DRN-3341067

The complaint

Mr T complains about the advice given by Niche Independent Financial Advisers Limited 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 him 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 BSPS (the employers' DB scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved benefits which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

At the time the BSPS scheme closed to new accruals in March 2017, Mr T had 17 years and 6 months of pensionable service with his employer which gave him a total (index linked) pension of £10,792.50 per year (forecast to be £18,240 per year at the scheme's normal retirement age of 65). After the DB scheme closed to new accruals in March 2017, Mr T joined his employer's Defined Contribution ('DC') scheme.

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

Mr T was unsure about what to do so in October 2017 he approached Niche for advice about his DB scheme benefits. Niche completed a fact-find on 9 October 2017 and an attitude to risk ('ATR') questionnaire on 27 November 2017 in order to gather information about Mr T's circumstances and objectives. A few weeks prior to the meeting Mr T had received a Cash Equivalent Transfer Value ('CETV') from the DB scheme of £266,034 valid for 3 months until 11 December 2017. Mr T's circumstances at the time were noted by Niche as follows:

- He was aged 37, married with 3 dependent children (their ages were undocumented).
- He was employed as an automation technician earning £40,485 per year excluding any overtime or bonuses. His wife was earning £5,687 per year and received child benefit payments of £192 per month.
- Mr and Mrs T had total outgoings of £2,035 per month and a total monthly income of £3,030.
- Mr and Mrs T had an outstanding mortgage on their home of £50,000 which cost them £450 per month and had 12 years to run. Their home was valued at £110,000.
- He had an outstanding personal loan of £8,000 which cost £180 per month and had an outstanding term of 3 years.
- Mr T had joint savings with his wife of £10,000
- He was recorded as being a member of his employer's DC scheme to which he made contributions of 6% of his gross salary per month with his employer

contributing 10% of his gross salary per month. It's approximate value at the time of the advice was £4,500.
- Mrs T was recorded as having two occupational pensions with a combined value of £14,755.
- Mr T wanted the flexibility to retire early and to control how much income he took. His preferred retirement age was 58 and his estimated monthly outgoings in retirement were £1,305.
- He no longer trusted his employer.
- Mr T's ATR was recorded as 'moderately cautious' or 4 on a scale of 1 to 10.
- He liked the idea of flexible death benefits and being able to leave his remaining pension fund to his wife and/or family.

On 13 December 2017 Niche provided Mr T with its suitability report. Niche said that the critical yield required to match Mr T's benefits was such that it would not recommend that he transfer his scheme benefits as doing so would likely mean he would be financially worse off in retirement. However, Niche said that as Mr T said he wanted to use his pension in a completely different way to that permitted by the DB scheme rules, it was happy to make a positive recommendation that he transfer his DB scheme benefits into a SIPP and invest the proceeds with a discretionary fund manager (DFM) through a provider ('A') in a cautious tracker fund. The report also contained a table comparing the benefits of the SIPP with BSPS2 based on Mr T retiring at age 58. The suitability report said the reasons for this recommendation to Mr T were, in summary:

- That he would have complete control over the pension, how it was invested and the level of income that was withdrawn from it.
- He was concerned about early retirement penalties applied by his DB scheme.
- That having control would allow him to achieve his goal of taking early retirement.
- That he would be able to withdraw a greater amount in early retirement which he could then reduce when he was able to collect his state pension.
- That it would allow him to nominate the beneficiaries of any funds remaining on his death so that they could receive the full value of any remaining fund.

Mr T accepted the recommendation and the transfer went ahead in January 2018.

Niche was remunerated with an initial advice fee of £4,500 and an ongoing annual fee of £500. A's annual charges were 0.35% on the first £175,000 of the fund and 0.25% for the next £100,000. The DFM's charges were 0.15% of the fund value along with underlying fund fees ranging from 0% to 0.28% per annum.

In September 2021, Mr T's representative complained to Niche that the advice he'd been given to transfer out of his DB scheme had been unsuitable and that the transfer shouldn't have been recommended to Mr T in his circumstances as they were at the time. Mr T went on to say that his benefits could have been carried forward into BSPS2 and that they were highly unlikely to be matched through the SIPP that Niche had recommended.

