DRN-4140169

Financial Ombudsman Service

The complaint

Mr B complains about the advice Penvest Limited gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS') to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr B's wife, Mrs B, has helped him to bring this complaint. But, for ease of reading, I will refer to Mrs B's comments as being Mr B's.

What happened

In March 2016, Mr B's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) 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.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr B's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

In October 2017, members of the BSPS were sent a "time to choose" letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere. Mr B opted to join the BSPS2.

In December 2017, the BSPS provided Mr B with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £172,798.

Mr B approached Penvest for advice about his pension. Penvest carried out a fact-find with him to establish his circumstances and objectives. Amongst other things it noted that Mr and Mrs B were both aged 55. They were both working and had no dependents. They owned their own home, subject to a small mortgage which would be paid off within a year. They also owned another property which generated a rental income of £650 a month. They had cash savings worth around £20,000. Mr B had investment ISAs worth £64,772, Mrs B had investment ISAs valued at £42,680 and shares valued at £11,200. Mrs B had her own DB pension which would be payable from age 60. Mr B also had another DB pension. He had also joined his employer's recently set up defined contribution ('DC') pension scheme. Together Mr B and his employer were contributing a sum equivalent to 16% of his salary to that. By November 2017 that fund had a value of around £4,715.

In January 2018 Penvest obtained a transfer value analysis ('TVAS') report, which set out the growth rates required from an alternative personal arrangement (the critical yields) to match the DB scheme benefits.

In February 2018 Penvest gave Mr B its suitability report setting out its analysis and recommendations. It recommended that Mr B should transfer his BSPS benefits to a named personal pension. Briefly it said that doing so would allow Mr B to access his benefits flexibly and to leave any residual pension to beneficiaries on his death.

Mr B accepted Penvest's recommendation and transferred his BSPS funds to the named personal pension.

In 2022 Mr B complained to Penvest that its advice might not have been suitable for him. It didn't uphold his complaint. In summary it said: Mr B wouldn't be reliant on the BSPS income in retirement; transferring allowed him to achieve his objectives; it had made him fully aware of the risks of doing so; Mr B was comfortable to take those risks and to give up the guarantees of the BSPS DB scheme.

Mr B brought his complaint to us. One of our Investigators looked into it. He didn't think a transfer was in Mr B's best interests. So, the Investigator recommended Penvest should establish if Mr B had suffered a financial loss as a result of its advice and if so pay compensation. The Investigator also said Penvest should pay Mr B £200 to address the impact of making an irrevocable transfer.

Penvest didn't agree with our Investigator's complaint assessment. In brief it said:

- It had followed the regulator's guidance and begun the advice process with the assumption that a transfer wouldn't be suitable. But there was enough evidence to recommend it.
- Mr and Mrs B were financially sophisticated; they were aware of the available options and well placed to understand the risks.
- Penvest fully considered the high critical yields. But there was still good reason to recommend a transfer.
- If Mr B took his BSPS benefits at age 65 they would be well above his income needs and Mr B was keen to access those flexibly at age 60 by drawdown.
- Mr B could have supported his lifestyle at age 60 by other means but that wasn't in line with his objectives. He couldn't have had the same death benefits.

As our Investigator wasn't persuaded to change his opinion the complaint was referred 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 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 Penvest'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, Penvest should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B'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 decision

The TVAS report that the regulator required Penvest to carry out showed that the critical yield – how much Mr B's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme – was 15.2% for Mr B taking his benefits at age 60 or 9.1% at age 65. The critical yield at age 65 would reduce to 7.4% if Mr B took a tax free cash ('TFC') lump sum and a reduced pension. I think the prospect of a personal pension achieving those critical yields to be slim.

Penvest said the critical yield at age 65 could be met by investing in a medium to long-term strategy. But, one of the reasons for Penvest's recommendations to transfer was that it would allow Mr B to access those benefits flexibility from age 60. That was less than five years away. A period Penvest itself described to us as "very short". So, by following Penvest's recommendations, while Mr B would leave some of his funds invested for a longer period, he would start to access those, and reduce the funds left to grow, in the short term. That strategy would most likely mean the critical yields were improbable to achieve.

Further I've kept in mind that the regulator's projection rates had remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%. So, if Mr B didn't take TFC then his investments would have had to repeatedly perform above the regulator's upper projection rate just to match the benefits from the BSPS2 scheme. Similarly if Mr B did take TFC then the fund would need to consistently grow at a rate approaching the regulator's upper projection level. And given that Penvest had recommended Mr B invest in funds with a balanced or medium risk level, that seems extremely unlikely.

