DRN-2672987

The complaint

Mr C complains about the advice Better Retirement Group Ltd ('BRG') gave to transfer the benefits from one of his defined–benefit ('DB') occupational pension schemes, from his time working for a former employer, to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

In bringing this complaint Mr C's been helped by professional representatives. But, for ease of reading, I'll refer to the representatives' comments as being Mr C's.

What happened

A financial adviser introduced Mr C to BRG in 2017 in order to discuss his pension and retirement needs.

BRG completed a fact–find to gather information about Mr C's circumstances and objectives. It also carried out an assessment of his attitude to risk, which it deemed to be "medium".

On 18 October 2017, BRG gave Mr C a suitability report which advised him to transfer his former employer's DB scheme into a SIPP with a provider I'll refer to as 'R'. The suitability report said the reasons for this recommendation were because:

- Mr C had enough income from other sources to meet his needs from age 65.
- The estimated growth rate required to match the benefits from the DB scheme was deemed reasonable when compared with the risks Mr C was prepared to take.
- Mr C could leave the full value of the fund to his wife – in the event of his death – and not just part of it.
- He had the "*potential need*" for tax free cash ('TFC') without taking an income. An option his DB scheme didn't offer.
- The SIPP offered flexibility and potentially better death benefits than his DB scheme.
- The level of the cash equivalent transfer value ('CETV'), which is the amount Mr C could transfer from his DB pension into the SIPP, was at "*an all time high*". And as such provided a "*unique opportunity*" as changes in the market in the future could result in a reduction in the transfer value. And Mr C had said that his "*main concern*" was that the transfer value could reduce by the time he was 55 when he wanted to take TFC.
- Mr C's existing DB scheme's financial position was not good and was in deficit.
- A transfer would allow Mr C the flexibility offered by the new pensions freedoms and flexi access drawdown.

Mr C complained to BRG in July 2020 about the suitability of the transfer advice because he said, amongst other things, that BRG:

- Inadequately assessed his attitude to risk and capacity for loss.
- Failed to consider and explain the high costs associated with the SIPP administration and adviser charges.
- Had not demonstrated that the transfer was in Mr C's best interests.

- Didn't obtain the relevant information from Mr C about his knowledge and experience with investments, his financial situation or his investment objectives.
- Provided misleading information that the transfer would increase his pension provision.

BRG didn't uphold Mr C's complaint; it maintained that the advice it gave was suitable.

Mr C referred his complaint to our service. An investigator upheld it and required BRG to pay compensation. In short she said that, as per the regulator's – the Financial Conduct Authority's ('FCA') – guidance BRG should have approached its advice from the standpoint that a transfer out of a DB scheme would not be suitable, unless there was clear evidence the transfer was in Mr C's best interest. She said that the investment return required to match the existing DB returns (known as the critical yield) was 7.79%. Similarly the measure used by our service for calculating the likely return required to match a transferred fund, known as the discount rate, was 4.1%. And given Mr C's "*low to medium*" attitude to risk and the fact he was a "*cautious*" investor indicated he was unlikely to achieve the appropriate level of return by transferring from his DB scheme.

The investigator added that transferring out of the DB scheme would mean that Mr C's wife, who did not have a pension of her own, would lose valuable benefits from that scheme. The investigator also said that transferring out of a DB scheme in order to take TFC should be a last resort. She said BRG's advice to Mr C to transfer his funds so he could take TFC in order to go travelling wasn't suitable for him. She concluded that if BRG had provided adequate advice Mr C most likely wouldn't have transferred out of the scheme.

BRG disagreed, amongst other things it said:

- Its initial assumption was that Mr C should not transfer his benefits from his DB scheme. But its suitability report set out why this was in Mr C's best interests.
- It doesn't use the critical yield figure as a measure to support or oppose a recommendation to transfer. That's because it considers critical yield figures are unrealistic in order to assess the viability of doing so.
- Mr C has a recognised health condition that could reduce his lifespan by ten years. But it had not made any changes to its calculations because of that.
- A discount rate of 4.1% was reasonable but that is a figure net of charges and, once fees were incorporated into that, the figure could rise to 5%. It said that applying a 5% gross return to Mr C's fund meant his SIPP fund wouldn't ever run out.
- Our investigator wasn't right to say Mr C had a low to medium attitude to risk as it had assessed his risk appetite as medium.
- The plan with R had a lower risk profile than DB schemes which matched Mr C's level of risk. It said he was not a cautious investor but was prepared to take medium risks.
- The flexibility Mr C required was to allow him to take his TFC and access his fund in a flexible way, providing the possibility of filling a gap between his initial retirement and his state pension age. And that he didn't say his desire for flexibility was related to investment.
- Mr C had another DB scheme with his current employer which he'd paid into for at least thirteen years and which would also provide a guaranteed income.
- Mr C had said that using his TFC to go travelling was only one of his objectives.
- While Mr C will be reliant on his pension income in retirement BRG had calculated that given the likely benefits from his current employer's pension scheme Mr C should have enough income to meet his needs in retirement.
- The growth rate required from the R's scheme in order to meet the DB scheme benefits until age 86 was 2%. A 5% gross return would match the DB scheme returns

