DRN-3185032

The complaint

Mr R complains about the advice given by Financial Solutions Wales Ltd ('FSW') to transfer out of the British Steel Pension Scheme ('BSPS') and invest the funds in a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr R's employer 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 benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

In October 2017, members of BSPS were sent a "Time to Choose" leaflet, giving them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their benefits elsewhere. The deadline to make their choice was 22 December 2017.

Mr R was concerned about what the announcement by his employer meant for the security of the defined-benefits he held in the BSPS. As Mr R was unsure about what to do with his pension, he approached FSW for advice. Mr R met with FSW twice in November 2017. At the second meeting on 28 November 2017, FSW gathered information about Mr R's circumstances, objectives and his risk appetite.

In January 2018 FSW advised Mr R to transfer out of the BSPS to a personal pension. It recommended he invest the funds across three managed funds in line with his attitude to risk, which FSW had assessed as being 'lowest-medium'. FSW recommended this because Mr R said he wanted to cut ties with his employer and because it met Mr R's need for flexibility. It said it also allowed him to retire early, without the significant penalties that would apply under the BSPS2 or the PPF. Mr R accepted the advice and £460,401.44 was transferred to his new personal pension.

In 2019 Mr R complained about the advice as he now believed he would be worse off in retirement. FSW didn't uphold the complaint. It said the advice was suitable for Mr R as it thought he would be better off by transferring out. FSW maintained that Mr R wanted to have control over his pension as the trustees of the BSPS had made several changes over the years and each time this had resulted in lower benefits. FSW added that Mr R's need for flexibility and his wish to leave his pension to his children couldn't have been met if he joined the BSPS2 or moved with the scheme to the PPF.

Mr R referred his complaint to our service. Our investigator thought the advice FSW gave Mr R was unsuitable. He thought Mr R would be worse off by transferring out because the critical yields required to match his BSPS benefits were unachievable. He didn't think Mr R's other objectives were good enough reasons to give up the valuable guarantees the BSPS2 provided. He also wasn't persuaded Mr R had a genuine need for flexibility and he thought his income requirements could be met through the BSPS2 until his state pension became payable. The investigator said FSW should compensate Mr R for the losses he incurred by transferring out of the BSPS and that compensation should be based on Mr R having opted to join the BSPS2.

FSW didn't agree. It said the risks of transferring out were explained to Mr R and he chose to accept the risk. It maintained Mr R's objectives could only be met by transferring out.

FSW also asked for an oral hearing. It believed if Mr R was offered an annuity in place of his BSPS benefits he wouldn't take it because he wanted flexibility. FSW also said Mr R had very strong views about his employer and wanting to move his pension outside of its control – it thought if questioned, Mr R would reiterate those views now.

The investigator didn't change his opinion so the complaint was referred to me to make a final decision and to decide whether to hold an oral hearing.

I turned down FSW's request for an oral hearing because I was satisfied I could ask Mr R to provide his comments on the two issues raised by FSW in writing. FSW accepted this and said it welcomed the opportunity to review those comments before I made a final decision.

Mr R's representative arranged for Mr R to speak to the investigator instead to provide his response to FSW's concerns. Mr R told the investigator that at the time of the advice, he didn't really understand what was going on; he didn't know anything about pensions or investments. Mr R said he remembered that time was running out and it was all such a rush. He said there was a lot of 'talk' going round about the PPF, but it was complicated and he didn't understand it. But Mr R thought transferring out was the right thing to do and that's what other people were doing. When asked if it was possible to take the money and undo what happened and get back the benefits he lost, Mr R said he would he do it because he understood that what he got by transferring out could be a lot less.

Mr R's comments, and an additional response from Mr R's representative, were sent to FSW so it could provide any final comments. I didn't hear back from FSW by the deadline given, so I'm now providing my final decision on this complaint.

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 regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a defined-benefits scheme is that it is unsuitable. So, FSW should have only considered a transfer if they could clearly demonstrate that the transfer was in Mr R's best interests (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 fact-find completed by FSW shows that Mr R hoped he would be able to retire at age 60. But according to the pension transfer questionnaire Mr R completed before he met with

FSW, Mr R acknowledged that he might not be able to afford to and so he might continue working to age 65. So, I think it's fair to say that Mr R hoped to be able to retire at age 60, but this wasn't a concrete plan and would depend on his circumstances.

