DRN-3854012

The complaint

Mr W complains about the advice given by Heron House Financial Management Limited ('Heron House') to transfer the benefits from his defined-benefit ('DB') scheme with British Steel ('BSPS') to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Our investigator thought that Mr W's complaint should be upheld and recommended Heron House pay Mr W compensation. Heron House disagreed with the investigator's opinion, so the complaint was then passed to me.

I issued my provisional decision saying that, while I was likely to reach the same overall conclusion as the investigator and uphold the complaint, I wanted to expand on my reasoning. A copy of the background to the complaint and my provisional findings are included below in italics and form part of this final decision.

What I said in my provisional decision

What happened

In March 2016, Mr W'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.

In October 2017 Mr W's employer sent out 'Time to Choose' information asking members of the DB scheme what they wanted to do with their preserved benefits – either remain in the BSPS which would then move to the PPF, join the BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017.)

Mr W was concerned about what this meant for the security of his DB scheme, so he sought advice. Mr W enquired at two other businesses before being referred to Heron House by a colleague. Mr W met with Heron House in December 2017 and it completed a financial planning questionnaire with him to gather information about his circumstances and objectives. Heron House also carried out an assessment of Mr W's attitude to risk, which it deemed to be 'moderately adventurous.'

On 5 January 2018 Heron House advised Mr W to transfer his BSPS benefits into a personal pension arrangement and invest the proceeds in a portfolio of investment funds, which Heron House deemed matched Mr W's attitude to risk.
In summary, the suitability report said the key reasons for this recommendation were to provide Mr W with flexibility and control allowing him to stagger his withdrawals in line with his expenditure needs, provide the ability for Mr W to retire early, and provide financial security for his family by allowing him to use his pension as a family asset.

Mr W accepted the recommendation and around £195,000 was subsequently transferred to Mr W's new personal pension.

In 2021 Mr W complained to Heron House about the suitability of the transfer advice. Mr W said he'd started to see more negative press about transfers out of the BSPS, which prompted him to have concerns about the advice he received.

Heron House didn't uphold Mr W's complaint. It provided a substantive response – but in summary it said it was satisfied the advice to transfer to a personal pension arrangement was suitable for Mr W. It said Mr W had a good understanding of investment risk and that it was agreed a moderately adventurous approach was appropriate. It said the annualised performance of Mr W's pension has exceeded the critical yield, or growth rate required to match Mr W's DB scheme benefits and it was confident in continuing to do so. It said there was a detailed discussion at the advice meetings covering Mr W's objectives and priorities as well as the relevant risk warnings. Overall it said Mr W understood the risks involved and that he had other guaranteed income (two other deferred pensions) which would provide a foundation level of income in retirement. It said the transfer provided flexibility albeit it recognised that Mr W's workplace Defined Contribution ('DC') scheme provided flexibility too. And it said it believed Mr W had a good balance of DB and DC pensions to meet his objectives.

Dissatisfied with its response, Mr W asked this service to consider his complaint. And an investigator upheld the complaint and required Heron House to pay compensation. In summary they said a transfer wasn't suitable. They said a transfer to a personal pension was unlikely to improve on Mr W's DB scheme benefits given the level of growth required to match them. They also considered Mr W's attitude to risk assessed as 'moderately adventurous' wasn't suitable given his limited investment experience – they thought a medium risk or 'balanced' risk assessment was more appropriate.

In addition they said there were no other compelling reasons to justify a transfer out of the DB scheme – for example Mr W's retirement was many years in the future and his plans weren't known at this time; there was no evidence to indicate why Mr W needed flexibility; death benefits shouldn't have been prioritised given the pension was designed to provide a retirement income; and Mr W's concerns about the future of the BSPS should have been allayed by Heron House because the BSPS2 had been confirmed.

