DRN-5036443

The complaint

Mr B complained that he was given unsuitable advice to transfer a defined benefit (DB) pension scheme, to a type of personal pension, in 2018.

MacArthur Denton Asset Management Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "MDAM".

What happened

The pension in question here related to a DB scheme from an employment at a large company which Mr B had already decided to leave when this advice was given. Information gathered about Mr B's circumstances was broadly as follows:

- Mr B wanted to enter retirement more or less immediately, at the age of 55.
- He was unmarried and had no financial dependents.
- Mr B was given a cash equivalent transfer value (CETV) from his existing DB scheme of around £290,110. The normal retirement age (NRA) was 65.
- Mr B owned his own home outright with no mortgage outstanding. He had no other debts or liabilities and had around £60,000 in various savings and investments.
- Mr B didn't have any other personal pensions because pension(s) form earlier in his life had already been transferred to the DB scheme now being complained of.

Mr B had first asked another financial adviser about his pension options in early 2018. But my understanding is that this adviser probably didn't have the required regulatory permissions to deal with a DB transfer request. Mr B was therefore put in touch with MDAM.

MDAM set out its advice in a suitability report in December 2018. In this, it advised Mr B to transfer out of the DB scheme, move the funds to a personal pension with a large and well-known pension provider, take a small amount of tax-free cash, and then invest the remaining money in a selection of market funds.

In 2024 and aged almost 61, Mr B complained to MDAM about its advice, saying he shouldn't have been advised to transfer out to a personal pension. In response, MDAM said it hadn't done anything wrong and was acting on the financial objectives Mr B had at the time.

Disagreeing with this, Mr B referred his complaint to the Financial Ombudsman Service. One of our investigators looked into the complaint. It's my understanding that MDAM has since entered a form of liquidation. However, I've noted we've had a commitment from its Directors that the complaint will be duly considered and that the Directors will discharge their responsibilities to cover any costs as necessary. My further understanding is that the liquidators have also confirmed that a complaint can legitimately be brought against MDAM.

Our investigator then issued a 'view' saying the complaint should be upheld in Mr B's favour. MDAM still didn't agree that it should be upheld and sent in some further documentation which it says shows Mr B had wanted to transfer, that he was given sufficient information, and that ultimately the advice to transfer was correct in his particular circumstances.

As the parties cannot agree, it therefore now 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 MDAM'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, MDAM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests.

I don't think the advice to transfer to a personal pension was in Mr B's interests, so I'm upholding his complaint.

Financial viability

In my view, no substantive case was ever made out by the MDAM adviser for transferring on financial comparison grounds and this was a material failing.

To demonstrate the financial comparisons between his current DB scheme and transferring out to a personal pension arrangement, MDAM referred in its transfer analysis to a '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.

MDAM said the TVC was £387,784. This figure is clearly substantially above the CETV which was only £290,110 at the time – or put another way – over £97,000 more to buy a similar pension annuity. So, in my view, the TVC should have provided a revealing window into just how much Mr B could be giving up by leaving his DB scheme.

I've taken into account that Mr B wasn't married and didn't have any financial dependents. So, the levels of benefit the TVC was being benchmarked against – in particular the spouse's pension element if Mr B passed away – could be construed as being greater than Mr B needed. However, although Mr B might not have (at that time) needed direct comparisons with a spouse's pension included, there would be no justification in the adviser benchmarking his DB scheme against anything other than a pension which still had similar valued benefits. These would likely include such benefits as certain annual increases in the pension payments going forward and other guarantees about the certainty of his retirement income.

However, in reality MDAM made no case whatsoever for transferring on financial comparison grounds. In fact, it told Mr B that the *"same retirement income at your current scheme's normal retirement age could cost you £97,673.04 more by transferring".* And in respect of the critical yield[1] percentage figure, it said, *"in our opinion,* [the critical yield] *is not an achievable return based on your retirement time horizon and the potential returns from the recommended fund portfolio.* These comments were therefore implying that even the adviser himself didn't think there was any financial comparison case made out, for transferring away.

