DRN-3580622

The complaint

Mr P complains about the advice given by True Potential Wealth Management LLP (TP) to transfer the benefits from his defined benefit (DB) scheme with British Steel (BSPS) to a personal pension. He feels he has lost out as a result.

What happened

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the BSPS 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 Pension Protection Fund (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 P's employer would be set up – the BSPS2.

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

Mr P contacted another adviser in 2017 for advice on his pension. As they couldn't provide DB transfer advice they introduced him to TP.

Mr P completed a fact find and an attitude to risk questionnaire. The following was recorded for Mr P.

He was 35, in good health and married with a small child. He had an annual salary of £24,500 plus an additional and his wife earned £20,600 per year. Their combined net income was £3,370 per month and their typical expenditure was around £1,350 per month.

Mr and Mrs P owned a house valued at around £280,000 with an outstanding repayment mortgage of £178,000. They had savings of £1,700 which they said would increase when home improvements had finished. They had outstanding loans of £8,000 which were expected to be paid off with a recent inheritance of £15,000. They also had joint level term life cover to pay off the mortgage if one of them died.

In addition to his BSPS pension with pensionable service of 13 years and seven months and a transfer value of around £208,000, Mr P had his employer's newly established defined contribution (DC) pension which was valued at £3,671.33 and was receiving combined employee and employer contributions of 16% per year. His wife had her own DB pension with 11 years of service which was estimated to give her £4,000 per year from age 60. Both expected to receive full state pension at age 68 of £8,230 per year.

It was recorded both Mr and Mrs P planned to retire at age 60. Mrs P was three year younger than her husband. And their expenditure was expected to be £15,000 per year. If Mr P predeceased his wife, she would need £7,000 per year pre-retirement and £12,000 post-retirement to cover her outgoings.

Mr P's attitude to risk was recorded as him being a capital growth investor. This was described as:

The Capital Growth investor may be willing to accept high risk and chance of loss in order to achieve higher returns on his or her investment. Significant losses over an extended period may prompt the Capital Growth Investor to shift to a less risky investment.

With regard to his capacity for loss the suitability report Mr P confirmed that *'any loss of capital would not impact on your standard of living and/or your objectives. Your income shortfall could be met by your [DC] pension based on your expected contributions, and/or any savings/investments you accrue over the next 25 years to your retirement.'*

Mr P's objectives in the suitability report on 27 November 2017 were recorded as:

'*You would like to have the flexibility to access your pension when you wish rather than being dictated to by a fixed scheme income and be able to retire prior to the British Steel Pension Scheme retirement age without penalty. You also want to ensure that your wife and son can receive the maximum possible benefit from your pension in the future.*'

The reasons for recommending the transfer rather than opting for the PPF or BSPS2 were essentially that the DB options didn't provide enough flexibility, the critical yields were achievable and Mr P could possibly outperform the DB scheme if he transferred now. TP also said death benefits were more attractive and the transfer value had been enhanced and was likely higher than it would be if he ever wanted to transfer from BSPS2 in future.

Mr P, through his representative, complained in 2019 about the suitability of the transfer advice. After TP rejected his complaint, Mr P referred his complaint to this service.

An investigator thought the advice TP had given Mr P was unsuitable and asked them to compensate Mr P for the losses he incurred by transferring his DB pension.

TP disagreed so the complaint was passed 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.

The starting assumption when advising on a transfer from a DB scheme is that it is unsuitable. TP should have only considered a transfer to be suitable if they could clearly demonstrate, on contemporaneous evidence, that the transfer was in Mr P's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied this is the case here. I'll explain why.

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, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

TP prepared a transfer analysis which showed that the average investment return required in the new pension to match the BSPS2 benefits at age 65 (critical yield) was quoted as 4.32% per year if Mr P's benefits in retirement were taken as a lump sum plus a reduced Pension and 4.62% if he took benefits at age 60. The critical yields to match the benefits available in the PPF at age 65 and 60 taken in the same form were 4.27% and 4.77% respectively.

The closest discount rate to this time which I'm able to refer to was published by the Financial Ombudsman Service for the period before 1 October 2017. It was 4.6% per year for 25 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.

