DRN-3034578

The complaint

Mrs S complained that she was given unsuitable advice to transfer her defined benefit (DB) British Steel Pension Scheme (BSPS), to a self-invested personal pension plan (SIPP) and invest the funds through a discretionary fund manager (DFM).

Better Retirement Group is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "BRG".

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 eventually closed to further benefit accrual from 31 March 2017.

Mrs S left British Steel's employment in July 2016 but became concerned about what the above announcement meant for the security of the defined benefits she had accrued in the BSPS. Mrs S says there were a lot of worrying rumours at around this time and had heard that BSPS could eventually move into the PPF and that there might be a modified new pension scheme (BSPS2). She was concerned that everything she'd heard about her pension was negative.

In September 2016 Mrs S was introduced to another firm I will refer to as 'F'. It completed some of the initial paperwork for her and requested pension information on her behalf, but as it didn't have the relevant permissions to advise on DB pension transfers it involved BRG to provide the pension transfer advice.

In December 2016 BRG provided a suitability report for Mrs S which advised her to transfer out of the BSPS to a SIPP. It noted F intended to recommend Mrs S invest the funds with a business I'll refer to as 'S', which was a DFM. BRG agreed that this was suitable for her.

Around £74,000 was transferred from Mrs S's BSPS to her new SIPP. Mrs S says she subsequently suffered significant losses in the SIPP and that firms F and S are no longer trading.

One of our investigators looked into the complaint and said that BRG should not have recommended Mrs S to transfer out of her BSPS. The investigator said all the evidence indicated that Mrs S was likely to be worse off after the transfer as the investments she had been advised to transfer into would have needed to grow substantially to have been able to match what she had previously in her BSPS. They said Mrs S should be compensated in line with the regulator's DB transfer methodology for this failure.

BRG did not respond to the investigator's view, but I've looked carefully at what it said during the course of the investigation. As the complaint couldn't be resolved informally, it was passed 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.

Having done this, I am upholding Mrs S's 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 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 S's best interests (COBS 19.1.6).

Overview

Mrs S had accrued deferred benefits in the BSPS having completed over 19 years pensionable service. She was married with two young dependent children at the time of the advice and lived in a family home valued at approximately £280,000, owned jointly with her husband and with no mortgage. She and her husband also owned two rental properties generating around £6,000 per year income and I've noted there was a considerable amount of equity in these investment properties. They also had cash savings of £40,000 and Mrs S had recently taken up new employment at the time of the advice. She had also joined her new company's pension scheme.

Mrs S was only 39 years old when BRG recommended she transfer out of the BSPS and into the SIPP. She wasn't planning to retire for some time, probably at around the age of 65. Her state pension age was 67. In making the recommendation, BRG said transferring out from the BSPS to a SIPP:

- allowed access to tax-free cash from the age of 55;
- provided flexibility in the future;
- allowed the taking of a higher level of income if needed; and
- allowed money to be left more flexibly to others upon death.

Pension schemes such as the one Mrs S belonged to typically have significant defined benefits which include index-linking, guarantees of future payment and death benefits. Giving these up and subjecting future pension income to the risks associated with unpredictable investment returns should therefore only be done where it can be shown that it was clearly in the best interests of Mrs S. And I don't think it was.

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.

BRG's suitability report showed the growth Mrs S's fund would need to achieve in order to match the financial benefits she could obtain through the BSPS. The investment return required to match the BSPS pension at the age of 65 - the critical yield - was 11.37% per year if no tax-free lump sum was taken. The critical yield required if Mrs S *did* take a tax-free sum in those circumstances wasn't provided. However, the 'hurdle rate' – the growth needed per year to buy an annuity with no spouse benefits, increases or guarantee - was 8.78%.

BRG also said the critical yield to match the benefits available through the PPF at age 65 was 9.66% per year if Mrs S took a full pension, and 9.45% per year if she took a tax-free cash lump-sum and a reduced annual pension.

This compares with the discount rate of 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 all this into account, together with the composition of assets in the discount rate, Mrs S's 'highest medium' attitude to risk (as assessed by BRG) and also the term to retirement. There would be little point in Mrs S 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, referring to the critical yield figures, I think Mrs S was very likely to receive benefits of a lower overall value than those provided by the BSPS at retirement, as a result of investing in line with that attitude to risk. This would be the case even if the scheme moved to the PPF.