FSW carried out a transfer value analysis report ('TVAS') showing the growth Mr R's fund would need to achieve in order to match the benefits he could obtain through the BSPS. The investment return (critical yield) required to match the BSPS pension at age 65 was 5.74% per year if benefits were taken in full or 4.67% if tax-free cash ('TFC') was taken with a reduced pension. At age 60, the critical yield was 7.79%% per year if benefits were taken in full or 6.25% if TFC was taken with a reduced pension. The equivalent critical yields to match the benefits available if Mr R remained with the scheme and moved with it to the PPF were 4.52% and 4.19% with TFC at age 65 and 5.49% and 5.08% with TFC at age 60.

The relevant discount rate published by the Financial Ombudsman Service at the time the advice was given was 3.8% per year for 10 years to retirement and 4.3% per year for 15 years to retirement. For further comparison, the FCA'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 (4.19%), which was a comparison to the PPF at age 65 if Mr R took TFC, it's unlikely Mr R could've exceeded his BSPS benefits in the personal pension if he was invested in line with a low-medium risk strategy as suggested by FSW. And given Mr R actually wanted to be able to retire at age 60, the lowest critical yield (5.08%) was unlikely to be matched, let alone be exceeded given his attitude to risk. So, I think it is clear the transfer would not have put Mr R in a better position financially.

But FSW says that the risks of transferring were explained to Mr R and he was happy to accept a lower pension income. I accept that some of the risks were explained, and in particular, FSW said in the suitability report that it was unlikely the critical yields could be achieved. But explaining the risks of the new arrangement is not a substitute for providing Mr R with suitable advice. And ultimately Mr R was entitled to rely on the advice he was given; FSW said a transfer out of the BSPS was suitable for him despite the risks.

FSW also says that it provided Mr R with a cash flow analysis which showed his fund would not run out even if he lived to 100. The cash flow analysis showed the impact of Mr R taking income of £20,000 from age 60 and reducing this to £15,000 from age 67 when his state pension became payable. FSW says it showed the level of income Mr R required was sustainable and would potentially leave a substantial lump sum for his wife and children on his death. However, the analysis assumed 3% returns after charges which means Mr R needed to achieve returns of over 4.6% to make up for ongoing adviser and pension plan charges (around 1.6% a year) and the initial adviser charge of around £7,600. And, as FSW will know, past performance is no guarantee of future performance. So, I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. As explained above, it was unlikely these levels of return could be achieved given Mr M's attitude to risk, so I think his funds were at risk of running out a lot sooner.

Furthermore, the cash flow analysis was based on Mr R drawing substantially less income than he would have been entitled to receive from the scheme. And the TVAS report shows that the fund would be exhausted at the middle rate of growth before age 100 if equivalent drawings were made. So, demonstrating Mr R's potential position throughout the later years of his retirement, based on assumed growth rates, was not a fair comparison.

In summary, even if Mr R had remained in the BSPS and had moved to the PPF, meaning Mr R's benefits would be reduced, he was still very unlikely to match, let alone exceed his benefits by transferring to a personal pension. So based on the above alone, a transfer wasn't in Mr M's best interest.

Nevertheless, 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, as FSW has argued here. I have considered these below.

Flexibility and income needs

FSW's main arguments in support of its recommendation to transfer are that Mr R wanted to retire early and he initially needed an income of £20,000 per year – the penalties for retiring early under the BSPS and the PPF were too severe. FSW said the BSPS2 pension on offer at age 60 was £20,998 per year. However, the £20,998 is in 'future' terms, and the equivalent in 'today's' terms (accounting for inflation) is £17,184 per year. FSW said this didn't allow him enough income to retire at his desired age. Also, it said Mr R required flexibility; whilst he initially needed an income of £20,000 per year, he wanted to reduce it to £15,000 when his state pension became payable.

FSW says Mr R needed £20,000 per year from age 60. But it isn't clear why this amount was required. FSW's fact-find noted that Mr and Mrs R's monthly expenditure was £1,789 per month, leaving disposable income of £1,253 per month. This wasn't broken down further in the fact-find, but the cash flow analysis provided greater detail. The expenses set out there amounted to around £18,000 per year. But this included repayments for a mortgage which would have been repaid by the time Mr R hoped to retire at age 60. So, in reality, this reduced the annual expenditure to around £16,500. That said, I would've expected FSW to do a thorough analysis of Mr and Mrs R's expected expenditure in retirement, rather than just assuming the same outgoings and adjusting them for inflation. Generally, spending in retirement decreases. But assuming the annual household expenditure in 2018 was £16,500, this would be around £20,000 in 2028 after adjusting for inflation. So, I'm prepared to accept that Mr R needed around £20,000 to meet his household expenses if he hoped to retire at age 60.

