

## **The complaint**

Mr N complains about the advice given by Towergate Financial (East) Limited ("Towergate") to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says his understanding was that both schemes were very similar – he wasn't told how far apart they actually were – so he thought had nothing to lose by deciding to transfer out.

## **What happened**

Mr N met with Towergate in May 2007 to discuss his pension and retirement needs.

Towergate completed a fact-find to gather information about Mr N's circumstances and objectives. Towergate also carried out an assessment of Mr N's attitude to risk, which it deemed to be cautious – a score of two on a scale of one to ten.

On 30 May 2007, Towergate advised Mr N *not* to transfer his DB scheme pension benefits into a personal pension. The suitability report said the reason for this recommendation was because given the critical yield of 6.7% and Mr N's attitude to risk, there was a high risk that Mr N would be worse off in retirement.

Within the same report and immediately beneath the recommendation not to transfer, it said that, because Mr N had indicated in the fact-find that his priority for his pension was lump sum death benefits before retirement - and there was a possibility that he might be better off by transferring away – he decided to transfer against its advice.

The report said that Mr N asked Towergate to recommend a suitable product and provider to receive his DB scheme benefits, and its recommended solution was to transfer to a personal pension, which would provide investment choice and full flexibility.

On 2 June 2007 Mr N sent Towergate a typed letter, which said that he wanted to transfer his DB pension to a personal pension and take the additional cash lump sum being offered (representing the enhancement to the transfer value.)

It said that he'd received the suitability report and understood his decision was against Towergate's advice and that the plan recommended was following his request for a suitable contract. Finally it said that Mr N understood he'd be worse off in retirement but wished to go ahead anyway.

In 2017 Towergate wrote to Mr N to say that as part of some work carried out by its regulator the Financial Conduct Authority (FCA), it was offering to review the advice and information he'd been given in 2007. And Mr N accepted to be part of the review.

On 13 October 2020 Towergate wrote to Mr N to say that its review of the advice he was given showed that he was told not to transfer his DB pension, but that he knowingly acted against that advice. It said it wouldn't therefore be offering any redress.

In November 2020, in response to Mr N's dissatisfaction with the outcome, Towergate repeated its reasons for not offering redress.

Mr N referred his complaint to our service in December 2020 and one of investigator's didn't uphold the complaint. Because Mr N disagreed, and the investigator wasn't persuaded to change their mind, the complaint was passed to me for a decision.

I issued my provisional decision of June 2022 in which I said I was likely to uphold the complaint and I gave both parties the opportunity to respond with anything they wanted me to consider in response.

Towergate said that it accepted my provisional decision and wouldn't challenge further.

Mr N said he had nothing further to add.

While I'm mindful that both parties have effectively accepted my provisional decision, in the interest of completeness, I've decided to go ahead and issue my final decision.

### **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.

When considering what is fair and reasonable, I'm required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold this complaint and direct Towergate to put things right. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), stated in its Conduct of Business Sourcebook ('COB') at the time, that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Towergate should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr N's best interests (COB 5.3.29).

A key aspect in this case is Towergate's categorisation of Mr N as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were rules in the regulator's Handbook, which required Towergate to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COB required Towergate to provide information that was clear, fair and not misleading. So, Towergate's recommendation had to be clear and Mr N had to have understood the consequences of going against the recommendation.

In its suitability report, Towergate recommended that Mr N should not transfer away from his DB scheme. It said this was because the critical yield or investment return needed to match the benefits of his existing scheme was too high given his cautious attitude to risk. Towergate warned Mr N that there was a high risk he'd be worse off in retirement if he transferred.

In the same report, Towergate said that Mr N had decided he wanted to go ahead in any event.

And in response to Mr N's request, it went on to recommend a solution that provided flexible retirement benefits with an investment fund choice, which appears to have been appropriate for Mr N's attitude to risk.

But Mr N says that he wasn't provided with all the information and didn't understand his DB scheme benefits were better – he thought the two pension schemes were similar – which is why he thought he had nothing to lose by transferring out. He says it wasn't explained to him how far apart the two schemes actually are.

Having carefully considered all of the evidence presented, while Towergate's suitability report did set out that its recommendation for Mr N was *not* to proceed with the transfer, I think there were weaknesses and failings in the advice process, which meant Towergate didn't act in his best interests. And I think Mr N likely understood or believed overall that Towergate was recommending he should go ahead with the transfer.

