DRN-3563885

The complaint

Mr K complains about the advice given by Dobson & Hodge Limited ('D&H') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

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.

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 K's employer would be set up – the BSPS2.

Mr K approached D&H in September 2017 to discuss his pension and retirement needs. He was thinking about retiring in the not-too-distant future and he wanted advice on how best to do this. He was also concerned about the future of the DB scheme.

D&H completed a fact-find to gather information about Mr K's circumstances and objectives. This showed that he was 54, married and employed earning around £43,000 per year. Mr and Mrs K owned their own home which was subject to a mortgage. They held around £3,000 in cash savings.

D&H also carried out an assessment of Mr K's attitude to risk, which it said was 'three to four out of ten' or 'cautious to moderate'.

In respect of Mr K's pension arrangements, he had received a number of cash equivalent transfer values ('CETV') over time from the BSPS, the latest one being in October 2017. This showed that he had around 36 and a half years' service. He was entitled to a pension of about £26,000 at the date of leaving the scheme. The CETV was about £636,650. Mr K had also joined his employers new defined contribution ('DC') scheme. The fact find noted that he and his employer were contributing a total of 12% of his salary into this.

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

But on 11 October 2017, D&H advised Mr K to transfer his pension benefits into a self-invested personal pension and invest the proceeds in a range of funds that met his attitude to risk. The suitability report said the reasons for this recommendation were that Mr K was indenting to retire early, either at his age 55, or not very much later. Because of this he wanted greater flexibility about how he could withdraw his pension benefits, for example he could take a higher amount earlier on and a lower amount when his state pension became payable. And he wanted access to the tax-free cash so he could repay his mortgage and spend some money on home improvements, a car purchase and set up an emergency fund.

Mr K fully retired at age 57 in 2019. He had used cash lump sums from his pension to repay his mortgage and so on as above. And he started to take a regular income of £1,800 a month from April that year.

Mr K complained in 2021 to D&H about the suitability of the transfer advice. He had received a letter from the industry regulator, the Financial Conduct Authority ('FCA') that said that the advice he was given to transfer may not have been right for him. He thought this may be the case for him.

D&H didn't uphold Mr K's complaint. It said that the transfer of his scheme to a drawdown arrangement met his needs at the time. It felt that the advice was appropriate for Mr K.

Mr K referred his complaint to the Financial Ombudsman Service. An Investigator upheld the complaint and recommended that D&H pay compensation. He thought the transfer was poor value for money and Mr K could have met his needs by remaining the DB scheme, even if it moved to the PPF. He thought that Mr K should receive compensation of £300 for the distress the poor advice caused him.

D&H disagreed, saying as Mr K wanted to retire early the transfer was in his best interests. The DB scheme wouldn't have met his needs for income and tax-free cash at the age he wanted to retire.

There was some further correspondence about Mr K's circumstances in which it was established that Mr K had retired at his age 57. Our Investigator considered this and informed both parties that that whilst his opinion about suitability of the DB transfer was unchanged, he thought that the compensation should be calculated assuming that Mr K had retired at age 57. And that the most suitable advice would have been for him to move to the PPF, as this provided the greatest benefits where early retirement was being considered, this clearly was the case here.

Moving forward, in 2022, D&H performed a loss assessment that showed that Mr K hadn't suffered a loss. D&H provided details about this, but our Investigator wasn't fully persuaded that it was performed correctly. In particular it used a retirement age of 65, rather than 57 and I understand that it used the BSPS2 as a comparator rather than the PPF. So, they thought the loss assessment may not be entirely correct.

The Investigator wasn't persuaded to change their opinion. And D&H doesn't really agree that the complaint should be upheld. So, both parties were informed that an ombudsman would consider the complaint in due course.

After this the FCA has developed, and now provides access to, a BSPS-specific redress calculator. Both parties to the complaint have been informed that I'm likely to award compensation based on this. As far as I can see D&H hasn't performed a revised loss assessment using this calculator.

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 D&H'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 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, D&H should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr K's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

- D&H was required to carry out a transfer value analysis ('TVAS') report by the regulator. This calculated the critical yield which was how much Mr K's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme. It showed this was 9.42% to match the full pension he'd have been entitled to under the scheme at age 65. The TVAS didn't show the critical yields to age 55 as this was too close to Mr K's age, and so the report said they were likely to be above 50%. And calculations weren't shown for his age 57 either. These were also likely to be much higher than the calculated yield at Mr K's age 65.

