DRN-4211746

The complaint

Mr D complains about the advice David Stock & Co Limited ('DSC') 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.

What happened

In March 2016, Mr D'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.

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 D'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.

Mr D was concerned about the future of his pension and contacted DSC for advice. DSC advised him to ask the BSPS administrators to give him a cash equivalent transfer value ('CETV') for his pension fund. The BSPS provided that on 21 July 2017, at that time the value was around £287,000.

On 31 July 2017 DSC sent Mr D an "Initial Report". This set out DSC's understanding of the BSPS situation. It explained the BSPS would provide a guaranteed pension that would increase each year depending upon certain indices. DSC said it could use those figures to calculate a critical yield (the growth rate required to match the DB scheme benefits). It said it didn't yet know what the revaluation rates would be for the BSPS2 but assumed these would be superior to the PPF. It said it would try and find out. Its Initial Report didn't contain any information specifically personal to Mr D or provide any critical yield figures.

DSC met with Mr D on 3 August 2017. It conducted a fact-find and an assessment of his attitude to risk, which it deemed to be "above average". Amongst other things it noted Mr D was 39 years old, single and in good health. He earned a basic salary of around £30,000 before overtime. His income exceeded his outgoings (although the specific figures are not recorded). He owned his own home worth £185,000 subject to a mortgage of £47,000. He had £5,000 in cash savings and £75,000 invested in funds within an ISA.

Mr D completed the forms to transfer his benefits to a named personal pension that day (3 August 2017). He also signed a "client agreement" to say he had "received an Initial, an

Interim and a Final Report” relating to the BSPS transfer. The agreement also said Mr D understood the significance of the critical yield calculation figure. And that he accepted the risks of a transfer.

On 10 August 2017, DSC provided its “Final Report”. It said Mr D had concluded he wanted to transfer his DB funds and he felt the greater risk was “not requesting the greatly increased transfer value”. DSC said transferring would provide the “added flexibility associated with personal plans”. DSC set out why it had recommended the named personal pension provider. It referred to some specific funds Mr D may wish to invest in within the personal pension. It said it was doing so “purely as a suggestion” and said it would meet with him again after the transfer had concluded to decide the portfolio.

In September 2017 the BSPS sent Mr D a revalued CETV which had increased to around £296,000.

Later the same month (September 2017) DSC sent Mr D a “Pension Investment Programme”, with some information about the sorts of funds available to invest in and the effects of risk tolerance on investment strategies.

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.

On 1 December 2017 the named personal pension provider confirmed it had received the money from the DB transfer. Shortly after DSC arranged for the sum to be invested in the various funds – within the personal pension – of Mr D’s choosing.

After receiving a letter from the regulator, Mr D wrote to DSC in 2022 to say he thought the transfer advice might not have been suitable for him. DSC replied to say it believed Mr D was happy with the suitability of the transfer advice and said his complaint was a blatant attempt at gaining compensation. So it refused to deal with the substance of his complaint.

Mr D asked us to consider the matter. One of our Investigators looked into it. Amongst other things he didn’t think DSC had given Mr D enough information with which to make an informed decision to transfer. So he recommended the complaint be upheld. He said DSC should calculate if Mr D had suffered a financial loss as a result of its advice.

DSC told us it was willing to make the required calculation. We asked it for clarification if it accepted our Investigator’s complaint assessment or not. It didn’t reply. As the Investigator was unable to resolve the matter informally it’s been passed 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 DSC'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, DSC should have only considered recommending a transfer if it could clearly demonstrate it was in Mr D'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 regulator required DSC to compare the benefits likely to be paid under Mr D's DB scheme with those payable under a personal pension by using reasonable assumptions (COBS 19.1.2R). In practice, at that time, advising firms did this by obtaining a transfer value analysis ('TVAS') report. Such reports set out a consumer's entitlement from a DB scheme and show the growth rates required (the critical yields) to match those benefits by transferring to a personal pension. The purpose of a TVAS is to assist advising firms like DSC to help consumers like Mr D to understand if the likelihood of a transfer to a personal pension is financially viable.

In this case there's no persuasive evidence that DSC obtained a TVAS at any point. It sent Mr D an Initial Report on 31 July 2017. But that doesn't set out Mr D's entitlement under the DB scheme. In fact it doesn't provide any details personal to Mr D. It does explain how the BSPS would revalue a pension by applying appropriate indices. It also said it could use those figures to calculate a critical yield, but it doesn't actually provide a critical yield figure.

DSC then met with Mr D on 3 August 2017. It completed a fact-find with him and he signed the forms for the transfer to go ahead that day. So it's evident that DSC recommended the transfer after completing the fact-find. But I've seen no compelling evidence that DSC gave him any additional paperwork or written explanation for recommending the transfer at that time.

