DRN-4429504

The complaint

Mr H complains about the advice given by Truly Independent Limited ('TIL') 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.

Mr H is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr H.

What happened

Mr H held benefits in the BSPS. In March 2016, Mr H's employer announced that it would be examining options to restructure its business including decoupling the BSPS (the employers' DB pension scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved pension benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

In May 2017, it was announced that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed between the BSPS trustees, PPF and the pensions regulator. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr H'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. Updated transfer valuations were then provided by the BSPS trustees to qualifying members, reflecting the improved funding position – with the cash equivalent transfer value ('CETV') of Mr H's pension being £272,409.27. And 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.

TIL's records show that Mr H was introduced to it by another business, which I'll call 'Firm C', to discuss his BSPS benefits.

TIL completed a fact-find to gather information about Mr H's circumstances and objectives. Amongst other things it recorded that Mr H was 47, in good health, co-habiting with his partner and had one dependent child. Mr H was employed full time. He owned his own home subject to a mortgage which had a balance of approximately £55,000 and a remaining term of around 16 years.

In addition to the benefits Mr H held in the BSPS he was also a member of his employer's new defined contribution ('DC') pension scheme. And TIL noted that Mr H and his employer were making combined contributions equivalent to 16% of his salary.

TIL said Mr H hoped to retire at age 57, clearing his remaining mortgage at that point, and expected to need an income of £15,000 - £20,000 in retirement. It said he was also keen to ensure his family benefitted from his pension in the event of his death and wanted to take control of his pension, given the issues that had occurred so far.

The fact-find we've been provided also included notes by TIL in relation Firm C. These said that Firm C was to provide ongoing servicing after a transfer. And they said that Firm C typically recommended the use of a specific discretionary fund manager ('DFM').

TIL also carried out an assessment of Mr H's attitude to risk ('ATR'). A risk profile report generated on 28 October 2017 said it was agreed Mr H's ATR was 'low medium' or five on a scale of one to ten, with one being lowest risk and ten highest. This assessment said the target portfolio for a 'low medium' risk profile investor had an estimated potential annual growth rate of 2.47%, but the recommended portfolio for Mr H had an estimated potential annual growth of 2.58%. However, TIL also referred to Mr H's attitude to risk as 'balanced'. And a document it has provided dated 6 November 2017, in reference to selecting a DFM, mentions an agreed 'cautious' ATR.

On 23 November 2017, TIL advised Mr H to transfer his BSPS benefits into a SIPP, use the DFM that Firm C typically recommended and receive ongoing servicing from Firm C, at an additional cost. The suitability report said TIL had assessed Mr H's attitude to risk as matching a 'Capital Growth Investor' which is defined as someone who "may be willing to accept high risk and chance of loss in order to achieve higher returns on his or her investment." It also said it had assessed the critical yield – the level of growth required of a new pension to enable Mr H to purchase benefits at retirement equivalent to those he was giving up – and TIL thought these were achievable. It said a transfer would provide Mr H with flexibility, enable him to meet his future requirements, retire at age 60 without penalty (although the documents prior to the suitability report indicated age 57 was when Mr H hoped to retire) and ensure his partner would benefit from his pension in the event of his death.

I understand the transfer went ahead in line with TIL's recommendation.

Mr H complained to TIL in November 2022 about the suitability of the transfer advice. TIL didn't uphold Mr H's complaint. It said it believed the advice to transfer was suitable based on Mr H's circumstances and objectives.

Mr H referred his complaint to the Financial Ombudsman Service. One of our Investigators considered the complaint. He didn't think the advice to transfer was in Mr H's best interests. He didn't agree that the critical yields were likely to be achievable and thought the information from the time indicated Mr H was likely to receive benefits of a lower overall value by transferring. He thought Mr H was too far from retirement for his plans to be confirmed so didn't think a transfer for flexibility was suitable. And he didn't think the alternative death benefits or breaking ties with his employer gave sufficient reason to recommend a transfer. So, the Investigator recommended TIL establish if Mr H had suffered a financial loss as a result of its advice using the BSPS-specific redress calculator that the regulator, the Financial Conduct Authority ('FCA') had introduced. And our Investigator also recommended that TIL pay Mr H £300 for the distress caused.

TIL said that it accepted the Investigator's recommendation. It said its calculation indicated Mr H had not suffered a loss. But it would pay the £300 that the Investigator recommended. And it informed Mr H's representative of this.

Mr H did not accept the Investigator's opinion and said he wanted an Ombudsman to review his complaint. His representatives said they thought TIL should be instructed to carry out a loss calculation as of January 2023, when he first made his complaint to the Financial

Ombudsman Service, rather than using the economic assumptions relevant now, as this may have resulted in compensation being payable.

Our Investigator wasn't persuaded to change his opinion that the redress calculations should be run using the BSPS-specific calculator and the up-to-date assumptions set by the FCA. So, as agreement could not be reached, 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.

