DRN-3313524

The complaint

Mr R complains that Better Retirement Group Ltd gave him unsuitable advice to transfer two defined benefit occupational pension schemes (OPSs) to a Self-Invested Personal Pension (SIPP).

What happened

One of our investigators considered Mr R's complaint. She set out the background and circumstances to the complaint and the reasons why she thought it should be upheld in her assessment, which she sent to both parties.

In summary, she said Mr R's financial advising firm (which I will refer to as firm A) engaged a pension transfer specialist, Better Retirement Group, (BRG) to provide advice to Mr R on his two deferred benefit OPSs.

In May 2016 Firm A's adviser completed a fact find which noted the following about Mr R:

- He was married and in his mid-fifties
- He had a mortgage of £94,000 and additional debt of £9,000. He had a surplus monthly income of £1,200 per month
- His attitude to risk (ATR) was assessed as Medium
- He wanted to retire fully at age 65 on an income of approximately £20,000 per year
- He expected this income to be made up of his existing pensions, along with his wife's income and both of their state pensions
- His other financial goals were recorded as paying off some of his mortgage and debt, and to ensure his wife was provided with an income in the event of his death.

Mr R had two defined benefit OPSs (which I will refer to as OPS1 and OPS 2), and a small personal pension plan.

OPS1 had a transfer value of just over £160,000 at the point of the advice. It provided a deferred pension of approximately £5,500. Mr R had the option to take tax-free cash and a reduced income, and it also provided a spouse's pension of £2,700 a year.

OPS2 entitled Mr R to a pension of £2,800 from age 65. It included "contracted out" benefits which gave rise to a Guaranteed Minimum Pension. The transfer value was approximately £65,000 which included an enhancement.

BRG completed a Transfer Value Analysis report (TVAS). And a recommendation report was sent to Mr R advising him to transfer both OPSs to a SIPP.

Firm A completed the SIPP application process. OPS 2 was transferred into the SIPP and invested through a Discretionary Fund Manager (DFM) in December 2016. There were some delays with completing the required paperwork for OPS1. It was finally transferred into the SIPP and then with the DFM in June 2017. An updated transfer report was completed because of the delay, based on the same information and with the same recommendation.

Mr R took tax-free lump sums from the SIPP of £19,000 in February 2017, and a further £43,000 in July 2017. No income was initially taken, but he started making withdrawals in 2019, before the DFM went into administration.

The investigator said that the main issue for her to determine was whether the advice to transfer the OPSs was suitable for Mr R. She noted that the industry regulator had a specific rule that advisers needed to take into account when giving advice about transferring out of a defined benefits pension scheme. This was COBS 19.1.6 which provided:

"*When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests.*"

The investigator said the starting point was therefore to assume a transfer wasn't suitable, unless it could be clearly demonstrated it was in Mr R's best interests. She also noted that the FCA issued an alert for firms advising on transfers from defined benefit schemes in January 2013. This alert clearly said firms must not make generic comparisons and must consider where the funds would be invested and the likely expected returns of the assets. She said as the transfer specialist, the regulator clearly put responsibility for both areas on BRG.

The benefits Mr R had accrued with the two OPSs were relatively secure and accounted for more than half of the retirement income Mr R was aiming for. The investigator said it appeared that Mr R was also relying on his wife's income in retirement. However there were no details recorded of how old she was or what that income might be. So she didn't know when the benefits would be available to Mr R and if they matched his needs.

The investigator said that the OPSs would have provided spouse's pensions and death benefits to Mr R's wife. Mr R was also relying on his state pension in retirement, however he could not draw this until he was 66. As he wanted to retire fully at age 65 this left a shortfall.

The investigator said that the benefits Mr R already had in place were valuable. She said as the OPSs formed such a large part of Mr R's income in retirement there needed to be a significant chance of improving on those benefits to demonstrate the transfer was in his best interests.

The critical yields required on the transfer values at the time of advice showed Mr R would need annual investment growth of 11.06% in relation to OPS1 and 6.91% in relation to OPS2 simply to match the existing scheme benefits at age 65. The updated critical yield for OPS 1 referred to in the April 2017 report was 10.01%.

