

complaint

Mr D complains that Morgans Ltd gave him unsuitable advice regarding transferring his Occupational Pension Scheme (OPS) and a subsequent transfer into Income Drawdown.

background

Mr D says he was first introduced to an adviser at Morgans Ltd through his union in 2002. He's told us he was an inexperienced investor and as the adviser was recommended through his union, he trusted her to act in his best interest.

Mr D was advised to transfer his occupational pension scheme (OPS) to a section 32 policy in 2002.

Mr D also held a personal pension plan in 2002. He told us he was advised by Morgans Ltd to transfer this pension into another personal pension plan and later transfer it to an income drawdown (*this will be considered under a separate case reference*).

Mr D says he was informed by his new advisor in January 2017, after they'd contacted his pension providers for information, that the advice he'd previously received to transfer his various pension policies had severely impacted his pension provision. And he was advised to make a complaint.

Mr D is unhappy with the advice he received. He says he lost the benefit of withdrawing a higher amount of tax-free cash when his section 32 policy was transferred. And he was paying a higher rate of tax on income he didn't need – from his income drawdown policy, which he later stopped. As such, Mr D raised a complaint with Morgans Ltd.

Morgans Ltd believed the complaint to be out of time, but they also said the advice provided was sound.

I issued a decision concluding that this complaint had been made in time and could be considered. After which our investigator looked into the merits. She upheld the complaint, explaining that suitable advice would've been to tell Mr D to remain in the OPS in 2002. She said that Mr D had no reason to transfer when he did. He could've waited until he was age 50 to consider his circumstances then. In transferring, his funds were put at unnecessary investment risk. And later the transfer from the section 32, which reduced the tax-free cash figure was clearly unsuitable given the rationale for taking benefits. And she concluded that had Mr D been given suitable advice, he wouldn't have taken his tax-free cash early. She also said that the adviser didn't establish the need for the tax-free cash as was required.

Morgans Ltd responded to say it disagreed with the investigator's findings and it would like a final decision. It said the investigator's view was very one sided and it didn't take into account that Mr D wanted to access his tax-free cash. It also said it could not have told him in more certain terms that by taking the action he desired, that he would compromise the guaranteed benefits he had. It believes the claim is being made with hindsight.

The information recorded at the time of OPS transfer in 2002

A fact-find wasn't completed – or if it was it's no longer available. However, the evidence we do have is that at the time of advice Mr D circumstances were:

- He was married with no dependent children and he wished to provide for his wife in the event of his death
- He was employed with a new employer and was earning less than his previous employment
- He was contributing to a group personal pension with his new employer
- He wanted to access his tax-free cash early – possibly at age 50
- His OPS was his main pension provision for him and his wife - he had a smaller protected rights personal pension
- He was an inexperienced investor
- His attitude to risk (ATR) was assessed as being cautious to realistic – which was described to mean Mr D wanted to benefit from long term investment, though he was wary of stock market volatility and therefore preferred low risk investments

Morgans Ltd recommended Mr D transfer his OPS into a section 32 policy. The letter said:

- His objective was to access tax-free cash even though he intends to keep working
- To do this the pension will also need to be taken but dependant on circumstances at the time various options are available and can be discussed at time of proposed retirement
- Mr D's pension will be diminished quite severely on early retirement but Mr D's requirement to access tax-free cash means that the pension will also have to be accessed
- Mr D would have more flexibility at retirement
- The maximum tax-free cash available from the OPS was £32,595 and this figure was also available at retirement at 50.
- The OPS figures aren't guaranteed and are just an indication of what benefits may be available. It could be more or less at chosen date of retirement
- The critical yield to retirement of 9% would usually be of concern. However, as Mr D intends to retire early and possibly as early as 50, the investment return needed to match his preserved benefits at age 50, were acceptable at 5.9%.
- Many people are swayed to transfer by the much enhanced pre-retirement death benefits. If Mr D were to die before 50 his wife would only receive £2,000 a year. However, once transferred Mr D's wife would receive the whole value of the fund.