Niche looked into Mr T's complaint, issuing its final response letter on 16 November 2021, but didn't recommend that it was upheld. Niche said that it made it clear to Mr T in the suitability report that the scheme benefits were unlikely to be achieved by transferring and, on a like-for-like basis, Mr T was likely to be worse off financially in retirement. However, it said the suitability report went on to explain what Mr T's objectives were and that the like-for-like critical yield comparison was not an appropriate one.

Niche also said that it explained to Mr T that he would experience a shortfall in income if he stayed in his DB scheme and took early retirement at 58. It said it had told him he'd have to make that shortfall up by relying on savings until he was able to collect his state pension. However, Niche went on to say, if Mr T transferred his benefits to a SIPP and retired at 58 he could cover his desired expenditure. Niche also said that its suitability report had set out the favourable death benefits that Mr T said he wanted. So, Niche said it had given Mr T suitable advice and that its suitability report had clearly set out the benefits he'd be giving up and the reasons it was recommending that he do so.

Unhappy with the outcome of his complaint to Niche, Mr T complained to this service. Our Investigator looked into Mr T's complaint and recommended that it was upheld. He said he thought the transfer wasn't suitable for Mr T because it wasn't financially viable. He also thought that there were no other compelling reasons which meant the transfer could be said to be suitable for Mr T in the circumstances.

Mr T replied to say that he agreed with our Investigator's findings and that he thought any loss calculation should be completed in line with FCA guidance and be calculated to his NRD of 65. Niche replied to say it remained of the view that the advice had been suitable. It said that regulatory guidance referred to by our Investigator wasn't issued until several years after it had advised Mr T so had no relevance to this complaint. And Niche said that Mr T's complaint was unspecific and generic and that no attempt had been made to establish what his specific concerns were. Niche said it didn't accept our Investigator's findings and it asked for the complaint to be referred for an ombudsman's decision.

Our Investigator responded to Niche to say that he had not suggested at any point that it should have relied on the regulatory guidance he had referred to. He said he had referred to it illustrate that his view about the complaint was consistent with that held by the regulator.

The complaint was passed 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.

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

What follows 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 Niche'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. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, 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 COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Niche should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr T's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Niche carried out a TVAS report (as required by the regulator) showing how much Mr T's pension fund would need to grow by each year (the critical yield) in order to provide the same benefits as his DB scheme. It said Mr T's pension would need to achieve growth of 4.24% each year to match his full scheme income at age 65 or 4.99% at age 58. It also stated that Mr T's pension would need to grow by 3.77% for the benefits he could access in the PPF to match those he was giving up in the DB scheme at age 65. This analysis was based on his existing BSPS scheme benefits, but Mr T didn't have the option to remain in the BSPS; he either needed to opt into BSPS2 or move with the existing BSPS scheme to the PPF.

Shortly after providing Mr T with the TVAS report, Niche sent him its suitability report in which it included a small amount of information about BSPS2. Notably it referred to the critical yields which Mr T's SIPP would need to attain to match the benefits available under BSPS2 at ages 65 and 58. The critical yields cited however were identical to those Niche had referred to in the TVAS and which were based on BSPS. Typically I would expect any critical yields for BSPS2 to be slightly lower than those under BSPS because all the information the BSPS trustees provided states that benefits under BSPS2 are lower overall than the BSPS. So whilst Niche cited the critical yields for BSPS2 in its suitability report, I'm not persuaded that these were correct. The same applies to the reference in the suitability report to the pension forecast for Mr T at age 58 and at NRD. However, I don't think I need to know the exact figures to reach my decision.

And whilst Niche provided a brief comparison between the benefits and drawbacks of the BSPS2 and the SIPP taken at age 58, it didn't include any comparison for him retiring at his NRD. So while of course it's possible BSPS2 may not have gone ahead, I still think the proposed benefits available to Mr T through the BSPS2 at his NRD, along with a complete comparison of the benefits and drawbacks, should've been addressed in greater detail, and with greater accuracy, by Niche in its advice so that he was able to make an informed decision.

The TVAS dated 30 November 2017 set out the relevant critical yields; at age 65 it was 4.24% if Mr T took a full pension (or 3.5% if he took TFC and a reduced pension) and at age 58 it was 4.99%. It also stated that Mr T's pension would need to grow by 3.77% for the benefits he could access in the PPF to match those he was giving up in the DB scheme at age 65 or 3.56% if he took a reduced pension and a pension commencement tax free lump sum (PCLS) (at age 58 the critical yields were 4.66% and 4.44% respectively).

