DRN-3637644

Financial Ombudsman Service

The complaint

Mr H complains about the advice given by Futures Assured Ltd ('FAL') to transfer the benefits he held in the British Steel Pension Scheme ('BSPS') to a personal pension. The BSPS was a defined benefit ('DB') occupational pension scheme. He says the advice was unsuitable for him.

What happened

In March 2016, Mr H's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr H's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and agreed steps carried out shortly after.

On 18 September 2017, the BSPS provided Mr H with a summary of the transfer value of his scheme benefits. The letter explained the value had been updated as a result of the steps of the RAA being carried out. It said that Mr H's benefits had a cash equivalent transfer value ('CETV') of £296,469.12. And in October 2017, members of the BSPS were 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 the BSPS2 or transfer their BSPS benefits elsewhere.

In the meantime, on 26 September 2017, Mr H asked FAL for advice about his BSPS pension.

FAL completed a fact-find to gather information about Mr H's circumstances and objectives. It recorded that he was 45, employed full time, he was co-habiting with his partner and had two children aged 19 and 22. Mr H and his partner owned their home with an outstanding mortgage of approximately £27,000. Their combined income exceeded their outgoings by over £1,000 each month. They had savings of roughly £28,500. And in addition to the benefits held in the BSPS, Mr H was also a member of his employer's new defined contribution ('DC') pension scheme, with he and his employer making contributions equivalent to 12% of his salary.

The fact-find noted that Mr H was in good health. But I can see he also informed FAL he'd had an operation approximately three years earlier.

FAL recorded that Mr H was interested in retiring at age 55 and was thinking of transferring his pension because he wanted flexibility so he could decide how much income to take and when. It also said he was interested in lump sum death benefits to provide for his partner and he wanted control of the pension and to break ties with his employer because the BSPS

was going to move to the PPF.

FAL also carried out an assessment of Mr H’s attitude to risk, which it deemed to be a 4 on a scale of 1 to 8, which it described as Mr H being *“prepared to accept the risk of losing a modest amount of your money”*. It has since referred to this representing a ‘low to balanced’ attitude to risk.

Application forms to enable the transfer to take place were signed on 9 November 2017. But a written summary of FAL’s advice wasn’t provided until 15 November 2017.

This written summary, or suitability report, said FAL advised Mr H to transfer his pension benefits into a personal pension and invest in the providers managed fund. It said that Mr H’s main priority was to alleviate the worry that he’d been caused in relation to his pension benefits. It said he’d lost trust in his employer and was sceptical about the BSPS2. It also said that while Mr H did not intend to retire until 67, he planned to stop working for his current employer at age 55 and set up a business. FAL said he wanted to take the tax-free cash (‘TFC’) and to be able to do so without having to start taking his pension benefits. So, he wanted flexibility in how his pension could be drawn. It said he also wanted to take advantage of the CETV being offered, and secure alternative death benefits to provide for his family. It also said that Mr H and his partner expected to need an income of £2,300 per month in retirement.

It noted that the critical yield – how much a new pension would need to grow by each year in order to allow Mr H to purchase equivalent benefits to those the DB scheme guaranteed – was high and unlikely to be achieved. But it said Mr H did not intend to purchase an annuity. And it felt growth to allow the pension to be used sustainably was possible.

So, based on Mr H’s objectives, his circumstances and his attitude to risk, FAL said it felt a transfer was suitable as it would meet his needs and the advantages of the transfer outweighed the disadvantages. The suitability report also noted that it had been agreed, subsequent to the transfer, FAL would provide ongoing servicing and advice to Mr H in relation to the pension, at a cost.

The transfer went ahead in line with FAL’s recommendation.

Mr H complained in 2021 to FAL about the suitability of the transfer advice. He said he had gone into the discussion thinking that transferring to have control of his pension was potentially a good idea. But he didn’t think the advice overall had been in his best interests and said that his objective of retiring at 55 to start a business had been overstated.