Heron House disagreed. In doing so, it provided a substantive response, which I have read I full. But in summary it said:

- *Mr W's job and qualifications meant he was someone who was used to making complex financial decisions and had a good level of financial understanding and sophistication.*

- *Mr W repeatedly agreed that he wished to take a moderately adventurous or growth focused approach to his pension investment. It disagreed with the investigator that Mr W should be a balanced investor and said they'd not given any reasons for their finding. They added that an investment strategy of around 78% equities would be deemed 'balanced' by other companies given the investment timeframe.*

- *Mr W was not 'following the herd' - he had strong views and a high level of understanding of the situation with the pension scheme and the financial position of his employer given his role within the firm.*

- *Mr W had thought carefully about his retirement plans, including producing a detailed expenditure analysis to show his income need in retirement – he showed a greater understanding of early retirement than most other clients.*

- *Mr W and his wife had the financial capability to save and build retirement funds so that retiring at age 60 was realistic. Mr W could afford to give up the guaranteed income provided by the DB scheme.*

- *It made it clear that death benefits alone is not a primary reason to transfer – but Mr W was keen to ensure his family could benefit from his pension, so it was considered along with his other objectives.*

- *Having control over his pension was a well-reasoned objective given the uncertainties and concerns about the future of the scheme.*

- *Flexibility was important to Mr W including the option for him to retire early. And because Mr W and his wife's income shortfall from state pension age onwards was small, it was affordable for him to place greater importance on flexibility over guaranteed income.*

- *It disagreed with the investigator that Mr W had a high reliance on his BSPS pension benefits and said they had exaggerated the importance of them – it would only form around 20% of his overall retirement assets at retirement.*

- *The BSPS2 was not a confirmed option as the investigator said – it wasn't confirmed until after the deadline had passed for scheme members to make their decision about what they wanted to do with their BSPS benefits – so it is unfair to say that Mr W should have transferred to it given the uncertainty.*

The investigator didn't change their opinion, so the complaint was referred to me to make a final decision.

Heron House submitted further evidence for my consideration. This broadly repeated what it said before and I've set out above. But it said that more weight should be placed on the fact Mr W's employer was in significant financial difficulty and there was a real probability that pension benefits would move to the PPF – a situation Mr W understood given his role in the firm. It also said that the investigator had failed to consider causation and what Mr W would've done had it advised him to stay in the scheme. It said it doesn't believe this can be determined from the file documentation and it requires a reasonable level of investigation. But it said in its view, given that Mr W was shopping around and that he'd taken the time to do his own research, he'd have transferred in any event. It added that it needed an opportunity to consider whether an oral hearing is required.

What I've provisionally 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

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 Heron House'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 provisionally decided to uphold the complaint. My reasons are set out below.

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, Heron House should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests. And having looked at all the evidence available, I'm not currently persuaded it was in his best interests.

Financial viability

Heron House produced a transfer value analysis report, as required by the regulator, showing how much Mr W's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme – referred to as the critical yield. And it based this on Mr W's benefits available under the BSPS2. Despite the fact the advice was provided after the deadline I referred to above by which Mr W had to make a choice about whether he wanted to opt in to the new BSPS2 or remain in the scheme and move with it to the PPF, because Mr W had taken the decision to opt into the BSPS2 as a precautionary measure, I'm satisfied it was appropriate for Heron House to base the report using the BSPS2 scheme benefits.

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

Mr W was 38 at the time of the advice and the advice paperwork said his intention was to retire at 60. The critical yield required to match Mr W's benefits at age 60 in the BSPS2 was 6.52% if he took a full pension. I can see the investigator referred to this as being 5.93% - but this was based on a retirement age of 65. Because the advice was predicated on Mr W wanting to retire at 60, I think it is the critical yield at age 60 which is relevant here.

Heron House didn't provide a critical yield figure assuming Mr W took his tax-free cash and a reduced pension. But it did provide critical yields to match Mr W's benefits available through the PPF at age 60, which were 6.21% assuming Mr W took a full pension and 5.94% if he took a reduced pension.

