

The complaint

The estate of Mr A complains that Whiting Group Limited (Whiting) provided him with negligent financial advice to access and transfer the benefits of his Defined Benefit Occupational Pension (DB Scheme), causing him a financial loss.

What happened

The complaint has been brought against Whiting, in relation advice provided to Mr A by one of their appointed representative firms. For ease of reference, I'll refer only to Whiting throughout this Decision.

Mr A brought this complaint to Whiting, with the aid of a solicitor firm acting as his representative. Sadly, Mr A passed away in June 2023, before this complaint could be brought to our Service, and so the complaint has been continued in the name of his estate. However, for ease of reference, I'll refer to Mr A throughout this Decision.

Mr A was employed by 'U' between October 1986 and February 1998. During this time, he built up benefits in U's DB Scheme.

In April 2001, Mr A approached a financial advisor, who was part of the Whiting Group. He wanted to start taking some of his benefits immediately (he was 53 at the time). He wanted to take the maximum Tax-Free Cash (TFC) that was available and start drawing as much pension income as possible at that time as well to supplement his income.

Enquiries were made with the Trustees of the DB Scheme to establish the value of Mr A's pension at that time. In summary, those details were as follows:

- The transfer value of Mr A's occupational pension was £36,594.46.
- This was made up of two parts, a protected part amounting to £9,823.04, which couldn't be accessed until Mr A reached age 60 at the earliest, and a non-protected part which amounted to £26,771.42.
- Mr A had also been paying additional sums into a separate Additional Voluntary Contribution (AVC) policy. This was separately valued at £3,043.14.

As part of their fact find, Whiting obtained the following information about Mr A's personal financial circumstances, and his objectives:

- He was aged 53, and working as a dispatch manager, with a gross salary of £15,000 plus £300 average overtime per year. His wife, a dinner lady, earned £6,000 per year.
- They owned a house valued at £50,000, with a £34,000 mortgage outstanding.
- Their monthly outgoings were approximately £1,207, made up of mortgage (£350), Utilities (£125), Loan/HP agreement (£220), Council Tax (£82), Household (£300 approx.), travel (£25), and credit and miscellaneous (£105). Monthly savings of £60 were also made.
- There were £1,050 of other joint debts – credit card and overdraft.
- Mr A said his main priority was to raise funds to assist with the refurbishment of his garage. He also wanted to start receiving pension income to supplement his salary.

And, after considering the relevant information, Whiting made the following recommendation:

- From the non-protected element of the funds, Mr A would receive TFC of £12,092.22 (after payment of £350 fee to Whiting).
- The remainder of the non-protected funds, £12,449.25, were to be used to purchase an annuity, paying an immediate annual pension of £786.48 before tax.
- The AVC funds would also be used to purchase a separate annuity of £158.76pa.
- The protected element of the funds, £9,823.04, were to be used to set up a pension plan with Aegon which Mr A would be able to access from age 60 onwards.

Mr A accepted this advice, and the TFC cash was paid to him in October 2001. The two annuities were set up between October and December 2001.

Mr A transferred the third ('protected') pension to another provider at the end of October 2012, in anticipation of drawing annuity benefits from that pension when he reached his 65th birthday in January 2013. Whiting played no part in that further transfer and annuity process.

In May 2023, Mr A complained to Whiting. He believed the advice he received to transfer away from his DB Scheme was negligent and had caused him a financial loss. In particular, he made the following summarised points:

- He wasn't adequately informed of the benefits he would be giving up by transferring out of his DB scheme, including death benefits and pension growth. Had he been made aware, he wouldn't have transferred.
- Whiting didn't do enough to explore other ways of Mr A raising the cash he said he needed.
- The transfer wasn't in line with his stated investment objectives and exposed him to unnecessary risk.
- Mr A would be exposed to high levels of fees and charges, none of which would apply if he remained in his existing employer scheme.