FAL didn’t uphold Mr H’s complaint. It said it felt the advice was suitable as it met Mr H’s stated objectives by removing the worry of the pension remaining tied to his employer and potentially having to enter the PPF, gave him access to a likely higher TFC sum at age 55 and the flexibility to delay drawing an income, thus avoiding unnecessary tax, and provided more appropriate death benefits for his circumstances – which it felt was appropriate particularly given his health condition that had required an operation.

Mr H referred his complaint to our service. An Investigator upheld the complaint and said FAL should compensate Mr H for any loss the transfer had led to as well as pay £300 for the distress caused. She thought Mr H was always likely to receive overall pension benefits of a lower value as a result of transferring. And she didn’t think any of the other reasons for transferring were strong enough to justify the transfer or Mr H accepting this reduction in benefits – noting in particular that Mr H had said he had no definitive plans to set up a business at age 55. So, she didn’t think a transfer was in Mr H’s best interests and believed, if he had been correctly advised, Mr H would’ve transferred his benefits to the BSPS2.

FAL disagreed. It said that starting a business at age 55 was a definitive objective of Mr H's, based on the information from the time. And the transfer allowed him to meet this and his other objectives. So, it still considered the advice to have been suitable.

FAL also said the BSPS2 was not certain to proceed at the time and so it didn't think using this as the basis for redress was fair. And FAL also argued any losses since it had stopped providing ongoing servicing should not be apportioned to it.

The investigator wasn't persuaded to change their opinion, so the complaint was referred for a final decision by an ombudsman.

In August 2022 the regulator, the Financial Conduct Authority ('FCA'), launched a consultation on changes to its DB transfer redress guidance. So, the Investigator wrote to Mr H to advise him of the FCA's proposed changes which were due to come into effect in April 2023 and to give him the option to have any redress due to him calculated under the then current guidance or to wait for the new rules to come into effect. Mr H indicated he would like redress calculated under the guidance in place at the time. But the Investigator explained that if the complaint hadn't been settled in full and final settlement by the time the new rules came into effect, he expected FAL to carry out a calculation in line with the updated rules and guidance in any event.

FAL later said it estimated Mr H had not incurred a loss. So, although it didn't agree with the Investigator's opinion, it offered to pay £300 for the distress caused, as recommended, in full and final settlement of the complaint. And therefore, said it didn't require an ombudsman's decision.

Mr H did not however accept the offer of £300 and confirmed he still wanted an ombudsman to review his complaint. So, I'm now providing a final decision on the matter.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of FAL'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 regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, FAL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

FAL carried out a transfer value analysis report (as required by the regulator) showing how much Mr H's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

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 H was 45 at the time of the advice and FAL said he wanted to use his retirement benefits, at least partially, from age 55. The critical yield required to match the benefits Mr H was estimated to be entitled to under the BSPS2 at age 55 was 5.91% if he took a full pension and 3.68% if he took TFC and a reduced pension. The critical yield to match the benefits estimated to be available through the PPF at age 55 was quoted as 6.29% per year if Mr H took a full pension and 5.98% per year if he took TFC and a reduced pension.

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 3.7% per year for 9 full years to retirement – which would be the case if Mr H retired at age 55. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr H's 'low to balanced' attitude to risk and also the term to retirement. There would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And here, given the lowest critical yield was 3.68%, I think Mr H was always unlikely to receive benefits of greater overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk. And he seems likely to have received benefits of a lower overall value, as a result of transferring, in comparison the PPF. And indeed, the suitability report acknowledged that the critical yield was high and unlikely to be achieved on a sustained basis.

