complaint

Mr H has complained about the advice he received from Total Wealth Solutions Ltd (referred to from now on as TWS) to transfer his personal pension to the Green Retirement Plan (GRP). He thinks the investments GRP made were too risky and he thinks he's lost out as a result.

background

Mr H was initially approached by an unregulated third party who referred him to TWS.

In August 2012 TWS provided Mr H with a report comparing the GRP and his existing pension arrangement. The report said it would provide advice on the potential transfer but stated that:

> *'For the avoidance of any doubt the responsibility for assessing the 'suitability' of any investment within The Green Retirement Pension Plan 'rests with you and the Trustees of the scheme. If you have any doubts about the investment options proposed, you should seek advice from a suitably authorised and qualified adviser. Total Wealth Solutions will not provide financial advice in this area.'*

At the time of advice Mr H was 43 and married. He was employed as a nurse and had net monthly earnings of £1,400. He had a house worth £70,000 with an outstanding mortgage of £26,000.

It was recorded that Mr H wanted *'to personally take control of your pension funds and how they were invested.'*

Mr H agreed to transfer his pension provision to the GRP in the hope of enhancing his benefits on retirement. He had a '*realistic approach to investment risk'*. This was a balanced attitude to risk.

The report set out, that despite the existing provider offering a number of alternative funds, Mr H wanted to invest in the GRP. Under the GRP the trustees would make the investment decisions as to where the funds were to be invested. It was stated that the funds would be invested in one fund or a portfolio of funds. Transfers out would be available at any time subject to the liquidity of the funds Mr H was invested in.

The report from TWS also warned that:

> '*These investments can be held within your occupational pension although you should only invest in them if you are fully aware of the risks associated with the investment as they are aimed at sophisticated investors. We are not responsible for ensuring that you are aware of the risks before the investment is purchased.'*

And finally it stated:

> *'I can confirm however that we will not be reviewing your assets and holdings at any time and out (sic) is purely based on the recommendation of an alternative provider of your pension funds, we have made no recommendation as to how your funds should be invested as you personally wished to research and choose your own investments.'*

There were illustrations of the projected benefits at age 65 from the existing arrangement and from the new plan. These indicated that at age 65 on all the assumed growth rates of 5%, 7% and 9% the new plan produced lower projected funds. The reduction in the projected fund was between 6% and 9%.and the report stated that the new plan would need to provide an additional growth of 1% p.a.c. to match the benefits in the former plan.

It was noted that a stakeholder pension plan would be cheaper but that this was not what Mr H wanted.

A transfer value analysis report on the transfer value of £21,053.59 also showed that the new arrangement was more expensive than the old plan.

The report was left with Mr H and it was left with him to decide whether or not to transfer.

The transfer went ahead and the funds were transferred to the GRP where the investments in the GRP were invested in either the Para Sky plantation or in a corporate bond fund The decision where to invest Mr H's funds was left to Mr H and the business has stated that it did not provide advice on where the funds should be invested. It has been confirmed that Mr H did not invest in the Para Sky plantation fund but in the Ecoquest corporate bond fund. This provides a guaranteed 5% return and repayment after a 5 year term.

The current scheme trustee is trying to sort out the records and to pursue the former trustee for the records that they have.

The trustee has stated that the corporate bonds mainly mature in 2017 and it is hoped by the new trustees that at that point members' interests will identified and then transferred to a new reputable pension provider.

Our adjudicator upheld the complaint. She said:

- TWS hadn't acted fairly. It was required to know its customer and act in their best interests. She didn't think it could've done this without considering the suitability of the investments within GRP.
- The report said it would provide advice on the potential transfer. So it was reasonable for Mr H to think he was being advised.
- TWS hadn't said whether it was recommending the transfer or not. But it should've done this, and given reasons for its recommendation. As it didn't, Mr H couldn't make an informed decision.
- She didn't know what investments had been made for Mr H. But she didn't think either of the choices available was suitable. One was high risk and the other might not be realisable if Mr H wished to sell the investment before the proposed end of the term. Mr H had no experience of investments, and wasn't in a position to accept this level of risk.
- If TWS had considered Mr H's circumstances and the investment choice available in GRP, she didn't think it could reasonably advised making the transfer. And if TWS had advised against this, she thought Mr H would've stayed in his existing plan.

TWS didn't agree. It said:

- It told Mr H it wouldn't provide investment advice. He agreed to this. Mr H either chose the investments on his own, or took advice elsewhere.
- Mr H confirmed his attitude to risk was 'realistic'. And he was already invested in an above average risk fund.
- Mr H's money is invested in a corporate bond with Ecoquest. The interest payments due have been made. So he hasn't incurred a loss. In fact, the bond may have provided a higher return than his previous plan.
- Ecoquest is based in the UK and listed on the Cypriot Stock Exchange. The bond was set up with strict non-payment penalties. Mr H was aware the bond was fixed for five years.
- Ecoquest has experienced problems with one of the investments it made, but the company's directors have injected extra capital into the business to offset this.
- It believes Mr H was offered a cash incentive by a third party to transfer.

