DRN-5145902

Financial Ombudsman Service

The complaint

Mr S complained about advice he was given to transfer the benefits of a defined-benefit (DB) pension scheme to a type of personal pension. He says the advice, which was provided in February 2007, was unsuitable for him and believes this has caused him a financial loss.

The Aldra Group Ltd is responsible for answering this complaint. To keep things simple therefore, I'll refer mainly to "AGL".

What happened

These events obviously relate to quite some time ago, and whilst we have access to many important documents from the advice session(s), it's possible there are some relevant pieces of information no longer available.

However, we know that Mr S had previously been employed by a large and well-known company which had operated a DB pension scheme. By 2007, Mr S had long since left the company and so was a deferred member of the scheme. Mr S had accrued a number of years' service with this pension and was given a cash equivalent transfer value (CETV) of £77,178.

Mr S asked AGL for regulated pension advice because the rules in place at that time allowed certain pensions to be accessed from the age of 50 (this was changed to 55 several years later). It seems that Mr S was experiencing some financial challenges and the advice he was seeking related to potentially accessing his pension to obtain some immediate cash. His circumstances and objectives were broadly as follows:

- Mr S was 51 years old and single. He had no financial dependents, lived in a rented property, and had no demonstrable savings or investments. His 'new' job evidently paid a salary of £20,000 per year (gross).

- Mr S had acquired some debt. It's not entirely clear what this was but the AGL adviser noted at the time that repayments were around £400 per month just to service the debt. Mr S said he wanted to pay this debt off.

- I have seen information which tends to suggest that the normal retirement age (NRA) of Mr S's DB scheme was 65. There's no evidence of Mr S having any other pensions, other than the state pension, which I think would have been payable at the age of 66 in his case.

AGL set out its advice in a recommendation letter of 21 February 2007. In this letter, it advised Mr S to transfer out of the deferred DB scheme to a personal pension, take out a 25% tax-free lump-sum of £19,294 to spend this on eliminating his debt, and reinvest the remaining sum in funds commensurate with his attitude to risk. His intention at the time was to continue to pay into the new pension for his old age.

Mr S accepted this advice and he transferred to a newly established personal pension plan, in March 2007. As I'll explain more about later, Mr S drew down further pension amounts in later years and my understanding is that, as of 2024 there was around £39,000 left.

In 2024, now aged 68, Mr S says he became aware that the transfer might not have been in his best interests, and he raised a complaint with AGL. AGL said it hadn't done anything wrong and had acted to achieve what were clearly Mr S's objectives at that time. It didn't uphold his complaint.

In May 2024, Mr S referred the complaint to the Financial Ombudsman Service. But AGL questioned whether the complaint had been made too late - or 'out of time' - under the rules we operate by. In September 2024, one of my colleague ombudsmen issued a Jurisdiction Decision setting out why the complaint *was* within our remit and said that this was a complaint we had the power to consider. One of our investigators then looked into the actual merits of the complaint and issued a 'view' saying that Mr S's complaint should be upheld.

AGL still disagrees that Mr S's complaint should be upheld, so it now falls to me to look at the merits and 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.

<u>The applicable rules, regulations and requirements</u>

The below is not a comprehensive list of the rules and regulations which applied at the time of this advice. But they provide useful context for my assessment of AGL's actions here.

- The previous rules were set out in the Financial Service Authority (FSA)'s handbook at COB 5.3 (available on-line by using the time travel facility in the FCA handbook).
- COB 5.2.5 included a requirement to *'know your customer'*.
- COB 5.3.5 said that the advice had to be suitable.

Presumption of unsuitability

In 2005, the regulator's guidance also set out in its rulebook (COB - 5.3.29) which said:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

a) start by assuming it will not be suitable, and

b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension was in Mr S's best interests. I don't think it was, so I'm upholding his complaint.

Financial viability

AGL should have explained in its suitability letter and in any transfer recommendation, the financial comparisons between remaining in Mr S's existing DB scheme and transferring out to a type of personal pension plan.

I mentioned above that whilst we do still have access to quite a few documents used and recorded at the time, it seems to me that some other important material from the advice session(s) is missing. For example, I can't see that there was comparative analysis carried out which explained whether Mr S' pension outside the DB scheme could grow enough to make transferring financially worthwhile.