The investigator pointed out that the transfer analysis didn't take into account ongoing adviser charges. TP knew ongoing advice would be provided by the introducer firm at 0.5% so these critical yields would have been at least 0.5% higher than stated. However, even if I consider higher critical yields at age 60 of 5.12% in BSPS2 or 5.27% in the PPF, I think there was a reasonable chance they were achievable, given Mr P wanted to take a bit more risk with his investments.

I appreciate there have been discussions about whether Mr P's attitude to risk was properly established. Based on Mr P's answers in the risk questionnaire he was given he likely was prepared to take some investment risk. And as he was still so many years from retirement I think he had some capacity for loss.

When he did another risk assessment with the introducer firm a year later his answers in the risk questionnaire suggested he was a high risk investor, however after further discussions with the adviser it became clear Mr P didn't really answer the questions with his pension in mind. When further discussed, a balanced investment approach was agreed as Mr P realised that large capital losses would seriously impact his financial security.

Overall, I'm satisfied Mr P likely had at least a balanced attitude to investment risk, possibly slightly above. I'm not sure whether it was much more than this. Looking at TP's questionnaire, he said he was prepared to accept moderate risks and it was clear that he wouldn't be overly concerned with fluctuations in his investments. However when he was asked to choose certain portfolios which showed different gains and losses, he picked the ones in the middle.

I also note that the questionnaire was very much geared towards investment risk up to retirement. The questions related to how Mr P would feel about fluctuations 'in the next two years' or 'assuming you still have ten years until you make withdrawals'. So I can't see that his attitude to transfer risk -which is different to attitude to investment risk- was established. For example how he would feel if benefits in retirement suddenly reduced or that he needed to manage his investments (or pay for this service), compared to guaranteed benefits.

Taking this aside for the moment, I think it was possible for Mr P to match his DB benefits outside the scheme. But there was still a risk he wouldn't, particularly if he changed his risk appetite over the many years to retirement. And I think the chances he could significantly improve on his benefits were a lot less likely.

As TP has stressed in many complaints and I agree, matching the critical yield isn't the only consideration when considering whether a transfer is in a consumer's best interest.

So I've considered Mr P's circumstances and recorded objectives to see whether a transfer was in his best interest. However, I'm not persuaded it was. I'll explain why.

Early retirement and flexibility

I don't doubt that Mr P found the thought of retiring early attractive and so I think TP was right to consider how and if this was possible. I also appreciate that being so far away from retirement age Mr P likely wanted to keep the option open to take flexible benefits in retirement.

However, Mr P had another pension with generous employer contributions and at least 25 years to build up further pension provisions. He could have accessed this pension (or other future ones) flexibly when he chose to retire. And he also could have taken early retirement from BSPS2. So in fact keeping the DB benefits would have given him a risk-free guaranteed income and he could still have flexible benefits through his other pension provision. Based on what I've seen his and his wife's expected income requirements in retirement could have also been met if he chose BSPS2 or the PPF. He didn't need, in my view, to transfer his DB benefits for flexibility when he could have achieved this through his other pensions.

TP say Mr P didn't need a fixed guaranteed income. However, in my view most people value the security and peace of mind of a guaranteed income. And as explained above, he still had the flexibility to retire early and use benefits flexibly through his DC arrangement.

Death benefits

Mr P said he preferred passing on a lump sum to his family. 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. I'm sure that the idea of leaving a large sum to his wife and child in the event of his death sounded attractive.

However, the DB scheme provided valuable guarantees. Mr P's wife would have received a guaranteed spouse's pension for life which would be increasing in payment and would have been valuable if Mr P predeceased her as well as a dependant's pension for children. Mr P had generous death in service cover if he died before retirement and he had additional life cover of £180,000. His family also would have received the value of his money purchase pension too if he died. So his family would have had guaranteed and flexible benefits if he died.

In any event, whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr P about what was best for his own retirement provisions. A pension is primarily designed to provide income in retirement. So I don't think different death benefits justified a transfer.