FAL has said that analysis of the critical yields is not relevant as its advice was based on Mr H taking TFC at 55 but then not drawing a pension until age 67, which the critical yield isn't a like for like comparison for. The suitability report said it estimated if a 'modest' growth rate of 4.73% were achieved each year, this would enable Mr H to draw the income he

needed from the plan, which when combined with his state pension and other retirement provisions, would meet his needs beyond his average life expectancy. And the suitability report also said FAL estimated that if he achieved growth of 5.12%, he'd likely to be able to meet his needs from the plan alone. And FAL said it thought these rates *could* be achievable and referenced, amongst other things, the past performance of the recommended plan.

Firstly, I don't agree with FAL that an analysis of the critical yields is not a relevant consideration. The regulator required this to be calculated and considered when giving pension transfer advice. And the critical yields are a very useful indicator of the value of the benefits the DB scheme provides – which FAL said in its suitability report. So, I do think an analysis of the critical yield is a relevant consideration here.

Turning to what FAL has said about the growth rates it estimated Mr H would need to achieve, I note the calculations supporting this weren't included with the suitability report or provided. So, it isn't clear whether these estimates accounted for the ongoing fees under the new pension plan (0.9% per year – provider and FAL combined). Because if not, the growth that would need to be achieved would have been higher than stated. But either way, I don't agree that level of growth was necessarily 'modest', and I'm not sure either of the rates stated were achievable.

As FAL is aware, and indeed as the suitability report noted, past performance is no guarantee for future performance. And so, I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

As I've already discussed, the discount rates, in my view, give a useful indication of the level of growth that was likely to be achievable to a typical investor. The discount rate for 9 years to retirement at the point of the advice was 3.7%. So, with this, the regulators standard projections and Mr H's attitude to risk in mind, achieving either of the two rates of growth FAL referenced as being needed over that period of time doesn't appear likely.

The discount rate for 21 years to retirement – so the growth likely to be achievable by Mr H to age 67 – was 4.5%. This is closer to the rates FAL referenced. But still indicates that achieving those levels of growth consistently was unlikely. And had there been any significant falls in the market, it suggests Mr H may have been left with less than he needed.

So, from a financial viability perspective, I don't think a transfer out of the DB scheme appears to have been in Mr H's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as FAL has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility and income needs

FAL says Mr H wanted flexibility as he wanted to take TFC at age 55 and use the funds to start a business after he left his current employer, while not intending to draw a pension until age 67. Mr H says these plans were overstated by FAL and he had no firm plans to do this.

FAL says it relied on what Mr H said at the time it gave advice. And the information I've seen refers to FAL understanding Mr H was confident he could start a business and turn a profit promptly. But FAL didn't carry out any further analysis of how realistic this was. Mr H had worked for his employer for over twenty years at the time of the advice and I haven't seen anything that suggests he had any significant experience of running a business. There was also nothing recorded about how much Mr H was likely to actually need to start a business or what the anticipated income from this was likely to be. Yet FAL's advice seems to have

been based on him earning enough from this business to meet his income needs immediately and an income from his pension from age 55 being unnecessary and likely to create a tax liability.

FAL may well argue that a lot of this information was unknown and couldn't be estimated because this wasn't going to happen for almost ten years. But I think for that very reason, it is unlikely that Mr H's plans around this were definitive. I don't doubt Mr H was interested in potentially retiring from his existing job at age 55 and starting something new as he phased into retirement. I think most consumers, when asked, would like to do something similar. But this was almost ten years away at the time that Mr H spoke to FAL. And on balance, I don't think this was anything more than a potential aspiration at that time

And in any event, I don't think Mr H necessarily needed flexibility to potentially achieve this aspiration.

Mr H could've taken benefits early under either the PPF or the BSPS2, including drawing TFC. FAL has said it believed Mr H was likely to be able to take more TFC following a transfer. But again, there doesn't appear to have been a discussion about how much he would actually *need.* And the amounts available under either the BSPS2 or PPF were still substantial. And Mr H would by then have also built-up benefits in the DC scheme he had joined through his employer while the consultation was ongoing. Which could've been access flexibly.

