DRN-4131834

The complaint

Mr M complains about the advice Tideway Investment Partners LLP ('Tideway') gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS') to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

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

The BSPS provided Mr M with a summary of the transfer value of his scheme benefits. They had a cash equivalent transfer value ('CETV') of £166,125.

Mr M was concerned about what the recent announcements would mean for the security of his pension. In July 2016 he approached Tideway for advice. Tideway sent Mr M information about its service and asked him to complete a fact find questionnaire. Mr M completed it telling Tideway he:

- was 61 years old, single with no dependents;
- was a "non-professional carer";
- received "0" income;
- owned his home outright, which was worth around £450,000;
- had cash and savings worth £146,000;
- had a second final salary pension of around £2,500 a year;
- described himself as a low risk investor; and
- didn't want to pay Tideway's fees for ongoing financial advice.

Tideway spoke with Mr M and on 21 July 2016 it sent him two documents: an ‘initial appraisal’ and a ‘final salary transfer report’. Such reports are generally referred to as suitability reports and that’s the term I will use in this decision. The suitability report set out Tideway’s analysis and recommendations. It recommended Mr M should transfer his DB scheme funds to a named SIPP. In brief it said that doing so would:

- Allow Mr M to access his funds flexibly.
- Let him leave any residual pension to his beneficiaries on his death.
- Have the potential to grow the size of his pension in “real terms”.
- Give him the option to make bigger withdrawals in the early years of retirement.
- Give him control over the pension fund as he had concerns over the stability of the BSPS and the chance it would enter the PPF.

The suitability report made no recommendation for how Mr M should invest the funds after opening the SIPP.

Mr M accepted Tideway’s advice and his funds were transferred to the named SIPP.

Mr M complained to Tideway in 2022 about the suitability of the transfer advice. He didn’t think the advice to give up a guaranteed pension income was right for him.

Tideway didn’t uphold Mr M’s complaint. In short it said that transferring allowed Mr M to achieve his objectives.

Mr M referred his complaint to the Financial Ombudsman Service. One of our Investigators spoke with him. During that conversation, amongst other things, Mr M said that since moving his funds to the SIPP he had invested in “one share” and he left the rest in cash. Another Investigator looked into the complaint. He thought Tideway’s advice was unsuitable. In short he said Mr M wasn’t likely to improve on the guaranteed benefits he already had by transferring. And he didn’t think there was any other reason to transfer that was worthwhile Mr M giving up his DB benefits for.

Tideway didn’t agree with our Investigator’s assessment of the complaint. It didn’t provide any reasons for disagreeing with his analysis. Instead it said that the regulator (the Financial Conduct Authority - FCA) had selected Mr M’s case for a file review. When doing so it had identified “missing information gaps”. Tideway said the regulator had asked it to request the missing information from Mr M. It had done so but he had refused to give answers. Tideway said the regulator had told it that without that information it couldn't assess the suitability of its advice. Tideway told us that it couldn’t understand how we could decide its advice wasn’t suitable when the regulator, using the same information, couldn’t make that determination.

So, because things couldn’t be resolved informally, 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. This includes the Principles for Businesses (‘PRIN’) and the Conduct of Business Sourcebook (‘COBS’). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Tideway'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.

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, Tideway should have only considered a transfer suitable if it could clearly demonstrate it was in Mr M’s best interests.

Having considered all of this and the evidence in this case, I’ve decided to uphold the complaint for broadly similar reasons to those our investigator gave.

Reasons for my findings

When assessing whether a transfer is suitable the regulator requires Tideway to take reasonable steps to obtain the necessary information from Mr M about things like his investment experience, financial situation and his investment objectives. And that includes information about his regular income and financial commitments.

When Mr M completed Tideway’s fact-find, the answers he gave indicated he had no income from any source whatsoever. When it spoke with Mr M Tideway noted he had no need for tax free cash (‘TFC’) or an income at that time. He also told it he might sell his home and downsize at some point in the future. Tideway’s suitability report also said Mr M had no need to draw an income immediately. But Tideway hasn't recorded why he had no need for an income. Also, Tideway hasn't noted what Mr M’s regular financial commitments were or how he was meeting these. in addition it didn't do any form of assessment of what Mr M’s income needs would be in retirement or how he would meet those. So I don't think Tideway gathered all the information needed in order to have a full picture of Mr M’s financial situation or what that would look like in retirement. So, I don’t think Tideway gathered enough information about Mr M’s circumstances in order to make a personal recommendation to him.

Further the regulator also required Tideway to compare the likely benefits (on reasonable assumptions) of the DB scheme with the likely returns from transferring. The regulator says that comparison should:

"…be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds are invested."

The regulator has also made it clear that in order to give suitable advice on a DB transfer, the advice has to include the suitability of the underlying investments. But in this case Tideway didn't make any recommendation about which funds Mr M should invest in. And without knowing what funds he would invest in I don't think Tideway followed the appropriate process or provided a reasonable comparison. Similarly, without assessing and recommending an investment strategy in line with Mr M's risk appetite I don't think Tideway gave him enough information with which he could make an informed decision to transfer.