until Mr C was 99 with money left over.
- Mr C's health issue and his current employer's pension scheme were good enough reasons to make the transfer advice suitable.
- Mr C wanted to acquire flexible access to his funds for a range of reasons including provision for his wife if he died. It said that because of his health condition life insurance was a "no no".
- The death benefits to Mr C's wife from R's scheme were greater than Mr C's previous DB scheme. She would also have access to guaranteed benefits from Mr C's current employer's DB scheme.
- Mr C was concerned that the CETV figure which was on offer would fall. BRG said that figure was clearly enhanced "*which almost certainly has a de–risking added*" which the trustees could remove.

The investigator wasn't persuaded to change her 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.

Mr C and BRG have made numerous points in both bringing the complaint and the responses to it. And I've considered carefully everything on file. But in this decision I don't intend to address each and every issue or point raised. Instead I will focus on the issues that are at the heart of Mr C's complaint and the reasons for my decision.

When considering what's fair and reasonable, I am 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 the complaint for largely the same reasons given by the investigator.

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

Financial viability

BRG gave its advice 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. 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, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The critical yield required to match Mr C’s benefits at age 65 was 7.79% if he took a full pension. I note that BRG didn't include in its suitability report what the critical yield would be if Mr C chose to take his TFC. And, although BRG clearly recorded that Mr C planned to retire at age 60 the only figures used in its analysis were based solely (assuming the DB pension fund remained liquid) on figures if Mr C were to retire at 65. But Mr C had told BRG that he wanted to retire at 60 and that he planned to take his TFC at 55. Mr C’s DB scheme did allow for early retirement but the figures BRG presented to Mr C in its suitability report, were all given on the assumption that Mr C wouldn’t retire early. So it didn't give Mr C any indication of what his investment returns might be if he were to retire at 60. So I don't think BRG gave Mr C the full picture when recommending he transfer his funds out of his DB scheme.

Further, the relevant discount rate was 4.1% a year for 13 years to retirement, if Mr C was to retire at age 65. But that discount rate would reduce to 3.5% if Mr C were to retire at age 60. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

BRG has provided cashflow models which it says show Mr C would’ve been able to meet his income needs despite the high critical yield. BRG’s told us that it doesn't rely on the critical yield measure because it doesn't find it realistic in assessing the viability of a DB transfer. But it agreed that a discount rate of 4.1% was reasonable. It said that, after making an adjustment for charges, in its opinion the 4.1% discount rate was equivalent to a 5% growth return. And its analysis had shown a 5% gross growth rate would match Mr C’s expected DB returns based on his acceptance of a medium level risk.

It’s worth noting that BRG’s cashflows were all based on a CETV value of £62,172. But, by the time of the actual transfer that figure had grown by 2.5% to £63,745. So, while the two sums aren’t hugely different, the figures BRG based its advice on weren't accurate at the time it gave that advice.

I also think it’s worth pointing out again that BRG’s models are all based on Mr C retiring at 65 without taking his TFC. But that wasn’t what Mr C told BRG he wanted to do. If he’d taken his TFC from his SIPP at 55, which is what he wanted to do, then his SIPP funds would have dropped significantly. By my calculations, based on the figures in BRG’s models, the sum invested in the SIPP would have fallen from around £61,280 to around £45,960 after Mr C took TFC at age 55. So he would have had a considerably smaller pot to draw an income from in his retirement than BRG’s models show.

Further, BRG’s models don’t reflect what Mr C’s position would have been if he retired at 60 rather than 65. As I've said above I note that the discount rate would have fallen to 3.5% if Mr C had chosen to retire at 60. But the sums invested in his SIPP would also have a shorter time in which to grow, while at the same time being subject to the risks that his investments in the SIPP might not only fail to increase but could actually suffer losses within that period. Losses that would not occur if Mr C stayed with his DB scheme.

BRG's models show it was extremely unlikely that Mr C's investment in a SIPP could achieve the critical yield level. And I note those models also show that its own conclusion was that, if Mr C's fund only attracted the lower rate growth of 2% then it would "*almost certainly not provide*" him with the income and security he needed. Its models do show that a 5% growth rate would have produced a return that would match the expected income from Mr C's DB scheme. But as I've said above, those models don't fully compare what Mr C told BRG he wanted to do with the likely expectations of what his DB scheme would deliver in those circumstances. So, as those don't reflect Mr C's stated objectives, I don't think it would be fair or reasonable to rely on them.