According to Mr R's 'time to choose' leaflet, he would be entitled to £20,998.25 a year at age 60 or TFC of £99,416.36 and a reduced pension of £14,912.45 a year. At 65, he would be entitled to £26,413.10 a year or TFC of £120,242.69 and a reduced pension of £18,036.40 a year. This aligns with the TVAS report figures. The equivalent sums available to Mr R through the PPF were lower than this.

At the time of the advice, Mr R did not foresee any need to take TFC, so, for comparison purposes, I think it's fair to assume that he would take a full pension. I also think it's fair to use the BSPS2 benefits on offer to him, as the PPF benefits were lower.

If I accept what FSW says about the value of the BSPS2 benefits on offer to Mr R at age 60, he will have a shortfall of around £3,000 per year before he and his wife's state pensions become payable at age 67. Mr R already had savings of around £11,000. And the fact-find shows that he and his wife had surplus income of over £1,000 per month, meaning they had further capacity to save in the 10 years leading up to Mr R's retirement. Furthermore, Mr R was contributing 6% and his employer was contributing 10% of his salary to his employer's new defined-contribution scheme ('DCS'). Based on Mr R's salary at the time, this meant over £6,000 per year was being paid into his DCS. And even if I assume that Mr R's salary didn't increase for 10 years, he will have a fund of at least £66,000 available to him, assuming modest growth of 2%.

So, I think Mr R would've had ample additional capital to draw from to make up the £3,000 or so needed to top up his income to the required level until his state pension became payable. This means I think Mr and Mrs R would've comfortably been able to meet their essential income needs if Mr R opted to join the BSPS2 and he retired early. My key concern here is that this option wasn't discussed with Mr R in any meaningful way. Instead, he as left with the impression that he could only retire early and meet his income needs at age 60 if he transferred out of the BSPS. To my mind, it ought to have been clear to FSW that Mr R's objectives would be met by opting to join the BSPS2 given his capacity to save in the interim and the likely value of his DCS.

FSW also said Mr R wanted to take his pension income flexibly. But Mr R wasn't looking to take any TFC before he retired at 60 (if at all). So, it's difficult to see what flexibility Mr R actually required at the time of the advice. FSW's cash flow forecast was based on Mr R withdrawing £20,000 from age 60 to 67, before reducing it to £15,000. But I don't think that flexibility was necessarily required – it simply had the effect of ensuing more of his pension remained invested, meaning a higher sum could have been available to his family on death. If Mr R felt he had too much income once his state pension became payable at 67, he could've recycled his excess income by reinvesting it elsewhere. Or he could've invested it in a tax-efficient manner, such as through a trust, to ensure that a greater sum was available to pass on upon his death. Either way, I'm not persuaded that Mr R had a genuine need for flexibility such that he should've been advised to give up a guaranteed, escalating pension in retirement.

Concerns about financial stability of BSPS

FSW says that Mr R was very clear in his meetings with it; he wanted to transfer out of the BSPS to have control over his pension. It said he had lost trust in his employer as it had 'moved the goalposts' so many times and he didn't want to join the BSPS2.

I accept that Mr R 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. I also think he was probably fed up with his employer – it's clear that things were happening very quickly and Mr R thought transferring out would be best. So it's likely that Mr R approached FSW already leaning towards the decision to transfer. However, it was FSW's obligation to give Mr R an objective picture and recommend what was in his best interest.

Mr R said he didn't want to join the BSPS2 because he didn't want his employer to be able to change his benefits again in the future. But the scheme wasn't actually controlled by Mr R's employer – six trustees were appointed to protect the scheme members' interests, and only two of those represented Mr R's employer. So, I think Mr R ought to have been reassured that his employer couldn't simply change his benefits in the future even if it wanted to. And one of the main purposes of the BSPS2 was to maintain the same starting pensions, and the escalation rates are at the statutory minimum.

Overall, I don't think that Mr R's fears about his employer or the new scheme were challenged by FSW, as it should have. Instead it appears to have used these concerns to justify the transfer.

Death benefits

According to the fact-find, Mr R said he wanted to be able to leave any remaining pension funds to his wife and children.

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 R he could leave a large sum to his family when he died would have sounded a lot more attractive than the BSPS2, where his wife would receive a reduced pension. While Mr R might have thought it was a good idea to transfer his BSPS benefits because of this, the priority here was to advise Mr R about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think FSW really explored to what extent Mr R was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits with BSPS were underplayed. Mr R had a substantial death in service benefit and Mr R's wife would have received a guaranteed spouse's pension for life which would have been valuable if Mr R predeceased her. And if he wanted to leave some of his pension to his family, he could have made provisions for this with his DCS if he wanted to. Or, as I've said above, he could've or reinvested any excess pension income for the benefit of his children. In comparison, if Mr R lived a long life, there might not have been a large or any sum to leave to beneficiaries from his personal pension, particularly if the growth achieved was less than expected.

