DRN-4030918

The complaint

Mr P complained that he was given unsuitable advice to transfer his defined benefit (DB) Occupational Pension Scheme (OPS), to a type of personal pension arrangement.

Although trading at the time under another name, Bluesky Wealth Management Limited is now responsible for answering this complaint. I'm aware Bluesky Wealth Management Limited is currently the subject of creditors voluntary liquidation, however my understanding is that a complaint can still be brought against the company. Mr P himself is represented by a third-party company.

To keep things consistent throughout this final decision, when referring to the business and complainant I'll refer mainly to "Bluesky" and "Mr P" respectively.

What happened

Mr P was a deferred member of an OPS, having previously worked for a company between 1988 and 2005. In 2014, it seems he approached Bluesky for advice about his deferred scheme.

As I refer to later on in this decision, only limited information seems to have been gathered by Bluesky about Mr P's circumstances during the advice session(s) it had with him. The information known about him at the time was that:

- He was 57 years old and married. He was unemployed and said to be in average health. No information was collected about Mrs P's circumstances.

- Mr P owned a house which had an estimated value of around £100,000. Around £45,000 was still owed on the mortgage with 10 years left to run.

- It was recorded at the time that Mr P was in significant debt and was having difficulties maintaining the repayments towards this. He was said to be in urgent need of cash and wanted to know if he could use his pension to help address this.

- Mr P had no other demonstrable assets and no savings.

- The cash equivalent transfer value (CETV) of Mr P's DB pension was £209,385. The normal retirement age (NRA) was 65.

Bluesky set out its advice about Mr P's pension in a suitability letter it issued on 18 November 2014. It advised him to transfer out of his deferred DB scheme and invest the funds in a personal pension arrangement. Mr P accepted this advice and so transferred from his deferred DB scheme to a personal pension arrangement shortly after.

Mr P first complained to Bluesky about its advice in late 2021 saying he shouldn't have been advised to transfer out of his DB scheme. In response, Bluesky denied it had done anything wrong.

Mr P then referred his case to our Service. One of our investigators looked into it and said the complaint about an unsuitable pension transfer should be upheld.

Bluesky hasn't been consistently responding to our Service, but we've checked it has received what we've been sending it, including the investigator's view recommending we should uphold Mr P's complaint. 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 Bluesky'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 (updated version) that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Bluesky should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr P's best interests.

I've used all the information we have to first consider whether the complaint is within our jurisdiction. Then I've considered whether transferring away from the deferred OPS to a personal pension arrangement was in Mr P's best interests.

Having done all this, I'm upholding Mr P's complaint.

Jurisdiction

I first considered whether I'm able to consider Mr P's complaint at all. And my decision is that I can.

We can't look at *all* the complaints referred to us. For example, the rules say that where a business objects, I can't consider a complaint made more than six years after the event complained of, or if later, made more than three years from the date the complainant was aware, or ought reasonably to have been aware, of having cause for complaint. A copy of Dispute Resolution rule 2.8.2R can be provided on request or can be found online in the 'DISP' section of the Financial Conduct Authority Handbook.

Mr P was given the pension advice by Bluesky in November 2014 and he then transferred his pension in December 2014. As Mr P first complained to Bluesky in December 2021, then he is outside the six-year part of the rule.

I therefore need to also look at the second part of the rule, namely whether Mr P brought his complaint within three years of being aware, or of him ought to having been reasonably aware, of having any cause for complaint.

Mr P told me that he only became aware that he may have cause to complain about this matter when he saw an advert about pension transfer complaints. So, in 2021 he contacted the claims management company on the advert which duly raised a complaint on his behalf, in December 2021.

I've seen nothing else that shows me that Mr P knew or should have known he had a cause for complaint before this. So, as my findings are that Mr P didn't know he had cause to complain about his 2014 pension transfer until 2021, this is a complaint I *can* look into.

I'll therefore now address the merits of his complaint.