Responding, Whiting said they believed Mr A had raised the complaint too late for our Service to consider. However, I disagreed, and issued a Jurisdiction Decision explaining why I'd concluded it had been brought in time. One of our Investigators then considered the merits of Mr A's complaint. She upheld it for the following summarised reasons:

- There was no documentation from the time of the advice that explained why Mr A needed to raise the funds for the home/garage improvements.
- There was no reason to sacrifice the valuable benefits afforded by Mr A's DB Scheme for extra income, as his recorded income and expenditure figures showed a surplus.
- Whiting's advisor didn't ask enough questions to properly understand what Mr A's attitude to risk was, and not enough to conclude he was a 'balanced' investor.
- There was no evidence that Whiting had carried out a Transfer Value Analysis exercise (TVAS) or compiled a TVAS report.
- The transfer advice imposed and created extra charges Mr A would have to pay, or have deducted from his new pension – all of which would have been avoided if he didn't transfer away from his DB Scheme.

Our Investigator set out a loss calculation that Whiting would need to follow to place Mr A's estate back in the position it would have been in had the advice not been given.

Whiting disagreed with our Investigator. They felt she'd made some fundamental mistakes in her assessment. They said she was wrong to conclude they should have undertaken a TVAS exercise, given most of the pension funds were taken at the time of the advice, with

only a small proportion transferred away from the DB Scheme to a different policy. They also felt she'd reached an unrealistic conclusion on the issue of affordability in the context of the other options available for raising the 'garage' funds.

Whiting asked for an Ombudsman to reconsider this complaint, and so it's been passed to me to undertake a fresh review and issue a Decision accordingly.

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.

And having done so, I essentially agree with the outcome reached by our Investigator and uphold this complaint. I've taken into account relevant law and regulations, rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I've reached conclusions based on the balance of probabilities - what I think is more likely than not to have happened based on the evidence available and relevant wider circumstances.

The applicable rules, regulations and requirements

Whiting provided their advice in August 2001. And whilst Whiting were previously members of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), the Personal Investment Authority (PIA) took over responsibility for LAUTRO businesses in 1994. The PIA also took over responsibility for businesses regulated by Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) at that time.

PIA adopted the LAUTRO and FIMBRA Rules, which applied at the time Whiting provided their advice. Relevant here is the LAUTRO Code of Conduct at Schedule 2 of the Rules, which required financial advisers to exercise "*due skill, care and diligence*", and "*deal fairly with investors*". Paragraph 6 of the Code required advisers to give best advice, which included that they should not:

"Allow the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages".

Paragraph 8 required the adviser to consider the consumer's financial position generally and to all other circumstances. This included rights under an occupational scheme, requiring them to recommend a plan that was most suited to the consumer.

I refer also to the LAUTRO Enforcement Bulletin 31, issued in June 1994 which, amongst other things, provided detailed guidance on what a member business needed to do/consider when dealing with/advising on the transfer of defined benefit pension policies.

Commenting on 'investors' who had deferred benefits in a final salary occupational scheme (as here), the bulletin explained that an adviser's process should include procedures that:

"assess prospective investor's attitude to risk and security...

...ascertain...career aspirations and desired retirement age and to consider what a realistic retirement age would be, having regard to the size of the transfer value and the extent to which it can be converted into a stream of income before state pension age...

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

And

“The various steps in this process make it most unlikely that pension transfer business can be concluded on the basis of a ‘single visit’ sale.

The bulletin also provided guidance on what an adviser’s recommendation letter (the ‘reason why’ letter) should include. Of relevance here, it said:

“The main purpose of the ‘reason why’ letter is to confirm the advice given to the investor and to explain why that advice is suitable [my emphasis]. That explanation should take explicit account of the alternative of remaining within the occupational scheme.

[It] should demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made...

And, the PIA expected:

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

It’s against these rules and guidance that I’ve considered whether Whiting’s adviser provided suitable advice to Mr A – and having done that I don’t think the adviser did. I’ll explain why.

The TVAS

Before addressing the crux of this complaint, I want to begin by responding to Whiting’s unhappiness with our Investigator’s conclusion the absence of a TVAS was a failing on their part. In the specific context of this complaint, I agree with them. A TVAS is designed to help those who have been advised to invest the value of their DB scheme until a later date, to understand how the benefits they may be able to achieve through investment would compare with the DB benefits at retirement. With only a small part of the funds being invested here (the protected element, accounting for barely a quarter of the total transfer value), there would have been no meaningful comparison to make at the time the advice was provided.

Notwithstanding, I think it’s clear (from the evidence I’ve seen) there were material inconsistencies in the information obtained at the time of the advice that weren’t identified or explored by Whiting’s advisor. And accordingly, I haven’t seen any evidence suggesting the advice provided was in Mr A’s best interests, or that the disadvantages of immediately accessing/transferring his DB Scheme pension were fully explained to him. I’ll explain why.

