DRN-2869807

The complaint

Mr B complains about the advice given by BRG Ltd ('BRG') to transfer out of the British Steel Pension Scheme ('BSPS') and invest the funds in a personal pension. He says the advice was unsuitable for him which has resulted in him suffering a significant financial loss.

What happened

In March 2016, Mr B's employer announced that it would be examining options to restructure its business including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

Mr B was concerned about what the announcement by his employer meant for the security of the defined-benefits he held in the BSPS. He was also struggling with some debts. As Mr B was unsure about what to do with his pension, he approached an independent financial adviser for advice, who introduced him to BRG.

In November 2017 BRG advised Mr B to transfer out of the BSPS to a self-invested personal pension ('SIPP'). It recommended he invest the funds with a business I'll refer to as 'S', which was a discretionary fund manager ('DFM'). £113,531.49 was transferred to Mr B's SIPP – Mr B took a lump sum of £28,382 and the remainder was invested by S.

After becoming aware of some issues with S in 2019, Mr B complained. His pension was inaccessible and it was possible he would sustain substantial losses as a result of the investment decisions made by S. BRG didn't uphold the complaint. It thought the advice was suitable for Mr B as it believed he could've only reduced his debt and met his other objectives by transferring out of the BSPS and taking his tax-free cash ('TFC').

Mr B referred his complaint to our service. Our investigator agreed that it was probably necessary for Mr B to transfer out of the BSPS and take his TFC to clear his immediate debts. However, she didn't think a SIPP was suitable for Mr B and she also didn't think he needed to use a DFM, which she believed had caused him to incur unnecessary additional costs. The investigator recommended that Mr B should be compensated by comparing his actual position with a benchmark, and paying him the difference.

BRG didn't agree. It said the SIPP wasn't expensive and it thought Mr B could've benefited from the use of a DFM. It noted that Mr B's loss associated with S had most likely prompted the complaint, and BRG couldn't be held responsible for the actions of S.

The investigator didn't change her opinion so the complaint was referred to me to make a final decision.

After reviewing the file, I informed BRG that I was intending to depart from the investigator's findings. On balance, I didn't think the advice to transfer out of the BSPS was suitable for Mr B. I thought Mr B should've been advised to join the BSPS2, and use his wife's TFC to clear their immediate debts. I didn't think it was reasonable to recommend that Mr B should also transfer and take his TFC, just to pay down part of their mortgage, given they could afford the repayments if the immediate debts were cleared.

BRG responded, saying that Mr B's wife, Mrs B, had already taken and spent her TFC, which is why Mr B needed to access his pension. It also said Mr and Mrs B's mortgage interest rate was very high – 8% – so it was suitable to advise Mr B to take his TFC so they could re-mortgage and ease the financial pressure they were under.

I asked for evidence of this from both parties. Mr B provided mortgage statements showing that their mortgage interest rate was much lower – 2.5%. He also said Mrs B hadn't spent her TFC, instead she hadn't taken it at all. BRG didn't reply. So, I informed BRG that I still intended to uphold the complaint. I didn't hear back from BRG, so I'm now providing my final decision on this complaint.

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.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a defined-benefits scheme is that it is unsuitable. So, BRG should have only considered a transfer if they could clearly demonstrate that the transfer was in Mr B's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied the transfer was in his best interest. I'll explain why.

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.

The documents provided show that Mr B wasn't planning to retire until age 67, which would coincide with payment of his state pension. BRG carried out a transfer value analysis report ('TVAS') showing the growth his fund would need to achieve in order to match the benefits he could obtain through the BSPS. It doesn't appear that the comparison was made based on the benefits available to Mr B through the BSPS2 – I'm not sure why that is, as the details of BSPS2 were known by the time BRG gave advice. So, although I will make reference to Mr B's BSPS benefits, in reality he needed to choose between joining the new scheme, BSPS2, or allowing his benefits to enter the PPF.

