DRN-3102248

Financial Ombudsman Service

The complaint

Mr H complains that he was given poor advice by Chambers Wealth Management Ltd to transfer the benefits from his defined benefit (DB) scheme with British Steel (BSPS) to a personal pension.

Chambers Wealth Management was an appointed representative of Smith, Law & Shepherds I.F.A. Limited (SLS) who is responsible for this complaint. For ease of reading I'll refer to SLS throughout my decision.

What happened

Mr H was advised by SLS to transfer his deferred benefits from BSPS to a personal pension in 2017.

At the time of the advice Mr H was 54, married with no dependants, in good health and was earning around £38k per year.

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 May 2017, the Pension Protection Fund (PPF) made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr H's employer would be set up – the BSPS2.

Mr H started enquiries and requested a transfer value from BSPS in February 2017. He was worried about losing benefits and flexibility by moving to the PPF. He contacted SLS for advice regarding his pension and they recommended him to transfer to a personal pension.

Mr H complained in 2020 about the suitability of the transfer advice. After SLS rejected his complaint, Mr H referred his complaint to this service. An investigator thought the advice had been unsuitable. SLS disagreed so the complaint was passed to me for a 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. SLS should have only considered a transfer if they 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 during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The documents provided show differing accounts of when Mr H was planning to retire. Fact find notes show that he was hoping to retire around 60. The transfer analysis report (TVAS) matches this as it compared the benefits available in the DB scheme and the personal pension at age 60 and age 65 which was the normal retirement age of BSPS.

The suitability report said that Mr H wanted to retire at 55. However, it also said this date wasn’t set in stone and Mr H might work beyond this age. In the application for the personal pension it was recorded that Mr H expected to take retirement benefits at age 57. Based on what I’ve seen Mr H wasn’t certain when he would retire but I think on balance he was looking to retire somewhere between 57 and 60.

The investment return (critical yield) required to match the DB pension at age 60 was quoted as 10.91% per year. The critical yield to match the benefits available if BSPS moved to the PPF was 7.08% at age 60.

The relevant discount rate published by the Financial Ombudsman Service at the time the advice was given was 3.1% per year for 5 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

Even taking the lowest critical yield here (7.08%), which was a comparison to the PPF at age 60, it’s likely Mr H wouldn’t have been able to match, let alone exceed his DB benefits in the personal pension if he was invested in line with a medium risk strategy as suggested. SLS said they took into account what the recommended portfolio in the personal pension could reasonably achieve. As SLS will know, past performance is no guarantee for future performance and I consider the discount rates and the regulator’s standard projections as more realistic in this regard.

However, even on SLS’s assumptions Mr H still was unlikely to be financially better off in the personal pension. In their own fact find notes SLS said that, after taking off the fund charges and the ongoing adviser charges, the average returns for the chosen portfolio had been 6.99% per year in the past 5 years. And in their final response to Mr H’s complaint they said returns of 6-7% per year were reasonable. This would still be less or just about matching the DB benefits in the PPF. And as I explained above I think there was a significant risk he would not even match his DB benefits and possibly by quite a big margin. Even more so if Mr H retired earlier than 60 as the critical yield would increase.

Mr H was also only a few years away from possible retirement, so any short-term losses would have been difficult to make up and his portfolio was invested around 50% in equities which made this more volatile. In fact the personal pension provider described this portfolio as “adventurous”. This was Mr H’s main retirement provision and given his relatively low capacity for loss, I think a lower risk investment strategy would have been more suitable for him which in return would have likely achieved lower returns and less likely matched his DB benefits.

I also note that only a few months after the transfer Mr H felt uneasy about the fluctuations in his investments and his attitude to risk was downgraded to 3 (low to medium risk). This indicates that Mr H's attitude and understanding of risk might not have been properly tested.

In summary, even if BSPS had moved to the PPF and Mr H's benefits were reduced, he was unlikely to match, let alone exceed his benefits by transferring to a personal pension. By transferring his pension it was 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.

concerns about financial stability of BSPS

Mr H approached SLS as he 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. Transfer values were also higher than they had been before (Mr H's transfer value had increased significantly within a few months) and members felt there was a risk these values would go down again at some point. Mr H also said he was concerned that he would lose the flexibility to retire early once BSPS had moved to the PPF.

So it's quite possible that Mr H came to SLS leaning towards the decision to transfer. However, it was SLS'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.

