DRN-3459447

The complaint

Mr O complains about the advice given by AMG Wealth Solutions LLP 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.

What happened

In March 2016, Mr O'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 O had 10 years and 7 months of pensionable service with his employer which gave him a total (index linked) pension of £5,605 per year (forecast to be £10,089.09 per year at age 65). After the DB scheme closed to new accruals in March 2017, Mr O 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 O was unsure about what to do so his financial adviser referred him to AMG (a pension transfer specialist) for advice about his DB scheme benefits. AMG completed a fact-find, an attitude to risk ('ATR') questionnaire and a pension transfer questionnaire on 31 October 2017 in order to gather information about Mr O's circumstances and objectives. About a month prior to the meeting Mr O had received a Cash Equivalent Transfer Value ('CETV') from the DB scheme of £119,890.48 valid for 3 months until 11 December 2017. Mr O's circumstances at the time were noted by AMG as follows:

- He was aged 41, unmarried with one dependent child aged 5.
- He was employed as an engineer earning £42,000 per year including bonuses.
- Mr O had total (unspecified) outgoings of £1,000 per month.
- His house was valued at £120,000 with an outstanding mortgage of an undocumented amount which had 10 years to run and was costing £320 per month in repayments.
- He had £40,000 saved for emergencies. He had no other savings or investments.
- He was recorded as being a member of his employer's DC scheme, making contributions of 6% of his gross salary per month with his employer contributing 10% of his gross salary per month.
- He had death in service cover from his employer of four times his salary.
- His preferred retirement age was 60 and he estimated he would need £600 per month to live on in retirement.

- He would like to try a different career at some point, maybe as a pest controller, because his job was physically demanding. He was thinking about accessing his pension at 55 so he could consider changing his job.
- He wanted to take control of his pension away from his employer as he had concerns over its financial stability and wanted to break tiles with it by moving his pension to an individual plan under his control.
- He didn't want to risk his benefits being transferred to the Pension Protection Fund ('PPF') as he had no confidence in it or the BSPS2.
- He liked the idea of flexible death benefits and being able to leave his remaining pension fund to his son as he had little life insurance cover and his son could benefit from the extra money.
- He wanted the flexibility at retirement to control how his benefits are paid.
- As his mortgage would be repaid before retirement he had no specific need for any tax-free cash ('TFC') but wanted the flexibility to decide how to take his benefits – he did not want the options offered by the PPF.
- He considered the stock market to be 'at a high' and overvalued so he wanted to consider investing in a more cautious fund until the market changed.

AMG assessed Mr O's ATR, as 'high medium', or a risk level of 6 on a scale of 1 to 10. It also assessed that Mr O had a limited capacity for loss before his standard of living became affected.

A transfer value analysis report (TVAS) was produced on 31 October 2017 which set out the amount of investment growth (known as the 'critical yield') the transferred funds needed to attain to be able to match the benefits being given up in the BSPS. It said Mr O's pension would need to achieve growth of 7.5% each year to match his full scheme income at age 65. It also stated that Mr O's pension would need to grow by 5.3% for the benefits he could access in the PPF to match those he was giving up in the DB scheme at age 65. On the same date Mr O accepted the recommendation and signed the transfer forms.

On 8 November 2017 AMG provided Mr O with its suitability report and advised him to transfer his pension benefits into a personal pension and invest the proceeds with a provider ('L') in a cautious fund. The suitability report said the reasons for this recommendation to Mr O were, in summary:

- That he no longer had confidence in his employer so he preferred it didn't have control of his pension.
- He wanted to take advantage of 'pension freedoms' with regard to income flexibility in retirement in how and when he accessed his funds and with regard to death benefits.
- He wanted to ensure he maximised his full use of his fund be that in retirement or upon his death.
- He wanted to leave any unused fund to his son and didn't want the pension scheme to keep his money if something happened to him. He preferred a lump sum was made available to his son rather than him receive a dependent's pension.
- He needed an income of £7,200 per year in retirement (in today's terms) which was achievable through a combination of this personal pension, his new employer's DC scheme and his state pension.
- He wanted to be able to access TFC once he reached the age of 57 but was unlikely to need the full TFC in one go so it could be used in a tax efficient way towards his income.