I've noted Mr D signed a "client agreement" on 3 August 2017, which said he'd received "Initial, Interim and Final reports". But I don't think that's accurate. That's because DSC didn't produce its final report until a week later, on 10 August 2017. So Mr D couldn't already have received the Final Report on 3 August 2017. There's also nothing on file titled "Interim Report". There is an undated document called "The investment Principles", which explains the sorts of investments and portfolio choices DSC would consider and/or recommend, including using the named personal pension provider. But it doesn't refer to Mr D's personal circumstances, objectives or critical yields. And it discusses choosing Mr D's investment strategy once the named pension provider had received the DB scheme funds. So it would appear that document was produced after Mr D had already completed the forms to transfer to the named pension provider. It follows that I don't think DSC produced an Interim Report that set out the required comparison between the DB scheme benefits and those from a personal pension.

Similarly, there's a document on file which is clearly some form of checking tool to help DSC identify when (or if) it had taken some key actions. There is also an internal "audit report" which would appear to do a similar job. On both of those documents, the box which should contain the date the TVAS was produced has been left blank. And I note that neither the Initial Report nor the Final Report refer to Mr D's entitlements under the DB scheme or the critical yields required to match those. So I don't think DSC ever produced a TVAS or met its regulatory requirement to give Mr D the appropriate comparison between the DB scheme benefits and those from a personal pension.

Further, at the time of DSC's advice there was a likely possibility that the BSPS benefits would move into the PPF. So I would have expected the TVAS to show the relevant critical yields to match the benefits from the PPF. I would also have expected the TVAS to show Mr D's entitlement from the DB scheme and the PPF if he chose to take a tax free cash lump sum and a reduced pension. But DSC didn't give him any of those figures.

Without a TVAS it's extremely difficult to gauge whether a transfer was financially viable for Mr D at the time of the advice. DB schemes are generally recognised as having benefits which are difficult to meet (at a similar cost) from products available on the open market. So transferring to a personal pension might not match the DB scheme benefits. But, even if it did that doesn't mean a transfer was in his best interests. That's because, in order for the potential to match or improve on the DB scheme benefits, Mr D would need to put those funds at risk. And, if there was an extended period of poor performance or market crashes causing his investments to suffer losses that could result in him being worse off in retirement.

It's also notable that – at the point DSC advised Mr D to transfer – it didn't recommend the investment assets it believed would be suitable for Mr D. However, COBS 19.1.3(4)G said DSC needed to provide its benefit comparison on the likely growth rates Mr D could expect from the assets the money would be invested in. But without making a recommendation for which assets to invest in and showing the likely returns he could expect from doing so DSC wasn't in a position to make that comparison. It follows that, at the point Mr D accepted DSC's recommendation to transfer, the only relevant written information it appears he had sight of was the DSC's Initial Report which simply set out generic information about the BSPS.

In fact it's notable that there is virtually no analysis whatsoever in the reports DSC gave to Mr D which support why a recommendation to transfer was in his best interests. Instead they essentially sum up the BSPS position and then say that Mr D believes it is a good idea to transfer and he could benefit from flexibility by doing so. DSC has explained why it recommended the personal pension provider. But there's no analysis setting out Mr D's financial objectives or the manner in which a transfer would help him achieve those. Similarly there's no in depth explanation of why transferring would be better for him than remaining in the DB scheme. The only clear objective that DSC's documents address was Mr D's desire to transfer. But the reasons for recommending that aren't clear.

It follows that I don't think DSC gave Mr D all the information he needed in order to make an informed decision to transfer. Transferring out of a DB scheme is a one-off event. Once transferred there's no going back, the benefits of the DB scheme are usually lost forever. But in this instance DSC made a recommendation to transfer, and allowed Mr D to complete the forms to do so, without providing a detailed analysis of what he would be giving up by doing so. And I don't think that was a fair and reasonable manner in which to approach a subject as serious as a transfer from a DB scheme.

I understand Mr D was concerned about the prospect of his pension moving into the PPF. But, it's not clear how DSC addressed that concern. There was some widespread trepidation about what moving pensions to the PPF meant for scheme members. It's also well known that this was a period of uncertainty for people like Mr D as there were concerns that the BSPS2 might not ever be set up or might itself move to the PPF. However, this only serves to emphasise the need at that time for a balanced assessment of the options available and ultimately the requirement for suitable advice.

