Financial Ombudsman Service

The complaint

Mrs H complains about the advice given by Better Retirement Group Ltd trading as Fiducia Prosperity (BRG) to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused a financial loss. This is because her fund is worth much less than it would have been if she had not made the transfer.

What happened

Mrs H approached BRG in March 2018 to discuss her pension and retirement needs.

BRG completed a fact-find to gather information about Mrs H's circumstances and objectives. BRG also carried out an assessment of Mrs H's attitude to risk, which it deemed to be 'low to medium'.

In June 2018, BRG advised Mrs H to transfer her pension benefits into a personal pension and invest the proceeds. Ultimately she invested using a Discretionary Fund Manager (DFM). The suitability report said the reasons for this recommendation were because the benefits Mrs H would receive from the more flexible personal pension arrangement were of more value to her than the benefits she would have received from her existing DB scheme.

It's worth noting that Mrs H's personal pension funds were frozen when the DFM went into special administration in 2019. I understand Mrs H's funds have been transferred to a third party who have taken on the former customers of the original DFM.

Mrs H complained in June 2020 to BRG about the suitability of the transfer advice. This was caused, to a large degree, by the significant falls in the value of the fund that the new personal pension had invested in.

BRG didn't uphold Mrs H's complaint. It said that the transfer was likely to be suitable for Mrs H. This was because her retirement income requirements were modest, and she had other means to fund her retirement. She had some health concerns and a genuine need for flexibility. It said the transfer value analysis supported the transfer.

Mrs H referred her complaint to our service. An investigator upheld the complaint and recommended that BRG pay compensation. The investigator said that the transferred out benefits were likely to be substantially lower than those of the DB scheme. As this was her only large pension scheme her capacity for loss was low. The DB scheme had significant dependents and death benefits.

BRG disagreed, and it responded in detail. I won't list each point it made here, but a brief summary is as follows:

- A critical yield was not a reasonable way to look at Mrs H's situation, its cash flow analysis better reflected her requirements.
- The 'discount rate' needed for the transfer to meet her needs met her attitude to risk.
- Due to ill health Mrs H wanted flexibility with her benefits.

- Mrs H did have capacity for loss as she was due to inherit some rental properties that had a significant value.

The investigator wasn't persuaded to change their opinion, and I've noted the correspondence that followed. In particular the further evidence from both parties about Mrs H's health situation.

The complaint has been 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.

Although I have only included a summary of the complaint, I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

When considering what is 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 Financial Conduct Authority ('FCA'), states 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 the transfer was in Mrs H's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how BRG 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 BRG 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 Mrs H's benefits at age 65 was 6.99% if she took a full pension and 4.38% if she took no tax free cash and there was no spouses pension, no increases in payment and no guarantees (the 'hurdle rate').

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 4.6% per year for 25 years to retirement. 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.

I've taken this into account, along with how the discount rate is calculated, Mrs H's 'low to medium' attitude to risk and how long she had to retirement. There would be little point in Mrs H giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield was

6.99%, I think Mrs H 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.

BRG has provided cashflow models which it says show Mrs H would've been able to meet her needs despite the high returns needed to match the DB scheme benefits. I've considered these, but BRG's models show that if Mrs H took the same benefits as she would from the DB scheme then, assuming a low growth rate of 2%, her fund would be reduced to zero at around age 76. The age her pension fund was reduced to zero, assuming a medium growth rate of 5%, increased to around age 91. The maximum sustainable income, until age 99, assuming the lower growth rate of 2% was £2,773 per year. This rose to £7,087 if an assumption of 5% was used.

So, it's very likely her pension benefits would be much lower than the DB benefits she transferred away from would have been, due to this transfer.

Also, as BRG will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

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

Flexibility and income needs

I don't think Mrs H required flexibility in retirement. This is because based on the evidence I've seen, I don't think she had a genuine need to access her tax free cash (TFC) earlier than the normal scheme retirement age and could leave her funds invested until a later date. It was confirmed in the suitability letter that Mrs H had no earlier need for her TFC.

I also can't see evidence that Mrs H had a strong need for variable income throughout her retirement. Again, there was no need for this identified. And in fact the client review said that Mrs H's required income in retirement was 'Not Known'. This isn't unreasonable given how far in the future her retirement was. But it's hard to see how BRG could reasonably advise on Mrs H's retirement income needs when it hadn't really determined what these were.

Under the DB scheme, Mrs H was entitled to an annual income of £8,737.12 from the scheme at 65. And the planning was based on replicating this income from the personal pension. So, I'm satisfied Mrs H could have met her income needs in retirement through the DB scheme at 65. And again, this was confirmed in the suitability letter.

BRG says that Mrs H was due to inherit some properties and these would provide the majority of the income she would need in retirement. It's not entirely relevant to my decision about this aspect of the planning, but it should be noted that Mrs H has said that the value of the properties is much less than BRG recorded.

And there is no certainty about this inheritance, Mrs H may, or may not, receive these properties and the related income stream in the future. Of course, this potential inheritance is something to bear in mind, but I don't think it was right to give up the guaranteed DB benefits on the basis of this possible future income or asset.

Furthermore, Mrs H was only 39 at the time of the advice and based on what I've seen she didn't have concrete retirement plans. As Mrs H had around 25 years before she would think about accessing her pension, 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 Mrs H to give up her guaranteed benefits now when she didn't know what her needs in retirement would be. If Mrs H later had reason to transfer out of their DB scheme she could have done so closer to retirement.

Death benefits

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 were an attractive feature to Mrs H. And this seems to be one of the drivers of the advice given, that is Mrs H wanted her dependents to access her fund on her death, rather than it being used to provide her pension.

