DRN-4379977

Financial Ombudsman Service

The complaint

Mr C complains about advice provided by Quilter Financial Services Ltd (Quilter) to transfer his defined occupational pension ('DB') scheme into a Self-Invested Personal Pension (SIPP). Mr C believes the advice to transfer was unsuitable because it wasn't in his best interests and has caused a financial loss. Mr C complained jointly with Mrs C, but her complaint is being considered separately under a different reference.

What happened

Mr C alongside his wife approached Quilter in 2019 to discuss their pension and retirement needs. TAG Wealth Management were an appointed representative of Quilter at the time of advice and it was their adviser who met with Mr and Mr C. Therefore, as the principal firm, Quilter are responsible for the advice given.

Quilter completed a fact-find to gather information about Mr and Mrs C's circumstances and objectives. Quilter also carried out an assessment of their attitude to risk, which it deemed to be balanced.

On 1 September 2019 Quilter advised Mr C to transfer his pension benefits into a SIPP to purchase a commercial property and hold this within the pension. The suitability report said the reasons for this recommendation were:

- Mr and Mrs C wanted to purchase the commercial property their business operated from and hold this within a SIPP.
- They wanted flexibility on retirement, and the potential for higher/more flexible death benefits.

Mr C complained to Quilter in February 2023, raising concerns the advice was unsuitable for the following reasons:

- Mr C believes his objectives could have been met without losing the defined benefit pension.
- Mr C was only 43 at the time of advice, so still had many years until retirement. He doesn't feel a transfer should have been considered until at least age 55.
- There was no financial reason to go ahead with the transfer. The TVC showed a large shortfall on transfer, so Mr C doesn't believe he should have been advised to proceed.

Quilter didn't uphold Mr C's complaint. It said the advice had been appropriate. It said the adviser had met the objectives required by Mr and Mrs C and if they had any queries about this, they should've been raised at the time. They said the adviser had correctly followed all the relevant procedures to provide a suitable recommendation for their objectives and circumstances.

Initially our investigator felt that Mr and Mrs C weren't eligible complainants as she felt they had sought advice in relation to their business and not their personal retirement objectives.

However, an ombudsman at this service decided that this was not the case. The ombudsman explained that Mr and Mrs C whilst clearly wishing to explore the possibility of holding a commercial property within their pension. They were ultimately considering their wider retirement aims and the evidence supports this. So she explained that Mr and Mrs C were acting wholly or mainly outside their business trade or profession when they sought advice.

Our investigator then considered the merits of the complaint and required Quilter to pay compensation. She said that the financial viability of the transfer wasn't in Mr C's favour. And his objectives could've been met by other methods whilst keeping his valuable DB benefits in place. Or failing that, the objective shouldn't have been recommended over keeping in place the DB benefits. So, she didn't think the transfer had been in Mr C's best interests.

Quilter disagreed, saying after consideration it still felt the adviser did act fairly. It said the investigators arguments were subjective. And the adviser followed the correct procedures. It said it failed to understand why after three and a half years after the recommendation the clients then decided it was not the best course of action. It feels the particulars of this case are subjective and so wished to receive an ombudsman's final decision.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a 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.

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. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). 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.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Quilter's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Quilter should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Is the complaint within our jurisdiction?

Our investigator initially considered that Mr and Mrs C were not eligible complainants due to the fact she thought they were mainly acting in relation to their business interests when they sought advice. However, this was considered by an ombudsman who concluded that Mr and Mrs C were seeking advice as individuals and not mainly in relation to the business. She pointed out that there were no specific business objectives set and that the advice included information about their wider retirement aims and redirecting savings as part of the recommendation into their respective pensions. For clarity having considered the jurisdiction of this complaint, I am in agreement with the decision reached by our ombudsman on jurisdiction and for the same reasons. So I am satisfied that Mr C is an eligible complainant.

Financial viability

Quilter carried out a transfer value analysis report (as required by the regulator) showing how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

The business also calculated a transfer value comparator (TVC) of £253,143. This was required by the regulator on transfers after 1 October 2018 - and is a measure of the funds that would need to be invested at the time of transfer on a so-called 'risk-free' basis (government bonds), to provide the same income as the DB scheme at normal retirement age.

This can be compared with the actual transfer value quoted by the scheme of £73,222. The difference between the two represents the amount of additional growth Mr C would have needed to achieve by taking on investment risk if intending to draw benefits at the scheme's normal retirement age.

So, I've considered what this means for the likely growth Mr C would have needed to achieve in order to take benefits from the plan at age 60.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr C was 43 at the time of the advice and wanted to retire at 60. The critical yield required to match Mr C's benefits at age 60 was 11.71% if he took a full pension and 10.8% if he took tax free cash and a reduced pension.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 4.3% per year for 16 years to retirement. I've kept in mind that the regulator's projection

rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr C's balanced attitude to risk and also the term to retirement. There would be little point in Mr C giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 10.8%, I think Mr C was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

For this reason alone a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Quilter has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Advantages of transferring their business premises into the SIPP

It was recorded that it could be tax efficient to sell the existing owned business premises to the SIPP, and then the business pay rent to the pension. Mr and Mrs C could then release equity which would allow them to pay off some of the mortgage on their home. To have the capital to purchase the property from within the SIPP it was recommended that Mr and Mrs C transfer their DB pensions.

