DRN-3801183

The complaint

Mr S 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 Money".

What happened

In March 2016, Mr S'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 S'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 S was concerned about what the announcement by his former employer meant for the security of his preserved benefits in the BSPS. He was unsure what to do and was referred to Tuto Money 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 S was 35 years old, married and with three dependent children. He was described as being in good health and at the time.

- Mr S lived in a home valued at around £110,000 with a mortgage outstanding of around £76,000. Mr S earned around £30,000. Mrs S also worked, part-time. After expenses they had some disposable income left over. They had some loans and credit card balances outstanding.

- The cash equivalent transfer value (CETV) of Mr S's BSPS was approximately £202,101. The normal retirement age (NRA) was 65. He had accrued these benefits after over 9 years' service, and he'd since moved jobs.

- Mr S had an additional defined contribution (DC) pension said to have £23,000 in it. He was also currently contributing to a DC pension with his new employer although this had not long started. These aren't the subject of any complaint.

Tuto Money set out its advice in a suitability report on 17 November 2017. In this it advised Mr S to transfer out of the BSPS and invest the funds in a type of personal pension plan. Tuto Money said this would allow Mr S to achieve his objectives. Mr S accepted this advice and so transferred out. In 2022 Mr S complained to Tuto Money about its advice, saying he shouldn't have been advised to transfer out to a personal pension.

Mr S referred his complaint to our Service. One of our investigators looked into the complaint and said it should be upheld. In response, Tuto Money said it hadn't done anything wrong and was acting on the financial objectives Mr S had at the time.

As this complaint can't be resolved informally, it's come to me for 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 Business ('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.

<u>The applicable rules, regulations and requirements</u>

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 Money'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 Money should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr S's best interests.

I've used all the information we have to consider whether transferring away from the BSPS to a personal pension was in Mr S's best interests. I have also carefully considered the final response letter from Tuto Money. I've carefully considered too, the various other responses made to the points contained within our investigator's view.

Having done all this, I'm upholding Mr S's complaint.

Financial viability

Tuto Money referred in its transfer analysis and suitability report to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme.

The critical yield comparison was a requirement from the regulator at the time when advising clients on DB transfers. It's also important to point out that the critical yield comparison is only one of a number of different metrics I've used to compare the different schemes. And in my view, these all point one way – that Mr S was probably going to receive lower pension benefits overall, as a result of transferring to a type of personal pension plan.

Tuto Money said that the critical yield required to match the benefits at the age of 65 in the BSPS, was 4.98% if Mr S took a pension without a tax-free lump sum. If taking a tax-free lump sum, the critical yield was slightly lower. Tuto Money also calculated the critical yield rates for an earlier retirement, at the age of 60. It did this because Mr S had apparently expressed a desire to retire early. However, as I'll explain more about later, retirement was still a very long way off for Mr S and so I very much doubt whether retiring at 60 was anything more than something he just aspired to, rather than being part of a real plan. For the age of 60, the critical yield came out at 5.35%.

In 2017 we were in a period of sustained low interest rates and bond yields. And I don't think that whatever critical yield figures one uses here, that there was any credible evidence that achieving enough growth outside the DB scheme, to make transferring financially viable, was likely to be achievable. I say this with the following in mind.

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

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 was only 4.7% per year for 29 years to retirement (age 65), which is below the critical yield figures I've referred to above. If considering an early retirement, at the age of 60, the discount rate was only 4.6% (24 years to retirement). I've also 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%.

At the time, Tuto Money assessed Mr S's attitude to risk (ATR) as "lower medium" and he was an inexperienced investor. I therefore don't think the adviser had enough information or evidence to recommend transferring away from a DB scheme based on a financial comparison basis. Growth assumptions close to the regulator's lower projections and also to the discount rate were most relevant here in my view. So, I think growth assumptions of around 4½% were much more realistic here. These were still below the critical yield figures for the BSPS2. It's also important to remember here that the effect of charges and fees associated with a personal pension such as the one being recommended to Mr S, would have further reduced the likely growth. So, I think this showed that achieving the critical yield(s), year-on-year, upon transferring out, was unlikely.

In my view, there would be little point in irreversibly transferring away from a DB scheme at the age of 35 to obtain lower – or even similar benefits – to that scheme. There would be still less reason to take that course of action after deducting the fees and charges as I've described above as these clearly implied growth outside the DB scheme would probably be lower. So there was a very real risk of Mr S's pension benefits being lower at retirement than they otherwise would be.

I've also noted that using the NRA of 65, Tuto Money's own transfer analysis said that even in order to purchase an annuity to provide benefits of equal value to the benefits provided by the existing scheme, assuming *no* spouse's pension, *no* increases in payment and *no* guarantee at retirement, the estimated fund required at 65 was £306,498. For the age of 60 the amount required was £268,222.

To reiterate, these figures are found in Tuto Money's own analysis based on data the regulator required businesses to refer to at the time. To be clear, these sums were to buy a much inferior pension. And because these figures are far above Mr S's CETV, they represent, in my view, a revealing window into the value of the guaranteed pension Mr S could be giving up by transferring away to a personal plan, rather than a similar DB scheme that was on offer here.