The investigator said the advice was given during the period for which the Financial Ombudsman Service was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. She said whilst businesses weren't required to refer to these rates when giving advice on pension transfers, she thought they provided a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The discount rate was 3.5%; so the rates required on the transfer values from the OPSs were significantly above it.

The investigator said the yields required to simply match the benefits from the OPSs were too high. She said in order to make a transfer financially worthwhile the expected returns would need to be in excess of that required to match the OPS' benefits, otherwise there would be no point in transferring. The investigator thought the opportunity to improve on the benefits that would otherwise have been provided by the OPSs was limited.

She said she didn't think the yields required were achievable bearing in mind Mr R's time to retirement, his noted medium attitude to risk and the target investment return from his intended DFM portfolio of 5% per annum. She said that in order to obtain a return greater than the critical yields each year, a higher risk would have needed to have been taken. She said given he was noted as a medium risk investor, with reference to a specific model (and his individual answers seemed to suggest he had less appetite for risk than that), Mr R wasn't willing to take the degree of risk required. And she said that in any event, Mr R didn't have the capacity to accept the risks involved. Mr R had specifically confirmed his capacity for loss was none or very limited, i.e. 0-5%, which would not sensibly support this recommendation.

The investigator went onto consider other reasons why the transfer could have been in Mr R's best interests. She said the goal of paying off some of Mr R's mortgage with a tax-free cash withdrawal was prioritised. However she said his income and expenditure statement showed his monthly mortgage payment to be well within his affordability. There were no further details recorded to show why it needed to be paid off at that particular time. The investigator said the adviser should have fully considered the alternatives available to deal with the mortgage.

The investigator said the benefits on death had also featured as a justification for transfer. However she said it was noted that Mr R was in good health and he had declined to take a whole of life policy.

She also noted that the recommendation report had referred to the enhanced transfer value as a "significant" reason for transferring. However she said the enhancement had been taken into account in the critical yield, and she didn't think a client should be advised to transfer if the risk involved was greater than the client should have been expected to take.

Overall the investigator didn't think the transfer value represented good value for money based on the investment returns required or Mr R's objectives. She didn't think there were good reasons for Mr R to transfer and give up the guaranteed benefits he'd been entitlement to.
The investigator said she didn't think BRG should have recommended Mr R transfer his pensions as it wasn't in his best interest. So she thought that Mr R's complaint should be upheld.

BRG didn't agree with the investigator's findings. It provided a full explanation of its policies and processes regarding advising on transfers from defined benefit pension schemes, in particular when it was dealing with clients from Firm 1.

It said the adviser had completed full due diligence on the DFM and the asset allocation of its portfolios. Information about the DFM's behaviour wasn't available at that time. It said the FCA had confirmed there were valid reasons for some clients transferring out of defined benefit schemes. Its adviser had started from the assumption that a transfer wasn't suitable, but on reviewing all the circumstances deemed a transfer to be in Mr R's best interest.

It said Mr R had stated a desire for a yearly income of £20,000 in retirement. So ignoring the transferred funds, Mr R and his wife were each entitled to a full state pension' Mr R had a small defined contribution scheme and his wife had some other small defined benefit (approx. £2,000). It said as Mr R's wife was still working there were a number of ways of addressing the 12-month shortfall between Mr R's intended retirement age and his state pension being payable.

BRG said the COBS rules required it to demonstrate that the transfer was in the client's best interests. It said this wasn't the same a "significant chance of improving the benefits." It said the critical yield reflected the cost of buying the OPS' benefits in today's economic conditions. This included ultra-low interest rates which might change when conditions returned to the long term 'norm'. It said if the critical yield reflected the target investment return required then a higher risk would have needed to be taken. But it said it did not. It said the critical yield didn't inform or allow clients to understand the risks they were taking – whereas the income drawdown cash flow reports which it provided to Mr R did; they provided a like for like comparison.