The adjudicator was able to obtain some further information from GRP's new trustee at this point which confirmed:

- Mr H's initial investment was in the Ecoquest corporate bond. Some of the interest payments received had been reinvested in loans on solar panels leased by local authorities.
- The Ecoquest bond is due to mature in November 2017. Interest payments are fixed at 5% a year.
- The interest payments due have been made to date. And GRP has seen evidence to suggest the company will be able to make the remaining interest payments and return the capital at the end of the term.
- Due to various issues with the scheme records and registration, it's unlikely Mr H can transfer out of the plan at the moment.
- It might be possible to redeem or sell Mr H's investments in theory. But the scheme isn't in a position to try this at the moment.

The adjudicator considered the new information and TWS's arguments but she didn't change her view. She said:

- It didn't matter what TWS's client agreement said, if this agreement wasn't fair or in line with the rules TWS had to follow. And she didn't think it was.
- She accepted Mr H had a balanced attitude to risk. But she didn't think the Ecoquest investment matched this. The company had only recently been set up. It was engaged in high risk activities (investing in overseas forestry and energy projects). Mr H's whole pension is tied up in this company and at risk if it fails (regardless of any non-payment penalties in place). She didn't agree this was a suitable investment. She thought it was much riskier than the managed fund Mr H's money had previously been invested in.
- Mr H says he didn't receive a cash incentive to transfer to GRP, and there was no evidence to show he had.

- If unsuitable advice had been given but there was no loss and the customer had the option to transfer out of the unsuitable investment, and this service wouldn't recommend redress. But Mr H is stuck with the investment at the moment. And there's no guarantee he'll get his money back when the bond matures in 2017.

TWS remained unhappy with the adjudicator's view, and the redress she'd suggested. It said:

- No redress should be awarded unless Mr H can prove he's incurred a loss. It's likely his money will be returned in full when the bond matures in 2017.
- Mr H will be worse off if TWS pays him compensation now. He'll have to pay his CMC 25% of the amount received. If he waits until his money is returned in 2017, he won't need to pay the CMC anything.
- The investment isn't illiquid and it's not fair for it to be valued as nil in the loss calculation. Mr H agreed to take the bond out knowing it was for a five year term.
- If compensation is paid now, TWS would expect Mr H to repay it in 2017, even though he won't be able to withdraw any money from the plan then, as he doesn't turn 55 until 2023. It's unreasonable to say Mr H can't wait for his money until 2017, but TWS must wait until 2023.
- If Mr H can't repay any money received from the investment in 2017, it will expect Mr H to repay this amount with interest in 2023.
- If Mr H agrees to wait until the investment matures in 2017, it's willing to pay him £200 as a gesture of goodwill now. It will also provide a free review and help him transfer to a new plan in 2017.

Mr H didn't accept the offer. And the adjudicator didn't think it was fair. She said:

- Mr H is entitled to use a CMC. His agreement with it isn't relevant to his complaint. And we wouldn't change the redress because a CMC is involved.
- She'd made Mr H aware of TWS's points about the CMC's fees and the possibility of the investment paying out in 2017, but he still felt compensation should be paid now.
- We can't put the complaint on hold until we know whether the Ecoquest bond pays out or not. Where we decide unsuitable advice has been given, the redress we award is intended to put the customer back in the right position – at the time we consider the complaint.
- It's fair to treat the investment as having a nil value, as Mr H can't redeem it or sell it at the moment.
- It's not ideal that TWS won't be able to recover any money Mr H receives from the investment until 2017. But as suitable advice wasn't given, it's fair TWS compensates Mr H. As TWS has argued that it doesn't want to take ownership of the investment. Leaving it in Mr H's name and getting him to agree to repay anything he receives is the only other fair option.

- We'd expect Mr H to repay the net amount he receives from the plan (including any growth on anything he gets back from the investment), once he turns 55. We wouldn't expect him to repay TWS before he can access the money. And we wouldn't expect him to pay interest on this either.

As the firm did not agree the complaint has been referred to an ombudsman.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

(1) what was suitable advice?

TWS said it was made clear to Mr H that the scope of its agreement restricted its advice to just choosing the right pension product Mr H signed a letter confirming he understood this.

COBS 2.1.1R required TWS to act *"honestly, fairly and professionally in accordance with the best interests of its client."* This is an independent duty; TWS can't simply say that the customer had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in Mr H's best interests. I'm also mindful of the principles for business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care)*.

Therefore, although Mr H may have stated that he had carried out his own investigations and wanted to invest in the GRP, he still approached TWS for advice on the transfer. TWS still had an obligation to consider whether the proposed transfer was in his best interests. TWS should have recognised that as a nurse Mr H was unlikely to have the relevant experience or knowledge to understand the risks of the transaction he was carrying out. The GRP had set out clearly that the investments available under the GRP were only suitable for sophisticated investors and in my opinion it should have realised that Mr H was not such an investor.

TWS couldn't reasonably rely on Mr H receiving separate advice on this investment. It had an independent duty to give suitable advice.

