DRN-3504929

The complaint

Mr J complains about the advice given by Better Retirement Group Ltd (BRG) trading as FIDUCIA PROSPERITY to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr J was introduced to BRG in 2018 through another advisory firm which provided information on Mr J, to discuss his pension and retirement needs.

BRG completed a fact-find to gather information about Mr J's circumstances and objectives. BRG also carried out an assessment of Mr J's attitude to risk, which it deemed to be 'low/medium'.

On 4 December 2018, BRG issued a suitability report in which it advised Mr J to transfer his pension benefits into a SIPP and invest the proceeds through a Discretionary Fund Manager (DFM).

The suitability report said the reasons for this recommendation were;

- Mr J had concerns about his future health and wanted to ensure that in the event of his death, his wife would have sufficient income.
- Mr J wanted financial stability, and a possible holiday. He also wanted flexibility and control over the amount of income he wanted to take and when.
- Mr J had sufficient alternative income from elsewhere to provide his financial needs throughout retirement.
- If his wife was to pre-decease him, he wanted to leave the death benefits to his step-granddaughter.

Mr J complained in 2021 to BRG about the suitability of the transfer advice because;

- The financial jargon used when the advice was hard for him to understand.
- BRG assessed Mr J attitude to risk as 'low/medium' but he was a cautious investor.
- He had suffered a financial loss as a consequence of the transfer.

BRG didn't uphold MR J's complaint. It said;

- Mr J and his wife both smoked and had medical conditions which reduced their life expectancy.
- Mr J's wife was 17 years older than him, so she was likely to predecease him. As such, the likelihood of Mr J's wife benefitting from the death benefits of the DB scheme were small.
- The value of the guaranteed lifetime income wasn't essential as Mr J's state pension would cover their living costs. Therefore, flexibility and potential to leave his pension to his grandchild were not objectives that could be met within the DB scheme.

Mr J referred his complaint to our service. An investigator upheld the complaint and required BRG to pay compensation.

They said, in summary, that the advice given by BRG wasn't suitable for Mr J, and the reasons BRG provided for going ahead with the transfer didn't outweigh the risks associated with doing so when the DB scheme provided valuable benefits with virtually no risk involved.

The investigator communicated this to BRG in May 2022, around six weeks ago, but BRG hasn't responded, despite the investigator chasing the matter.

So, to ensure a timely resolution, the complaint has been passed to me to make 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, 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 its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, BRG should have only considered a transfer if it could clearly demonstrate that the transfer was in MR J's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

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.

Mr J told BRG that he wanted to retire at age 65. However, under his DB scheme, his normal retirement age was 60.

BRG calculated a transfer value comparator (TVC) of £260,607, as was required by the regulator on transfers after 1 October 2018. The TVC is a measure of the funds that would need to be invested at the time of transfer on a so-called 'risk-free' basis (government bonds), to provide the same income as the DB scheme at normal retirement age. This can be compared with the actual transfer value quoted by the scheme of £118,756.02. The difference between the two, over £141,000, represents the amount of additional growth Mr J would have needed to achieve by taking on investment risk if intending to draw benefits at the scheme's normal retirement age.

BRG also calculated the critical yield required to match Mr J’s benefits at age 60, which was 32% if he took a full pension. This was the growth rate Mr J’s funds would need to achieve in order to purchase an annuity providing the same benefits as his DB scheme.

The relevant 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 2.2% per year for 3 years to retirement. 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 J’s ‘low/medium’ attitude to risk and also the term to retirement. There would be little point in Mr J 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 critical yield was 32%, and Mr J needed his funds to grow by over £141,000 just to match his benefits, I think Mr J 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. And given it was noted in the fact-find that Mr J’s number one priority was to increase his pension, I think BRG ought to have known that transferring out of the DB scheme wasn’t the way to achieve this.

BRG has said that the critical yield isn’t particularly relevant because Mr J didn’t intend to take an annuity. It provided several cashflow models which it says shows Mr J would’ve been able to meet his objectives if he transferred out of the DB scheme. I’ve considered these, but BRG’s models show that if Mr J took the same level of income he was entitled to through his DB scheme and a low level of growth was achieved, his funds would be depleted by age 77. And if growth of 5% was achieved the fund would be depleted by age 85.