In 2005 Mr D was subsequently advised to transfer his section 32 policy into income drawdown. Mr D was also advised to open an ISA to transfer the income he was withdrawing from the drawdown.

The reason given for the advice to crystallise Mr D's pension benefits at this stage was that he required the maximum tax-free cash but not income as he intended to keep working for many years. The reasons for the need for tax-free cash requirement weren't recorded.

In transferring into drawdown Mr D lost his protected tax-free cash amount from the OPS. And he received a considerably reduced figure. A comparison of the figures wasn't included in the recommendation and the loss of the protected tax free-cash wasn't mentioned either in any of the sale documentation.

It doesn't appear a fact-find was completed in this sale either. The investigator asked Mr D about his circumstances then and why he required the tax-free cash. He told us that at the

time he'd paid off his mortgage with redundancy money but was looking for additional cash to buy a caravan and a new car. He said he was considering re-mortgaging and other financing options but he was persuaded to take his tax-free cash from the pension and go into drawdown by the adviser.

my findings

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

The applicable rules, regulations and requirements

The advice to transfer was given in July 2002. Prior to December 2001, the relevant rules that were adopted by our predecessor the Personal Investment Authority (PIA) were FIMBRA and LAUTRO. But in December 2001, the Financial Services Authority introduced its COB rulebook which built on these two schemes. Importantly here, COB added the presumption of unsuitability:

"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."

Other selected requirements from the time that are relevant to this transfer are:

"COB 5.3.29A(4)

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."

A reason why (or equivalent) letter was required which:

"...explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme."

"...demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

The guidance required a Transfer value analysis (TVAS) for the first time, which was to be discussed with the investor in 'simple clear language'.

The regulators said that a fact find designed with pension transfers in mind would be needed, and set out the information required from the investor and the pension scheme.

'COB 5.3.22

1.

A firm must ensure that a transfer value analysis is carried out in accordance with COB 6.6.87 R - COB 6.6.93 R (Projections) before it makes any recommendation to a customer to transfer out of a defined benefits pension scheme.

2.

A copy of the analysis must be delivered with the key features document or otherwise provided to the customer before he gives consent to the application to transfer.

3.

The firm must take reasonable steps to ensure the customer understands the analysis, drawing attention to factors which do and do not support the recommendation to transfer.'

What it is I have to decide?

I need to decide whether the advice given to Mr D in 2002 and later in 2005 was suitable considering his circumstances at the time.

When providing the advice to Mr D in 2002 to transfer out of his OPS, the adviser needed to start with the assumption that it wouldn't be suitable to do so. There were also requirements to provide a fair and balanced picture of the advantages and disadvantages of transferring so that the customer was well informed to make a decision.

Looking at the sale documentation provided by Morgans Ltd, the adviser didn't meet the requirements of the time in terms of the information gathered and the information provided to Mr D. It doesn't appear that a fact-find was completed in either sales, the recommendation was lacking in detail and focused mainly on the benefits of transferring. I don't think the presumption of unsuitability was considered. This doesn't in itself mean that the advice was unsuitable but it's not a good base for suitable advice.

It appears a transfer value analysis of sorts was carried out – although only the summary of this in the recommendation letter is available. This said that the critical yield to normal retirement age was 9% and this was of concern – to the point where a transfer probably wouldn't be in Mr D's best interests.

Mr D's recorded attitude to risk (ATR) was cautious to realistic and that he was looking for long term investment returns, wary of stock-market returns and would like to compensate his risk by making low risk investments. So it's fair to say given Mr D's ATR, a critical yield of 9% over some 15 years would likely be unattainable.

At the time of advice it was recorded that Mr D's OPS at age 63 would pay him a £8,191.80 plus a temporary pension for three years of £3,708.12. He could also benefit from tax-free cash of £32,000. Unfortunately the documentation from the time doesn't show how much the pension would be reduced if full tax free cash is selected at retirement.