But whilst I appreciate death benefits are important to Mrs H, and Mrs H might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Mrs H about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think BRG explored to what extent Mrs H 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. Mrs H was married and had children and so the spouse's and dependent's pension provided by the DB scheme would've been useful to her spouse and dependents if Mrs H predeceased them. I don't think BRG made the value of this benefit clear enough to Mrs H and I think she now recognises this. 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 may not have been a large sum left particularly if Mrs H lived a long life. In any event, BRG should not have encouraged Mrs H to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Mrs H genuinely wanted to leave a legacy for her spouse and children, which didn't depend on investment returns, or how much of her pension fund remained on her death, I think BRG should've instead explored life insurance.

Basing the quote on the transfer value of Mrs H's pension benefits essentially assumed that she would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mrs H wanted to leave whatever remained of her pension to her spouse or children, which would be a lot less than this if she lived a long life or if investment returns were poor. So, the starting point ought to have been to ask Mrs H how much she would ideally like to leave to her spouse or children, and this could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide.

As I mentioned above, there is a lack of clarity around Mrs H's health at the time of advice. The first suitability report says that Mrs H was in good health. And the recommendation, on paper at least, was made on this basis. But I acknowledge that Mrs H had a health condition and so appears to have had concerns about her life expectancy. It seems from what both sides say that these were discussed at some point. I've seen a second suitability letter which acknowledges that Mrs H has some health problems. But, as part of the complaint, Mrs H has said that she doesn't have any health issues.

But Mrs H not reaching her life expectancy was only a possibility and it was also possible that she would exceed this, in which case Mrs H would need her pension to last longer. If Mrs H transferred out of the DB scheme she would be relying on investment returns to ensure sufficient capital remained in the personal pension to provide the death benefits, whereas the spouse's and dependents pensions under the DB scheme were guaranteed and escalated.

And I haven't seen that any meaningful investigation into this was undertaken, for example it wasn't determined that life cover was very expensive or difficult to obtain, and it may have been a cost effective option and enabled Mrs H to preserve her DB plans. It's not even really established that Mrs H had any significant health problems. And she certainly doesn't seem to have had any problems that would mean it was a pressing need to transfer immediately.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mrs H. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

Mrs H confirmed that she wanted control over her pension benefits, and she wanted to make a clean break from her past employer. I think Mrs H's desire for control over her pension benefits was overstated. Mrs H was not an experienced investor and I cannot see that she had an interest in or the knowledge to be able to manage her pension funds on their own. So, I don't think that this was a genuine objective for Mrs H – it was simply a consequence of transferring away from her DB scheme.

The funding of her employer's DB scheme was not in a position such that Mrs H should have genuinely been concerned about the security of her pension.

Use of DFM

BRG recommended that Mrs H use a DFM to manage her pension funds. And Mrs H now thinks that the funds weren't right for her. This is largely because of the significant fall in the value of the investments.

As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs H should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage her funds if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs H. But BRG wasn't there to just transact what Mrs H might have thought she wanted. The adviser's role was to really understand what Mrs H needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs H was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs H 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. Mrs H shouldn't have been advised to transfer out of the scheme just to potentially allow her spouse and dependents to access her fund. This was a decision she could have made later if her health situation changed or deteriorated. So, the potential for flexibility wasn't worth giving up the guarantees associated with her DB scheme.

So, I think BRG should've advised Mrs H to remain in her DB scheme.

Of course, I have to consider whether Mrs H would've gone ahead anyway, against BRG's advice. I've not seen any persuasive evidence that this would be the case here.

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

I'm not persuaded that Mrs H's concerns about her death benefits and her stated need to sever links with her old employer were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If BRG had explained that Mrs H could meet all of her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs H would have insisted on transferring out of the DB scheme.

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

In addition, BRG should pay Mrs H £250 for the stress and inconvenience this situation has caused her. She says the significant fall in the value of the fund has given her some sleepless nights. So, all of this, has clearly been very stressful for her. So, I think this amount is reasonable.

FSCS compensation

I'm aware Mrs H has had some correspondence with the Financial Services Compensation Scheme ('FSCS') in respect of the situation concerning the funds the personal pension is invested in. It's not clear at this point if the FSCS will fully consider complaints, or pay compensation, in respect of these funds.

As a scheme of last resort, it's possible the FSCS won't pay out if a third party could also be held liable. This means requiring BRG to pay only part of the losses could risk leaving Mrs H out of pocket. But I think it's important to point out that I'm not saying BRG is wholly responsible for the losses simply because the DFM is now in liquidation. My starting point as to causation is that BRG gave unsuitable advice and it is responsible for the losses Mrs H suffered in transferring her existing pension to the personal pension and investing as she did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position.

With this in mind – and recognising also that Mrs H wouldn't have lost out at all but for BRG's failings and that BRG benefitted financially from advising on this transaction – I think holding BRG responsible for the whole of the loss represents fair compensation in this case.

Putting things right

A fair and reasonable outcome would be for the BRG to put Mrs H, as far as possible, into the position she would now be in but for BRG's unsuitable advice. I consider Mrs H would have most likely remained in her 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, Mrs H has not yet retired, and she has no plans to do so at present. So, compensation should be based on her normal 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 Mrs H's acceptance of the decision.

BRG may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs H's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs H's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mrs H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mrs H within 90 days of the date BRG receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes BRG to pay Mrs H.

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 BRG pays the balance.

BRG should also pay Mrs H £250.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require BRG to pay Mrs H 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 Mrs H 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 Mrs H 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 Mrs H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs H.

If Mrs H accepts this decision, the money award becomes binding on BRG.

My recommendation would not be binding if Mrs H does not accept my decision. Further, it's unlikely that Mrs H can accept my decision and go to court to ask for the balance. Mrs H 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 Mrs H to accept or reject my decision before 1 June 2022.

Andy Burlinson
Ombudsman