DRN-3660387

The complaint

Mr S complains about the advice given by Hereford Pension, Investment and Mortgage Centre LLP ('HPIMC') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr S is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr S.

What happened

Mr S says he approached HPIMC on the recommendation of a colleague. Mr S has said he and his colleague had both left his former employer after having worked there for a similar period of time and his colleague had suggested speaking to HPIMC to discuss what options could be available for his DB scheme benefits.

In September 2006, HPIMC completed a fact-find to gather information about Mr S' circumstances and objectives. It recorded that he was 28, single with no dependents. He'd been working in his current role for less than a month. He lived in accommodation provided through his employment so had low outgoings. No assets were recorded and likewise Mr S was said to have no outstanding debts or liabilities.

Mr S' DB pension benefits were noted as his only pension provisions at the time. They represented just over nine and a half years' worth of service with his previous employer and would provide a guaranteed, escalating income in retirement, as well as a tax-free sum on retirement. The normal scheme retirement age was recorded as age 60. The estimated annual pension Mr S would be due, at the time of the fact find, was noted as £3,364. And the benefits were recorded as having a cash equivalent transfer value ('CETV') of £26,881.

HPIMC recorded that Mr S' planned to retire at some time between age 55 and 60 – although it also noted he wanted an investment term to age 60. Mr S expected to need an annual income in retirement of approximately £25,000. HPIMC also noted that he would like to leave an inheritance to his family. In a notes section of the fact find it said that Mr S wanted to control the investment choices of his scheme. But later, when asked what level of involvement Mr S wanted to have it recorded his answer as "low".

HPIMC also carried out an assessment of Mr S' attitude to risk, which it deemed to be 'high'.

In October 2006, HPIMC arranged a transfer value analysis ('TVAS'). This said that the DB scheme offered a pension of £3,449 per year and tax-free cash of £10,346 on retirement. Both of those figures were as of the time of the report and were subject to revaluation increases until retirement. The TVAS also included details of the critical yield – the growth rate required of a new pension to allow Mr S to purchase equivalent benefits to those he'd be due under his existing scheme. This was recorded as being 9.2%.

On 16 January 2007, HPIMC advised Mr S to transfer his pension benefits into a personal pension and invest in specific funds. The suitability report said the reasons for this recommendation were that Mr S wanted to control his investment and a personal pension provided greater fund choice. It noted his attitude to risk was high and said that he wanted to risk his benefits in the hope of good returns and the prospect of retiring early. And HPIMC felt the critical yield of 9.2% was achievable. It therefore recommended Mr S transfer to meet these objectives. The suitability report said that it was decided that it was appropriate for the term of the new pension contract to be to age 60. It was also agreed that HPIMC would actively manage the funds on Mr S' behalf.

Mr S complained in 2018 to HPIMC. He said he felt he'd been taken advantage of and the advice he'd received was unsuitable. He said he was advised to take a high-risk investment without having the relevant knowledge or experience to understand what that means. He said he was also told that the new pension would achieve returns much higher than the DB scheme would increase by. But he believes these returns were unrealistic and, when also accounting for charges and their impact on growth, he'd have been better off not transferring. Mr S added he also thought he'd been given incorrect information about the death benefits that would be available through a personal pension.

HPIMC didn't uphold Mr S' complaint. It said the DB scheme didn't allow access before age 60. And Mr S' main objective at the time of the advice was to take control of the pension and invest so he could access it at age 55 or sooner if allowed. HPIMC felt it had carried out appropriate analysis, including identifying that Mr S had a high attitude to risk. And it was on this basis that it recommended the transfer, as it agreed and said it had made clear in the suitability report that if Mr S had a cautious attitude to risk, he'd have been better off leaving the pension where it was. On the point of death benefits, HPIMC thought the information it had given around what these would be under a personal pension was correct. And it felt it had reiterated several times that the transfer could only be justified if Mr S had a high attitude to risk, so didn't agree Mr S wasn't aware of the risk involved. Overall, it felt the advice was appropriate based on his stated objectives.

Mr S referred his complaint to our service. HPIMC initially said it felt that the complaint was not one that we could consider. It said it thought the complaint had been referred to us more than six months after it issued its final response. And the complaint was also brought more than six years after the advice was given, and HPIMC questioned why Mr S did not complain sooner, given he'd been receiving annual summaries of his pension showing how it had performed.

An Investigator considered the objection but said that they felt the complaint was one we could consider. They explained that the complaint had been referred to our service within six months of the final response being issued. And, while it had been brought more than six years after the advice was provided, he didn't think Mr S ought to have realised he may have had cause to complain significantly before he did so.

