DRN-3456046

The complaint

Mr N complains about the advice given by The Pension Drawdown Company Limited ('PDC') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss. He says that he thinks he would be better off if he had not transferred out.

What happened

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the BSPS (the DB pension scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved pension benefits, one of which was a transfer to the Pension Protection Fund ('PPF') – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

On 21 March 2016 BSPS sent Mr N information about what he could receive if he were to take early retirement and retire immediately. This would be a full pension of £10,075.68 or a tax-free lump sum of £47,501.00 and a reduced pension of £7,125.24.

Mr N approached PDC in March 2016 to discuss his pension and retirement needs. I understand he'd made an enquiry via its website as he was concerned about the DB scheme funding deficit and the plans of his employer to close, or sell, some of the operations and end their pension liability.

In May 2016 PDC completed a fact-find in a telephone call to gather information about Mr N's circumstances and objectives. This showed that:

- Mr N was aged 55 and he was divorced with no dependents (he did have three adult children).
- He had worked at Tata Steel for 33 years between 1977 to 2011.
- He was presently employed, and his earnings of around £1,000 a month after tax covered his outgoings.
- He owned his own home and had taken a modest loan from a family member. But he had no other savings, investments or credit.

In respect of his pension benefits:

In April 2016 Mr N received a cash equivalent transfer value ('CETV') from the BSPS. He'd accrued just over 33 years service in the BSPS and the pension had a transfer value of £232,629.20. This gave him an annual pension at the date of leaving (in 2011) of £17,267.11 and this had been indexed to the current time to £19,512.36.

PDC also carried out an assessment of Mr N's attitude to risk. It said that '*The answers to your questions throughout the risk profiler show you are willing to take investment risk with the pension fund to achieve your longer term objectives.*' It said the answers showed that Mr N should have a tolerance to risk of 8 out of 10, with 1 being the lowest and 10 the highest risk. But it was agreed that a ‘balanced’ attitude to risk was appropriate for this transfer.

On 5 May 2016, PDC advised Mr N to transfer his pension benefits into a personal pension and invest the proceeds in a range of investments that matched his balanced attitude to risk.

The suitability report said the reasons for this recommendation were:

- Mr N wanted to transfer his BSPS pension benefits into a personal pension that could provide him with a drawdown facility.
- He wanted to access the tax-free-cash to repay a modest debt to his brother and have an emergency fund of £27,000.
- He wanted control of his pension and to minimize income tax.
- He wanted his children to inherit the plan upon his death.

Mr N complained in March 2021 to the Financial Ombudsman Service about the suitability of the transfer. He initially said that he thought he would have been better off staying in the DB scheme. Later that month PDC contacted Mr N about the correspondence it had received from the Financial Ombudsman Service. It asked Mr N for some further information to help it consider his complaint. Mr N provided this shortly afterwards.

PDC didn’t initially acknowledge that what Mr N had said was a complaint, but it did provide information about why it thought that Mr N was better off due to the transfer. It didn’t refer Mr N to the Financial Ombudsman Service if he disagreed with this. Mr N then said that he would withdraw his complaint.

Mr N didn’t feel able to pursue his complaint straightaway after this. But he contacted the Financial Ombudsman Service again in January 2022 to request that we consider the complaint. And we began to look at it.

An Investigator upheld the complaint and recommended that PDC pay compensation. She said that the transfer was likely to lead to Mr N receiving lower retirement benefits and so it wasn’t suitable for him. She said that he should have been advised to stay in his DB scheme and take his benefits at the scheme’s normal retirement date.

PDC disagreed, and in a letter dated 27 April 2022 its representative at the time provided detailed reasons why this was. This letter concluded that Mr N had made an informed decision to proceed with the transfer and was content to do so at the time. PDC had met all of its regulatory responsibilities and it was satisfied the advice was suitable for Mr N.

The investigator wasn’t persuaded to change her opinion, so the complaint was referred to me to make a final decision. There was some further correspondence, but no new issues were raised.

Recently PDC has changed its representative. And it has now said that it is looking to calculate and pay any loss Mr N had suffered due to the advice it had given him. It asked for his authority to obtain some information to enable it to do this.