AMG tried to arrange a meeting with Mr O on 10 November 2017 to discuss the contents of the suitability report but Mr O said he was too busy. He asked AMG to submit the forms to L anyway as he didn't want his CETV to expire. AMG posted the forms the same day. AMG managed to arrange a meeting with Mr O in February 2018 to go through the suitability report taking with it a further updated TVAS is had more recently produced. Mr O confirmed at the meeting that he understood the report and remained happy to proceed.

The transfer took effect in early March 2018. AMG were remunerated with an initial advice fee of £2,397.80. After the pension was set up it was returned to Mr O's financial adviser for management.

In March 2019 Mr O's personal pension was valued at £116,623.04.

In December 2020, Mr O's representative complained to AMG 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 in his circumstances as they were at the time.

AMG looked into Mr O's complaint but didn't agree that it should be upheld. AMG said that the transfer was suitable for Mr O and that it took reasonable steps to satisfy itself that it was suitable having regard to his personal and financial circumstances at the time. More specifically it said that the CETV Mr O had received from his DB scheme was due to expire on 11 December 2017 which was sometime before the consultation for the BSPS2 closed so it could not have advised him to transfer to BSPS2 at this point. It said Mr O's options at this point in time were to remain in the scheme (and later transfer to BSPS2 if it came into existence, or transfer to the PPF if it did not) or accepting the CETV and transferring to a personal pension. It said that he did not, at that time, have the option of transferring to BSPS2.

Unhappy with the outcome of AMG's investigation, Mr O complained to this service. Our Investigator looked into Mr O's complaint and recommended that it was upheld. He said he thought the transfer wasn't suitable for Mr O because it wasn't financially viable in that it was evident from the growth rate identified that he would attain significantly lower benefits at retirement than had been available under the BSPS. He also thought that there were no other compelling reasons which meant the transfer could be said to be suitable for Mr O in the circumstances.

Our Investigator recommended that AMG should compensate Mr O for the losses he incurred by transferring his DB pension and that compensation should be based on him having opted to join the BSPS2.

Mr O's representative replied to say that he accepted our Investigator's findings.

AMG responded to say it disagreed with our Investigator's findings which, it said, were unfair and unreasonable. It said that it took reasonable steps to ensure that the advice it gave Mr O was suitable, as it was required to by the Financial Conduct Authority ('FCA'), in view of Mr O's circumstances and objectives at the time. It made the following comments:

- It said the key issue for this service to decide was whether it had taken reasonable steps (pursuant to COBS 9.2.1R) to ensure its recommendation was suitable for Mr O. It said this service should consider whether it had exercised reasonable skill and care when advising Mr O, whether it had discharged its regulatory obligations and whether Mr O had been able to make a fully informed decision.
- That our Investigator had placed disproportionate weight on the critical yield and the 'discount rate'. It said that whilst the critical yield was a material factor, it wasn't the only factor. And it said it was based on the assumption that the client would be acquiring an annuity which Mr O wouldn't. The critical yield doesn't provide a comparison between the scheme benefits and the benefits Mr O wished to secure.
- Insufficient regard was had to the other factors that Mr O said were important to him.

- It is flawed to think that the option to transfer to BSPS2 existed at the time of the advice. There was a high amount of concern from scheme members about being transferred to the PPF. This wasn't something Mr O wanted to happen to him at the time.
- Our Investigator failed to place enough significance on the fact that Mr O had made a fully informed decision to transfer. And he had failed to consider if the transfer had proceeded owing to any failure on AMG's part to exercise reasonable skill and care.
- Our Investigator failed to address the issue of factual causation – i.e. whether any alleged shortcoming in its advice had caused the transfer. Even had AMG advised Mr O differently he would have proceeded with the transfer anyway because he wanted to sever the tie between his employer and his pension and he didn't want to end up in the PPF.
- There can be no doubt that Mr O was fully engaged with the advisory process and made a fully informed decision to transfer having been comprehensively advised.
- That Mr O, having made a fully informed decision to transfer was now having second thoughts about his decision to proceed.

Our Investigator considered what AMG had said in response to his view but wasn't persuaded to change his mind about Mr O's complaint. AMG remained unhappy with our Investigator's view. It said that it was common theme for this service to determine complaints of this nature by viewing the preferences expressed clearly by the client at the time of the advice as largely immaterial. It also said that it had considered the value of the benefits Mr O was giving up. It said it remained the case that there was still no evidence that Mr O would have remained in the scheme had he been advised to do so given his desire to transfer.