I therefore think it's fair to say that from a financial comparison perspective, Tuto Money's own figures, shown in its suitability report and transfer analysis documents, showed that transferring to a personal pension plan would mean Mr S would likely receive lower pension benefits in the longer term, when compared against the BSPS2.

I've also considered some projections Tuto Money used to help show that if he transferred out to a personal plan, the funds could last Mr S well into retirement. Again, I think most of these were based on growth projections which were based on past performance. It's also fair to say these were not comparing like-with-like. What Tuto Money was showing Mr S were comparisons with plans which lacked the guarantees and benefits of a DB scheme.

Of course, according to Tuto Money, its recommendation that he should transfer out to a personal pension was not wholly based on the financial comparisons with his current scheme alone. Rather, Tuto Money said Mr S also had other reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer was suitable for him, despite providing the overall lower benefits mentioned earlier.

I've considered these below.

Other reasons to transfer

Tuto Money recommended a transfer to a personal pension plan based on what it said were Mr S's wider objectives. I have used all the documents we still have from the advice sessions to summarise the following themes as supporting the recommendation to transfer away:

- Tuto Money said Mr S wanted to retire at 60.
- By transferring, he could vary the level of income received throughout retirement.
- Transferring would ensure the full value of any fund could be inherited as a death benefit.
- He would move his benefits away from the scheme if he transferred and he had lost trust in his former employer / scheme.

I have therefore considered all these issues in turn.

Retiring early

I've taken into account that Mr S approached Tuto Money for advice because of the uncertainties he faced with the BSPS. He clearly didn't want to enter the PPF.

But as I've mentioned above, Mr S was still only 35 years old and in good health. In this context, I think Tuto Money's adviser saying Mr S had specific uses for his retirement funds lacked any credibility.

In my view, the adviser portrayed the DB scheme opportunity Mr S had with the proposed BSPS2 in a negative dimension. The implication was that transferring to the BSPS2 was somehow too restrictive for Mr S and unsuitable for him.

But I think it's important to focus for a moment here on Mr S's very young age by pension standards. The evidence I've seen here is that Mr S – understandably - had no concrete plans whatsoever for his retirement. With over 29 years still left to when he'd be actually contemplating retiring if using his NRA, there's simply no way that what he might possibly use the money for, or how much he thought he might need, should have been major influences in him deciding to irreversibly move away from a DB scheme. Doing so involved an investment risk which I've showed above could mean lower overall financial benefits at retirement.

So whilst I'm sure, like most people, Mr S probably wanted to stop working as early as possible, I think what he and the adviser discussed could only ever have been general retirement aspirations on his part. In reality, there was no plan to retire early. It was simply far too early to speculate about this.

Flexibility

I also can't see that Mr S required flexibility in retirement in the way the adviser suggested. In any event, flexibility was poorly defined by Tuto Money. I therefore think this was no more than a 'stock' objective used to help justify the recommendation to transfer out to a personal plan. For example, I've seen nothing that showed Mr S required changing how his retirement benefits ought to be paid. I don't think this could have been predicted whilst still so far away from retirement age. He already had a new and more flexible DC pension with his existing job and another existing DC fund. His current employer's' DC pension was being contributed towards by both Mr S and his employer and still had up to 29 years left to run (24 years if he did eventually retire very early). So, these other pensions would have afforded Mr S any flexibility he might have needed in the years ahead.

This means I've seen nothing explaining why Mr S 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 S could have been in a very 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 BSPS2 and the scheme was still underpinned by the PPF. On the other hand, he'd have also built up a substantial DC scheme over a long period of time – up to 29 years. So, if Mr S 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 S had either the capacity or desire to exercise control over his funds. With his DB scheme, Mr S was being offered the opportunity to transfer to the new BSPS2. It's true there were some differences in this scheme when compared to the original BSPS, but it remained a DB scheme nonetheless and was run for him by trustees. Mr S himself had no experience of these types of 'money market' investments and I think he would have found the complexity, scale and responsibility of managing over £202,000 of transferred funds to be onerous in the years ahead. What I've seen tends to show Mr S would have required ongoing financial advice and support, all of which would cost him money which his DB scheme didn't require from him.

Tuto Money itself set out the estimated pension he'd get under the BSPS. In my view, this showed a reasonable income when assessed against what Mr S had speculated that he might need in retirement. Of course, I've already explained the unpredictability of assessing retirement needs so far in advance and at such a young age. However, Mr S speculated that he might have needed around £12,000 per year in 'todays' money and this was accepted without challenge by the adviser.

However, in my view this was nothing more than guesswork because retirement was decades away for Mr S. He had three dependent children; his youngest child was still only a baby. He had a mortgage with years left to run and what looked like normal household debts to pay down. Mr S, in my view, could also realistically be said only to be 'mid-career'. In short, he and Mrs S still had their whole lives ahead of them. Tuto Money's analysis set out the estimated pension Mr S could get at 60 and 65. However, there's simply no reason for me to address these figures as retirement was so far away and transferring was very clearly unsuitable. No-one could predict what Mr S's retirement would look like.

