DRN-3670532

Financial Ombudsman Service

The complaint

Mr R complains about the advice given by David Stock & Co Limited (David Stock) to transfer the benefits from his British Steel Pension Scheme ('BSPS') defined-benefit ('DB') occupational pension scheme benefits to a self invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes it has caused a financial loss.

What happened

In March 2016, Mr R'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 October 2017, members of the 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 2017 (and was later extended to 22 December 2017).

Mr R had received a Cash Equivalent Transfer Value ('CETV') from the DB scheme in October 2017. It had a value of £231,361.52 and was valid for three months.

Mr R was unsure about what to do so he contacted David Stock. On 2 November 2017 they had a 'triage' meeting. David Stock says that no advice was given in this meeting. It says that only pensions in general, and the situation with Mr R's employer were discussed. David Stock says that Mr R indicated he wanted to transfer after the triage meeting and it sent him a fact find document to complete. This was so it could gather information about his circumstances and objectives. Mr R completed and returned this to David Stock.

The fact find showed that Mr R was aged 36, single, and he had no dependents. He was living with his parents and he had a modest amount of debt. Mr R was currently a member of his employers defined contribution (DC) scheme and he also had his defferred BSPS benefits. David Stock also carried out an assessment of Mr R's attitude to risk ('ATR'), which it said was 'speculative'.

David Stock's file notes show that a transfer value analysis report ('TVAS') and a suitaility report were prepared for a meeting that took place on 28 November 2017. I understand that Mr R agreed to proceed with the transfer after reviewing these in the meeting.

On 30 November 2017, David Stock provided written advice to Mr R to transfer his pension benefits into a personal pension. The suitability report said the reasons for this recommendation were:

- He didn't trust the BSPS, or his employer, and was worried about the future of his pension.

- He wanted flexibility and control over his pension and he wanted to transfer to a scheme that would let him retire earlier than the BSPS.
- He was attracted by the enhanced transfer value.
- And he was keen to gift his pension savings when he passed away.

The transfer to the SIPP proceeded in due course. Mr R's DB scheme value of £231,361.52 was invested using a discretionary fund manager (DFM) in a 'progressive' portfolio.

Mr R complained in 2022 to David Stock about the suitability of the transfer advice. He said he had received information from the industry regulator that showed the transfer may not have been suitable for him. He says he was told his fund would significantly increase in value, but this may not be the case. He's gone on to say that as the DFM is managing the investments it's not clear why he is paying fees to David Stock and the personal arrangement product provider.

David Stock didn't uphold Mr R's complaint. It said that it took the time to fully explain and document the advice. It said this was suitable for Mr R and met his needs and objectives. He was made aware of the risks of the transfer, but he wanted to proceed in any event due to the situation with his employer.

Mr R referred his complaint to our service. An Investigator upheld the complaint and recommended that David Stock pay compensation. He said that whilst the critical yield showed that replacing the benefits Mr R gave up were possibly achievable, his retirement was too far away for him to have any concrete retirement plans. And so, there was no real need for him to transfer his DB scheme benefits at this time.

David Stock disagreed, it said that the sale wasn't rushed and Mr R was provided with full information about the transfer. He was fully informed about the new scheme and the risk of it, he was given time to consider this information. It said that it thought that the sale was reasonable.

David Stock also thought that the compensation should be based on the PPF rather than the BSPS2. This is because the BSPS2 wasn't fully started until after the transfer had completed.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

What I've decided – and why

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

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 David Stock'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, David Stock should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr R's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

David Stock has strongly argued that BSPS2 may not have gone ahead so the only meaningful comparison it could provide was with the benefits available to Mr R through the PPF. But I think David Stock overestimated the chance of this not happening; Mr R had received his "Time to Choose" pack by the time the advice was given. And details of the scheme had been provided; the BSPS2 would've offered the same income benefits but the annual increases would've been lower. Of course, it's possible this may not have gone ahead, but I note the advice was given at the time on the basis that Mr R had a choice between the PPF, the BSPS2 and transferring away. Which correctly reflects the options he had.

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

Mr R was 36 at the time of the advice and wanted to retire at the latest age 65. The critical yield required to match Mr R's benefits from the BSPS2 at age 65 was 4.66% if he took a full pension and 4.25% if he took TFC and a reduced pension. The critical yield to match the benefits available through the PPF at age 65 was quoted as 3.62% per year if Mr R took a full pension and 3.4% per year if he took TFC and a reduced pension.

I haven't seen that David Stock looked at critical yields for any age except Mr R's age 65. It would have been better if it had looked at earlier ages if Mr R said he wanted to retire early. I would expect the critical yields for an earlier retirement to be higher than those at his age 65.

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 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 4.7% per year for 29 years to retirement. 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%.