Our Investigator thought that AMG hadn't made any new points so the complaint was referred to me for a 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

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 AMG'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 FCA states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, AMG should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr O's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

AMG carried out a transfer value analysis report (as required by the regulator) at the end of October 2017 showing how much Mr O's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). This analysis was based on his existing BSPS scheme benefits, but Mr O 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.

AMG has argued that at the time it was advising Mr O, the BSPS2 scheme was merely the subject of consultation. It also said that Mr O had no entitlement to join it or to transfer any of his DB scheme benefits into it. And it said that on the date the CETV expired it was still unknown whether the BSPS2 would come into existence. AMG has also submitted that there was never any prospect of Mr O expressing a preference to join the BSPS2 due to the antipathy he had towards his employer. It says the advice it is now said it should have provided to Mr O was that he taken the risk of his benefits ending up in the PPF and not transferred.

Whilst it wasn't completely certain that the BSPS2 would go ahead, the restructuring of the BSPS had been ongoing for a significant amount of time by the time Mr O took advice, and he'd also received his Time to Choose document, so the details of the scheme would've been known by the time he first met with AMG. So, I think AMG should have advised Mr O to wait and see if the BSPS2 was confirmed so that he could make a fully informed choice about what action was in his best interests.

I've considered AMG's point about Mr O's CETV expiring in mid-December 2017 before the scheme trustees could confirm the funding requirements of the BSPS2 had been met. But I don't think this point is relevant – Mr O had to opt into the BSPS2 before the deadline of 22 December 2017, which was also before the scheme would be confirmed as proceeding. So, he would've always needed to choose to join the BSPS2 knowing that it might not go ahead. Nor do I think that the expiry of the CETV should've been a barrier to AMG providing Mr O with suitable advice, which I think would involve it considering all of his options before advising him to make an irreversible decision to transfer out of the scheme.

And whilst the CETV was indeed to expire on 11 December 2017, it was always possible to pay for a new CETV. So I don't agree that AMG couldn't have advised Mr O to opt into the BSPS2.

According to the fact-find and the suitability report Mr O wanted to retire from British Steel early, possibly at age 60. Mr O estimated he would need a monthly income in retirement of £600. However, that doesn't appear to have been anything more than a 'best guess', given he was only 41 at the time of the advice and would likely continue working for around another 20 years.

The TVAS dated 31 October 2017 set out the relevant critical yield; at age 65 it was 7.5% if he took a full pension. The second TVAS AMG produced set out a critical yield of 6.94% if Mr O took a full pension. Given that one of the objectives Mr O had, and one of the advantages of the transfer AMG cited, was to take 25% TFC flexibly it is notable that AMG didn't calculate the critical yield required for such a scenario.

The critical yield required to match the benefits provided through the PPF was 5.3% if Mr O took a full pension at age 65. The critical yield in the second TVAS AMG produced was 5.03% if Mr O took a full pension at 65 or 4.76% if he took a pension commencement lump sum and a reduced pension. But I've said above, Mr O remaining in his existing DB scheme wasn't an option. So, the critical yields applicable to the BSPS2 benefits should also have been provided by AMG. 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.

I also note that AMG didn't provide the relevant critical yields should Mr O decide to retire at age 60. I think it should have, given Mr O indicated that he may wish to do so and so that he was able to make an informed decision. Given that the transferred funds would be invested for less time and would be required to pay for benefits for a longer period, I think the critical yields would've been higher than those at 65 if Mr O retired at age 60.

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 to the time of this transfer which I'm able to refer to was published for the period before 1 October 2017, and was 4.6% per year for 23 years to retirement (age 65) and 4.4% for 18 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% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr O's attitude to risk and also the term to retirement. AMG says it assessed that Mr O was likely to be a high medium risk investor given he had around 23 years before he expected to retire, so he had the capacity to build pension funds in between and tolerate some losses.

However, I'm unable to agree with AMG's assessment of Mr O's ATR. There is nothing in the fact-find to support the conclusion that Mr O was an individual whose ATR was bordering on aggressive (or level 6 on a scale of 1 to 10). I would expect someone whose ATR is assessed at a level 6 to be able to display some evidence of previous investment experience. However, Mr O is recorded as having no investment plans. He has £40,000 but it is documented as being for an emergency. That being the case, and with Mr O having no investment plans, it is reasonable to assume they must be held in an accessible savings account.