I therefore think Mr S's circumstances here were much more aligned to him transferring to BSPS2 and retiring from that when he felt he was ready to do so. All the evidence pointed to him being able to build a pathway in the years ahead to retiring earlier than 65 if he felt he really needed to. There would have been an actuarial reduction involved, depending on his age at the time. And because Mr S had the capacity to increase contributions to his new DC scheme, this generally supported that strategy.

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 BSPS2 contained certain benefits payable to a spouse and children if Mr S died. Mr S was married and had children so I think the value of these benefits were most likely underplayed because the spouse's pension provided by the BSPS2 would have been useful to Mrs S if he predeceased her. I don't think Tuto Money 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.

The adviser told Mr S that he'd be able to pass on the value of a personal pension, potentially tax-free, to anyone he nominated. So, the lump sum death benefits on offer through a personal pension was probably made to look like an attractive feature to Mr S.

But whilst I appreciate death benefits are important to consumers, and Mr S 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. A pension is primarily designed to provide income in retirement. And I don't think Tuto Money explored to what extent Mr S was prepared to accept a different retirement income in exchange for different death benefits.

Mr S was only 35 and in good health. 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 S had lived a long life there could be nothing left at all in his personal pension plan.

Although I've questioned the ability to forecast an early retirement whilst still so young, there's no real doubt that retiring at 60 was at least mentioned. The adviser should have therefore additionally known that a healthy male retiring at 60 would likely have many years ahead in which he would be drawing down his pension funds thus leaving very little left to pass on to someone.

I note life insurance was discussed in this case and even a whole life policy matching the CETV from 'day one' wasn't that expensive. But at 35 years old, a 'term' life insurance policy would have also been a reasonably affordable product if Mr S really did want to leave a large legacy for a specific relative or someone else. But more so, it doesn't appear that Tuto Money took into account the fact that Mr S could have nominated a beneficiary of any funds remaining in his other DC schemes. So, to this end, Mr S already had plenty of options ensuring part of his pension wouldn't 'die with him'. There was no need to transfer.

Overall, in this case I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr S. I think this objective, listed as it was in the suitability report, was no more than a generic comment and not meaningful to Mr S's situation.

Concerns over financial stability of the DB scheme

It's clear that Mr S, like many employees of his former company, was concerned about his pension. His former employer had recently made the announcement about its plans for the scheme and Tuto Money said he lacked trust in the company. He'd heard negative things about the PPF and Tuto Money said he could have more control over his pension fund.

So, it's quite possible that Mr S was also leaning towards the decision to transfer because of the concerns he had about his employer and a negative perception of the PPF. However, it was Tuto Money's obligation to give Mr S an objective picture and recommend what was in his best interests.

By the point of the advice being delivered details of BSPS2 were known and it seemed likely it was going ahead. So, I think this should have alleviated any concerns about the scheme moving to the PPF.

However, even if there was a chance the BSPS2 wouldn't go ahead, I think that Tuto Money should have reassured Mr S that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr S through the PPF would have still probably provided a significant portion of the income he would have needed at retirement, and he was still unlikely to be able to exceed this by transferring out, given his ATR and the effect of pension charges and fees. 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 have led to Tuto Money's recommendation to Mr S to transfer out of the DB scheme altogether.

Suitability of investments

Tuto Money recommended that Mr S invest his funds in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr S and I don't think he would've insisted on transferring out of the scheme if clear advice had been given to him, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the

DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

Summary

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

He was giving up a guaranteed, risk-free and increasing income within the BSPS2. By transferring to a personal pension, the evidence shows Mr S 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 Money ought to have advised him against transferring out of his DB scheme for this reason, particularly as it meant he'd be worse off in retirement.

I don't think it was in Mr S's best interests for him to transfer his DB scheme to a personal pension when he had the opportunity of opting into the BSPS2.

I think it was clear to all parties that the BSPS2 was likely to be going ahead. Mr S still had many more years before he intended to retire. So, I don't think that it would have been in his interest to accept the reduction in benefits he would have faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. By opting into the BSPS2, Mr S would have retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

On this basis, I think Tuto Money should have advised Mr S to opt into the BSPS2.

In light of the above, I think Tuto Money should compensate Mr S 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 S, as far as possible, into the position he would now be in but for Tuto Money's unsuitable advice. I consider Mr S would have most likely opted to join the BSPS2, rather than transfer to the personal pension if he'd been given suitable advice and compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance. Tuto Money should use the benefits offered by BSPS2 for comparison purposes.

Tuto Money 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 Money 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 S 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 S'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 Money should:

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

Redress paid to Mr S as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Tuto Money 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 S'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 Money should pay Mr S for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr S 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 S. So I agree the recommended payment of £300 for distress and inconvenience. Tuto Money should pay Mr S 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. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award</u>: I am upholding this complaint and I now direct Tuto Money Limited to pay Mr S the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Tuto Money Limited pays Mr S the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S 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 S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 16 November 2023.

Michael Campbell
Ombudsman