The investment return (critical yield) required to match the BSPS pension at age 65 was quoted as 24.09% per year if no TFC was taken. The critical yield required if Mr B took TFC wasn't provided. The critical yield to match the benefits available if the BSPS moved to the PPF was 10.04% without taking TFC, and 9.14% with TFC. BRG also provided Mr B with the hurdle rate, which is the estimated annual investment return needed to purchase an annuity to provide benefits of equal value to the estimated benefits provided by the BSPS assuming no spouse's pension, no increases in payment and no guarantee. This was 13.01% if no TFC was taken.

The relevant discount rate published by the Financial Ombudsman Service at the time the advice was given was 3.1% per year for 5 years to retirement. For further comparison, the FCA's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year. Even taking the lowest critical yield here (9.14%), which was a comparison to the PPF at age 65 if Mr B took TFC, it's highly unlikely Mr B could've matched, let alone exceeded his BSPS benefits in the SIPP if he was invested in line with a medium risk strategy as suggested by BRG. And on balance I think the critical yield required to match the benefits in the BSPS2 if Mr B took TFC at age 65 would've been even higher than 9.14% - this is because the starting benefits available through the PPF would be reduced by 10%. So, I think it is clear the transfer would not have put Mr B is a better position financially.

However, BRG has stated that it was never its intention to show that Mr B would be better off financially or that he could achieve a higher income by transferring out of the BSPS. It says it warned Mr B about this. But I think the suitability report contained a lot of misleading statements, such as:

"It is possible that you may, in the long term be financially disadvantaged following any transfer of your final salary benefits..." - page 10.

"The estimated growth required to match benefits in your existing scheme is deemed reasonable when compared with the risk you are prepared to take with your fund." - page 11.

"It should be borne in mind that whilst I am recommending the transfer of your benefits, based upon the information provided, my analysis shows that in transferring away from your existing scheme, it is likely that you could be financially disadvantaged if the UK goes through a sustained period of inflationary pressure and or both you and your partner live longer than is statistically anticipated at outset." – page 13.

"We believe the critical yield is achievable, given your attitude to risk." - page 14.

So, I don't think Mr B would've necessarily understood that there was a very high risk he would be worse off financially if he transferred out of the BSPS based on the information he was given.

BRG says that in any event, analysis of the critical yield is no longer useful, given the long-term sustained low interest rates. Instead, it says it analysed the growth the fund required in order to meet Mr B's income need of £6,000 per year for the average life expectancy for someone in his demographic, plus five years. This showed that growth of 5% gross, including adviser and investment charges, was achievable and was sufficient to meet Mr B's income needs until age 87. It added that Mr B had health conditions which may have reduced his life expectancy, but it hadn't made any allowances for this.

But the guidance under COBS 19.1.3 states that the comparison undertaken by BRG should:

1) *take into account all of the retail client's relevant circumstances;*
2) *have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;*
3) *explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and*
4) *be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested…*

While BRG did provide the critical yield to Mr B, in the suitability report it said:

"If you are looking to take your benefits flexibly and in a different way to those offered by your ceding scheme or have no intention of ever taking an annuity, then this figure may be deemed somewhat irrelevant."

So, I think BRG essentially told Mr B to ignore the critical yield in favour of its alternative method of comparison. This comparison didn't replicate the benefits he was giving up, which is what the regulator required. This seriously undermined the comparison the regulator asked it to give Mr B and together with the statements above, I think it would've made it very hard for Mr B to understand whether or not he'd be better off remaining in the BSPS. And in any event, I'm still not persuaded that the gross growth rate of 5% was achievable, based on the discount rate I've referred to above. So, I'm still not persuaded that Mr B would've been able to meet his income needs for the rest of his life if he transferred to the SIPP. Overall, based on the above alone, I don't think a transfer was in Mr B's best interest.

Nevertheless, 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.

