DRN-4003417

The complaint

Ms B complains about the advice given by PSP Wealth Management Ltd ('PSP') to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension arrangement. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Ms B met with PSP in May 2014 to discuss her pension and retirement needs. Ms B says she was introduced to them following a cold call from another business.

PSP completed a fact-find to gather information about Ms B's circumstances and objectives. In summary this recorded that Ms B was single; aged 55; unemployed and in receipt of jobseekers allowance; she had a monthly income deficit of around £230 a month; she had unsecured debts of around £7,000; and her objective was to access a lump sum to go on holiday, repay her debts, supplement her income while she was seeking new employment and provide an emergency fund. PSP also carried out an assessment of Ms B's attitude to risk, which it deemed to be 'high medium'.

On 18 June 2014, PSP advised Ms B to transfer her pension benefits into a personal pension arrangement and invest the proceeds with a discretionary fund manager. The suitability report said the reasons for the recommendation were to provide the maximum tax-free cash payment to meet Ms B's objectives, to maintain income flexibility for the future as well as offering more options on death.

Ms B duly accepted the recommendation and the transfer completed – Ms B received around £19,000 tax-free cash and the residual funds were invested as PSP recommended.

I understand that shortly after the transfer Ms B suffered ill heath, which prevented her from returning to work. And according to her representative, she withdrew funds from her personal pension to supplement her income and by 2018 she'd withdrawn the entire fund value and the plan was closed.

In 2021 Ms B complained to PSP, through a representative, about the suitability of the transfer advice. In summary she said that there was no health reason to transfer in 2014; her financial circumstances did not justify a transfer; she ought to have been categorised as low risk; and while her desire for a cash lump sum at the time was genuine, this was caused by her temporary unemployment so she should've been advised to seek debt counselling advice instead.

PSP didn't uphold Ms B's complaint. In summary it said that advice was carried out to establish how best Ms B could access her lump sum to support her financial situation. It said Ms B was in debt, she was struggling to repay these debts and she needed further support with her monthly income. It said there was no option for her to access her benefits from the DB scheme early and the analysis showed that a transfer was seen as the only available solution to her at that time. It said whilst it recognised the regulator's starting position is not to transfer, there are circumstances where a transfer is deemed appropriate and this was clearly evident in Ms B's case.

Dissatisfied with its response, Ms B referred her complaint to our service, through her representative. An investigator considered things and upheld the complaint and told PSP to pay compensation. In summary they said the transfer wasn't financially viable because of the growth rate required to match Ms B's DB scheme benefits at her scheme's normal retirement age. And they said there wasn't a compelling reason to justify the transfer – they said although Ms B was unemployed at the time, her pension was there to provide her with an income in retirement and not supplement her income beforehand. They said they believed Ms B had other options available to her to help clear her debts, including speaking with her creditors. They said had suitable advice been given, Ms B would've remained in her DB scheme.

PSP disagreed. It said it didn't believe it was the right thing to do to force Ms B into a debt management plan when she had other assets she could use. It said Ms B didn't have the option of taking early retirement from her DB scheme and so it didn't understand the investigator's rationale for not accessing her pension when Ms B had a negative disposable income. It said Ms B has accessed the fund flexibly to support her needs, which wasn't available via her existing scheme.

Because the investigator wasn't persuaded to change their mind, the complaint was passed 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 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 PSP'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. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, PSP should have only considered a transfer if it could clearly demonstrate that the transfer was in Ms B's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

PSP carried out analysis, as required by the regulator, to determine the level of investment growth (the critical yield) required to match Ms B's DB scheme benefits if she transferred to a personal pension arrangement. This showed that the critical yield required to match Ms B's scheme benefits at age 60 was 14.78% assuming she took a lump sum and a reduced pension.

I'm mindful that PSP didn't express an opinion on the likelihood of Ms B achieving this rate of return taking into account her assessed 'high medium' attitude to investment risk and the term to retirement. But PSP's advice and recommendation in this case was not based on Ms B retiring at age 60 and investing all of her pension monies in the meantime in the belief that she'd be better off by transferring – its advice was based on addressing Ms B's immediate objective and giving her access to a cash lump sum and possibly income at age 55.