The financial viability of a proposed transfer isn't the only area that has to be considered when recommending transferring away from a DB scheme. But it's an important one, and I think it would have been very helpful for Mr S to understand the financial comparisons between the two types of pension scheme and the financial implications he might face if deciding whether to transfer away. We haven't been sent any analysis by AGL, which means it either wasn't carried out or hasn't survived this long. Of course, I accept that these events were some 18 years ago now, but AGL will know, or should know, of the expectation to retain key pieces of documentation relating to pension transfers. And I've noted that the suitability letter Mr S was sent by AGL in February 2007 doesn't mention any such analysis at all. Having considered this letter carefully, I think it's tone and approach focus only on other matters, such as Mr S's apparent desire to release his tax-free lump sum from his pension savings.

However, one of the things AGL should have explained in its recommendation was the relevance of 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. It is part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable. But I don't think AGL explained this to Mr S as it focussed mainly on meeting his objectives for immediate cash to pay down his debts and then investing the rest of the transferred money within *"our in-house …. administration platform"*.

I've therefore seen nothing showing whether Mr S's existing scheme's pension payouts at certain ages might have actually been able to meet his immediate financial needs. Nor can we discount the fact that transferring away would leave Mr S with much lower pension benefits in the longer term. In my experience, Mr S's DB scheme was likely to be a relatively generous pension scheme by most standards; one that would have been hard for a personal pension to financially outperform in the longer term. I accept we don't know this for sure, but this oversight is a failing of AGL, and one which causes this uncertainty. We also know the starting point of the regulator was that such DB transfers were probably not in most client's interests. I think the future growth performance of the transferred funds would have also had a 'drag' effect caused by fees and charges found in a personal pension that Mr S didn't have with his existing scheme.

So overall, the onus here was very much on AGL to show that, from a financial perspective, Mr S could be better off by transferring away from the DB scheme and into a new personal pension plan. Put simply, AGL failed to demonstrate this – and I think it's more likely than not that by transferring away Mr S would receive lower pension benefits overall as a result.

However, as I've said, I think that AGL's recommendation that Mr S should transfer out to a personal pension was probably not predicated on financial comparisons with his current scheme alone. Rather, AGL said he had different reasons to transfer away, and these were the focus of its suitability letter. So, I've thought about the other considerations which might have meant a transfer *was* suitable for him, despite the overall lower financial benefits mentioned above.

Other reasons to transfer

The crux of this complaint is really around Mr S's financial situation as of 2007. AGL's position in defending the complaint is based firmly on Mr S being in financial difficulties to the extent that transferring was his only credible option. The adviser said that by transferring, he could access £19,294 and pay down the debts that I agree sound like they were a cause of concern to him.

I therefore accept that what information we do still have about Mr S tends to show he wasn't in a strong financial position. I can't say how he got to this situation, but at 51 years old he appeared to own no home, was in debt, and had no savings or investments. But he had a job which appeared to pay a reasonable salary for that time. The location of his residence and being single would have also likely meant his living costs (aside his debt repayments) were relatively low. So, this doesn't necessarily mean that his only option was to transfer away from his DB pension. In my view, it's unfortunate that we don't have any more information that would enlighten us to just how serious a debt problem Mr S apparently had. But the failure of AGL to retain the type of information that would now better explain his circumstances is the cause of this lack of understanding. The adviser recorded that Mr S was required to pay back £400 each month and the *implication* was that this was only the interest. But we don't know this for sure, nor do we know what his total debts were, who he owed money to, and over what period.

Mr S speculates now that his debts were only around £4,700 at the time. However, AGL thinks the outstanding money owed by him must have been much higher, and it sent in a number of assumptions and calculations which could show that what Mr S owed was a more substantial amount. AGL also now questions Mr S's recollections and says he could possibly have ended up homeless if his debts hadn't been paid down. In a similar way, AGL also questions Mr S's recollections about his salary and everyday spending commitments and says that if Mr S were to be believed, then he would have had no reasons to seek any financial advice in the first place.

I accept the points being made. But these uncertainties and alleged inconsistencies arise only because of AGL's failures to properly retain documents and / or failures to set out these important issues on the suitability letter back in 2007.

What we do know is that the suitability letter refers to him earning £20,000 per year in a new job and his personal circumstances do tend to suggest only moderate living costs . And so, I've seen nothing showing that Mr S's debts weren't addressable and repayable in other ways. I've also seen no evidence that the adviser first considered that he might rearrange his debts, as opposed to just irreversibly transferring away from what was likely a valuable, index-linked DB scheme guaranteed for life.

The suitability letter is also silent on other options that might have been considered. One credible option might have been to assess whether his existing DB scheme was one from which he could access early. This would have no doubt involved actuarial reductions (due to the scheme being crystalised early and drawn upon for longer). But this would have still retained all the elements of a DB scheme which are typically regarded as very useful – such as a pension for life and insulation against inflation. An analysis may have shown that remaining in the scheme could be worthwhile and still allow Mr S the capacity to pay down the debts he was clearly troubled by.