Access to TFC

BRG says Mr and Mrs B had immediate debts they needed to clear of around £20,000, which included some mortgage arrears. It says Mr and Mrs B also wanted to reduce their mortgage by around £28,000, so they would be mortgage free when Mr B retired at 67. And by reducing the mortgage BRG says this would've allowed them to re-mortgage, as their current interest rate of 8% was too high. BRG says Mr B could've only achieved all of this by transferring out of the BSPS to a SIPP and both he and his wife taking their TFC entitlements. This would give them access to a lump sum of around £55,000, which would enable them to clear their debts, pay around £28,000 towards the mortgage and allow them to put some extra money aside for emergencies.

Whilst I think there was an immediate need to clear the debts of £20,000, I'm not persuaded that the other two objectives were as important – to my mind they appear to be more of a 'nice to have'. And in any event, an adviser's job isn't simply to facilitate a customer's objectives. Any objectives should be interrogated thoroughly to determine whether or not they are realistic, or achievable through other means. And ultimately, the adviser has to determine whether giving up the secure, guaranteed benefits available through the BSPS2 or the PPF was in Mr B's best interests.

Mr B's mortgage had around £80,000 outstanding at the time of the advice, and understandably he wanted to ensure it was paid off by the time he retired at 67. If he transferred his BSPS benefits and took TFC, he'd only be able to reduce this by around £28,000. The only advantage to paying down the mortgage then, as opposed to at 65 or 67 when he could access his BSPS benefits and use the TFC from the scheme, was to save on the mortgage interest payments. I initially explained to BRG that I thought that saving was likely to be minimal, as interest rates were and continue to be very low. And that minimal interest saving had to be weighed up against the disadvantages of transferring out of the scheme, which were significant.

In response, BRG said that Mr and Mrs B were referred to BRG by a mortgage broker as they couldn't re-mortgage without addressing their debts. It said the interest rate on their mortgage was 8%. So, BRG thought that there was a clear need to pay down some of the mortgage with Mr B's TFC, to ease the financial pressure they were under. As this wasn't detailed in the fact-find, I asked for contemporaneous evidence to demonstrate this but it wasn't provided. So, I asked Mr B about his mortgage interest rate at the time of the advice.

He provided me with a mortgage statement which shows the mortgage interest rates applicable to his accounts was 2.25% from 1 January 2017 and 2.5% from 1 January 2018.

As the evidence provided demonstrates that Mr and Mrs B’s mortgage rate was low, I don't think there was any genuine need to pay down part of the mortgage at the time of the advice. This could've been done closer to retirement, using Mr B's TFC, which would've likely been higher at that time, leaving his guaranteed benefits intact. That leaves the issue of Mr and Mrs B’s immediate debts.

According to the fact-find and meeting notes completed at the time of the advice, Mr B and his wife were relying on Mr B's salary alone (Mrs B was just starting a new business and her income at first was likely to be low). It doesn't appear that they needed access to extra funds once the debts had been cleared – Mr B’s income was sufficient to meet the ongoing mortgage repayments and their cost of living. Mr B also confirmed he didn't need to take any income from the pension at the time. So, I think Mr B's only immediate objective that needed to be addressed by the adviser at the time was to clear his debts. That leaves Mr B needing a capital sum of around £20,000.

It is evident from the fact-find completed by the adviser that at the time of the meeting in November 2017, Mrs B had decided to transfer her own defined-benefit occupational pension scheme (‘OPS’), and would be receiving around £27,000 as TFC. This amount was sufficient to clear Mr and Mrs B’s immediate debts and boost their emergency fund. In the representations made to this service, BRG says that Mrs B taking her TFC formed part of its recommendations to Mr B. That is, it recommended that Mrs B’s TFC and the TFC available to Mr B if he transferred out of the BSPS should be used to pay off their debts and reduce the outstanding residential mortgage. This aligns with the objectives described by Mr B in the fact-find and meeting notes. However, I don’t think the suitability report is particularly clear that using Mrs B’s TFC in this way formed part of BRG’s recommendation. And, in my view, I think the adviser ought to have recognised that Mr and Mrs B could meet their immediate pressing objective of clearing their debts using Mrs B’s TFC alone.

