DRN-2304547

The complaint

Mr L complains about the advice given by Better Retirement Group Ltd ("BRG") to transfer the benefits from his defined-benefit ("DB") occupational pension with British Steel ("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 L'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'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

Mr L says he was worried about his pension potentially going into the PPF, so wanted to take advice. A lot of colleagues were transferring their pension at the time and one had used an introducer for BRG. So, Mr L approached BRG around August 2017 to discuss his pension. Mr L has said his only other consideration at the time was to potentially retire early, and he has mentioned thinking about doing so between the age of 58-60.

BRG completed a fact-find to gather information about Mr L's circumstances and objectives. It recorded that he was aged 48 at the time, married with two children (aged 21 and 16). Mr L was employed, earning £34,000 per year, and had been with the same employer – which had provided the BSPS scheme – for 25 years. It noted he had joined his employers new defined contribution pension scheme in April 2017. Mr L was noted as owning his home and had a small outstanding mortgage of approximately £1,000. BRG also recorded that Mr L had savings totalling approximately £4,500 and that he had a life insurance policy with a sum assured of £200,000.

BRG also carried out an assessment of Mr L's attitude to risk, which it deemed, on a scale of 1-10 to be "5" or "low medium".

In October 2017 BRG advised Mr L to transfer out of the BSPS to a self-invested personal pension ('SIPP'). It recommended he invest the funds with a business I'll refer to as 'S', which was a discretionary fund manager ('DFM'). The suitability report said the reasons for this recommendation was that the reasons to transfer were more important to Mr L's overall financial planning and lifestyle objectives than the potential financial rewards he may receive from his existing scheme over the longer term. BRG indicated the reasons for transferring, which it said were important to Mr L, were greater flexibility with how the pension would be drawn, maximising tax free cash ("TFC") – which it said would in part be used to clear Mr L's mortgage and support children and grandchildren – and the nature of the death benefits that would be available to Mr L's wife and children under the new pension arrangement.

Mr L accepted the advice provided and the full transfer value of Mr L's BSPS pension, just over £316,000, less fees charged by BRG and S, was invested by S. BRG was to provide an annual review of Mr L's pension.

In late 2018 Mr L raised concerns after receiving statements indicating the value of his pension fund had fallen quite significantly. He continued to voice these concerns to BRG and S over the course of several months. BRG began the process of carrying out an annual review and sent Mr L a questionnaire about his current attitude to risk. Mr L's answers to these questions showed a significantly more cautious approach that BRG had recorded when it first gave advice.

I understand Mr L remained unsatisfied with how his concerns about his pension arrangement were addressed and subsequently took advice from another financial adviser. This resulted in him transferring his pension scheme away from S to a different provider in May 2019. By that point I understand his fund value had fallen to just below £254,000.

Mr L complained to BRG in 2019 about the advice it had given him. He felt the recommendation to invest with S wasn't appropriate for his attitude to risk and he was concerned with the significant reduction in the value of his pension fund. He also questioned the suitability of the advice BRG had given him in general.

BRG didn't think it had done anything wrong, so the complaint was referred to our service.

One of our Investigator's upheld the complaint and required BRG to pay compensation and £300 for the distress caused, as he didn't think the recommendation to transfer was suitable. This was because he felt it was unlikely by transferring that Mr L would've been able to exceed the benefits provided by BSPS2 or the PPF without taking significant risk – which he didn't think Mr L would be willing to do. He also felt the other benefits available through BSPS2 or the PPF had been downplayed in comparison to those afforded by the new scheme. And he also questioned some of the information that had been recorded – most notably that Mr L was due a significant inheritance, which he had told us was not the case.

Mr L accepted the Investigators findings. BRG however disagreed. It said it believed that the complaint was more down to performance than the original advice. And in any event, it didn't think the advice was unsuitable. BRG said the critical yield was not a useful or relevant measure and felt its lifetime cashflow models supported that the transfer was appropriate. It also didn't agree with observations the Investigator made about the cost of the new scheme or some of the answers given in the attitude to risk questionnaire indicating Mr L was more cautious than it had categorised. And it said it was Mr L that had noted an inheritance – which had been factored into future income planning. Overall, it maintained that the benefits – flexibility and death benefits – of transferring made the transfer appropriate.

Our Investigator remained of the opinion that the advice was unsuitable. He explained he hadn't only considered the critical yield, although he did feel this was an important factor. And he didn't think the benefits described meant that the transfer was appropriate.