Also, the regulator required Tideway to carry out a transfer value analysis. That's usually presented by way of a report, known as a TVAS. Tideway hasn't provided a copy of such a report, although I've noted its suitability report does refer to some of the features a TVAS would provide. For example it said that, in order to match Mr M's DB benefit income on a like-for-like basis the growth rate required (the critical yield) was 18.2%. It said such a growth rate was impossible to achieve. The critical yield figure was a measure given in a standard TVAS report at that time. I agree with Tideway's analysis that a critical yield of 18.2% was virtually impossible to achieve.

But, Tideway went on to say that a comparison based on critical yield was "largely irrelevant" for those who took their benefits by drawdown. In other words it's dismissed the figure as being of little use. However, I find the critical yield is a useful tool as it is a reasonable comparison of the growth required in order to replace DB benefits with something of a similar nature; that is a product that would provide a guaranteed income for life. And the regulator required Tideway to consider the rate of investment growth that would have to be achieved to replicate the benefits being given up. So, Tideway needed to provide an analysis based on the critical yield and I do think it's a relevant consideration. However, rather than using it as a starting point to explain to Mr M why he would most likely be worse off by transferring, Tideway essentially said Mr M could ignore it. I don't think that was a reasonable thing to do.

Further, instead of using the critical yield figure, Tideway instead said investment returns of 6.04% a year, after fees, would match Mr M's DB scheme income until beyond his life expectancy to age 100. But Mr M told us that the SIPP fees were 1% a year. So Tideway's return rate would rise to 7.04% once those were factored in. Tideway went on to say that a return of 4 to 5% after fees (or 5 to 6% when including the fees) was "not unrealistic". It didn't say at what age Mr M would deplete his funds if they did grow at those rates. But I find the prospect of returns at those rates for an investor with Mr M's low attitude to risk highly unlikely.

To put this into context Tideway gave its advice 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. I'll explain that a discount rate is a measure of what an investment is likely to grow at in the future. 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 Tideway advised Mr M.

The relevant discount rate was 2.8% for three full years to retirement when Mr M turned 65. That is considerably below, the 4 to 5% (5 to 6% once fees are factored in) Tideway believed Mr M might achieve and less than half the 7.04% Tideway calculated would be required to allow Mr M to access funds by drawdown beyond his life expectancy. And 2.8% is a mere fraction of the 18.2% critical yield that was required to provide like-for-like benefits with the DB scheme and was the industry recognised measure for making benefit comparisons at that time.

Also, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% a year. So, for someone with a low risk appetite like Mr M, the lowest projection rate of 2% would seem the most likely reasonable rate of return. Yet Tideway was essentially telling Mr M he could achieve double or triple that. However, looking at the discount rate the regulator's low projection rate of the critical yield shows that was most unlikely.

In addition, Tideway didn't give Mr M an investment strategy. So he instead held the majority of his funds in cash. And given the low interest rates prevalent at the time, that had no prospect of giving him the sorts of returns Tideway's suitability report said he could expect from transferring to a SIPP.

So, having considered the above I think Mr M was most likely to receive benefits of a materially lower overall value than the DB scheme at retirement, as a result of investing in line with his low attitude to risk. And for that reason I don't think a transfer was in his best interests.

Further, Mr M was seeking advice because of his concerns over the stability of the DB scheme and the prospect that his funds would have entered the PPF. But Tideway didn't provide any analysis about what Mr M's likely benefits from the PPF would be or show how those would compare with benefits from a transfer to a SIPP. So I don't think it gave him enough information about whether or not a transfer was suitable for him.

Tideway also said transferring gave Mr M flexibility to access his benefits as he chose and to take larger sums earlier in his retirement. But there's no evidence on file that Mr M required flexible access to his pension funds. As I've said above, Tideway didn't record any information about what Mr M's outgoings were or what his likely income needs would be in retirement. So, it's not clear why Mr M would require flexible access to his funds nor has Tideway provided any rationale for why this flexibility would be worthwhile giving up the guarantees the DB scheme offered him.

Also, Mr M had £146,000 in savings. So, if he wanted to access funds in a flexible manner, then he could have done so by making withdrawals from his savings in that way, while also taking his secure income from his DB scheme. That would have given him a higher amount of guaranteed income for life, thereby decreasing his overall risk in retirement. So, I don't think it was suitable or in Mr M's best interests for Tideway to advise him to transfer his DB pension, potentially exposing him to the risks of the financial markets, just to have extra flexibility that he didn't need.

Tideway also recommended the transfer because it would allow Mr M to leave any residual pension to his beneficiaries on his death. Mr M was single with no dependents. So, unless he married in later life, which couldn't be discounted, the spouse's benefits from the DB scheme was unlikely to be of value to him and his pension would die with him. In contrast he could leave any sums remaining in his SIPP on his death to his nominated beneficiaries. But I don't think the possibility of more attractive death benefits was a sufficient reason to recommend a transfer.

Tideway's priority was to advise Mr M about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – not a lump sum to beneficiaries after death. But in transferring out of his DB scheme Mr M was essentially giving up a guaranteed, index linked, increasing income in retirement, for the potential for a lump sum for his family that they may not receive for many years to come.