BRG said the pension review discount rate the investigator had referred to (of 3.5%) was a net figure after charges. Its cashflow modelling used a 5% gross return – which reasonably related to the 3.5% net figure. It said Mr R wasn't necessarily looking for a higher income as shown by his stated desired retirement income. It said its modelling showed the same benefits that were payable from OPS 1 and 2 could be paid from the personal pension following transfer until age 88 and 99 (assuming a 5% yearly return). And it could be seen from the drawdown report that with a 5% gross return (similar to the discount rate) Mr R would achieve greater value. It said the significant losses suffered by Mr R were as a result of the fraudulent actions of the DFM.

BRG said it thought the transfers passed the 'mathematical criteria' which allowed it to go onto consider the soft facts; Mr R's financial planning desires and objectives and decide if a transfer was suitable. It said although Mr R had a medium attitude to risk his stated capacity for loss was relatively small. However it said this was more his attitude to it rather than a reflection of his retirement income need; his desire for £20,000 was largely covered by his and his wife's state pensions and his wife's small defined benefit scheme. It said Mr R wanted to utilise his tax-free cash as soon as possible but not take any income until retirement. Mr R was clear about his objective to reduce his mortgage.

Mr R, through his representative, said he agreed with the investigator's assessment.

The investigator considered what BRG had said but wasn't persuaded to change her view that the complaint should be upheld. She said, in summary, that although BRG had discounted the critical yield as a measure of suitability, she thought it was a valuable benchmark that could be used to see whether the transfer value offered value for money. She said in this case the yield clearly showed it did not.

She said the DFM was a complex solution that carried inherent additional risks which weren't compatible with Mr R's agreed attitude to investment risk, his lack of investment experience, and his express lack of appetite and capacity to take that risk. The investigator accepted there may have been later developments in the relationship with the DFM that may not have been foreseeable. However the investigator said BRG had specifically endorsed the investment choice in its recommendation. And she said if the transfer hadn't been recommended Mr R wouldn't have been in the position he was.

The investigator said although the main rational for the transfer was to access the tax-free lump sum, this didn't appear to be an immediate need. The lump sum was to be used to repay some or all of Mr R's mortgage. Yet the fact-find recorded that Mr R had a significant amount of disposable income and his mortgage repayments only represented just over 11% of his income. The investigator said that the mortgage was comfortably affordable, and no evidence had been recorded about its term or whether there was an immediate need to repay it. The investigator didn't think the evidence showed Mr R needed to pay off his mortgage, or that there was the level of evidence required to demonstrate that a transfer was in Mr R's best interest as required by the regulator.

The investigator also thought there was a lack of information about Mr R's wife's finances. Although the recommendation to transfer placed reliance on some of her guaranteed benefits no information had been recorded at to what that income would be or when it would become available. The investigator said it wasn't therefore possible to say what the overall income position would be in retirement if Mr R transferred his OPS' benefits.

The investigator didn't think the evidence showed Mr R needed to pay off his mortgage, or that there was the level of evidence required to demonstrate that a transfer was in Mr R's best interest as required by the regulator. So she didn't think the contemporaneous evidence clearly demonstrated that a transfer was in Mr R's best interest.

As the parties couldn't agree Mr R's complaint has been passed to me to decide.

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.

Having done so I've come to the same conclusion as the investigator that the complaint should be upheld, and largely for the same reasons.

When considering what is fair and reasonable, I'm 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.

As the investigator said, the upshot of COBS 19.1.6 is that the adviser's starting position should have been to assume that a transfer wouldn't be suitable for Mr R. There would then need to be good reasons to decide that a transfer was in Mr R's best interest.

The pension accrued in the two OPSs represented approximately 20 years of service Mr R had accrued in those two schemes. They were estimated to provide a total pension of over £11,000 a year at retirement date, with annual increases on that starting figure. So this was a significant and largely guaranteed yearly income.

BRG said Mr R had indicated he wanted a joint annual income of £20,000 in retirement, and that this was already largely met by Mr and Mrs R's State pension provision along with some other small defined benefit pension that Mrs R had accrued. I also understand Mr R had a small defined contribution pension.