Mr B's OPS was Mr and Mrs B's main retirement provision – it was projected to provide an escalating annual pension of £8,132 per year from age 65. Again, I don’t know what the annual pension was if Mr B joined the BSPS2, but I don’t think it would’ve been substantially lower than this. Mrs B's OPS would only provide an income of around £3,000 per year. Mr B didn't intend to retire until age 67, so the income achievable and TFC available to him at age 67 would've likely been even higher. The fact-find stated that Mr B would need around £6,000 a year from his pension in retirement, so his BSPS benefits met that need comfortably. Given that Mrs B’s TFC was sufficient to clear their debts, I think Mr B should've been advised to opt into BSPS2 rather than transfer his pension to a SIPP.

In response to my provisional thoughts, BRG said that Mrs B had already been spent her TFC on her new business venture. I asked BRG to provide contemporaneous evidence of this as the only reference to this I could find was in BRG’s final response letter to Mr B. But BRG didn’t provide any evidence to support this point. So I put this to Mr B, and he said that Mrs B ultimately didn't withdraw her TFC. He said the only TFC taken was through Mr B's SIPP on BRG's advice, which was used to clear his debts. In the absence of any evidence to the contrary, I’m persuaded by Mr B’s account here.

The fact-find completed by BRG clearly stated that Mrs B wanted to use her TFC – around £27,000 – to 'clear debts' and 'reduce mortgage'. It isn't clear why Mrs B didn't take her TFC, but it's possible that she no longer considered it necessary given BRG's advice to Mr B to transfer his BSPS benefits and take his TFC. And perhaps the absence of any mention in the suitability report of Mrs B using her TFC to help repay the debts and pay down the mortgage contributed to this.

Concerns about financial stability of the BSPS

Although Mr B approached BRG because he was in financial difficulty, he was also concerned about his BSPS pension - he was worried his pension would end up in the PPF. So it's quite possible that Mr B came to BRG leaning towards the decision to transfer for this reason alone. However, it was BRG's obligation to give Mr B an objective picture and recommend what was in his best interests. The fact-find says that Mr B was particularly concerned about the BSPS moving to the PPF. However, as the figures above show, even if this happened, Mr B was still likely to be better off not transferring. And he would've been better off still if he opted to join the BSPS2 - I can't see that this was properly explained to him in terms he could clearly understand.

Flexibility and death benefits

The suitability report said it was important to Mr B to have flexibility. But I think this was only on the basis that BRG believed Mr B needed to access his TFC immediately but he didn't need to take any pension income. Mr B didn't express the need to take a flexible income in retirement. As Mr B couldn't have taken his TFC without taking his pension income in the BSPS2, it seems to me that BRG used this as a reason to justify the transfer. But as I've said above, I don't think Mr B needed to take his TFC to clear his immediate debts, so this objective falls away.

It was recorded in the suitability report that on his death Mr B wanted to leave any remaining funds in his pension to his wife. However, when asked about the importance of lump sum death benefits in the fact-find, Mr B chose the following statement:

"My dependants will receive significant sums upon my death and whilst a great amount might be beneficial, it is not an absolute priority for me."

So, again I don't think this was a genuine objective for Mr B, rather it was a consequence of the recommendation to transfer that BRG emphasised to Mr B. I also think the existing death benefits with BSPS2 (or the PPF) were underplayed. Mr B's wife would have received a spouse's pension for life, which given that she only had a small pension herself, would have been valuable if Mr B predeceased her. I don't doubt that the option of leaving a lump sum to his wife would have been attractive and is something Mr B would have liked. However, BRG didn't explore to what extent he was prepared to accept a lower retirement income in exchange for this.

