DRN-3098866

The complaint

Mrs S complains about the advice given by Better Retirement Group Ltd trading as FIDUCIA PROSPERITY (BRG) to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a to a self-invested personal pension plan, and to invest through SVS securities acting as a Discretionary Fund Management (DFM) arrangement. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Mrs S approached BRG in November 2018 to discuss her pension and retirement needs.

BRG completed a fact-find to gather information about Mrs S's circumstances and objectives. BRG also carried out an assessment of Mrs S's attitude to risk, which it deemed to be 'low medium' or 5/10.

On 19 December 2018, BRG advised Mrs S to transfer her pension benefits into a SIPP and invest the proceeds through a Discretionary Fund Management (DFM) Arrangement with SVS.

The suitability report said the reasons for this recommendation were:

- Mrs S had sufficient long term/alternative income from elsewhere to provide for her financial needs throughout retirement;
- The estimated growth required to match benefits in the DB scheme were reasonable considering the risk she was willing to take;
- Mrs S demonstrated an immediate need for tax free cash (TFC) but didn't want to take an income yet, which wasn't possible in the DB scheme;
- Mrs S had non-dependent children who she wanted to benefit from any remaining funds upon her death, this wasn't possible in the DB scheme;
- The transfer value of the DB scheme was an at all-time high, and any transfer value could be reduced in the future.

Mrs S accepted the recommendation and the cash equivalent transfer value 'CETV' of £93,842.40 was transferred to the SIPP. Mrs S took TFC of £23,460.60 in February 2019.

In May 2020, Mrs S received a letter from 'LC', a business insolvency and recovery firm, explaining that SVS had been placed into special administration which made her aware of potential unsuitable and high-risk investments SVS had been making.

Mrs S complained in 2020 to BRG about the suitability of the transfer advice because she felt that she had made it clear that she had a low appetite for risk, and had been given poor advice which meant she had lost out financially.

BRG didn't uphold MRS S's complaint. It said that while it agreed SVS invested incorrectly and too high risk for her, it wasn't responsible. It directed Mrs S to the Financial Services Compensation Scheme (FSCS). The FSCS then referred Mrs S to our service to consider

BRG's involvement as it was the regulated advice firm that advised upon the transfer and the subsequent investment with SVS.

An investigator upheld the complaint and required BRG to pay compensation. They said that the advice given by BRG to Mrs S to transfer her pension, and subsequently invest through SVS into a DFM was unsuitable.

BRG disagreed, saying that it has provided suitable advice to Mrs S while taking into account her personal circumstances – and that it had been mis-lead by SVS, although it had undertaken extensive due diligence.

The investigator wasn't persuaded to change their opinion, saying that no new information had been provided by BRG in response to the view, 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.

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

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, BRG should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs S's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how BRG could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst BRG weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mrs S was 55 at the time of the advice and stated that she wanted to retire at age 60. While BRG carried out a pension transfer analysis, including the transfer value comparator ('TVC'), it did so based on Mrs S retiring at age 56. The critical yield required to match Mrs S's benefits at age 56 was over 50% if she took a full pension. And the TVC showed that it could cost her £134,015.77 to provide the same income as her DB scheme through a defined contribution pension scheme.

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 2.25% per year for one year to retirement and 3.1% per year for five 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.

BRG says that Mrs S had a 'high medium' attitude to risk. But I've seen two risk assessments that it completed with Mrs S, one of which came out as 'low medium' or 5/10 (the client review form) and the other as 'high medium' or 6/10 (the risk profile report). The suitability report uses both terms and there appears to be little difference between these two assessments. But for clarity, given Mrs S's experience of investing, her capacity for loss, and her investment horizon, I think that a 'medium' attitude to risk is a fair representation of Mrs S's situation.

I've taken the discount rates into account, along with the composition of assets in the discount rate, Mrs S's medium attitude to risk 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, given the critical yield was 50% and she needed her fund to grow by over £40,000 in less than a year to be able to provide the same benefits as her DB scheme, I think Mrs S was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, even if she took a higher risk with her funds. However, when BRG summarised the reasons for its recommendation, it said that the growth required to match the benefits in the existing scheme was achievable – I think this was seriously misleading.

BRG didn't do a TVC based on Mrs S's actual intended retirement age of 60. And I think it should have done so that she understood by how much her pension fund would need to grow in five years to replicate the benefits she was giving up. In the absence of this information, I'm not persuaded that Mrs S was likely to be able to exceed the income available through the DB scheme if she started drawing funds at age 60 either.