The ATR questionnaire shows that Mr O said he had some experience of investing in cash-based savings and stocks and shares but there are no details about the nature of these transactions. There was nothing in his current profile that, in my view, could lead to the conclusion that Mr O, someone with such previous (albeit unquantified) experience, should reasonably be classified as someone with a high medium ATR.

And I've seen the risk questionnaire and note that Mr O said he took low financial risks and did not feel comfortable with financial uncertainty. And, in any event, it seems that on a later assessment, AMG classified Mr O's ATR as between 4 and 6 on a scale of 1 to 10. Indeed, his transferred pension was invested in a cautious fund (a low/medium fund) so I think Mr O's ATR, given his personal circumstances at the time, should more reasonably have been assessed as low/medium/moderate.

I don't think that the length of time Mr O had to go to retirement means his capacity for loss was significant. I can see that Mr O had £40,000 in savings at the time of the advice and that he had 10 years left to run on his mortgage. It can't be assumed that just because Mr O had 20+ 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 O 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 4.76%, which was based on Mr O taking a reduced pension and a PCLS through the PPF at age 65. The critical yield if Mr O took a full pension (no critical yield having been produced for a reduced pension and TFC) through his existing scheme at age 65 was 7.5%. So, if Mr O were to opt into the BSPS2 and take the same benefits at age 65 the critical yield would've been somewhere between those figures, and likely closer to 7.5%.

Given the discount rate of 4.6% the regulator's middle projection rate of 5%, a reasonable assessment of Mr O's ATR and his investment in a low/medium risk fund, I think Mr O was likely to receive benefits of a lower overall value than those of the PPF and BSPS2 if he transferred to a personal pension, as a result of investing in line with that attitude to risk. And I am confident had AMG informed Mr O of the true value and benefits of BSPS2 and the PPF, and then advised him to remain in the BSPS, he would have accepted this and he would have opted to join the BSPS2.

AMG says that it is unreasonable to base any findings on the discount rate because taking this into account was not required by the regulator when giving advice. While I haven't based my findings on this alone, 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 O's attitude to risk, which leads me to be believe he'd likely be worse off in retirement if he transferred out of the DB scheme.

I note that the second TVAS analyses the 'hurdle rate' (the rate of return required to purchase an annuity to provide benefits of equal value to the estimated benefits provided by the existing scheme assuming no spouse's pension and no index linking). The hurdle rate to age 65 was 3.81%. So only the hurdle rate (and one of the critical yields I mentioned above – but only just) are below the discount rate I have referred to above. But only by using a method of comparison that didn't match the guaranteed benefits in Mr O's BSPS, could it be argued that the DB scheme transfer was financially viable. But of course, both the index linking and spouse's pension are very valuable benefits so I don't accept the hurdle rate to his normal retirement date ('NRD') at age 65 demonstrates that the transfer was suitable and in Mr O's best interests.

I appreciate that Mr O told AMG that he didn't intend to marry and so the spouse's pension was of no use to him but he also had a dependent's pension included in his DB scheme which would have been of benefit to his young son had anything happened to him.

In summary, even if the BSPS had moved to the PPF and Mr O's benefits were reduced as a result, I think he would have still been very unlikely to match, let alone exceed, those benefits by transferring to a personal pension. And that was particularly the case if Mr O retired early. By transferring his pension I think it was highly likely that Mr O would be financially worse off in retirement.

Given Mr O was likely to receive lower overall retirement benefits by transferring to a personal pension, 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 AMG has argued in this case. There might be other considerations which mean a transfer is suitable and in Mr O's best interests, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

It seems one of the main reasons that AMG recommended this transfer was for the flexibility and control it offered Mr O. Having considered the evidence, I don't think Mr O needed to transfer his DB scheme to a personal pension in order to have flexibility in retirement. It's evident that Mr O could not take his DB scheme benefits flexibly. Although he could choose to take TFC and a reduced annual pension, Mr O had to take those benefits at the same time. But I'm not persuaded that Mr O had any concrete need to take TFC and defer taking his income, or to vary his income throughout retirement. To my mind this seems more of a 'nice to have' rather than a genuine objective.

Furthermore, AMG's advice ignores the retirement funds that Mr O would be building up over the next 20+ years, through his employer's DC scheme or any other future employment. The fact-find says that the combined contributions of Mr O 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 20+ years, Mr O could have access to a significant fund by the time he retires. And Mr O 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).