The adviser based their recommendation on Mr D wishing to retire early at age 50 due to his requirement for tax-free cash. In essence recommending that Mr D put at significant risk his primary source of retirement provision due to a need for tax-free cash three years in the future. However, no record was made of why Mr D needed the tax-free cash. This is a failure

to meet the COB requirement to clearly demonstrate why a transfer was in the customers best interest.

To put the primary source of retirement provision at such risk of being severely diminished, you'd expect a very compelling reason for taking the tax-free cash – and in doing so 'retiring' at 50. Yet reading the adviser's recommendation, the wording suggests the plan to take benefits at 50 was pretty loose. The adviser says in regards to retiring at 50, *'your pension at this stage will also need to be taken, but dependent on your circumstances various options are available and we can discuss this nearer to your proposed retirement...'*, *'You will probably 'retire' at 50...'*, *'however as it is your intention to retire earlier than 63 and possibly as young as 50'*. It doesn't sound like the need or want to retire at 50 is a definitive plan. And as I said no analysis was carried out as to why Mr D wished to risk his future pension benefits in favour of taking a tax-free cash lump sum at 50.

The adviser recommended transferring to a Section 32 to keep the maximum tax-free cash figure and to take benefits at 50. She said that the critical yield for this was 5.9% and classed this as acceptable. The latest discount rates published from the time had a rate of 6% for those three years from retirement.

But given Mr D's attitude to risk and there only being three years until the suggested retirement age of 50 – I don't think this was suitable advice even if a genuine need to retire at age 50 and take tax-free cash had been established. The critical yield was too high to justify that there was a likely advantage to transfer across those three years. And more importantly there was no need to transfer then at age 47 (to take benefits at 50), when Mr D could've stayed within the OPS and made that decision at a later date.

If he'd not transferred and been advised to wait until age 50 and he then changed his mind and no longer required tax-free cash, his benefits within the OPS would still have been secured. By transferring, the investment risk taken on couldn't be reversed (and guaranteed benefits lost) and the critical yield to normal retirement was very high. Transferring at 47 locked in a critical yield of over 9% if Mr D chose to wait until normal retirement age. And if he wish to take tax-free cash at 50 he still required 5.9% a year for three years just to match what he'd given up. Looking at returns at the time I think the likelihood of him exceeding his benefits from the OPS in that time were low. And that's not to mention Mr D was also advised to invest in a with-profits fund which when he came to take his benefits would bring about an early vesting charge.

Another reason Morgans Ltd recommended the transfer was the death benefits available outside the OPS. After the transfer, a lump sum would be payable to his beneficiaries, rather than in the form of dependants' pensions from the scheme. But there are two issues here – the first is that, Mr D had no particular health issues which would mean that death benefits for a 47 year old were of concern at that point. And the advice was to crystallise his benefits at age 50, therefore the potential death benefits advantages could end then. So in essence this *benefit* was only for three years and very unlikely to be a key concern for Mr D given he was in good health and only 47 years old. Furthermore, a 50% spouses pension benefit was of value itself, yet no recognition of this was given. I very much doubt that Mr D wished to transfer due to his concern of dying in the next three years and that a lump sum was that much more beneficial than the 50% spouses' pension in that time. Especially when there was a good chance the transfer was at the expense of his future pension benefits.

The death benefits were presented as an advantage of transferring without proper analysis of Mr D's actual circumstances or needs and requirements. This is another failure of the requirements under COB.

Another justification of transferring was the increased flexibility available upon transfer in terms of retirement benefits. This wasn't explained in any detail. But in actual fact, in transferring at age 47 and before any pension benefits could be taken, this course of action reduced Mr D's options and flexibility. I say this because in transferring, the guaranteed benefit options within the OPS disappeared. The additional flexibility outside the OPS could be accessed by transfer at any-time in the future and when required at retirement. This is further evidence that the adviser didn't present a balanced picture to Mr D and failed in her requirements under COB.