In addition, Mr C had given contradictory statements concerning his capacity for loss. Indicating at one point that he had almost no capacity for loss. But at another point he said he could bear some potential loss in order to pursue long-term investment growth. BRG said that Mr C's capacity for loss was increased because he could rely on his current employer's DB scheme to provide him with the retirement income he needed, together with his state pension, once those became payable. But, I note that BRG's suitability report actually described Mr C's current occupational pension as continuing to build up *money purchase* benefits, which – if accurate – would not be a DB scheme with guaranteed benefits. However, in its response to our investigator's assessment of the complaint it said Mr C's current employer's pension is also a DB scheme, which would appear to be at odds with the facts it gave advice upon. So it's not clear if BRG were in full possession of the facts when it gave Mr C such important advice.

Also, I can't see any detail within BRG's suitability report showing how it analysed the likely income Mr C would receive from his current occupational pension scheme and how this would meet his needs at retirement. In fact I can't find any clear reference in the suitability report to BRG having established what Mr C's likely income needs at retirement would be. Instead it refers to these as: "*to be confirmed*". So it seems that BRG gave its advice without a full picture of Mr C's likely income needs in his retirement. And if Mr C did in fact intend to retire at age 60, although BRG didn't identify what level of income Mr C required in retirement, it seems unlikely the remaining fund would've met his needs until age 65.

What I can say for certain is Mr C had the prospect of a guaranteed return from his DB scheme which would increase each year. A return he stood to lose some or all of by moving it into a SIPP which had no guarantees of any return whatsoever. Also, in going ahead with that transfer the funds would instantly be subject to a 3.5% transfer fee. He would also be charged an administration fee of 0.45% each year and a further charge of 1% each year for financial advice. Those are charges that would potentially continue to reduce the size of Mr C's investment but are charges that wouldn't have been deducted from his DB scheme benefits had he remained in that.

BRG has pointed out that Mr C had health conditions which it says would've reduced his life expectancy by around eight years, and it made no allowance for this when giving the advice. Here, BRG is effectively saying that Mr C was less likely to reach his life expectancy, so in reality he would need to rely on these funds for less time. But I don't think it is reasonable for BRG to assume this without having a better understanding of Mr C's health – if his conditions were well-controlled, Mr C still could've met or exceeded his life expectancy. And in any event, I don't think Mr C's health conditions were of such concern that he believed he wouldn't live a long life.

For the reasons given above, particularly as BRG didn't paint a full picture of Mr C's potential financial landscape if he chose to take his TFC at 55 or retire at 60, 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 BRG has argued in this case. There might be other considerations which mean a transfer was suitable, despite potentially providing overall lower benefits. I've considered these below.

Flexibility and income needs

BRG said Mr C would be able to use the SIPP pot to take his TFC at 55 and then to have flexible access to his funds after that. Mr C had said he would like to use some of the funds for him and his wife to travel. He also said he would like to have the flexibility to access funds to meet his circumstances at the time. But while I can see why those might have been desirable prospects for Mr C it doesn't mean that meeting those desires was in his best interests. That's because in order to have access to those funds before retirement meant giving up guaranteed income at retirement age.

I note that at the time BRG advised Mr C he said he had no real assets, but he had no debts either. So there could have been alternative ways of Mr C and his wife funding his desire to travel, if he still maintained that desire, in four years time when he said he wanted to take his TFC.

Further, while Mr C said he wanted the ability to vary his income as his circumstances changed in the future, at the time of BRG's advice he had no need to do that. At that point he was still 13 years from his DB scheme retirement age, 8 years from his preferred retirement age and four years from the date at which he could take TFC. So there was no immediate requirement for Mr C to transfer funds out of his DB scheme when he did.

BRG said that one of Mr C's main concerns was that the CETV his DB scheme was offering at the time of its advice, would reduce before he became 55. The age at which he planned to take his TFC. In other words Mr C was worried that he might lose out on the transfer value if he waited until he was 55 to decide whether or not he wanted to take his TFC. BRG reinforced this point in its suitability report saying that the CETV was an all–time high and that this was a "*unique opportunity*" for Mr C to transfer the funds. It also told us that it believed the CETV was being enhanced by the scheme's trustees, an enhancement that could be removed at any time. But, while the CETV was most likely influenced by the state of the market at the time, I've seen nowhere in the file, beyond BRG's comments, that indicated that the CETV was enhanced as BRG says. Neither have I seen any evidence that it was likely to reduce before Mr C turned 55. So I don't think BRG fairly presented the position of Mr C's CETV at that time.

Mr C had four years before he could access TFC. He also had at least eight years until retirement. In those circumstances 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 C to give up his guaranteed benefits in 2017, especially at a time when he didn't know what his needs in retirement would be. If Mr C later had reason to transfer out of his DB scheme he could have done so closer to retirement when he might have had a better picture of his income needs.