Mr A’s reasons for wanting to transfer

Mr A said he needed funds for two reasons – to refurbish his garage primarily, but also to supplement his income. Mr A was consistent throughout his exchanges with Whiting about the garage refurbishment. I’ve no doubt he approached them with that goal in mind, and that it was a genuinely held wish when he sought advice in 2001.

But the purpose of a pension is to provide for an income in retirement. There must be very strong reasons for accessing benefits early, especially if that involved a transfer away from a DB Scheme with its guarantees and protections.

However, there are some inconsistencies within the documents, as well as missing relevant information regarding the amount Mr A needed to raise for this ‘project’.

Whiting’s fact-find asked about anticipated capital expenditure. Whilst the copy of the document I’ve been provided is not completely clear, it appears to confirm the word “Garage” was recorded. But it appears to confirm only £1,500 was “immediately required”.

There is no other commentary regarding how the remainder of the TFC would be applied, or why it was needed. Mr (and Mrs) A only had recorded other debts of £1,050, plus an unspecified amount owing on either a HP or loan agreement (costing £220 per month). So, even allowing for the £1,050 debts to be repaid, that still would have left a significant sum available. There is no evidence I've seen that Whiting's adviser identified this discrepancy.

I've also looked at Mr (and Mrs) A's income and expenditure. Echoing what our Investigator said, the figures recorded there show a surplus, even before the pensions were accessed. Their total gross income was about £21,000pa, with Whiting's advice report recording they had a net disposable income of £8,557pa before tax and NI deductions (although I think the report appears to have made a small mistake in its calculation of the net income amount, overstating it slightly).

Mrs A's earnings amounted to £6,000, and so it's unlikely there'd have been any material deductions made from that. Mr A earned £15,000. Whilst I can't see any evidence that Whiting's adviser sought to clarify what his net income was, it's fair to assume that Tax and NI deductions would have been made from that sum. Having considered the basic rate tax and NI rates at that time, coupled with the tax thresholds that existed, I think total deductions in the broad region of £3,000pa were likely to have been made – meaning Mr A would have had a net annual income of about £12,000. Adding Mrs A's income of £6,000, that equated to an approximate household net income of about £1,500 per month. As stated above, their total monthly expenses were about £1,207, leaving approximately £300 per month surplus.

The fact-find also contained a number of statements, asking Mr A to tick which ones applied to him. He selected the following:

- *"My current income is less than my outgoings*
- *I am aware that my future pension benefits will be reduced if I take benefits now*
- *Extra income from my pension benefits will be used for additional savings [and] to supplement my income"*

Whilst I've no reason to doubt it when Mr A said he wanted extra income, I think the evidence, as available, clearly suggests that his income was *not* less than his outgoings (or at least on a joint basis). The figures in the fact-find are clearly not consistent on this point, and yet I can't see any evidence the adviser picked up on this or sought a better understanding of Mr A's finances.

Mr A's Attitude to Risk (ATR)

Before commenting on the risk appetite Mr A chose, it's worth noting an earlier question in the fact-find about financial objectives (Section 4), which asked Mr A to assign a priority rating to certain objectives. Increasing his income and raising immediate cash were marked as being a high priority for Mr A – unsurprisingly, given what his stated objectives were for approaching Whiting in the first place. In addition, 'Financial Security' was also marked as a high priority, with 'Provision for Retirement' as a medium one.

The form also contained five levels of risk for Mr A to choose (discounting 'ethical', which his answers in the 'objectives' section suggested were of no interest to him). These ranged from Adventurous to No Risk (saver). Mr A chose the middle level – indicating he was a 'balanced' investor, who wanted a spread of mainly 'medium' risk investments that "*do not fluctuate wildly in value, but with some slightly higher risk and some more cautious*".

I haven't seen any evidence this was discussed with Mr A in any detail, or at all in fact. And, looking at Mr A's (and Mrs A's) personal circumstances at the time, I question whether this was an accurate reflection of Mr A's risk profile. Aside from Mr A's home, his DB pension was his only other investment or asset. Both his and Mrs A's income at the time were relatively modest. There were no identifiable signs that Mr and Mrs A's financial situation

was going to change before they both reached retirement age in 10-15 years' time. And aside from basic state pensions, Mr A's DB pension was the only other means of providing a retirement income for him, or any material extra spouse income should he die before Mrs A.