I've also kept in mind that the period in question had seen previous, but still ongoing, market volatility and political uncertainty in the United Kingdom following the decision to leave the European Union. This had impacted on the investment landscape and so meant that if transferring away from his DB scheme, Mr B was leaving a guaranteed scheme with a known pension for the rest of his life - to a pension where *he* bore the risks of the markets at a somewhat uncertain time. We were also still in the midst of a sustained period of ultra-low bond yields and the Bank of England base rate was only 0.75%. The regulator's upper forward growth projection rate was 8%, the middle projection rate was 5%, and the lower projection rate was 2% (although these hadn't been revised for a number of years). Mr B's attitude to risk was judged by the adviser as being medium, and he had very little capacity for loss. So I don't think he'd have been able to achieve more than limited returns on the transferred sums. If transferring, Mr B would also incur the new costs of operating on a personal pension platform, and costs from using funds likely overseen by a fund manager. By comparison, his current scheme had no such costs borne by him.

So, with all this in mind there was simply no case for moving across to a personal pension based on Mr B's transferred funds potentially 'outperforming' his existing DB scheme. On balance, I think it was much more likely, that when viewed through the lens of that time, transferring was going to mean he'd receive less retirement benefits in the longer-term. And as I've said, given what the adviser told Mr B, I don't think they genuinely thought transferring on this basis was ever merited either.

I do accept that MDAM's recommendation that Mr B should transfer out to a personal plan was not connected with or predicated on the financial comparisons with his current scheme alone. Rather, MDAM augmented its recommendation with some additional and different reasons to transfer away. I've therefore thought about all the other considerations which

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[1] The 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.

might have meant a transfer *was* suitable for him, despite quite likely providing the overall lower financial benefits mentioned above, over the longer term.

I've considered these below.

Other reasons to transfer

In my view, MDAM's suitability letter of 20 December 2018 didn't give Mr B clear enough information about the importance of remaining in the DB scheme. I accept Mr B was provided with some warnings and other related information, but the recommendation was still to transfer away with additional recommendations made about what should happen with the subsequent personal pension investments.

I've summarised Mr B's financial objectives and the recommendations discussed between him and the adviser as follows:

- *"You have recently left employment and require drawing a pension to meet your living expenses.*

- *You are looking to retire and take your pension benefits.*

- *You require an income of £10,000 per annum*

- *You would like to retain the option to use some of the pension tax free cash to purchase a property abroad. You have no firm plans at the moment, but it is perhaps something you would like to do.*

- *You would like to be able to pass on any unspent wealth to your nephew".*

So, it seems the supporting reasons that MDAM recommended the transfer out to a personal pension were largely predicated on issues connected to the flexibility and control it apparently offered to Mr B. I have therefore considered all these issues in turn.

- *Early retirement*

From the documentation and information I've seen, I think it's fair to say that Mr B was fairly fixed on retiring at the age of 55 which was his age when this advice was being sought. I do think he left the door open to doing some part-time work to top up his income as I've seen some evidence of this in an email trail dated 16 March 2018 (a few months before he started seeking pension advice in earnest). But deep down, his preference was clearly for outright retirement at which, by pension standards, was a comparatively young age.

I think it's also fair to point out that this immediate retirement aspiration was set against a backdrop of a relatively modest pension entitlement. This was mainly because by retiring so early – 10 years before the NRA – there were actuarial reductions which were applied to his DB scheme. This meant Mr B's annual DB pension amount would be lower than otherwise because he was drawing his pension earlier and for longer. But the scheme still offered various options for retirement which could be flexed to suit individual needs and so Mr B could have opted, for example, to draw an immediate annual pension of almost £13,000 per year (gross). This contained some elements of no annual increases in parts of the pension, and also significant changes to the annual pension overall at the point when Mr B eventually reached state retirement age (and his state pension then 'kicked in').