BRG suggests that Mrs S would be investing for the long term, but given that Mrs S was 55 and her desired retirement age was 60, I can't see how the investments would have a long time to grow before she would start to draw on them – especially to the extent that would be required to reach or exceed the benefits provided by the DB scheme she already had in place.

BRG also argues that the TVC and critical yield aren't particularly relevant because Mrs S didn't intend on purchasing an annuity. It said it demonstrated that if the fund grew by 5% (gross) Mrs S would be able to withdraw the same income as her DB scheme provided at age 65 and the fund wouldn't be depleted until age 85. But Mrs S told BRG she wanted to retire at age 60 and the discount rate was 3.1% for five years to retirement – so I don't think that growth of 5% was actually very likely based on Mrs S's term to retirement. And even if I were to accept that growth of 5% was achievable in the short-term, BRG has shown that Mrs S's fund would be depleted by age 85. So, if she lived longer than expected, or there was a period of poor investment performance, there was a real possibility that Mrs S's funds could run out sooner than expected. So overall, I think it ought to have been clear to BRG that Mrs S was likely to be worse off financially if she transferred out of the DB scheme.

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

Flexibility

I can see that BRG considered Mrs S's capacity for loss and taking into account the other assets Mrs S said she had in place, BRG thought she had capacity to absorb some losses should they occur from the pension transfer. But while I can see that Mrs S may have been able to absorb potential losses – I can't see that this was reason enough for Mrs S to make the transfer as BRG has suggested, given that it was already shown to be very likely be worse off by making the transfer. Furthermore, I'm not persuaded that BRG carried out sufficient analysis of Mr and Mrs S's other pensions compared with their income needs in order to determine whether it was in Mrs S's best interests to give up her guaranteed benefits.

BRG noted that the reasons for Mrs S wanting to make the transfer was access to TFC for a variety of reasons including topping up savings, purchasing a car and home improvements. However, BRG failed to establish how much Mrs S actually required to meet this need. The fact that some of the TFC would be used to top up savings suggests that less than the £23,000 available to her was actually needed immediately. I think this was an important fact that BRG needed to establish in order to demonstrate that it knew its client. And it's hard to see how suitable advice could be provided without knowing this.

In BRG's suitability letter, it set out one of the reasons justifying the reasons for the transfer as;

'*You have an immediate need for tax free cash but not to take an income. And option not available from your existing scheme'*

'You have a need for flexible income to allow you to retire from your intended retirement age which is not an option with your existing scheme'.

This seems contradictory – on one hand saying that Mrs S didn't need to take an income, but also that she required a flexible income. Mrs S's other assets were previously used to show that she didn't need to rely on the DB scheme to provide an income – but BRG then suggests that she needed to make the transfer in order to access these benefits in a flexible arrangement for her retirement income.

But as I've explained above, it had already been determined that a loss would be likely if Mrs S transferred out of the scheme. So I fail to see why the general lifestyle motives BRG set out demonstrate a genuine financial need for the TFC – and Mrs S and her husband already had assets they could have utilised to fulfil these objectives without taking the risk that had already been determined.

Mrs S ended up taking around £23,000 as TFC, but she already had access to this sum in savings. It doesn't seem that Mr and Mrs S wanted to use the savings to meet their need as they considered it to be 'emergency cash' – although significantly, any discussion around using their existing savings is missing from the suitability report. BRG also noted that Mr and Mrs S had significant disposable income, over £3,000 per month. So, if Mr and Mrs S had instead used their savings to meet their objective of purchasing a car and helping pay for home improvements, they could have easily rebuilt their savings quite quickly. I don't think it was suitable advice to give up the guarantees associated with Mrs S's DB pension to access a sum they already had available to them.

In the suitability report I appreciate that BRG noted Mr and Mrs S didn't want to take on any lending to meet this need. But it isn't clear why that is. Mr and Mrs S had a very small mortgage and substantial disposable income. So, I think re-mortgaging or taking out a small loan should have been given more thorough consideration, particularly as interest rates were low at the time and the sum they required appears to have been small. To my mind, sacrificing a guaranteed pension income ought to have been the last option, after giving full consideration to the alternatives, including providing Mrs S with the costs of taking a loan or re-mortgaging. I also note that Mr S had substantial personal pension fund, and assuming they were flexible arrangements (or if not he could have switched one of the plans to a flexible plan) he'd have been able to access his TFC in less than two years, meaning any borrowing could be quickly paid off if required.

For completeness, I should also say that I don't think BRG did an adequate analysis of Mr and Mrs S's income requirements in retirement.