It is true that if Mr H took retirement benefits under the BSPS2 or the PPF from age 55 he couldn't do so flexibly. He'd be required to start drawing an annual income. But that income would've been guaranteed for the rest of Mr H's life and would've escalated while in payment.

FAL says that this income would've been surplus to Mr H's requirements until age 67 and would've likely resulted in him incurring additional income tax – because he intended to continue working. But again, this seems to have been based on the assumption that Mr H would immediately receive enough income from a new business venture to meet his needs, with no analysis of how likely this was. And I think the guaranteed income from his pension would in fact have been a useful reassurance and could've been used to supplement his income, from age 55, had he in fact looked to take this course of action.

And FAL said, in its response to Mr H's complaint, that if Mr H took benefits under the BSPS2 from age 55, the income this would provide by age 67, in addition to he and his partners state pension and his partners occupational pension, would've been enough to meet their stated income needs of £2,300 per month. And that seems to have been before even accounting for any benefits that could be drawn from the new DC scheme Mr H had joined through his employer.

And if Mr H later had reason to transfer out of his DB scheme, I understand that this would've been allowed under BSPS2. And he could've done so closer to retirement. FAL has said that the CETV may have been lower in the future, and Mr H wanted to avoid this uncertainty. But again, I don't think he needed to transfer when he was advised to.

Taking all of this into account, I don't think Mr H had a need for flexibility when the transfer was recommended. He was over 9 years from potentially being able to take his retirement benefits. And I don't think his plans were finalised. And in any event, it appears he could've still met his aspirations by retaining his DB scheme benefits. So, I don't think it was a suitable recommendation for Mr H to give up his guaranteed benefits when he did – particularly given this was an irreversible decision and he was always likely to receive benefits of a lower overall value by doing so.

Death benefits

Mr H and his partner were not married, so FAL noted she'd have had to evidence she was entitled to the spouse's pension under the scheme rules and may not have qualified, based on the fact her earnings exceeded Mr H's. In which case she would not have benefited from the spouse's pension. FAL also said Mr H wanted to be able to leave the pension to his children. So, because of this he wanted alternative death benefits.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr 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 personal pension because of this, the priority here was to advise Mr H about what was best for his retirement provisions. Because a pension is primarily designed to provide income in retirement.

Mr H was not married at the time of the advice. But he and his partner could've later gotten married. In which case the spouse's pension – a guaranteed amount payable for life which escalated – could've been very useful if Mr H predeceased his partner. It doesn't appear that FAL enquired about whether this may happen, but I haven't seen anything to suggest that it had been ruled out.

The CETV figure would no doubt have appeared attractive as a potential lump sum. But the sum remaining on death following a transfer, as well as being dependent on investment performance, would've also been reduced by any income Mr H drew in his lifetime. So, the pension may not have provided the legacy that Mr H may have thought it would – particularly if he lived a long life. I acknowledge that Mr H had a health condition for which he'd had an operation and appears to have had concerns about how this may impact his life expectancy. But Mr H not reaching his life expectancy was only a possibility and it was also possible that he would exceed this, in which case Mr H would need his pension to last longer. In any event, FAL should not have encouraged Mr H to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

The DC scheme Mr H was a member of would also have already provided some alternative death benefits, in the event he passed away before his partner.

The suitability report said FAL had considered life insurance as an alternative way of improving death benefits. But it said that the cost of this was circa £400 per month, which was not an expense Mr H wanted to take on. The income and expenditure information recorded suggested that Mr H could afford the premium mentioned. And I think it'd have been reasonable for FAL to have addressed this in more detail than it did.

I note though that the 'whole of life' insurance quotations FAL has provided to our service, to support that this was considered at the time, were based on a cover level of £500,000 – significantly in excess of the transfer value of the pension fund. For the avoidance of doubt, I don't think basing a life insurance quote on the transfer value would've been appropriate either – as this essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. But I think the starting point ought to have been to ask Mr H how much he would ideally like to leave to his dependents. And I can't see that this was done. And if it had been, a more realistic level of cover, with a premium that was more acceptable to Mr H, might've been a reasonable alternative.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr H.

