DRN-3768226

The complaint

Mr M complained that he was given unsuitable advice to transfer his defined benefit (DB) British Steel Pension Scheme (BSPS), to a type of personal pension plan, in 2017.

Tuto Money Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Tuto".

What happened

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

In May 2017, the Pension Protection Fund (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 M's employer would be set up – the BSPS2.

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 M was concerned about what the announcement by his employer meant for the security of his preserved benefits in the BSPS. He was unsure what to do and was referred to Tuto which is responsible for providing the pension advice. Information gathered about his circumstances and objectives at the time of the recommendation were broadly as follows:

- Mr M was 51 years old, married and with no financial dependents. He was described as being in good health and at the time.
- Mr and Mrs M owned a home with no mortgage outstanding.
- Mr M earned around £44,600. Mrs M also worked. They had moderate joint savings.
- The cash equivalent transfer value (CETV) of Mr M's BSPS was approximately £634,381. The normal retirement age (NRA) was 65 although he had evidently expressed a desire to retire earlier, at 55.
- Mr M had recently joined the new defined contribution TATA pension scheme as a consequence of BSPS closing to new contributions. He had £5,000 in this and around £7,400 was being added each year.

Tuto set out its advice in a suitability report on 6 December 2017. In this it advised Mr M to transfer out of the BSPS and invest the funds in a type of personal pension plan. Tuto said this would allow Mr M to achieve his objectives. Mr M accepted this advice and so transferred out. In 2022 Mr M complained to Tuto about its advice, saying he shouldn't have been advised to transfer out to a personal pension.

Mr M later referred his complaint to the Financial Ombudsman Service. One of our investigators looked into the complaint and said it should be upheld. They also said Mr M ought to be paid £300 for the distress and inconvenience this matter has caused him.

In response, Tuto still said it hadn't done anything wrong and was acting on the financial objectives Mr M had at the time. However, Tuto has since said it would like to settle the complaint. It initially said it would do this using a purchased software package and it said this calculation revealed Mr M hadn't lost any money as a result of transferring. However, the regulator then said firms should use an FCA BSPS-specific redress calculator to calculate the redress. It also said a copy of the BSPS calculator output should be sent to consumers, like Mr M, and the Financial Ombudsman Service upon completion of the calculation.

It's my understanding that whilst Tuto has agreed to carry out such a calculation using the above redress calculator which the financial regulator has established for these cases, this still hasn't been done. I recognise that Tuto asked for Mr M to supply details of his transferred pension value so it can begin the process of establishing if there has been a loss. And it has also said if there was a loss, then it will pay what is due under the guidelines.

However, I can see we've been waiting for this process to happen for some time now. So even though I acknowledge that Tuto is apparently willing to settle this complaint using the approach we endorse, it still hasn't been resolved.

I have therefore been asked 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 also 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 Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Tuto's actions here.

- PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability and the provisions in COBS 19 which specifically relate to a DB pension transfer.

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

I've used all this information we have to consider whether transferring away from the BSPS to a personal pension was in Mr M's best interests. I have also carefully considered the latest responses whereby Tuto is offering to use the redress methodology and approach that we endorse.

Having done all this, I'm upholding Mr M's complaint about the transfer advice being unsuitable.

Because I understand Tuto has agreed to carry out a loss calculation in line with the approach I've mentioned above, I therefore don't see the need to address the suitability of Tuto's advice to Mr M in the same detail as I would normally. However, to be clear, I fully agree with the investigator's comprehensive view that the advice was unsuitable, and I do so for the same reasons.

Tuto's transfer advice was unsuitable for the following reasons:

- At the age of 55, which in this case was the preferred retirement age, the critical yield, the investment return required to replicate the benefits available to him through the PPF, was 9.15%. Our investigator explained that the PPF was the better option for Mr M, due to his age and close proximity to (early) retirement. But the relevant discount rate closest to when the advice was given was only 2.8% per year for just over 3 years to retirement (age 55), which is well below the critical yield figure I've referred to above. This implied Mr M could likely receive materially lower pension benefits as a result of transferring away and into a personal pension arrangement.
- I've kept in mind that the regulator's upper projection rate at the time was 8%, the middle projection rate was 5%, and the lower projection rate was 2%, and Mr M's attitude to risk was at the lower end of these figures. I've also considered the higher costs associated with a personal pension and that Mr M's knowledge of investing would have probably required on-going support and management from a professional adviser. So again, everything I've seen shows – that when viewed from the point of advice in 2017 - he would likely receive lower pension benefits in the longer term as a result of transferring away.

