DRN-3865831

The complaint

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

Niche Independent Financial Advisers Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Niche".

What happened

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

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

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

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

- Mr R was 53 years old, married and with no dependent children. He was in good health and at that point he had accrued around 27 years of pension benefits with the BSPS.

- Mr and Mrs R lived in a home valued at around £175,000 with a mortgage outstanding of £57,000. The had a separate loan outstanding of £28,000. Niche didn't record on the 'fact-find' how long the mortgage or loan still had to run.

- Mr R earned £2,000 per month (net) and Mrs R earned £1,700. Their outgoings were less than this, so they had a disposable income of around £1,200 per month after expenses. They had no other savings or liabilities.

- The cash equivalent transfer value (CETV) of Mr R's BSPS was approximately £376,876 and the normal retirement age (NRA) was 65. Niche said Mr R wanted to retire early if possible, at the age of 55.

Niche set out its advice in a suitability letter on 30 November 2017. It advised Mr R to transfer out of the BSPS and invest the funds in a type of personal pension plan. Niche said this would allow Mr R to achieve his objectives. Mr R accepted this advice and so transferred to a personal pension. In 2021 Mr R complained to Niche about its advice, saying he shouldn't have been advised to transfer out to a personal pension.

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

As the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've also taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

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 Niche's actions here.

- PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability and the provisions in COBS 19 which specifically relate to a DB pension transfer.

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

I've used all the information we have to consider whether transferring away from the BSPS to a personal pension was in Mr R's best interests.

I don't think it was, so I'm upholding his complaint.

Financial viability

Niche referred in its transfer analysis and suitability letter to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. It is therefore part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable.

However, I think it's important to say that Niche itself acknowledged, during its advice, that the critical yields required to match the benefits of Mr R's existing scheme were high. This is because in its suitability letter, of 30 November 2017, Niche said of the critical yield, *"even though this is not unachievable, it is not guaranteed".* It said it would not recommend a transfer out on this basis.

However, I think this was misleading as Niche nevertheless went onto recommend that he should transfer out anyway, for other reasons. But I also want to be clear that the critical yield wasn't, in my view, realistically achievable. And I can't see that Niche was able to demonstrate that Mr R might be able to grow his pension above the critical yield rates provided. The critical yields required to match the benefits at the age of 65 in the BSPS2, were 5.87% if he took a pension without a tax-free lump sum; with a lump sum the rate was 4.32%.

However, Niche itself said that Mr R wanted to retire at 55 and its entire recommendation is built on that premise. But in this case the critical yield rates were exceptionally high – 46.11% and 33.71% respectively. As our investigator pointed out, these weren't referred to in the suitability letter. So as well as being very high, I don't think Mr R was given the information he needed to make an informed decision.

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

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 and was 3.9% per year for 11 years to retirement (age 65), which is well below the critical yield figures I've referred to above. For an early retirement, at 55, the discount rate was 2.5%. Because these rates are significantly below the critical yields I've referred to, this infers that reaching the growth level required to help make a transfer worthwhile, was highly unlikely. Niche should have been clear about this.

I've also kept in mind that the regulator's upper projection rate at the time of the advice was 8%, the middle projection rate was 5%, and the lower projection rate was 2%. Mr R was categorised as a "cautious balanced" attitude to risk (ATR). So, the regulator's lower rate, which was applicable here, was also well below the critical yields. The critical yield rates for a *reduced* pension under the PPF scheme were lower than the others, but Niche said Mr R wasn't interested in doing this. Everything I've therefore see here strongly suggests Mr R would receive lower pension benefits as a result of transferring out.

In addition to these things, I've also noted that Niche said that in order to purchase an annuity to provide all the benefits of equal value to the existing scheme at retirement at age 65, the funds required would be around £635,000 if taking a full pension and £529,000 if taking a pension and lump sum. Those at age 55 were even higher, so I think these figures provide a revealing window into the value of the benefits Mr R was being advised to give up.

So, I'm very much persuaded to agree with Niche's sentiments - when it said achieving the critical yield rates was unlikely. And although Niche wasn't as clear as it should have been about this when advising Mr R, it told him it wouldn't recommend a transfer on the basis of the critical yield figures alone. And so, having said this in 2017, it would be very hard for it now to argue these growth rates *were* achievable.

We know now that Niche still recommended that he transfer out, nonetheless. However, to be clear, Niche's recommendation that he should transfer out to a personal pension was not predicated on the financial comparisons with the BSPS2 or PPF. Rather, Niche said Mr R had different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer *was* suitable for him, despite providing the overall lower benefits mentioned above.

I've considered these below.

Flexibility and other needs

Niche recommended a transfer to a personal pension based on what it said were Mr R's wider objectives. It listed the following themes as supporting the recommendation to transfer away:

- Mr R said he'd like to retire early from the steel industry. It said he'd be able to sell his home, as he and Mrs R were planning to move into a family member's property without paying any rent. It said this sale could generate around £100,000.

- Niche said there was the potential for complete control over the funds if he transferred out, and what these were invested in.

- There would be more flexible access to death benefits in a personal pension and he'd be allowed to name a beneficiary.