BRG's role should have been to advise Mr C on what was in his best interest, not simply to arrange what he said he wanted at that moment in time without carefully examining what his needs, rather than simply his desires, were. And while I can see why the prospect of access to a large sum of money to spend on travelling or otherwise as he desired might have been a mouth–watering prospect, that doesn't mean it was in his best interests. It's also worth noting that Mr C had no savings and had no investment experience at all. And, at most, he had a medium attitude to risk. So transferring his guaranteed benefits from a DB scheme to a SIPP which had the potential for losses, wasn't in his best interests.

Death benefits

Death benefits are an emotive subject and of course when asked, most people say they would like their loved ones to be taken care of when they die. And giving Mr C's wife access to the remaining funds in Mr C's SIPP following his death might have been an attractive feature to him. But whilst I appreciate such a consideration is important to consumers, and Mr C might have thought it was a good idea to transfer his DB scheme to a SIPP because of this, the priority for BRG 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 BRG explored to what extent Mr C was prepared to possibly accept a lower retirement income in exchange for potentially higher sums being available to his wife in the event of his death.

Further, it's worth noting that Mrs C would have been entitled to the DB schemes death benefits for the rest of her life. Whereas the SIPP would simply return to her what was left after Mr C had taken his TFC and any other income from it. I note Mr C said he wanted to use the money invested in his SIPP as an income between his retirement at age 60 until he could access his other pension provisions at ages 65 and 67. In those circumstances it seems quite likely that the sums invested in his SIPP could have been significantly depleted as he took sums from it. And that amount would likely be further reduced the longer Mr C lived for. So, depending on his lifespan and the funds he'd taken from his SIPP, the fund might not have a large – if indeed any – sum left at the time of Mr C's death. In any event, BRG should not have encouraged Mr C to prioritise the potential for higher sums being available at his death through a SIPP over his security in retirement.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the potential for decrease of retirement benefits for Mr C.

The financial stability of the DB scheme

It appears that Mr C was concerned about the financial position of Mr C's former employer's DB scheme. However, the funding of that scheme was not in such a perilous position that Mr C should have genuinely been concerned about the security of his pension. I think this is something BRG should have been aware of and should have advised Mr C about, it's certainly not unusual for DB schemes to show a balance deficit, but that doesn't mean they can't cover their liabilities as employers find ways to plug the gaps. Further, the scheme also had the added security of the Pension Protection Fund (PPF), which would have preserved most of his guaranteed benefits from the DB scheme had it gone insolvent. So, I think BRG should have explained that the scheme deficit was not as concerning as Mr C thought.

Also I note that BRG said, in its response to Mr C's complaint, that the risks to his DB scheme were higher than the risks associated with his SIPP. But I think that's a misleading statement. Mr C's benefits from his DB scheme were guaranteed. His employer accepted the risks of any shortfalls and guaranteed to cover those. So Mr C would have taken almost no risk by staying in the DB scheme. And even if the DB scheme couldn't cover all its liabilities, as I've said above, then Mr C had the added security of the PPF. But, Mr C lost those protections once he transferred out of the DB scheme. And instead he would have to bear the full risk of investment losses should the SIPP not perform as hoped himself.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a SIPP would have sounded like attractive features to Mr C. But BRG 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 BRG gave to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C faced the possibility of lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer. BRG shouldn't have advised Mr C to transfer out of the DB scheme in order for flexible access to his fund and the potential for higher death benefits. Those weren't worth giving up the guarantees associated with his DB scheme.

So, I think BRG should've advised Mr C to remain in his DB scheme. And I think that if it had, Mr C wouldn't have insisted on transferring out of the DB scheme, against BRG's advice. I say this because Mr C was an inexperienced investor with – at most – a medium attitude to risk. So, if BRG 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 have accepted that advice.

In light of the above, I think BRG should compensate Mr C for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. We asked Mr C if he had accessed his TFC or taken other drawdowns from his SIPP. But, to date, he hasn't replied. So, unless Mr C provides advice to the contrary I think it would be reasonable for BRG to calculate any compensation while assuming Mr C won't access his benefits until age 65.

Putting things right

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

BRG 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 C has not yet retired, he's said he plans to retire at age 60 but hasn't done so yet. But he wouldn't have had full access to his benefits from the DB scheme until he reached 65. So, BRG should base its compensation calculation on his scheme retirement age of 65, 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 C's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr C'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 C 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 C within 90 days of the date BRG receives notification of the acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% a 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 BRG to pay Mr C.

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. 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 require Better Retirement Group Ltd to pay Mr C 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 BRG to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require BRG to pay Mr C any interest as set out above on the sum of £160,000.

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

If Mr C accepts this decision, the money award becomes binding on BRG.

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 27 June 2022.

Joe Scott

Ombudsman