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, and was 4.5% per year for 21 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's moderately adventurous' attitude to risk and also the term to retirement. In my view there would be little point in Mr W giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

Here, assuming Mr W took his full pension available to him through the BSPS2 at 60, which as I will discuss later on I think is how Mr W could likely help meet his overall retirement income objective, the critical yield was 6.52%. This figure was 2% higher than the discount rate and it was just over the mid-point between the regulator's middle and upper projection rate.

I can see that Heron House classified Mr W as a 'moderately adventurous' risk investor, which it says was the approach Mr W repeated he wanted to take. Mr W says this is the level of risk which Heron House deemed the investment strategy needed to take – it wasn't an assessment of his attitude to risk. The investigator considered Mr W's limited investment experience better suited a balanced or medium risk approach.

I've thought carefully about this point. On the one hand, I'm not persuaded as Heron House argues that just because Mr W had invested some money in shares in the past, invested into an Individual Savings Account for his child and was 'managing' his workplace DC pension (it was invested in the default lifestyle fund) that this means Mr W was an experienced investor. But on the other hand he *wasn't completely inexperienced. And I'm conscious that Mr W's occupation and qualifications ought to have meant he was familiar with both the concept and the different categorisations of investment risk. So if Mr W didn't see himself as 'moderately adventurous' as defined, I would've expected him to have challenged this at the time.*

So taking all of this into account, I currently think Mr W's assessed attitude to risk of 'moderately adventurous' as defined wasn't unreasonable and was broadly in line with the level of risk I think Mr W was prepared to take. In doing so I'm mindful that Mr W was relatively young and the term to retirement was long.

But despite that, I think the opportunity to improve on the benefits provided by the BSPS2 was limited if Mr W transferred out of the scheme and invested in line with this attitude to risk. Achieving a growth rate of 6.52% was the rate to effectively stand still. To improve on the benefits available to Mr W in the BSPS2 required growth in excess of this every year until retirement - in my view it required returns closer to or at the level of the upper projection rate.

I think it's likely, at best, Mr W would end up receiving benefits of broadly the same overall value as a result of investing in line with his stated attitude to risk. In my view, to have come close to achieving the level of growth required to exceed the benefits provided by the BSPS2 if he transferred to a personal pension, would have required Mr W to take a higher level of investment risk than I think he indicated he was prepared to take. There of course still remained the real risk that Mr W might end up with benefits of a lower overall value than those provided by the BSPS2.

And given the critical yield required to match Mr W's benefits through the PPF, I don't think the situation was any different here - I think the opportunity to improve on the benefits provided by the PPF was limited if Mr W transferred out of the BSPS.

I can see that Heron House has said it believes the critical yield is achievable here and has provided an annualised performance figure for Mr W's pension plan showing this to be the case. But I don't think the adviser held this view at the time. Looking at the suitability report it records that while the adviser thought the growth rates were at a reasonable level, they "certainly could not be guaranteed on an ongoing basis over the long-term." So it strikes me that the adviser wasn't persuaded that the transfer was financially viable at the time.

But even if I accept that the transfer had the potential to be financially viable, crucially and as I will explain in more detail below, I think it's likely Mr W's income needs in retirement could be reasonably met by the guaranteed income from his DB scheme together with the income from his other existing pension provision. I appreciate the suitability report set out how Mr W could take a sustained level of income at around £200 more a year through the drawdown option than the BSPS2 would provide, assuming a growth rate of 5%. But I don't think Mr W needed to take on any investment risk with his BSPS scheme benefits.

Overall, I'm not currently persuaded that even if the BSPS had moved to the PPF and Mr W's benefits were reduced, he was likely to be able to improve on those benefits by transferring to a personal pension. In my view, by transferring his pension it was likely he'd end up, at best, with retirement benefits of broadly the same as those available to him from the DB scheme at age 60. So based on this alone, I don't think a transfer was in Mr W's best interests.

But I accept that financial viability isn't the only consideration when giving transfer advice, as Heron House has argued in this case.
There might be other considerations, which mean a transfer is suitable, despite providing broadly the same benefits. I've considered below whether such other reasons applied here.

