DRN-3679156

Financial Ombudsman Service

The complaint

Mr P complains about the advice given by Prudential Financial Planning Limited (Prudential) to transfer the benefits from his defined-benefit (DB) occupational pension with the British Steel (BSPS) scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss. He says the industry regulator says that a transfer wasn't likely to be in his best interests and he feels that this transfer isn't.

What happened

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved pension benefits, one of which was a transfer to the Pension Protection Fund (PPF) – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr P's employer would be set up – the BSPS2.

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

Mr P contacted Prudential to on 4 December 2017 and they met on 8 December 2017 to discuss his pension and retirement needs. He was also concerned about the situation with British Steel pension scheme. Prudential completed a fact-find to gather information about Mr P's circumstances and objectives. According to this document he was:

- Aged 56, married with three grown up non-dependent children.
- Employed as a factory worker at British Steel earning £37,000 a year.
- Owned his property outright (with his wife).
- He had £13,000 held on deposit.
- He was a member of his new employer's defined contribution scheme. Both him and his employer paid a combined total of 16% of his salary into this.

Mrs P wasn't working and was in receipt of benefits. She had a deferred Civil Service pension, it was estimated that this would provide £1,200 a year.

Prudential carried out an assessment of Mr P's attitude to risk, which it said was 'low/medium'. He was also recorded as being an inexperienced investor.

On 24 January 2018, Prudential advised Mr P to transfer his pension benefits, which were £289,454.84 into a personal pension and invest the proceeds in the Prudential PruFund 10-40.

The suitability report said the reasons for this recommendation were:

- Maximising his pension benefits at retirement. This was described as also being able to draw an income at the level that he required and perhaps reduce it at state pension age. He did not need a lump sum immediately.
- He wanted to pass on his pension fund and provide a legacy to his family.
- Mr P wanted to retire at age 60 to spend time with his wife.
- He wanted to be in control of his pension and to break ties with his employer and the BSPS.

Mr P complained in 2021 to Prudential about the transfer advice. He said that the advice was unsuitable as he would get lower benefits than the BSPS2 pension that it replaced.

Prudential didn't uphold Mr P's complaint. It said that the advice was suitable for him and it met his recorded aims. It said Mr P was provided with full information about the transfer and he proceeded, as a fully informed individual, on the basis the advice met his needs. It added Mr P could have decided to stay in the BSPS if he wanted to.

Mr P referred his complaint to our service. An investigator upheld the complaint and said that Prudential should pay compensation. He said that whilst Mr P may have had some concerns about the future of the scheme and he was interested in leaving his pension to his family, these weren't good enough reasons to transfer his DB scheme benefits. Added to this, the BSPS2 would have met Mr P's aims. The transfer would have left Mr P worse off financially so it wasn't in his best interests.

Prudential disagreed, saying:

- Mr P wasn't reliant on his DB scheme benefits as he would have other sources of retirement income. So, he could afford to put this part of his pension planning at risk.
- It met his requirement to provide a legacy for his family.
- Mr P was a heavy smoker, so he did have some health concerns. Even though he was recorded as being in good health on the fact find.
- Other options, such as the BSPS2, were discussed but discounted as they did not meet his aims.
- Mr P needed flexible benefits to meet his retirement aims.
- His risk profile and capacity for loss were reasonably assessed.

The investigator wasn't persuaded to change their opinion. He noted that whilst Mr P may have been a heavy smoker there was no indication that he believed he would die early. Furthermore, the BSPS2 met his needs and leaving a lump sum to his family wasn't a good enough reason to transfer away.

As no agreement has been reached the complaint has been passed to me to consider.

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 Prudential ('PRIN') and the Conduct of Prudential 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 Prudential'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 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Prudential should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr P's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr P was 56 at the time of the advice and wanted to retire at 60. As far as I can see Prudential didn't provide critical yields at this age, which it should have done. But the critical yield required to match Mr P's benefits at age 65 was 8.3% if he took a full pension. So, it was likely to be higher at age 60 given the pension would be invested for a shorter time and the benefits would be paid for longer. The critical yield to match the benefits available through the PPF at age 65 was quoted as 4.5% per year if Mr P took a full pension. Again, at age 60 I think the critical yield was likely to be higher than this.

The closest discount rate to the time of this transfer which I'm able to refer to was published for the period before 1 October 2017, and is 3.4% per year to his age 65. The discount rate to his age 60 was 2.7%. 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 P's attitude to risk and also the term to retirement. And given Mr P's low attitude to risk, I think Mr P was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement at age 60, as a result of investing in line with this attitude to risk. This would be the case even if the scheme moved to the PPF.