I don't doubt that the CETV figure would have appeared an attractive sum to be able to leave as a legacy. But, in reality, the sum remaining on death following a transfer was always likely to be different. The fund would be depleted by Mr M's withdrawals from it in his lifetime. So, how much would remain in it on his death depended on a number of factors. And there may not have been much left in his SIPP if he lived a long life, the investments performed poorly, or if he took large sums from it early in his retirement.

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

I understand Mr M approached Tideway because he was concerned about the stability of the BSPS. At the time his employer had begun consultation about the future of the scheme. And there was the possibility his pension fund could be transferred to the PPF. However, there was also the possibility of a new scheme being set up. But when Tideway gave its advice the likely outcome was not known and wouldn't be for some time. So, while I don't doubt that this was a worrying period for Mr M, and others in a similar situation, it wasn't the case that he had to make any urgent decisions as the BSPS scheme's future was still a matter for consultation.

Further, Tideway's role was to objectively address any concerns Mr M might have had. The PPF would have still given Mr M a guaranteed income worth roughly 90% of his BSPS entitlement. And he would be unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might have thought. So I don't think any concerns he held about this meant that transferring was in his best interest. But, while Tideway did provide a link to the PPF's website, its summary of the PPF's benefits in its suitability report is extremely brief. It consists of two sentences of less than 40 words in total. That was unlikely to have done much to explain the benefits the PPF offered or to allay Mr M's fears about what the PPF could mean for him. I don't think that was a fair or reasonable manner in which to set out the valuable support the PPF offers.

Overall, I can't see persuasive reasons why it was clearly in Mr M's best interests to give up his DB benefits and transfer them to a SIPP. I also haven't seen anything to persuade me that Mr M would have insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think the advice Tideway gave to Mr M was unsuitable for him.

Turning to Tideway's comments about the regulator's file review. I'll say first that Tideway hasn't given us any source material from the regulator's review. So I haven't seen the regulator's notes, questions or a completed – or partially completed – Defined Benefit Advice Assessment Tool ('DBAAT')[1] . So it's extremely difficult for me to say with any confidence what actions the regulator took or why.

[1] The DBAAT is a mechanism the FCA introduced in 2019 to help it assess the suitability of DB transfer advice..

Tideway said the regulator noted some “missing information gaps” and asked it to make enquiries of Mr M to fill those gaps. Mr M didn't answer the questions and – according to Tideway – the regulator said it wasn’t in a position to say whether or not its advice was suitable. So Tideway doesn't understand how our Investigator could conclude its advice wasn’t suitable when the regulator didn’t have enough information to determine the question.

I’ll note first that the regulator’s guidance for completing the DBAAT indicates that where there are “missing information gaps” that can't be filled with information the advising firm already holds, then the DBAAT should be noted as “non-compliant”. In other words the advising firm concerned has failed to meet its regulatory information gathering requirements. I don't know whether or not that was the regulator’s conclusion in this case.

However, I’m not surprised the regulator found there were information gaps. As I've set out above, I don’t think Tideway had enough information with which to make a personal recommendation to Mr M to transfer out of his DB scheme. And for the other reasons set out above, it’s plain to me its advice was unsuitable. I think that’s easily apparent from the information on file, which, Tideway told us, is the same information it gave to the regulator.

But, in any event, my role isn't to provide an analysis of the regulator's actions and we don’t have the same function. Unlike the FCA our job is not a regulatory one. We are tasked with looking beyond simply whether a firm has complied with its regulatory requirements. Instead, we consider information from both parties and decide, while having regard for relevant law and regulations, what we consider to be fair and reasonable in all the circumstances of the complaint. So, I don’t think the fact the regulator had begun, but not completed, a separate review impacts on our consideration of this complaint. Nor does it prevent me from reaching my findings independently of the FCA’s considerations. And having done so, for the reasons set out above, I'm satisfied that Tideway’s recommendation that Mr M should transfer wasn’t in his best interests and so wasn’t suitable for him.

Instead I think Tideway should have advised Mr M to remain in his DB scheme until the outcome of his employer’s consultation about the future of the scheme was known. Had it done so, I think Mr M would have then chosen to opt to join the BSPS2, which was eventually set up following the consultation. That’s because the BSPS2 essentially provided the same benefits as the BSPS although it’s yearly indexed increases were lower. But that would have been Mr M’s best option, so I think he would have chosen that if he hadn't already transferred out of the DB scheme.

Putting things right

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

Tideway 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.

Tideway should use the FCA’s BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to C and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what Tideway based the inputs into the calculator on.

Mr M has now retired, although he has yet to access his pension funds. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M 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 their redress prudently is to use it to augment his SIPP
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Tideway's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr M 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 M's end of year tax position.

Redress paid to Mr M as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Tideway 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 M'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 Tideway Investment Partners LLP to pay Mr M 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 Tideway Investment Partners LLP pays Mr M the balance.

If Mr M accepts this decision, the money award becomes binding on Tideway Investment Partners LLP.

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

Joe Scott
Ombudsman