- The future of the BSPS was a concern and Mr R didn't want to enter the PPF.

So, it seems the supporting reasons that Niche recommended the transfer out to a personal pension was for the flexibility and control it offered to Mr R. I have therefore considered all these issues in turn.

Retiring early

Niche mentioned several times in documents from the time of the advice that Mr R had said he wanted to retire early. I don't doubt that Mr R might have genuinely hoped to retire as early as 55, which is what was recorded on the 'fact-find'. But I've also noted that this is a very 'basic' document and there's some conflicts in the information it recorded. Sections about Mr and Mrs R's borrowing didn't show how long their mortgage and loan were outstanding for and I've also seen different information about her being either employed or self-employed. Niche also didn't record here what type of pension Mrs R had as I think this could have been relevant. I've also seen nothing that shows retirement was anything more than something Mr R aspired to do at that stage, as opposed to being part of a formulated plan. It was recorded he would like to retire from his current industry but at 53 and in good health, I think there was every possibility he'd like to take another job.

I mention these things because I don't think Niche really got to grips with Mr R's circumstances. Its job, as a regulated financial advisor, was not to just transact what Mr R thought he wanted. Its job was to really understand his situation and provide advice that was in his best interests.

Niche also promoted that Mr R could access more tax-free cash if he transferred to a personal pension plan. It said he'd be able to access 25% of his pension as a lump-sum and then use the remaining funds more flexibly. It's usually the case that more tax-free cash can be accessed from a personal pension when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But Niche should have been telling Mr R at the time that extra tax-free lump sums being removed from a personal pension, potentially from the age of 55, also came with consequences in that the amount left for his later retirement years would obviously decrease.

Even if I were to consider that Mr R's retirement plans were more fixed - and he really did want to retire early - I think Niche should have better assessed the possibility of achieving this goal whilst being a member of the BSPS2, for example. Early retirement under the BSPS2, or indeed the PPF, would still have been an option for Mr R, although this would have meant Mr R's pension benefits would have been somewhat different due to him accessing the pension earlier and for longer. But I think this was discounted by Niche as I've seen no evidence it was realistically discussed with a view to assessing whether it was more in Mr R's best interests. The advice simply focussed on him transferring away completely.

So, whilst I accept the notion of retiring early and / or accessing tax-free cash might have been appealing, this needed to be considered against the other options Mr R faced, including opting for the BSPS2.

Flexibility

I can't see that Mr R required flexibility in retirement in the way Niche suggested. Niche said that Mr R's estimated annual pension upon his NRA was £19,918 per year or £16,137 at the age of 55. As a DB pension this was guaranteed and index linked. So, I haven't seen anything to persuade me that Mr R wouldn't have been able to meet his likely retirement income needs by accessing his DB pension instead of transferring out to a personal pension plan.

Niche said Mr R was intending to sell his home up when he left work and move to a family's members home, the implication here was that it would be at no cost. He and Mrs R would be able to then sell their home and repay the mortgage and have around £100,000 in a cash sum. However, it's not clear to me on what basis, if any, this affected the advice he was given. On one level, it would likely make Mr R less in need of a tax-free lump sum removal from his pension; and on another, it certainly conflicts with what Niche implies was his apparent desire to control several hundred thousand pounds' worth of transferred pension funds in a personal plan linked to stock market investments.

I've seen nothing that shows Mr R had a need for flexibility in his income going forward. In fact, I think the objectives listed by Niche in the context are no more than 'stock' ideals unrelated to Mr R's situation. Under the auspices of a DB scheme and their other resources, I think Mr and Mrs R could hope to enjoy a very satisfactory retirement from a financial perspective. Whenever Mr R chose to draw his pension benefits, for example, I think they were in a good position.

For instance, I don't think Niche took enough account of his 'second' pension – his employer's new defined contribution (DC) scheme. Mr R and his employer were making significant contributions to this of 6% and 10% respectively and there was already some money in the fund. So, even a few years' worth of being in this pension would have mattered - there could have been a reasonable amount in this DC pension to complement his deferred DB scheme (in BSPS2).

So by retirement, on one hand Mr R would have had a long-standing DB pension with all the guarantees and benefits this type of scheme brought. And on the other hand, he'd have built up a reasonable DC pension over a few years, which, if he later found he did require flexibility, this pension could have helped provide this. By the age of 55 this DC fund was projected to be over £35,000.

I have therefore considered what Niche said about retiring early and the potential flexibility brought about by transferring to a personal plan: it said this would include how funds were invested, the level of income he could withdraw from it and a greater ability to flexibly use the tax-free lump sum element.

However, Mr R was already able to retire early from the BSPS2 if he wanted to which would have been in accordance with his aspirations. Niche also implied that Mr R would be able to have complete control over the pension if he transferred out. But I've seen nothing which shows Mr R had either the desire or capacity to exercise personal control over his pension. The evidence here is that Mr R's previous exposure to investing was extremely limited and he wanted no risk.

So, I think Mr R's circumstances here were much more aligned to him transferring to BSPS2 and retiring from that when he felt he was ready to do so. Because he also had a smaller 'second' DC pension, and Mrs R also evidently had a pension of her own, this supported that strategy in my view.