Control and concerns over financial stability of the DB scheme

FAL says that Mr H wanted control over his pension as the situation with the BSPS had caused him significant worry. It says he wanted that worry to be resolved and because of a loss of trust with his employer was sceptical about the BSPS2. So, therefore he was keen to transfer. And it says this meant that a transfer was suitable as it addressed these concerns.

Mr H has acknowledged that he went into the discussions with FAL thinking about transferring, and that his concerns about the scheme were behind this.

But I think Mr H's desire for direct control over his pension benefits was overstated. Mr H was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. And as part of recommendation, FAL said it would continue to provide ongoing servicing and advice. So, I don't think that this was a genuine objective for Mr H – it was simply a consequence of transferring away from the DB scheme.

It's also been suggested that, because of a loss of trust, Mr H wanted a 'clean break' from his employer. But at the same time, he still worked for the same employer. And hadn't suggested he intended to find alternative employment until significantly later in his life. He was also a member of the new defined contribution pension scheme his employer provided. So, he wasn't going to truly achieve a 'clean break' by transferring, as he would remain tied to the employer in other respects.

I don't doubt Mr H, like many of his colleagues, was concerned about his pension. His employer had been consulting on its plans for the scheme for some time. There had been a great deal of uncertainty. And there had been a number of important updates in the weeks before Mr H spoke to FAL in relation to the RAA, the BSPS2 being established and transfer valuations being updated. And between him first speaking to FAL and it providing him advice, Mr H had been told he'd to need to make an important and significant choice about his pension – which I doubt is something he'd done or contemplated before.

Mr H had likely heard negative things about what could happen, including entry into the PPF. He was likely unhappy with how things had turned out and he may've been sceptical of how his employer would handle things moving forward. But that was why it was even more important for FAL to give Mr H an objective picture and recommend what was in his best interests.

Contrary to what FAL argues, at the time it spoke to Mr H, I think it was pretty clear to the parties that the BSPS2 was likely to go ahead. As I've said, the restructuring of BSPS had been ongoing for a significant amount of time by that point, the RAA had been agreed and the separation of the BSPS from Mr H's employer completed on 11 September 2017, after the employer made a lump sum payment of £550million into the BSPS. This had also enabled the provision of improved transfer value quotations – as received by Mr H before he took advice. Mr H also received his "time to choose" pack – with joining the new scheme one of the options – prior to the advice process being completed. And details of the new scheme were set out in that pack – and taken into account by FAL. So, based on what had happened to that point, I think the relevant parties, not least the trustees, were confident the BSPS2 would go ahead.

The BSPS2 should've alleviated some of the concerns Mr H might've had about the scheme moving to the PPF – particularly if FAL had done more to explain the significant distinction between Mr H's employer and the trustees of the BSPS2. And, while Mr H's experiences with the BSPS to that point might've made him sceptical, there wasn't anything at the time to suggest that the BSPS2 would experience the same troubles the BSPS had.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that FAL should've 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, while a reduction on what he'd have been due under the BSPS, was still guaranteed and not subject to investment risk. He could still take benefits under the PPF earlier than the normal retirement age of the BSPS, including taking TFC. And he was unlikely to improve on the pension benefits the PPF would've provided by transferring out. So, I don't think that any concerns Mr H might've had about the PPF should've led to FAL recommending he transfer out of the DB scheme altogether.

Suitability of investments

FAL recommended that Mr H invest his personal pension using the pension providers managed funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr H, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr H should, in my view, have been advised not to transfer so the investments wouldn't have arisen if suitable advice had been given.

FAL has said that it shouldn't be responsible for any losses stemming from those investments after it ceased servicing the pension on Mr H's behalf. But again, the investments would not have arisen at all were it not for FAL's advice. So, I don't agree that it's responsibility for loss stemming from its advice ceased when it ended its agreement with Mr H.