Mr N hasn’t disagreed with this, but he has requested that an ombudsman consider the merits of the complaint so the outcome of it is certain before providing his agreement or consent for PDC to calculate any loss he may have suffered. I’ve done this below.

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 Businesses ('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 PDC'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, PDC should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr N's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

What I've looked at in this decision and why

There has been a significant amount of correspondence already about whether it was right that the Financial Ombudsman Service consider this complaint. And this has been considered in some detail already. I won't go over all of those details again here.

But for the avoidance of doubt, I don't think that this complaint is outside of the jurisdiction of the Financial Ombudsman Service. This is because, even though Mr N indicated he didn't want to continue with his complaint at an early point in the process, PDC didn't ever issue a Final Response letter or a Summary Resolution letter, as it is required to do. I acknowledge that PDC now says there is no question that the complaint is outside of our jurisdiction.

The complaint process that is laid down by the FCA provides both parties with a clear path for a complaint. The rules provide detailed guidance on how to acknowledge, and consider complaints, within certain timeframes. And if a quick resolution is reached then a Summary Resolution letter can be issued. Otherwise, a Final Response Letter should be issued. Both of these would have provided PDC, and Mr N, with an outcome to his complaint and what Mr N could do next if he didn't agree.

But PDC didn't follow this process. That led to a situation where it's reasonable to say that Mr N's complaint wasn't fully considered. And under the rules that the Financial Ombudsman works under say that where this is the case we can, and should, go on to consider it.

And this is the case even if Mr N indicated, at one point, that he wanted to withdraw his complaint. As his complaint wasn't properly looked at, and he wasn't given the information and timeframes to refer it here, I can't say that it's not within our jurisdiction. And it's not right to dismiss a complaint that hasn't been properly considered.

PDC did initially respond to our Investigator's opinion with a detailed response (drafted by its representative). However, things have moved on since that letter and PDC now says it is prepared to calculate and pay compensation. So, I won't respond to all of the issues raised in the earlier correspondence, although I have read them. I'll look at whether PDC's advice to transfer his DB scheme funds to a personal pension was suitable for Mr N and in his best interests, bearing in mind what has been said earlier. And comment on some of the issues PDC has raised about the compensation.

Financial viability

PDC carried out a transfer value analysis report (as required by the regulator) showing how much Mr N'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 advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr N was 55 at the time of the advice and wanted to retire at 65. The critical yield required to match Mr N's benefits at age 65 was 16.59% if he took a full pension. The critical yield if Mr N took tax-free cash and a reduced pension wasn't calculated.

The critical yield to match the benefits available through the PPF at age 65 was quoted as 11.47% per year if Mr N took a full pension and 11% per year if he took tax-free cash and a reduced pension. This compares with the discount rate of 4.1% per year for nine 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 N's 'balanced' attitude to risk and also the term to retirement. There would be little point in Mr N giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 11%, I think Mr N was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk. This would be the case even if the scheme moved to the PPF.

And this was recognised at the time of sale when the suitability letter setting out the reasons for PDC's recommendation to transfer said *'This indicative number is partly based on assumptions of inflation rates which have been below average in recent years due to weak* *growth. The 16.59% is significantly above the current guideline of 4.2% pa of someone with your attitude to risk with 10 – 15 years until retirement. Our recommended investment portfolio is unlikely to meet this level. This means you could be worse off at retirement if you wanted to purchase an annuity like retirement income based on these assumptions.'*

And PDC provided cashflow models which it says shows Mr N would've been able to meet his needs despite the high critical yields. I've considered these, but PDC's models show that if Mr N took an income of an equal value to the DB scheme pension initially, which increased each year by the retail price index, and the fund grew at a medium rate of return, then it would run out at his age 78. Mr N's life expectancy was calculated to be age 85. So, there was a significant risk, even if his line of work is considered, that he may be on a reduced income later on in his retirement as he had depleted his personal pension fund.

For this reason alone, a transfer out of the DB scheme wasn't in Mr N's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as PDC has said in this case. It said that Mr N wanted flexibility above all else and wanted to repay a modest debt and have an emergency sum. I've considered these below.