I therefore think the suitable option was for Mr R to access his DB pension in the way it was originally intended.

Death benefits

Niche says that death benefits were discussed at the time and the personal pension would better enable the retention of the value of the funds if Mr R died.

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 probably made to look like an attractive feature to Mr R. But whilst I appreciate death benefits are important to consumers, and Mr R might have thought it was a good idea to transfer the BSPS to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Niche explored to what extent Mr R was prepared to accept a lower retirement income in exchange for higher death benefits.

Mr R was only 53 and in good health. He had no children of his own and he was married. So, I think the likely death benefits attached to the DB scheme were substantially underplayed. The spouse's pension provided by the BSPS2 would have been very useful to Mrs R if Mr R predeceased her. I don't think Niche made the value of this benefit clear enough. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And when Niche says he could name another beneficiary under a personal pension plan, it's hard to see who he'd nominate other than his own wife. Niche provided no such details.

I also can't see whether, or the extent to which, life insurance was discussed in this case. But at 53 years old, a modest 'term' life insurance policy may have been a reasonably affordable product if Mr R really did want to leave a legacy for someone other than Mrs R. Furthermore, it doesn't appear that Niche took into account the fact that Mr R could have nominated a beneficiary of any funds remaining in his DC scheme. So, to this end, Mr R already had plenty of options ensuring part of his pension wouldn't 'die with him'.

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

Control or concerns over financial stability of the DB scheme

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

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

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

However, even if there was a chance the BSPS2 wouldn't go ahead, I think that Niche should have reassured Mr R that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr R through the PPF would have still probably provided a significant portion of the income he would have needed at retirement, and he was still unlikely to be able to exceed this by transferring out, given his actual ATR and the effect of pension charges and fees. And although the increases in payment in the PPF were lower, the income was still guaranteed and was not subject to any investment risk. So, I don't think that these concerns should have led to Niche's recommendation to Mr R to transfer out of the DB scheme altogether.

Summary

I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income within the BSPS2. By transferring to a personal pension, the evidence shows Mr R was likely to obtain lower retirement benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this. I think Niche ought to have advised him against transferring out of his DB scheme for this reason, particularly as it meant he'd be worse off in retirement.

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

I think it was clear to all parties that the BSPS2 was likely to be going ahead. Mr R still had a few more years before he intended to retire. So, I don't think that it would have been in his interest to accept the reduction in benefits he would have faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. By opting into the BSPS2, Mr R would have retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. Also, Mr R was married, and his wife's pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mr R chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

On this basis, I also think Niche should have advised Mr R to opt into the BSPS2.

I have considered, given the circumstances of the time, whether Mr R would have transferred to a personal pension in any event. I accept that Niche disclosed some of the risks of transferring to Mr R, and provided him with a certain amount of information. But ultimately it advised Mr R to transfer out, and I think Mr R relied on that advice.

I'm not persuaded that Mr R would have insisted on transferring out of the DB scheme, against Niche's advice. I say this because Mr R was an inexperienced investor and this pension accounted for most of his retirement provision at the time. So, if Niche had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

I'm also not persuaded that Mr R's concerns about the PPF were so great that he would have insisted on transferring his pension, knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. So if Niche had explained Mr R was also unlikely to exceed the benefits available to him through the PPF if he transferred out, and that he could meet his income needs in retirement without risking his guaranteed pension, I think that would have carried significant weight.

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

Putting things right

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in but for Niche's unsuitable advice. I consider Mr R would have most likely opted to join the BSPS2, rather than transfer to the personal pension if he'd been given suitable advice. So, Niche should use the benefits offered by BSPS2 for comparison purposes.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA 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 several times Mr R whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. His representative didn't make a choice when we asked, so as set out previously I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

I am therefore satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr R.

Compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance. This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

Niche may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr R's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr R'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 R 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr R within 90 days of the date Niche receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Niche to pay Mr R.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Niche to carry out a calculation in line with the updated rules and/or guidance in any event.

I have also considered the impact on Mr R of the unsuitable advice and transfer. Our investigator recommended that a sum of £250 should be paid to Mr R by Niche for what he referred to the trouble and upset caused by this unsuitable transfer. I've taken into consideration Mr R's age, circumstances and the substantial amount he'd built up in his pension to that date; Mr R had built up his pension over a long time. Also, by retirement this DB pension would still have been a significant part of his overall pension entitlement so I think the thought of losing benefits would have negatively impacted Mr R. So, I agree that Niche should also pay Mr R £250 for the trouble and upset caused by the unsuitable advice which has likely had an impact on his retirement planning

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

Determination and money award: I am upholding this complaint and I now direct Niche Independent Financial Advisers Limited to pay Mr R 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 Niche Independent Financial Advisers Limited to pay Mr R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Niche Independent Financial Advisers Limited to pay Mr R any interest as set out above on the sum of £160,000.

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

If Mr R accepts my final decision, the money award becomes binding on Niche Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 16 January 2023.

Michael Campbell
Ombudsman