- To match the full pension the PPF would've paid from 65 the critical yield was 4.71% and to match the tax-free cash and reduced pension the PPF would've offered, it was 4.07%. Again, earlier retirement amounts weren't calculated.

- Despite the fact it was known by the point D&H instructed the TVAS that continuing in the BSPS in its existing form wasn't an option for Mr K, the analysis was based on the BSPS benefits. And D&H didn't undertake any analysis of the benefits he'd have been due under the BSPS2, even though details were available. I think it should've done. In any event, given what we know about the BSPS2, I think the critical yields to match the benefits the BSPS2 would've provided from age 65 were likely to be between those of the BSPS and the PPF.

- The discount rate, which represents a reasonable assumption about future growth, was 4.1% to his age 65. It was also 3.1% to his age 57, and 2.1% to his age 55. Given this, and Mr K's recorded attitude to risk, and the regulator's low and middle projection rates of 2% and 5%, I think Mr K was always likely to receive pension benefits, from age 65, of a lower value that those he'd have been entitled to under the BSPS2 or the PPF. I can accept that if Mr K moved to the PPF and took the maximum amount of tax-free cash then the DB transfer may have provided similar benefits. But this isn't enough to justify the transfer as Mr K would be taking on the risk of the personal pension providing lower benefits when he didn't need to do. And I think he was even more likely to receive lower benefits than either the BSPS2 or the PPF offered if he retired early.

- And this was recognised at the time of sale when the suitability report said that *'I would suggest that our recommended portfolio is unlikely to achieve the Critical Yield and therefore, on that basis, you are likely to receive less income from a private pension than you would otherwise receive from the BSPS.'* And gave warnings that he may not be able to secure the same, or same type of income, as the DB scheme would have provided.

- D&H has said that Mr K wanted to access tax-free cash from his pension at between his ages 55 and 57. It's fair to say the advice was based on this and was precipitated by Mr K's realising that the transfer value was significant and had recently increased. The adviser stated that Mr K had previously considered retiring at 57, but following an increased transfer value for his occupational pension scheme benefits, he was now thinking about retiring at 55.

- But it wasn't D&H's role just to put in place what Mr K might've thought he wanted. Its role was to advise him on what was in his best interests. And even if Mr K indicated this was something he was considering, I don't think this meant a transfer was in his best interests.

- It was recorded that Mr and Mrs K were paying a significant amount to repay some debts they had. Their mortgage repayment was £1,000 a month and they were also making payments of £1,300 a month to a debt management plan. So, they felt they were living off an effective income of £22,000 a year – once these debts were accounted for. And so, they felt that if their debts were repaid this amount would be enough for them. Although they did feel they could get by with less and they wanted between £1,000 and £1,800 a month. And I note that Mr K went on to start withdrawals of £1,800 a month at his age 57.

- Mr K was giving up a guaranteed and increasing income to withdraw the sums he wanted and make the transfer. And there was a significant risk that he would have lower retirement benefits because of this. So, it wouldn't be in his best interests if he could have met his aims through the DB scheme.

- Looking at Mr K's age 65. It's not clear if a full analysis was done in respect of the DB benefits Mr K could take at this age. For example, there is no split of income and tax-free cash in the TVAS. The TVAS does show that Mr K would receive an annual pension of £33,599 from the BSPS. But it's a reasonable assumption, from what I know about the BSPS2 scheme, that even if Mr K took the maximum amount of tax-free cash, which likely would be over £100,000, then the income he would receive would be over £22,000. And Mr and Mrs K would be in receipt of their state pensions a few years after this. And it seems likely that his debts would be much reduced at 65 in any event. So, I don't think there is much doubt that the DB scheme would provide the cash and income that Mr and Mrs K wanted at Mr K's age 65.

- I've also looked to see if Mr K could have met his aims from the DB scheme if he retired early. I think it's fair whilst there was a detailed analysis about the cashflow situation from the personal pension I don't think the analysis about what Mr K could receive from the DB scheme was similarly robust. There was no information about what he could receive from the BSPS2 or the PPF at his age 57 which was important here as this was one of his likely retirement ages. The comparisons at his age 55 don't show how much tax-free cash he could take and how this would reduce the income payable from the BSPS, although they did from the PPF. The advice was based on Mr K retiring early but it concentrated on how the transfer could facilitate this, rather than how the DB scheme could. And I think this was a significant failing.