However, Mr B had told the adviser that he could live on £10,000 per year. One could argue whether this figure was realistic or enough to live on. But Mr B didn't live in what could be said as an overtly expensive part of the country and his personal expenses did seem low and under control. All these outgoings and spending commitments had also been set out in detail as part of the advice process. Mr B lived alone, he had no mortgage, no excessive transport costs, and no apparent lifestyle interests which appeared costly. In any event, the adviser clearly accepted this retirement income requirement from Mr B and calculated it would mean that he didn't pay any income tax. So, to be clear, the adviser accepted the £10,000 figure and used it as part of their overall suitability recommendation.

It's also important to remember that it was MDAM which was the regulated party here, and not Mr B. So whilst I accept that Mr B probably went along to the adviser with some preconceived ideas about wanting to completely stop work and transfer his DB pension to a type of personal scheme, this didn't just mean the adviser ought to simply 'sign off' on this. The law required all DB transfers of this value to be the subject of regulated financial advice. Mr B was paying a considerable amount for that advice and he wasn't a pensions expert himself. He was therefore entitled to expect that the adviser from MDAM would use their knowledge and experience to act in his interest.

I say this because MDAM makes many points now, all of which I've read and considered in full, that Mr B was given a lot of information and indeed some warnings about the issues related to transferring away from a DB scheme. That may be so, but MDAM still recommended the transfer and I think Mr B heavily relied on this when thinking about what was best. Of course, an option open to the adviser would have been to tell Mr B that such an early retirement was always going to be 'tight' in a financial sense, whatever he chose to do. The adviser could have even suggested to him to remain in the scheme and take up the part-time work he'd previously mentioned, so he could leave his pension to increase for as long as possible before starting to draw from it. But I think the adviser focussed too much on the notion of transferring away instead of starting by looking at what could be achieved within his current DB scheme. I've noted that a new personal pension scheme was even set up on the same day as the suitability letter was dated, which in my view further implies that transferring was the only real option being considered.

In my view, although Mr B's retirement income was always going to be only marginally above his outgoings whether he transferred or not, there was simply no apparent reason why Mr B needed to transfer. In this context, I don't think the advice followed the FCA's starting point about a transfer probably not being suitable.

I say this because his annual income requirement of £10,000 was comfortably within the almost £13,000 per year the DB scheme could pay him under an option I understand was included in his transfer pack and which the adviser ought to have very carefully considered. His income would be marginally topped-up at his state retirement age. We also know Mr B had around £60,000 in savings that were not subject to any income tax. Therefore, as a person with a modest lifestyle, a retirement at 55 still seemed eminently possible by remaining in the current scheme, if that is an age Mr B wouldn't compromise on. I've seen no reason why Mr B couldn't retire immediately and then use the DB scheme in much the way the scheme was intended. His everyday income seemed covered and he had, in his terms, a substantial savings reserve to call upon for life's uncertainties.

- *The property abroad*

MDAM makes the case for this being relevant and that transferring was the only way this could be achieved. However, like our investigator, I've seen no evidence of the purchase of a property abroad being anything other than a vague desire for Mr B. No property had been identified, no value was spoken about and no method of funding considered. The funding was of particular relevance as it's clear to me that borrowing would almost be inevitable in his case if he were to buy a property abroad. But the adviser himself only described Mr B as *"perhaps buying a property abroad"* rather than it being a realistic prospect.

So, given what I've said above about Mr B's overall modest financial means, there seems no credible possibility that the purchase of a home overseas could have been a serious consideration to the extent that it affected Mr B's pension choices. If such a property was to be funded from the transferred pension monies, as implied in the advice rationale, then Mr B would likely have to borrow heavily and he'd have very little left of his transferred funds to actually live on.

I therefore don't think this was a realistic reason to add to the rationale for transferring away from Mr B's DB scheme.

- *Death Benefits*

I can see that MDAM and Mr B discussed the death benefits in his DB scheme. From the evidence I've seen, a personal pension arrangement was portrayed as being better owing to the retention of the full value of Mr B's funds if he died. Mr B had no spouse so the (often quoted) valuable benefit of having a spouse's pension upon the death of the pensioner wasn't of use to Mr B, or certainly not at that time.

