complaint

Mrs D complains that she was advised by Bank of Scotland Plc to take out an Annuity Growth Account instead of going into income drawdown.

background

I issued my provisional decision on Mrs D's complaint on 31 March 2016, which is attached. I said that I was minded to uphold Mrs D's complaint and make an order for redress, subject to any further representations made by the parties. Both Bank of Scotland and Mrs D made further representations. I've set these out below.

Bank of Scotland doesn't accept my provisional decision. It also says if I intend to make an order for redress I should do so in different terms. It says, in summary:

- It had already been decided that income drawdown wasn't suitable for Mrs D when she saw its annuity adviser.
- That decision was taken based on the information known about Mrs D's finances in 2010. Not with the benefit of hindsight and knowledge of legislative changes.
- Mrs D wanted to take a lower than medium risk with her pension fund – a cautious approach. She had also taken a cautious approach with her non pension investment portfolio.
- Income drawdown would've been higher risk than the Annuity Growth Account. There were other risks with drawdown.
- If she'd taken a pension commencement lump sum (PCLS) her remaining pension fund would've been around £100,000, which is typically regarded as the minimum for income drawdown.
- Legislative changes introduced since may have meant that income drawdown would've been better for her now. But, these shouldn't be taken into account. The legislation and framework that existed at the time of the advice should be considered.
- The provisional decision said that Mrs D had the capacity to take risk. There must also be a willingness to do so.
- The award for trouble and upset and non financial loss should be reconsidered. Markets have been volatile and we can't know what impact that would've had on Mrs D's fund if invested at a greater level of risk.
- It's difficult to obtain hypothetical values from third parties. Redress should be calculated on the basis that Mrs D transferred her fund to the provider of her Annuity Growth Account in 2010 and a hypothetical value should be obtained from it.

Mrs D's adviser said, in summary, on her behalf:

- he agreed with the decision to uphold the complaint, but not the redress proposed.
- he'd asked HMRC whether it was possible to allow Mrs D's annuity to be unwound so that she could now go into drawdown. HMRC said that as an annuity was payable for life, some other form of redress would be needed.
- Although not reliant on the annuity income, Mrs D hadn't taken out another annuity because he'd advised her not to do so, pending the outcome of her complaint.
- It's inappropriate to gauge compensation based on a person's existing wealth. And factually incorrect to say there has been no financial loss. Had she been advised to go into drawdown her estate at the time of advice would've benefitted from 45% of the residual pension funds at the time of death. The loss to her estate should be calculated on the full value of her fund, £150,000.

- The figure of £3,000 compensation is derisory and arbitrary.
- If Mrs D was in drawdown now, she would have access to 100% of her fund.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I see no reason to depart from my provisional decision. But, I will respond to the points made.

Mrs D showed that as well as having the capacity to take a risk, she was prepared to do so, by leaving two thirds of her pension fund invested in risk based funds. So, as I said in my provisional decision, I don't think that the adviser could fairly say that other options, including drawdown, were obviously unsuitable and that they didn't need to be covered. In reaching this conclusion, and concluding that Mrs D wasn't given adequate information about her options, I've looked only at what was known about her financial circumstances at the time, and considered the relevant law and practice that applied at that time.

I can't see how market performance should have any bearing on my award for *non financial* loss.

I am unable to put Mrs D back into a position where she can go into drawdown. So, Bank of Scotland's inappropriate advice may have long term consequences for Mrs D. She may be locked into this arrangement for life. This, in my view, places Mrs D's trouble and upset at the higher end of the scale. But, I do think it fair to take into account her wider personal circumstances, as set out in my provisional decision, when assessing overall, just how much distress and inconvenience this is likely to have caused her.

I mentioned the legal changes announced in the March 2015 budget, because they may be of some benefit to Mrs D. She may be able to get out of her annuity by selling it to a third party, with the agreement of the annuity provider. But, as I said, without knowing all the detail, I don't know if Mrs D will be able to benefit from this potential change in the law. So, it's not something I can factor in now when deciding on the appropriate amount of compensation.