Another cashflow model showed the impact of Mr J not drawing any funds from the pension, instead, relying purely on his and his wife’s state pension. Clearly, this would leave Mr J with a significant fund to draw on or pass to his family on his death. However, given Mr J’s objective was to increase his pension, I don’t think that demonstrating Mr J could make his funds last if he took little or no income supports that transferring out of the DB scheme would enable Mr J to meet his objectives.

For this reason alone a transfer out of the DB scheme wasn’t in Mr J’s best interests. Of course financial viability isn’t the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I’ve considered these below.

Flexibility and income needs

BRG says that Mr J required around £1,000 per month in retirement. It said he had sufficient additional pension funds and savings, as well as his and his wife’s state pension, that he could rely on. So, in effect, it says he could afford to take a risk with this pension and transferring out of the DB scheme would give him the flexibility to take variable income and the maximum tax-free cash (‘TFC’) if he needed it.

But I don’t think Mr J actually required flexibility in retirement. Based on the evidence I’ve seen, I don’t think he had any need to access his TFC earlier than the normal scheme retirement age and leave his funds invested until a later date. I say this because BRG has provided no reasons for him wanting to do so – in fact, the information it gathered noted Mr J did not have any need to take TFC, though he thought it was a good idea to have the option.

A desire to have the potential for flexibility is not, in my view, a reason to give up a guaranteed increasing income in retirement. And if Mr J required flexibility, then I think BRG ought to have noted he already had this through his other pensions (defined-contribution schemes) and significant savings of over £50,000. Mr J could've used these funds to drawdown as and when he needed.

I also can't see evidence that Mr J had a strong need for variable income throughout his retirement. Although BRG has said that Mr J wanted to increase, decrease start and stop his income in retirement, and didn't want the set income for life provided by the existing DB scheme, it hasn't provided any reasons as to why this would be the case.

I appreciate that Mr J's income requirements in retirement could largely be met by his and his wife's state pension. However, I don't think that meant Mr J should've been advised to give up another guaranteed source of income just to have flexibility that he already had, and didn't actually need.

Death benefits

In the suitably report provided by BRG, it says that flexible death benefits was a specific objective for Mr J – as he wanted to be able to leave his benefits to his step-granddaughter should his wife, who was older than him, pre-decease him. It says it was of high importance to him to specify whom his death benefits should go to.

However, it also says that Mr J was worried about his own health and wanted to make sure that his wife would have sufficient income on his death.

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

Mr J's DB scheme provided a 50% spouses pension so his wife would've received a guaranteed income for the rest of her life should Mr J have passed away before her. I don't think BRG made the value of this benefit clear enough to Mr J. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, there may not have been a large sum left/the fund may have been depleted particularly if Mr J lived a long life. In any event, BRG should not have encouraged Mr J to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

If Mr J genuinely wanted to leave a legacy for his step-granddaughter, which didn't depend on investment returns or how much of his pension fund remained on his death, he had a separate defined contribution pension and a personal pension which he could have nominated her as the beneficiary of (instead of his wife). But I can't see that BRG discussed these options with him.
I can see that BRG also explored the whole of life insurance, but this was discounted due to cost. Given that Mr J had suffered with poor health in the past, I accept that life insurance was likely to be an expensive way of providing death benefits to his family (if indeed an insurer was prepared to provide him with cover at all). But as I've said above, I think Mr J had other assets that he could've left for his family in the event of his premature death.

I acknowledge that Mr J had appears to have had concerns about his life expectancy, and he had a medical condition. So, BRG argues that Mr J might not benefit from his DB scheme for a long time. But Mr J not reaching his life expectancy was only a possibility and it was also possible that he would exceed this, in which case Mr J would need his pension to last longer. If Mr J transferred out of the DB scheme he would be relying on investment returns to ensure sufficient capital remained in the personal pension to provide the death benefits, whereas the spouse's pension was guaranteed and escalated.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr J. And I don't think that Mr J's alternative assets were properly explored as an alternative.

