DRN-3842005

The complaint

Mr P complains about the advice given by Dobson & Hodge Limited (D&H) to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

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

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

Mr P approached D&H in September 2017 to discuss his pension and retirement needs. He was also concerned about the situation about the BSPS.

D&H completed a fact-find to gather information about Mr P's circumstances and objectives. This showed that he was age 50 and living with his partner, they were due to get married in a years' time. They had three children that, whilst older, were still financially dependent on them. Mr P was employed by Tata Steel. They rented their own home but owned three (rental) properties which they intended to sell at retirement, they would then purchase their own property. These had a mortgage against them of £20,000. They had cash savings of £45,000.

D&H also carried out an assessment of Mr P's attitude to risk, which it said was 'cautious to moderate' for this transfer. This lower tolerance to risk was partly due to Mr P's recorded lack of investment experience.

In respect of Mr P's pension arrangements Mr P had:

- Received a cash equivalent transfer value ('CETV') from the BSPS in September 2017. This showed that he had 28 years and eight months service. He was entitled to a pension of about £17,000 per year at the date of leaving the scheme. The CETV was about £427,000.
- Joined his employers new defined contribution ('DC') scheme. It was recorded on the fact find that he and his employer were contributing a total of 12% of his salary into this.

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

On 22 November 2017 D&H advised Mr P to transfer his pension benefits into a personal arrangement and invest the proceeds into a portfolio of funds that D&H said matched his attitude to risk. The suitability report said the reasons for this recommendation were:

- He wanted to go part time at age 55 and then retire earlier than the BSPS retirement date of 65, possibly at age 60. He wanted £1,200 a month as an income.
- He wanted a flexible income taking varying amounts between ages 55 and 67 and the reducing this when the state pension became payable.
- He felt the guaranteed BSPS income would provide more than he needed and would be surplus to requirements after his state pension age.

Mr P complained in 2022 to D&H about the suitability of the transfer advice. He said that it was unlikely that the benefits he would receive in the BSPS2 would be matched in the personal pension. He didn't think the advice to transfer he was given was suitable for him and he thought he may have suffered a financial loss because of it.

D&H didn't properly respond to Mr P's complaint and as far as I can see it hasn't provided a final response letter, as it was required to do.

Mr P referred his complaint to the Financial Ombudsman Service. An Investigator upheld the complaint and recommended that D&H pay compensation. They thought that the BSPS2 would have met his income needs and so he didn't need to give it up and risk his pension. And he didn't need flexibility as he would have his DC scheme and the funds from his properties to supplement this income. The investment return required to provide the same benefits as those he was giving up from the DB scheme were very high, and so he was likely to lose out.

Whilst D&H disagreed, it didn't provide a full response, or its reasons why.

Mr P's representative said that the notional 15% reduction to the redress in relation to the tax-free cash our Investigator referred to in their redress recommendation wasn't reasonable. It thought this should be calculated after fees and charges had been taken from the fund.

The Investigator wasn't persuaded to change their opinion, so the complaint was referred to an ombudsman to make a final decision in due course.

Since then, D&H has said that it has performed a loss assessment, and this showed that Mr P's fund had enough value to purchase the benefits that he gave up from the DB scheme. D&H first said this in October 2022, but it hasn't provided a copy of any loss assessment it may have done.

And after this the regulator has since developed, and now provides access to, a BSPS-specific redress calculator. Both parties to the complaint have been informed that I'm likely to award compensation based on this.

I've seen no indication that D&H has performed a loss assessment using this calculator. I understand that D&H may be looking to perform another loss assessment but, again, it hasn't provided any detail about this.

As the complaint isn't resolved, I'm now issuing 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 Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of D&H'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, D&H should have only considered recommending a transfer if it could clearly demonstrate that it was in Mr P's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

- D&H was required to carry out a transfer value analysis ('TVAS') report by the regulator. This calculated the critical yield, which was how much Mr P's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme. It showed this was 7.57% to match the full pension he'd have been entitled to under the scheme at age 65. The same calculations at his age 60 was 9.83%. The calculations if Mr P took tax-free cash weren't provided.

- To match the full pension the PPF would've paid from 65 the critical yield was 4.3% and to match the tax-free cash and reduced pension the PPF would've offered, it was 4%. The same calculations at Mr P's age 60 were 5.24% and 4.88% respectively. The PPF did provide lower benefits than the BSPS, but these growth rates are lower than I would have expected to see, given the critical yields for the BSPS, I'm not sure if they are reliable.

- And despite the fact it was known by the point D&H instructed the TVAS that continuing in the BSPS in its existing form wasn't an option for Mr P, the analysis was based on the BSPS benefits. And D&H didn't undertake any analysis of the benefits he'd have been due under the BSPS2, even though details were available. I think it should've done. In any event, given what we know about the BSPS2, I think the critical yields to match the benefits the BSPS2 would've provided from age 65 were likely to be between those of the BSPS and the PPF.