Furthermore, if Mr R genuinely wanted to leave a legacy for his children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think FSW should've instead explored life insurance. I appreciate that the suitability report mentioned a whole of life policy with a sum assured of £460,401. This was discounted by Mr R because although the premium of £451 per month was affordable, Mr R thought the death benefits available through the new pension were preferable to spending a significant amount on insurance. But I don't think that this was a balanced way of presenting this option to Mr R.

Basing the quote on the transfer value of Mr R's BSPS benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mr R wanted to leave whatever remained of his pension to his children, which would be a lot less than this if he lived a long life and/or if investment returns were poor. So, the starting point ought to have been to ask Mr R how much he would ideally like to leave to his children, and this could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide.

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 R was in good health and so more focus should have been on ensuring Mr R would receive his required income over a long period of time.

Summary

Overall, I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring he was essentially guaranteed lower retirement benefits and as I have explained above, I think he and his wife were able to meet their income needs through the BSPS2. I don't think there were any other particular reasons which would justify a transfer and outweigh this.

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 R likely was keen to transfer out as he was worried about his pension. However, it was the adviser's responsibility to objectively weigh up the options for Mr R. He should have advised him what was best for his circumstances and explained what he would be giving up if he transferred out.

For the reasons given above, I think FSW should have advised Mr R to join the BSPS2. I say this because Mr R wanted to retire early, around age 60, but he still thought it was possible he would work to age 65. So, I don't think his retirement plans were set in stone and he could've retired closer to his normal retirement age of 65. As a result, the benefits available to Mr R under the BSPS2 would likely be higher than through the PPF. Also, Mr R was married, and his wife's pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mr R chose to do so).

The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

On balance I think Mr R would have listened to the adviser and followed their advice. Mr R was an inexperienced investor and this pension made up a significant part of his retirement provision. He also couldn't afford to lose it. So, if FSW had provided him with clear advice against transferring out of the BSPS, explaining why it wasn't in his best interests, and recommended he join the BSPS2, I think he would've accepted that advice. I appreciate that FSW's suitability report was dated after the deadline for joining the BSPS2. But Mr R first contacted FSW in October 2017, and first met with FSW in November 2017. So, I think FSW should've been in a position to provide Mr R with advice before the deadline to join the BSPS2 expired on 22 December 2017.

I've thought about FSW's argument that Mr R would still choose flexibility over the inflexible benefits provided by the BSPS2, even now. But I don't think that's the case. Most people, when asked, would say that having flexibility is preferable. But if Mr R had been given a balanced view about what he'd be giving up to have flexibility, I don't think he'd have insisted on transferring out. In my view, if Mr R had been given clear advice that transferring out of the BSPS just to have flexibility (that he didn't need) wasn't in his best interests, I think he'd have accepted that.

In any event, if FSW had given Mr R suitable advice, that is, that he should join the BSPS2 and Mr R didn't accept this, it could've treated him as an insistent client. But FSW didn't give Mr R suitable advice, so that point is moot. And as above, I don't think Mr R would've acted against the professional advice he'd sought out.

In light of the above, I think FSW should compensate Mr R for the unsuitable advice, using the regulator's pension review methodology. And it's the benefits offered by the BSPS2 which should be used for comparison purposes.

Putting things right

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in but for FSW's unsuitable advice. I consider Mr R would have most likely transferred into BSPS2, rather than to the personal pension if he'd been given suitable advice. So, FSW should use the benefits offered by BSPS2 for comparison purposes.

FSW 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.

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 R's acceptance of the decision.

FSW may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R'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 R's SERPS/S2P entitlement.

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

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr R within 90 days of the date FSW 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 FSW to pay Mr R.

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.

For the upset caused by the unsuitable advice, FSW should also pay Mr R £300.

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 Financial Solutions Wales Ltd to pay Mr R 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 Financial Solutions Wales Ltd to pay Mr R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Financial Solutions Wales Ltd to pay Mr R any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Financial Solutions Wales Ltd pays Mr R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr R. If Mr R accepts this decision, the money award becomes binding on Financial Solutions Wales Ltd. My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R may want to consider getting independent legal advice before deciding whether to accept any final decision.

Financial Solutions Wales Ltd should provide details of its calculations to Mr R and his representative in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr R to accept or reject my decision before 15 April 2022.

Hannah Wise
Ombudsman