DRN-3320260

The complaint

Mr T complains about the advice given by Vision Independent Financial Planning Ltd ('Vision') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He thinks the advice may have been unsuitable for him and has caused a financial loss.

What happened

In March 2016, Mr T's employer announced that it would be examining options to restructure its business, including decoupling the employer's DB scheme (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 (the 'BSPS2'). Alternatively, members were informed they could transfer their benefits to a personal pension arrangement.

Concerned about the changes being made to his pension, Mr T contacted Vision and met with an adviser in September 2017. Vision gathered information about Mr T's circumstances and objectives. It noted Mr T was aged 50, married and his wife had given up work to care for her mother. Vision recorded that Mr and Mrs T owned their home and had around £17,000 in savings. Mr T also jointly owned his parents' home with his brother.

Vision noted that Mr T intended to retire no later than age 65 but he wanted to know what the impact of him retiring early at age 60 would be. Ideally, he wanted a net income of £18,000 per year (£1,500 per month) in today's terms. Mr T said he would use his tax-free cash ('TFC') entitlement to pay for things like holidays. It was further noted Mr T and his employer were contributing 16% of his salary per month to his employer's new defined-contribution ('DC') pension scheme, equivalent to around £6,000 per year. Vision completed an attitude to risk assessment, noting Mr T had a 'balanced' attitude to risk.

In October 2017, members of the BSPS were sent a "Time to Choose" letter which gave them three options; to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017).

In November 2017 Vision advised Mr T to transfer his BSPS benefits to a personal pension, and invest the funds in a managed portfolio. It said transferring would provide Mr T with flexibility that he wouldn't have if he remained in the DB scheme.

Mr T accepted this advice and £505,758.75 was transferred from the BSPS to his new personal pension.

In 2021 Mr T complained about the advice he received from Vision. But as Vision wasn't able to provide its final response to his complaint within eight weeks, it gave him referral rights to our Service. Mr T referred his complaint to us; he said he trusted Vision but after receiving a letter from the regulator about the advice possibly being unsuitable, he was worried about whether the advice was right for him. He added that the market conditions affecting the value of his pension have caused him a lot of worry.

Vision provided its final response to the complaint, maintaining the advice was suitable as it allowed Mr T to meet his objectives of more flexibility and higher death benefits for his wife, who did not have her own pension. It also said transferring allowed Mr T to retire early at age 60 without penalty.

An Investigator considered the complaint and upheld it. He thought Mr T's objectives could be met by either joining the BSPS2 or moving to the PPF, and he wouldn't likely be better off by transferring. Overall, he didn't think Mr T should've been encouraged to take the risk with his pension as he had a low capacity for loss and most likely a cautious attitude to risk. The Investigator believed that Mr T should be compensated based on him having joined the BSPS2. He also awarded £300 compensation for the distress and inconvenience the advice had caused him.

Vision initially disagreed with the Investigator's view, saying that Mr T didn't want his pension income to be reduced by the early retirement factors under the BSPS2 or PPF. Also, that Mr T was comfortable with the level of risk and the transfer met his objectives at the time. However, in March 2023 Vision decided to accept the view 'under protest' to bring the complaint to a close. It offered to settle the complaint in line with the regulator's new redress methodology, due to come into effect in April 2023. Vision also confirmed it would use the FCA's BSPS-specific redress calculator to calculate whether Mr T was owed redress.

The Investigator informed Mr T that Vision was willing to settle his complaint. Mr T confirmed Vision had written to him about this and had asked for some information it needed in order to carry out the redress calculation. Mr T raised concerns about how the delay in Vision accepting the Investigator's view could impact the amount of compensation he was due. He felt that Vision was only making this offer, albeit under protest, because the assumptions applying to the redress method currently worked in its favour. Mr T thought there was guidance from 2001 which prevented Vision from 'gaming the system' in this way. And for this reason, he thought Vision should be required to calculate whatever redress he might be owed to him as of the date when the Investigator upheld his complaint in January 2022.