Prudential has provided cashflow models which it says shows Mr P would've been able to meet his needs despite the high critical yields. I've considered these, but Prudential's models show that if Mr P matched his DB scheme income initially, and this increasing at 2.5%, his fund would be exhausted at his age 98. And the suitability report doesn't say that this account for charges, if these are not included the growth rate would need be higher and the fund would be depleted sooner. If took the same benefits as the BSPS2 but reduced the amount to account for the state pension, then this increases to 104. But if there was a large fall (15%) and using similar assumptions, the fund is exhausted at 94. So, I think there was a real risk of his funds running out before he died, particularly if returns were poor and Mr P took the same level of income his DB scheme provided.

In any event, as Prudential will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulators 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. And if applying these rates, I think Mr P's fund would've depleted sooner.

For this reason alone, a transfer out of the DB scheme wasn't in Mr P's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Prudential has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

The information about Mr and Mrs P's retirement that Prudential recorded is fairly detailed and is not disputed. This showed that Mr and Mrs P wanted £1,458 each month in retirement from age 60. This was after accounting for inflation.

It was documented that Mrs P would receive an income of £772 per month when she retired. This left £686 for Mr P to provide. The DB scheme would have provided £11,226 at his age 60, which is much more than the £686 a month.

Mr and Mrs P also had state pension provision and Mr P was in his employers new defined contribution scheme which was building up a fund which could be used flexibly.

Mr P's first objective was recorded as being 'maximising his pension benefits'. As above, it's likely that he would receive a lower income due to the transfer. So, he wouldn't be 'maximising' his retirement income by effecting the transfer. The only way he would be able to have an increased income by transferring was if he took a higher sum from the personal pension before his state pension became payable. But I don't think he needed to do that.

I also don't think it's reasonable to say that Mr P's pension was 'surplus to requirements'. This was Mr P's primary source of pension income and whilst he may have discussed taking benefits from it in a different form, I don't think it's reasonable to say he didn't want or need the income from it. Its clear Mr P was wholly reliant on this pension for at least seven years until his state pension became payable – and it was noted that he wouldn't be entitled to the full amount. Just because Mr P would have other sources of income doesn't mean he wasn't reliant on this pension.

I can see that part of the 'maximising' his pension benefits aim was qualified by saying that Mr P could draw down from the transferred fund as and when this was needed. Which was a benefit the DB scheme didn't have. But this seemed like a want rather than a need. And he was building up a fund with his employer that he could use flexibly in this way going forward if he wanted to.

It was recorded that Mr P didn't want to take any tax-free cash so he had no need to take any lump sums and leave his remaining funds invested. I also can't see that Mr P had a strong need for variable income throughout his retirement. To my mind, this need for flexibility was borne out of Mr P's apparent desire to reduce his pension income when his state pension became payable, which would have the effect of preserving more of his funds to pass on upon his death. I don't think this was a good reason to transfer and I'll address this further below.

Overall, I'm satisfied Mr P could have met his income needs in retirement through the DB scheme at age 60, or at age 65. And I don't think he needed the flexibility that transferring out of the scheme provided.

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 P. But whilst I appreciate death benefits are important to consumers, and Mr P 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 P about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Prudential explored to what extent Mr P 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. Mr P was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr P predeceased her. I don't think Prudential made the value of this benefit clear enough to Mr P. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, there may not have been a large sum left and the fund may have been depleted particularly if Mr P lived a long life. In any event, Prudential should not have encouraged Mr P to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

I acknowledge that Mr P was noted as being as a heavy smoker. But he was apparently in good health at the point of sale, and I haven't seen any recorded concerns about his life expectancy. So, Mr P not reaching his life expectancy was only a possibility, it was also possible that he would exceed this, in which case Mr P would need his pension to last longer. Furthermore, given what Mrs P had disclosed about her health, it seemed more likely at the time that Mr P would outlive her. So, I don't think Mr P should've been encouraged to transfer his DB scheme to provide different benefits when he was reliant on this to provide for his own retirement.

While taking life insurance out may have been expensive for Mr P given his age and smoking status, I think that Prudential could've explored alternative ways of providing a legacy for his family if that was indeed important to him. It's evident from the fact-find that Mr and Mrs P had significant disposable income and they were managing to save, so this could've built up additional funds to pass on to their children. This would've continued in retirement, particularly once Mr and Mrs P's state pensions became payable. Any excess income could've been directed towards their savings, or they could've made use of their annual gift allowances to pass funds on to their children. This would've met Mr P's desire to ensure his children benefitted from his pension without risking any guarantees or taking on investment risk.

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 P. And I don't think that the alternatives were properly explored.

Control over his pension

I think Mr P's desire for control over his pension benefits was overstated. Mr P 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 P – it was simply a consequence of transferring away from his DB scheme.

Time to choose and concerns about financial stability of BSPS

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

As I've explained, by the time the advice was given details of the BSPS2 were known and it seemed likely it was going ahead. And I think this should've alleviated some of Mr P'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 Prudential should've reassured Mr P that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr P through the PPF would've still been guaranteed and escalated. It combined with his other provisions would still have met his goals. And he was unlikely to be able to exceed this by transferring out. And while the increases in payment in the PPF were lower, again the income was guaranteed and was not subject to any investment risk. So, I don't think that these concerns should've meant Prudential recommending Mr P transfer out of the DB scheme altogether.

