DRN-3715858

The complaint

Mr E complains about the advice given by D C Financial Limited ('DCF') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension plan. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr E'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.

At the time the BSPS scheme closed to new accruals in March 2017, Mr E had 6 years and 3 months of pensionable service with his employer which gave him a total (index linked) pension of £2,574.95 per year (forecast to be £4,303 per year at age 65 or £2,353 at age 55). After the DB scheme closed to new accruals in March 2017, Mr E joined his employer's Defined Contribution ('DC') scheme.

In September 2017 Mr E had received a Cash Equivalent Transfer Value ('CETV') from the DB scheme of £52,062.52 valid for 3 months until 11 December 2017.

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 E was unsure about what to do so he contacted DCF. DCF completed a fact-find in November 2017 to gather information about Mr E's circumstances and objectives. Mr E's circumstances at the time were noted as follows:

- He was aged 44, married with three children, two of which were no longer dependent on him and one which was.
- He was employed as a team member earning £32,300 per year excluding bonuses.
- Mrs E was employed earning £12,500 per year.
- Mr and Mrs E had a combined monthly income of £2,700 and their monthly combined expenditure on their mortgage, loans and credit cards was £760. Their other outgoings were undocumented.
- Mr and Mrs E's house was valued at £110,000 with an outstanding mortgage of £51,500 with 17 years to run.
- He had no savings, investments or assets.
- He was recorded as being a member of his employer's DC scheme, making contributions of 6% of his salary per year along with employer contributions of 10% per year; the fund was valued at approximately £2,000-£3,000.

- Mrs E was documented as being a member of her employer's DB scheme since 2011.
- Mr and Mrs E had a joint mortgage protection policy – the amount of cover was undocumented – along with death in service cover from Mr E's employer of four times his salary.
- His preferred retirement age was 57 but he was unsure what percentage of his current income he would need in retirement. It was documented that he would consider this at the time he retired.
- That he was uncertain about the new BSPS2 and didn't want to risk his benefits being reduced in the future by either the Pension Protection Fund ('PPF') or the BSPS2.
- He wanted to take control of his pension away from his employer, to have flexible income in retirement, to retire early without penalty, and liked the idea of flexible death benefits and being able to leave his remaining pension fund to his wife.

DCF also carried out an assessment of Mr E's attitude to risk ('ATR'), which it deemed to be 'cautious to moderate' or a risk level of 4 on a scale of 1 to 10. It also thought he had the capacity for loss as determined by his ATR.

A transfer value analysis report (TVAS) was produced on 2 November 2017 which set out the amount of investment growth (known as the 'critical yield') required by the transferred funds to be able to match the benefits being given up in the BSPS. It said Mr E's pension would need to achieve growth of 8.31% each year to match his full scheme income at age 65 or 12.59% to match his full scheme income at age 55. It also stated that Mr E's pension would need to grow by 6.3% to match the benefits he could receive from the PPF at age 65.

On 14 November 2017 DCF provided Mr E with its suitability report and advised him to transfer his pension benefits into a personal pension and invest the proceeds with a provider ('L') in 19 different funds to be actively managed by DCF. The suitability report said the reasons for this recommendation to Mr E were, in summary:

- Flexibility of income in retirement
- To have the flexibility to take early retirement before the scheme NRD of 65 without being financially penalised.
- To be able to access 25% of the fund as tax-free cash (TFC).
- The uncertainty surrounding the BSPS, fear of benefits being cut further in the future, concern that the fund would fall into the PPF and the new BSPS2.
- Transferring his benefits would remove them from the control of his employer who he didn't trust.
- Flexible death benefits.

Mr E accepted the recommendation and signed the transfer forms on 8 November 2017. The forms were submitted to L and Mr E signed a declaration on 30 November 2017 to say that he had received and read the suitability report. DCF were remunerated with an initial advice fee of £1,301.56 and an annual ongoing adviser fee of 1% of the fund value. L also charged an annual fee of 0.25% and the 19 different funds that the pension was invested in each attracted their own annual charges ranging between 0.46% and 1.38% which proportionately equated to a further annual fund charge of 1.06%. The transfer took effect in mid-March 2018.

