DRN-2980510

The complaint

Mr H complains that he was given unsuitable advice by Bailey Richards Wealth Management Limited (BRWM) to transfer deferred benefits from his Defined Benefit (DB) pension with British Steel (BSPS) to a Self-Invested Personal Pension (SIPP).

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 late 2016, Mr H contacted a financial adviser firm for advice on his pension. They completed some of the initial paperwork for Mr H, but as they didn't have the relevant permissions to advise on a pension transfer they referred him to BRWM for advice. Mr H was advised by BRWM to transfer his BSPS benefits to a SIPP.

A fact find, risk profiler and a retirement options form were completed in November 2016 which say:

- Mr H was approaching 55, married with one dependent, and in good health. He earned £45,000 per year. He and his wife had an outstanding repayment mortgage of around £110,000 which was due to finish in 2026, loans of £10,000 and £10,000 in cash savings. They had monthly disposable income of £1,400 between them.
- Mr H was also member of his employer's money purchase pension scheme. His wife had no pension provisions. The DB benefits represented nearly all of Mr H's retirement provision.
- He wanted to retire at 61 if feasible and required £18,000 annual income from age 61-67 and around £10,800 from age 67 onwards when his state pension would be paid.
- He required a lump sum of £20,000 immediately to pay for some home renovation works. He had £10,000 to cover costs of his planned extension, but wanted to take a lump sum to cover decorating costs for his kitchen.
- He was looking to pay off his debts (mortgage and a loan) as soon as possible and was making additional contributions towards his mortgage. He accepted that drawing a lump would reduce his income in retirement. He didn't want to take out a loan or remortgage to pay for his home renovations as he didn't want any additional monthly outgoings.

- He had concerns about the future financial stability of BSPS. His desire to move away from BSPS together with wanting to access a lump sum and the facility to have flexible control over when and how he could draw income motivated him to take action.

- He had no knowledge of investments and had a limited understanding of risk. His attitude to risk was cautious to moderate.

A suitability report shows BRWM recommended Mr H to transfer his BSPS benefits to a flexi-drawdown plan which would allow him to take tax-free cash of £20,000 and leave the remainder of his funds invested.

Mr H complained to BRWM in 2019 about the advice he received. He said he wasn't given all the relevant information to make a suitably informed decision and that BRWM didn't explain all the risks and disadvantages of a transfer. BRWM rejected his complaint.

Mr H referred his complaint to this service. One of our investigators upheld his complaint. He thought BRWM had given unsuitable advice. BRWM still disagreed and so the complaint has come to me for 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.

The starting assumption for a transfer from a DB scheme is that it is unsuitable. BRWM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interest. (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 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.

The investment return required to match the DB pension at retirement at age 65 (critical yield) was 15.47% per year if benefits were taken in full or 12.96% if taken as a lump sum payment with a reduced pension. The equivalent critical yields to match the benefits available if BSPS moved to the PPF were 11.2% and 10.45% at age 65.

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 it was 3.7% per year for 9 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 low-medium attitude to risk and also the term to retirement. And I think Mr H was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement (even if the BSPS moved to the PPF), as a result of investing in line with that attitude to risk.

I also note that Mr H was looking to retire at 61. So comparisons should have also been made at this age and not only to age 65. BRWM discounted the option to take benefits from BSPS immediately as Mr H didn't want to take any income at this point. However, the option to leave the BSPS benefits untouched until 61 -when Mr H wanted to retire if feasible- was not even mentioned. Critical yields at 61 might have been even higher than at age 65.

BRWM now says the critical yield is of limited relevance as Mr H was not planning to take an annuity with his SIPP funds. However, the critical yield does still give a good indication of the value of benefits Mr H was giving up and the regulator deems it an important part of the decision-making process. I also note that BRWM said themselves in the suitability report that the critical yield was very high and if Mr H hadn't wanted to access tax free cash immediately, they wouldn't have recommended the transfer.

