

The complaint

Mr H complained that he was given unsuitable advice to transfer his defined benefit (DB) British Steel Pension Scheme (BSPS), to a self-invested personal pension (SIPP).

Niche Independent Financial Advisers Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Niche".

What happened

In March 2016, Mr H's employer 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 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 personal pension arrangement.

Mr H was concerned about what the announcement by his employer meant for the security of his preserved benefits in the BSPS. He was unsure what to do, so he contacted independent financial adviser Niche for advice in August 2017.

Niche gathered information about his circumstances and objectives which were broadly as follows:

- Mr H was 46 years old, married and with one dependent child. He was in good health.
- He lived in a home valued at approximately £150,000, owned jointly with his wife which had an outstanding mortgage of around £64,000. The mortgage had around 8 years left to run.
- Mrs H worked part-time. Together they had a joint income of £2,900 (net) per month and £10,000 in savings.
- The cash equivalent transfer value (CETV) of Mr H's BSPS was approximately £291,069 and the normal retirement age (NRA) was 65.
- Mr H had expressed an aspiration of retiring at the age of 60.

Niche set out its advice in a suitability letter on 13 October 2017. The letter said that on the basis of the financial comparisons alone, it didn't recommend Mr H should transfer out of his DB scheme. However, it went on to say that, as Mr H had said he wanted to use his pension in what it called "*an entirely different manner*", it advised him to transfer out and invest the funds in a SIPP. Niche said this would allow Mr H to achieve his objectives.

Mr H accepted this advice and so transferred from the BSPS to a SIPP. In 2021 Mr H complained to Niche about its advice, saying he shouldn't have been advised to transfer out of the BSPS. In response, Niche said it hadn't done anything wrong and was acting on the financial objectives Mr H had at the time.

Mr H referred his complaint to our Service. One of our investigators looked into the complaint and said it should be upheld. As the complaint couldn't be resolved informally, it's come to me for 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.

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'). 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 Niche'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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Niche should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests.

I've used all the information we have to consider whether transferring away from the BPS was in Mr H's best interests. And I don't think it was, so I'm upholding his complaint.

Financial viability

As required by the regulator, to demonstrate the financial comparisons between his current scheme and transferring out to a personal pension, Niche referred in its transfer analysis to 'critical yield' rates.

The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity income as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable. In Mr H's case, Niche provided two transfer analysis documents based on comparisons. There are only very minor differences in the analysis contained in the two versions, so I've used the one dated 13 October 2017, the same one our investigator used. This said the critical yield required to match his benefits at

the age of 65 was 6.33% if he took a full pension and 7.62% if he took a full pension at the age of 60.

The critical yields identified were based on Mr H's existing scheme benefits - and he didn't have the option to remain in the BSPS – he either needed to opt into the BSPS2 or move with the scheme to the PPF. But Niche's advice was provided on 13 October 2017, by which time details of the 'new' scheme were emerging (and briefly referred to in the suitability letter Niche produced for Mr H). Of course, it's possible this scheme may not have gone ahead, but I still think the benefits available to Mr H through the BSPS2 should have been factored in with this advice so that he was able to make an informed decision.

Nevertheless, in my view, this issue is something of a moot point in this case because from a financial comparison perspective, there's no real dispute between the parties that Mr H would probably receive lower overall retirement benefits as a result of transferring out to a SIPP. Niche itself outlined the likely lower retirement benefits in its own suitability letter. It pointed out to Mr H, for example, that, *"for the vast majority of members, yourself included, it will be more beneficial for you to transfer to [BSPS2]"*. And I think the situation as regards critical yield analysis would have been broadly similar in the case of the planned BSPS2; there would still be little point in Mr H giving up the guarantees and benefits available to him through a DB scheme only to achieve a lower level of benefits in a SIPP.

Elsewhere in its transfer analysis, Niche also made mention of the PPF, which it described as a compensation scheme providing a *"safety net"* for pension schemes when the sponsoring employer becomes insolvent. It said the critical yield to match the benefits available through the PPF at age 65 was 4.36% per year if Mr H took a full pension under the reduced terms of the PPF, and 5.83% at the age of 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 relevant discount rates 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 4.5% per year for 18 years to retirement, which is well below the main critical yield figure of 6.33% I've referred to above. The discount rate at age 60, it was 4.1% for 13 years to retirement. I've also kept in mind that the regulator's upper projection rate was 8%, the middle projection rate was 5%, and the lower projection rate was 2%. At the time, as Niche assessed Mr H's attitude to risk (ATR) as moderately cautious I think a figure at the lower end of these projections was most relevant.