- The TVAS shows that if Mr K moved to the PPF he could receive a lump sum of £108,510 and an annual pension of £16,340 at 55. This is more than the minimum he said he needed. And there is an early retirement quote that was produced in July 2017 (I'm assuming this would be from his age 55) that shows that Mr K could receive an annual pension of about £18,300 or a pension of about £13,000 and a tax-free lump sum of £86,500. Again, this is more than the minimum he wanted.

- So, I think it's reasonable to say that Mr K could have met his aims if he took early retirement from the DB scheme. Particularly if he was able to wait until age 57. When the amounts he could receive were higher and his debts would be lower.

- I accept that the income he could receive from the scheme at an earlier time may be less than he ideally wanted, that is closer to his minimum of £12,000 a year rather than his target of £22,000, but it still met his aims. Mr K should have been given enough information to allow him to decide how he wanted to proceed given this, and I don't think he was.

- Whilst Mr K's aim for repaying his debt was clearly important to him. I don't think that D&H should have advised him to alter his retirement provisions, at a significant potential overall cost, without fully exploring any alternatives he could have used to meet these aims. I don't think it did this here.

- Overall, the pensions under the BSPS2 or PPF were guaranteed. And appear to have been an appropriate way to meet Mr K's income needs in retirement – which is the primary purpose of a pension. I don't think transferring to obtain flexibility in this way was in his best interests.

- D&H said Mr K was interested in the improved death benefits a transfer offered to his family by way of alternative death benefits. And Mr K says that he was told the fund value could be lost if he died before the pension became payable, which he didn't want.

- But the priority here was to advise Mr K about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension, that could've been valuable to his wife in the event of his death.

- While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would've also been reduced by any income Mr K drew in his lifetime. And so may not have provided a legacy if this is what Mr K wanted.

- And if Mr K had wanted to leave a legacy for his family, D&H could've explored life insurance as an alternative. And this could've been considered on a whole of life or term assurance basis – which was likely to be cheaper. But there's little evidence D&H did so.

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

- I think any desire for control Mr K may have had about how his pension was invested was overstated. I can't see that he had interest in or the knowledge to be able to manage his pension funds on his own. And the recommendation seems to have been given on the basis he'd receive, and pay for, ongoing support with his pension, which he did make use of. So, I don't think that this was a genuine objective for Mr K – it was simply a consequence of transferring away from his DB scheme.

- Mr K may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was D&H's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BSPS2 being established. But even if not, the PPF provided Mr K with guaranteed income and the option of accessing tax-free cash. Mr K was unlikely to improve on these benefits by transferring, particularly if he retired very early as he did intend to. I think that in this situation the PPF was likely to provide the highest guaranteed benefits. I don't think any concerns he held about this meant that transferring was in his best interests.

Overall, I can't see persuasive reasons why it was clearly in Mr K's best interests to give up his DB benefits and transfer them to a personal pension. And I also haven't seen anything to persuade me that Mr K would've insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think the advice Mr K received from D&H was unsuitable for him.

Our Investigator recommended that D&H also pay Mr K £300 for the distress caused by the unsuitable advice. Mr K said that finding out that he may be worse off in retirement has caused him stress and anxiety. I don't doubt that Mr K has been caused concern in relation to his retirement planning, in what was already a difficult time for employees of the company he worked for. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr K, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr K would most likely have remained in the occupational pension scheme and moved with it to the PPF, if suitable advice had been given.

D&H 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.

D&H should use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr K and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what D&H based the inputs into the calculator on.

For clarity, Mr K had concrete plans to retire at between the ages 55 and 57 and he did retire at age 57. So, compensation should be based on him taking benefits at age 57.

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 K's acceptance of my final decision.

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

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

Redress paid to Mr K as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, D&H may make a notional deduction to cash lump sum payments to take account of tax that Mr K 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 K'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.

D&H should also pay Mr K £300 for the distress and inconvenience the poor advice caused him.

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

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Dobson & Hodge Limited to pay Mr K 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 Dobson & Hodge Limited pays Mr K the balance.

If Mr K accepts this decision, the money award becomes binding on Dobson & Hodge Limited.

My recommendation would not be binding. Further, it's unlikely that Mr K can accept my decision and go to court to ask for the balance. Mr K 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 K to accept or reject my decision before 20 December 2023.

Andy Burlinson
Ombudsman