Penvest said Mr B didn't want to buy an annuity. So it's implied the critical yield isn't particularly relevant to Mr B's circumstances. It also said that the short term to retirement had inflated the critical yields. But the regulator required Penvest to consider the rate of investment growth that would have to be achieved to replicate the benefits being given up.

So I find the critical yield a reasonable yardstick to explain to Mr B the relative value of the benefits he will no longer have by transferring. And, for the reasons I've already given, I don't think they were achievable in this case and I don't think it was fair for Penvest to play down their significance.

I’ve noted Penvest said Mr and Mrs B were financially “sophisticated” and had a good understanding of Mr B’s pension options. But while Mr and Mrs B might have had some financial experience, I don't think that put them in a position where they would have ignored appropriate expert advice once given, even if that didn’t agree with their initial thoughts.

Further, I think Penvest is overstating Mr and Mrs B’s financial knowledge. When completing the fact-find, Mr and Mrs B’s investment experience has been noted as ‘moderate’. That is the middle option of three choices: limited, moderate, or experienced. So, it doesn’t appear that Mr B considered himself to be an experienced or sophisticated investor.

Also, while it was the case that Mrs B was working in a financial adviser’s office she wasn’t a qualified financial adviser herself. So, while she might have had more knowledge than average, I've seen no evidence she had any relevant experience in advising on pension transfers or the complexity of those considerations.

Also, as Penvest will know, advising on a DB transfer is a fairly heavily regulated activity. Before financial advisers can give advice on transferring they need to have the relevant qualifications. Most financial advisers don't have that qualification or the relevant skills or authorisation to advise on pension transfers. So I don't think Mr and Mrs B’s financial experience meant they didn’t need full and appropriate advice from a qualified adviser. Nor did it mean Penvest wasn’t required to give advice that was suitable for Mr B and in his best interests.

That said, I accept Penvest did warn Mr B that he could be worse off in retirement by transferring and that he would be giving up guarantees by doing so. It said Mr B was prepared to accept those risks. But pointing out a risk doesn't make unsuitable advice suitable. And, regardless of any financial knowledge Mr and Mrs B had, they had asked Penvest to give Mr B the benefit of its expertise. Its role wasn’t simply to transact what Mr B might have thought he wanted. So even if Mr B said he understood and would accept a risk of lower income doesn't mean it was in his best interests for Penvest to recommend he take that risk.

Penvest also said the reasons for its recommendations were not to meet or exceed the BSPS2 benefits but to achieve Mr B’s other objectives. For example, it said he could benefit from flexible access to his pension funds in the early years of his retirement. But I've seen no evidence that Mr B had any need to access his BSPS DB funds flexibly in retirement.

Penvest’s suitability report said Mr B intended to retire at age 60. But he had no need to access his BSPS benefits before the scheme’s normal retirement age of 65. It noted he and Mrs B would require an income in retirement from age 60 of £30,564. It said they had pension income of £26,800 at age 60. And they also had savings, investments, rental income and other assets that would make up any shortfall in income. So, Mr B had no need to transfer his BSPS benefits in order to afford to retire at age 60.

That said, it’s true to say Mr B couldn’t have had the same level of flexible access to his BSPS DB funds as he could from a personal pension. If he’d wanted to take a TFC lump sum, then he would have had to take that at the same time as drawing a regular income from his pension. Whereas the personal pension would allow him to draw down funds as he saw fit.

But while I can see why accessing funds flexibly might have been an attractive prospect for him, I’m not persuaded that Mr B had any concrete need to vary his income throughout retirement. But, if he believed he did there was no requirement for him to give up the safeguarded benefits from the BSPS scheme in order to have some flexible access to retirement funds.

As I've already said, Mr and Mrs B had savings and investments that would have given them liquid access to funds, if they wanted to access cash in a flexible manner. Further Mr B and his employer had begun contributing to a recently set up DC pension scheme. And, by the time he was 60 Mr B could anticipate that his DC pension pot would be in the region of £33,000.

The nature of a DC pension means this already provided Mr B with flexibility – he wasn’t committed to take its benefits in a set way. This combined with his savings, investments and other pension provision, would have likely given him flexible access to funds if that was what he needed. So, he didn’t need to transfer from the BSPS scheme to have some flexible access to cash and I don't think it was in his best interests to recommend this course of action and potentially to put his BSPS benefits at risk by doing so.

Also, if Mr B had joined the BSPS2 and he later decided he needed greater flexibility than the scheme provided, then he could have chosen to transfer from that scheme nearer to his retirement age. It wasn’t a decision he needed to make straightaway.