Flexibility, control and income needs

One of the key reasons Heron House recommended the transfer for was flexibility and control it offered Mr W. The suitability report referred to Mr W's desire to retire early and to provide him with the ability to stagger his pension withdrawals in line with his personal expenditure in retirement.

But having considered the evidence, I don't think Mr W needed to transfer his DB scheme to a personal pension in order to have flexibility in retirement.

While Mr W had thought about what his expenditure might be in retirement and so what income he would need, I'm not persuaded that with over 20 years to go before he wanted to think about accessing his pension, that his plans could reasonably be described as set in stone. I think it was too soon to make any kind of decision about transferring out of the DB scheme – I don't think it was a suitable recommendation for Mr W to give up his guaranteed benefits now when he couldn't reasonably know what his needs in retirement would be

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Mr W wanted the ability to retire early. But he already had this option available to him – he didn't have to transfer out to achieve this. Of course if Mr W's needs developed later on and he had reason to transfer, I think this could've been explored closer to his intended retirement age, which as I've said was still many years away. And because Mr W had opted to join the BSPS2 he would've retained the ability to transfer out nearer to retirement, if indeed it was required.

In terms of the ability for Mr W to stagger his pension withdrawals, I've not seen anything to persuade me that Mr W had a need for variable income at different stages of retirement. The retirement expenditure analysis carried out at the time of the advice didn't reflect changing requirements. And I haven't seen anything to indicate that Mr W needed access to his tax- free cash and defer taking his income for example.

While I can see that Mr W had a mortgage and I understand the term extended beyond Mr W's intended retirement age of 60 by a couple of years, the mortgage was on a repayment basis. So by age 60 the outstanding balance would likely be small. And given the level of Mr W's household income – Mr W's wife had returned to work – I think they had the capacity to repay their mortgage balance, if they chose to, before Mr W reached 60. Mr W also had the option of accessing tax-free cash from one of his pensions at age 60 to clear any outstanding balance.

Turning to Mr W's income need – as I said above I think Mr W could've likely achieved his overall retirement income objective by staying in the DB scheme. If Mr W took benefits from the BSPS2 at 60, he would be entitled to an annual income of around £11,000 if he took a full pension. On its own this wouldn't have met Mr W's indicated household expenditure requirement at retirement of around £23,800 – the effects of inflation also need to be taken into account here. But in my view, this would've provided a strong foundation for Mr W's retirement, and importantly it was guaranteed. Mr W also had two other deferred pensions – a DB scheme that it was recorded would provide around £2,600 at age 65 and another DC pension that had a value of around £15,000.

And it doesn't seem logical to me that Heron House would advise Mr W to give up the scheme providing him with the most guaranteed income.

I can see that Heron House said Mr W also asked it about transferring his other DB scheme too – but it deemed it wasn't suitable and that this would provide Mr W with a guaranteed foundation income. But by keeping both of his DB pensions, Mr W had a larger guaranteed, escalating foundation income, which his other provision could supplement.

For example, Mr W was contributing to his current workplace pension – both employer and employee contributions totalling 16% of his salary - and he had another 22 or more years of pension contributions to add to this part of his retirement provision.
Given this had the potential to amount to a significant sum – around £200,000 based on his current salary and not allowing for any growth - I think this would've likely provided the difference Mr W needed to meet his overall retirement income need, particularly in the early years until his state pension became payable. In my view, this is the part of Mr W's pension provision where I think he could've afforded to take a moderately adventurous investment approach and where I think Heron House should've focused its investment advice on to help with the growth of this fund.