I recognise that Prudential noted in the suitability report that Mr P wanted to 'break ties' with his employer. So, it may argue that Mr P wouldn't have agreed to join the BSPS2 because of his feelings towards his employer. But it's evident that he still worked for the same employer. And he hadn't suggested he intended to find alternative employment. He was also a member of the new defined contribution pension scheme via his employer. So, he wasn't going to be able to break ties with it by transferring, as he would remain tied to the employer in other respects. I think it also should've been mentioned that his employer and the BSPS2 trustees were not entirely one and the same.

As I've outlined above, Mr P met with Prudential before the time he had to choose to either join BSPS2 or remain in the BSPS scheme and his eventually his pension would pass the PPF. As far as I am aware Mr P didn't choose to join the BSPS2 and he's said he can't remember completing a 'Time to Choose' form. The suitability report says about this:

'We discussed the option of transferring this pension to the British Steel Pension 2 or the PPF. British Steel have not provided you with literature regarding these options and I have not provided advice in relation to them. However, both of these options were discounted as you want to benefit from the flexible nature of control and the improved death benefits that you feel will benefit you and your beneficiaries more.'

Whilst the full suitability report was not produced until 24 January 2018 this indicates to me that Mr P's options were discussed prior to 22 December 2017 when Mr P had to choose the future of his BSPS pension.

Mr P now says that he should have been advised to join the BSPS2. All of advice from Prudential was based on a comparison of the BSPS2 scheme and a personal pension, there is no consideration, or mention, of Mr P ending up in the PPF. This doesn't seem to be what he wanted at all.

The literature from Tata Steel says that Mr P could have opted to join the BSPS2 whilst the advice process was ongoing and, provided he transferred out before March 2018, this choice would be cancelled if he decided transferring was in his best interests. So, even though there was a short time between first contact and the Time to Choose deadline, I think Prudential could and should have advised Mr P to opt into the BSPS2 to ensure he didn't lose that opportunity, even though it hadn't been through the full advice process. Given that I think the suitable advice here would've been for Mr P to opt into the BSPS2, if the transfer had not been advised, I'm satisfied he would have joined the BSPS2.

It is worth noting that by the time the suitability letter was issued in January 2018 its content may have been redundant. If Mr P had not chosen to join BSPS2 already he wouldn't be able to. His pension would 'default' to the PPF. None of that was made clear to him and so I don't think he was ever in an informed position as a result of Prudential's advice.

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

Suitability of investments

Prudential recommended that Mr P invest in one of its managed funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr P, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr P should have been advised to remain in the DB scheme and so the investments in this fund wouldn't have been made 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 P. But Prudential wasn't there to just transact what Mr P might have thought he wanted. The adviser's role was to really understand what Mr P needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr P was suitable. He was giving up a guaranteed, risk-free and increasing income that would've met his stated retirement needs. By transferring, Mr P 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.

So, I think Prudential should've advised Mr P to join the BSPS2.

Of course, I have to consider whether Mr P would've gone ahead anyway, against Prudential's advice.

I've considered this carefully, but I'm not persuaded that Mr P would've insisted on transferring out of the DB scheme, against Prudential's advice. I say this because Mr P was an inexperienced investor with a low attitude to risk and this pension accounted for the majority of his retirement provision. So, if Prudential 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.

I'm not persuaded that Mr P's concerns about his employer, or his health, were so great that he would've insisted on the transfer 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. If Prudential had explained that Mr P 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 P would have insisted on transferring out of the DB scheme.

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

Our Investigator recommended that Prudential also pay Mr P £300 for the distress caused by the unsuitable advice. I don't doubt that Mr P has been caused distress and concern in relation to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

Prudential should pay Mr P £300 for the distress caused by the unsuitable advice.

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) 17/9 (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 P whether he preferred any redress to be calculated now in line with current guidance or wait for any new guidance/rules to be published. He has chosen not to wait for any new guidance to come into effect to settle his complaint. I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr P.

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

Prudential must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, Mr P 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 as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr P's acceptance of the decision.

Prudential may wish to contact the Department for Work and Pensions (DWP) to obtain Mr P's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr P's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr P's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr P within 90 days of the date Prudential receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Prudential to pay Mr P.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Prudential to carry out a calculation in line with the updated rules and/or guidance in any event.

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 Prudential Financial Planning Limited to pay Mr P the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Prudential Financial Planning Limited to pay Mr P any interest on that amount in full, as set out above.

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

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

If Mr P accepts this decision, the money award becomes binding on Prudential.

My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 16 December 2022.

Andy Burlinson
Ombudsman