Flexibility and income needs

It seems one of the main reasons that PDC recommended this transfer was for the flexibility and control it offered Mr N. Having considered the evidence, I don't think Mr N needed to transfer his DB scheme to a personal pension in order to have flexibility in retirement.

It's evident that Mr N could not take his DB scheme benefits flexibly. Although he could choose to take tax-free cash and a reduced annual pension, Mr N had to take those benefits at the same time. But I'm not persuaded that Mr N had any concrete need to take tax-free cash and defer taking his income, or to vary his income throughout retirement. To my mind these seem more of a 'nice to have' rather than a genuine objective.

I say this because it was documented that one of the reasons Mr N wanted to transfer was to access some cash to pay a loan to a family member and have an emergency fund.

But Mr N was employed and living within his means, even though I appreciate he may not have had a lot spare each month. But this loan was modest and I don't think it was reasonable for him to give up his DB scheme benefits to pay this. PDC should have explored all of the other options Mr N may have had before recommending that he transfer for this reason. Repaying the loan this way was a very expensive means to repay his debt.

And similarly, whilst Mr N did want to have an emergency fund, and I'm sure this would have been useful to him, it was again a very expensive way to obtain this. And not in his best interests when he had no immediate or pressing need for any money.

PDC didn't record what income Mr N wanted at retirement. Given that it was advising him on his retirement, and it was not too far away for Mr N, I think this was a significant failing. It's hard to see how PDC can now say that the advice to transfer was in his best interests when it wasn't clear what his needs were.

That said Mr N was taking home around £1,000 a month, which is £12,000 a year, and he seemed to be living within his means. And he indicated that his circumstances wouldn't change materially, so he would regard this as a minimum he would need to cover his expenditures. Ideally he would like more than this to be comfortable.

It was estimated that the DB scheme would provide £25,738 at his age 65, and he would receive his state pension of £8,100 at his age 67. So, I don't think there is any doubt that taking the DB scheme would have met his aims at this age. He would have more than enough than he seemed likely to need at retirement.

Mr N did want to retire early if possible. He had contacted the scheme and had been informed that in 2016 he could receive a full pension of £10,075.68 or a tax-free lump sum of £47,501 and a reduced pension of £7,125.24. So, I don't think retiring immediately and taking the DB scheme benefits was a realistic option for Mr N.

PDC didn't look at the situation Mr N would have been in at age 60. He had indicated that he would consider retiring then so it should have done. The FCA's redress calculator for the BSPS pension says that where a consumer is five years away from the scheme retirement date then a reduction factor of 85% to 87% should be used depending on the time when the service was accrued. 85% of the estimated pension of £25,738 would give Mr N a pension of £21,877.30 at age 60. And he could take some tax-free cash and reduced pension as well.

Even though I can't say these are definitely the amounts Mr N was entitled to, I think they demonstrate that at age 60 Mr N would have met his needs from the DB scheme as well. And again he would receive the state pension in time.

So, I'm satisfied Mr N could have met his income needs in retirement through the DB scheme. I don't think there was a pressing need for immediate cash, or at least to the degree that he should have transferred his pension and accepted the much lower retirement benefits this would lead to. I don't think it was suitable for him to transfer to increase the flexibility he had when he didn't really need this.

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 N. But whilst I appreciate death benefits are important to consumers, and Mr N 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 N about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think PDC explored to what extent Mr N was prepared to accept a lower retirement income in exchange for higher death benefits.

And Mr N didn't have any financial dependents. I'm sure he would have wanted to leave his pension fund to his older children or his wider family. But as the cashflow analysis shows, there may not have been a large sum left particularly if Mr N lived a long life. In any event, PDC shouldn't have encouraged Mr N to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr N 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 PDC should've instead explored life insurance.

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

PDC has said that the compensation would not take into account his objective of leaving his funds to his wider family, but as this wasn't a good reason to make the transfer, I don't think it should.

Control or concerns over financial stability of the DB scheme

It was recorded that Mr N wanted to break all ties with the DB scheme and would prefer to control his funds. He was particularly worried about the problems at his former employer and the related problems the DB scheme was facing. He said that this situation was causing him some stress.