As well as an award for non financial loss, I've also made an award for financial loss. For the reasons given it is difficult to quantify Mrs D's financial loss. I don't think it would be fair, as her adviser has asked me to, to assess the loss to her estate as being 45% of her residual fund, but calculated on her full fund of £150,000. Firstly, because Mrs D wanted to take an income from her fund, and also I don't know whether it will be possible, over time, to mitigate the inheritance tax consequences in any event.

It can't have been known at the time (because the law has changed to allow this) that Mrs D would now be able to access her full fund if she'd gone into drawdown at the time of advice. So, I don't think it fair to take this into account when assessing her financial loss.

I see no reason why Bank of Scotland plc can't obtain hypothetical values from the provider Mrs D had her SIPP with. Bank of Scotland said that Mrs D wouldn't have been able to go into drawdown had her fund stayed with this provider. But, the provider has told us she could've. So, I think the award for redress set out in my provisional decision is appropriate in all the circumstances.

my final decision

I uphold Mrs D’s complaint. I order Bank of Scotland plc to pay Mrs D fair compensation as set out in my provisional decision (attached).

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs D to accept or reject my decision before 27 June 2016.

Kim Parsons
ombudsman

copy of provisional decision

complaint

Mrs D complains that she was advised by Bank of Scotland Plc ("Bank of Scotland") to take out an Annuity Growth Account instead of going into income drawdown.

Mrs D is represented by an adviser.

background

Mrs D took pensions advice from Bank of Scotland in 2010. Her circumstances at the time were she:

- was in her mid fifties;
- had selected a retirement age of 60;
- was unemployed and seeking full-time employment;
- was recently divorced;
- got income interest of £3,855 on her cash deposit of £220,000;
- had a monthly expenditure of £3,500;
- was in need of immediate income;
- said her outgoings were likely to go down as her parents were moving in and sharing household expenses;
- was soon to get a lump sum of £350,000 from her parents;
- had one dependant child aged 18;
- had a house worth £1million with a mortgage of £60,000;
- was due to get a pension from an occupational pension scheme at age 60 – and therefore wanted the flexibility to reduce her income when she reached retirement age;
- intended to sell her house to generate capital in the future;
- had a SIPP, with a pot of just over £150,000; and
- could take a tax free pension commencement lump sum (PCLS) of £38,000.

Bank of Scotland advised Mrs D to start an Annuity Growth Account which allowed her to take a fixed income from a portion of her pension (just over £50,000) for a fixed period of five years. The remaining around £100,000 stayed invested (in risk based funds). Mrs D got an income of around £9,900 per year for five years from her Annuity Growth Account. According to the notes made at the time Mrs D decided not to take a PCLS in favour of a higher income.

After the Annuity Growth Account matured, Mrs D then had the option to either take out another short term annuity or a lifetime annuity.

One of our adjudicators investigated Mrs D's complaint. She didn't uphold it. In summary, she said:

- at the time of advice, Mrs D was unemployed and in need of income;
- the annuity Growth Account had a term of five years and matured when Mrs D turned age 60, which was when she was due to get her benefits from her occupational pension scheme (OPS);
- the suitability letter mentioned that Mrs D was looking to invest in low risk funds. To advise her to start a drawdown arrangement would have gone against her attitude to risk;

- although Mrs D's potential future circumstances meant that she had the capacity to take on some risk, Mrs D didn't have the capacity at that time as her future circumstances weren't guaranteed;
- the Annuity Growth Account provided a fixed amount of income for the period;
- Mrs D needed regular income, whereas income from a drawdown arrangement would have varied depending on the performance of the funds; and
- the adjudicator didn't think that Mrs D's inheritance tax position alone justified starting a drawdown arrangement.

Overall, she felt the Annuity Growth Account was suitable for Mrs D's circumstances and objectives at the time of advice.