In June 2022, HPIMC said that it noted the Investigator's opinion and comments and accepted that the complaint had been brought in time and was one that our service could consider.

The Investigator then looked into the merits of the complaint. They said they felt it should be upheld and thought HPIMC should pay compensation in line with the regulators redress methodology for unsuitable DB transfer advice. In summary he thought it was always unlikely that Mr S would improve his pension benefits by transferring and so didn't think introducing significant additional risk for no improvement was appropriate. He also didn't think the other motives for transferring were strong enough to justify this and didn't think the transfer was likely to enable Mr S to realistically retire early – one of the stated objectives. So, he felt HPIMC should've advised him to remain in his DB scheme.

HPIMC did not agree. It said that Mr S had been provided reports each year since the advice was given that demonstrated the critical yield was not being achieved. And based on this it said it again considered that the complaint had been brought too late. That notwithstanding it still believed the advice was suitable. It said it had clearly explained the risks of transferring to Mr S and he had understood this. It also reiterated he had been clear he was willing to accept high levels of risk and the DB scheme benefits were not important to him. So, it felt the advice was appropriate as it gave him the potential to improve his benefits, whereas remaining invested in the DB scheme would've guaranteed he wouldn't have been able to achieve the retirement income he thought he needed through that scheme.

The investigator wasn't persuaded to change their opinion. He noted he'd already given an opinion saying that he thought the complaint was one we could look into. And HPIMC had accepted this and indicated it consented to our investigation. In any event though he didn't think annual summaries of how the new pension arrangement was performing should've prompted Mr S to think that the advice provided to him wasn't in his interests – particularly given how long he still had to retirement.

While HPIMC may've set out that returns were not guaranteed, he didn't think this meant the advice to transfer was suitable. Particularly as it introduced significant risk but there was very little prospect of Mr S improving his retirement provisions.

As HPIMC did not agree with his findings though, the complaint was referred to me to decide.

What I've decided – and why

Can we consider this complaint?

The rules under which the Financial Ombudsman Service operate are set out by the Financial Conduct Authority ('FCA'). These are known as the DISP rules. These rules set out the limits to what our service can and can't consider. One of the things these rules cover is whether the complaint has been brought in time.

There are several different rules relating to whether a complaint has been brought 'in time'. But the two that have been mentioned during this complaint are that we generally can't consider a complaint referred;

- more than six months after the respondent (HPIMC) issued its final response

- more than six years after the event complained of; or, if later, more than three years after the person bringing the complaint knew – or ought reasonably to have been aware – they had cause to complain.

If a complaint is brought outside of these time limits, we'd be unable to consider it unless there are exceptional circumstances that explain why the person bringing the complaint didn't do so within the time limits or the respondent business consents.
Our Investigator issued an opinion on 22 June 2022, in which they said they thought the complaint had been brought within the time limits mentioned above – as it had been referred to us on the same day as HPIMC's final response – so within six months – and while it had been more than six years since the advice was given , he didn't think Mr S ought reasonably to have been aware he had cause to complain more than three years before he did.

In response to this opinion, on 30 June 2022, HPIMC said it *"…accepts that this complaint has been brought in time and therefore one that your service can consider further"* and that it *"consider that this complaint can be dealt with".*

In my view, I think this indicates that, following the Investigator explaining their findings, HPIMC consented to our service considering this complaint.

DISP 2.8.2A says *"If a respondent consents to the Ombudsman considering a complaint in accordance with DISP 2.8.2 R (5), the respondent may not withdraw consent."*

In response to our Investigator's opinion about the merits of this complaint, HPIMC again raised that it thinks the complaint could potentially be 'time barred' – one our service does not have jurisdiction to consider on the basis it has been referred too late. But as it has already, in my view, consented to us looking at the complaint, and this can't be withdrawn, I don't think there are further grounds to revisit whether this is a case that we can consider.

For completeness though, I have looked at the arguments made and, like our Investigator, I'm of the opinion that this is a complaint that we can consider.

HPIMC issued its final response on 25 February 2019 and Mr S asked our service to consider the matter on the same day – so it was referred within six months of the final response.

The event complained about is the advice in 2007. And the complaint was referred to us more than six years after those events took place. But I haven't seen anything that leads me to think Mr S ought to have been aware of having cause to complain more than three years before he did.

Mr S appears to have initially raised concerns in August 2017 and asked for a copy of the information HPIMC held in relation to the advice – which was provided. Mr S has indicated it was upon receiving these documents he began to think something was wrong – which I think is reasonable. And a complaint was subsequently raised with HPIMC in December 2018 and referred to us in February 2019 – within three years.