- I've seen nothing that showed Mr M required flexibility or changing how his retirement benefits ought to be paid. He already had a new and more flexible DC pension with his existing job as a consequence of the old BSPS scheme being closed to new contributions. It's easy to discount this pension, but it was being significantly contributed towards by both Mr M and his employer and already had £5,000 in it. There's no reason why, by retirement, this DC scheme couldn't have still contained a meaningful sum which would have provided some flexible options for Mr M. Mr M also seemed to have the capacity to raise his contribution levels and there was no real case made out for him requiring additional flexibility beyond what he already had.

- I've therefore seen nothing explaining why Mr M wouldn't want to continue membership of a DB scheme and to use that scheme in exactly the way it was originally intended. Indeed, I think that by retirement, whenever it eventually came, Mr M could have been in an agreeable position. On one hand he'd have an existing deferred DB scheme of considerable value. This would contain all the guarantees and benefits that such schemes normally bring which tend to include a promise to pay a known pension for life. Significant indexation guarantees also existed within the PPF. On the other hand, he'd have also still built up a modest DC scheme by retirement. So, if Mr M ever found he needed so-called flexibility, then he'd be able to use the latter, rather than transferring away from the former.

- I've also seen no evidence that Mr M had either the capacity or desire to exercise control over his funds. I think he would have found the complexity, scale and responsibility of managing over £634,000 of transferred funds to be onerous in the years ahead. What I've seen tends to show Mr M would have required ongoing financial advice and support, all of which would cost him money which his DB scheme didn't require from him.

- Death benefits - the PPF contained certain benefits payable to a spouse if Mr M died. He was married so I think the value of these benefits were most likely underplayed because the spouse's pension provided by the PPF would have been useful to Mrs M if he predeceased her. I don't think Tuto made the value of this benefit clear enough. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

- I think the adviser told Mr M that he'd be able to pass on the whole value of a personal pension, potentially tax-free, to anyone that he nominated. So the lump sum death benefits on offer through a personal pension were probably made to look like an attractive feature to Mr M. But this needed carefully explaining. Whilst I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer the BSPS to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. Mr M was only 51. An obvious drawback with a personal plan's death benefits is that the amount left to pass on – to anyone – may be substantially reduced as the pensioner starts to withdraw his or her retirement income. To this end, if Mr M had lived a long life there could be nothing left at all in his personal pension plan. It also doesn't appear that Tuto took into account the fact that Mr M could have nominated a beneficiary of any funds remaining in his other (TATA) DC scheme. And at 55, a moderate 'term' life insurance might still have been reasonably affordable if he really wanted to leave a lump sum to someone. So, to this end, Mr M already had options ensuring part of his pension wouldn't 'die with him'.

- It's clear that Mr M, like many employees of his company, was concerned about his pension. I think that Tuto should have reassured Mr M that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr M through the PPF would have still probably provided the income he would have needed at retirement, given his and Mrs M's overall financial resources, and he was still unlikely to be able to exceed this by transferring out. The PPF income was still guaranteed and was not subject to any investment risk. So, I don't think that these concerns should have led to Tuto's recommendation to Mr M to transfer out of the DB scheme altogether.

Summary

I don't think the advice given to Mr M was suitable.

He was giving up a guaranteed, risk-free and increasing income within the PPF. By transferring to a personal pension, the evidence shows Mr M was likely to obtain lower retirement benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this. I think Tuto ought to have advised him against transferring out of his DB scheme for this reason, particularly as it could mean he'd be worse off in retirement.

So, I don't think it was in Mr M's best interests for him to transfer his DB scheme to a personal pension when he had the opportunity of moving into the PPF. On this basis, I think Tuto should have advised Mr M to move into the PPF.

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

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Tuto's unsuitable advice. I consider Mr M would have most likely opted to join the PPF, rather than transfer to the personal pension if he'd been given suitable advice and compensation should be based on an early retirement age of 55, as set out clearly by our investigator.

Mr M has retired early. Tuto should use the benefits offered by PPF for comparison purposes.

Tuto 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.

Tuto 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 M and our Service upon completion of the calculation.

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 M'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, Tuto should:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - the 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 the redress prudently is to use it to augment the DC pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr M accepts Tuto's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

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

Our investigator recommended that Tuto should pay Mr M for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr M in his particular circumstances. This pension at the time represented most of his retirement provision. In his situation I think the thought of losing material benefits would have impacted upon Mr M. So I agree the recommended payment of £300 for distress and inconvenience. Tuto should pay Mr M this amount in addition to the redress I've set out above.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. However, for context, this is a maximum figure and may not be relatable to Mr M's particular situation.

My final decision

Determination and money award: I am upholding this complaint and I now direct Tuto Money Limited to pay Mr M the compensation amount as set out in the steps above.

If Mr M accepts my final decision, the money award becomes binding on Tuto Money Limited.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 10 February 2024.

Michael Campbell
Ombudsman