

## The complaint

Mr D complains about the advice given by Better Retirement Group Ltd (BRG), trading as Fiducia Prosperity, to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was flawed and unsuitable for him and believes it has caused a significant financial loss.

## What happened

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

BRG completed a fact-find to gather information about Mr D's circumstances and objectives. This showed that he:

- Was aged 54.
- Was employed with gross earnings of £63,000. His wife earned £1,500 a year.
- Was married with two children, one child was dependent.
- Had a pension income of £1,500 a year.
- He had a separate defined contribution pension scheme that had a value of £80,000.

BRG also carried out an assessment of Mr D's attitude to risk, which it said was 'low medium'.

On 5 April 2018, BRG advised Mr D to transfer his DB pension benefits. His 22 years of service provided a transfer value of around £290,000. He placed the proceeds in an Intelligent Money SIPP. I understand he invested in a third party 'Model Portfolio' using a discretionary fund manager (DFM).

The suitability report said the reason why the advice was suitable, and the main benefits of it, were:

- Mr D had sufficient income from elsewhere to provide his core financial needs in retirement, so he could transfer this pension.
- The estimated growth required to match the benefits in his existing scheme was reasonable when compared with the risk Mr D was prepared to take.
- He wanted the full value of the transferred fund to be available to his family straight away, or on his death, particularly as he currently had ongoing health concerns
- He wanted a flexible income to allow him to retire early.
- The transfer values being offered to scheme members were at an all-time high due to low gilt and interest rates.

Mr D complained in 2020 to BRG about the suitability of the transfer advice. He said that the advice wasn't properly explained at the time. And he wasn't fully aware of the benefits he was giving up, including the spouses pension. The health concerns noted at the time of sale were not serious and were not a reason for an immediate transfer. He said the fact that his investments are illiquid (or have been) has meant that he will be unable to retire when he wants to.

BRG didn't uphold Mr D's complaint. It said that he wanted flexibility with his retirement income which the DB scheme wouldn't offer. And his health was an immediate concern. The tax-free cash would enable him to help his family and in particular his son who was at university. It said that the fund losses, rather than its advice, were the cause of the complaint.

Mr D referred his complaint to our service. An investigator upheld the complaint and recommended that BRG pay compensation. The investigator said that the SIPP was likely to provide lower benefits than the DB scheme. And so, Mr D shouldn't have been advised to make the transfer.

BRG didn't respond to the opinion. As no agreement has been reached the complaint has been 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.

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 Mr D'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, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The critical yield required to match Mr D's benefits at age 65 was 11.71% if he took a pension on the same basis as the DB scheme, and this rose to 23.07% at age 60. And the transfer value analysis also said that in order to provide benefits of equal value to those of the DB Scheme pension at retirement would require a fund of £723,086.25.

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 3.9% per year for 11 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr D's 'low to medium' attitude to risk and also the term to retirement. There would be little point in Mr D 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, given the lowest critical yield was 11.7%, I think Mr D was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

BRG has provided cashflow models which it says shows Mr D would've been able to meet his needs despite the high critical yields.

I've considered these, but BRG's models show that if Mr D took the same benefits as he would from the DB scheme then, assuming a low growth rate of 2%, his fund would be reduced to zero at around age 79. The age his pension fund was reduced to zero, assuming a medium growth rate of 5%, increased to around age 86. The maximum sustainable income, until age 99, assuming the lower growth rate of 2% was £7,314 per year. This rose to £11,848 if an assumption of 5% was used.

And, in any event, as BRG will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

So, it's very likely Mr D's pension benefits would be much lower than they would have been had he not transferred away from the DB scheme.

For this reason alone, a transfer out of the DB scheme wasn't in Mr D's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as BRG has said 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 and income needs*

I don't think Mr D required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date.

It was noted that Mr D wanted to use some of the tax-free cash to help his son through university. Whilst I don't doubt this was important to Mr D, I can't see that any other means to do this were explored. And I'm not persuaded that Mr D needed, or wanted to, potentially significantly reduce his retirement income to meet this aim.

And Mr D already had a significant sum in in a DC scheme which could provide him with flexible retirement benefits if he wanted these. As far as I can see it was considered if he could use this to provide some flexibility (if he needed it).

I also can't see evidence that Mr D had a strong need for variable income throughout his retirement. This is because there was no real need for this identified. The fact find recorded that Mr D needed an income of £20,000 at retirement. Rather than a variable income.