TIL said in June 2023 that it accepted the Investigator's opinion about Mr H's complaint. And hasn't since provided any information to the contrary. So, the suitability of the advice it provided to Mr H no longer appears to be in dispute. And as a result, I don't intend to address this in detail. For the avoidance of doubt though, I would like to note that I agree with the Investigator's view that the advice was unsuitable, for largely the same reasons. I'll briefly explain why.

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'). These include the provisions in COBS 19 which specifically relate to a DB pension transfer in which the FCA states, in COBS 19.1.6G, that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, TIL should have only considered recommending a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mr H's best interests. Having looked at all the evidence available, I'm not satisfied it was.

- TIL was required by the regulator to instruct a transfer value analysis ('TVAS'). This included the calculation of critical yields. TIL calculated that the critical yield to match the tax-free cash and accompanying annual pension Mr H could take under the BSPS2 at age 65 was 5.65%. And to match equivalent benefits the PPF would provide at age 65, was 4.88%.

- It also said that Mr H was interested in retiring at age 57, so calculated the relevant critical yields to match the benefits he could've taken at that age as well. For the BSPS2 this was 9.72%. And for the PPF 7.5%.

- The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

- There is some conflicting information regarding Mr H's ATR with references to several potentially conflicting risk profiles. On balance though, it appears to have been agreed that this was 'low medium'. Taking that into account along with the relevant discount rates, regulators standard projections and the estimated potential annual growth for an investor with Mr H's ATR, set out in the risk profile report, I think the information at the time indicated it was unlikely that the critical yields would be achievable consistently.

- I've also considered some projections TIL used to help show that if he transferred out to a personal plan, the funds could last Mr H well into retirement. But these appear to have relied on regularly achieving growth levels in excess of the critical yield, which I don't think could reasonably have been said at the time to be likely.

- Because of these things I think Mr H appeared likely to receive benefits of a lower value by transferring. Which, in my view, means a transfer wasn't in his interests.

- TIL said Mr H wanted to retire at age 57, clear his mortgage (which he expected to need around £25,000 for) and have flexibility to allow him to take the income he anticipated needing. Mr H thought he'd need a minimum income of £15,000 per year in retirement but would ideally like an income of £20,000 until age 67, when he'd reduce this to £15,000 and he'd begin receiving his state pension.

- Mr H could've taken benefits from age 57 under the BSPS2 or the PPF. So, he didn't need to transfer in order to access his benefits earlier than the scheme's normal retirement age.

- TIL says that this wouldn't have enabled him to meet his objectives. In particular it referred to what the BSPS2 was estimated to provide him from age 57 – either a starting pension of £13,399 per year or tax-free cash of £65,786 and a reduced starting pension of £9,867 per year.

- It is true that these pension amounts were less than his desired annual income. But they were guaranteed and would continue to escalate in payment. In addition, if he took the maximum tax-free cash and used £25,000 of this to clear his mortgage, this would've left him with approximately another £40,000 to supplement his pension income. He was also a member of his employer's new DC pensions scheme. I think it's reasonable to expect he'd have continued to contribute to this, or an equivalent if he moved employer, until he retired. And based on his salary and level of contributions, and before even accounting for growth or increases in salary or contributions, he could potentially have had around £49,500 in this policy by the time he retired. And this again could've been used to supplement his income.

- I also note that Mr H suggested he may've done some part time work from age 57, which would've provided a further income. And while his partner was not working at the time of the advice due to a recent health issue, she could possibly have returned to work in the future or began receiving other income, such as state benefits. Which would've also helped towards meeting their household income goal. So, I don't think Mr H necessarily needed flexibility in order to meet his objectives.

- In any event though, Mr H was only 47 at the time of the advice – approximately 10 years from when he thought he might retire. His circumstances, objectives or aims could've changed over the years that followed. So overall, I think it was too soon for an irreversible decision to transfer out of his DB scheme for flexibility in his pension arrangements to be considered in his best interests. Particularly when the BSPS2 would've still provided the option to transfer out at a later date if his circumstances required it.

- TIL said Mr H was interested in the alternative death benefits a transfer offered as he wanted to ensure that his pension passed to his partner – as they were not married at the point of the advice, so she may not have benefitted from a spouse's pension. But while death benefits are an emotive subject, the priority here was to advise Mr H about what was best for his retirement provisions.

- Mr H and his partner could've gotten married at a later time, but it doesn't appear that this was considered by TIL. And while the CETV would no doubt have been appealing as a potential lump sum, the figure remaining on death was always likely to be different. This is because it would be impacted by investment performance and any benefits Mr H drew from the pension. Which given he was recorded as being in good health and TIL's advice was based on him retiring at age 57, could've been significant. So, the pension might not have provided the legacy Mr H thought. And overall, I don't think different death benefits available through a transfer meant it was in Mr H's best interests.

- TIL has said that moving his pension away from his employer and having control over it appealed to Mr H. But I can't see that Mr H had an interest in or the knowledge to be able to manage his pension funds on his own. And indeed, the advice was on the understanding he'd take ongoing advice, at a cost – which he wouldn't have incurred by remaining in the scheme.