I've also considered the cash flow analysis BRWM conducted for Mr H. It showed he could take income of £18,000 from age 61 and reduce this to £10,800 from age 67. It showed Mr H wouldn't run out of funds until age 99. However, the analysis assumed 5% net returns after charges which means Mr H needed to achieve returns of more than 6.75% to make up for ongoing adviser and SIPP charges of 1.75% a year and the initial adviser charge of around £8.4k.

As explained above it was unlikely these levels of return could be achieved given Mr H's attitude to risk, so I think his funds were at risk of running out a lot sooner. Also the analysis didn't allow for another tax-free cash lump sum at age 61 which BRWM say Mr H likely would have wanted. The fact find supports this stating that Mr H likely wanted another (unspecified) lump sum to spend on holidays etc at age 61.

Mr H also was in good health and a fact find completed with the introducer showed there was longevity in his family with his parents still alive and his grandparents having lived into their late 90s. So I think there was a reasonable risk Mr H could have run out of money in his SIPP during his lifetime. This also meant there wouldn't have been any lump sum available to leave for his family when he died. Even if he died earlier and still had some funds left, this was not guaranteed to be enough to provide better benefits than a spouse's pension could have in the DB scheme.

In summary, even if BSPS had moved to the PPF and Mr H's benefits were reduced, he was very unlikely to match, let alone exceed his benefits by transferring to a SIPP. By transferring his pension it was highly likely Mr H would be financially worse off in retirement.

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. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I considered below whether such other reasons applied here.

flexibility and income needs

The suitability report recorded Mr H wanted an income of £18,000 from age 61 and could afford to take a lower income from age 67. Whilst being able to flexibly take income as needed sounds attractive I can't see that an actual need for this was identified for Mr H, particularly when this was weighed up against the likelihood of receiving lower benefits in retirement

The transfer analysis shows that at age 65 Mr H could receive an income of around £24,000 per year or just over £21,000 if the pension went to the PPF. His early retirement figures for immediate retirement (at age 55) showed only an income of around £10,500. I understand that Mr H didn't require any income immediately, so this option was discounted.

I don't know for certain what benefits Mr H would have been entitled to at age 61 as BRWM didn't do the necessary analysis at the time like they should have. They say reduction of benefits would have been over 30% and so Mr H would have received around £13,000 at age 61, £5,000 less than he wanted. And this would have been even more reduced if Mr H had moved to the PPF or taken tax free cash.

I don't know what BRWM based their figures on, as a reduction of 30% of Mr H's entitlement at age 65 in the PPF would be £14,700 (70% of £21,000). However, I do agree that starting benefits for Mr H would have been lower than £18,000. Even so, I think he likely could have topped up his income with tax-free cash.

His tax-free cash entitlement in BSPS was recorded as around £50,000 at age 55 with a reduced pension of around £7,500 and £108,000 at age 65 with a reduced pension of around £16,600, so I think Mr H's benefits would have been somewhere in between that at age 61. If I assume he could have taken a reduced pension of around £11-12,000 maybe with a tax-free cash lump sum of around £80,000 (which I think are not unreasonable assumptions), he could have topped up his income for six years until age 67 and still be left with around £31-38,000 of tax-free cash. Mr H also had a defined contribution pension which at age 61 would have had accumulated benefits for six years and could have provided further income and/or another lump sum which Mr H could have accessed flexibly. His income would have also increased steadily over the years.

So overall I think Mr H's income needs could have likely been met by staying in BSPS. My key concern here is that none of these options were discussed with Mr H.

death benefits

Mr H also said he didn't want his pension to die with him and he would like the ability to not only leave any remaining funds to his wife but also to choose other beneficiaries after death. 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. So telling Mr H he could leave a large sum to his family when he died would have sounded a lot more attractive than the DB scheme where his wife would receive a reduced pension.

I think the existing death benefits with BSPS were underplayed. Mr H's wife would have received a guaranteed spouse's pension for life which would have been valuable if Mr H predeceased her. And if he wanted to leave some of his pension to his daughter, he could have made provisions for this with his defined contribution pension he had with his employer if he wanted to. In comparison, if Mr H lived a long life, there might not have been a large or any sum to leave to beneficiaries from the SIPP as explained above.