Mrs D didn't agree with the adjudicator's opinion so the complaint has been passed to me to consider. Mrs D's representative said:

- the risks inherent in the Annuity Growth Account weren't taken into account;
- the adviser who advised Mrs D wasn't authorised to consider drawdown plans, therefore a drawdown arrangement wasn't considered as an option during the advice;
- Mrs D's options should have been kept open given her age, employment prospects and other assets;
- Mrs D should've been advised to go into drawdown. This option wasn't considered because the adviser wasn't authorised to consider it.

Bank of Scotland made no further comments.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I am minded to uphold Mrs D's complaint.

The key questions I need to consider here are:

- Did Bank of Scotland make sure the advice it gave Mrs D was suitable for her needs?

- Did it give her the information she needed to make an informed choice about whether to take its advice?

If there was a problem with the way the advice was given then I need to consider if Mrs D is worse off as a result, because she would've done something different.

suitability

At the time of advice Mrs D was assessed as having a balanced approach to risk, but it was noted that she had decided on a cautious approach towards her pension. The adviser recorded she had capacity to take risk on her annuity. Also, it was noted Mrs D would consider linking her pension income to a specialist annuity, so she could select income to suit her circumstances.

Mrs D needed a regular income. She was due to get her OPS pension in around four years time. She would also get the state pension. Her circumstances were expected to change quite significantly in the short term because her parents were moving in with her, sharing the bills and giving her £350,000. She was also hoping to return to full-time employment. Mrs D already had cash reserves of £220,000.

Taking into account all of these circumstances, I think Mrs D did have the capacity to take some risk with her pension, not just with an annuity. Bank of Scotland advised her to take out the Annuity Growth Account, which she gave up around £50,000 of her pension pot for, to provide a guaranteed income over the next five years totalling a bit less than that.

It seems there were a number of other options open to Mrs D that weren't discussed in the recommendation report, for example she could've:

- taken her PCLS of £38,000, still a guaranteed amount, and used this to provide an income over the next five years;
- supplemented her PCLS by also going into drawdown;
- put her whole pot into drawdown. Bank of Scotland said if she had, she could've taken an income of around £8,800 per year at the outset;
- gone into drawdown and invested £50,000 in cash, then she would've effectively been exposed to the same level of risk as with the Annuity Growth Account. But, wouldn't have been subject to the same limitations.

Having taken out the Annuity Growth Account Mrs D was tied into buying another fixed annuity or a life time annuity at the end of the five year term. Had she gone into drawdown she wouldn't have been limited in this way. I think having this flexibility may have been important to her. I say this because by then she would've been getting her guaranteed OPS benefits and her income needs would've likely changed. In drawdown she could've varied the amount of her income payments. In addition, had she gone into drawdown, likely this would have been more favourable for inheritance purposes, particularly as she had an 18 year old child.

The adviser didn't discuss the option of drawdown with Mrs D. She wasn't authorised to do so. Although, Bank of Scotland said that the adviser could've referred Mrs D on to a colleague to get this advice if drawdown had been identified as suitable.

I think taking into account Mrs D's objectives and circumstances, the advice she got from Bank of Scotland wasn't suitable because her income needs could've been more suitably met by other means, with her taking about the same level of risk. She wouldn't then have been subject to the same limits imposed on her as she was with the Annuity Growth Account.

informed choice

I think based on Mrs D circumstances and objectives she should've been given more information, in particular about the benefits and dis-benefits of the other options, in particular drawdown, compared to the recommended product. I don't think that the adviser could fairly say that other options were obviously unsuitable and that they didn't need to be covered.

I think if Mrs D had have been given better information she would've decided to go into drawdown instead. I say this because I think Mrs D did have the capacity to take some risk, and said she was prepared to do so. She had reserves, at the time of £220,000 and this was expected to rise to around £570,000 later that year. Her OPS benefits were guaranteed. Even, had she taken out a drawdown plan and invested in low risk funds with minimal investment returns, likely she would still have been in a better position overall, as two thirds of her pension pot in the Annuity Growth Account was exposed to market performance. She wouldn't have been tied into buying an annuity at the end of five years, would've had more flexibility over her income, and would've been in a more favourable position for inheritance purposes.

fair compensation

This service aims to put a person back as close to the position they would've been in but for the unsuitable advice. I can't know exactly what Mrs D would've done with better advice. I think it likely she would've gone into drawdown, without taking a PCLS. I think ordinarily she would've taken the maximum amount of income she could, up to Government Actuarial Department (GAD) limits, for the first five years and no income after that. I say this because she hasn't taken another annuity at the end of the first five years.