David Stock says it assessed that Mr R was likely to have a 'speculative' attitdue to risk. So it was therefore reasonable to assume he would invest to gain higher returns, that is 5% or above, and would be able to replicate the benefits he was giving up in the DB scheme. And in addition gain the flexible benefits the personal arrangement had.

Mr R did have around 30 years before retirement so it's not unreasonable to expect that he would take some investment risk over this time. But I've seen the information that Mr R provided about this and I don't think it properly establishes his attitude to risk.

What seems to have happened here is Mr R gave the same answer to certain questions about his attitude to risk, which was three on a scale of one to four, or 'agree' to all but two of the attitude to risk questions. And this gave him a high enough 'score' to fit into the speculative category.

But the answers Mr R gave were contradictory. For example, Mr R said on the form that he had invested before without advice. But he also said that he was 'not at all experienced; I'm not very comfortable with investing'.

I would expect someone whose attitude to risk was assessed as 'high' to have significant investment experience. But this doesn't seem to be the case here. Mr R had no current investments and there was no detial about how he'd invested in the past, if he had.

I think overall that David Stock should have 'ironed out' these contridictions by looking at this in much more detail. If it had done this I think it would have determined that Mr R's attitude to risk was much lower than the 'speculative' it recorded on the form, particularly in respect of what could turn out to be the mainstay of his retirement provisions. It's one thing to take a speculative risk with a smaller investment, but doing this with a the transferred out proceeds of a DB scheme is more signficant and the consequences for loss can be far more serious. It follows that I'm also not persauded that Mr R had the capacity to take a signficant risk with this pension.

I've taken this into account, along with the composition of assets in the discount rate, what I think about Mr R's attitude to risk and also the term to retirement. There would be little point in Mr R giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 4.6%, I think the Mr R was at best likely to receive benefits of the same value, or lower than the DB scheme from retirement at age 65, and he could receive less as a result of investing in line with his likely tolerance to risk. And I think he was likely to achieve lower benefits if he wanted to retire at an earlier time than his age 65.

I recognise that the situation when comparing critical yields is different if the scheme moved to the PPF. But it was recorded that Mr R didn't want to join the PPF and it was reasonably certain when he received advice that his BSPS benefits could move to the BSPS2, if this is what he wanted

Overall, whilst I think it was possible for Mr R to match his DB benefits outside the scheme. But there was still a risk he wouldn't, particularly if his atttitude to risk was lower or 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.

David Stock has provided cashflow models which it says shows Mr R would've been able to meet his needs despite the high critical yields. I've considered these, but David Stock's models show that if the fund grew at a medium rate, and Mr R took the same income as he could from the DB scheme, then it would run out at his age 92. So, if there was a period of poor returns or Mr R lived a long life, his fund was at risk of running out before he died.

And David Stock also provided an estimate of the fund value he would need to replicate the benefits he was giving up in the DB scheme. At age 65 this was £747,117.50. This was far above the transfer value, and what the transfer could reasonably be assumed to grow to. This gave a revealing insight into the value of the benefits Mr R gave up when he transferred into the SIPP.

As David Stock will know, 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.

For this reason alone, I'm not persuaded that a transfer out of the DB scheme was in Mr R's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as David Stock has said 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

It seems that one of the main reasons that David Stock recommended this transfer was for the flexibility and control it offered Mr R. That said, Mr R's retirement date was so far in the future that his actual aims weren't established. This wasn't entirely unreasonable given his age, but it does make it difficult to actually know what he wanted.

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

It's evident that Mr R could not take his DB scheme benefits flexibly. Although he could choose to take tax free cash and a reduced annual pension, Mr R had to take those benefits at the same time. But I'm not persuaded that Mr R had any concrete need to take tax free cash and defer taking his income, or to vary his income throughout retirement. To my mind this seems more of a 'nice to have' rather than a genuine objective.

Mr R was a member of his empoyers DC scheme and he and his employer were jointly contributig 16% of Mr R's salary into this. He had around 30 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 the BSPS2. So 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. He didn't need, in my view, to transfer his DB benefits for flexibility when he could have achieved this through his other provisions.

David Stock says Mr R 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 would likely have had the flexibility to retire early and use hs benefits flexibly through his DC, or other, arrangements.

So, I don't think it was a suitable recommendation for Mr R to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr R later had reason to transfer out of his DB scheme he could have done so closer to retirement.

Overall, I'm satisfied Mr R could have met his income needs in retirement by maintaining the guaranteed income available to him through the BSPS2 or the PPF at age 65 and taking additional funds from his DC scheme until his state pension became payable. So, I don't think it was in Mr R's best interests for him to transfer his pension just to have flexibility that it wasn't really established he needed.