In addition, Penvest said that if Mr B didn't access his BSPS2 benefits until he was 65 then any BSPS2 income he received at that stage would be surplus to requirements. That might be the case. But I think it’s rare for people to complain that they have too much income. And having income above their target level would simply mean Mr and Mrs B would be better off. That is, they’d have more disposable income to enhance their lifestyle with, or even to put towards a legacy on death if that’s what they wished to do.

That brings me to Penvest’s argument that transferring allowed Mr B to leave any residual pension to his beneficiaries on his death. So, for example, he could leave it to Mrs B who could herself pass any residual sums on after her own death. In contrast the BSPS2 or PPF would pay 50% of Mr B’s pension entitlement to Mrs B. However, once she died the pension would die with her; she wouldn't be able to pass it on. But I don’t think the possibility of more attractive death benefits was a sufficient reason to recommend a transfer.

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

I don't doubt the CETV figure would have appeared an attractive sum to be able to leave as a legacy. But, in reality, the amount remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance the fund would be depleted by Mr B’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 personal pension if he lived a long life, the investments performed poorly, or if he took large sums from it early in his retirement.

It follows that I don’t think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr B. And ultimately Penvest should not have encouraged him to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

Penvest also said a transfer achieved Mr B's objective of avoiding his pension going into the PPF. It noted Mr B said he didn't want to join the BSPS2 as he was concerned it might also move to the PPF in the future. So it would appear that Mr B was leaning towards a transfer when he approached Penvest.

I can understand Mr B's concerns about the safety of his pension. His employer had been consulting about the future of the scheme and I'm aware that many scheme members were concerned that, in time, the BSPS2 itself might also move to the PPF. And that had likely motivated Mr B to seek advice.

But Penvest's role was to objectively address any concerns Mr B might have had. Its job wasn't to simply transact what he might have thought he wanted to happen. And, even if Mr B's pension had moved to the PPF, it would have still given him a guaranteed index linked pension for life at no risk or cost to him. However, by transferring he was not only putting his funds at the risks and volatilities of the investment markets but he would also have to pay the adviser and product charges associated with the personal pension. Those are not charges he would have to pay had his benefits moved to the PPF. And he would be unlikely to improve on the PPF benefits by transferring. So, entering the PPF was probably not as concerning as Mr B might have thought, and I don't think any fears he held about this meant that transferring was in his best interest. But I don't think Penvest did enough to make this clear to him.

Overall, I can't see persuasive reasons why it was clearly in Mr B's best interest to give up his BSPS DB benefits and transfer them to a personal pension. Penvest has said that, regardless of its advice, Mr B would have gone ahead with the transfer anyway. But, I think that if it had taken the time to explain to Mr B why transferring wasn't in his best interests and he could achieve his objectives without putting his BSPS2 funds at risk I think he'd have accepted that advice. He had sought out Penvest's expertise; so I don't think he'd have transferred if Penvest had given advice not to do this. It follows that, I'm upholding the complaint as I think Penvest's advice to Mr B was unsuitable for him.

Also as I think that learning that he'd put some of his pension funds at risk unnecessarily has been a source of distress and inconvenience for him, I think Penvest should pay him £200 to address that.

For completeness I'll add I'm aware Mr B retired last year and has accessed some funds from his personal pension. But I think he's only done that as a result of Penvest's advice. Prior to Penvest advising him Mr B had said that he had no reason to access his BSPS funds prior to age 65. However, he's in a different position now. And, having transferred the funds, he's acted on Penvest's advice to access his pension benefits flexibly from age 60. I don't think he'd have accessed his BSPSs benefits if the transfer hadn't gone ahead as he had other sources of cash and pensions he could have used instead, as he originally planned to do.

Putting things right

A fair and reasonable outcome would be for Penvest to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would most likely have remained in the occupational pension scheme and joined the BSPS2 if Penvest had given suitable advice.

Penvest 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.

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

For clarity, although Mr B is retired, I don't think he would have taken his BSPS2 benefits early than age 65 if he hadn't transferred. So, compensation should be based on the scheme's normal retirement, 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 B 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, Penvest should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts Penvest's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B 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, Penvest 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 B'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.

Also I think Penvest should pay Mr B £200 to address the distress and inconvenience arising from Penvest's unsuitable advice.

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 Penvest Limited to pay Mr B 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 Penvest Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on Penvest Limited. My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr 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 Mr B to accept or reject my decision before 26 December 2023.

Joe Scott
Ombudsman