I accept at the time of the advice, the BSPS2 hadn't been established. Although I think the communications sent out by the scheme trustees were very optimistic that the scheme operating conditions would be met, it wasn't certain. And if Mr O had opted into the BSPS2 and it hadn't gone ahead, he would've moved with the scheme to the PPF. At age 65 Mr O would've been entitled to a pension of £6,411.98 per year (along with a PCLS of £42,746.57) from the PPF. This was probably lower than the pension he'd be entitled to under the BSPS2, but I don't think it would've been substantially lower such that it should've made a difference to the recommendation. As I've said above, Mr O 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, I still think Mr O could've most likely met his needs in retirement even if the BSPS2 hadn't gone ahead and he'd had to move with it to the PPF.

Furthermore, the fact-find noted that Mr O already had savings of £40,000 and that after all his monthly expenditure he was left with significant surplus income. It is reasonable to assume that Mr O's disposable income could be put towards building his savings pot further. And his mortgage was due to be paid off by the time Mr O was aged 51 meaning he would have even more disposable income to put towards his savings thereafter. So potentially, by the time he wanted to retire, Mr O could have had a substantial savings pot to access flexibly to top up his retirement income.

AMG says Mr O wanted a retirement income of £600 per month– that was in today's terms however, meaning that in reality his income at retirement would need to be higher. However, this was some 20 years away, so I think it was too soon for Mr O to realistically know what income he'd need in retirement. AMG says that the value of the DB scheme income at age 65 would be around £10,089 per year. This is more than the income Mr O said he would need (albeit in today's terms) so I don't think this shows that it was in Mr O's best interests to transfer to a personal pension.

As I've set out above, Mr O was unlikely to obtain benefits of the same value at retirement if he transferred his funds to a personal pension. So he would have had even less income than was forecast. But I still think Mr O had a better chance of achieving his target retirement income of £600 per month by opting into the BSPS2 (the benefits under which were guaranteed and escalated) rather than relying on investment growth in a personal pension for all of his retirement funds. The majority of the pension provisions Mr O was building up over the next 20 years would be subject to investment risk, so I don't think it was reasonable to also place his guaranteed pension funds at risk.

And I can't see that there was any known need for the TFC without having to simultaneously draw an income (Mr O's mortgage would be repaid some years before retirement). But if, by the time Mr O retired some 20+ years hence, he needed a lump sum without wanting to start drawing his pension at the same time there were, as I've previously explained, other means available to him. And I think Mr O could've met his income needs until his state pension became payable at age 67. Mr O would have likely had a significant pension to draw on flexibly (from his DC scheme), as and when he needed, to top up his income or take additional lump sums. So, I don't think Mr O would have had to sacrifice flexibility in retirement by opting into the BSPS2.

Furthermore, Mr O was only aged 41 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr O had 13 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 O to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr O later had reason to transfer out of their DB scheme he could have done so closer to retirement.

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

In Mr O's circumstances as they were at the time it is arguable that the death benefits offered under a personal pension were more favourable than those under his DB scheme. He was unmarried, with one young dependent son, but there may not have been a large sum left, or the fund may have been depleted, if he lived a long life. Under the DB scheme there was also provision for a children's pension up to age 23 if they remained in full-time education. I don't think AMG made the value of this benefit clear enough to Mr O. This was guaranteed and escalated so it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, AMG should not have encouraged Mr O to prioritise the potential for higher death benefits through a personal pension over his own security in retirement.

Furthermore, if Mr O genuinely wanted to leave a legacy for his child, which didn't depend on investment returns or how much of his pension fund remained on his death, I think AMG should've instead explored life insurance. Mr O was relatively young with a large disposable income so it may well have been something he would have considered and been able to afford. I think it is an option that AMG should have explored regardless. Significantly I can't see that there was any documented discussion about the fact that Mr O was now a member of his employer's defined contribution scheme which had the potential to grow depending on when Mr D retired.

And it's evident that Mr O could nominate beneficiaries of his choosing under the DC scheme. So, he'd already made provisions to ensure that the vast majority of his pension didn't die with him.

In any event, whilst death benefits might be important for consumer, there generally shouldn't be a disproportionate emphasis on this compared to their own retirement needs. 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 O. 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 O, 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 O 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 AMG's obligation to give Mr O an objective picture and recommend what was in his best interests.