Financial viability of the transfer

Normally in a pension transfer scenario, I'd expect to see the adviser demonstrating the financial viability of transferring to the consumer. Put another way, I'd expect to see the adviser showing the consumer some comparisons between either leaving their pension where it is – or transferring away and into a personal pension arrangement.

In most cases, such a comparison is usually set out in the suitability report, where the adviser makes his / her recommendations. And reference is usually made to a 'critical yield' rate. 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 income as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

In Mr P's case, Bluesky didn't calculate a critical yield rate. In my experience this is unusual and it's certainly unhelpful since Mr P would have probably been unable to make the comparisons I've referred to above. Bluesky also didn't attempt to show Mr P any alternative meaningful comparisons between the financial value of his existing pension and a personal plan.

In my view, these omissions were significant failures by Bluesky and they meant Mr P didn't have the information he needed to make an informed decision. This is because Mr P didn't have anything to show whether transferring out would be in his best interests from a financial perspective. So, if moving out to a personal plan was being recommended by Bluesky, Mr P couldn't see by how much his transferred funds would need to grow by his retirement date, to keep pace with the financial pension benefits he'd be giving up.

I've noted the advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case. In Mr P's scenario, I've noted all the likely growth assumptions upon him transferring out were relatively low.

I say this because the relevant discount rate published by the Financial Ombudsman Service for the period was 4.2% per year for 7 years to retirement (using a retirement age of 65). However, as a central theme in Bluesky's advice was that Mr P wanted to take his retirement benefits, or certainly most of them, much sooner than the NRA, I also looked at the discount rate for an earlier retirement. And, for a retirement at the age of 58, I've calculated that the discount rate was only 3.3%. I've also kept in mind that the regulator's upper projection rate at the time was 8%, the middle projection rate was 5%, and the lower projection rate was 2%.

At the time, Bluesky said Mr P's attitude to risk (ATR) was "cautious" and I've noted that Bluesky itself recommended that Mr P's transferred pension should be invested in a cautious money market fund. So, I think the likelihood here was that Mr P's transferred funds wouldn't have been projected to grow that much outside of his DB scheme. I think the level of assumed growth, at best, would have been around 2% -to- 3.5%, given what I've outlined above.

I think it was also obvious that Mr P knew very little about pensions or investments and he certainly had no capacity for loss. So, taking all these things into account, I think I can say that any realistic assumptions from that time would have been indicating a very cautious investment strategy and as a consequence of this Mr P would probably receive lower pension benefits overall as a result of transferring into a personal pension arrangement. Of course, I can't completely evidence this – but that's because of Bluesky's failure to analyse or publish any critical yield figures in the first place. In any event, there would be little point in Mr P giving up the guarantees and benefits available to him through his existing scheme only to achieve a lower level of benefits in a personal pension in the longer term. Bluesky didn't demonstrate there were any financial benefits in transferring, and in my view, he'd likely be worse off in the long term if he transferred. The regulator also assumes, that from a starting point, transferring is more likely to be unsuitable.

So, Bluesky effectively recommended the transfer away without properly comparing all these different options or showing that transferring was a better option for Mr P. These were substantial failures, but I do note nevertheless, that Bluesky's recommendation to transfer away was probably based on a different rationale to the rather one-dimensional financial viability comparisons.

As I'll go on to explain, Bluesky failed in these other areas too, because its analysis was similarly poor and it failed to comprehensively explain its rationale. But I've given thought to all the other considerations which might have meant a transfer was suitable for him, despite probably still providing overall lower financial benefits in the longer term.

<u>Other potential reasons for the pension transfer advice</u>

- *Mr P's financial situation*

It seems Bluesky's recommendation to transfer Mr P's DB pension to a personal plan was focused only on him needing money there and then. Mr P was unemployed at the time and evidently not earning an income. The only meaningful transfer objective Bluesky recorded on any of the documentation I've seen was that Mr P was encountering debt financial hardship and so wanted to transfer his pension, access the 25% as a tax-free lump sum, and invest the remained in a cautious fund supposedly for future use.

Bluesky didn't define or analyse what this future use of the remaining funds might look like. In the event, we now know Mr P accessed the funds to spend on various items of discretionary spending, repairs and business ventures and so his transferred pension money is now completely gone.