- I don't doubt that Mr H was likely to have been concerned by what had happened with his pension to that point. Or that he might've had negative feelings about his employer or thought moving his pension away from it was appropriate. I think that would have been a very natural emotional response to what was happening. But TIL's role was to give impartial, objective advice. Mr H's employer and pension scheme were not one and the same. And Mr H intended to continue in his job and was paying into a new pension scheme with his employer. So, the relationship may not have irretrievably broken down as suggested.

- I don't doubt Mr H had potentially heard negative things about the prospect of his benefits moving to the PPF. But that was why it was even more important for TIL to provide objective advice. Notwithstanding that the BSPS2 was being established as an alternative, the PPF still provided Mr H with a guaranteed income and the option of accessing his benefits early, and the information at the time indicated he was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've thought, and I don't think any concerns he held about this meant that transferring was in his best interests.

Overall, I can't see persuasive reasons why it was clearly in Mr H's best interest to give up his DB benefits and transfer them to a personal pension. Nor have I seen anything that leads me to think Mr H would've gone against advice not to transfer, had it been explained that this wasn't in his best interests. So, I think the advice TIL gave was unsuitable.

As I've mentioned though, TIL accepted the Investigator's opinion regarding this. And what remains in dispute, and for me to decide, is what a fair way to put things right is.

I can understand that consumers like Mr H might have an expectation that, because they received unsuitable advice, they must have suffered a financial loss as a result. But that's not always the case. Where we think an error has been made, the aim of any recommendation we make is to put the impacted party, as far as possible, in the position they would now be in but for that error. It is not to fine or punish the business or put Mr H in a better position than he would've been in.

Mr H can't re-join his DB scheme. The FCA developed and has set out a methodology for calculating redress where unsuitable advice has been given to transfer from a DB scheme (like the BSPS). And it has developed a BSPS-specific redress calculator. If the calculation shows there is not enough money in the consumer's pension arrangement to match the BSPS benefits they would have received, the shortfall is the amount owed to the consumer. If the calculation shows there is enough money in the consumer's pension arrangement, then no redress is due. That means, despite the fact that we might have found that the transfer wasn't in a consumer's best interests, it doesn't automatically mean that they are worse off or will be entitled to compensation. That is something the calculation will determine.

The calculations themselves are fairly complex. They include assumptions about future market conditions, interest rates and investment returns. And as those assumptions are susceptible to market forces, the FCA updates them on a regular basis. I understand that the aim of the FCA's redress methodology is to produce results comparable to how a court would award damages in similar circumstances.

The Investigator thought a calculation should be done using the BSPS-specific redress calculator. And I also think that this is a fair way to settle things here. The calculator was developed by actuaries and is programmed by the FCA with benefit structures of the BSPS, BSPS2 and PPF (including the impact of the following buy-out) and relevant economic and demographic assumptions which are updated regularly. This information can't be changed by firms. And I think it is appropriate that the calculation be carried out using this calculator.

Mr H's representative has said that they believe that any redress calculation should be backdated to the point Mr H complained in January 2023, effectively because it believes TIL should've accepted the advice was unsuitable at the time. But I don't agree. TIL was entitled to disagree with Mr H's complaint.

I think it is fair that any steps to put things right are carried out at the point the complaint is decided as this ensures the use of the most up to date assumptions, set by the regulator, and that the calculation is therefore correct at the time of the decision. And while I note TIL carried out a calculation previously, this has since expired. So, I think carrying out an updated calculation is fair in this case.

The Investigator also recommended TIL pay Mr H £300 for the distress he'd been caused. And TIL agreed to this.

Mr H received advice from TIL in 2017. He first complained about that advice in late 2022, after speaking to his professional representative. I haven't seen anything that suggests the advice caused him ongoing distress during that period as the first indication he potentially had any concerns about the advice seems to have been when he first discussed matters with his representative. Nor can I see he's been caused any significant inconvenience in that time. And indeed, his representative has brought his complaint for him, so the impact of having to make a complaint – which I wouldn't usually recommend compensation for anyway – has also been reduced.

I do accept Mr H was likely worried, after talking to his representative, that the advice might not have been suitable for him. Particularly given the circumstances under which he first asked for this advice - when there was a lot of uncertainty regarding the pension scheme. But any award for distress is not intended to punish a business. Nor is it intended to make up for any loss of expectation that a redress calculation may result in. And in the circumstances, I think the £300 that the Investigator recommended to address the upset caused is fair and reasonable.

Putting things right

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

TIL 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.

TIL 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 H and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what TIL based the inputs into the calculator on.

For clarity, Mr H has not yet retired. 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 H'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, TIL should:

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

Redress paid to Mr H 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, TIL 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 H'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.

In addition, TIL should pay Mr H £300 for the distress caused by the disruption to his retirement planning.

My final decision

I uphold this complaint and require Truly Independent Limited to carry out the steps outlined in the 'putting things right' section of this decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 23 February 2024.

Ben Stoker
Ombudsman