Time to retirement and enhanced transfer value

Mr P was only 35 when he asked for advice. TP acknowledged that it's generally accepted that transferring out of a DB scheme under the age of 50 would usually not be suitable. The regulator more recently referred to the scenario of younger consumer in Finalised Guidance 21/3 (which did not represent new rules). It states:

If a client is some way from retirement and has no clear idea of what they want from it, it may not be possible to advise them on a transfer, until they are closer to retirement. You should be asking the question 'why transfer now?' when your client's retirement plans are unclear. Wanting to take advantage of a high transfer value is not generally a good reason on its own to transfer.

I think this applies to Mr P. As I said above I think he was interested in early retirement and taking benefits flexibly, however given that he was 25-30 years away from retirement, I think it's fair to say that these retirement objectives were not certain and could of course change. And giving up his guaranteed benefits was an irreversible action. In my view there was no obvious reason for Mr P to transfer in 2017.

TP's argument here is that the establishment of BSPS2 was still not guaranteed and even if Mr P chose BSPS2 he might have ended up in the PPF after all. And then a transfer at a later date, closer to retirement, would not have been possible. I do think it was more likely than not at the time BSPS2 would go ahead. However, I appreciate there was still a risk of Mr P ending up in the PPF and not being able to transfer in future.

However, overall and as set out above, I think a guaranteed income from the PPF would have still been valuable and Mr P could have still retired early and have flexible benefits through his other pension. So I don't think this scenario had to be avoided at all cost.

Like the regulator, I also don't see that potentially lower transfer values from BSPS2 in many years' time were reason enough to transfer immediately.

concerns about financial stability of BSPS

Mr P approached TP at a time when BSPS members were concerned about their pensions. Lots of his colleagues at the time would have been transferring out of the scheme and he likely was worried his pension would end up in the PPF. So I think it's quite possible that Mr P came to TP leaning towards the decision to transfer. However, it was TP's obligation to give Mr P an objective picture and recommend what was in his best interest. I agree with TP that out of the PPF and BSPS2 options, the BSPS2 option was better suited to Mr P.

Mr P should have been advised, in my view, to move to BSPS2. TP also should have explained that even if BSPS2 failed and Mr P was moved to the PPF, the benefits provided would still be very valuable. And if TP had explained properly why not transferring his DB benefits was in his best interest I have no reason to believe he wouldn't have listened to the adviser.

Summary

Overall, I'm not persuaded based on the contemporaneous evidence provided that the advice given to Mr P was in his best interest. He was giving up a guaranteed, risk free and increasing income that was extremely valuable. He possibly could have matched his benefits in the DB scheme. However, I think he could have comfortably achieved his objectives without taking the risks associated with the transfer. He had many years to build up other pension provisions which could provide him flexibility and lump sum death benefits if he wanted them when he came to retire. And there was a good chance if he chose BSPS2 that he could still transfer his benefits nearer to retirement if he still thought this was required.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for the poor advice he was given. I consider he would have selected to move to BSPS2. So calculations should be made on this assumption.

TP argues that if a loss is calculated, redress should take form of a deferred annuity. However, the regulator's guidance sets out how redress should be paid and I see no reason to depart from this guidance.

During the course of the complaint TP engaged a firm to provide a redress calculation for Mr P to establish how much he had lost out by transferring which first showed no loss however didn't make allowances for ongoing adviser charges. A new calculation was done In February 2021 incorporating ongoing adviser charges of 0.5% which led to the loss of a few thousand pounds, however was still based on Mr P's pension value as at 1 October 2020 which was out of date.

A new calculation is required using the most current assumptions. I note there were discussions about what ongoing adviser charges should be factored in. Mr P was paying 0.85% the last time we checked. I think it's fair and reasonable to use Mr P's current ongoing charges for the calculations.

TP must 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.

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 P's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr P'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 P 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.

In addition TP should pay Mr P £300 for the distress and inconvenience this matter has caused him.

The compensation amount must where possible be paid to Mr P within 90 days of the date TP 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 TP to pay Mr P.

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.

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 True Potential Wealth Management LLP to pay Mr P 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 True Potential Wealth Management LLP to pay Mr P any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require True Potential Wealth Management LLP to pay Mr P any interest as set out above on the sum of £160,000.

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

If Mr P accepts this decision, the money award becomes binding on True Potential Wealth Management LLP. My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P 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 P to accept or reject my decision before 5 August 2022.

Nina Walter
Ombudsman