I say this because looking at the suitability report, immediately underneath the brief one reason why Towergate recommended Mr N should not transfer away from his DB scheme, and before he'd had time to read and reflect on the written advice and recommendation made, I think that advice was undermined and confused. It says that, because Mr N indicated one of his main considerations for his pension was to provide lump sum benefits before retirement, he might be better off transferring away from his DB scheme. And while it said this would be against Towergate's advice, I'm not persuaded this was clear given the context and overall positioning of the advice. I'm also mindful that, when setting out Mr N's options, the first and second options presented to him involved him transferring his benefits out of the DB scheme, with the third option being to remain in the scheme.

I think if Towergate firmly believed in its advice and recommendation and it was acting in Mr N's best interests, it wouldn't have told Mr N at the same time as delivering its recommendation that he might be better off by transferring and entering into a discussion that ultimately appears to have led to him deciding to transfer in any event. I don't think Towergate's actions here were fair to Mr N or acting in his best interests.

I don't think it was in Mr N's best interests to go against Towergate's recommendation – yet the evidence appears to indicate that Towergate made it very easy for him to do so. And as I said above, given the way the recommendation was worded and laid out, I think Mr N could have interpreted this overall that Towergate was recommending he go ahead and transfer.

I think it ought to have been clear to Towergate that Mr N had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr N was an experienced investor – in fact it appears he was completely inexperienced.

I'm mindful too that Towergate assessed Mr N's attitude to risk as cautious, which doesn't suggest that he would be someone who was confident or had the requisite knowledge to go against the advice they were given. I also think that, given Mr N was unemployed at the time he was likely in a vulnerable position. And I think this should've put Towergate on notice that it had to be careful if it was to take matters through the insistent client route.

I've looked at the insistent client letter Mr N signed and dated a few days after the suitability report. I think it's likely this was templated.

Not only is the language quite business like and formal, it lacks any personal reasons why Mr N had decided to go against the advice he received. The only personal information – his name and reference number – are handwritten against typed headings.

While I acknowledge it wasn't a requirement at the time, given Mr N's level of experience, I think it would've been important for Towergate to ensure he understood what he was getting into. And a good way to have done this would've been to see in his own words that he understood the recommendation being made and importantly why he wanted to proceed. Although the suitability report indicated Mr N decided to go ahead because of the potential for higher lump sum pre-retirement death benefits (albeit it strikes me as odd that someone with no spouse or dependent children would rank this above anything else for their pension, which I will discuss later on) his letter doesn't say this was the reason. As I said above, Mr N provided no reason for either going against the advice or importantly why he wanted to take the cash lump sum.

Because I have doubts that these were Mr N's own words, I'm not persuaded he was able to make an informed choice here. And I think the lack of explanation from Mr N about why he wanted to proceed ought to have given Towergate reason to ask further questions.

But Towergate instead immediately produced a recommendation, which I think muddied the waters further. While the suitability report said that, in light of Mr N's decision to transfer he asked Towergate to recommend a suitable product, it proceeded to give a positive recommendation advising Mr N to transfer his benefits to a personal pension and invest in a cautious lifestyle fund. And this was all set out under a heading titled '*Recommendation.*'

While the suitability requirements under COB 5.3 were not as prescriptive as the current rules and were more principles-based, I think Towergate was still required to give Mr N advice on the overall suitability of the transaction - that is the transfer and the choice of pension and investment. Instead, it first gave Mr N advice on the advice to transfer, and only considered the suitability of the proposed alternative after Mr N decided to proceed in any event.

So, by recommending that Mr N transfer his benefits to a particular scheme, I think it has effectively recommended that he transfer out of his DB scheme. If Towergate didn't think that transferring out of the DB scheme to a personal pension was in Mr N's best interests, it needed to ensure that it gave clear advice that the whole of the transaction was unsuitable for him. I don't think it could separate out the elements. For this reason and given the way the suitability report was set out, I think Mr N likely believed Towergate was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

I can see Towergate says Mr N was unemployed at the time of the advice and had an income deficit of around £160 a month. It says Mr N only had around £600 left in savings and this is why he decided to transfer out of his DB scheme and take the cash lump sum available to him.

But if Towergate understood this was the true position and it was Mr N's objective to secure funds to meet his everyday living needs while he was out of work, then I would have expected this to have been documented in the advice paperwork, so that when it delivered its recommendation to Mr N it was clear that Towergate didn't think it was suitable advice to transfer from his DB scheme to a personal arrangement for this purpose.