Mr T was informed that the guidance he was referring to was issued in 1998 during the 'Pension Review' exercise because firms were not following the regulator's guidance and were calculating redress incorrectly. He was told that this didn't apply in the circumstances of his complaint – Vision was entitled to defend its case and request an Ombudsman's decision. It was explained to Mr T that it was fair and reasonable for Vision to use current assumptions when calculating redress and that this would put him as far as possible into the position he would've been in if he hadn't transferred out of the BSPS.

Mr T still felt that using the current assumptions wasn't fair. And he added that the £300 compensation the Investigator had recommended was derogatory given the stress the matter had caused him. And as there was no agreement on this point, the complaint was referred to me for 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.

Vision initially said the advice it gave Mr T was suitable. But it has now accepted the Investigator's opinion that the complaint should be upheld and agreed to put things right for Mr T by carrying out a loss assessment in line with the regulator's guidance. What remains in dispute here is whether what Vision has offered to do to put things right for Mr T is fair and reasonable in the circumstances. However, for completeness, I agree with Investigator that the advice provided to Mr T was unsuitable and as there is broad agreement that the complaint should be upheld, I will only briefly set out my reasons for this.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Vision's actions here.

- PRIN 6 : *A firm must pay due regard to the interests of its customers and treat them fairly.*
- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability.
- The provisions in COBS 19 which specifically relate to a DB pension transfer.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Vision should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr T's best interests. I'm also mindful that under COBS 9.2.1R Vision needed to take reasonable steps to ensure that its recommendation to Mr T was suitable for him. And having looked at all the evidence available, I don't think the advice provided to Mr T was suitable.

Financial Viability

Vision carried out a TVAS, as required by the regulator, showing how much Mr T's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). The TVAS used the benefits available to Mr T through the BSPS2 for comparison purposes.

The TVAS showed that in order to match the benefits available to Mr T under the BSPS2 at age 60, Mr T's personal pension needed to meet a critical yield of 8.07% (6.64% if he took a reduced pension and TFC). The critical yields were also 6.4% and 5.75% (reduced pension and TFC) if the BSPS moved to the PPF.

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.

The relevant discount rate at the time the advice was given was 3.7% a year for 9 years to retirement (age 60). 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% a year.

Given the lowest critical yield was 5.75%, I think Mr T was unlikely to be able to match, let alone improve on, his benefits if he transferred out of the DB scheme to a personal pension as a result of investing in line with his balanced attitude to risk, even if he ended up in the PPF. And it was even less likely compared to the BSPS2 benefits.

However, in the suitability report, Vision told Mr T that with a critical yield of 6.64% (reduced pension and TFC at age 60) it was happy to support the transfer based on his objectives and also his 'balanced' attitude to risk. But I don't think that statement was fair to Mr T as it gave him the impression that this return was achievable, when this was well above the discount rate and the regulator's middle projected growth rate.

Like the investigator, I'm also not convinced that Mr T had the capacity to lose his pension funds. This was Mr T's only significant retirement provision, and both he and his wife were reliant on it for their retirement. In the 'Additional Question Sheet – Penson Transfers', Mr T said that his BSPS benefits were a significant proportion of his retirement benefits which should only be exposed to limited risk where the potential for reward was reasonable. And in the attitude to risk questionnaire, he described himself as fairly cautious. With this in mind, I don't think he should've been encouraged to risk his DB pension by transferring to a personal pension scheme.

So, overall, I don't think the transfer was financially viable as I think Mr T was likely to receive lower overall benefits at retirement by transferring to a personal pension.

Flexibility and income needs

Vision noted that Mr T wanted flexibility and that transferring out of the BSPS would provide this. It said he could take £18,000 per year from age 60, without 'penalty', and could then reduce what he took from the pension when he started receiving his state pension at age 67.

Mr T was interested in retiring at 60. And I think it's worth saying here that the early retirement 'penalty' that Vision referred to was in fact actuarial adjustments. Those adjustments reflect that, by taking a pension earlier, it's likely that the pot to pay for that pension will have to last longer. As such the scheme's actuaries calculate a reduction in the yearly pension to allow for the fact that the pensioner will claim the pension – most likely – for a longer period. That is not a 'penalty' for taking the pension early, it's simply a compromise for having the benefits of that pension paid over a longer period. And I think describing early retirement factors as a 'penalty' wasn't providing Mr T with information that was clear, fair and not misleading.

