would have impacted upon Mrs R. So I agree the recommended payment of £400 for distress and inconvenience. HPL should pay Mrs R this amount in addition to the redress I've set out above.

Where I uphold a complaint, I can award fair compensation of *up to* £415,000, 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 £415,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Haven Protect Limited to calculate and if appropriate pay Mrs R the compensation amount as set out in the steps above, up to *a maximum* of £415,000.

If Mrs R accepts this decision, the money award becomes binding on Haven Protect Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs R can accept my decision and go to court to ask for the balance. Mrs R 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 Mrs R to accept or reject my decision before 27 February 2025.

Michael Campbell
Ombudsman