Also, if this was Mr N's objective for wanting to transfer out, I think that in acting in his best interests Towergate should have gathered more information to better understand his position – importantly whether he believed his financial situation would improve in the relative short-term. Mr N indicated in the fact-find that he expected his employment situation to change, so Towergate could have asked questions to understand this in more detail - for example how long Mr N believed he would continue to be out of work and what his prospects for employment were - before continuing to facilitate an irreversible transaction to transfer his

pension.

Looking at Mr N's income and expenditure recorded on the fact-find, it seems that his income requirements to meet his basic monthly expenditure was not that high – for example he didn't have a mortgage or other debts to service. I can see that at some point during the course of the complaint Mr N told Towergate that he used the cash lump sum from his pension to pay off his mortgage. But this wasn't the case – Mr N later clarified matters and said that he'd paid off his mortgage from his redundancy payment.

So given this and because Mr N still had some savings to fall back on, I don't think his budget was under significant pressure. Indeed Mr N has told us that he was fit for work and was actively seeking employment. He says he was not concerned about money or making ends meet at the time because his mortgage was paid off and he was looking for work.

But Towergate didn't try to understand this. Instead the advice paperwork paints what I think is a confused and unclear picture about Mr N's objectives - I think they appear at odds with his circumstances at the time. As I referred to earlier it was recorded that Mr N was single and had no dependents. Yet it is also recorded that his primary retirement planning priority was the provision for a spouse's and dependents pension without explaining why. And it also appears that the basis of the discussion with the adviser and the apparent reason why Mr N decided to proceed with the transfer against advice, was because lump sum death benefits before retirement was an important consideration for him – again with no explanation as to why.

I acknowledge there were no specific insistent client rules at the time. But I consider the rules that were in place at the time were clear that Towergate had to act with due care and skill and in Mr N's best interests. And by not seeking to fully understand Mr N's objectives and what he was trying to achieve before carrying things out, I'm not persuaded this was acting in Mr N's best interest. Ultimately, I don't think he was able to make an informed choice here – it seems to me that Mr N most likely went ahead with the transfer as he believed this was the only way to meet what he thought or was led to believe was his objective. And also because I consider Towergate actually gave him a positive recommendation to transfer out of the scheme, which in the circumstances I think would've given Mr N the impression that Towergate agreed with this approach.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Towergate followed meant that Mr N can truly be regarded as an insistent client. Towergate's communications overall weren't clear or fair. It didn't act in Mr N's best interests. And it failed to act with due care and skill.

If Towergate had acted in Mr N's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr N's true objectives at the time, I don't think Mr N would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr N was an experienced investor such that he possessed the requisite knowledge or had the confidence to go against the advice he was given. I think he relied on the advice and process Towergate employed. And despite the fact that Mr N was unemployed at the time, he's told us that he wasn't concerned about his situation, which I think is reasonable and supported by the evidence from the time. So if things had happened as they should have, taking everything into account I'm not persuaded Mr N would have insisted on going ahead with the transfer.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr N, as far as possible, into the position he would now be in but for Towergate's failings. I consider Mr N would have

most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

Towergate 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.

My understanding is that Mr N could've taken his DB pension benefits without reduction at age 60. So, I think compensation should be based on Mr N accessing his benefits at age 60.

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 this 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 N's acceptance of the decision.

Towergate may wish to contact the Department for Work and Pensions (DWP) to obtain Mr N'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 Mr N's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr N'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 N 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr N within 90 days of the date Towergate receives notification of his acceptance of a final decision.

Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of any final decision to the date of settlement for any time, in excess of 90 days, that it takes Towergate to pay Mr N.

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.

## **My final decision**

Determination and money award: I uphold this complaint and I direct Towergate Financial (East) Limited to pay Mr N 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 would additionally require Towergate Financial (East) Limited to pay Mr N any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Towergate Financial (East) Limited to pay Mr N any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Towergate Financial (East) Limited pays Mr N the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr N.

If Mr N accepts my final decision, the money award becomes binding on Towergate Financial (East) Limited.

My recommendation would not be binding. Further, it's unlikely that Mr N can accept a final decision and go to court to ask for the balance. Mr N may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 18 July 2022.

Paul Featherstone

**Ombudsman**