DRN-3224942

The complaint

Mr K complains about the advice given by Better Retirement Group Ltd trading as FIDUCIA PROSPERITY (BRG) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr K approached BRG in September 2018 to discuss his pension and retirement needs.

BRG completed a fact-find to gather information about Mr K's circumstances and objectives. BRG also carried out an assessment of Mr K's attitude to risk, which it deemed to be 'highest medium' – a score of seven on a scale of one to ten. But I can see in the suitability report Mr K's attitude to risk is recorded as 'high medium' risk - a score of six. It's unclear whether Mr K's score was revised downwards or whether this is an error. I'll talk more about this later on.

On 21 September 2018 BRG advised Mr K to transfer his pension benefits into a SIPP and invest the proceeds in a bespoke portfolio with a third-party Discretionary Fund Manager (DFM.) The suitability report said the reasons for this recommendation were:

- To provide flexibility of income throughout retirement.
- Mr K had sufficient retirement income from his intended retirement age derived from variable sources including his state pension, income from his transferred pension scheme and continued earned income.
- To generate a tax-free cash lump sum without the need to draw additional income to clear a business loan and to provide better overall financial security.
- To provide lump sum death benefits for his family in both the short and long term.

Mr K accepted the recommendation and the transfer duly went ahead.

In September 2020 Mr K complained to BRG about the suitability of the transfer advice because given his circumstances he didn't think the transfer was in his best interests.

BRG didn't uphold Mr K's complaint. In summary it said the transfer advice was suitable. It said Mr K wanted to use the tax-free cash to pay off a loan saving him around £400 a month – the remainder increasing his savings. It said that given his objective, his assessed attitude to risk and the lifetime cashflow comparison, which showed that Mr K's pension fund would provide an equivalent income beyond his life expectancy (assuming a growth rate of 5%) it recommended the transfer.
It said that while it was clear its investment advice had gone wrong given the investment losses suffered and the DFM going into special administration, it said it was satisfied it acted in good faith.

Mr K referred his complaint to our service. An investigator upheld the complaint and required BRG to pay compensation. In summary they said the transfer advice wasn't suitable because they didn't think the transfer was financially viable given the critical yield; they weren't persuaded Mr K's attitude to risk was truly high medium; they weren't persuaded that

Mr K wanted to control his pension given his lack of investment experience; they didn't think death benefits were important given Mr K was single with no dependants; and finally they said that there was insufficient consideration given to Mr K taking early retirement from his DB scheme which would've likely met his objective.

Despite BRG indicating that it intended to respond to the investigator's assessment and us reminding it that it still had time to do so, BRG has said nothing in response. Because it is assumed that BRG disagrees with the investigator's findings, 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.

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 and my reasons are set out below.

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 K's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17 /9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, 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 closest discount rate to the time of this transfer which I'm able to refer to was published for the period before 1 October 2017 and is 2.7% per year for two years to retirement. The share returns that were used to compile this discount rate wouldn't have been significantly different by the time of transfer and, if anything, the bond returns would have got lower. So, I think it still gives an approximate guide to the upper end of potential future returns.

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%.

The critical yield required to match Mr K's benefits at age 60 was 9.60% if he took a full pension – no figure was generated assuming a reduced pension with a tax-free cash withdrawal. I've taken this into account, along with the composition of assets in the discount rate, Mr K's recorded attitude to risk in the suitability report as a 'high medium ' and also the term to retirement.

In my view there would be little point in Mr K giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, the critical yield was 9.6%. And even on the assumption that the critical yield figure would have been lower based on the more likely option of Mr K taking his full entitlement to tax-free cash and a reduced pension, the figure was still likely significantly higher than the regulator's middle rate and higher than the upper projection rate – it was also several times higher than the discount rate. And while I have serious concerns about how BRG arrived at classifying Mr K as a 'highest medium' investor given his apparent complete lack of any real investment experience, his age and the term to retirement (I think a more appropriate assessment would have been a score of four or five at best) even if I thought this was the level of risk Mr K was prepared to take with his pension, which for the avoidance of doubt I do not, I think it was clear he was likely to receive benefits of a substantially lower overall value than his DB scheme at retirement, as a result of investing in line with that attitude to risk.

Because the required sustained growth rate was significantly higher than the discount rate, I think it is clear the transfer was not compatible with Mr K's attitude to risk. To have come close to achieving the level of growth required, in my view would have required Mr K to take significant investment risk, which was greater than his recorded appetite and substantially higher risk than I think he was truly prepared to take. And even then I think it's more likely than not that Mr K would have been worse off financially at retirement if he transferred out. I think the term to retirement was also a limiting factor here.

I can see that BRG argues that the critical yield isn't particularly relevant because Mr K didn't intend on purchasing an annuity. It also said it demonstrated that if the fund grew by 5% Mr K would be able to withdraw the same income as his DB scheme provided from age 60 to beyond his life expectancy. I've considered this – but I'm not persuaded by BRG's arguments.