Based on what I've seen, Mr T would've been able to meet his income needs in retirement either through the BSPS2 or the PPF. If Mr T chose not to take TFC, he would've been entitled to around £19,700 (PPF) or £21,000 (BSPS2) at age 60. Although he would receive less income than the £18,000 per year he said he needed from age 60 if he took TFC, I'm mindful that the TFC available to him through the BSPS2 or PPF was significant (£100,000+) and he didn't have any specific needs in mind for this sum so he could've used it to supplement his income until his state pension became payable. Mr T also had a DC scheme with his employer that he would likely be paying into for the next ten years – so, alternatively, he could've used this to top up his income.

Overall, I think Mr T already had a degree of flexibility in how he took his pension benefits, and I think he could've met his income needs by joining the BSPS2 or moving to the PPF.

So, I also don't think it was a suitable recommendation for Mr T to transfer out of the BSPS just to have flexibility that he didn't actually need.

Death benefits

Vision recorded that although lump sum death benefits were not a priority for Mr T, he preferred the idea that the full pension pot would be available to Mrs T on his death. Death benefits are an emotive subject and of course most people would like their loved ones to be taken care of when they die. And I'm sure that the idea of leaving a large sum to his wife in the event of his death sounded attractive to Mr T, as it would to most people. But whilst I appreciate that Mr T might have preferred to be able to leave whatever remained of his pension to his wife on his death, the priority here was to advise Mr T about what was best for his retirement provisions. And I don't think Vision explored to what extent Mr T 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 T was married and so the spouse's pension provided by either the PPF or the BSPS2 would've been useful to his spouse if Mr T predeceased her, which, given Mrs T was around 11 years younger than him, was quite possible. This pension, when added to Mrs T's state pension entitlement, would've been sufficient to meet her individual needs. The spouse's pension was also guaranteed and it escalated – and under the BSPS2 the spouse's pension would be calculated as if no TFC had been taken. Furthermore, this benefit was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And if investment returns were poor, there may not have been a large sum to pass on in any event, particularly if Mr T took more out of the fund than he anticipated in the early years of his retirement.

Overall, I don't think Mr T's desire to leave whatever remained of his pension on his death to Mrs T was a good enough reason to recommend that he transfer out of the BSPS. By opting into the BSPS2 or moving to the PPF, his wife would be entitled to an escalating pension on his death, as well as a return of his contributions (around £64,000 according to the suitability report) and Mr T also had life insurance in place. So, I don't think it was in Mr T's best interests to give up his own guaranteed pension just for the potential of a higher lump sum death benefit for his wife, which by his own admission, wasn't a priority for him.

Concerns about the scheme

Vision noted that Mr T was concerned about the BSPS moving to the PPF and how this reduced the value of his benefits. It also noted that Mr T wanted peace of mind that the fund would be under his control and couldn't be further 'weakened' by his employer – he wanted to 'break ties' with it.

At the time of the advice, all signs pointed towards the BSPS2 being established. And if Mr T's concerns about his employer's influence on his pension remained, I think it should've been explained that his employer and the pension scheme trustees were not entirely one and the same. So Mr T's employer didn't have the control over the pension Mr T thought it did. And in any event, Mr T hadn't expressed a desire to move his DC pension away from his employer – so transferring his DB scheme benefits wouldn't allow him to 'break ties' with it.

Even if the BSPS2 didn't go ahead, Mr T still could've met his objectives by moving with the scheme to the PPF. Although the increases in payment in the PPF were lower, the income was still guaranteed and was not subject to any investment risk. So, I don't think that these concerns should've led to Vision recommending Mr T transfer out of the DB scheme altogether.

I also think Mr T's desire for control over his pension benefits was overstated. Mr T was not an experienced investor and I cannot see that he the knowledge to be able to manage his pension funds on his own. Indeed, the recommendation letter suggested he would remain reliant on professional advisers. So, I don't think that having control was a genuine objective for Mr T – it was simply a consequence of transferring away from his DB scheme.

So, for all the reasons given above, I don't think it was clearly in Mr T's best interests to transfer out of the BSPS. And it follows that the advice he received from Vision to transfer out of the BSPS to a personal pension wasn't suitable for him.