It's clear that Mr N, like many members of this scheme, was concerned about his pension. His ex-employer had recently said it was looking at the possibility of restructuring the DB scheme. But this was some time in the future and this process wouldn't be complete until late 2017. And the changes that were made took place in 2018. So, I think it would have been reasonable for PDC to have advised Mr N to wait until this situation developed further. And if he wanted to transfer out at a later date it was likely that he would be able to do so.

Furthermore, if the scheme did end up ultimately moving to the PPF, I think PDC should have explained that this was not as concerning as Mr N thought. As I've explained above, Mr N was still unlikely to match, let alone exceed the benefits available to him through the PPF if he transferred out to a personal pension.

I think Mr N's desire for control over his pension benefits was overstated. Mr N 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 N – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

PDC recommended that Mr N invest in a range of funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr N, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr N should have been advised to remain in the DB scheme and so the investments in these funds wouldn't have arisen if suitable advice had been given.

Would Mr N have joined the BSPS2

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr N's ex-employer would be set up – the BSPS2.

In October 2017, members of BSPS were 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 (and was later extended to 22 December 2017).

So, I appreciate that PDC wouldn't have been able to fully explore the BSPS2 as an option for Mr N when it was giving advice. But if Mr N had stayed in the DB scheme he would have had to choose between his DB scheme moving to the PPF or he would had to opt in to the BSPS2.

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 N would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think Mr N would have opted into the BSPS2.

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 N. But PDC wasn't there to just transact what Mr N might have thought he wanted. The adviser's role was to really understand what Mr N needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr N was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr N was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr N shouldn't have been advised to transfer out of the scheme just to repay a modest debt and I don't think the problems with the scheme or his employer were so apparent that they were worth giving up the guarantees associated with his DB scheme.

So, I think PDC should've advised Mr N to remain in his DB scheme and Mr N would have ultimately joined the BSPS2.

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

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

I'm not persuaded that Mr N's concerns about his old employer and the BSPS 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. If PDC had explained that Mr N could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr N would have insisted on transferring out of the DB scheme.

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

Putting things right

A fair and reasonable outcome would be for PDC to put Mr N, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr N would most likely have remained in the occupational pension scheme and opted to join the BSPS2 if suitable advice had been given.

PDC 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.

PDC should use the FCA's BSPS-specific redress calculator to calculate the redress. If PDC does not yet have access to the calculator it should contact the supervision department of the FCA to seek access to it as soon as possible. A copy of the BSPS calculator output should be sent to Mr N and our Service upon completion of the calculation together with supporting evidence of what PDC based the inputs into the calculator on.

For clarity, Mr N has not yet retired, and as far as I'm aware has no firm plans to do so at present. So, compensation should be based on the scheme's normal retirement age, 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 N's acceptance of my decision.

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

- calculate and offer Mr N redress as a cash lump sum payment,
- explain to Mr N 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 personal pension
- offer to calculate how much of any redress Mr N receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr N accepts PDC's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr N for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr N's end of year tax position.

Redress paid to Mr N as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, PDC may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr N'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.

PDC will need some information from Mr N, or his former scheme, and it would be helpful if Mr N could either provide this, or give PDC the authority to do this itself, a soon as he is able.

And PDC has said that Mr N has been in receipt of state benefit income that he would not have received if he had remained part of the BSPS. As it has noted the redress scheme doesn't take this into account. The redress scheme looks at the difference in pension benefits only. The fact that Mr N has received some state benefits will be due to a range of factors and not just due to the pension advice. So, I don't think this should be factored into the compensation.

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 The Pension Drawdown Company Limited to pay Mr N 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 also recommend that The Pension Drawdown Company Limited pays Mr N the balance.

If Mr N accepts this decision, the money award becomes binding on The Pension Drawdown Company Limited.

My recommendation would not be binding. Further, it's unlikely that Mr N can accept my decision and go to court to ask for the balance. Mr N 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 N to accept or reject my decision before 25 October 2023.

Andy Burlinson
Ombudsman