Death benefits

Mr R said that he would like to pass on his pension fund to his family. That said, this doesn't seem to have been a high priority as he didn't have any actual dependents.

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

I also think the existing death benefits attached to the DB scheme were underplayed. If Mr R had dependents in the future, the dependent's pensions provided by the DB scheme would've been useful to them if Mr R predeceased them. I don't think David Stock made the value of this benefit clear enough to Mr R. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, David Stock should not have encouraged Mr R to prioritise the potential for higher death benefits through a personal pension over his security in retirement. Particularly as he didn't yet have dependents.

Furthermore, if Mr R genuinely wanted to leave a legacy for any of his relatives, which didn't depend on investment returns or how much of his pension fund remained on his death, I think David Stock should've instead explored life insurance.

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

Control and concerns over financial stability of the DB scheme

Mr R was only 36 when he asked for advice. The regulator more recently referred to the scenario of younger consumers 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 R. As I said above I think he was interested in early retirement and taking benefits flexibly, however given that he was 25 to 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.

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

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

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going ahead. So, the advice David Stock gave Mr R should've properly taken the benefits available to him through the BSPS2 into account and I think this should've alleviated Mr R's concerns about the scheme moving to the PPF.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that David Stock should've reassured Mr R that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr R through the PPF would've still provided a significant income at his retirement, and he was 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've led to David Stock recommending Mr R transfer out of the DB scheme altogether.

I also think Mr R's desire for control over his pension benefits was overstated. Mr R 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. So, I don't think that this was a genuine objective for Mr R – it was simply a consequence of transferring away from his DB scheme.

It seems to me that Mr R's stated desire for 'control' related more to moving his pension away from an employer that he didn't trust than to any resolution on his part to begin to manage his investment.

But it ought to have been explained that Mr R's employer and the trustees of the BSPS2 were not one and the same. And in any event, Mr R was not intending to leave his employment and his DC pension remained connected to his employer – so transferring out of the scheme didn't achieve a 'break' from his employer. So had David Stock explained that Mr R's belief regarding the control Mr R's employer had over his pension was misplaced, I think he would have been reassured by this.

Use of DFM

David Stock recommended that Mr R use a DFM to manage his pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr R, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr R should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage his funds if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr R. But David Stock wasn't there to just transact what Mr R might have thought he wanted. The adviser's role was to really understand what Mr R needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr R was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr R shouldn't have been advised to transfer just because of any concerns he may have had about his employer or the scheme. This wasn't worth giving up the guarantees associated with his DB scheme.

Mr R was being advised by David Stock after having received the "Time to Choose" document and was at the point where he had to select which option to he wanted to take. I've carefully considered what Mr R likely would have done – had he been suitably advised by David Stock – and on balance I think he would have opted to join the BSPS2. I say this because I don't think Mr R's retirement plans were fully formed. So, I don't think that it would've been in his interests to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. And by opting into the BSPS2, Mr R would've retained the ability to transfer out of the scheme if he needed to at some point in the future. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think David Stock should've advised Mr R to opt into the BSPS2.

Of course, I have to consider whether Mr R would've gone ahead anyway, against David Stock's advice. David Stock argues that this is the case. And I have noted that the point of sale documentation does say that Mr R was 'determined' to transfer whatever the outcome of the advice given was. Put simply, David Stock says that Mr R was as good as an 'insistent client' who would've chosen to transfer even if it had advised him against it.

I've considered this carefully, but I'm not persuaded that Mr R would've insisted on transferring out of the DB scheme, against David Stock's advice. I say this because Mr R was an inexperienced investor with at best a medium attitude to risk and this pension accounted for the majority of Mr R's retirement provision. So, if David Stock had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice. And he's recently said that this was the case.

I'm not persuaded that Mr R's concerns about his employer and the scheme 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. If David Stock had explained that Mr R could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr R would have insisted on transferring out of the DB scheme.

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

I agree with our Investigator that Mr R will have been caused some distress and inconvenience by David Stock's unsuitable advice so I think that David Stock should pay him compensation of £200 in recognition of any trouble and upset it has caused him.

Putting things right

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

David Stock 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.

David Stock 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 R and our Service upon completion of the calculation.

For clarity, Mr R has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual

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 R'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, David Stock should:

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

Redress paid to Mr R as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, David Stock 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 R'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.

David Stock should pay Mr R £200 for the distress and inconvenience the unsuitable advice caused him.

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

My final decision

Determination and money award: I uphold this complaint and require David Stock & Co Limited to pay Mr R 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 David Stock & Co Limited pays Mr R the balance.

If Mr R accepts this decision, the money award becomes binding on David Stock & Co Limited.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 6 July 2023.

Andy Burlinson
Ombudsman