Use of DFM

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

Ultimately, I don't think the advice given to Mr J was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr J 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 J shouldn't have been advised to transfer out of the scheme just in case he or his wife may have passed away earlier than expected, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So, I think BRG should've advised Mr J to remain in his DB scheme.

Of course, I have to consider whether Mr J would've gone ahead anyway, against BRG's advice, but BRG hasn't provided any compelling reasons as to why he would've done so.

Therefore I'm not persuaded that Mr J would've insisted on transferring out of the DB scheme, against BRG's advice. I say this because Mr J was an inexperienced investor with a low/medium attitude to risk and this pension was a significant part of Mr J's retirement provision. So, if BRG 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 J's concerns about his health were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he was paying for, didn't think it was suitable for him or in his best interests. If BRG had explained that Mr J 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 J would have insisted on transferring out of the DB scheme.

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

DFM's responsibility for loss

BRG recommended that Mr J use a DFM. I'm upholding this complaint on the basis the recommendation to transfer out of the DB scheme was unsuitable. So, I don't need to consider the suitability of the investment recommendation because Mr J should've been advised to remain in the DB scheme - the investment only exists because of BRG's unsuitable recommendation.

I recognise BRG may feel the DFM's actions may have also separately caused some of Mr J's loss. With this in mind, I've considered whether I should only hold BRG partly responsible for compensating Mr J for his loss. In the circumstances, though, I think it fair to make an award for the whole loss against BRG. As I've said, the DFM arrangement only exists because of BRG's unsuitable advice. BRG also continued to provide an ongoing advice service to Mr J which it received a fee for, but I haven't seen any evidence to demonstrate that it monitored the investment strategy to ensure it remained suitable for Mr J. So, anything that the DFM might also have done wrong doesn't make it reasonable in the circumstances of this case for BRG to avoid compensating for the losses they may have gone on to cause.

I'm aware Mr J may be able to take his claims about the DFM to the Financial Services Compensation Scheme ('FSCS').

As a scheme of last resort, it's possible the FSCS won't pay out if a third party could also be held liable. This means requiring BRG to pay only part of the losses could risk leaving Mr J out of pocket. But I think it's important to point out that I'm not saying BRG is wholly responsible for the losses simply because the DFM is in administration. My starting point as to causation is that BRG gave unsuitable advice and it is responsible for the losses Mr J suffered in transferring his existing pension to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position.

With this in mind – and recognising also that Mr J wouldn't have lost out at all but for BRG's failings and that BRG benefitted financially from advising on this transaction – I think holding BRG responsible for the whole of the loss represents fair compensation in this case.

Putting things right

A fair and reasonable outcome would be for the business to put Mr J, as far as possible, into the position he would now be in but for BRG's unsuitable advice. I consider Mr J would have most likely remained in his DB scheme if suitable advice had been given.

BRG 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.

For clarity, Mr J has not yet retired, and he has no plans to do so at present. So, compensation should be based on him taking benefits at age 60, which is the earliest he could've taken his benefits without reduction.

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 J's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr J'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 J as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr J within 90 days of the date BRG receives notification of her 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 BRG to pay Mr J.

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.

My aim is to return Mr J to the position he would've been in but for the actions of BRG. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

To calculate the compensation, BRG should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If BRG is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything BRG has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, BRG may ask Mr J to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. BRG will need to meet any costs in drawing up the undertaking. If BRG asks Mr J to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mr J wish to move his investment portfolio) and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by BRG taking over the investment, or this is something that Mr J can discuss with his SIPP provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that BRG pay Mr J an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr J the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr J any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Better Retirement Group Ltd trading as FIDUCIA PROSPERITY to pay Mr J any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Better Retirement Group Ltd trading as FIDUCIA PROSPERITY pays Mr J the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr J.

If Mr J accepts this decision, the money award becomes binding on Better Retirement Group Ltd trading as FIDUCIA PROSPERITY.

My recommendation would not be binding. Further, it's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J 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 J to accept or reject my decision before 29 July 2022.

Claire Pugh
Ombudsman