HPIMC has said that Mr S has received regular summaries in the years between the advice and him raising his concerns. And these made the performance of the new pension plan clear. So, Mr S ought to have known he had reason to complain. But I don't agree. While the summaries may have indicated that the pension had not yet achieved the growth that was hoped for, Mr S was at least 27 years from retirement at the time of the advice and still had a significant period until retirement on receipt of the summaries. And the period in question coincided with several significant market events – not least the financial crisis of 2008. I don't think this initial performance was enough to mean Mr S, who was an inexperienced investor, ought to have thought the advice he was given, by a professional adviser, was unsuitable or not in his best interests. So, I don't think the complaint has been brought more than three years after Mr S ought to have been aware of having reason to complain.

Was the advice provided suitable?

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

Among other requirements, the regulator at the time (the Financial Services Authority), under Conduct of Business 5.3.29G, specified the information a business should gather from the consumer and the DB scheme in order to assess suitability. It also said:

“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.”

This is known as the ‘presumption of unsuitability’ and has been renumbered to COBS 19.1.6G in the current FCA rulebook.

And what this means is HPIMC should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr S’ best interests. And having looked at all the evidence available, I’m not satisfied it was in his best interests.

Financial viability

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr S was 28 at the time of the advice. HPIMC has said that Mr S had a firm intention to retire at age 55, and that this was more than an aspiration. But that isn’t entirely reflected in the information from the time. The fact find noted that he would be looking to retire between ages 55-60. And went on to say he preferred an investment term to age 60. The suitability report also referred to Mr S hoping to be able to take retirement ‘early’ and noted that the DB scheme didn’t allow access prior to age 60, so one of the reasons for transferring was to potentially access the pension from age 55. But this also went on to say that, after discussing Mr S’ objectives, it was appropriate to consider an investment term to 60. Mr S may have expressed an interest in retiring early. But I think most customers would when asked. Given how far he was from retirement I don’t think a definitive decision had been made about this – which I think is supported by evidence from the time, particularly the investment term to 60 being recommended.

The critical yield required to match Mr S’s benefits at age 60 was quoted as 9.2%. This compares with the discount rate of 6.6% per year for 31 years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I would note that the basis of this critical yield quoted is slightly unclear – whether this involved taking tax-free cash (‘TFC’) from the new pension at retirement or not. The information from the DB scheme indicated that it provided a guaranteed tax-free sum in addition to the pension, without having to reduce the annual pension income. Whereas in a personal pension, the level of TFC taken depends on sacrificing a portion of ongoing income. And it is possible the true critical yield was therefore in fact higher, if this figure didn’t account for also matching the guaranteed tax-free sum under the DB scheme.

That notwithstanding, I've taking into account the quoted critical yield, discount rate and regulators projections, along with the composition of assets in the discount rate, Mr S' 'high' attitude to risk and also the term to retirement. HPIMC said in the suitability report that it thought the critical yield was an achievable return. But I don't think this is supported by the available information. There would be little point in Mr S giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here I think Mr S was always likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of transferring.

HPIMC has pointed to Mr S' high attitude to risk and him apparently not being concerned about potential losses to his pension fund. It has said it made it clear to Mr S that there was a risk the new pension may not achieve the required growth. And it has said that by not transferring he was guaranteed not to improve on his benefits.

I can see from the suitability report that HPIMC did outline risks that the pension value and growth were not guaranteed. But warning of the risks doesn't mean that the advice to transfer was suitable. And while Mr S does appear, based on his answers to the risk profile questions to have been willing to take a high level of risk, this pension was, at the time, his only retirement provision. And so he arguably had a low capacity for losses. In any event though, HPIMC's role wasn't to facilitate something Mr S may have thought he wanted – to take risk. It was to advise him on what was in his interests.

HPIMC says that without transferring this pension would not have met his income needs in retirement. And there was a disparity between what the DB scheme was estimated to provide, and the £25,000 annual income Mr S indicated he expected to need. But again, I don't think by transferring he was likely to improve on DB scheme benefits. And based on the information in the TVAS report, I think it is entirely unrealistic to suggest that transferring meant that this pension fund could've grown enough to meet those needs on its own.

Mr S would've always needed to use the benefits available under this pension in conjunction with further benefits he continued to build over the remainder of his working life to meet his retirement income needs. And even with a 'high' attitude to risk, he needed to achieve above the regulator's upper projection rate, for the duration of his working life, just to achieve the same benefits as he was already guaranteed under the DB scheme. So, while Mr S may have been willing to take risk, doing so when it was unlikely to improve his benefits was not, in my view, in his best interests.