I've noted that Niche also said that in order to purchase an annuity to provide benefits of equal value to the existing scheme at retirement at age 65, the funds required would be around £794,000. So, all these things, in my view, provide a powerful indication of the real value of the benefits Mr H would lose if he transferred out to a SIPP.

So, I think it's fair to say that from a financial comparison perspective, Niche's figures, shown in its suitability letter and transfer analysis documents, clearly showed that transferring to a personal pension plan would mean Mr H would receive lower pension benefits in the longer term, when compared against the BSPS. This was supported by Niche's own statements in the suitability letter, which I've referred to above. And I think it's safe to say the same can be said broadly of the BSPS2 scheme, although we don't have corresponding analysis here to show it.

Of course, to be clear, Niche's recommendation that he should transfer out to a SIPP was not based on the financial comparisons with his current scheme. Rather, Niche said Mr H had entirely different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer was suitable for him, despite providing the overall lower benefits mentioned above. I've considered these below.

Flexibility and income needs

As I've said, although the suitability letter initially said that transferring wasn't recommended if being considered only on financial comparison grounds, Niche still recommended a transfer out nonetheless, based on what it said were Mr H's objectives. It listed these in the letter and I summarise them below as follows:

- It would allow him to retire at the age of 60.
- Transferring out to a personal pension would allow Mr H to have complete control over his pension funds, how they were invested, and the level of income he could withdraw from the age of 55. Niche said he'd be able to use the money for holidays and / or to support his daughter through university.
- Niche said there were likely increased death benefits for his wife and daughter, by transferring out.

So, it seems the main reasons that Niche recommended the transfer was for the flexibility and control it offered to Mr H. I have therefore considered all these issues with great care, beginning with Mr H's apparent desire to retire at the age of 60.

Retiring early

I don't doubt that Mr H might have genuinely hoped to retire at the age of 60 and I appreciate Niche's comments about manual workers sometimes needing to retire early. But I've seen nothing that shows this was anything more than something Mr H aspired to do at that stage, as opposed to being part of a formulated plan. I say this because Mr H was only 46 years old and from what I've seen, he had no concrete plans for retirement at that point. I've also noted that Mr H could have retired early as a member of the BSPS2 and the PPF.

So, even if I were to consider that Mr H's retirement plans were more advanced than the mere aspirations set out by Niche - and he really did want to retire early - I think Niche should have assessed the possibility of achieving this goal whilst being a member of BSPS2 or the PPF. It's clear that in these circumstances there would have been an 'actuarial reduction' caused by early retirement from the scheme. This would have meant Mr H's pension benefits would have been somewhat reduced due to him accessing the pension earlier and for longer. But I've seen no evidence this was discussed with a view to assessing whether it was more in Mr H's best interests, rather than him being advised to transfer away completely.

Flexibility

In its suitability letter, Niche said that by transferring out and having a SIPP, Mr H would be able to increase the amount of tax-free cash he'd be able to access. It set out the values he'd be able to get with the BSPS versus a SIPP.

It's usually the case that more tax-free cash can be accessed from a SIPP when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But Niche should have been telling Mr H at the time that extra tax-free lump sums being removed from a SIPP from the age of 55 onwards also came with consequences in that the amount left for his later retirement years would obviously decrease.

I've seen no compelling evidence showing access to a lump-sum at 55 years old was necessary or required for other specific reasons. Niche implied Mr H might wish to draw funds from the age of 55 to spend on holidays, and it also said he'd be able to support his daughter through university.

However, the same issues as I've described above apply; using pension savings to spend on holidays comes with obvious costs – and the main purpose of a pension is to provide an income in retirement. I've also noted that Mr H's daughter was only 9 years old at the time, so making an irreversible decision about transferring out of a DB pension to help fund a university education was, in my view, somewhat premature.