In October 2021 Mr E raised a complaint with this service. We told Mr E that before we were able to look into his complaint he first needed to raise a complaint with DCF which would then have 8 weeks to issue him with its final response letter.

DCF looked into Mr E's complaint and issued him with its final response letter in late November 2021. DCF said it didn't think it had done anything wrong so it wasn't upholding Mr E's complaint. It said it had concluded that the advice it gave Mr E in November 2017 had been suitable.

As Mr E was unhappy with the outcome of DCF's investigation into his complaint one of our Investigators looked into it for him and recommended that the complaint was upheld. He said that whilst Mr E may well have had concerns about the future viability of his employer, DCF should have explained that the options it was providing would continue to provide some form of protection for him which would have given him reassurance and eased his concerns about the fund. And he said any concerns Mr E had about his employer would still have existed regardless of where his pension fund was. So our Investigator didn't think this was a sufficient enough reason to justify the transfer.

Our Investigator went on to say that Mr E was some way off of retirement with unknown wants and needs so it would have been advisable to have advised Mr E to wait until he was closer to retiring before deciding if he wanted to transfer his fund or not. Our Investigator also said that it was also incorrect to say that early retirement under the scheme attracted a penalty when any reduction in benefits paid merely reflected the fact that the pension would need to be paid for longer. He thought the same could be said for using a personal pension to take early retirement – as demonstrated by the larger critical yields that applied in such situations.

Our Investigator didn't think flexible death benefits justified the transfer nor did he think, given the critical yields, that the transfer was financially viable; he thought the opportunity to match, let alone exceed, the benefits of his scheme was unlikely.

Our Investigator recommended that DCF should compensate Mr E for the losses he incurred by transferring his DB pension and that compensation should be based on him having opted to join the BSPS2. He also thought DCF should pay Mr E compensation of £300 for the distress and inconvenience he had been caused by having to live with the worry that the advice he'd received had caused him financial detriment.

Mr E replied to say he accepted our Investigator's findings.

DCF responded to say it disagreed with our Investigator's findings which, it said, were unfair and unreasonable. It made the following comments:

- BSPS2 was far from certain at the time so it plainly could not have recommended a transfer.
- It didn't accept that the critical yield should be the focal point for assessing the suitability of its advice. The only critical yield that should be used for comparison purposes was the one for the PPF so any focus on the critical yields associated with BSPS was wrong because it wasn't going to continue.
- The advice it gave Mr E was suitable and in his best interests. The critical yield is just one consideration and of limited relevance to a client with no intention of purchasing an annuity at retirement. If the critical yield was the most important factor to take into account then the regulator's COBS rules would have said as much.
- The critical yield doesn't determine the overall suitability of the advice.
- For the period of time it had managed Mr E's personal pension his fund achieved annualised growth of 5.61%.
- It questioned the focus on discount rates. The regulator didn't require firms to consider or apply discount rates when advising consumers. When comparing the

critical yield for the PPF against the applicable discount rate it was apparent that the critical yield would be achievable.
- Mr E had a number of compelling reasons for transferring his pension. He would not have been able to achieve his objectives without transferring.
- That even if it hadn't advised Mr E to transfer he would have proceeded anyway as an insistent client.
- That our Investigator's findings were unfair and unreasonable; were overly focussed on critical yields and discount rates without considering the overall suitability of the advice; placed no weight on Mr E's actual objectives; that even if the critical yield for matching benefits under the PPF was unlikely to be achieved the transfer was a suitable one given Mr E's objectives.
- That the flexibility to draw income in the way he wanted was more important to Mr E that having a rigid set income for life.
- Mr E had four compelling reasons for accessing his pension: to retire early without actuarial reduction; to access TFC without drawing an income from his pension; to take control of his pension; to allow any unused pension to be left to his wife and any potential children in the event of his death. Mr E would not have been able to achieve his objectives without transferring.
- Mr E didn't value the death benefits offered by the BSPS or the PPF rather he preferred the notion of his dependents receiving the remaining balance of his fund.
- That our Investigator's view diminished the importance of Mr E's objectives and instructions he gave at the time of the advice which didn't reflect the COBS rules and guidance or the FCA's guidance for assessing the suitability of the transfer. This made it unfair and unreasonable.