In any event, whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr B on what was best for his own retirement provisions. A pension is primarily designed to provide income in retirement. So I don't think different death benefits justified the likely decrease of retirement benefits for Mr B.

Summary

Overall, I'm satisfied that the advice given to Mr B was not suitable. He was giving up a guaranteed, risk free and increasing income. By transferring he was essentially guaranteed lower retirement benefits and as I have explained above, while Mr B had debts that needed to be addressed immediately, I think he and his wife were able to clear these without giving up his BSPS benefits. And I don't think there were any other particular reasons which would justify a transfer and outweigh this.

I appreciate that at the time the advice was given there was a lot of uncertainty around the pension scheme and I've fully taken into account that Mr B likely was keen to transfer out as he was worried about his pension. However, it was the adviser's responsibility to objectively weigh up the options for Mr B. He should have advised him what was best for his circumstances and explained what he was giving up in the BSPS and that moving to the PPF was not as concerning as he thought.

For the reasons given above, I think BRG should have advised Mr B to join the BSPS2. I say this because Mr B didn't intend to retire early – he was working for a different employer and intended to work until age 67. So, I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for early retirement. Also, Mr B was married, and his wife's pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement. The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

On balance I think Mr B would have listened to the adviser and followed their advice. Mr B was an inexperienced investor and was concerned about his financial stability – this pension made up a significant part of his retirement provision, and he couldn't afford to lose it. So, if BRG had provided him with clear advice against transferring out of the BSPS, explaining why it wasn't in his best interests, I think he would've accepted that advice. So, I think BRG should compensate Mr B for the unsuitable advice, using the regulator's pension review methodology. And it's the benefits offered by the BSPS2 which should be used for comparison purposes.

I've thought about the fact that S was responsible for managing Mr B's investments, and as I understand it, because S is in administration, Mr B's assets are frozen and have fallen in value. I recognise that S could be separately held responsible for some of Mr B's losses. However, Mr B has complained about BRG's advice and, on balance, I think it would be fair to hold BRG fully responsible for Mr B's loss. I say this because BRG advised Mr B to transfer out of the BSPS; it set up the SIPP and arranged for his existing pension benefits to be transferred. It was only as a result of BRG's involvement that Mr B transferred his BSPS benefits to the SIPP. BRG's role was pivotal, since the eventual investments were fully reliant on its advice to transfer the funds; if that hadn't happened, Mr B couldn't have invested as he did. So, in my view, the entirety of his loss stems from BRG's unsuitable advice to transfer away from the BSPS.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in but for BRG's unsuitable advice. I consider Mr B would have most likely transferred into BSPS2 and taken his benefits at age 67, rather than to the SIPP if he'd been given suitable advice. So, BRG should use the benefits offered by BSPS2 for comparison purposes.

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.

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 B's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr B'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 B 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 B 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 Mr B.

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.

My aim is to return Mr B to the position he would've been in but for the actions of BRG. This is complicated where investments in the SIPP are frozen as their value can't be determined, which appears to be the case here.

To calculate the compensation, BRG should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If BRG is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything BRG has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, BRG may ask Mr B to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. BRG will need to meet any costs in drawing up the undertaking. If BRG asks Mr B to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

SIPP Fees

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mr B wish to move his investment portfolio) and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by BRG taking over the investment, or this is something that Mr B can discuss with his SIPP provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that BRG pay Mr B an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

In addition, BRG should pay Mr B £300 for disruption to Mr B's retirement planning.

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 BRG pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Better Retirement Group Ltd to pay Mr B 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 Better Retirement Group Ltd to pay Mr B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Better Retirement Group Ltd to pay Mr B any interest as set out above on the sum of £160,000.

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

If Mr B accepts this decision, the money award becomes binding on Better Retirement Group Ltd. My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 11 March 2022.

Hannah Wise
Ombudsman