COBS 9.2.1 required TWS to obtain the necessary information about the client's knowledge and experience relevant to the specific type of investment and the investment objectives. Having done so, COBS 9.2.2 required TWS to consider whether the transfers from the existing plan to the GRP met Mr H's investment objectives, he could bear the risks involved, and that he understood the risks.

Mr H was looking at transferring his personal pension to the GRP. In order to determine if the advice was suitable, or not, required TWS to understand what investment the GRP was going to invest in. TWS knew that was the sole objective behind the transfer. To be able to advise in accordance with the rules, it had to understand the risks associated with the proposed investment. Without this information, it could not say whether the transfer was suitable or not. GEN 2.2.1 states "*every provision in the Handbook must be interpreted in the light of its purpose."* The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that TWS closed its eyes from the purpose of the GRP would avoid looking at all of the factors that the rule (and the rest of Chapter 9) says are necessary to ensure suitability.

The Financial Services Authority (FSA) 2013 directive just restated the rules that would have applied at the time of the advice to Mr H.

(2) was the transfer suitable?

The proposed investment was highly illiquid. Mr H was transferring all of his pension provision to the GRP. He did not have any experience of investments allowed under the GRP. His fact find recorded he had no other investments and he therefore had a very limited capacity for loss.

TWS said that Mr H had a *"balanced"* attitude to risk. His answers to the attitude to risk questionnaire may have led to this categorisation. But that doesn't mean the investment was suitable. As well as Mr H's attitude to risk, the rules required TWS to consider Mr H's financial situation. It also required TWS to be satisfied that he was able to bear the investment risks. It failed to do this. Mr H didn't have the capacity for loss required for such a high risk investment.

The proposed investment in the GRP represented all of Mr H's pension provision. The only reason he transferred into the new arrangement was to invest in GRP. I think on any view, TWS should've advised Mr H that the transfer of a significant proportion of his pension provision to invest in GRP with the potential liquidity problems wasn't suitable. There's no evidence that the transaction was carried on either an 'insistent client' or 'execution only' basis.

(3) what would Mr H have done?

When looking back it's difficult to be sure what someone would've done if suitable advice had been given. I think, on balance, Mr H wouldn't have transferred to the GRP.

The GRP was recommended to Mr H by an agent. But TWS was a regulated independent financial adviser. I think any advice that the transfer wasn't suitable due to the high risk nature of the underlying investment would've been significant for Mr H and carried due weight - despite what the agent may have told him about GRP.

I have reached this decision on the balance of probabilities. Given the significant risks involved in investing in GRP, and the greater weight TWS's advice should reasonably have had, I'm satisfied this test has been met. On balance, I believe Mr H wouldn't have transferred had TWS given him suitable advice.

For the reasons above, my view is that the transfer of Mr H's pension plans to the new GRP was not suitable. I don't think that TWS gave him suitable advice and Mr H should be compensated for this.

(4) Valuation of the GRP and the payment of a transfer to a new pension plan for Mr H.

I consider that the approach to take in this case is for the investment in the GRP to be given a zero value and Mr H should give an undertaking to TWS that he would repay to them the amount that he can get from his GRP investment (which may be able to be sold next year) or when he reaches age 55 in 2023 or at any earlier date. Any repayments agreed by Mr H should be after deducting any tax that Mr H will have to pay on the payments.

fair compensation

My aim is to put Mr H in the position he would now be in if he had received suitable advice by TWS. I think that he would have: a) kept his existing pension; and b) wouldn't have invested in GRP. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. The involvement of third parties - the SIPP provider and GRP – mean much of this is beyond this service or the business's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's unlikely that the investment can be sold before July 2017. While it's complicated to put Mr H back in the position he would have been in if suitable advice had been given, I think it's fair that Mr H's compensated now. I don't think we should wait and determine each any every possibility before making an award. What is set out below is a fair way of achieving this.

If TWS had advised against the transfer, I think Mr H would've stayed in his existing plan with Friends Life.

what should TWS do?

To compensate Mr H fairly, TWS must:

- Determine the fair value of the investment in the GRP using the table below and then pay the difference between the fair value and the actual value.

  TWS should also pay interest as set out below.

  TWS should pay this amount into a new stakeholder pension plan for Mr H with a leading pension provider, allowing for any available tax relief and/or costs.

  If TWS is unable to pay the total amount into Mr H's pension plan, it should pay it directly to him. But if it had been possible to pay into the plan, it would've provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

  The *notional* allowance should be calculated using Mr H's marginal rate of tax at retirement. For example, if Mr H is likely to be a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr H would've been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

- Pay to Mr H £200 for the worry and upset caused.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
The Green Retirement	still exists	Friends Life Managed Ex	date of investment	date of my decision	8% simple per year from date

Plan		NM fund			of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

Because of the reasons set out above this should be set to zero in the redress calculation.

Alternatively if the investment can be sold then the value paid for the investment should be used in the above calculation and the level of redress payable should be appropriately adjusted.

my final decision

I uphold this complaint against Total Wealth Solutions Ltd and I direct it to pay redress as set out above.

Total Wealth Solutions Ltd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 November 2016.

Adrian Hudson
ombudsman