Firstly as I said above, there would be little point in Mr K giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme while at the same time as being exposed to investment risk. And here BRG's income modeller does not in my view show that Mr K could reasonably take a sustained higher income than his DB scheme assuming a 5% growth rate – this appears to require an 8% growth rate to avoid the risk of Mr K running out of money if he lived a long life. And this in my view was not a realistic rate of sustained growth taking into account what I consider was Mr K's true attitude to risk, the discount rate and the regulator's standard projection rates.

Secondly I don't think the importance of the critical yield figure should have been downplayed by BRG and the adviser, which I think is what happened here. The regulator required BRG to provide the rates of return required to replicate the benefits available to Mr K through his DB scheme. So, telling Mr K it wasn't really relevant to him undermined the analysis the regulator required it to undertake. And I think given the high critical yield figure in Mr K's case, this should have acted as a clear sign that Mr K ought to retain his DB scheme and that transferring out was not likely to be in his best interests.

Overall, I think BRG ought to have told Mr K that it wasn't in his best interests to transfer out of the DB scheme because I think it's clear that he would be worse off financially if he did so. And for this reason alone, I don't think the advice to transfer out was suitable. But I accept that 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 considered these below.

Flexibility – access to tax-free cash and income need

Mr K's objective and the primary reason for the recommendation to transfer out of his DB scheme was to access his tax-free cash to clear debt – a business loan of around £20,000 he'd taken out around a year earlier – and to provide *'living support'* and *'comfort factor'* which I think the suitability report later clarified as increasing Mr K's cash funds.

But I don't think this was a suitable reason to recommend the transfer. I say this because firstly I'm not entirely persuaded that Mr K had a need to repay his business loan at this stage. Just because Mr K thought it was a good idea didn't mean that BRG had to execute what he thought he needed – it was BRG's role to determine what was in Mr K's best interests.

While Mr K's monthly income and expenditure analysis recorded in the fact-find showed that he was likely spending up to his income – not an untypical consumer profile in my view - I'm not persuaded this demonstrates Mr K's loan payment wasn't manageable or that he was suffering financial pressure. I think it's reasonable to assume that Mr K's business loan lender would've carried out an affordability check and been satisfied with the result before granting the loan in 2017. It's not clear to me what had changed in the meantime to suggest it was no longer affordable – BRG didn't record in the advice paperwork that the reason for Mr K wanting to repay it was because of affordability issues or budgetary concerns. What is recorded is that Mr K intended to keep working and he didn't need any more income – so it appears he could've continued to service the loan repayment from his earned income.

As such I think in acting in Mr K's best interests the adviser should have explored the possibility of Mr K waiting to repay his loan. Given Mr K was only around two years from his DB scheme's normal retirement age, it might have been possible for him to have serviced his loan from his income during this period before taking his full entitlement to his scheme benefits and using his tax-free cash at this point to repay the outstanding loan balance.

But even if I accept that repayment of the loan was a key objective and an immediate priority for Mr K, I'm not persuaded Mr K needed to transfer out of his DB scheme to achieve it. I think there was a realistic alternative, which I can't see BRG properly considered – early retirement from his DB scheme. The scheme permitted early retirement from age 55. Taking his scheme benefits immediately would've given Mr K access to a lump sum, which he could've used to repay his loan. And while Mr K might not have needed the income immediately, he was not accepting any risk in taking it.

I can see that the suitability report says that early access to Mr K's scheme benefits would incur a *'severe reduction in his initial income...'* it goes on to say that this would make it *'financially unviable to retire early.'* Firstly Mr K had not indicated he wanted to retire early and stop working for example – so this appears at odds with what's recorded elsewhere in the advice paperwork. But that aside, I can't see that the adviser explored what the reduction in income would be – this appears to be an unsubstantiated statement. I accept there would likely be a reduction imposed by the scheme trustees. But Mr K would soon be 58, so only two years from his normal retirement age; the income although reduced would still be guaranteed and would escalate; any reduction imposed would be offset to a degree because he'd be receiving income for two years before it would ordinarily be paid; and despite the likely reduction, it still appears that Mr K's overall target retirement income could still be achieved.
I think greater consideration and emphasis on this being a solution to meet Mr K's objective should have been made by BRG before it went ahead and recommended he made an irreversible decision to transfer his DB scheme to a personal arrangement to help achieve things.

Turning to Mr K's other objective of wanting the comfort factor of adding to his cash funds or savings by gaining access to an immediate lump sum – I'm also not persuaded this was a compelling reason to transfer out of his DB scheme. No further explanation for Mr K wanting to add to his savings was given in the suitability report – in fact the advice paperwork records that Mr K was happy with the emergency funds he had. So it's not clear to me why Mr K needed to do this.

More generally I can see that the recommendation to transfer was made because Mr K had demonstrated a potential need for flexible income. Mr K already had a degree of flexibility because he had an existing personal pension - so he could choose how to access these benefits in future. But I can't see any evidence that Mr K had a strong need for variable income throughout his retirement. Overall I'm not persuaded this was a real objective – I think it was simply a consequence of transferring out to a different arrangement to meet Mr K's need for access to cash.