Mr and Mrs C were seemingly happy with this recommendation at the time. However, following a conversation with their accountant and new IFA – Mr and Mrs C were told there were other alternatives that may have achieved this without risking their main source of guaranteed benefits in retirement. Alternatives to transferring the valuable DB benefits weren't considered in the advice process. This seems to be the reason that Mr and Mrs C complained some years after the advice, they had become aware that the advice might not have been in their best interests.

Although I've seen no reason to doubt the validity of the alternative options presented by Mr and Mr C, I don't have all the information to say with confidence that these methods would've been workable. However, I think the adviser ought to have considered other options before considering transferring the valuable DB benefits, which the evidence suggests he didn't.

But regardless of the validity of other options, I don't think Mr C ought to have been advised to risk his DB pension for the tax savings in any event. I say this because Mr and Mrs C at the time were already able to meet the repayments needed for the commercial property and there was only £41,000 left to pay against the value of the property of £140,000. And by transferring his valuable DB benefits he was very likely to be worse off in retirement. I can see no reasonable analysis or justification in the recommendation of how the benefits of holding the commercial property in the SIPP would outweigh the guaranteed benefits achievable from the DB pension.

Mr and Mrs C were inexperienced investors reliant on the advice given by the expert party, Quilter. Whilst they came to it with an objective, they weren't qualified or experienced enough to know if it was in their best interests. And Quilter's role here wasn't simply to transact what Mr and Mrs C wanted. It was required to give best advice in their best interests, but it didn't in my view sufficiently challenge this objective or give enough weight to what Mr C (and Mrs C) were giving up to achieve it.

Pensions primarily exist to provide income in retirement, this was going to be Mr C's largest source of income in retirement and he had little capacity for loss. I accept Mr and Mrs C

came with a particular objective and Quilter achieved this, however it should've only recommended transferring their DB benefits if it was clearly in their best interests. And I don't think Quilter has evidenced that it was. The advice process ought to considered alternatives to achieving the objective whilst keeping the DB benefits in place (especially considering the lack of viability in transferring). If no alternative was viable, I think the advice should've still been to retain the DB pensions. As I've said above Mr and Mrs C were comfortable in being able to fully purchase the commercial property through the repayment vehicle in place. They were simply looking to see if there was a better more tax efficient way of achieving this.

Flexibility and income needs

Quilter recorded that Mr and Mrs C would require £40,000 in income per year in retirement. But that this income need would fluctuate. And therefore, Mr and Mrs C would require flexibility in retirement. However, I can't see any evidence to suggest this was anything more than a stock motive included in the report. Mr C was only 43 at the time of advice and so there were many years to go until his retirement plans would be tangible. If it transpired flexibility would be required in the future, he could've transferred at a later date when his plans were more concrete.

Death benefits

Quilter noted that Mr C wanted to make sure Mrs C had the largest value available to her on the event of his death rather than a modest income. 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. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr C. But whilst I appreciate death benefits are important to consumers, and Mr C might have thought it was a good idea to transfer his DB scheme to a personal pension arrangement because of this, the priority here was to advise Mr C about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Quilter explored to what extent Mr C was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr C was married and had children and so the spouse's and dependent's pension provided by the DB scheme would've been useful to his spouse and dependents if Mr C predeceased them. I don't think Quilter made the value of this benefit clear enough to Mr C. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, there was a good likelihood there wouldn't be any left at the time of Mr C's death considering the average life expectancy. In any event, Quilter should not have encouraged Mr C to prioritise the potential for higher death benefits through a personal pension over security in retirement.

Summary

I don't doubt that the flexibility, tax efficiencies and potential for higher death benefits on offer through purchasing the commercial property within the SIPP would have sounded like attractive features to Mr C. But Quilter wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C 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. Mr C shouldn't have been advised to transfer out of the scheme just to provide tax-efficiencies whilst repaying the loan for their business property

given Mr and Mrs C could already comfortably meet these payments and the mortgage had a relatively short period left to run.

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

Of course, I have to consider whether Mr C would've gone ahead anyway, against Quilter's advice.

I've considered this carefully, but I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme, against Quilter's advice. I say this because Mr C was an inexperienced investor with a balanced attitude to risk and this pension accounted for the majority of Mr C's retirement provision. So, if Quilter had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

In light of the above, I think Quilter should compensate Mr C for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice.

Putting things right

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

Quilter must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

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

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr C's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Quilter should:

- calculate and offer Mr C redress as a cash lump sum payment,
- explain to Mr C before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr C receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr C accepts Quilter's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr C for the calculation, even if he ultimately decides not to have any of their redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr C's end of year tax position.

Redress paid to Mr C as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Quilter may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr C's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £415,000, 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 £415,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Quilter Financial Services Ltd to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £415,000.

Recommendation: If the compensation amount exceeds £415,000, I also recommend that Quilter Financial Services Ltd pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on Quilter Financial Services Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 15 January 2024.

Simon Hollingshead
Ombudsman