The absence of analysis by AGL is therefore a shortcoming.

<u>Other considerations</u>

AGL asks me to consider that Mr S's approach was an unsolicited request and that he went to AGL, rather than the other way around. I'm also asked to consider that Mr S was given several warnings about leaving a DB scheme and was "*informed about the potential reduction in pension and importantly, knew about the risks"*.

Again, I do understand the points being made. However, it's important to point out that it was AGL which was the regulated party here, not Mr S. I think it's likely that he was a relative amateur in these matters given that he had no savings or investments and had no other pension. He was also paying for regulated financial advice and so had every right to expect that engaging a professional would thus result in advice that was firmly in his best interests.

In this context, whilst I accept that Mr S may indeed have received some warnings, it's a fact that AGL nonetheless still advised him to transfer away. This means that AGL carries the responsibility rather than its client. AGL should have known of the regulator's starting position on these transfers and I think the adviser focussed wholly on paying debts – which while laudable when looked at through a certain lens – probably could have been addressed in a number of different (and more suitable) ways.

Mr S was also still some way off retiring. But I think it would have been necessary for the adviser to consider the obvious question that, if taking a substantial amount out of his pension savings at this point, then what were the prospects of a retirement income in the future which met Mr S's needs? I've seen nothing that shows this was properly considered. I've also seen that Mr S was assessed by AGL as having an attitude to risk of 5/10. But given he appeared to have absolutely no capacity for loss, and no apparent investment experience to call upon, I think even this moderate risk attitude was higher than it ought to have been. The dilemma was therefore whether sacrificing 25% of an already modest pension now was worthwhile, when considering what his retirement needs were.

<u>Would Mr S have insisted on transferring?</u>

The approach to defending the complaint by AGL implies that Mr S's circumstances were so dire that he would have always wanted to transfer even if the advice had been different. But I don't accept the portrayal of Mr S as being in a kind of 'no win' situation. The evidence simply doesn't justify such a bleak assessment and there's nothing showing that changes to his lifestyle, debt restructuring or using his existing pension more imaginatively, wouldn't have been much more suitable than leaving the DB scheme.

I think if the adviser had put forward analysis showing Mr S could be worse off in retirement, and his debts could still be addressed without transferring, Mr S would have also followed that advice.

<u>Fund selection</u>

I can't yet say if Mr S has actually lost any money as a result of transferring. And his balance of £39,000 as of 2024 will of course need to take into account that he has withdrawn funds.

But as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr S 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 further consider the suitability of the investment recommendation. This is because he should have been properly and genuinely 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.

Summary

I've considered all the issues in this case with care.

Although there's some key information missing, AGL is responsible for this failing. However, I think it's more likely that by transferring away from this DB scheme, the analysis would have shown Mr S would probably receive less pension benefits in the longer term.

I agree with our investigator who commented that AGL failed to explore what other options Mr S probably would have had with regards to paying down his debt and I see no reason why these liabilities could not have been addressed by engaging with the relevant parties and seeking payments to be made over time or through an amended payment plan.

Alternatively, there was an option to explore whether Mr S could access his existing DB scheme early without the need to transfer. What Mr S was irreversibly giving up was a guaranteed pension which probably had long-term and substantial index-linking attached. Although not a large pension, it made up nearly all of his current security in retirement, providing as it did a pension for the rest of his life.

I do accept that AGL provided Mr S with a certain amount of information. It also warned him that he'd lose important guarantees by transferring. But the adviser focussed unilaterally on one area and still advised him to transfer out. I think Mr S wholly relied on that recommendation.

On this basis, I don't think AGL should have advised Mr S to transfer away from his DB scheme.

I think AGL should compensate Mr S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

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

AGL 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.

Compensation should be based on the scheme's normal retirement age of 65, 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 Mr 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, AGL should:

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

Redress paid to Mr S 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, AGL 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 S'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 AGL should pay Mr S for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr S in his particular circumstances. This pension at the time represented a substantial proportion of his retirement provision and by the time he realised the potential shortfall, he was close to retirement age. In his situation I think the thought of losing material benefits would have impacted Mr S. So, I agree the recommended payment of £200 for distress and inconvenience. AGL should pay Mr S 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 £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 The Aldra Group Ltd to calculate and pay Mr S 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 that The Aldra Group Ltd pays Mr S the balance.

If Mr S accepts this decision, the money award becomes binding on The Aldra Group Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr 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 Mr S to accept or reject my decision before 13 March 2025.

Michael Campbell
Ombudsman