In any event, whilst death benefits might be important for consumers, there generally shouldn't be a disproportionate emphasis on this compared to their own retirement needs. Mr H was in good health and so more focus should have been on ensuring Mr H would receive his required income over a long period of time.

tax free cash

There's no dispute that Mr H wanted to access a lump sum of £20,000 to pay for a new kitchen. I also appreciate that he said he didn't want to add to his monthly outgoings or take out further loans. However, Mr H did have £1,400 disposable income each month, so I think he likely could have afforded to make additional monthly loan payments. His preference to not add to his existing debts should have been weighed up against the significantly higher benefits in the DB scheme he was giving up. The adviser should have explained to him that any additional interest on a relatively small sum of £20,000 for a few years until retirement would have been a lot less than giving up higher retirement benefits for the rest of his life.

To put it simply, it wasn't worth giving up higher retirement benefits which were secure for the sake of avoiding another affordable loan for a few years. In my view I don't think Mr H was given an objective picture of his options here. Whilst advantages of staying in the scheme and disadvantages of transferring are referred to in the suitability report, the transfer is justified by suggesting Mr H's objectives can't be achieved by staying in the scheme. However, I don't think this is true. Alternative options were just not properly discussed and explored. I note that Mr H took out a total of £42,000 as tax free cash from his SIPP in the first year of transfer to spend on home improvements. However, the fact that Mr H took some more money from his pension as it was readily available does not necessarily mean he would have done the same if he had remained in his DB scheme as any access would have triggered an income Mr H didn't require.

concerns about financial stability of BSPS

Mr H was concerned about his 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. He said this is why he wanted to move the pension into his control.

So it's quite possible that Mr H was leaning towards the decision to transfer. However, it was BRWM's obligation to give Mr H an objective picture and recommend what was in his best interest. Mr H 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 BRWM did enough to alleviate these concerns.

summary

It's possible that Mr H was attracted by the idea of transferring. He might have heard from colleagues that this is what they were doing. And I don't doubt that flexibility, control and higher death benefits would have sounded like attractive features. But BRWM 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 interest.

I think Mr H could have met his objectives by not transferring his DB benefits. He could have likely covered his income needs at age 61 from BSPS (even in the PPF) and would have been entitled to a guaranteed and secure income which continuously increased with inflation. And his immediate requirements for a lump sum to pay for home improvements could have likely been covered through a loan or further advance on his mortgage.

For these reasons, BRWM should have recommended Mr H to stay a member of his scheme and not transfer his benefits. And if they had done so and explained their reasons properly why Mr H would be better off staying in BSPS, I think Mr H likely would have followed their advice. I acknowledge that BRWM says Mr H had previously received advice before from another firm which recommended him not to transfer. He apparently also asked the introducer how he could proceed as an insistent client in case BRWM had advised to remain in BSPS.

I haven't seen any evidence of this. However, even if I assume that Mr H had been advised not to transfer previously and he wanted a second adviser to provide another recommendation, I don't think on balance he would have insisted on transferring against

BRWM's advice. It's possible that when he spoke to the introducer he thought he definitely wanted to transfer, however I think a properly reasoned recommendation from BRWM 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. Particularly as by that point this would have been the second independent party giving him the same advice.

If Mr H had stayed in BSPS, he would have shortly after had the choice to move to the PPF or transfer to a new scheme, the BSPS2. Mr H's representatives have said BRWM should have made comparisons whether BSPS2 or the PPF was better for Mr H and perform these calculations now. However, at the time the advice was given in December 2016 Mr H hadn't been given the option of BSPS2 yet. The advice for BRWM to give at the time was whether to stay in BSPS or transfer out. Mr H might have contacted them or another adviser again when the Time to Choose Exercise began. However, he also might not have done.

So I carefully considered what Mr H likely would have done nearly a year later had he been given the choice of either the PPF or BSPS2 and placed into an informed position regarding the features, risks and benefits of both options. On balance I think Mr H would've likely opted for the PPF. I say this because at the time Mr H wanted to retire early and he was reasonably close to his intended retirement age.

