DRN-2948800

The complaint

Mr H complains about the advice given by Better Retirement Group Ltd (BRG) to transfer the benefits from his British Steel defined-benefit (DB) occupational scheme (BSPS) to invest in a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes it has caused him a financial loss.

What happened

In March 2016, Tata Steel UK Ltd 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 pension benefits, one of which was a transfer to the Pension Protection Fund (PPF) – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

In 2017, Mr H started considering his pension arrangements. Mr H started the advice process with a third party. This third party completed some of the initial paperwork for Mr H and requested information about Mr H's DB pension scheme, but as they didn't have the relevant permissions to advise on DB pension transfers they involved BRG to provide the pension transfer advice.

The fact find that was completed in April 2017 showed that Mr H:

- Was 43 years old, married with two dependent children. His wife had no pension provision.
- Owned his home with around £20,000 remaining on his mortgage. He had no other significant liabilities aside from a credit card.
- Had savings of around £6,500.
- Planned to retire at age 60.
- Had an attitude to risk (ATR) of 'high medium'.

And Mr H had some existing pension provision:

- His expected state pension.
- His deferred benefits in the BSPS.
- Mr H's employer set up a defined contribution (DC) scheme. His employer currently paid 10% of his salary, and Mr H paid 6% of his salary, into this.
- A small personal pension plan with Scottish Widows.

On 3 October 2017, BRG advised that Mr H transfer his DB pension benefits, which were around £240,000 into a SIPP and invest the proceeds using a discretionary fund manager (DFM).

The suitability report said the reasons for this recommendation were:

- A personal arrangement would provide the income and flexibility Mr H required during retirement.
- Mr H wanted increased death benefits.
- Mr H would have sufficient retirement income from other sources.

Mr H complained in 2019 to BRG about the suitability of the transfer advice. He now thinks the advice to transfer in the personal pension wasn't right for him and he should have moved into, and stayed in, the BSPS2.

BRG didn't uphold Mr H's complaint. It said that it had undertaken a full analysis of his circumstances and the advice was appropriate.

Mr H referred his complaint to our service. An investigator upheld the complaint and said that BRG should pay compensation. She said that there wasn't a legitimate reason for transferring the BSPS pension into a personal arrangement. Mr H should have been advised to keep the guaranteed benefits which would've been available from the BSPS2. This scenario wasn't considered by BRG.

BRG disagreed, saying:

- At retirement his DB scheme benefits would only form about a third of his total pension provision, so he could take some risk with it to gain flexibility.
- He agreed at the time he had a higher tolerance to risk, he didn't have a 'low' capacity for loss. He was informed about, and agreed with, the risk to his DB benefits
- He did want to break all ties with his employer.
- It's not reasonable to rely on the 'critical yield' when assessing a DB transfer. Its cash flow analysis is a far better method to asses this. This showed Mr H could meet his needs with the DB transfer.

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.

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 Mr H'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

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.

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 H 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 H's BSPS benefits, in reality he needed to choose between joining the new scheme, BSPS2, or allowing his benefits to enter the PPF.

The critical yield required to match Mr H's benefits at age 65 was 8.17% if he took a full pension. The critical yield that would provide the same pension with no increases, or spouses pension, (the hurdle rate) was quoted as 4.78% per year.

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 4.5% per year for 21 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 the composition of assets in the discount rate, Mr H's recorded ATR and also the term to retirement. There would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

I note that Mr H's ATR was recorded as high medium initially after the first fact finding meeting. However, I do have some concerns about this assessment. In what looks to be a second assessment (which was completed by the third party in September 2017) it says that Mr H had answered 'agree' to some statements which I think showed that that he didn't want to take a higher risk with his money. For example, he was concerned with possible losses and uncertainty around returns. He preferred investments that provided a guaranteed return, such as bank acounts, above shares. This ATR assessment showed Mr H's answers indicated he had a 'low medium' attitude to risk. It seems that after a further dicussion about his capacity to take risk that his ATR was raised to high medium.