Our Investigator considered what DCF had said in response to his view but wasn't persuaded to change his mind about Mr E's complaint. He said his findings had addressed all the objectives for the transfer and that there'd not been an over emphasis on the critical yield. He said the annualised return of 5.61% that DCF had quoted was still significantly below the critical yield for the benefits given up. Our Investigator also said he'd seen no evidence that Mr E would have pursued the transfer as an insistent client. He said that he was still of the view that it hadn't been shown that the transfer was in Mr E's best interests or that Mr E had any particularly valid reason for the transfer. So he thought DCF should have recommended that Mr E move to BSPS2.

DCF also sent some further comments to our Investigator. It said any compensation calculation needed to be based on the PPF, not BSPS2 because BSPS2 didn't exist at the time the advice was given.

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

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

Financial viability

DCF carried out a transfer value analysis report (as required by the regulator) showing how much Mr E's pension fund would need to grow by each year (the critical yield) in order to provide the same benefits as his DB scheme. This analysis was based on his existing BSPS scheme benefits, but Mr E didn't have the option to remain in the BSPS; he either needed to opt into BSPS2 or move with the existing BSPS scheme to the PPF.

DCF has strongly argued that BSPS2 may not have gone ahead so the only comparison it could provide was with the benefits available to Mr E through the PPF. But I think DCF overestimated the chance of this not happening; Mr E 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 still think the proposed benefits available to Mr E through the BSPS2 should've been factored in with this advice so that he was able to make an informed decision.

The TVAS dated 2 November 2017 set out the relevant critical yields; at age 65 it was 8.31% if he took a full pension and at age 55 it was 12.59%. Given that one of the advantages of the transfer DCF cited, was to take 25% TFC flexibly it is notable that DCF didn't calculate the critical yield required for such a scenario at either age. The critical yields required to match the benefits provided through the PPF were 6.3% if Mr E took a full pension at age 65 or 5.98% if he took a reduced pension and a pension commencement tax free lump sum (PCLS). At age 55 the critical yields were 10.12% and 9.69% respectively.

According to the fact-find and the suitability report Mr E wanted to retire from British Steel early, possibly at age 57 however, that doesn't appear to have been anything more than a 'best guess', given he was only 44 at the time of the advice and would likely continue working for around another 20+ years. Nevertheless, given Mr E had expressed a desire to retire at that age, I think DCF should've provided him with the relevant critical yields for BSPS2 at the time it was advising him so that he was able to make an informed decision.

As I've said above, Mr E remaining in his existing DB scheme wasn't an option. So, the critical yields applicable to the BSPS2 benefits should also have been provided by DCF. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat but, I still think they would've likely been higher than those reflecting the PPF benefits, particularly at age 65. And that way Mr E would have been in possession of all the information he needed to make an informed choice.

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. 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 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 was 4.5% per year for 21 years to retirement (age 65) and 4.1% for 13 years to retirement (age 57). For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr E's attitude to risk and also the term to retirement. DCF says that at the time of the advice it assessed that Mr E as having being a cautious to moderate risk investor. Having reviewed the ATR questionnaire completed at the time of the advice I think that DCF's assessment in this respect was reasonable.