Instead the suitability report talked about *the threat of the PPF, and the potential loss of benefits* which SLS said were important factors in the decision to transfer. From what I've seen SLS didn't provide Mr H with an objective picture about the PPF and what this might mean for him specifically. In their final response letter to Mr H's complaint SLS acknowledged he had been concerned about losing the flexibility to retire early in the PPF. However, I can see no evidence that they actually explained to him that early retirement was still possible in the PPF and so his concerns in this regard weren't justified.

Overall, I think SLS didn't do much to alleviate Mr H's concerns and fears, but used them as a reason to help rationalise a transfer.

flexibility and death benefits

The suitability report said it was important to Mr H to have flexibility but it wasn't really explored what Mr H actually required. I can't see that his income needs and general plans in retirement were discussed at all. In subsequent reviews after the transfer Mr H said he wanted a regular income -which he could have had in the DB scheme. And as explained earlier early retirement was also possible, even if the scheme moved to the PPF.

It was recorded that Mr H *would prefer* to nominate beneficiaries -such as his wife and son - to fully enjoy the benefits on the personal pension plan rather than receive a reduced spouse's pension from the DB scheme. I think the existing death benefits with BSPS (or the PPF) were underplayed. Mr H's wife would have received a spouse's pension for life which given that she only had a small pension herself, would have been valuable if

Mr H predeceased her. And if he wanted to leave some of his pension to his son, he could have made provisions for this with his defined contribution pension he had with his employer.

I don't doubt that the option of leaving a lump sum to his wife and son would have been attractive and is something Mr H would have liked. However, SLS didn't explore to what extent he was prepared to accept a lower retirement income in exchange for this.

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

Summary

Overall, I'm satisfied that the advice given to Mr H was not suitable. He was giving up a guaranteed, risk free and increasing income. By transferring he was risking obtaining lower retirement benefits and there were no other particular reasons which would justify a transfer and outweigh this. I don't think his options with regards to his DB scheme were properly explored.

I appreciate that at the time the advice was given there was a lot of uncertainty around the pension scheme and I've fully taken into account that Mr H likely was keen to transfer out as he was worried about his pension and the high transfer values were enticing. However, it was the adviser's responsibility to objectively weigh up the options for Mr H. He should have advised him what was best for his circumstances and explain what he was giving up in the DB scheme and that moving to the PPF was not as concerning as he thought. For the reasons given above I think this advice should have been to remain in the BSPS.

On balance I think Mr H would have listened to the adviser and followed their advice if they had recommended him not to transfer out and explained why.

If Mr H had stayed in BSPS, he would have shortly after had the choice to move to the PPF or transfer to BSPS2. I carefully considered what Mr H likely would have done and on balance I think he would have opted to move to the PPF. I say this because at the time Mr H wanted to retire early. 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 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. 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

My aim to is put Mr H, as closely as possible, into the position he'd be in now but for SLS's unsuitable advice. I consider he would have stayed in BSPS and subsequently moved to the PPF.
SLS should undertake a redress calculation in line with the 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.

The calculation should be carried out using the most recent financial assumptions at the date of the actual calculation.

I'm aware that Mr H took tax free lump sums both in 2017 and in 2019. Mr H has explained that he took the first sum in 2017 to keep it secure and not expose all his pension to investment risk. He said he spent some of it on his mortgage and a new car. He took the second lump sum to finance a property abroad, again because he thought brick and mortar were safer than keeping all his pension invested in the stock market. Mr H says he hasn't spent all the money he took.

On balance I don't think there was a pressing need for Mr H to take these lump sums. So if he had remained in BSPS I don't think he would have accessed his benefits early which would have triggered taxable income he didn't need. Mr H has confirmed he is still working now and is looking for a new role next year. He has no fixed retirement plans. So SLS should use the regular assumptions in FG 17/9 about Mr H's assumed retirement age.

SLS 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 in respect of any future loss 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 future 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 Mr H's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the future loss adequately reflects this.

In addition SLS should pay Mr H £250 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 SLS receives notification of his acceptance of any final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of any final decision to the date of settlement for any time, in excess of that 90 day period, that it takes SLS 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 Smith, Law & Shepherds I.F.A 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 Smith, Law & Shepherds I.F.A 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 Smith, Law & Shepherds I.F.A 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 Smith, Law & Shepherds I.F.A 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 Smith, Law & Shepherds I.F.A 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 4 January 2022.

Nina Walter
Ombudsman