BRG provided a number of models in its income drawdown report which it implies shows Mrs S would have been able to meet her retirement needs. I've considered these, but I think they merely show that the funds would likely be exhausted in her retirement, even when considering the medium estimated growth rate. Also, these were not direct comparisons with the benefits being given up and I think Mrs S could have found these models difficult to understand, and certainly, to draw like for like comparisons from. 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 much more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. And based on growth of this level, if Mrs S drew the same income as provided by her DB scheme at age 65, her funds would be depleted by age 74.

For this reason alone, I don't think a transfer out of the DB scheme was in Mrs S's best interests. 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've therefore considered these other factors below.

Flexibility and income needs

I don't think it could yet be said that Mrs S required the flexibility BRG described when it recommended she transfer out of her DB scheme – Mrs S was only 39 at the time of the advice so it was too early to know what her needs in retirement might be. I think this apparent need was poorly defined by BRG, referring only to a possible requirement for a higher income at certain times in the future. In my view, there was no evidence supporting this requirement, only an implied assumption that getting access to more income in some years rather than others might be something Mrs S would want to do.

Similarly, BRG said Mrs S would be able to access more tax-free cash. Whilst this might have been possible, this time-period was still many years off in her case and we know Mrs S already had significant cash savings and equity within the investment properties at the time. In my view therefore, this need for 'flexibility' seems somewhat undefined and assumes that being able to access tax-free cash specifically from a SIPP at 55 might be something she would want to do. But I think it's fair to say that set against the guarantees and benefits Mrs S was being advised to give up, the case for being able to access a higher proportion of tax-free cash in this way is not persuasive. Mrs S would also have been able to access some tax-free cash by staying in the BSPS, but I don't think this was promoted thoroughly enough for her.

As I've said, Mrs S giving up work was probably quite a long way off and so her income needs at retirement, at that point, were uncertain - she could have had up to around 25 years or so before accessing her pension. So I think it was too soon to make any kind of decision about transferring out of the DB scheme. On the information I've seen, I'm satisfied she could have probably met her income needs through the DB scheme at 65. She was entitled to an annual income of £16,274 from the scheme at 65 and had other financial assets as I've described. It also seems likely that Mrs S's husband would also have the benefit of a pension. So, I don't think it was a suitable recommendation for her to give up the guaranteed benefits in 2016 when she didn't know what her needs in retirement would yet be.

Death benefits

The issue of death benefits for Mrs S's family were promoted by BRG when giving the transfer-out advice, but I don't think this was a genuine objective for Mrs S quite in the way portrayed. In my view, it was more likely a consequence of the overall recommendation to transfer out.

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 was most likely an attractive feature to Mrs S. But whilst I appreciate death benefits were important to Mrs S, and she 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 her 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 S 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 S was married with children and so the spouse's / dependent's pension provided by the DB scheme would have been useful if Mrs S predeceased them. I don't think BRG made the value of this benefit clear enough to Mrs S. This benefit 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 I've said above, if Mrs S took benefits of the same level provided by her DB scheme at age 65, the funds would have been depleted by age 74. So, there wouldn't be any remaining capital to pass on to her family in the event of her death.

Furthermore, if Mrs S genuinely wanted to leave a legacy for her husband / children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think BRG could have instead explored life insurance. The suitability report makes brief mention of a whole of life policy, but this appears to be discounted on the grounds of cost. However, the cost isn't provided so I don't know whether it was genuinely unaffordable. Nevertheless, given Mrs S's age, I think BRG could have provided a quote for term assurance, which was likely to be a lot cheaper to provide.

Overall, I don't think the different death benefits available through a transfer to a SIPP justified the significant decreases in retirement benefits for Mrs S. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of BSPS

When Mrs S met with BRG she was concerned about the financial stability of her BSPS pension. Lots of her former colleagues at the time were considering transferring out of the scheme and she was worried her pension could end up in the PPF.