I've thought about Mr E's capacity for loss but I don't think that the length of time he had to go to retirement meant his capacity for loss was significant. I can see that at the time of the advice Mr E had no savings to speak of and that he had 17 years left to run on his mortgage. It can't be assumed that just because Mr E had 20+ years to go until he retired that he could afford to 'gamble' by transferring his DB scheme. The income he was forecast to receive at retirement from the scheme (if he remained) is, I think, one he didn't have the capacity to lose.

There would be little point in Mr E giving up the guarantees available to him through a DB scheme only to achieve, at best, the same level of benefits outside the scheme. Here, the lowest critical yield was 5.98%, which was based on Mr E taking a reduced pension and a PCLS through the PPF at age 65. The critical yield if Mr E took a full pension (no critical yield having been produced for a reduced pension and TFC) through his existing scheme at age 65 was 8.31%. So, if Mr E were to opt into the BSPS2 and take the same benefits at age 65 the critical yield would've been somewhere between those figures, and likely closer to 8.31%.

Given the discount rate of 4.5% the regulator's middle projection rate of 5%, and a reasonable assessment of Mr E's ATR, I think Mr E was most likely to receive benefits of a lower overall value than those provided by the PPF and the BSPS2 if he transferred to a personal pension, as a result of investing in line with that attitude to risk. And I am confident had DCF informed Mr E of the true value and benefits of BSPS2 and the PPF, and then advised him to remain in the BSPS, he would have accepted this and when the availability of BSPS2 arose, he would have opted to be transferred into it.

DCF says that it is unreasonable to base any findings on the discount rate because taking this into account was not required by the regulator when giving advice. While I haven't based my findings on this alone, I think it is a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice. Under COBS 19.1.2 the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension by using reasonable assumptions. So, businesses were free to use the discount rate as this would be considered a reasonable assumption of the likely returns. And in any event, this has been considered in tandem with the regulator's published projection rates, which providers were required to refer to. And it is this combination, along with Mr E's attitude to risk, which leads me to be believe he'd likely be worse off in retirement if he transferred out of the DB scheme.

Furthermore, DCF said in its suitability letter: "The critical yield required is high and it would be very unlikely that an investment could provide a return to match the benefits you are giving up." So it is clear to me that DCF realised that by transferring, Mr E would be unable to match the benefits he was giving up.

DCF provided analysis in the TVAS of the critical yields Mr E's pension would need to attain for retirement at ages 55 and 65 and along with analysis of how long his pension last if he drew the same income (indexed linked) as provided by his DB scheme (without taking any TFC). If he retired at age 65 his pension would run out by the time he was 88 and if he retired at 55 it would run out by the time he was 87. If Mr E been advised to remain in BSPS however and transfer to the PPF or BSPS2, his pension would never have run out, regardless of how long he lived.

I note too that the TVAS analyses the 'hurdle rate' (the rate of return required to purchase an annuity to provide benefits of equal value to the estimated benefits provided by the existing scheme assuming no spouse's pension and no index linking). The hurdle rate to age 65 was 4.52% and to age 55 was 3.99%. So only the hurdle rate at 55 was below the discount rate I have referred to above. But only by using a method of comparison that didn't match the guaranteed benefits in Mr E's BSPS, could it be argued that the DB scheme transfer was financially viable. But of course, both the index linking and spouse's pension are very valuable benefits so I don't accept the hurdle rate to age 55 demonstrates that the transfer was suitable and in Mr E's best interests.

I think that it's misleading for DCF to refer to any income that's been reduced as a result of taking retirement earlier than the scheme's NRD as being subject to a 'penalty'. What actually occurs is an actuarial adjustment to reflect a situation where the scheme is being asked to pay a pension for a longer period of time. This isn't done to 'penalise' individuals and I think DCF's focus should have been on explaining this to Mr E. That by taking early retirement from the scheme his pension would be reduced accordingly to reflect that. DCF should also have explained that a similar situation applied when using a personal pension to fund early retirement – as illustrated by the larger critical yields that applied in such situations. In Mr E's best interests, DCF should have said that rather than transferring he may want to wait to nearer retirement age to see if he did really want or need to retire at 57. He may well be content to work past 57 and the more years he does so, the smaller any actuarial reduction his scheme benefits would have been.