So the position before BRG's advice was that Mr R was a deferred member of both OPSs, and if he had done nothing and stayed in those two schemes, he and his wife could have expected an income of around £30,000 in total once all their pensions were in payment. The vast majority of this income would have had yearly increases. Therefore Mr R was seemingly in a very healthy position in terms of his expected income throughout his lifetime in retirement.

So I think the obvious question is why transfer? Mr R already appeared to be in a good position. He was set up to enjoy a comfortable retirement. I think there would need to be a very good reason to do something that put that position at risk and it be in Mr R's best interest – as reflected in the COBS rules.

BRG has said Mr R wanted to obtain access to the tax-free lump sum from his pension to pay off some of his mortgage. Whilst I accept that Mr R may have gained some comfort in having paid off (or largely paid off) his mortgage, the 'cost' was putting a significant proportion of his retirement provision at risk. Transferring could have a major impact on his standard of living throughout retirement.

The recommendation letter said that alternative sources of capital raising had been explored but discounted. But as the investigator said, there were no reasons given as to why the mortgage needed repaying immediately other than Mr R had indicated he would like to pay it off. Mr R had a significant monthly disposable income and there's no evidence on file to show monthly overpayments to the mortgage were explored or how this income could help pay of the other debts.

The other reason put forward for the transfer was to improve the capital death benefits and to leave any remaining funds to Mr R's wife and his family on his death. The fact find completed didn't provide any details of what provision Mr R's wife had in terms of life cover either privately or though her employment. Neither did it provide details of what cover Mr R had, again including through his employment. I accept such cover may have ended when ceasing employment. But Mr R could have remained in his OPSs until near to retirement date and then considered the transfer options at that point, without being exposed to several years of investment risk.

I accept that the death benefits from a personal pension can appear attractive against the spouse's benefits provided by the OPS. But that has to be balanced against the 'costs' of a transfer and giving up the largely guaranteed benefits that would otherwise be provided by the OPSs. If this was one of the main reasons for recommending a transfer, I think Mr and Mrs R's existing life cover provision needed to be considered in detail. I'm not satisfied on the evidence provided that it was. I accept that BRG was only advising on a transfer. But there were significant risks and consequences associated with transferring out of the OPS's.

BRG was required to obtain such information as was necessary to understand the essential facts about Mr R's circumstances and enable it to have a reasonable basis for believing its recommendation to transfer was suitable. In my view BRG failed to obtain sufficient information about Mr R and his wife's circumstances to conclude that taking on the risks associated with the transfer was suitable on death benefit grounds.

Both OPSs provided spouse's pensions for life. The death benefits from the SIPP would depend on its value on Mr R's death, and whilst they may initially have appeared superior following a transfer ultimately they depended on the subsequent investment performance of the funds and Mr and Mrs R's longevity.

BRG has said the risks of the transfer were aligned to Mr R's medium attitude to risk and his capacity to accept risk. It's said that the 5% gross return as shown in its cashflow modelling showed that Mr R could match the benefits from the OPS. It said with charges this was comparable to the 3.5% discount figure. And effectively this was a better indication of the return required than the critical yield calculated by the TVAS.

I accept that the validity of whatever tool is used to compare the comparative benefits of an OPS with a personal pension will depend on the appropriateness of the assumptions behind it. However, in my view the critical yields provided a good indication of whether the transfer values offered good value for money relative to the value of all the benefits being given up in the OPSs. They reflected the rates of return required to replace those guaranteed benefits on a like for like basis outside of the schemes. I accept that the firm considers they are unrepresentative given in part to the historically low annuity rates prevailing. However, in my view they, in effect, show the intrinsic value of benefits that are guaranteed, and for life. The critical yields showed it was highly unlikely the transfer values would be able to match the value of the OPS's benefits on an ongoing basis. The regulator thought critical yields were relevant at the time and I agree.

