DRN-3865591

The complaint

Mr J complains about the advice WPS Financial Group Limited gave to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS') to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr J's former 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'). The PPF acts as a 'lifeboat' for insolvent DB pension schemes, paying compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme. Alternatively, members of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr J's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

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. Mr J opted to join the BSPS2.

On 16 October 2017, the BSPS provided Mr J with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £210,480.

After a colleague made a recommendation Mr J approached WPS for advice about his pension choices on 18 December 2017. It conducted a fact-find with him. Amongst other things it recorded that Mr J was aged 36, in good health, married but separated and with two financially dependent children under eight years old. He was working and earning around £36,500. He owned his home worth around £180,000 which was subject to an outstanding mortgage. No further details of the mortgage were recorded. He owned another property which was rented by a relative. The relative's rent covered the outgoings for that property. Mr J was a member of his new employer's defined contribution ('DC') pension scheme. He was contributing 6% of his salary into that and his employer paid a contribution equivalent to 12% of his salary. WPS didn't record any further details of Mr J's expenditure.

WPS also assessed Mr J's attitude to risk. It initially said his risk appetite was highest medium or seven out of ten. But after a discussion with Mr J it reduced this to six out of ten or ‘high medium”. It also recorded that Mr J would like the majority of his funds invested in something of a lower risk category.

In January 2018 after obtaining a transfer value analysis report (‘TVAS’) WPS produced a ‘Financial Planning Report’ setting out its analysis and recommendations – such documents are generally referred to as suitability reports. I will use that term in this decision.

WPS recommended that Mr J should transfer his DB scheme funds into a named personal pension. In brief, it noted that the possibility of Mr J achieving the growth rates required to match the benefits of the DB scheme (the critical yields) by transferring, was “potentially borderline”. However, elsewhere in the report it said the critical yields were “achievable and acceptable”. It said that remaining in the BSPS2 would give Mr J a “solid base with a guaranteed income”. But it added that Mr J was “more than happy to take a gamble with these funds” and he could be worse off as a result. WPS noted the BSPS scheme would most likely not be Mr J’s principal pension in retirement. As he would probably pay into his DC pension until its normal retirement age of 65. WPS said transferring would allow Mr J to access his pension funds in a flexible manner. It also said the death benefits from a personal pension were more suitable for him.

Mr J accepted WPS’ recommendation and transferred his DB scheme funds to the named personal pension.

Mr J complained to WPS that its advice might not have been suitable for him. WPS didn’t uphold it. Amongst other things it said it wasn’t required to guarantee or ensure that a transfer would prove suitable for Mr J. Instead it was required to take reasonable steps to ensure the transfer was suitable. It believed it had complied with its regulatory requirements and that Mr J was happy with its advice.

Mr J asked us to consider his complaint. One of our Investigators looked into it. In brief he felt that, given Mr J’s timeframe to retirement, it was too early to say that he would require flexible access to his DB funds in retirement. And the Investigator didn’t think there would be any other reason that would mean a transfer was in Mr J’s best interests. So the Investigator said WPS should establish if Mr J had suffered a financial loss as a result of its unsuitable advice and if so pay him compensation.

WPS didn’t agree. It said Mr J had previously been happy with its advice. Our Investigator said that while Mr J might have been comfortable with the advice previously but the regulator had since written to BSPS members and that had prompted many of them to complain.

As our Investigator wasn’t persuaded to change his opinion the complaint was subsequently referred 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 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 WPS'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.

WPS says its adviser was only required to take reasonable steps to ensure the advice was suitable for Mr J. I agree that under COBS, WPS was required to take reasonable steps to ensure its personal recommendation to Mr J was suitable for him (COBS 9.2.1R). But it was also required, under COBS 2.1.1R to ensure it acted in accordance with his best interests. And, as I've mentioned above, additional regulations and guidance apply to advising on transferring out of DB schemes. These say that the starting assumption for a transfer from a DB scheme is that it is unsuitable. And that WPS should only have considered recommending a transfer out of the scheme if it could clearly demonstrate it was in Mr J's best interests (COBS 19.1.6G). And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

Reasons for my decision

I'll say at the outset that WPS has argued that Mr J had previously been happy with its advice and that it felt his only motivation for complaining was to claim compensation. In effect it's argued that Mr J's complaint wasn't genuine. But I don't think that's a fair summary of Mr J's position.

There may be any number of reasons why former BSPS members complain about being advised to transfer out of the scheme. Mr J himself said he was concerned that he's lost valuable guarantees by doing so. And that on its own would be a legitimate reason to complain.

