

The complaint

Mrs D complains about the suitability of the advice she received from Zurich Assurance Ltd (Zurich) in 1998 to transfer the deferred benefits of an Occupational Pension Scheme (OPS) to a personal pension plan (PPP).

What happened

Mrs D held benefits in two OPS's. She belonged to the first OPS from 1 November 1969 to 31 December 1995. A deferred benefit statement provided to her in 1996 confirmed her deferred annual pension was £9,867.81 – which was projected to be £23,949.66 at her normal retirement date of age 65.

In January 1998 Mrs D's then adviser requested a cash equivalent transfer value (CETV) from the trustees of the pension scheme.

In November 1998 the transfer of the OPS benefits completed, with the amount of £119,070.30 paid into a Zurich PPP.

In September 2005 the PPP, which had been invested equally between a property and a gilt-edged fund and was valued at £164,217.21, was transferred to Mrs D's existing OPS.

Mrs D's most recent service was with a global healthcare company from 1 July 1997 to 31 August 2008 – which was when the scheme said she retired. In September 2005 a total of £165,825.15 was transferred in from two separate PPP's, which included the transfer from the Zurich PPP. These transfers gave Mrs D the equivalent of an additional 22.75 years in her OPS.

In 2019 Mrs D was referred to a claims management company which, having made a complaint about a pension policy with another provider, then complained about the advice she'd been given by Zurich to transfer her deferred OPS benefits.

Zurich explained that Mrs D had claimed the benefits from her personal pension in 2005 and it held little if any records of her plan. It said it wasn't obliged to keep the records for longer than six years where a client relationship had ended, so it couldn't provide any documentation. But it accepted the transfer of benefits had taken place in 1998/9 and that it would have been subject to a full transfer analysis. It said it would then have been for Mrs D to confirm if she wished to go ahead.

Mrs D didn't think it was reasonable for Zurich to assume the advice was suitable without any documentation, so she brought her complaint to us – where one of our investigators said this was a complaint that should be upheld. He said that Zurich had an obligation, according to the regulatory requirements, to retain its records for pension transfers indefinitely. He said Zurich accepted that it carried out the transfer – so it wasn't reasonable for it to assume the transfer was suitable in the absence of any documentation to support that claim. He recommended that Zurich carry out a redress calculation in line with the regulator's pension review guidance.

Zurich didn't agree. It said it hadn't destroyed the sales documentation but simply misplaced it – which wasn't unreasonable given the time since the transfer took place. But it said that at the time all its transfers went through a robust checking process and were subject to a full transfer analysis – which followed the completion of a transfer questionnaire. Zurich thought its recommendation would have been suitable and that the transfer would have followed the guidelines set out by the regulator at the time. It said that this was its recognised sales process and as Mrs D had been unable to demonstrate that it hadn't been followed it had no reason to conclude the transfer wasn't in her best interests.

The investigator reiterated that under the conduct of business sourcebook (COBS) Zurich had a responsibility to retain the transfer documentation indefinitely. But he also said that the regulator's default position was that a transfer ought to be seen as unsuitable unless the firm could clearly demonstrate that it was in consumer's best interest. In this case he didn't think Zurich could do that and thought it was less than likely that a transfer of 33 years' service within a defined benefit OPS would be suitable.

So as no resolution could be found the complaint was passed to me for a review.

My provisional decision

In my provisional decision I said the complaint should be upheld giving the following reasons to support my findings:

- I first considered if Mrs D's transfer ought to have fallen under the industry wide "pensions review" but concluded that she was beyond the age for women to qualify to receive *phase two* mailshots.
- The lack of documentation that was available from the time of the transfer meant I had to make a decision on the balance of probability.
- The regulator's "*guidance on future pension transfer and opt-outs*" said that Zurich should be able to refer back to the basis on which it justified its advice – so it hadn't fulfilled that regulatory requirement. However, Zurich said it hadn't destroyed the information but simply misplaced it, so I couldn't reasonably say the absence of the documentation automatically meant the advice was unsuitable. So I looked at the evidence that was available from the time.
- The CETV that was transferred in 1998 was £119,070, however the deferred OPS annual pension was £9,867.81. This would suggest the CETV was low given our experience of other CETV's and crucially suggested that a critical yield of more than the mid-range growth rate (9% at the time) was more likely than not to be required over the remaining time to Mrs D's retirement age.
- In addition, Mrs D had 26 years of service in the OPS and was unlikely to want to take too much risk in investing it for as little as 10 years. The funds that were used to invest in the PPP were of a low to medium risk profile – so would be unlikely to provide the growth that would have been needed to exceed the OPS benefits.
- Mrs D's deferred OPS annual income at age 65 was revalued to £23,949.66. It was unlikely she would risk such an income unless it was demonstrated that she was very likely to be better off financially. I wasn't persuaded this could have been demonstrated to her.
- I'd also noted that Mrs D had joined another OPS at the time of the advice and I had seen evidence to show that the PPP was transferred into it in 2005, but the CETV was based on additional years of service – which was in line with having belonged to a defined benefit scheme. So I thought, as Mrs D did eventually transfer the benefits, it would have been possible to transfer benefits from one OPS to another in 1998. I thought that if such an option had been discussed it was likely to have provided a

better financial outcome for Mrs D and was likely to be an option she would have chosen to take.

- Zurich should undertake a redress calculation in line with the regulator's pension review guidance.

Responses to my provisional decision

Mrs D accepted my provisional decision. Zurich, although disappointed with the outcome, accepted it – although it said reserved the right to limit the redress to the maximum award amount, if applicable.

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 as both parties have broadly accepted my provisional decision, I see no reason to depart from my findings.