While DCF has referred to the past performance of the funds it recommended to him, as DCF 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.

In summary, even if the BSPS had moved to the PPF and Mr E's benefits were reduced as a result, if he retired early I think he would have still been very unlikely to match, let alone exceed, those benefits by transferring to a personal pension. By transferring his pension I think it was highly likely that Mr E would be financially worse off in retirement.

Given Mr E was likely to receive lower overall retirement benefits by transferring to a personal pension, for this reason alone I don't think a transfer out of the DB scheme was in his best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as DCF has argued in this case. There might be other considerations which mean a transfer is suitable and in Mr E's best interests, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

It seems the main reason that DCF recommended this transfer was for the flexibility and control it offered Mr E. Having considered the evidence, I don't think Mr E needed to transfer his DB scheme to a personal pension in order to have flexibility in retirement. Nor do I think he needed to access his DB scheme before his NRD such that it was at risk of actuarial reduction.

Mr E was only age 44 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. As Mr E had 11 years before he could think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr E to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr E later had reason to transfer out of their DB scheme they could have done so closer to retirement.

It's evident that Mr E could not take his DB scheme benefits flexibly. Although he could choose to take TFC and a reduced annual pension, Mr E had to take those benefits at the same time. But I'm not persuaded that Mr E had any concrete need to take TFC 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. An adviser's job isn't to simply facilitate a customer's wants. Any objectives should be thoroughly interrogated to determine if they are realistic or not or achievable through other means. And ultimately the adviser had to determine whether giving up the secure, guaranteed benefits of available through the BSPS (and then the PPF) was in Mr E's best interests.

But I've seen no evidence that DCF meaningfully explored Mr E's retirement objectives with him. Most people, if asked, say that they would want to retire as early as possible. But if DCF had had full regard to Mr E's information and communication needs I think it should have explored his actual retirement plans and what was important to him. I can't see that DCF determined what income Mr E would require in retirement, or for that matter, what his existing outgoings were and whether there was any disposable income that he could put towards building a savings pot which could provide him with the flexibility he said he needed in retirement. All I can see is that Mr E's mortgage was due to be paid off by the time he was 57 so it's reasonable to assume that his disposable income would increase as this point thereby allowing him to build a savings pot to access flexibly to top up his retirement income.

Furthermore, DCF's advice largely ignores the retirement funds that Mr E would be building up over the next 20+ years, through his employer's DC scheme. The fact-find says that Mr E and his employer were making combined contributions of 16% of his salary into his DC scheme. So it is reasonable to assume that even with modest investment growth over the next 20+ years, Mr E will have access to a significant fund by the time he retires. And Mr E could use his DC scheme if he wanted to retire early, without needing to access his DB scheme before his NRD (thereby avoiding any actuarial reduction). I think that DCF should have placed more emphasis on the fund Mr E would be building up in his DC scheme and how they could be accessed flexibly should he want to do so.

I accept at the time of the advice, the BSPS2 hadn't been established. Although I think the communications sent out by the scheme trustees were very optimistic that the scheme operating conditions would be met, it wasn't certain. And if Mr E had opted into the BSPS2 and it hadn't gone ahead, he would've moved with the scheme to the PPF. At age 65 Mr E would've been entitled to a pension of £2,826.43 per year (along with a PCLS of £18,842.88) from the PPF. This was lower than the pension he'd be entitled to under the BSPS2, but I don't think it would've been substantially lower such that it should've made a difference to the recommendation. As I've said above, Mr E would've had his DC scheme to draw on until his state pension became payable, or until he reached his DB scheme NRD if he wanted to retire earlier. So, I still think Mr E could've most likely met his needs in retirement even if the BSPS2 hadn't gone ahead and he'd had to move with it to the PPF.