In any event, Mr and Mrs H seem to have had access both to moderate and available savings, and a significant monthly disposable income. The 'fact-find' completed by Niche showed they had several hundred pounds of difference between their joint monthly incomes and expenditures, so I think either of the above apparent objectives could have been met from their existing financial resources. In short, Niche demonstrated no need whatsoever for Mr H to transfer away from a DB pension, based solely on these reasons.

So, whilst I accept the notion of accessing tax-free cash earlier than his NRA might have been appealing, this needed to be considered against the other options Mr H faced, including opting for the BPS2.

Also, I can't see that Mr H required flexibility in retirement in the way Niche implied. Niche said in its transfer analysis that Mr H's estimated annual pension upon his NRA was £18,353. This was guaranteed and index linked and I think it fitted Mr H's needs. And even with actuarial reductions, his BPS pension at the age of 60 was £13,182. I don't know the income Mr H would've been entitled to under the BPS2, but based on what I know about the scheme, the starting pensions at age 65 and 60 wouldn't have been significantly lower. The PPF benefits also were not substantially lower, and in fact, at age 60 it was more or less the same. So, I think Mr H could've met his needs if he opted into the BPS2 or he moved to the PPF.

When discussing his circumstances with Niche, Mr H had speculated that in retirement he might actually need less income than the DB pension figure above. So overall, I haven't seen anything to persuade me that Mr H wouldn't have been able to meet his retirement income needs by accessing his DB pension instead, particularly as he had also recently joined his employer's new defined contribution ('DC') scheme and would have been making contributions to it for at least another 13 years until he retired. It seems to me that in the event of any shortfalls in Mr H's income needs between the age of 60 and his state retirement age, could have been met by drawing on this second pension.

I have therefore considered everything Niche said in its suitability letter about flexibility: it said this would include how funds were invested, the level of income he could withdraw from the age of 55 and a greater ability to flexibly use the tax-free lump sum element. It also said that Mr H would be able to have complete control over the pension if he transferred out.

However, I've seen nothing which shows Mr H had either the desire or capacity to exercise personal control over his pension. In my view, Mr H's circumstances were much more

aligned to him retiring from a DB scheme, such as the BSPS2, and drawing a pension. So, I think the suitable option was for him to access his DB pension in the way it was originally intended. His DC pension could have supported some of his other aspirations for flexibility if ever needed.

Death benefits

Niche says that death benefits were discussed at the time and that Mr H didn't like those associated with his existing BSPS. However, it's not clear on what basis Mr H apparently held such a view, and so this was, in my view, a demonstration of Niche's failure to clearly explain the value of the death benefits he already enjoyed through the BSPS (and which would be broadly replicated in BSPS2).

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 SIPP was likely an attractive feature to Mr H. But whilst I appreciate death benefits are important to consumers, and Mr H might have thought it was a good idea to transfer his DB scheme to a SIPP because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Niche explored to what extent Mr H was prepared to accept a lower retirement income in exchange for higher death benefits.

I've noted that at the time of the suitability letter, both Mr and Mrs H were described as being in good health. Mrs H was also only 46 years old. I also think the death benefits attached to the DB scheme were underplayed. The spouse's pension provided by the DB scheme would have been useful to Mrs H if Mr H predeceased her and I don't think Niche made the value of this benefit clear enough. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a SIPP was. And there may not have been a large sum left particularly if Mr H lived a long life. In any event, Niche should not have encouraged Mr H to prioritise the potential for higher death benefits through a SIPP over his security in retirement.

Furthermore, it doesn't appear that Niche took into account the fact that Mr H could have nominated Mrs H as the beneficiary of any funds remaining in his DC scheme. To this end, Mr H could have ensured part of his pension wouldn't just 'die with him'.

I can't see whether, or the extent to which, life insurance was discussed in this case. But at around 46 years old, this may have been a reasonably affordable product if Mr H really did want to leave a legacy for his loved ones. Mrs H's circumstances don't seem to have featured much in the overall advice Mr H was given by Niche, but the evidence is suggestive of her having a small pension of her own.

Overall, in this case I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr H. I think this objective, listed briefly as it was in the suitability letter, was no more than a generic comment and not meaningful to Mr H's situation.