According to the fact-find and the suitability report, Mr T wanted to retire from British Steel early, possibly at age 58. However, that doesn't appear to have been anything more than a 'best guess', given he was only 37 at the time of the advice and could continue working for up to another 28 years. Nevertheless, given Mr T had expressed a desire to retire at that age, I think Niche should've provided him with the relevant critical yields for BSPS2 at the time it was advising him so that he was able to make an informed decision.

As I've said above, Mr T remaining in his existing DB scheme wasn't an option. So, the correct critical yields applicable to the BSPS2 benefits should also have been provided by Niche. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat but, I still think they would've likely been higher than those reflecting the PPF benefits, particularly at age 65. And that way Mr T would have been in possession of all the information he needed to make an informed choice.

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 closest 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 4.6% per year for 27 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr T's attitude to risk and also the term to retirement. Niche says that at the time of the advice it assessed that Mr T as having a moderately cautious investor. Having reviewed the ATR questionnaire completed at the time of the advice I think that Niche's assessment in this respect was reasonable.

I've thought about Mr T's capacity for loss but I don't think that the length of time he had to go to retirement meant his capacity for loss was significant. I can see that Mr T had £10,000 in savings at the time of the advice and that he had 12 years left to run on his mortgage. It can't be assumed that just because Mr T had 25+ years to go until he retired that he could afford to 'gamble' by transferring his DB scheme. The income he was forecast to receive at retirement from the scheme (if he remained) is, I think, one he didn't have the capacity to lose.

There would be little point in Mr T giving up the guarantees available to him through a DB scheme only to achieve, at best, the same level of benefits outside the scheme. Here, the lowest critical yield was based on Mr T opting into the BSPS and was 3.5% if he took TFC and a reduced pension at age 65 (or 4.24% if he didn't take TFC). The critical yield for the PPF based on Mr T taking a reduced pension and a PCLS at age 65 was 3.56%.

The critical yields cited in the TVAS for taking a pension through both the original BSPS and through the PPF were below the discount rate of 4.6% and somewhere between the regulator's lower and middle projection rates of 2% and 5%. Given Mr T's moderately cautious ATR, which can reasonably be said to fall somewhere between the regulator's lower and middle projection rates, I think the opportunity at NRD for Mr T to improve on his DB scheme benefits by transferring to a personal pension was a limited one. And there is little point in transferring just to match the benefits that would have been available by remaining in the scheme. If Mr T retired early however, which is something he had expressed an interest in doing, then he would likely receive benefits of a lower overall value than those offered by the PPF and BSPS given the critical yield for doing so was cited as

4.99%. So I am confident that had Niche informed Mr T of the true value and benefits of the BSPS2 and the PPF, and then advised him to remain in the BSPS, he would have accepted this and he would then have opted to join the BSPS2.

It's worth stating that I haven't based my findings on the discount rate alone however, I think it is a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice. Under COBS 19.1.2 the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension by using reasonable assumptions. So, businesses were free to use the discount rate as this would be considered a reasonable assumption of the likely returns. And in any event, this has been considered in tandem with the regulator's published projection rates, which providers were required to refer to. And it is this combination, along with Mr T's attitude to risk, which leads me to be believe he had little opportunity to improve on the benefits he was entitled to through the DB scheme, particularly if he retired early.

Niche has provided cashflow models which it says shows Mr T would've been able to meet his needs despite the high critical yields. I've considered these, but Niche's models show that it had compared Mr T's existing situation to a situation where his transfer value and his savings grew at a net investment rate of 2% per year. And whereas Mr T's DB scheme was going to give him an income at NRD of in excess of £18,000 (and which was index linked), Niche's cashflow model was based on Mr T reducing the amount he took from the pension significantly once his state pension became payable. So, it wasn't comparable with him taking his DB scheme benefits as he'd be receiving far less income overall.

And I can also see that Niche prepared a cashflow forecast based on Mr T remaining in his DB scheme and retiring at age 58. The forecast refers to a 20% early retirement penalty being applied to the scheme for taking early retirement at 58. I can also see from the suitability report that Mr T had 'expressed concerns' regarding early retirement penalties applied to the DB scheme that could affect the value of his pension at his desired retirement age of 58.