BRG concluded that Mrs S didn't need to rely on the income provided by her DB scheme, saying she saw it as a 'bonus'. Although BRG established that Mr and Mrs S wanted around £36,000 per year in retirement, I don't think it was in a position to know whether this was achievable. While BRG knew the size of Mr S's funds, it didn't ask Mrs S for any details of her current pension (apart from knowing her current contributions and her length of service). So, it didn't know how much income she was entitled to from her current employer's pension, and whether this, combined with Mr S's fund was sufficient to meet their needs until their state pensions became payable. Without knowing this, I don't think BRG was in a position to determine that the guaranteed income from Mrs S's DB scheme wasn't needed. To my mind, Mrs S should not have been advised to risk this pension at all, particularly as Mr S's pensions were subject to investment risk.

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. This was another reason why BRG recommended the transfer due to the lump sum death benefits on offer through a personal pension. But when looking at the answers Mrs S gave in regard to death benefits, she stated the following;

'*Provide for my family in the event of my death – no'*

'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, I can't say that this was a significant reason for BRG to recommend the transfer.

The priority here was to advise Mrs S 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 – especially as this does not seem to have been a priority for her given what she already had in place.

I also think the existing death benefits attached to the DB scheme were underplayed. Mrs S was married and so the spouse's pension provided by the DB scheme would've been useful to her spouse if Mrs S predeceased him. I don't think BRG made the value of this benefit clear enough to Mrs S. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as BRG demonstrated, Mrs S's fund was likely to be depleted if she lived longer than 85. In any event, BRG should not have encouraged Mrs S to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

Furthermore, if Mrs S genuinely wanted to leave a legacy for her spouse or children, which didn't depend on investment returns or how much of her pension fund remained on her death, I think BRG should've instead explored life insurance. I appreciate that the suitability report mentioned a whole of life policy – this was discounted because Mrs S would bear the cost of this rather than the pension fund. But it appears Mr and Mrs S already had life insurance providing cover of over £700,000, although it isn't clear when this cover expired. So, they may have already had sufficient means in place to meet this need. Either way, I think insurance ought to have been explored further if Mrs S genuinely wished to leave extra money to her children on her death.

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

Use of DFM

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

Summary

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

Ultimately, I don't think the advice given to Mrs S was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs S was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mrs S shouldn't have been advised to transfer out of the scheme just to achieve lifestyle goals which could've been funded in other ways, and the potential for higher death benefits wasn't worth giving up the guarantees associated with her DB scheme.

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

Of course, I have to consider whether Mrs S would've gone ahead anyway, against BRG's advice. But if this was the case, BRG could have followed an insistent client process.

I've considered this carefully, but I'm not persuaded that Mrs S would've insisted on transferring out of the DB scheme, against BRG's advice. I say this because Mrs S was an inexperienced investor with a medium attitude to risk. And it doesn't seem to me that Mrs S needed to access her pension, rather she was enquiring with BRG about what she should do with it, having only recently become aware of it. I'm not persuaded that Mrs S's concerns about accessing TFC were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought out and was paying for, didn't think it was suitable for her or in her best interests. If BRG had explained how valuable the guaranteed benefits were and explained that Mrs S could meet her objectives without risking her guaranteed pension, I think that would've carried significant weight. So, I don't think Mrs S would have insisted on transferring out of the DB scheme.

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

SVS's responsibility for the loss

BRG has argued that SVS has also separately caused some of Mrs S's loss. So, I have considered 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.

BRG should not have recommended Mrs S transfer out of her DB scheme. And it was only as a result of BRG's involvement that Mrs S transferred the funds held in her DB scheme. BRG's role was 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.

For this reason, 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 SVS 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 SVS are now in liquidation. My starting point as to causation is that BRG gave unsuitable advice and it is responsible for the losses Mrs S suffered in transferring her existing pension to the SIPP and investing as she did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position.

With this in mind – and recognising also that Mrs 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.

I've also thought about whether it's fair to award compensation for distress and inconvenience - this isn't intended to fine or punish BRG – which is the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mrs S.

We're all inconvenienced at times in our day-to-day lives – and in our dealings with other people, businesses and organisations. When thinking about compensation, I considered whether the impact of BRG's actions was greater than just a minor inconvenience or upset. It's clear to me that this was the case here. In recognition of this I think BRG should pay Mrs S £150 for the distress and inconvenience she's experienced here.

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.

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 60, 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.

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 19 June 2020.
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Claire Pugh
Ombudsman