DRN-4108610

The complaint

Mr G complains about the advice given by Brown Shipley & Co Limited, trading as Brown Shipley, to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He complains that the compensation he has been offered due to the SIPP being mis-sold is not right.

What happened

Mr G was advised to transfer out of two DB schemes by Brown Shipley in 2018. I understand a total of £412,114.87 was transferred into a SIPP that Mr G already owned.

Mr G already had some investments in this SIPP. He had around £850 in cash. A shareholding worth around £40,000 which I'll call S1 and another shareholding with a value of around £4,000 which I'll call S2.

In July 2022 Brown Shipley wrote to Mr G and informed him that it had reviewed the advice that it had given him to transfer and found that it wasn't suitable for him. It calculated redress based on the regulator's method of compensation for unsuitable DB pension transfers. It calculated that Mr G had suffered a loss of £10,453.79.

Mr G didn't agree with this loss assessment. He said that Brown Shipley hadn't accounted for the fact that some of the value of the SIPP was due to investments that didn't come about due to the DB transfer advice. These had already been in the SIPP when the transfer took place.

Brown Shipley agreed that it hadn't taken this into consideration correctly and adjusted the value of the SIPP used in the redress calculations. It did this broadly based on proportioning the SIPP value so that it only used a percentage of the value that matched the amount of the original DB transfer percentage, and didn't include the amount that was in the SIPP initially. This increased the redress to £26,730.20.

Mr G didn't agree. He said that the value of the two shareholdings should be excluded from this SIPP valuation as he already held these when the DB transfer took place. Brown Shipley doesn't agree with this, as Mr G sold S1 shortly after the DB transfer had taken place and repurchased it a few weeks afterwards. And it thinks the DB transfer influenced his decision to do this.

Mr G referred his complaint to our service. An Investigator upheld the complaint. She agreed that Brown Shipley should pay compensation. She thought that S1 and S2 should be excluded from the SIPP value. This is because they were both held within the SIPP when it was started. And the fact that S1 was sold and repurchased shortly after the transfer seemed to be a continuation of a trading strategy that Mr G had before he made the DB transfer. And so, the DB transfer wasn't instrumental in enabling him to do this.

Brown Shipley disagreed, saying that:

- It wasn't certain that Mr G would have sold and repurchased the S1 shares. But as the transfer provided him with a large amount of cash it would have affected his decisions about what shares he bought and sold.
- It thought that Mr G had chosen his investments as a whole to follow a particular strategy. And so, it was appropriate to include the S1 shares in the redress calculation (proportioning aside).
- It hasn't acted negligently or outside of the guidance given by the regulator for redress in this kind of case.

The Investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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.

As I've outlined above Brown Shipley has accepted that it mis-sold the DB transfer to Mr D. So, I don't need to consider if the DB transfer was right for him. I've only considered if the redress offer is fair.

The industry regulator has produced some detail about how to perform the redress calculation where a DB transfer has been mis-sold. As both parties are aware this guidance has changed recently.

The relevant rules are in DISP App 4, and I've reproduced some of these below. I've not reproduced the parts that that aren't relevant here. These give guidance on calculating the value of the DC pension, which in this case is the SIPP. It calls this value (D). DISP App 4.2.6 says:

DISP App 4.2.6 R 01/04/2023

A *firm* must use an *actuary* or an approach approved by an *actuary* when undertaking calculations in accordance with this appendix to calculate:

> (1) ...
>
> (2) the value of the *consumer's* DC pension arrangement, where adjustments are necessary to obtain the current value.

And DISP App 4.2.12 also says:

DISP App 4.4.12 R 01/04/2023

To determine the value of D in *DISP App 4.4.2R(4)*, a *firm* must:

> (1) use the value of all investments and holdings within the *consumer's* DC pension arrangement at the valuation date, in accordance with the technical guidance at *DISP App 4.5.5G*;
>
> (2) ...

> (3) deduct the accumulated value of any contributions and transfers to the DC pension arrangement, allowing for investment returns, not resulting from the *pension transfer* advice; and
>
> (4) …

It's not clear to me that that Brown Shipley has followed this guidance fully. I accept that it wasn't in place when the original calculation was done, but it also wasn't a large departure from the guidance that came before. And in any event Brown Shipley now needs to follow this guidance.

Its firstly not clear Brown Shipley used an actuary, or an actuarially approved method, to make the calculation for D. It should do this going forward.

And secondly this section of the regulations essentially say that the SIPP valuation should start with the total value at the time of the loss calculation. It should then remove from this the value of any investments that were not due to the transfer. And this can be calculated accurately as Mr G has provided a full statement for the SIPP.

There is no dispute that the values of the cash already held, and S2, should be taken from the SIPP value at the time of calculation. The ongoing disagreement is about whether S1 should be taken from the value of the SIPP.

At the time of transfer Mr G already had a holding in S1 so they could not have resulted from the pension transfer advice. So, the starting point is that the S1 holding, and any accumulated value that came from it, should be deducted from the SIPP value.

Brown Shipley is right to say that this isn't the full picture here as Mr G sold S1 and then repurchased the shares a few weeks later. It says this means that the value of repurchase could be included in the value of the SIPP, as this repurchase could have been made using the DB transfer funds.

But I don't think it's reasonable to assume this. Mr G had bought and sold these shares a number of times in the past. And this seems to be a trading strategy he had for this particular share. So, I don't think it's reasonable to say that he made this trade due to the DB transfer as he'd already done this before. I don't think it should be included in the SIPP value used for the redress for this reason.

And I don't think it's reasonable to say that the transfer particularly enabled him to follow a high risk strategy with these funds – by allowing him to invest in lower risk funds elsewhere – as he's said this part of his money was always in high risk areas and this seems to be the case. And whilst a lot of the SIPP remained in cash, he did invest in single equites which I don't think is a low risk investment strategy.

In any event, as I've outlined above, I don't think this assumption would necessarily follow the current guidance. Brown Shipley needs to properly separate out the returns due to DB transfer and those that came from investments he already had. And I think that the investment Mr S held in S1 should be regarded as being an existing SIPP investment, and removed from the SIPP value. For the reasons I've said above.

Mr G also said that he may incur a possible chargeable gain. However, pension schemes don't usually incur tax charges of this type. Brown Shipley has said that if there is a liability as a result of the redress, then it would compensate Mr G for this. I agree that this is reasonable.

Given all of the above I think Mr G's complaint should be upheld. Brown Shipley should recalculate the loss Mr G has suffered due to its unsuitable advice and it should properly remove the values of S1, S2 and the cash Mr G already held in the SIPP. I've outlined the compensation below.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr G would have most likely remained in the occupational pension scheme if suitable advice had been given.

Brown Shipley 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.

For clarity, Mr G has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 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 PS22/13 and 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 G'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, Brown Shipley should:

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

Redress paid to Mr G as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Brown Shipley 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 G'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 Brown Shipley & Co Limited to pay Mr G 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 Brown Shipley & Co Limited pays Mr G the balance.

If Mr G accepts this decision, the money award becomes binding on Brown Shipley & Co Limited.

My recommendation would not be binding. Further, it's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G 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 G to accept or reject my decision before 27 July 2023.

Andy Burlinson
Ombudsman