BRG's cashflow modelling projections showed that if investment returns were 5% the SIPP could match the income from the OPS until Mr R reached his late 80s in one scheme and late 90s in the other. It also showed that if investment returns were 2% then it could match the two OPS's income until age 82 and 88. But then the funds would be depleted and the income run out.

So even if I accepted BRG's view that the 5% cash flow modelling figure was a better representation of the investment risk involved, Mr R was still subject to that investment risk and only matching the OPS's benefits. And there was the risk that Mr R (and his wife) would live longer than assumed in the modelling and again the income run out.

However, the feasibility of achieving a particular rate of return alone wouldn't in any case be sufficient in itself to indicate suitability. The rate of return has to be considered in the context of all the circumstances, and consideration given to the effects of accepting that risk against the benefits of a transfer.

Mr R was recorded as a medium risk investor. However, in the risk questionnaire that Mr R completed he said he agreed with the statement that he would rather know he was getting a guaranteed rate of return than be uncertain about his investments. He also agreed that compared to the average person he took lower financial risks and that he did not feel comfortable with financial uncertainty. In answer to the question "How much of this investment could you stand to lose without having a significant impact on your future standard of living he indicated "None or very limited losses (0 -5%)".

BRG has said Mr R's statement about capacity for loss was his attitude to it rather than a reflection of his retirement income need. However, his statement appears to be consistent with his responses to the other questions on the risk questionnaire – he wasn't comfortable accepting significant risks. Although Mr R had said he wanted an income of approximately £20,000, that would still only be a modest income by the time Mr R reached retirement age. I don't think that meant he had the capacity to lose the additional £11,000 that would otherwise have provided him with a healthy and guaranteed income for life. Why take that risk unless there was a real need or significant benefit in doing so?

As I explained above, Mr R's starting position was that he could expect a largely guaranteed starting income of around £30,000 which would increase throughout his retirement and be payable for his lifetime. His wife would also receive a guaranteed and increasing income throughout her lifetime if Mr R pre-deceased her. Mr R would also have been able to take tax-free cash from the OPS's when he wanted to take benefits from them.

So in my view transferring and exposing his pension benefits throughout his retirement to investment risk presented significant risk in itself. The critical yield showed that it was highly unlikely the value of the SIPP would match the value of the OPS's benefits. Mr R could have left his benefits in his OPSs until he had a real need for them and then considered whether a transfer was suitable at that time. I'm not persuaded that there was an urgent need to access the tax-free cash from the pensions. In my view the risks of the transfer to Mr R's exiting position far outweighed its benefits. Accordingly, I don't think the recommendation to transfer was suitable in the circumstances.

BRG has referred to the actions of the DFM and its role in the losses suffered by Mr R. The DFM was also a regulated party with its own regulatory responsibilities and obligations. There may have been shortcomings in the management of the DFM's portfolio. However, BRG were asked to advise Mr R on the merits or otherwise of a transfer. In my view the advice was clearly unsuitable given his circumstances. I'm satisfied Mr R's losses flow from the unsuitable advice given by BRG to transfer. But for the unsuitable advice to transfer Mr R would still have been a member of his defined benefit schemes and his losses would never have happened. So, I've found no break in the chain of causation due to the actions of the DFM.

BRG said the COBS rules required it to demonstrate that the transfer was in the client's best interests. In my view, for the reasons outlined above, the recommendation to transfer wasn't suitable and a transfer wasn't in Mr R's best interest.

Putting things right

fair compensation

My aim in awarding fair compensation is to put Mr R, as far as possible, back into the position he would now be in but for BRG's unsuitable advice. I consider he would have remained a member of OPS1 and OPS2 if given suitable advice to do so.

Better Retirement Group Ltd should 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.

BRG 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 BRG receives notification of the acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% a 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 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. 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.

I understand Mr R’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 R to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. 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 R to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking

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 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 Better Retirement Group 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 Better Retirement Group 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 Better Retirement Group 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 Better Retirement Group 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.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr R to accept or reject my decision before 25 August 2022.

David Ashley
Ombudsman