So importantly, Mr W's workplace pension would've provided him with extra flexibility. He could've taken lump sums as and when required, and adjusted the income he took from it according to his needs. So, I think if Mr W retained his DB pension, this together with his other smaller deferred schemes combined with his new workplace pension, would've given him the flexibility to retire early *and meet his income needs. Mr W still of course had his state pension income to add to this when he reached 68. And I'm mindful too that Mr W's wife had returned to work from a career break, so she had the potential to build up a pension fund to support their income need. She was also entitled to a state pension.*

I can see that Heron House disagreed with the investigator that Mr W had a high reliance on his BSPS pension benefits and said they had exaggerated the importance of them – it would only form around 20% of his overall retirement assets at retirement. But at the time it formed a significant proportion of Mr W's retirement income provision. And the suitability report said as much.

While as I've said, Mr W had the ability to grow his pension provision through continued contributions to his workplace DC scheme, as I've shown above, I still believe his DB scheme formed a significant part of his pension income, which was guaranteed and escalated, that he could rely on to meet his overall income need.

If the BSPS2 hadn't gone ahead, he would've moved with the scheme to the PPF. At age 60 Mr W would've been entitled to a pension of around £10,500 a year. This wouldn't have met Mr W's income need but the difference between this and the BSPS2 benefits was not significant enough to change the recommendation.

Overall I think Mr W could've met his retirement income needs by remaining in the DB scheme and supplementing his income with his other pensions. And I think this was the case whether the BSPS2 went ahead as planned or if the scheme moved to the PPF - the income Mr W was entitled to wasn't significantly less so this wasn't enough to change the recommendation. I don't think Mr W needed to risk his guaranteed benefits to achieve things.

Death benefits

The suitability report recorded that one of Mr W's priorities was to provide greater financial security for his family and that Mr W was keen to ensure that the full value of any remaining pension was available to his two children in the event of his death.

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 W given the circumstances. But whilst I appreciate death benefits are important to consumers, and Mr W might have thought it was a good idea to transfer his BSPS benefits to a personal pension because of this, the priority here was to advise Mr W about what was best for his retirement provisions.

A pension is primarily designed to provide income in retirement. So I don't think the potential for different or greater death benefits should have been prioritised over this and Mr W's security in retirement. And I say potential, because the sum left on Mr W's death was dependent on investment returns – so if he lived a long life, and/or investment returns were lower than expected, there may not have been a large sum to pass on anyway.

I also think the existing death benefits within the DB scheme were underplayed. The spouse's pension provided by the BSPS2 scheme would've been useful to his wife if Mr W predeceased her. I don't think Heron House made the value of these benefits clear enough to Mr W.

They were guaranteed and escalated – under the BSPS2 the spouse's pension would also be calculated as if no tax-free cash had been taken. It's also the case that it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

Also, I think Heron House ought reasonably to have known that Mr W had generous death-in-service cover through his employer if he died before retirement. So he already had lump sum death benefits available, which he could nominate his wife / children to receive if he hadn't already done so. And it also knew that Mr W was paying into the current DC scheme and he would've been able to nominate his wife and/or children as beneficiaries of this plan too – again if he hadn't already done so.

I can see that the suitability report said Mr W's objective could potentially be achieved using life cover in the short term. It said: "We would not recommend transferring a safeguarded benefit scheme for potential more advantageous death benefits as it should be possible to overcome this concern with appropriate life cover to ensure your family is protected upon your death." But it didn't discuss this any further and in fact it departed from this view – but it's not clear to me why it did so. I think if Mr W genuinely wanted to leave a legacy for his spouse and/or children over and above that which was already available, and which didn't depend on investment returns or how much of his pension fund remained on his death, I think Heron House should've instead explored additional life insurance properly. In my view the starting point ought to have been to ask Mr W how much he would ideally like to leave to his family, after taking into account the above existing means. And this could've been explored on a whole of life or term assurance basis, which was likely to be affordable to provide given Mr W's age, his recorded good health and the level of his disposable income.

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 W. And I don't think Heron House did enough to explore or highlight the alternatives available to Mr W to meet this objective.