Mr H says he had a lower ATR than 'high medium'. He didn't seem to have any significant prior investment experience. And there is enough evidence to show that Mr H had indicated (at times) that he didn't want to take a higher risk with his pension fund. I accept the evidence around this isn't clear, it's contradictory at best. But this is something BRG really should have 'nailed down' before giving advice.

So here, given the critical yield was 8.17%, I think Mr H was likely to receive benefits of a lower overall value than the DB scheme at retirement, `Even if I assume he was a medium or higher risk investor, I think achieving the returns he would need to make each year to match the benefits he was giving up would be difficult. And simply matching the DB benefits wouldn't have been sufficient to make a transfer financially viable. There needed to be a reasonable chance for the SIPP to provide higher returns than this, I think this was even less likely.

BRG considers that the critical yield wasn't particularly relevant. I don't agree with this. It does provide a good indication of the value of benefits a consumer is giving up by transferring and the regulator deems it an important part of the decision-making process. So, I think the critical yield is relevant, and important, when looking at the financial viability of a transfer.

BRG used cash flow modelling to show how Mr H could take the same benefits from the SIPP as the DB scheme would provide. It also showed how this income could be sustained over different timeframes depending on certain growth levels.

However, these illustrations showed that with returns of 2% per year, Mr H's funds would run out at age 77, which is below his average life expectancy. The sustainable income for this growth rate was just £6,313. With returns of 5% his benefits would last until age 91. The sustainable income for this growth rate was £14,096.

Of course Mr H could have taken lower benefits and extended the time his benefits would last, however, I can't see why he would want to do this. And I'm not persuaded why Mr H needed to take this risk with his pension. The BSPS would provide an income of £18,034 and it would increase by the retail price index.

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.

So based on the above alone, a transfer wasn't in Mr H's best interest.

Of course financial viability isn't the only consideration when giving transfer advice, as BRG said in its response to the opinion. 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 it's unreasonable to say that BRG didn't establish what income Mr H needed, or wanted, when he retired. This isn't unreasonable given the time Mr H had left until he retired. But it's hard to see how BRG could've advised Mr H on his retirement needs without establishing what they were.

It follows that it wasn't established that Mr H required flexibility in retirement. I say this because whilst flexibility is mentioned in the point of sale information as being a feature Mr H would like, the advice didn't go any further than this.

Based on the evidence I've seen, I don't think he had a genuine need to access his TFC earlier than the normal scheme retirement age and leave his funds invested until a later date. I also can't see evidence that Mr H had a strong need for variable income throughout his retirement. Again, there was no definite need for this established at the point of sale.

BRG has said that at the time they gave Mr H advice on this transfer, they assumed he would remain in his current DC BSPS pension going forward. So he would build up benefits in this. Adding this to his expected state pension, and another smaller DC scheme, would mean the BSPS pension would form around a third of his total pension provision at retirement. So, they considered he had some capacity to risk his BSPS benefits.

But I don't agree that this was a good reason to transfer his BSPS benefits. This was his only guaranteed pension benefits, other than his state pension. So, this could be the cornerstone of his retirement planning and he could use his other pensions flexibly. I think he could have achieved his recorded aims by doing this.

Furthermore, Mr H was only 43 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr H had at least 17 years before he was thinking about accessing his 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 Mr H to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr H later had reason to transfer out of his DB scheme he 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 likely an attractive feature to Mr H.

But whilst I appreciate death benefits are important to consumers, and Mr H might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr H 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 H was prepared to accept a lower retirement income in exchange for higher death benefits. I don't think a need to leave his fund to his dependents or spouse was properly established in any event.

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

Time to choose

In September 2017, Mr H had the choice to move to the PPF or transfer to BSPS2.