I can't see that there was any known need for TFC without having to simultaneously draw an income (Mr E's mortgage would be repaid some years before retirement). But if, by the time Mr E retired some 20+ years hence, he needed a lump sum without wanting to start drawing his pension at the same time there were, as I've previously explained, other means available to him. And I think Mr E could've met his income needs until his state pension became payable at age 68. Mr E would have likely had a significant pension to draw on flexibly (from his DC scheme), as and when he needed, to top up his income or take additional lump sums. So, I don't think Mr E would have had to sacrifice flexibility in retirement by opting into the BSPS2.

Overall, I'm satisfied Mr E 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 E's best interests for him to transfer his pension just to have flexibility that he didn't need.

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 E. But whilst I appreciate death benefits are important to consumers, and Mr E 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 E about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think DCF explored to what extent Mr E 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 E was married so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr E predeceased her. There was also provision for a children's pension (at the time of the advice Mr E's daughter was aged 9) up to age 23 if they remained in full-time education. I don't think DCF made the value of this benefit clear enough to Mr E. These benefits were guaranteed and escalated – the spouse's pension would also be calculated as if no TFC had been taken – so it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And, as the TVAS shows, Mr E's pension fund would be depleted by age 88 if he achieved an annual investment return of 8.31%, so there may not have been a large sum left, if any at all, to pass on when he died. In any event, DCF should not have encouraged Mr E to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

DCF says that Mr E wanted to 'improve' on his scheme death benefits. It also said that Mr E was 'concerned' about the scheme death benefits, that he wanted to pass any unused pension on to his wife and children and that he preferred the 'notion' of any unused benefits being transferred to his dependents on his death. DCF says that the transfer meant these objectives were achieved for Mr E; I'm unable to agree. Transferring his pension was clearly not the only way for Mr E to achieve this objective. If Mr E genuinely wanted to leave a legacy for his wife and child, which didn't depend on investment returns or how much of his pension fund remained on his death, I think DCF could've explored the option of life insurance. If he wanted an extra sum specifically for his wife (and later his child), or if he wanted to 'improve' on his death benefits then he could've taken extra cover out on a whole of life basis and written it in trust for the benefit of any children.

And Mr E already had a significant death in service benefit through his employer (by virtue of his membership of the DC scheme) of four times his annual salary. So, arguably, Mr E already had sufficient life cover in place. So, Mr E already made provisions to ensure that part of his pension didn't die with him. But I've seen no evidence of any discussion with Mr E about using his DC scheme in this way should he so wish. So a degree of legacy planning was available in any event without the need to transfer.

In any event, whilst death benefits might be important for consumer, there generally shouldn't be a disproportionate emphasis on this compared to their own retirement needs. 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 E. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

It's clear that Mr E, 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 E 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 DCF's obligation to give Mr E 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 DCF gave Mr E should've properly taken the benefits available to him through the BSPS2 into account and I think this should've alleviated Mr E'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 DCF should've reassured Mr E that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr E through the PPF would've still provided a portion of the income he thought he needed at 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 DCF recommending Mr E transfer out of the DB scheme altogether.

I also think Mr E's desire for control over his pension benefits was overstated. Mr E 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 their own. So, I don't think that this was a genuine objective for Mr E – it was simply a consequence of transferring away from his DB scheme. It seems to me that Mr E'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 E's employer and the trustees of the BSPS2 were not one and the same. And in any event, Mr E 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 DCF explained that Mr E's belief regarding the control Mr E's employer had over his pension was misplaced, I think he would have been reassured by this.

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

Ultimately, I don't think the advice given to was Mr E suitable or in his best interests. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr E 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 E had a vague objective to retire at age 57 but I don't think this was a fully formed plan; it was some 13 years away. And I don't think DCF interrogated this objective in any meaningful way – it didn't establish how much TFC or income Mr E would need, so it couldn't offer any real insight into whether Mr E could've met this objective by moving with the scheme to the PPF or the new BSPS2, or by using the savings already available to him. So, I don't think Mr E's plans or ambitions were concrete enough for DCF to say it was in his best interests to give up his guaranteed benefits and transfer out of the scheme.