Death benefits

I think the advice paperwork contains conflicting information about this objective and in my view paints a confused picture. For example death benefits was recorded as one of Mr K's financial priorities on the fact-find. And the suitability report also records Mr K's objective of wanting to leave a lump sum upon his death to his beneficiaries. But Mr K was single and he had no dependants. He also ticked a box on the fact-find to say because he had no dependants a lump sum on his death wasn't important.

I can't see why given Mr K's circumstances the lump sum death benefits on offer through a personal pension would have been important to him – I don't think this was a true objective of Mr K's. In any event, BRG should not have encouraged Mr K to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Control and cutting ties with ex-employer

I think Mr K's documented desire for ownership and control over his pension benefits was overstated. Mr K was not an experienced investor and I've seen nothing to show or suggest that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr K – again it was simply a consequence of transferring away from his DB scheme.

And I don't think severing links with his previous employer was an objective reason for recommending the transfer to Mr K. I consider it was for the adviser to distance themselves from any emotion or feelings Mr K might have had about his previous employer and base their recommendation on Mr K's broader retirement objectives and circumstances at the time - albeit there's nothing to indicate that Mr K had any bad feeling towards his previous employer. I don't think severing ties with an employer was an appropriate reason to recommend a transfer.

Summary

I don't doubt that the immediate availability of tax-free cash, flexibility and control on offer through a personal pension arrangement would have sounded like attractive features to Mr K. But BRG wasn't there to just transact what Mr K might have thought he wanted. The adviser's role was to really understand what Mr K needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr K was suitable. He was giving up a guaranteed, risk-free and increasing income to meet an objective that could likely have been achieved by remaining in his existing scheme and taking his benefits early. And this would've been far preferable to Mr K in my view than giving up his only guaranteed retirement income. By transferring, Mr K was very likely to obtain lower retirement benefits and in my view, there were no compelling reasons which would justify a transfer and outweigh this.

So, I think BRG should've advised Mr K to remain in his DB scheme.

I now need to consider whether, if things had happened as they should have, Mr K would've gone ahead anyway, against BRG's advice.

Having done so, I don't think Mr K would've insisted on transferring out of his DB scheme and gone head in any event. I say this because Mr K was not in my view an experienced investor who possessed the requisite knowledge, skill or confidence to take an investment decision to go against the advice he was given. So I think he relied solely on the advice he was given. At the time this pension was the primary source of Mr K's guaranteed future retirement provision. So, if BRG had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, and that his objective could reasonably be met by taking benefits early from his DB scheme and not risk his guaranteed pension to do so, I think that would've carried significant weight. I think Mr K would've accepted that advice.

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

DFM's responsibility for the loss

BRG has made representations that the DFM caused some of Mr K's loss. It's clear something has gone wrong and the DFM is now in special administration. So, I've considered whether I should apportion only part of the responsibility for compensating the loss to BRG.

But in the circumstances, I think it is fair to make an award for the whole loss against BRG. BRG should not have recommended Mr K transfer out of his DB scheme. And it was only as a result of BRG's involvement that Mr K transferred the funds held in his 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, Mr K couldn't have invested as he did. So, in my view, the entirety of Mr K's loss stems from BRG's unsuitable advice to transfer away from his DB scheme. For this reason, I think holding BRG responsible for the whole of the loss represents fair compensation in this case.

I'm aware Mr K may be able to make a claim about the DFM 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 Mr K 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 the DFM are now in liquidation.

My starting point as to causation is that BRG gave unsuitable advice and it is responsible for the losses Mr K suffered in transferring his existing pension to the SIPP and investing as he 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 Mr K 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 can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr K. So 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 – that's the job of the regulator. But I think it's fair to recognise the emotional and practical impact this matter had on Mr K. Taking everything into account, including that I consider Mr K is now at the age when his retirement provision is of greater importance to him, I think the unsuitable advice has caused him distress. So I think an award of £300 is fair in all the circumstances.

Putting things right

A fair and reasonable outcome would be for BRG to put Mr K, as far as possible, into the position he would now be in but for BRG's unsuitable advice. I consider Mr K would have most likely remained in his 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.

Mr K could've taken his DB scheme benefits without reduction at age 60. So, compensation should be based on Mr K taking benefits at his scheme's normal retirement age of 60.

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 K's acceptance of the decision.

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

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

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 Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr K the compensation amount as set out in the steps above, up to a maximum of £160,000.

Better Retirement Group Ltd trading as FIDUCIA PROSPERITY should also pay Mr K £300 to reflect the distress and inconvenience this matter has caused.

Where the compensation amount does not exceed £160,000, I would additionally require Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr K any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr K 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 trading as FIDUCIA PROSPERITY pays Mr K the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr K.

If Mr K accepts this decision, the money award becomes binding on Better Retirement Group Ltd trading as FIDUCIA PROSPERITY

My recommendation would not be binding. Further, it's unlikely that Mr K can accept my decision and go to court to ask for the balance. Mr K 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 K to accept or reject my decision before 18 August 2022.
Paul Featherstone
Ombudsman