BSPS2 wouldn't have decreased Mr H's initial entitlement by 10% like the PPF and some of his benefits would have had potentially higher increases in BSPS2. However, early retirement factors in the PPF were lower and commutation factors for tax free cash entitlement were also more favourable under the PPF. So overall, it's likely Mr H's income and tax-free cash entitlement would have been higher in the PPF.

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 the spouse's pension would likely be lower in the PPF. I appreciate that Mr H says his wife was 12 years younger than him and spouse's benefits would have been important. However, I think on balance his own benefits and higher tax-free cash which he and his wife could benefit from earlier in retirement would have been more important to him.

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 the unsuitable advice he was given. I consider he would have remained a member of BSPS and subsequently moved with it to the PPF. So calculations should be made on this assumption.

BRWM must 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 H's acceptance of the decision.

If Mr H had remained in BSPS, I don't think he would have accessed his DB benefits to withdraw lump sums in 2017 like he did through the SIPP. As explained above, if Mr H really wanted additional funds for his home renovations, he could have likely taken out additional loans or considered spending less. Mr H said he hasn't retired yet and has no concrete plans to do so. BRWM should therefore use the standard assumed retirement age for prospective loss cases in the FG17/9 guidance.

BRWM 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.

In addition BRWM should pay Mr H £300 for the distress and inconvenience this matter has caused him.

The compensation amount must where possible be paid to Mr H within 90 days of the date BRWM receives notification of his 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 BRWM 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.

<u>*Additional compensation*</u>

In October 2020, due to an improved funding position, the BSPS trustees bought an insurance policy as part of the process of the pension scheme exiting its PPF assessment and completing a buy-out. Pension Insurance Corporation plc (PIC) will become responsible for paying benefits directly to members. The process of the buy-out is currently expected to be complete by late summer 2022.

It's been announced that:

'When the buy-out happens all members whose PPF benefits are less than their full Scheme benefits (i.e. the amount they would be if the Scheme were not in a PPF assessment period) will see an increase to their benefits. All other members will see no change as a result of the buy-out.'

'For most members, PPF level benefits are less than full Scheme benefits. When the buyout happens, these members will see an increase to their current level of benefits so they will receive more than PPF levels. All other members will see no change to their current level of benefits as a result of the buy-out.'

The amounts of possible increases are yet unknown. The scheme expects to be able to have information on this by late summer 2022. Mr H would possibly have been entitled to an increase in benefits after the buy-out if he had been in the PPF. I think it's fair any such increases are taken into account when compensating him.

I don't think it's reasonable for BRWM to delay the compensation calculation in its entirety until the buy-out is completed. Although it is expected to happen in late summer 2022, I'm conscious that this could be delayed further due to its complexity. To give some certainty to the parties, I think it's fair BRWM calculates and pays Mr H compensation now as set out above comparing his existing benefits with the PPF. Once the buy-out is completed and more detailed information is available how exactly PPF benefits will increase, BRWM should do a second calculation in line with the latest FCA guidance on DB transfer redress applicable at the time. They should base their calculations on the benefits Mr H would have been entitled to after the buy-out.

This calculation should be done as soon as possible after the new buy-out benefits are known. BRWM should keep up to date with developments on this matter, for example any information published on www.oldbritishsteelpension.co.uk. Equally, if Mr H becomes aware further information is available, he should let BRWM know. If the second calculation results in a higher redress amount than the first calculation, BRWM must pay Mr H the difference. If the second calculation results in the same or a lower redress amount than the first calculation, no further action should be taken.

The compensation amount of the second calculation must where possible be paid to Mr H within 90 days of the date a public announcement is made that the buy-out has completed. Further interest must be added to the compensation amount at the rate of 8% per year simple from the announcement date of settlement for any time, in excess of 90 days, that it takes BRWM to pay Mr H.

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 Bailey Richards Wealth Management Limited 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 Bailey Richards Wealth Management Limited 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 Bailey Richards Wealth Management Limited 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 Bailey Richards Wealth Management Limited 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 Bailey Richards Wealth Management Limited. 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 22 April 2021.

Nina Walter
Ombudsman