Further, in recent years the regulator identified that some advising firms gave many former BSPS members unsuitable pension transfer advice. As a result those members might have acted on this poor advice, losing significant sums of money as a result. So the regulator wrote to people like Mr J who transferred out of the BSPS to encourage them to revisit the advice given to them and to complain if they had concerns.

The fact that Mr J might have been happy with the advice previously doesn't mean his complaint isn't genuine or without merit. Nor does it mean he's acted unreasonably. Mr J was perfectly entitled to complain. And, as I explain below, his complaint was reasonable and justified.

WPS carried out a TVAS showing how much Mr J's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

WPS advised Mr J 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. I'll explain that a discount rate is a measure of what an investment is likely to grow at in the future. We find it a useful tool to establish whether an investment is likely to match or exceed the required growth rates to make a DB transfer financially viable. Prior to October 2017 we published similar rates 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 J was age 36 at the time of the advice and said his preference was to retire at age 65. According to WPS' TVAS the critical yield required to match Mr J's benefits from the BSPS at age 65 was 5.53% if he took a full pension and 4.63% if he took a tax free cash ('TFC') lumps sum and a reduced pension. The critical yield to match the benefits available through the PPF at age 65 was quoted as 4.09% a year if Mr J took a full pension and 3.88% if he took TFC and a reduced pension. However, those critical yields were given on a 'single life' basis (where no spouse's pension was payable on Mr J's death). For the reasons I explain below, I don't find that was an appropriate manner in which to calculate the critical yields. And, if WPS had calculated those on a joint life basis (where a spouse's pension would be payable) then the figures would almost certainly have been higher. So I don't think WPS gave Mr J all the information he needed in order to make an informed decision.

The relevant discount rate closest to when WPS gave its advice which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 4.7% a year for 28 full years to retirement at age 65. 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 J's 'high medium' attitude to risk and also the term to retirement. In this instance as the discount rates were higher than the critical yield to match the PPF benefits there was potential for a personal pension to match the benefits had Mr J's pension gone into the PPF**.** However, the critical yield to match the BSPS benefits appear unachievable. That said, WPS would have been aware the BSPS wouldn't be continuing in its existing form. So an analysis against the benefits from the BSPS wasn't helpful. Instead WPS should have produced figures for a comparison with the benefits from the BSPS2, as those details were available from Mr J's "time to choose" information. WPS didn't provide those figures. But, in any event, given what we know about the BSPS2, I think the critical yields to match the benefits the BSPS2 would have provided from age 65 were likely to be between those of the BSPS and the PPF. And given Mr J's attitude to risk there was a possibility that transferring to a personal pension might have allowed him to match the DB benefits.

But there would be little point in Mr J giving up the guarantees available to him through his DB scheme only to achieve a level of benefits outside the scheme that was broadly comparable to what he would receive from remaining in it. That's because, in order for the potential to match or improve slightly on the DB scheme benefits, he would need to put those funds at risk. And, if there was an extended period of poor performance or his investments suffered losses that could result in him being worse off in retirement. Indeed it's apparent that WPS recognised this as it said that Mr J was prepared to "gamble" and that the possibility of him matching his scheme benefits was "borderline".

Further, by transferring from the DB scheme Mr J would have to pay the fees and charges that are required in order to invest in a personal pension. And those would reduce any gains the funds made. In this case, apart from an initial fee to transfer of £3,125 Mr J would be paying WPS an ongoing fee for its advice of 0.5% of his fund's value each year. He would also have to pay fees to the personal pension provider equivalent to around 0.52% of his fund value. Those are not charges he would have had to pay if he'd remained in the DB scheme. And they would continue to reduce any gains from investment returns.

Further, the TVAS shows that if Mr J took an equivalent pension his DB scheme would pay by draw down from a personal pension, then his funds could expire by the time he was age 78. But that was based on the investments consistently growing at an anticipated mid-level rate of 4.75% (2.2% after allowing for inflation). But given the volatilities of the investment markets a consistent return at that rate seems unlikely.

In addition, WPS didn't provide any cash flow models or other analysis that showed what would happen if there was a market crash or a sustained period of poor performance. And in those circumstances, Mr J's fund could grow at a much lower level. And, if those events occurred his fund could be depleted during his lifetime, leaving him without the benefits of the pension. In contrast remaining in the DB scheme would give him a guaranteed and increasing pension for life. But by transferring he was unnecessarily putting that guaranteed income at risk. That wasn't something he needed to do.

For this reason alone a transfer out of the DB scheme wasn't in Mr J's best interests. Of course equalling the DB scheme benefits isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

WPS said transferring gave Mr J the opportunity for flexible access to his pension benefits. But I can't see evidence that Mr J had a need to access his DB funds flexibly throughout his retirement.