Concerns about financial stability of BSPS

While not a key reason for recommending Mr W transfer his pension benefits, the advice paperwork makes reference to Mr W's concerns about his pension scheme. Heron House has said that given Mr W's role within the company, he had very real and well-founded concerns about the viability of the BSPS2 meaning his benefits could end up in the PPF.

I have no doubt that Mr W was concerned about his pension at this time – there was lots of negative sentiment about the PPF. I think this is likely the reason Mr W sought advice in the first place and it's possible that Mr W was considering transferring because of these concerns about his employer and what might happen. But I think this risk was already understood and accepted by Mr W, as he'd already chosen to opt in to the BSPS2, knowing he would move to the PPF if the new scheme didn't go ahead.

In any event, it was Heron House's duty to give Mr W an objective picture and recommend what was in his best interests. I accept, as Heron House has pointed out on several occasions, that the new BSPS2 scheme wasn't guaranteed to go ahead at the time of the advice. But at the time, the available information from the scheme trustees indicated that it would likely go ahead. And I think this is what Heron House should've been clear with Mr W to help alleviate his concerns.

I'm mindful, as Heron House says, that Mr W's role and qualifications likely meant that he had a good grasp of the financial situation. But Mr W wasn't a scheme trustee, so I'm not persuaded he had any greater insight into things than any other scheme member. I also think this was an opportunity for Heron House to remind Mr W that his employer and the BSPS2 trustees were not entirely one and the same. And the scheme trustees had a duty to act in the best interests of its members. Mr W was still working for the same employer and he hadn't indicated he intended to find alternative employment – so it doesn't appear Mr W's concerns extended to his employer specifically and its attachment to the pension scheme.

In terms of Mr W's specific concerns about the scheme moving to the PPF, despite the 10% reduction in starting benefits and the fact the increases in payment in the PPF were lower, importantly the income was still guaranteed.

And the income available to Mr W through the PPF would've still provided a strong foundation towards the overall household income he thought he needed at retirement and he was unlikely to be able to exceed this by transferring out. So I think Heron House ought to have specifically reassured Mr W that, even if there was a chance the BSPS2 wouldn't go ahead, moving to the PPF was not as concerning as he thought or was led to believe. Mr W might not have been able to later transfer out of the PPF – but for the reasons I've set out earlier, I don't think Mr W would've needed to, to achieve his goals.

Summary

I accept that Mr W was likely motivated to transfer out of the BSPS and that his concerns about his employer were real. And I don't doubt that the flexibility, control and potential for higher or different death benefits on offer through a personal pension would've sounded like attractive features to Mr W.

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

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free and increasing income, whether through the BSPS2 or the PPF. By transferring to a personal arrangement Mr W was unlikely to achieve greater overall retirement benefits at his intended retirement age of 60. And I don't currently think there were any other particular or compelling reasons which would justify the transfer and outweigh this. So, I don't think it was in Mr W's best interests for him to transfer his DB scheme to a personal pension at this time.

So, I think Heron House should've advised Mr W that he should not transfer the benefits of his DB scheme to a personal pension arrangement and that his decision to opt into BSPS2 as a precautionary measure was suitable for him in the circumstances.

Of course, I have to consider whether Mr W would've gone ahead anyway, against Heron House's advice – something it said the investigator had failed to do. Heron House has also said that this is a matter which requires reasonable further investigation and suggests it can't be determined from the evidence on file.

But I disagree – I consider there is sufficient evidence on file. I don't consider I need to ask Mr W for more evidence whether verbally or in writing. And as I said at the start, 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.

So having considered this matter carefully, I'm not currently persuaded that Mr W would've insisted on transferring out of the BSPS against Heron House's advice. I say this because, while I accept Mr W was motivated to transfer when he approached Heron House, on balance, I still think Mr W would've listened to and followed Heron House's advice if things had happened as they should have and it recommended he stay in the scheme. I'm also mindful that Mr W had already opted into the BSPS2, so it's clear to me that he was open to being part of this scheme if he'd been advised it was in his best interests.