There will be instances where a client seeks financial advice with preconceived notions or concerns about the financial health of an employer or pension scheme. It's likely that Mr D's concerns of that nature were a motivating factor in seeking advice and considering transferring his pension. So he might well have been leaning towards transferring when he sought advice. But DSC was tasked with rationally addressing those concerns and providing an appropriately balanced view of all the available options.

A move to the PPF would mean, on a general basis, a reduction of around 10% in retirement income and less generous yearly indexed pension increases. I understand the prospect of pension benefits moving to the PPF was for some people rather daunting. But it's probably the case that the potential reduction in benefits wasn't as significant as many BSPS scheme members believed it to be. And in order to recommend that Mr D should transfer out of his DB scheme, even if that were to move to the PPF, DSC needed to be able to clearly demonstrate doing so was in his best interests. But DSC didn't provide any comparison of the relevant benefits from the PPF against what Mr D might achieve from a personal pension. So I don't think it clearly demonstrated how a transfer was in Mr D's best interests.
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I've noted DSC's Final Report says Mr D would have "added flexibility" by transferring. But while the DB scheme would provide a significant portion of Mr D's pension in retirement, it wouldn't be his only source of income. He had recently started contributing to his employer's newly set up defined contribution ('DC') pension scheme. DSC hasn't recorded how much Mr D or his employer were contributing towards that pension. But, in other BSPS cases I've seen the contributions range from 10% to 16% of salary a year. And Mr D could have anticipated continuing to contribute to that scheme (or a similar one if he changed employer) for the rest of his working life. And, as he had over 25 years until he reached the DB scheme's normal retirement age of 65, by then he could expect his DC pension pot to be worth a significant sum. So he could have accessed those funds flexibly.

The nature of a DC pension means this already provided Mr D with flexibility – he wasn't committed to take its benefits in a set way. He could have taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr D retained his DB pension, this combined with his DC pension, would have likely given him flexible access to funds if he decided he needed that flexibility.

I can understand why having extra flexibility was likely appealing to Mr D but it wasn't necessary at the time of the advice. And in any event, I don't think transferring was a decision he needed to make at the time. If Mr D hadn't transferred when he did he would have had the option of opting into the BSPS2. That would have allowed him to transfer out of the scheme closer to his retirement age if his circumstances required it. So he had no need to make such a decision, and put his DB funds at risk by doing so, when he still had 25 years to the scheme's normal retirement age.

It follows that DSC hasn't provided evidence which clearly demonstrated a transfer was suitable for Mr D.

As I've said above it's likely Mr D was leaning towards a decision to transfer when he approached DSC for advice. But DSC wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what he needed and recommend what was in his best interests.

So, I think DSC should have advised Mr D to remain in his DB scheme. Had he done so, then in October 2017 he would have needed to make a "time to choose" decision. In other words he would have needed to choose between:

- staying in the BSPS and his pension moving with it to the PPF
- opting to join the BSPS2
- transferring to an alternative arrangement.

I've already explained above that I think DSC should have advised Mr D to keep his benefits within the DB environment. So that meant a choice between the PPF and the BSPS2. The new scheme would essentially match the BSPS benefits but with lower revaluation rates but those were generally superior to the PPF. Additionally, as I've already said, if Mr D had opted to join the BSPS2 then he could have chosen to transfer out at some point in the future nearer to his retirement age, if that's what he chose to do. So I think if he had remained within the DB scheme it's likely he would have opted to join the BSPS2 as that better suited his needs.

Overall, I can't see persuasive reasons why it was clearly in Mr D's best interests to give up his DB benefits and transfer them to a personal pension. DSC told us that Mr D was determined to transfer. But, apart from its comments to us, there's no evidence of that on file. Mr D still had over 25 years until his scheme's normal retirement age. So he had no urgent reason to transfer when he did. And he was paying DSC for the benefit of its expertise. So if it had given him clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice. It follows that I'm upholding the complaint as I think the advice DSC gave to Mr D was unsuitable for him.

Putting things right

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

I'm aware that DSC has already said that it would make a redress calculation. But, I haven't seen evidence that it has already done that. So ,for the avoidance of doubt, DSC must 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.

DSC 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 D and our Service upon completion of the calculation together with supporting evidence of what DSC based the inputs into the calculator on.

For clarity, Mr D 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, 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 D 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, DSC should:

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

Redress paid to Mr D as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, DSC 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 D'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

<u>Determination and money award</u>: I uphold this complaint and require David Stock & Co Limited to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £170,000.

<u>Recommendation:</u> If the compensation amount exceeds £170,000, I also recommend that David Stock & Co Limited pays Mr D the balance.

If Mr D accepts this decision, the money award becomes binding on David Stock & Co Limited.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 12 December 2023.

Joe Scott
Ombudsman