Our investigator commented on the poor and restricted nature of Bluesky's advice to Mr P, focussed as it was only on him transferring away. Bluesky offered no explanation of its failures and so like our investigator, I've looked at the documentation we still have available when assessing this complaint.

Whilst I'm satisfied that Mr P probably did have a genuine need for money at the time and did have debts, to what extent these necessitated an irrevocable pension transfer is unclear. I would have expected Bluesky to have conducted enquiries as to exactly how much the debt was and to look at all the alternatives that didn't include losing a guaranteed pension income for life. Bluesky failed to properly look into these matters.

Mr P had lost his job but I can't see any consideration was given to him returning to work in the short term and / or whether this was feasible. Also, if Mr P's debts were at a stage where they were unmanageable, I would have expected the advisor to signpost Mr P to a debt counselling service (or similar) so he could understand all the options open to him. However, as Bluesky failed to record or address any of these important issues, it's hard to gauge just how unreasonable its failures really were. But overall, it failed to record very obvious and relevant facts about Mr P's financial situation and to me this strongly implies Bluesky failed in the most basic of its duties.

Bluesky also apparently failed to assess whether Mr P could have taken the pension benefits early from his existing DB scheme. In my experience, this would most likely have been possible and Bluesky could have easily confirmed what income he may have been entitled to from an early retirement and what tax-free lump sum he could have accessed. This may well have helped him to address his apparent debts. There's absolutely no evidence it was suitable for Mr P to give up his guaranteed pension benefits when no assessment had taken place of what his income needs in retirement might be. In my view, the evidence is strong that no analysis of Mr P's financial circumstances at the time was undertaken or that his income needs in retirement were assessed.

Even if I were to agree that Mr P was seeking advice specifically because he wanted to access some tax-free cash to get him out of a serious debt predicament, this objective certainly didn't remove the need for Bluesky to properly and professionally record all the relevant details and to provide suitable advice to Mr P.

In summary, Bluesky has provided no evidence from the time of the advice, or since, that the apparent debts were unmanageable to the degree that he needed to use his pension to address them.

- *Missing information*

In almost all areas, Bluesky's approach to the pension transfer advice Mr P was seeking was very poor. In my view, it solely focussed on what Mr P thought he wanted to do and despite being paid a significant sum for the regulated financial advice, Bluesky's completion of much of the relevant documentation lacked any real depth.

The 'fact-find' for example was simply 'scored through' in important places when information about Mr P's financial circumstances ought to have been recorded and considered. Also, no details at all were recorded about Mrs P's situation. So, from the start, the recommendation was focused solely on Mr P transferring away from his DB pension because he wanted to access an undisclosed amount of cash without any meaningful analysis of any of the alternatives.

Bluesky's job here wasn't simply to transact what Mr P might have thought he wanted. As a regulated adviser, its job was to understand his circumstances and to provide professional advice which was in his best interests. However, Bluesky failed to record details of any other pension Mr P (or Mrs P) might have had and it made no reference to how he would support himself in retirement if he transferred this pension away to another type of scheme. These omissions were just a few examples of Bluesky's very significant failings in this case. It also failed to recognise or consider the vulnerable financial position Mr P was clearly in.

- *Flexibility*

Having some of the flexibility a personal pension might add over a DB scheme is often cited as a rationale for transferring out of such schemes. This was not, however, used as a reason by Bluesky in this case. But Bluesky's reasoning was extremely poor throughout. So for the avoidance of doubt, I can't see that Mr P required any added flexibility in retirement. As I've said, Bluesky did a very poor job at identifying what Mr P's retirement income requirements might be. But there were already limited degrees of flexibility still available to Mr P around retiring early which Bluesky failed to explore.