I appreciate that at the time the advice was given there was a lot of uncertainty around the pension scheme and I've fully taken into account that Mr E was likely keen to transfer out as he was worried about his pension and colleagues were telling him this was a good idea. However, it was the adviser's responsibility to objectively weigh up the options for Mr E. He should have advised him what was best for his circumstances and explained what he was giving up in the BSPS and that moving to the PPF was not as concerning as he thought. For the reasons given above, I think this advice should have been to remain in the BSPS.

Mr E was being advised by DCF 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 carefully considered what Mr E likely would have done – had he been suitably advised by DCF – and on balance I think he would have opted to join the BSPS2. I say this because I don't think Mr E's retirement plans were fully formed. 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, as it wouldn't be offset by the more favourable reduction for very early retirement. And by opting into the BSPS2, Mr E 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 DCF should've advised Mr E to opt into the BSPS2.

DCF says the BSPS2 had not been confirmed at the time it was advising Mr E and that it is unreasonable for us to say Mr E should've been advised to join this scheme as it wasn't a genuine option. I appreciate that the BSPS2 hadn't been confirmed when the advice was given. But DCF was advising Mr E only a month or so before the "Time to Choose" form had to be returned to Mr E's employer (and even sent him a reminder letter in early December 2017). I think it was clear to all parties at this point that talks were progressing well and that BSPS2 was very likely to be going ahead. So, contrary to what DCF has said, I do think this was an option that it could've recommended at the time. And I don't think DCF could be said to be acting in Mr E's best interests by ignoring the progress of the new scheme and failing to consider whether opting into this scheme was suitable for him.

So, I think DCF should've advised Mr E to join the BSPS2.

Of course, I have to consider whether Mr E would've gone ahead anyway, against DCF's advice. DCF says Mr E's needs and objectives were only met by transferring to the personal pension and considering he was fully aware of the benefits he was sacrificing, and bearing in mind the objectives he was keen to achieve, it says he would have continued with the transfer regardless. Put simply, DCF says that Mr E was as good as an 'insistent client' who would've chosen to transfer even if it had advised him against it.

I'm not persuaded that Mr E's concerns about his employer or the PPF 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 DCF had explained that Mr E was always unlikely to exceed the guaranteed benefits available to him by transferring, that he shouldn't be prioritising death benefits over retirement benefits, that the flexibility he sought could be met by other means, that the uncertainty over his requirements meant transferring at that time was not in interests and that the other things he'd expressed worry about were not things he needed to be as concerned about as he was, I think that would've carried significant weight. So, I don't think Mr E would have insisted on transferring out of the DB scheme.

For this reason, I think DCF should compensate Mr E for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And it's the benefits offered by the BSPS2 at age 65 which should be used for comparison purposes. This is because I know that Mr E is a very long way from retirement and has no firmly formed plans around when he will retire.

I agree with our Investigator that Mr E has been caused some distress and inconvenience since becoming aware that the advice he'd received from DCF to transfer was unsuitable. So I think that DCF should pay him compensation of £300 in recognition of any trouble and upset it has caused him.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA 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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

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

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

DCF 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.

Mr E is a long way from retirement. 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 E's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr E'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 E 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/her/their 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 E within 90 days of the date DCF 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 DCF to pay Mr E.

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 DCF 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.

DCF should also pay Mr E compensation of £300 in recognition of any trouble and upset it has caused him.

My final decision

Determination and money award: I uphold this complaint and require D C Financial Limited to pay Mr E 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 D C Financial Limited to pay Mr E any interest on that amount in full, as set out above.

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

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

If Mr E accepts this decision, the money award becomes binding on D C Financial Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr E can accept my decision and go to court to ask for the balance. Mr E 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 E to accept or reject my decision before 9 March 2023.

Claire Woollerson
Ombudsman