And I'm satisfied Mr D could have met his income needs in retirement through the DB scheme at 65. Mr D needed £20,000 per year according to the information gathered by BRG. And under the DB scheme, Mr D was entitled to an annual income of just over £17,000 at age 65, which, when taken into consideration with his other pensions, and state pension entitlement, would've met his recorded objectives.

Furthermore, Mr D was only 54 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr D had about 11 years before he needed to think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits now when there wasn't a pressing need to do so. If Mr D later had reason to transfer out of his DB scheme he could have done so closer to retirement.

### *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. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr D. But whilst I appreciate death benefits are important to consumers, and Mr D might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr D about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think BRG explored to what extent Mr D was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr D was married and had children and in particular the spouse's pension provided by the DB scheme would've been useful if Mr D predeceased his wife. I don't think BRG made the value of this benefit clear enough to Mr D. 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 the cashflow analysis shows, there may not have been a large sum left particularly if Mr D lived a longer life. In any event, BRG should not have encouraged Mr D to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr D genuinely wanted to leave a legacy for his spouse or children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think BRG should've instead explored life insurance.

It was recorded that Mr D had some health problems. But he has recently said that these were routine, and they wouldn't impact on his life expectancy. He considers himself to be in good health. And I think the documentation from the time doesn't contradict this to any great degree. Whilst these problems were noted there seems to have been no meaningful discussion about life expectancy or any indication that Mr D had a reduced life expectancy.

And in any event Mr D not reaching his life expectancy would only be a possibility and it was also possible that he would exceed this, in which case Mr D would need his pension to last longer. If Mr D transferred out of the DB scheme he would be relying on investment returns to ensure sufficient capital remained in the personal pension to provide the death benefits, whereas the spouse's and dependent's pensions were guaranteed and escalated.

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

### *Use of DFM*

BRG recommended that Mr D use a DFM to manage his pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr D, it follows that I don't need to consider the suitability of the investment recommendation. This is

because Mr D should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage his funds if suitable advice had been given.

### *Summary*

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

Ultimately, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr D 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. Mr D shouldn't have been advised to transfer out of the scheme just to help a family member out, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme. I don't think his health was such that he should have transferred away.

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

Of course, I have to consider whether Mr D would've gone ahead anyway, against BRG's advice.

I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the DB scheme, against BRG's advice. I say this because Mr D was an inexperienced investor with a low medium attitude to risk and this pension accounted for a the majority of his retirement provision. So, if BRG had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr D's wish to help his son, or for increased death benefits was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If BRG had explained that Mr D could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr D would have insisted on transferring out of the DB scheme.

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

### *DFM's responsibility for the loss*

I don't think BRG had sufficient oversight of the DFM's actions here. Mr D had a low medium attitude to risk but the DFM made investments that have significantly fallen in value and have at times been illiquid. As far as I can see BRG didn't question these investments and it also continued to take fees from the investment that it should have been monitoring. So, anything that the DFM might also have done wrong doesn't make it reasonable in the circumstances of this case for BRG to avoid compensating for the losses they may have gone on to cause.

So, I think holding BRG responsible for the whole of the loss represents fair compensation in this case.

### *FSCS compensation*

I'm aware Mr D may be able to take his claims 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 D 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 is now in liquidation. My starting point as to causation is that BRG gave unsuitable advice and it is responsible for the losses Mr D 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 D 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.

Our Investigator recommended that BRG also pay Mr D £350 for the distress caused by the unsuitable advice. I don't doubt that Mr D has been caused distress and concern in relation to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

### **Putting things right**

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

For clarity, Mr D has not yet retired, and he has no firm plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr D's acceptance of the decision.

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

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

I understand Mr D's SIPP may include illiquid investments, meaning they can't be readily sold on the open market. This means it can be complicated to establish its value. If this is the case, to calculate the compensation, BRG should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investments.

If BRG is unable to buy the investments, they should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything BRG has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, BRG may ask Mr D to provide an undertaking to account to them for the net amount of any payment he may receive from the investment in future. That undertaking should allow for the effect of any tax and charges on what he receives. BRG will need to meet any costs in drawing up the undertaking. If BRG asks Mr D to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

In order for the SIPP to be closed (should Mr D wish to move his investment portfolio) and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by BRG taking over the investment, or this is something that Mr D can discuss with his SIPP provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that BRG pay Mr D an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr D within 90 days of the date BRG receives notification of his 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 D.

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.

BRG should also pay Mr D £350.

## **My final decision**

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

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

My recommendation would not be binding if Mr D accepts the this decision. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 31 August 2022.

Andy Burlinson  
**Ombudsman**