It was BRG's obligation to give Mrs S an objective picture and recommend what was in her best interests. However, as the figures above show, even if this happened, Mrs S was still likely to be better off by not transferring, even when compared to ending up in the PPF. I don't think that this comparison was properly explained to her; if the scheme did end up moving to the PPF, I think BRG should have explained that this was not as concerning as Mrs S thought. She was still unlikely to match, let alone exceed the benefits available to her through the PPF if she transferred out to a personal pension.

Summary

Overall, I don't think the advice given to Mrs S was suitable. She was giving up a guaranteed, risk-free and increasing income and by transferring out of the BSPS, Mrs S was very likely to obtain lower retirement benefits. In my view, there were no other particular reasons or circumstances which justified a transfer, particularly when she had around 25 years before she expected to retire.

In arriving at that view, I've taken into account that, at the time the advice was given, there was considerable uncertainty. However, it was the BRG's responsibility to objectively weigh up this uncertainty and the options for Mrs S. I've shown above how the financial comparisons simply didn't make transferring out a suitable option for her and just how much her funds would need to grow by to match what she already had. Mrs S was also married with dependent children, so the BSPS benefits relating to these things would have been important to her. There were also the guarantees of annual pension indexation to consider.

In my view, the clear and objective advice should have been against transferring out of the BSPS. And if this had happened, I think Mrs S would have accepted that advice – at that point she would have remained in the BSPS.

If Mrs S had stayed in BSPS, she would have shortly after had the choice to move to the PPF or transfer to a new scheme, the BSPS2. Mrs S had no plans to retire early – she expected to continue working to her normal retirement age. So, I don't think that it would have been in her interest to accept the reduction in benefits she would have faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for early retirement. Also, Mrs S was married, and her husband's pension would be set at 50% of her pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mrs S chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

So, overall, I think BRG should compensate Mrs S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And as per the above, it is the benefits available to her through the BSPS2 at age 65 that should be used for comparison purposes.

Responsibility for loss

I have considered the role of both firms F and S in determining whether I should apportion only part of the responsibility for compensating the loss to BRG. In the circumstances, though, I think it fair to make an award for the whole loss against BRG.

I note that the suitability report states that F had made the investment recommendation for Mrs S to invest via S. But BRG stated that it had taken this into account when making its recommendation to transfer out of the BSPS and it considered this to be suitable for Mrs S. But as I have set above, BRG should not have recommended that she transfer out of the BSPS as it was clearly not in her best interests. And it was only as a result of BRG's involvement that Mrs S did. BRG's role was therefore pivotal, since the eventual investments were fully reliant on the funds being transferred first. If that hadn't happened, Mrs S couldn't have invested as she did. So, in my view, the entirety of Mrs S's loss stems from BRG's unsuitable advice to transfer away from her DB scheme.

To be clear then, I think holding BRG responsible for the whole of the loss represents fair compensation in this case.

FSCS compensation

I'm aware Mrs S may be able to take her claims about F and S to the Financial Services Compensation Scheme ('FSCS').

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 S 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 F and S are now in liquidation. My starting point as to causation is that BRG gave unsuitable advice and it is fully responsible for the losses

Mrs S suffered in transferring her existing pension to the SIPP, and then 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 S 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 S, as far as possible, into the position she would now be in but for BRG's unsuitable advice. I consider Mrs S would have most likely remained in her DB scheme if suitable advice had been given. And I think it's clear Mrs S would have later wanted to transfer to the BSPS2 when this was offered the year after as the scheme offered many similar benefits.

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 S 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 S's acceptance of the decision.

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

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

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 Mrs S to the position she 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 Mrs S to provide an undertaking to account to it for the net amount of any payment she 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 Mrs S 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 Mrs S wish to move her 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 Mrs S can discuss with her 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 Mrs S 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 Mrs S £250 for the distress and inconvenience this matter has caused her.

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.

My final decision

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

If Mrs S accepts this decision, the money award becomes binding on Better Retirement Group Ltd.

My recommendation would not be binding. Further, it's unlikely that Mrs S can accept my decision and go to court to ask for the balance. Mrs S 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 S to accept or reject my decision before 23 June 2022.

Michael Campbell
Ombudsman