Most people would like their loved ones to be taken care of when they die. Mr B had expressed he didn't want his pension to 'die with him' and had said his nephew should benefit. So, if he passed away, then transferring to a personal type of pension would allow for such death benefit flexibility, whereas the DB scheme did not. MDAM uses this point as further rationale for transferring. I understand the point being made.

However, Mr B was only 55 years old and recorded as being in good health. Statistically, the chances of him passing away anytime soon were not high. So, whilst the lump sum death benefits on offer through a personal pension were probably made to look like an attractive feature, as his nephew might have inherited the value of his transferred funds tax-free, other factors should have been considered. An obvious drawback with a personal pension's death benefits is that the amount left to pass on – to anyone – would probably be substantially reduced as the pensioner starts to withdraw his or her retirement income. In this case, the adviser was clearly intending Mr B to use his transferred funds wholly for his retirement. Mr B wasn't wealthy and so he needed to spend his retirement income to live, and therefore, to drawdown most or all of the funds. If he lived a long life, which was highly possible, there was every chance that the amount left to pass on would be completely depleted.

Of course, we know Mr B owned his own home outright at that time which was a considerable asset he could pass on in his will if he died; he also had savings. Also, at just 55 years old, a 'term' life insurance policy may have still been an affordable product if Mr B really did want to leave a reasonable cash lump sum legacy for his nephew, or anyone else for that matter, in the event of his sudden death. I can't see this was ever properly discussed.

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 Mr B. I think this objective, listed as it was in the suitability report, was no more than a generic comment and not meaningful to Mr B's situation.

- *Security of the DB scheme*

I understand Mr B entered the advice process with concerns about the financial security and longevity of his existing DB scheme. In my experience, this has become a common worry for people, perhaps the reflection of a somewhat uncertain world.

However, Mr B's former employer was a substantial firm with a trans-national reach. Figures I've seen from the time showed the DB scheme was underfunded but the adviser would have known that this wasn't unusual. Indeed, the latest information on the scheme showed the scheme's funding had markedly improved in recent times. In any event, the adviser should have been telling Mr B that if this was a real concern, then he should be assured that the scheme fell within the Pension Protection Fund.

Summary

I don't think the transfer advice given to Mr B was suitable.

He was giving up a guaranteed and risk-free income within his existing DB scheme and by transferring to a personal pension, the evidence shows that Mr B was likely to obtain lower retirement benefits. I also don't think there were any other particular reasons which would justify the transfer and outweigh this.

I've found no justifiable reasons for him to transfer and so the advice wasn't consistent with the regulator's guidance. Therefore, on the basis of what I've comprehensively explained above, I think MDAM ought to have advised him against transferring out of his DB scheme.

I do accept that MDAM disclosed some of the risks of transferring to Mr B and provided him with a certain amount of information. But ultimately it still advised Mr B to transfer out, and I think he relied on that advice. In my view, if MDAM had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

In light of the above, if there is a loss I think Mr B should be compensated for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Suitability of investments

MDAM recommended that Mr B invest his funds in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for him and I don't think he would have insisted on transferring out of the scheme if clear advice had been given to him, it follows that I don't need to consider the suitability of the investment recommendation. This is because he 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.

Putting things right

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

MDAM must therefore establish if there has been any loss. It should 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.

In my view, there is reliable and comprehensive evidence of Mr B's intention and fixed preference to retire at the age of 55. Compensation should therefore be based on a retirement at the age of 55.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B'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, MDAM should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B 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 his DC pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts MDAM's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr B 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 B's end of year tax position.

Redress paid to Mr B as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. It's likely Mr B is now either a non-taxpayer or marginally above. So, in line with DISP App 4, MDAM may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr B's likely income tax rate in retirement – *presumed* to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of *up to* £195,000, 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 £195,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require MacArthur Denton Asset Management Limited to calculate and if appropriate pay Mr B the compensation amount as set out in the steps above, up to *a maximum* of £195,000.

<u>Recommendation:</u> If the compensation amount exceeds £195,000, I also recommend MacArthur Denton Asset Management Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on MacArthur Denton Asset Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 19 January 2025.

Michael Campbell
Ombudsman