Mrs D left membership of an OPS in 1996 and a year later she joined another OPS. In 1998 she met with Zurich and as a result transferred the benefits of the first OPS into a new PPP. It's accepted that Zurich carried out the transfer although it doesn't retain any paperwork or sales documentation from the time of the advice. So in order to determine if Zurich's advice was suitable I've considered the other evidence that I have been provided with, and have made my decision on the basis of what I think was most likely to have been the situation in 1998. I did consider if Mrs D's transfer ought to have been included in the industry wide pension review – but I'm satisfied that it didn't automatically qualify.

Was it likely the advice was suitable?

Zurich doesn't have any of the point of sale paperwork from 1998. It says the documentation has been mislaid which isn't unreasonable given the passage of time since the advice was given. But Zurich did have an obligation to be able to revisit the basis for its recommendation indefinitely, as explained in the regulator's "*guidance on future pension transfer and opt-outs*", so Zurich hasn't fulfilled its regulatory requirement there. But that alone doesn't make the advice unsuitable, so I've gone on to consider what the information I have seen would indicate to be the most suitable course of action at the time.

Mrs D was 50 at the time of the advice, with 26 years' service in the first OPS and 10 years to her state pension age and a further five years to the normal retirement age of the OPS. It would appear that Mrs D did retire at age 60.

The CETV for the OPS was £119,070, however the deferred annual pension from the OPS was £9,867.81 – which was revalued to £23,949.66 at age 65. This would suggest that the CETV was low at just over a multiple of ten, which was unlikely to be able to provide the same benefits as the OPS without significant growth within the PPP.

The assumed mid-range growth rate as prescribed by the regulator at the time was 9% - and just about to be reduced to 7%, so I think it was more likely than not that any critical yield calculation – over such a reduced investment horizon, would most likely have needed to be higher than the mid-range figure in order to have a chance to make the returns that would be required for the transfer to be in Mrs D's best interest.

In addition, the investment strategy that was recommended to Mrs D for the PPP was largely cautious with over 50% invested into a gilt fund. I've not been able to determine what was

discussed at the time to determine Mrs D's attitude to risk (ATR), but based on the strategy that was implemented, I think it's likely that she wouldn't have had the appetite for the risk that would have been required in order for the PPP to exceed the OPS benefits.

Mrs D had amassed around 26 years' service in the OPS and could potentially look forward to around £23,000 per year in retirement as a result. She also had guaranteed benefits being accrued from her other OPS. So I think it's likely Mrs D would have required significant demonstration of the likelihood that the new PPP would provide her with greater benefits than the OPS. I don't think Zurich would have been in a position to do that, particularly in respect of the amount of risk that Mrs D would have needed to take in order for that to be a possibility. I'm not persuaded the advice to transfer was suitable or in Mrs D's best interest.

What should the advice have been?

At the time of the advice Mrs D had joined a new OPS, which I'm satisfied was a defined benefits scheme. I say that because when the PPP was later transferred to the OPS it provided additional years of service which is consistent with it being a defined benefit scheme. So, based on further guidance from the regulator at the time which said, *"the process should include procedures: to ascertain whether the prospective investor's new employer (if any) has arrangements to accept transferred benefits"*, I would have expected Zurich to have looked into that possibility at the time and to have analysed whether it was beneficial for Mrs D to transfer the OPS benefits into her new OPS.

Of course, I accept that Zurich is unable to demonstrate what its analysis looked like at the time and it's not now possible to show whether such a transfer would have been in her best interests at that point. I've also taken into account that Mrs D hasn't referred to any such discussion in her complaint. But, on balance, I've decided it's more likely than not that a transfer from one OPS to the other would have benefitted Mrs D financially and would have been in her best interests.

Given that she ultimately held all her previous benefits in the new OPS, I think that also demonstrated that, with all the benefits of each option explained and shown to her, Mrs D would have preferred to hold benefits in a "guaranteed" scheme rather than an investment backed one.

Based on the information I've been provided with I'm not persuaded that a transfer was in Mrs D's best interest in 1998. I'm also not satisfied she wouldn't have been better off by transferring her OPS benefits into the OPS she joined in 1997 – which she already belonged to when she met with Zurich. So I think Zurich should carry out the calculation I've set out below in order to determine if Mrs D has suffered a financial loss because of the advice

Putting things right

A fair and reasonable outcome would be for the business to put Mrs D, as far as possible, into the position she would now be in but for the unsuitable advice. I consider she would have remained in the occupational scheme.

Zurich 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 will be slightly different, due to the conversion of Mrs D's PPP funds being translated into further defined benefits in 2005. But Zurich will need to make an appropriate actuarial adjustment to account for this.

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 Mrs D's acceptance of the decision.

Zurich may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs D's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs D's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs 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 Mrs 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 her 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 Mrs D within 90 days of the date Zurich receives notification of her 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 Zurich to pay Mrs D.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Zurich to pay Mrs D the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require Zurich to pay Mrs D any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Zurich to pay Mrs D any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Zurich pays Mrs D the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mrs D.

If Mrs D accepts my decision, the money award is binding on Zurich. My recommendation is not binding on Zurich. Further, it's unlikely that Mrs D can accept my decision and go to court to ask for the balance. Mrs D may want to consider getting independent legal advice before deciding whether to accept any final decision along these lines.

My final decision

I uphold Mrs D's complaint against Zurich Assurance Ltd and direct it to undertake the above calculation.

Zurich has stated that it will require Mrs D's authority to approach the OPS trustees for information to carry out the calculation, so Mrs D should provide the necessary authority to Zurich where necessary.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 1 June 2022.

Keith Lawrence
Ombudsman