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going ahead. So, the advice AMG gave Mr O should've properly and fully taken the benefits available to him through the BSPS2 into account and I think this should've alleviated Mr O'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 AMG should've reassured Mr O that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr O through the PPF would've still provided him with a significant amount 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 AMG recommending Mr O transfer out of the DB scheme altogether.

I also think Mr O's desire for control over his pension benefits was overstated. Mr O 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 their own. So, I don't think that this was a genuine objective for Mr O – it was simply a consequence of transferring away from his DB scheme.

It seems to me that Mr O'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 it ought to have been explained that Mr O's employer and the trustees of the BSPS2 were not one and the same. And in any event, Mr O 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 AMG explained that Mr O's belief regarding the control Mr O's employer had over his pension was misplaced, I think he would have been reassured by this.

Summary

It's clear that Mr O, 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 O was also leaning towards the decision to transfer because of the concerns he had about his employer and his negative perception of the PPF and his employer. However, it was AMG's obligation to give Mr O an objective picture and recommend what was in his best interests.

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going ahead. So, the advice should've properly taken the benefits available to Mr O through the BSPS2 into account and I think this should've alleviated Mr O's concerns about the scheme moving to the PPF.

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

Ultimately, I don't think the advice given to was Mr O suitable or in his best interests. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr O 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 O had a vague objective to retire at age 60 and take some TFC but I don't think this was a fully formed plan; it was some 20 years away. And I don't think AMG interrogated this objective in any meaningful way – it didn't establish how much TFC or income Mr O would need, so it couldn't offer any real insight into whether Mr O could've met this objective by moving with the scheme to the PPF or the new BSPS2, by using the savings already available to him or by using his DC scheme flexibly. So, I don't think Mr O's plans or ambitions were concrete enough for AMG 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 O 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 O. 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 O was being advised by AMG 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 O likely would have done – had he been suitably advised by AMG – and on balance I think he would have opted to join the BSPS2. I say this because I don't think Mr O'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 O 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 AMG should've advised Mr O to opt into the BSPS2.

Of course, I have to consider whether Mr O would've gone ahead anyway, against AMG's advice. AMG says Mr O's needs and objectives were only met by transferring to the personal pension and considering he was fully aware of the benefits he was sacrificing, and bearing in mind the objectives he was keen to achieve, it says he would have continued with the transfer regardless. Put simply, AMG says that Mr O was as good as an 'insistent client' who would've chosen to transfer even if it had advised him against it.

I'm not persuaded that Mr O'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 AMG had explained that Mr O was always unlikely to exceed the guaranteed benefits available to him by transferring, that he shouldn't be prioritising death benefits over retirement benefits, that the flexibility he sought could be met by other means, that the uncertainty over his requirements meant transferring at that time was not in 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 O would have insisted on transferring out of the DB scheme.

For the reasons I've set out above I don't think that AMG provided Mr O with all the necessary information he needed to make a fully informed decision. And by not fully advising Mr O – 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 AMG did take reasonable steps, or exercise reasonable skill and care, to ensure the transfer was suitable.

For this reason, I think AMG should compensate Mr O 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 O is a very long way from retirement and has no firmly formed plans around when he will retire.

I agree with our Investigator that Mr O will have been caused some distress and inconvenience by AMG's unsuitable advice so I think that AMG 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 has 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 O whether he preferred any redress to be calculated now in line with current guidance or wait for any new guidance /rules to come into effect. He didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for any new 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 O.

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

AMG 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 O 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 O's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr O'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 O 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 O within 90 days of the date AMG 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 AMG to pay Mr O.

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 AMG to carry out a calculation in line with the updated rules and/or guidance in any event.

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.

AMG should also pay Mr O compensation of £300 for the distress and inconvenience its unsuitable advice caused him.

My final decision

Determination and money award: I uphold this complaint and require AMG Wealth Solutions LLP to pay Mr O 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 AMG Wealth Solutions LLP to pay Mr O any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I would only require AMG Wealth Solutions LLP to pay Mr O any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that AMG Wealth Solutions LLP pays Mr O the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr O.

If Mr O accepts this decision, the money award becomes binding on AMG Wealth Solutions LLP.

My recommendation would not be binding. Further, it's unlikely that Mr O can accept my decision and go to court to ask for the balance. Mr O 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 O to accept or reject my decision before 11 January 2023.

Claire Woollerson
Ombudsman