As explained above, Mr A was clear that financial security was a high priority for him at the time of the advice. But I don't think Whiting's adviser did enough to take this into account when assessing Mr A's risk profile. Had the adviser done that, I think it's unlikely Mr A would have said he had a balanced attitude to investment risk. I think, based on his circumstances, he'd have been more likely than not to say he was a more cautious investor.

I appreciate an ATR exercise is generally undertaken when considering transferring a DB pension to a private one, to ascertain how much risk an investor wants to take with the transferred funds and where/how they are invested. Whilst this substantially isn't the case here – given only a small percentage of Mr A's DB pension was invested in a new one – I think the principle is relevant. It's about the adviser being aware the DB transfer Mr A was requesting came with significant longer term financial risks attached. The transfer would likely have had a serious negative impact on Mr A's ability to fund his retirement, which was not consistent with his desire for financial security. I think, based on the requirements in place at the time, this should have been clearly discussed with Mr A. From what I can see, there is no evidence it was.

Death Benefits

These are one of the most important benefits associated with a DB Scheme. They allow for payment of benefits to a surviving spouse, which would be index linked (or at least increasing at a defined rate each year). The documents confirm that, as at the date of the advice, Mrs A would be entitled to death benefits of a lump sum of £3,088.73, plus a dependant's pension of £1,402.92pa. These sums would escalate over time, in line with the DB scheme rules, to take account of inflation etc. In other words, Mrs A would have been guaranteed an increasing pension each year, and a minimum of £1,402.92pa if Mr A passed away at that time (2001).

I can see Death benefits were mentioned in Whiting's report, and so presumably were discussed at some point with Mr A. However, their inclusion was limited to highlighting what I've explained above. There is no detailed mention in the report of what the (likely significantly reduced) death benefits would have been for Mrs A if Mr A proceeded with the DB Scheme transfer in the way he sought. It wasn't made clear the risks Mrs A was being exposed to, in terms of the death benefits she'd be losing, compared to the death benefits that would remain were Mr A to proceed with the DB Scheme transfer in the way intended.

The SE personal illustration for the 'protected' transfer plan provided illustrations of what that plan might be worth when Mr A reached age 65, based on assumed growth rates of between 1% and 9% - a potential pension for Mr A at that time of between £408pa and £1,478pa. This would also increase in value each year, at a fixed rate of 3%. It confirmed Mrs A would be entitled to a pension valued at 50% of those sums.

As confirmed above, Mr A also took annuities of £786.48pa and £158.76pa. Whilst these guaranteed these payments for five years, there was no other spouse death benefit element. So, in effect, the transfer away from the DB Scheme would have reduced Mrs A's death benefits from a guaranteed (and increasing) amount of £1,402.92pa in 2001, to a potential amount of between £208pa and £739pa – which already took account of potential growth up to the date of Mr A's normal retirement date in 2013.

Put simply, the death benefits that would become payable to Mrs A would have been significantly less after Mr A transferred away from the DB Scheme. From what I can see this wasn't discussed with Mr A or made clear in Whiting's recommendation literature. Mrs A had a small income, and the documents I've seen suggest she had no other retirement income. There were no savings, and no obvious prospect of 'downsizing' the matrimonial home to release funds to help with her retirement needs. Given the small nature of her income at the

time (£6,000pa), and the likelihood that her post-retirement income would consist of a state pension only, I think serious consideration should have been given to explaining in detail the risks Mrs A was being exposed to by Mr A giving up his DB scheme benefits. I can see no evidence of any such detailed discussion having taken place.

Did Mr A need to transfer his OPS at all?

Based on what I've said above, I'm not convinced there are any evidenced and compelling reasons why Mr A needed to undertake the transfer. He was 53 at the time of the advice and so was only 12 years from having been able to access his DB Scheme benefits in full, and without any early payment actuarial reductions.

The information obtained by the adviser at the time doesn't contain any reasons why Mr A needed to access such a large amount of TFC. And whilst the suitability report does provide some cursory comment on other options for raising cash (including remortgage and personal loan, discounted by Mr A because he didn't wish to increase his expenditure), I think this is of limited importance. This is because of the report's failure to properly address the reasons for Mr A needing TFC of the sum in question. And, practically speaking, if Mr A did only need £1,500-odd to repair his garage, the evidence suggests he (and Mrs A) had a reasonable income surplus allowing that sum to be saved within a 12-month period at least.