So while I have concerns about PSP's assessment of Ms B's attitude to investment risk, which in my view could not reasonably be described as 'high medium' given her investment inexperience, her age and her low capacity for loss, I don't think it is necessary in this case for me to consider in detail the financial viability of the transfer - albeit in my view it's immediately apparent from the required rate of return that it wasn't. What I need to consider in this case are the other reasons, which PSP believes mean the transfer was nevertheless suitable.

Income need and access to tax-free cash

The advice paperwork records that Ms B was unemployed but was seeking new employment and she was currently in receipt of jobseekers allowance – an amount of around £313 a month. Ms B's outgoings were recorded as being around £550 a month, meaning that Ms B had an income deficit of around £236 a month. It was also recorded that Ms B had no cash or investment-based assets and she had debts of around £7,000. Ms B's objective was noted as wanting access to a lump sum to go on holiday, repay some debts, supplement her immediate income need while she was seeking employment and create an emergency cash fund.

While in my view Ms B's desire for a lump sum for a holiday could not reasonably be considered necessary in the circumstances, or in and of itself a compelling reason to access her tax-free cash earlier than her scheme's normal retirement age, on the one-hand I accept it could be argued that Ms B needed access to funds to improve her financial position. And given her pension was her only available asset, a need to access her tax-free cash earlier than her scheme's normal retirement age.

But on the other hand, I'm not persuaded that PSP did enough to demonstrate that it fully understood Ms B's overall circumstances or that it was in her best interests to transfer her pension. It strikes me that the adviser's assessment of Ms B's lump sum need was simply based on her accessing the maximum tax-free cash based on the transfer value.

I say this because, firstly, while PSP recorded that Ms B was unemployed, there's no evidence that it asked her how long she'd been out of work, what she considered her prospects for new employment were and what income she was likely to earn, in an attempt to fully understand her financial position and how long her situation might last. Without this information I don't think the adviser was in a position to establish how much money, if anything, Ms B needed. Ms B said that she was seeking employment again - so it's entirely possible that her financial predicament had only just been created and that the position was only short-term and would immediately improve once she started earning again. In which case, while repaying the debt might have seemed like a good idea, it might not have been necessary immediately if Ms B was likely to soon be in a position to service that debt again from her income.

Secondly, PSP's recording of Ms B's income and expenditure in the fact-find cannot reasonably be described as comprehensive – in my view it was basic. Only a total figure for Ms B's monthly expenditure is recorded. It's unclear whether Ms B declined to provide more detail here or whether PSP didn't ask her. But either way it meant that PSP did not fully understand what Ms B's outgoing were and importantly what her debt repayments were – it didn't know how much of her recorded income deficit was as a result of her debt repayments. PSP didn't collate any more information about what Ms B's £7,000 debt comprised of either – so I think PSP should've better understood the details of Ms B's debts and her income and expenditure before it went ahead and made its recommendation that she transfer out of her DB scheme to raise funds to repay her debts.

Thirdly and crucially in my view, assuming Ms B's debts were the cause of her income deficit (or a significant contributory factor) then I think PSP ought reasonably to have recommended that Ms B explore all of the alternatives available to her, in the first instance, before recommending she transfer her DB pension scheme. And in my view this should've included a recommendation that Ms B speak directly with her creditors, who should've treated her positively and sympathetically; and/or that she should seek debt counselling advice from a debt charity or similar organisation; and/or that she should consider the possibility of entering a debt management plan. But I've not seen any evidence that PSP considered this or discussed it with Ms B as an alternative to transferring her DB pension benefits in an attempt to improve her position. In my view, transferring out of the DB pension scheme ought to have been the last resort and should've only been considered once all the viable alternatives to manage and/or resolve Ms B's financial predicament had been explored and exhausted.

I can see that PSP says Ms B shouldn't have been forced into a debt management plan when she had other assets available. But form what I can see, because Ms B didn't own her own home or have any investment or savings, the only asset available to her was her DB scheme pension. Ms B's DB scheme was her only source of private pension provision. And with no information gathered about Ms B's state pension entitlement, this was likely to form a not insignificant part of her overall future retirement income. So I'm not persuaded a debt management plan should've been ruled out purely on the basis of Ms B having a DB pension available to her.

I'm also mindful that Ms B's situation may well have meant she qualified for state benefits – for example Ms B rented from a housing association and she might have been entitled to housing benefit. But because this benefit is means tested, it's likely that by releasing capital and/or income from her pension, this would've impacted the amount Ms B was entitled to.