There's no evidence on file that WPS established what Mr J's income needs in retirement would be or how he would achieve those. But, he had over 28 years to his preferred retirement age of 65. So it's likely that at the time of WPS' advice, Mr J wouldn't have known what his income needs would be in retirement or whether or not he'd need to access his pensions flexibly.

However, assuming that Mr J did require flexible access to funds in retirement, he had no need to transfer out of the DB scheme in order to achieve that. Mr J's DB funds wouldn't be his only retirement provision. He had recently joined his employer's DC pension scheme. He and his employer together were contributing 18% of his salary towards that pension. And WPS calculated that, after allowing for a "real return" of 2% a year, by age 65 Mr J's DC fund could be worth £300,000.

The nature of a DC pension means this already provided Mr J with flexibility – he wasn't committed to take its benefits in a set way. Mr J could have taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr J retained his DB pension, this combined with his new DC pension, would have likely given him the flexible access to funds he wanted, assuming he needed that flexibility.

I can understand why having extra flexibility was likely appealing to Mr J but it wasn't necessary at the time of the advice. By joining the BSPS2 he kept the option to transfer out of the scheme closer to his retirement age if his circumstances required it. So, he had no need to make such a decision at the time, and put his DB funds at risk by doing so, when he still had over 28 years to his preferred retirement age.

Overall, I think Mr J had more chance of meeting his income needs in retirement through a combination of taking his secured benefits through the BSPS2 together with flexible access to his DC scheme funds. And this provided him with a higher amount of guaranteed income for life, thereby decreasing his overall risk in retirement. So, I don't think it was suitable or in Mr J's best interests for WPS to advise him to transfer his DB pension, exposing him to the risks of the financial markets, just to have extra flexibility that he didn't need.

WPS also said a transfer was suitable because it would allow Mr J to leave any residual funds to his children on his death. At the time of the advice Mr J was separated. So the spouse's pension the DB scheme would pay was unlikely to have seemed important to him. But that assumes that Mr J would never remarry or reconcile with his wife and given he was only 36, that was anything but certain. In fact, as we now know, Mr J has reconciled with his wife. I accept that WPS couldn't have predicted that happening, but it could have anticipated that he may well form another relationship, and remarry, so it shouldn't have discounted the spouse's pension as being of no value to Mr J. And, as I've said above, I think it should have factored this in when calculating critical yields.

Further, the DB scheme would pay a dependents' benefit for Mr J's children if he was unfortunate enough to die while they were still in education – up to age 23. So the death benefits the DB schemes offered could have been valuable to Mr J's family in the event of his premature death.

In addition while the CETV figure would, no doubt, have appeared an attractive sum to leave as a legacy to Mr J's children that figure wasn't guaranteed unless he died immediately. But, in reality, the sum remaining on death following a transfer was always likely to be different. How much would remain in the fund on Mr J's death depended on a number of factors. And there may not have been much left in his personal pension if he lived a long life, the investments performed poorly, or if he took large sums from the fund early in his retirement.

Alternatively if Mr J wanted to leave a legacy for his family, which didn't depend on investment returns or how much of his pension fund remained on his death, then life assurance may have been a better option for him. In fact WPS did look into this. And noted that Mr J could have secured a term insurance product that covered him until his retirement age for between £20 and £25 a month. But it said Mr J didn't want to take such a policy because it was "not a driving factor" in his considerations. In other words it would appear that leaving a legacy for his children, while something that was nice to have, was not an overarching concern when thinking about his retirement.

Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr J. And ultimately WPS should not have encouraged him to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

WPS recorded that Mr J had concerns about the financial stability of the DB scheme and so didn't want to leave his funds under his ex-employer's control. Mr J may have legitimately held concerns about how his former employer had handled his pension and the prospect of it entering the PPF. But it was WPS' 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 J with a guaranteed income worth roughly 90% of his BSPS entitlement. Mr J was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interests.

On the whole, I can't see persuasive reasons why it was clearly in Mr J's best interests 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 J would've insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think the advice WPS gave to Mr J was unsuitable for him.

Putting things right

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

WPS 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.

WPS 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 J and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what WPS based the inputs into the calculator on.

For clarity, Mr J has not yet retired, and 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 J 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, WPS should:

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

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

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 WPS Financial Group Limited to pay Mr J 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 WPS Financial Group Limited pays Mr J the balance.

If Mr J accepts this decision, the money award becomes binding on WPS Financial Group Limited.

My recommendation would not be binding. Further, it's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J 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 J to accept or reject my decision before 15 December 2023.

Joe Scott
Ombudsman