I can see that Mr W had spoken to two other advice firms prior to meeting with Heron House. But I don't think this demonstrates anything other than as I said above that Mr W was motivated to transfer at the time. It was a work colleague that introduced Mr W to Heron House – so I think it's fair to assume that he had reason to place trust in Heron House knowing that a colleague had used its services.

While Mr W had some investment experience and I accept he would've been familiar with investment concepts and terminology given his circumstances. But I'm not persuaded he could reasonably be described as an experienced investor or someone who possessed the necessary skill, knowledge or confidence to go against the advice they were given in pension matters . Furthermore Mr W's pension accounted for the majority of his retirement provision at the time.
So, if Heron House had provided him with clear advice against transferring out of the BSPS, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr W's concerns about his employer were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he'd been referred to and was paying for, didn't think it was suitable for him or in his best interests. If Heron House had explained to Mr W that he could likely meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't currently think Mr W would've insisted on transferring out of his scheme.

In light of the above, I think Heron House should compensate Mr W for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And as per the above, it is the benefits available to him through the BSPS2 that should be used for comparison purposes.

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr W. But having considered this carefully, I'm not persuaded this is warranted in this case – I've not seen enough evidence to indicate that this matter has had significant emotional or practical impact on Mr W that fairly justifies an award.

Both Heron House and Mr W received my provisional decision.

Mr W said that he found Heron House's comment about him having a greater understanding of early retirement misleading because he said Heron House gave him a template to complete with estimates as to what he thought he'd need in retirement. He also commented that at the time of the advice Heron House had not advised him on his other DB schemes and failed to evaluate his DC scheme.

Mr W also commented about my intention to not make an award for distress and inconvenience – he said that he wanted to reiterate that the process has been and continues to be hugely stressful.

Heron House replied and in summary it said:

- The ombudsman is imposing the overall view of the Financial Ombudsman Service that it can't be right to give up guaranteed income from the BSPS – this is at odds with the law and regulatory guidance and contradicts Mr W's priorities.

- It treated Mr W as an individual when it formulated its advice – Mr W chose to risk his guaranteed benefits to achieve his objectives for the various reasons that were fully explored. It doesn't think it is right for either it or the ombudsman to tell Mr W he's wrong.

- It appears The Financial Ombudsman Service is taking a different approach to these types of cases and upholding the majority of cases when the FCA file reviews suggest less than 50% are unsuitable and when the FSCS are not upholding similar cases (it enclosed a copy of a decision as evidence.)

- It asked me why I intended to uphold the complaint when it had followed the necessary regulatory guidance on advising on DB transfers.

- It disagreed with my comment in my provisional decision where I said I didn't think the adviser was persuaded the transfer was financially viable at the time. It says it considers the comment is highly offensive to the adviser – the warning about not guaranteeing the return was an FCA required risk warning. It said there is no evidence the adviser didn't believe the critical yield was achievable and it asked for me to remove the statement from any final decision.

  It considers the statement to be unreasonable and petty given the projected returns have been achieved.

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.

Having done so, I've reached the same conclusions I reached before and for the same reasons.

I've read carefully and considered what Heron House has said in response to my provisional decision. But I don't think it has provided me with anything new and I don't think there is much more I can usefully add to what I've already said in my provisional decision.

For the reasons I explained in detail in my provisional decision, it is my view that in light of Mr W's individual circumstances at the time, it wasn't in his best interests to transfer out of the BSPS because it wasn't financially viable and there were no other particular reasons to justify a transfer to outweigh this. And as I also explained, I've reached my decision on what I think is fair and reasonable in all the circumstances of the complaint taking into account, amongst other things, the relevant law and regulator's rules, guidance and standards at the time of the advice.

As Heron House will already be aware, this decision is only about Mr W's individual complaint based on the specific circumstances of this complaint. Each case is different and considered on its own merits. So I don't think it is necessary or appropriate for me to refer to or comment on other cases – whether they appear to have similar characteristics and facts or otherwise. Notwithstanding this, I can see that the example decision issued by the FSCS Heron House has provided, which it says is a similar case to this one, was not upheld because it showed there was no loss. It wasn't a decision about the merits of the complaint as in this case. So in any event it is not an example of a similar case to Mr W's.