- The discount rate, which represents a reasonable assumption about future growth, was 4.2% for 14 years to retirement in this case, when Mr P turned 65. And 3.7% for 9 years to retirement, his age 60. And given this, and Mr P's recorded attitude to risk, and the regulator's lower and middle projection rates of 2% and 5% respectively, I think Mr P was always likely to receive pension benefits, of a lower value than those he'd have been entitled to under the BSPS2 by transferring and investing in line with his attitude to risk. This is most apparent at his preferred retirement date of 60. And this is by far the most relevant comparison as Mr P did have a realistic opportunity to retire at this age, as I'll talk about later.

- This was recognised at the time of sale when the suitability report said that Mr P was *'unlikely to achieve the Critical Yield and therefore on that basis, **you are likely to receive less income** from a private pension than you would otherwise receive from the BSPS'.* And gave warnings that he may not be able to secure the same, or same type of income, as the DB scheme would have provided.

- Mr P wanted to move to part time work from age 55 and fully retire at 60. He thought the flexibility that a personal pension had would help him to do this. This goal was recorded in the written recommendation and was clearly one of the main discussion points. And it's true to say the personal pension could be more flexible, as from the DB scheme Mr P would have to take any tax-free cash he wanted at the same time as he took an income. He wouldn't have had to do this in the personal pension.

- Mr P needed at least £14,000 a year to live off. And the BSPS itself would provide this at age 60. This is a fairly low amount and Mr P, and his partner, would likely want more than this. But Mr P was building up a fund in his new DC scheme that he could use flexibly to increase this income. And he did have some cash savings and three properties that he was intending either to use for income or to sell to raise capital. His Partner also had some pension provision.

- And the suitability letter said '*it's likely your objectives could be achieved by remaining a member of the BSPS or entering the PPF given that your target income from the BSPS assets is likely to be paid temporarily between retiring at work and reaching your State Pension Age. Furthermore, your [DC scheme] can be used to provide the flexibility you seek.'* I don't think there is any doubt really that Mr P's existing provision met his retirement needs at his age 60.

- Mr P was giving up a guaranteed and increasing income and there was a significant risk that he would have lower retirement benefits because of this. I don't think it was right to say this lower income wasn't important, or the DB scheme was surplus to requirements, due to Mr P and his partners other provisions. They could have used this income to fully enjoy their retirement, or saved, or provided for their family in a tax efficient way. I'm not persuaded it was in his best interests to give up this guaranteed income.

- In my view the BSPS2 was the more appropriate way to meet Mr P's income needs in retirement – which is the primary purpose of a pension. I don't think transferring to obtain flexibility in this way was in his best interests.

- D&H didn't give any advice about the different death benefits that the personal pension had. It did say that the personal pension had more flexibility in the death benefits, and they could be higher. Particularly as Mr P was not yet married. But the priority here was to advise Mr P about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension, that could've been valuable to his family in the event of his death.

- While the CETV figure could have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would've also been reduced by any income Mr P drew in his lifetime.

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

- Mr P may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was D&H's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BSPS2 being established. But even if not, the PPF still provided Mr P with a guaranteed income and the option of accessing tax-free cash. Mr P was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons why it was clearly in Mr P's best interest to give up his DB benefits and transfer them to a personal pension. And I also haven't seen anything to persuade me that Mr P would've insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think the advice Mr P received from D&H was unsuitable for him.

Our Investigator recommended that D&H also pay Mr P £300 for the distress caused by the unsuitable advice. Mr P said that finding out that he may be worse off in retirement has caused him understandable stress and anxiety. I don't doubt that Mr P has been caused concern in relation to his retirement planning, in what was already a difficult time for members of the DB scheme. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

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

D&H 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.

D&H 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 P and our Service upon completion of the calculation together with supporting evidence of what D&H based the inputs into the calculator on.

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

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 P'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, D&H should:

- calculate and offer Mr P redress as a cash lump sum payment,
- explain to Mr P before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr P accepts D&H's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr P for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr P's end of year tax position.

Redress paid to Mr P as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, D&H may make a notional deduction to cash lump sum payments to take account of tax that Mr Ps 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 P'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.

Mr P's representative's thinks the 15% deduction from any redress payable, to take into account the tax Mr P would've paid had this been taken as income, isn't fair. This is because it doesn't account for the charges that would've been deducted from the fund value over that time. While I appreciate the representative feels this may unfairly reduce the redress payable, I'm mindful that it is not possible to provide exact compensation in these circumstances, as the only way to achieve this would be to put Mr P back into the scheme as if the transfer out hadn't happened. So, overall, I remain of the view that the redress proposed fairly compensates Mr P for the impact of the unsuitable advice he received.

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

Determination and money award: I uphold this complaint and require Dobson & Hodge Limited to pay Mr P 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 Dobson & Hodge Limited pays Mr P the balance.

If Mr P accepts this decision, the money award becomes binding on Dobson & Hodge Limited.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 7 December 2023.

Andy Burlinson
Ombudsman