More evidence of the unbalanced poorly presented advice was the adviser's suggestion that a reason to transfer was the low transfer value offered by the scheme. There was no evidence presented that the benefits within the scheme were at risk. Therefore a low transfer value supports staying in the OPS rather than transferring. Yet this was presented as a reason to transfer without a balanced explanation of this point.

When Mr D reached aged 50, another meeting occurred and advice was given to transfer Mr D from his Section 32 to Income Drawdown and to take his tax free cash. However, again the adviser didn't establish why the tax-free cash was required. And in recommending a transfer away from the Section 32, Mr D's protected tax-free cash was lost – meaning a reduction in maximum tax-free cash of over £15,000. The adviser didn't make mention of this loss anywhere in her recommendation. Considering the recommendation was based on Mr D's need for tax-free cash, this is a huge failing in giving suitable advice. And the fact that Mr D accepted this advice I think shows how reliant he was on the adviser. Had he known he'd lose such a large amount in tax-free cash I think it's very unlikely he would've wanted to go ahead with the recommendation.

Mr D has since told us that in 2004, he was looking at various options to finance buying a caravan and a new car. He says he had other options as he was on good money for the time (approx £23,000), he'd paid off his mortgage and he had no dependent children but that the adviser persuaded him to finance it using his pension.

The advice in 2002 and follow up advice in 2004 to significantly reduce Mr D's pension at retirement was all based on the need for tax-free cash. But this need never looks to have been discussed or challenged. Why did he need it? Mr D says to buy a caravan and a car but given his circumstances at the time I think this could've been financed in other ways. Had this been challenged and discussed, I doubt Mr D would've given up his guaranteed benefits and main pension provision for something that likely could've been paid for in other ways.

After considering the available evidence, there is no doubt that Mr D was completely reliant upon the adviser for his decision making. And that the advice he was given was poorly considered with multiple failings under COB and unsuitable for Mr D.

Morgans Ltd's main defence of the transfer now is that Mr D was compliant in it and he has had the enjoyment of the new car and caravan. But this is not a reasonable defence. Mr D paid the advisor for expert advice, not just as someone to manage a pension transfer. That expert advice was severely lacking and had Mr D received that competent advice I think he would've accepted that a transfer was not in his best interests and understood his

guaranteed benefits at retirement were valuable. I therefore conclude that Mr D would've but for the poor advice, remained within his OPS.

What does Morgans Ltd need to do?

My aim to is put Mr D, as closely as possible, into the position he'd be but for Morgans Ltd's unsuitable advice to transfer out of his OPS. Reinstatement of Mr D's deferred benefits isn't possible. Therefore, Morgans Ltd should undertake a redress calculation in line with the most up to date pension review methodology as amended by the Financial Conduct Authority.

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Morgans Ltd must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr D's acceptance of the decision.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr D as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr D within 90 days of the date Morgans Ltd receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Morgans Ltd to pay Mr D.

Where I uphold a complaint, I can award fair compensation of up to £150,000, 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 £150,000 I may recommend that the business pays the balance.

determination and money award: I require Morgans Ltd to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £150,000.

Where the compensation amount does not exceed £150,000, I additionally require Morgans Ltd to pay Mr D any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000, I only require Morgans Ltd to pay Mr D any interest as set out above on the sum of £150,000.

recommendation: If the compensation amount exceeds £150,000, I also recommend that Morgans Ltd pays Mr D the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts my decision, the money award is binding on Morgans Ltd. My recommendation is not binding on Morgans Ltd. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D may want to consider getting independent legal advice before deciding whether to accept this decision.

my final decision

For the reasons explained above, I uphold Mr D's complaint against Morgans Ltd and upon Mr D's acceptance, I require it to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 10 October 2021.

Simon Hollingshead
ombudsman