Control or concerns over financial stability of the DB scheme

It's clear that Mr H, 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 Niche said he said he preferred to have control over his pension fund.

So, it's quite possible that Mr H 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 Niche's obligation to give Mr H an objective picture and recommend what was in his best interests.

By the point of the advice being delivered details of BSPS2 were emerging and it seemed likely it was going ahead. So, the advice should have properly taken the likely benefits available to Mr H through the BSPS2 into account and I think this should have alleviated any concerns about the scheme moving to the PPF.

However, even if there was a chance the BSPS2 wouldn't go ahead, I think that Niche should have reassured Mr H that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr H through the PPF would have still provided a significant portion of the income he thought he needed at retirement, and he was still 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 have led to Niche's recommendation to Mr H to transfer out of the DB scheme altogether.

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

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income within the BSPS2 (or the PPF). By transferring to a SIPP, the evidence shows Mr H was likely to obtain lower retirement benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this. I don't think aspirations for holidays in the future or paying for his young daughter's potential university education justified the recommendation; Niche ought to have advised him against transferring out of his DB scheme for these reasons, particularly as it meant he'd be worse off in retirement.

So, I don't think it was in Mr H's best interests for him to transfer his DB scheme to a SIPP when he had the opportunity of opting into the BSPS2.

I appreciate that the BSPS2 hadn't been fully confirmed when the advice was given, but I think it was clear to all parties that it was likely to be going ahead. Mr H still had a minimum of 13 years before he hoped to retire. But this might have been longer as in my view he couldn't yet know what his needs in retirement would be. So, I don't think that it would have been in his interest to accept the reduction in benefits he would have faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. By opting into the BSPS2, Mr H would have retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. Also, Mr H was married and had a young daughter. His wife's pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mr H chose to do so). His daughter may have also been financially supported by the scheme for many more years if something unexpected had happened to Mr H.

On this basis, I think Niche should have advised Mr H to opt into the BSPS2.

I have considered, given the circumstances of the time, whether Mr H would have transferred to a SIPP or other type of personal pension in any event. I accept that Niche disclosed some of the risks of transferring to Mr H, and provided him with a significant amount of information. But ultimately it advised Mr H to transfer out, and I think Mr H relied on that advice.

I'm not persuaded that Mr H would have insisted on transferring out of the DB scheme, against Niche's advice. I say this because Mr H was an inexperienced investor and this pension accounted for most of his retirement provision at the time. So, if Niche 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 have accepted that advice.

I'm also not persuaded that Mr H's concerns about the PPF were so great that he would have insisted on transferring his pension, knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. So if Niche had explained Mr H was also unlikely to exceed the benefits available to him through the PPF if he transferred out, and that he could meet his income needs in retirement without risking his guaranteed pension, I think that would have carried significant weight.

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

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](#). The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/19](#) (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.

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 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr H whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published.

We were told he would like to wait for the outcome of the consultation before the complaint is settled. I consider it's fair that Niche waits for the outcome of the consultation to settle this complaint.

A fair and reasonable outcome would be for Niche to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have transferred to BPS2.

The basic objective of the proposed amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and its proposed updates to the DB transfer redress methodology, I'm satisfied that the proposed changes will, if ultimately implemented, still reflect a fair way to compensate Mr H.

I therefore don't consider it necessary for me to wait for any new guidance /rules to come into effect to determine this complaint.

Niche must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H'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 H 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 compensation amount must where possible be paid to Mr H within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Niche has received notification of Mr H acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes Niche to pay Mr H.

Income tax may be payable on any interest paid. If Niche deducts income tax from the interest, it should tell Mr H how much has been taken off. Niche should give him a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

In addition Niche should pay Mr H £300 for the distress and inconvenience this matter has 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

Determination and money award: I've decided to uphold this complaint and require Niche Independent Financial Advisers Limited to pay Mr H 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 Niche Independent Financial Advisers Limited to pay Mr H any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Niche Independent Financial Advisers Limited to pay Mr H any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Niche Independent Financial Advisers Limited pays Mr H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

If Mr H accepts my final decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H 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 H to accept or reject my decision before 7 December 2022.

Michael Campbell
Ombudsman