Summary

I don't doubt that the flexibility, control and potential for alternative death benefits on offer through a personal pension would have sounded like attractive features to Mr H. But FAL wasn't there to just transact what Mr H might have thought he wanted. The adviser's role was to understand Mr H's circumstances, separate his concerns stemming from the consultation and his unconfirmed plans for a retirement from his genuine needs 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. And this action was irreversible. By transferring, Mr H 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, as there were other ways to address his objectives, if they turned out to be more than aspirational.

So, I think FAL should've advised Mr H not to transfer.

Mr H had over 9 years before he reached the age at which he'd indicated he might like to retire. Although again I think his plans were unconfirmed. So, while he indicated he was interested in retiring early I don't think he could say with certainty what his needs in retirement would likely be. So, I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF. I say this because while it is true the PPF would've provided a more favourable reduction for very early retirement, because his plans were not confirmed, there was no guarantee the reduction he accepted would end up being offset by this more favourable reduction. And by opting into the BSPS2, Mr H would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think if FAL had correctly advised him against transferring Mr H would've opted into the BSPS2. And I don't agree with FAL that it is unreasonable to base redress on this – given, in the circumstances, it is what I think is more likely than not to have happened had there been no error.

Of course, I have to consider whether Mr H would've gone ahead with a transfer anyway, against FAL's advice.

I've considered this carefully, but I'm not persuaded that Mr H would've insisted on transferring, against FAL's advice. I say this because Mr H was an inexperienced investor with a 'low to balanced' attitude to risk. This pension accounted for the majority of his private retirement provisions. So, if FAL had provided him with clear advice against transferring, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr H's concerns about the consultation or the PPF, or the potential appeal of alternative death benefits, control or flexibility were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. And if FAL had explained that Mr H was always unlikely to exceed the guaranteed benefits available to him by transferring, I think that would've carried significant weight. So, I don't think Mr H would have insisted on transferring.

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

FAL has said that Mr H will benefit from the flexibility of the personal pension even though I've found the advice to be unsuitable. So, has implied it thinks this is unfair. It is evident that Mr H will benefit from flexibility by virtue of the position he is in now, but that has only arisen because of the unsuitable advice. And ultimately the regulator has set out what it deems to be appropriate redress to put right instances of unsuitable defined benefit pension transfer advice. And I see no reason to depart from this in the circumstances of this complaint.

Our Investigator recommended that FAL also pay Mr H £300 for the distress caused by the unsuitable advice. Mr H has indicated he doesn't think this reflects the upset he's been caused by FAL, in his view, taking advantage of him when it gave advice. But an award for any distress caused isn't intended to address the advice itself or financial loss stemming from this. And our role isn't to fine or punish businesses, so such awards are not intended to be punitive.

I don't doubt that Mr H has been caused distress and concern by finding out more recently when making his complaint the advice may not have been suitable – particularly given the circumstances and uncertainty under which he first asked for this advice. And I'm conscious this recent upset wouldn't have happened but for the unsuitable advice. But, while this was no doubt upsetting, I don't think the advice caused ongoing distress in the period between it being given and Mr H raising his complaint. And, in the circumstances, I think the award the Investigator recommended in respect of the distress Mr H has incurred is fair.

Putting things right

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

FAL 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.

FAL 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 H and our Service upon completion of

the calculation.

For clarity, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out 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 H'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, FAL should:

- calculate and offer Mr H redress as a cash lump sum payment,
- explain to Mr H 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 H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts FAL's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr H 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 H's end of year tax position.

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

In addition, FAL should pay Mr H £300 for the distress caused by the disruption to his retirement planning.

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 Futures Assured Ltd to pay Mr H 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 Futures Assured Ltd pays Mr H the balance.

If Mr H accepts this decision, the money award becomes binding on Futures Assured Ltd.

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 July 2023.

Ben Stoker
Ombudsman