Mrs D did however, have the benefit of receiving around £9,900 each year, for five years from the Annuity Growth Account. So, for the purposes of calculating fair compensation she should be treated as having received this from a drawdown policy.

I think Mrs D would've left her SIPP with the same provider, invested in the same way as it was before the transfer into the Annuity Growth Account. I understand her SIPP investments were in funds which were not incompatible with her attitude to risk. I also believe it was possible for her to go into drawdown without transferring her benefits to another provider.

I have thought about whether Mrs D would've separated off £50,000 and invested this in cash to mitigate her investment risk. I don't think she would've. I say this because she had other reserves which were sizeable, so I think with better advice she would've taken a more balanced approach.

What should Bank of Scotland do?

Bank of Scotland should compare:

A. How much Mrs D's transfer value would be at the date of calculation if she had put her SIPP into drawdown, and left it invested as it was before she took out the Annuity Growth Account.

B. The value of her Annuity Growth Account at the same date of calculation.

Any withdrawal, income or other payment out of the investment should be deducted from A at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, Bank of Scotland can total all those payments and deduct that figure at the end instead of deducting periodically.

If the value of B is greater than (or equal to) A, then there is no financial loss and no compensation for financial loss is due. If the value of A is greater, then it should be added to Mrs D's current policy allowing for any available tax relief and/or costs, to increase the pension policy value by the total amount of the compensation and any interest.

If it is not possible to pay into the pension policy for any reason, then Bank of Scotland should pay that value directly to Mrs D as a lump sum after making a notional deduction for tax at her marginal rate.

Interest should be payable at 8% simple per year on any loss from the date of calculation to the date of settlement. Income tax may be payable on any interest awarded.

Bank of Scotland should provide details of its calculation to Mrs D in a clear, simple format. The Annuity Growth Account product provider has told this service that it's not possible to allow the annuity to be rescinded and Mrs D to go into a drawdown arrangement. It's not within my remit to change this. So I can't put Mrs D into the position where she can now go into drawdown.

I don't know if the planned changes announced in the March 2015 budget will be of any benefit to Mrs D. This will allow people who already have an annuity to sell that to a third party, with the agreement of the annuity provider. This change is not due to be introduced until April 2017 and the detail is, as yet, unknown. So, Mrs D will at best be left in limbo for another year. Alternatively, she may be stuck in the position where she is locked into taking out another annuity. The consequences of the advice she got from Bank of Scotland could therefore have a long term financial impact.

I think Mrs D has been caused considerable trouble and upset by being given inappropriate advice. It may prove impossible to put her back in the position she would've been in had she got better advice. I have taken this into account when assessing the distress and inconvenience involved. Mrs D is, however, not entirely reliant on her annuity as a source of income. She didn't have to tie herself into another annuity as soon as her five year Annuity Growth Account came to an end. Her policy remains invested in funds compatible with her attitude to risk, as would be the case if she'd gone into drawdown. It's not possible to know what Mrs D's exact inheritance tax position will be when she passes away. This will depend on all her circumstances at that time. She may be able to take steps to mitigate that position in the meantime. Mrs D has a guaranteed OPS pension, a state pension and other financial reserves. I hope Mrs D will understand why I need to take this account when reflecting on the award I make for compensation for non financial loss. I think a fair amount of compensation taking into account what I've mentioned above would be £3,000.

my provisional decision

For the reasons explained above I am minded to uphold Mrs D's complaint and order Bank of Scotland plc to pay Mrs D fair compensation as set out above.

Kim Parsons
ombudsman