I think PSP ought to have considered this - but I've not seen any evidence that it did.

Overall I'm not persuaded that, based on the available evidence, PSP acted in Ms B's best interests. In my view PSP failed to properly understand Ms B's overall financial position. By not completing a detailed income and expenditure analysis or gathering more details about her debts, I don't think it could understand the extent to which Ms B's debt repayments were the cause of her income deficit versus her other outgoings.

PSP didn't consider Ms B's entitlement to benefits as part of its advice and it didn't recommend that she first explore the other avenues that were available to her to help with her financial situation when I think in the circumstances it should've done. For these reasons I don't think it was suitable to recommended that Ms B make an irreversible decision to transfer her guaranteed DB pension scheme benefits to a personal pension arrangement to help achieve things when this should have been a last resort.

Summary

I don't doubt that the flexibility and immediate availability of tax-free cash on offer through a personal pension arrangement would have sounded attractive to Ms B at the time. But PSP wasn't there to just transact what Ms B might have thought she wanted or needed. The adviser's role was to really understand what Ms B needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Ms B was suitable. She was giving up a guaranteed, risk-free and increasing income to resolve a financial situation that not only did PSP not fully grasp, but that in my view with better advice and consideration could likely have been improved and/or resolved by the viable alternatives that were available to her such as seeking debt advice. And this would've been far preferable to Ms B giving up her only guaranteed private source of retirement income. By transferring and following PSP's advice, Ms B was very likely to obtain lower retirement benefits and in my view, there were no compelling reasons which would justify a transfer and outweigh this.

So, I think PSP should've advised Ms B to remain in her DB scheme.

Of course I now need to consider whether Ms B would've gone ahead anyway, against PSPs advice.

Having done so, I don't think Ms B would've insisted on transferring out of her DB scheme and gone head in any event. I say this because Ms B was not in my view an experienced investor, despite PSP's assessment of her attitude to risk, which might suggest otherwise. In my view she was a low or cautious risk investor who neither possessed the requisite, knowledge, skill nor confidence to go against the advice she given, particularly in complex pension matters.

So I think Ms B relied solely on the advice she was given. At the time this pension was the primary source of Ms B's guaranteed future retirement provision. So, if PSP had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for her, and if it had explained that she should seek proper debt advice in the first instance and that only as a last resort should she consider risking her guaranteed pension to achieve things, I think that would've carried significant weight. I think Ms B would've accepted that advice.

In light of the above, I think PSP should compensate Ms B 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 set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

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 Ms B whether she preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

Ms B didn't make a choice, so as set out previously I've assumed in this case she doesn't want to wait for the new guidance to come into effect.

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

A fair and reasonable outcome would be for the business to put Ms B, as far as possible, into the position she would now be in but for PSP's unsuitable advice. I consider Ms B would have most likely remained in her DB scheme if suitable advice had been given.

PSP must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, if things had happened as they should have and if suitable advice had been given, Ms B would've most likely remained in her DB scheme. Because shortly after the transfer completed Ms B suffered ill health, I think it's more likely than not that at this point Ms B would've requested taking her benefits early on the grounds of ill health and this would've likely been granted by the scheme trustees. So, compensation should be based on a retirement age of 55.

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 Ms B's acceptance of the decision.

PSP may wish to contact the Department for Work and Pensions (DWP) to obtain Ms B'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 Ms B’s SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Ms B’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 Ms B 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 her 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 Ms B within 90 days of the date PSP receives notification of her 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 PSP to pay Ms B.

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 PSP to carry out a calculation in line with the updated rules and/or guidance in any event.

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 uphold this complaint and require PSP Wealth Management Ltd to pay Ms B 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 PSP Wealth Management Ltd to pay Ms B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require PSP Wealth Management Ltd to pay Ms B any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that PSP Wealth Management Ltd pays Ms B the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Ms B.

If Ms B accepts this decision, the money award becomes binding on PSP Wealth Management Ltd.

My recommendation would not be binding. Further, it’s unlikely that Ms B can accept my decision and go to court to ask for the balance. Ms B 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 Ms B to accept or reject my decision before 4 April 2023.
Paul Featherstone
Ombudsman