I think that it's misleading to refer to any income that's been reduced as a result of taking retirement earlier than the scheme's NRD as being subject to a 'penalty'. What actually occurs is an actuarial adjustment to reflect a situation where the scheme is being asked to pay a pension for a longer period of time. This isn't done to 'penalise' individuals and I think Niche's focus should have been on explaining this to Mr T. That by taking early retirement from the scheme his pension would be reduced accordingly to reflect that. And that rather than transferring he may want to wait to nearer retirement age to see if he did really want or need to retire at 58. He may well be content to work past 58 and the more years he does so, the smaller any actuarial reduction his scheme benefits would have been.

So I think the cashflow is misleading in this respect. And I note that it doesn't include the index linking that is part of the DB scheme in its forecast. And whilst Niche's cashflow forecast shows that Mr T's funds won't run out before he reaches the age of 100 it is predicated on Mr T saving enough for that to be the case. Furthermore, Niche said in its suitability letter: *"I would recommend that you do not transfer this pension, as you are likely to be financially worse off in retirement."* So it is clear to me that Niche realised that by transferring, Mr T would be unable to match the benefits he was giving up.

Given Mr T was likely to receive lower overall retirement benefits by transferring to a personal pension, particularly if he retired early, for this reason alone I don't think a transfer out of the DB scheme was in his best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Niche has argued in this case. There might be other considerations which mean a transfer is suitable and in Mr T's best interests, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

It seems to me that the main reason that Niche recommended Mr T transfer his pension was for the flexibility and control it offered him over how it was invested and the amount of income that was withdrawn from it. But having considered the evidence, I don't think Mr T needed to transfer his DB scheme to a personal pension in order to have flexibility in retirement, if he did in fact need it. Although Mr T could choose to take tax-free cash (TFC) and a reduced annual pension from his DB scheme, Mr T had to take those benefits at the same time. But I'm not persuaded that Mr T had any need to take TFC earlier than his normal retirement age. I also don't think he had any particular need to vary his income throughout his retirement. To my mind this seems more of a 'nice to have' rather than a genuine objective.

Whilst I can see that the retirement funds that Mr T would be building up over the next 25+ years, through his employer's DC scheme (or any other future employment) were included in the cashflow forecast any mention of them seems to have been omitted in the suitability report. The fact-find says that the combined contributions of Mr T and his employer into his DC scheme amounted to 16% of his gross annual income. So it is reasonable to assume that even with modest investment growth over the next 25+ years, Mr T could have access to a significant fund by the time he retired. And Mr T could use his DC scheme if he wanted to retire early, without needing to access his DB scheme before his NRD (thereby avoiding any actuarial reduction).

Furthermore, it is reasonable to assume that Mr T's disposable income would increase when he paid his mortgage off in 12 years' time and when he paid off his personal loan in 3 years' time meaning any surplus income could then be put towards building his savings pot further. So potentially, by the time he wanted to retire, Mr T could have had a substantial savings pot to access flexibly to top up his retirement income. According to Niche's cashflow forecast and the fact-find, Mr T needed an annual income in retirement of £14,676.

Whilst I accept that at the time of the advice, the BSPS2 hadn't been established, I think the communications sent out by the scheme trustees were very optimistic that the scheme operating conditions would be met. And if Mr T had opted into the BSPS2 and it hadn't gone ahead, he would've moved with the scheme to the PPF.

And under the PPF at age 65 Mr T would've been entitled to a pension of £13,363.26 per year together with a PCLS of £89,088.44 (or an annual pension without taking a PCLS of £16,689.94). At 58 this would have been a pension of £10,471.92 together with a PCLS of £69,812.83).

Whilst the PPF pension was likely lower than the BSPS2 pension at NRD, Mr T would've had his DC scheme to draw on until his state pension became payable, or until he reached his DB scheme NRD if he wanted to retire earlier. So the fact the PPF pension was lower shouldn't have made a difference to the recommendation as I still think Mr T could've most likely met his needs in retirement – including being able to vary his income – even if the BSPS2 hadn't gone ahead and he'd had to move with it to the PPF.