Furthermore, if there was a desperate need for Mr A to access a cash sum, Whiting could have looked in more detail at Mr A accessing his DB Scheme benefits at that time, as the DB Scheme allowed Mr A to start taking benefits from age 50, albeit on reduced terms.

At the time of the advice, Mr A had deferred DB benefits that would pay him a lump sum of £6,879.08, plus an annual pension of £2,041.44 when he reached his 65th birthday (both of which would increase each year until they were accessed). The Rules of the Scheme allowed early access, but with benefits reduced by 5% for each year (from age 60, not 65). So, whilst there was no analysis undertaken at the time of the advice to ascertain the exact amount Mr A *could* have taken from his DB Scheme, it's reasonable to assume it's would have been in the region of 35% less (seven years at 5%) than the above amounts.

This would have provided a smaller lump sum than the £12,092 he received, but still noticeably more than the £1,500 recorded as being urgently needed in the fact-find. And he'd have still been in receipt of a pension broadly equivalent to the amount he received after transferring – which would have continued to increase in value each year, and which would have retained similarly increasing death benefits for Mrs A.

And whilst I acknowledge the letter Mr A signed which was dated 24 August 2001, confirming he was aware the transfer *"could detract from my potential deferred pension benefits and I understand that this course of action may not necessarily be in my long-term interest"*, I don't find that persuasive.

As I've explained, there's no evidence Whiting's adviser explained in any detail about the risks Mr A was agreeing to, and no evidence the adviser fully explored Mr A's financial situation or identified the inconsistencies I've referred to. As such, I don't think Mr A was in a suitably informed position to agree to the statement in that letter.

Of course, I also must consider whether, had Whiting advised Mr A to remain in his DB Scheme, he'd have chosen to go ahead with the way he accessed and transferred his DB funds at that time. I've thought very carefully about this, regrettably without the opportunity to speak to Mr A and ask him directly. So, I've had to think about what I think seems most likely would have happened in this situation, based on the information I have. And having done that, I'm not persuaded Mr A would have insisted on transferring out in the way he did.

Mr A was an inexperienced investor, who approached Whiting to provide him with suitable advice. For the reasons I've explained above, I think Mr A's DB Scheme pension was essential to one of his desired goals – financial security. And I think if the key risks

associated with early access/transfer were properly explored and explained, it seems more likely than not that he would have chosen to remain in his DB Scheme until retirement.

Accordingly, for all the reasons I've explained above, I don't think the advice Whiting's adviser provided was in Mr A's best interests, and nor do I think it was suitable.

Putting things right

My aim would ordinarily be to ask Whiting to undertake prescribed calculations to put Mr A back in the position he would have been in had he remained in his DB Scheme, taking account of the fact that he did receive the benefit of elements of his pension from age 53 onwards. Here, however, Mr A has since passed away, and so any redress in terms of what he may have lost out, prior to his death, will need to be paid to his estate as a lump sum.

Further, whilst the majority of what I've said above focusses on the effect of the DB Scheme transfer, I must be clear that redress will also need to take account of the advice to take immediate benefits from the additional AVC policy – the advice to access those funds was part and parcel of the same advice process.

So, a fair and reasonable outcome would be for the business to put the estate of Mr A, as far as possible, into the position it would now be in but for the unsuitable advice. I consider Mr A would have most likely remained in the occupational pension scheme if suitable advice had been given.

Whiting 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>

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 the estate of Mr A'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, Whiting should calculate and offer the estate of Mr A redress as a cash lump sum payment.

Redress paid directly to the estate of Mr A 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), Whiting may make a notional deduction to allow for income tax that would otherwise have been paid. Mr A's likely income tax rate in retirement is presumed to have been 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.

The compensation amount must where possible be paid to the estate of Mr A within 90 days of the date Whiting Group Ltd receives notification of the estate's acceptance of my final decision. Further interest must be added to the compensation amount at a rate of 8% per annum simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Whiting Group Ltd to pay the estate.

My final decision

For all the reasons I've set out above, I uphold the estate of Mr A's complaint against Whiting Group Ltd and require them to put matters right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr A to accept or reject my decision before 22 August 2025.

Mark Evans
Ombudsman