So, from a financial viability perspective, I think a transfer out of the DB scheme wasn't in Mr S' best interests. Of course financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility

HPIMC has said that Mr S wanted flexibility to be able to take his pension benefits early.

As I've already explained though, I don't think a definitive decision had been made in respect of intended retirement date – rather Mr S had expressed a preference. So, I don't think he needed to transfer when he did, to achieve flexibility, particularly given how long he had until he could even potentially retire. I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr S to give up his guaranteed benefits when he did, for this reason. If Mr S later had reason to transfer out of their DB scheme, he could have done so closer to retirement.

Death benefits

The fact find noted that Mr S was interested in leaving an inheritance for his family. And the suitability report said that Mr S would like more control over how death benefits were paid. But Mr S was still young and had no spouse or dependents at the time. His future circumstances and needs were unknown. So, I think any definitive, irreversible decision to transfer his benefits based on the need or desire for a particular type of death benefit was premature.

The DB scheme provided a spouse's pension. Again, Mr S was single, so I can understand why he may have thought alternative death benefits would be of better use to him. But it was entirely possible he would go on to have a spouse in future. So, I don't think it's reasonable to say at that point that Mr S definitely had no need for the DB scheme death benefits. I also think the existing death benefits attached to the DB scheme were underplayed. This was guaranteed and escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. So, could've been valuable to any future spouse if Mr S predeceased them.

Furthermore, if Mr S genuinely wanted to leave an inheritance or legacy for his family / estate I think HPIMC should've instead explored life insurance.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. But whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr S about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think HPIMC explored to what extent Mr S was prepared to accept a lower retirement income, which was always likely to be the case here, in exchange for alternative death benefits. Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr S.

Control

HPIMC has said that Mr S wanted control over his pension and how it was invested. But I think Mr S' desire for control was overstated. I've seen nothing to suggest that Mr S was an experienced investor. I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. The fact find recorded that the level of involvement Mr S wanted to have was "low". And the suitability report indicated that HPIMC would be actively managing funds moving forward on his behalf. Neither of which I think is indicative of someone who genuinely was seeking control of their investments. So, I don't think that this was a genuine objective for Mr S – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

Part of Mr S' complaint was that his funds were invested in a high-risk portfolio, inappropriately. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr S, it follows that I don't need to consider the suitability of the investment recommendation. This is because I think Mr S should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and alternative death benefits on offer through a personal pension might have sounded like attractive features to Mr S. But HPIMC wasn't there to just transact what Mr S might have thought he wanted. The adviser's role was to really understand what Mr S needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr S was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr S was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this.

So, I think HPIMC should've advised Mr S to remain in his DB scheme.

Of course, I have to consider whether Mr S would've gone ahead anyway, against HPIMC's advice. But I'm not persuaded that Mr S would've insisted on transferring out of the DB scheme, against HPIMC's advice. I say this because Mr S was an inexperienced investor and this pension accounted for the majority of his retirement provision. He may have had a high attitude to risk. But I don't think that means he would've taken risk just for the sake of it – particularly if it had been made clear that the risk here was unnecessary as it was always unlikely to improve his retirement benefits. So, if HPIMC – a professional adviser whom he had sought out – had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think that would've carried significant weight and Mr S would've accepted that advice.

In light of the above, I think HPIMC should compensate Mr S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr S, as far as possible, into the position he would now be in but for HPIMC's unsuitable advice. I consider Mr S would have most likely remained in his DB scheme if suitable advice had been given.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr S whether he preferred any redress to be calculated now in line with current guidance or to wait for any new guidance / rules to be published.

Mr S has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr S.

HPIMC 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.

For clarity, Mr S has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 60 under the DB scheme, as per the usual assumptions in the FCA's guidance.

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 S' acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr 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 S 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 S within 90 days of the date HPIMC 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 HPIMC to pay Mr S.

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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect HPIMC to carry out a calculation in line with the updated rules and / or guidance in any event.

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.

My final decision

Determination and money award: I uphold this complaint and require Hereford Pension, Investment and Mortgage Centre LLP to pay Mr S 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 would additionally require Hereford Pension, Investment and Mortgage Centre LLP to pay Mr S any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000, I would only require Hereford Pension, Investment and Mortgage Centre LLP to pay Mr S any interest as set out above on the sum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that Hereford Pension, Investment and Mortgage Centre LLP pays Mr S the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S accepts this decision, the money award becomes binding on Hereford Pension, Investment and Mortgage Centre LLP.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 14 December 2022.

Ben Stoker
Ombudsman