And, as I've set out above, Mr T was unlikely to obtain benefits of the same value at retirement by transferring his funds to a SIPP. So he would have had even less income than was forecast. From Niche's cashflow forecast it is clear that Mr T had a better chance of achieving an income to meet his forecast retirement expenditure of £14,676 per year by opting into the BSPS2 (the benefits under which were guaranteed and escalated) rather than relying on investment growth from the SIPP and his savings for all of his retirement funds. The majority of the pension provisions Mr T was building up over the next 25+ years would be subject to investment risk, so I don't think it was reasonable to also place his guaranteed pension funds at risk.

Furthermore, Mr T was only aged 37 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr T had 18 years before he could 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 T to give up his guaranteed benefits when he didn't know what his exact needs in retirement would be. If Mr T later had reason to transfer out of their DB scheme he could have done so closer to retirement.

Overall, I'm satisfied Mr T could have met his income needs in retirement by maintaining the guaranteed income available to him through the BSPS2 or the PPF at age 65 and taking additional funds from his DC scheme until his state pension became payable. So, I don't think it was in Mr T's best interests for him to transfer his pension just to have flexibility that he didn't need.

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 T. But whilst I appreciate death benefits are important to consumers, and Mr T 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 T about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think Niche 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 so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr T predeceased her. Mr T also had dependent children. Under the DB scheme there was provision for a children's pension up to age 23 if they remained in full-time education. I don't think Niche made the value of these benefits clear enough to Mr T. They were guaranteed and escalated so they weren't dependent on investment performance, whereas the sum remaining on death in a SIPP was. And if Mr T lived a long life there may not have been a large sum left, if any at all, to pass on when he died. In any event, Niche should not have encouraged Mr T to prioritise the potential for higher death benefits through a SIPP over his security in retirement.

Furthermore, if Mr T genuinely wanted to leave a legacy for his family, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Niche should've instead explored the option of life insurance with him. This may well have been something Mr T would have considered and been able to afford given he had disposable income. And I think it is an option that Niche should have explored regardless. If he wanted an extra sum specifically for his wife and/or children, he could've taken extra cover out on a whole of life basis and written it in trust for their benefit.

Significantly I can't see that there was any documented discussion when Niche was advising Mr T about the fact that he was now a member of his employer's defined contribution scheme which had the potential to grow through to when Mr T retired. And it's evident that Mr T could nominate beneficiaries of his choosing under the DC scheme. So, at the time of the advice he already had the option to ensure that part of his pension didn't die with him.

In any event, whilst death benefits might be important for consumers, there generally shouldn't be a disproportionate emphasis on this compared to their own retirement needs. Overall, I don't think the different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr T. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

It's clear that Mr T, like many employees of his company, was concerned about his pension. His employer had recently made the announcement about its plans for the scheme and he was worried his pension would end up in the PPF. He'd heard negative things about the PPF and he said he preferred to have control over his pension fund.

So it's quite possible that Mr T was also leaning towards the decision to transfer because of the concerns he had about his employer and his negative perception of the PPF. However, it was Niche's obligation to give Mr T an objective picture and recommend what was in his best interests.

As I've explained, by this point details of the BSPS2 were known and it seemed likely it was going ahead. So, the advice Niche gave Mr T should've properly taken the full benefits available to him through the BSPS2 into account and I think this should've alleviated Mr T's concerns about the scheme moving to the PPF.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that Niche should've reassured Mr T that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr T through the PPF would've still provided a significant portion of the income he thought he needed at retirement, and he was unlikely to be able to exceed this by transferring out. And 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 Niche 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 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 T – it was simply a consequence of transferring away from his DB scheme.

It seems to me that Mr T's stated desire for 'control' related more to moving his pension away from an employer that he didn't trust than to any resolution on his part to begin to manage his investment.

But Niche ought to have explained that Mr T's employer and the trustees of the BSPS2 were not one and the same. And in any event, Mr T was not intending to leave his employment and his DC pension remained connected to his employer – so transferring out of the scheme didn't achieve a 'break' from his employer. So had Niche explained that Mr T's belief regarding the control Mr T's employer had over his pension was misplaced, I think he would have been reassured by this.