- *Death benefits*

I can't see whether, or the extent to which, this subject was discussed. However, given the lack of detail and information provided by Bluesky in most other areas, I think it's more likely this subject matter wasn't addressed. But a pension is primarily designed to provide income in retirement. I also think the existing death benefits attached to the DB scheme were probably underplayed. Mr P was married and typically these types of pension have substantial spousal benefits. So the spouse's pension most likely provided by the DB scheme would have been useful to Mrs P if Mr P predeceased her. I don't think Bluesky made the value of this benefit clear enough. This was most likely guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

Summary

In this decision I've first explained why Mr P's complaint is one we can look into.

As regards the merits of his complaint, Mr P was 57 years old and evidently in need of some money to help address outstanding debt. However, in my view, Bluesky failed to comprehensively assess and record Mr P's overall financial situation. It also paid lip service to important documents and then focussed entirely on Mr P saying he needed some money to get by. It was on this sole basis that Bluesky recommended and facilitated the transfer out.

However, I've seen nothing which shows Bluesky really attempted to understand Mr B's best interests. Ultimately, I don't think the advice given to Mr P was suitable and because of it, he faced a very uncertain retirement. He was giving up a guaranteed, risk-free and increasing income within his current scheme. By transferring to a personal pension, the evidence shows there was very limited opportunity to improve on his existing benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this.

I think Bluesky ought to have advised him against transferring out of his DB scheme and probably help him in seeking a plan to manage his existing debts. However, Bluesky recorded so few details about Mr P's circumstances that we can't know if or how this would have worked.

Bluesky recorded nothing showing or explaining why retiring from the DB scheme when he was ready to do so, and then drawing a regular income, wasn't the much better option for Mr P. The regulator's position with DB pensions was that the starting point should be that transferring out was unlikely to be in a client's best interests – and Bluesky produced absolutely nothing to show otherwise.

I have considered, given the circumstances of the time, whether Mr P would have transferred to a personal pension in any event. But again, because Bluesky disclosed very few of the risks of transferring to Mr P and provided him with very little relevant information, it clearly failed in its duty. Ultimately it advised Mr P to transfer out, and I think Mr P relied on that advice. I'm not persuaded that Mr P would have insisted on transferring out of the DB scheme, against Bluesky's advice if it had done a better job. I say this because Mr P was an inexperienced investor and this pension accounted for almost all of his retirement provision at the time. So, if Bluesky had provided him with clear advice against transferring out of the DB scheme, explaining alternatives and / or why transferring wasn't in his best interests, I think he would have accepted that advice.

In light of the above, I think Bluesky should compensate Mr P 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 P**,** as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr P would have most likely remained in the occupational pension scheme if suitable advice had been given.

Bluesky 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.

Compensation should be based on the scheme's normal retirement age (65), as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr P's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Bluesky should:

- always calculate and offer Mr P redress as a cash lump sum payment,

- explain to Mr P before starting the redress calculation that:

    - the 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 their redress prudently is to use it to augment their DC pension

- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr P accepts Bluesky's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr P for the calculation, even if he ultimately decides not to have any of their redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr P's end of year tax position.

Redress paid to Mr P as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Bluesky 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 P's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

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.

I have also considered the impact on Mr P of the unsuitable advice and transfer. Our investigator recommended that a sum of £200 should be paid to Mr P by Bluesky for what they referred to as the trouble and upset caused by this unsuitable transfer. I've taken into consideration Mr P's age, circumstances and the substantial amount he'd built up in his pension to that date; Mr P had built up his pension over a long time. Also, by retirement this DB pension would have been a very substantial part of his overall pension entitlement so I think the thought of losing any benefits would have negatively impacted Mr P.

So, I agree that Bluesky should also pay Mr P £200 for the distress and inconvenience caused by the unsuitable advice which has likely had an impact on his retirement planning.

My final decision

<u>Determination and money award</u>: I uphold this complaint and I direct Bluesky Wealth Management Limited to pay Mr P the compensation amount as set out in the steps above, up to a maximum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Bluesky Wealth Management Limited pays Mr P the balance. If Mr P accepts this decision, the money award becomes binding on Bluesky Wealth Management Limited.

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr P to accept or reject my decision before 9 June 2023.

Michael Campbell
Ombudsman