I can see that Heron House feels strongly about the statement I made in reaching the conclusion that I didn't think the adviser was persuaded the transfer was financially viable at the time of the advice – it says there is no evidence the adviser didn't believe the critical yield was achievable and the warning about not guaranteeing the return was a FCA required regulatory warning. But I've decided to include it in my final decision. On the one hand, as I explained in my provisional decision, I accept that the financial viability of the transfer was not the only consideration in my determination of whether the advice was suitable – I also acknowledged that I could accept it had the potential to be viable. So because it isn't crucial to the overall outcome of the complaint I could choose to say very little here and move on.

But on the other hand, as I also said in my provisional decision, there would be little point in Mr W giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme; particularly given Mr W's objective of wanting to achieve capital growth above inflation on his investment. So I think the financial viability is still relevant here in considering the overall suitability of the advice given to Mr W. And as part of that, I think it is fair to consider what, if anything, the adviser said about this.

Having done so, I still believe that what the adviser recorded in the suitability letter is evidence about how they felt about the likelihood of the growth rates being achieved. I think the language the adviser used is important here - saying the critical yields were at a 'reasonable level' is not, in my view, clear. If the adviser thought they were achievable – and I'd expect them to give an opinion on this to enable Mr W to make an informed decision about things - I think they could've been clearer in saying so.

I'm also not persuaded the adviser's reference to the returns not being guaranteed was included simply as a standard FCA required risk warning. I think the context is relevant here. By saying what they did and the way they said it, in my view is evidence to suggest the adviser was not entirely persuaded that the transfer was financially viable at the time.

Heron House has also said my statement is unnecessary given it says the projected returns have been achieved. But my decision is about the events that took place at the time and whether I think the advice was suitable based on the evidence and circumstances at the time. Of course if the projected returns have been achieved, then this will be borne out when Heron House carries out the loss calculation to determine whether as a result of the unsuitable advice Mr W has suffered a loss.

Finally I've thought carefully - including taking account of Mr W's most recent comments - about whether it is fair to make an award in favour of Mr W for the distress and inconvenience the unsuitable advice has caused. But I'm still not persuaded that Mr W has suffered distress or inconvenience to the extent that it is appropriate or fair for me to make an award.

Overall, for the reasons I set out in my provisional decision together with those above, I've decided to uphold this complaint - so Heron House should compensate Mr W for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

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 has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

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 W 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 W would like his complaint to be settled in line with new guidance /rules. I consider it's fair that Heron House calculates Mr W's redress in line with new guidance and rules when they come into effect.

A fair and reasonable outcome would be for the business to put Mr W, as far as possible, into the position he would now be in but for the unsuitable advice.
Because Mr W had already opted into the BSPS2, if suitable advice had been given I think this would've supported Mr W's choice. So Heron House should use the benefits offered by BSPS2 for comparison purposes.

The basic objective of the amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and policy statement, I'm satisfied that the changes still reflect a fair way to compensate Mr W.

Heron House must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

For clarity, in the circumstances I think compensation should be based on a retirement age of 65 as per the usual assumptions in the FCA guidance.

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W'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 W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr W within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Heron House has received notification of Mr W's acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes Heron House to pay Mr W.

Income tax may be payable on any interest paid. If Heron House deducts income tax from the interest, it should tell Mr W how much has been taken off. Heron House should give Mr W a tax deduction certificate in respect of interest if Mr W asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award:</u> I uphold this complaint and require Heron House Financial Management Limited to pay Mr W 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 Heron House Financial Management Limited to pay Mr W any interest on that amount in full, as set out above.

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

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

If Mr W accepts this decision, the money award becomes binding on Heron House Financial Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept any subsequent final decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 10 January 2023.
Paul Featherstone
Ombudsman