Use of DFM

Niche recommended that Mr T use a DFM to manage his pension fund. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr T, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr T 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 T. But Niche wasn't there to just transact what Mr T might have thought he wanted. The adviser's role was to really understand what Mr T needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to was Mr T suitable or in his best interests. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr T was likely to obtain lower retirement benefits, particularly if he retired early and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr T had a vague objective to retire at age 58 but I don't think this was a fully formed plan; it was some 21 years away. And I don't think Niche interrogated this objective in any meaningful way so it couldn't offer any real insight into whether Mr T could've met this objective by moving with the scheme to the PPF or the new BSPS2, or by using the savings already available to him or by using his DC scheme flexibly. So, I don't think Mr T's plans or ambitions were concrete enough for Niche to say it was in his best interests to give up his guaranteed benefits and transfer out of the scheme.

I appreciate that at the time the advice was given there was a lot of uncertainty around the pension scheme and I've fully taken into account that Mr T was likely keen to transfer out as he was worried about his pension and colleagues were telling him this was a good idea. However, it was the adviser's responsibility to objectively weigh up the options for Mr T. He should have advised him what was best for his circumstances and explained what he was giving up in the BSPS and that moving to the PPF was not as concerning as he thought.

For the reasons given above, I don't think the advice to transfer out of the BSPS was suitable. Mr T was being advised by Niche after having received the "Time to Choose" document and was at the point where he had to select which option to he wanted to take. I carefully considered what Mr T likely would have done – had he been suitably advised by Niche – and on balance I think he would have opted to join the BSPS2. I say this because I don't think Mr T's retirement plans were fully formed. So, I don't think that it would've been in his 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 by opting into the BSPS2, Mr T would've retained the ability to transfer out of the scheme if he needed to at some point in the future. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think Niche should've advised Mr T to opt into the BSPS2.

Of course, I have to consider whether Mr T would've gone ahead anyway, against Niche's advice. Niche says Mr T's needs and objectives were only met by transferring to the SIPP and that he was fully aware of the benefits he was sacrificing. But I'm not persuaded that Mr T's concerns about his employer or the PPF were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. And if Niche had explained that Mr T was always unlikely to exceed the guaranteed benefits available to him by transferring and that he shouldn't be prioritising death benefits over retirement benefits I think he would've accepted this. I also think if Niche had explained that the flexibility he sought could be met by other means and that the uncertainty over his requirements meant transferring at that time was not in his interests and that the other things he'd expressed worry about were not things he needed to be as concerned about as he was, I think that would've carried significant weight. So, I don't think Mr T would have insisted on transferring out of the DB scheme.

For the reasons I've set out above I don't think that Niche provided Mr T with all the necessary information he needed to make a fully informed decision. And by not fully advising Mr T – for example by not exploring the option of life cover with him or by not attempting to fully understand what his retirement income needs were – I don't think I can agree that Niche did take reasonable steps, or exercise reasonable skill and care, to ensure the transfer was suitable.

For this reason, I think Niche should compensate Mr T for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And it's the benefits offered by the BSPS2 at age 65 which should be used for comparison purposes. This is because I know that Mr T is a long way from retirement and has no firmly formed plans around when he will retire.

I agree with our Investigator that Mr T will have been caused some distress and inconvenience by discovering that Niche's advice was unsuitable so I think that Niche should pay him compensation of £300 in recognition of any trouble and upset it has caused him.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr T whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect. Mr T confirmed that he would like any redress to be calculated in line with current guidance.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr T.

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 Niche's unsuitable advice. I consider Mr T would have most likely opted into the BSPS2 if suitable advice had been given.

Niche 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 T is a long way from retirement. 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 T's acceptance of the decision.

Niche may wish to contact the Department for Work and Pensions (DWP) to obtain Mr T'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 T's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr T'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 T 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/her/their 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 T within 90 days of the date Niche 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 Niche to pay Mr T.

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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Niche to carry out a calculation in line with the updated rules and/or guidance in any event.

Niche should also pay Mr T compensation of £300 in recognition of any trouble and upset it has caused him.

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 Niche Independent Financial Advisers Limited to pay Mr T 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 Niche Independent Financial Advisers Limited to pay Mr T any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Niche Independent Financial Advisers Limited to pay Mr T any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Niche Independent Financial Advisers Limited pays Mr T the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr T.

If Mr T accepts this decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

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 any final decision.

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

Claire Woollerson
Ombudsman