I've carefully considered what Mr H likely would have done if he had been recommended to remain in BSPS. And on balance I think he would have opted to move to BSPS2. I say this because BSPS2 wouldn't have decreased Mr H's initial pension entitlement by 10% like the PPF and some of his benefits would have had potentially higher increases in BSPS2. Under BSPS2, the spouse's pension would be set at 50% of Mr H's pension at the date of death, and this would be calculated as if no lump sum was taken at retirement. So it was likely to be higher than in the PPF.

Early retirement factors in the PPF were lower and commutation factors for tax free cash entitlement were more favourable under the PPF. However, Mr H didn't have plans to retire early and I think higher income overall as well as a higher spouse's pension would have been more important to him than a potentially larger tax-free cash sum.

Concerns about financial stability of BSPS

Mr H was concerned about his BSPS pension. Lots of his colleagues at the time were transferring out of the scheme and he was worried his pension would end up in the PPF.

So it's quite possible that Mr H was leaning towards the decision to transfer. However, it was BRG's obligation to give Mr H an objective picture and recommend what was in his best interests. Mr H has said he was particularly concerned about BSPS moving to the PPF. He was worried he could lose some of his pension. However, as the figures above show, even if this happened, Mr H was still likely to be better off not transferring. I can't see that this was properly explained to him or BRG did enough to alleviate these concerns.

Use of DFM

BRG recommended that Mr H use a DFM to manage his pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr H should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage his 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 Mr H. But BRG wasn't there to just transact what Mr H might have thought he wanted. The adviser's role was to really understand what Mr H needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr 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.

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

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

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring out of the DB scheme, against BRG's advice. I say this because Mr H was an inexperienced investor and this pension accounted for the majority of his retirement provision at the time. 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've accepted that advice.

I acknowledge that Mr H also had contact with, and may have received some advice from this third party. And they might have influenced his decision too. However, I think a properly reasoned recommendation from BRG, in their role as DB pension transfer specialists, alleviating some of his fears about the PPF and explaining why a transfer wasn't in his best interest, more likely than not would have persuaded him to follow their advice.

I've considered that both the third party and the DFM were also regulated parties, had their own regulatory obligations and possibly have contributed to Mr H's losses. However, I can only consider the complaint in front of me which is against BRG and I think it's fair in the circumstances that they compensate him for his losses in full. I say this because, as explained above, without BRG's unsuitable advice Mr H likely would have remained in his DB scheme and wouldn't have ended up in a SIPP or DFM. Consequently, he wouldn't have been exposed to the risk bearing investments that he has been.

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

FSCS compensation

I'm aware Mr H will have had some correspondence with the Financial Services Compensation Scheme (FSCS) in respect of the situation concerning the funds the SIPP 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 Mr 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 Mr H suffered in transferring his existing pension to the SIPP and investing as he 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 Mr 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 business to put Mr H, as far as possible, into the position he would now be in but for BRG’s unsuitable advice. I consider he would have remained a member of DB2 and BSPS. Subsequently, he would have likely moved from BSPS to BSPS2 when he was given the choice in late 2017. So for the BSPS calculation, BSPS2 benefits should be used as the comparator.

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 H has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 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 H’s acceptance of the decision.

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

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

I understand Mr H’s SIPP may include illiquid investments, meaning they can’t be readily sold on the open market. This means it can be complicated to establish its value.

If this is the case, 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 investments.

If BRG is unable to buy the investments, they 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 H to provide an undertaking to account to them for the net amount of any payment he may receive from the investment in future. 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 H to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

In order for the SIPP to be closed (should Mr H 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 H 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 H 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 H £300 for the stress and inconvenience this situation has caused him. I'm sure the significant fall in the value of the fund has given him some cause for concern. And, all of this, has clearly been very stressful for him. So, I think this is reasonable.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr 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 Mr 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 business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Better Retirement Group Ltd to pay Mr 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 Better Retirement Group Ltd to pay Mr H 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 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 Better Retirement Group Ltd pays Mr H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

If Mr H 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 H can accept my decision and go to court to ask for the balance. Mr 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 Mr H to accept or reject my decision before 6 July 2022.

Andy Burlinson
Ombudsman