Fair Compensation

Vision has already agreed to compensate Mr T for the unsuitable advice in line with the regulator's rules for calculating redress for non-compliant pension transfer advice. And it has accepted the Investigator's view that the BSPS2 benefits should be used for comparison purposes in the redress calculation.

I understand Mr T has concerns about the redress methodology used to compensate him for the unsuitable advice; he feels that Vision should be required to calculate redress as at the date of the Investigator's view, where he upheld the complaint. Mr T says it isn't fair for Vision to benefit from the change in economic assumptions that could mean the redress calculation shows a lower loss amount than if it had been calculated earlier, or even no loss. Mr T believes there is guidance from the regulator that requires businesses to revisit cases where consumers have received reduced or no redress.

I've considered Mr T's points carefully, but the regulator has set out what it considers the appropriate method of compensation to be in instances of unsuitable pension transfer advice. And this requires Vision to use the assumptions from the same financial quarter in which the calculation is carried out. Vision was entitled to disagree with the Investigator's opinion of the complaint and ask for an Ombudsman's decision, and so it was not obliged to carry out a redress calculation before a final decision was issued.

I've considered the guidance Mr T has referred to, but I don't think this applies here. The guidance – the Pensions Review Bulletin No 02 December 1998 – was issued by the regulator in response to concerns that firms were not calculating redress correctly under the Pension Review guidance. There is no suggestion that Vision will carry out the calculation incorrectly here. I appreciate that the assumptions used in the redress calculation have changed significantly over the last 12 months, and that this may mean that the calculation, when carried out, shows Mr T has not suffered a loss. But I'm satisfied the regulator's redress method puts Mr T back, as far as possible, into the position he would have been in had he not transferred his BSPS benefits. If the calculation shows no loss, it simply means he has no shortfall in his pension now to replicate the BSPS2 benefits in retirement.

I also think that Vision being required to use the FCA's BSPS calculator will provide him with some assurance that the calculation has been carried out fairly. And I will review the calculations once they have been carried out after the decision if Mr T requires me to do so.

I note Mr T doesn't think the £300 recommended by the Investigator fairly compensates him for the stress and worry the unsuitable advice caused him. Although it would've undoubtedly caused Mr T distress finding out that he had cause to complain, I'm mindful that it hasn't had an immediate impact on his retirement plans. Mr T is still working, and isn't yet reliant on his pension for his retirement, so it hasn't had an additional impact on his retirement planning. So taking all of this into account, I think £300 is fair compensation for the distress and inconvenience caused by the unsuitable advice.

Putting things right

A fair and reasonable outcome would be for the business to put Mr T, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr T would most likely have joined the BSPS2 if suitable advice had been given.

Although Mr T was interested in retiring at age 60, it was possible he'd retire closer to age 65. So, I don't think that it would've been in Mr T's interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. And as Mr T was married, his wife's pension would be set at 50% of his pension at the date of death, and under the BSPS2 this would be calculated as if no lump sum was taken at retirement (even if Mr T chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2 compared with the PPF. For these reasons, I think Mr T would've joined the BSPS2.

Vision must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

Vision should use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr T and our Service upon completion of the calculation, together with supporting evidence of what Vision based the inputs into the calculator on.

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

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr T's acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Vision should:

- calculate and offer Mr T redress as a cash lump sum payment,
- explain to Mr T before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr T receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr T accepts Vision's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr T for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr T's end of year tax position.

Redress paid to Mr T as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Vision may make a notional deduction to cash lump sum payments to take account of tax that Mr T would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr T's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Vision should also pay Mr T £300 to compensate him for the distress and inconvenience caused by the unsuitable advice.

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 Vision Independent Financial Planning Ltd to pay Mr T the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I have also recommended that Vision Independent Financial Planning Ltd pays Mr T the balance.

If Mr T accepts my final decision, the money award becomes binding on Vision Independent Financial Planning Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr T can accept my decision and go to court to ask for the balance. Mr T may want to consider getting independent legal advice before deciding whether to accept my final decision.

Vision Independent Financial Planning Ltd should provide details of its calculations to Mr T in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 3 October 2023.

Hannah Wise
Ombudsman