As BRG continued to disagree with the Investigator's opinion, the complaint has been passed to me to decide.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business

Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, BRG should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr L's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

The advice was largely given 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, with the regulator giving instructions in Final Guidance FG17/9 at roughly the same time. 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 for a typical investor when the advice was given in this case.

BRG carried out a transfer value analysis ('TVAS') showing the growth, the critical yield, Mr L's fund would need to achieve in order to match the benefits he could obtain through the BSPS. Although Mr L has indicated he was interested in retiring early, the TVAS report was carried out on the basis Mr L would retire at age 65. It doesn't appear that the comparison was made based on the benefits available to Mr L through the BSPS2. I'm not sure why that is, as the details of BSPS2 were known by the time BRG gave advice. So, although I will make reference to Mr L's BSPS benefits, in reality, continuing with his existing scheme meant he needed to choose between joining the new scheme, BSPS2, or allowing his benefits to enter the PPF.

The critical yield required to match Mr L's benefits under the BSPS at age 65 was quoted as 8.52% if he took a full pension. No figure was provided for what would be required if Mr L took TFC and a reduced pension. The critical yield to match the benefits available through the PPF at age 65 was quoted as 5.81% per year if Mr L took a full pension and 5.38% per year if he took TFC and a reduced pension. It is reasonable to assume that the critical yield required for Mr L to be able to retire early, which he expressed an interest in, would've likely been higher given this would've meant funding a retirement income for longer.

The relevant discount rate closest to when the advice was given which I can refer to was published by our service for the period before 1 October 2017, and was 4.3% per year for 16 years to retirement (and 3.9% for 11 years to retirement if retiring at age 60 had been compared). For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

BRG recorded Mr L's attitude to risk as "low medium" or a 5 on a scale of 1-10. And it said it recommended a portfolio with the DFM that was appropriate based on Mr L's attitude to risk. I note that BRG provided a document as part of its submissions titled "Risk Profile Report" for Mr L. And in this document, it said that the target portfolio, recommended to Mr L, had an estimated potential annual growth rate of 2.58%.

There would be little point in Mr L giving up the guarantees available to him through the BSPS scheme only to achieve, at best, the same level of benefits outside the scheme. Even taking the lowest critical yield (5.38%), which was a comparison to the PPF at age 65 if Mr L took TFC, and using the middle projection rate used by the regulator, there was no guarantee that Mr L would've even matched the level of benefits available through the PPF. And it seems highly unlikely he would've exceeded them. I'm also not sure using the middle projection rate is appropriate anyway given Mr L was a "low medium" risk investor and an estimated growth rate for the recommended investment portfolio was documented as 2.58%. And again, this is only in relation to moving to the PPF, when BSPS2 was an option. On balance I think the critical yield required to match the benefits in the BSPS2 if Mr L took TFC at age 65 would've been even higher than 5.38% - because the starting benefits available through the PPF would be reduced by 10%. So again, it seems highly unlikely he'd have been able to match or exceed the benefits available via BSPS2, through investing in the recommended SIPP. So, I think it is clear that the transfer was very unlikely to have put Mr L in a better position financially.

And I'm not sure Mr L would've necessarily understood the risk of this given that, despite some generic risk warnings being included, on page 13 of the suitability report BRG said *"We believe the critical yield is achievable, given your attitude to risk"* even though this statement doesn't appear to be supported by the figures I've noted above.

BRG has said several times in response to our Investigator's opinion that analysis of the critical yield is no longer useful (despite having stated in the suitability report that it was achievable – as noted above). Instead it used cashflow analysis, which it says showed that a growth rate of 5%, which it felt was achievable, would be enough to meet Mr L's income needs at retirement, having regard for his other sources of income.

The suitability report BRG has provided doesn't outline Mr L's target income for retirement. The cash flow analysis provided does talk about a target figure. But from what I can see the target amount is the same as the pension Mr L was due to receive under the BSPS. Which seems to suggest the target is to meet the already guaranteed return. And I'm not sure why it would be suitable for Mr L to give up a guaranteed amount just to target obtaining the same figure with increased risk.

I'd also note again that one of the documents BRG provided indicates the expected growth rate for the recommended portfolio was 2.58% - significantly below the 5% BRG has relied on.

The guidance under COBS 19.1.3 applicable at the time stated that the comparison undertaken by BRG should:

1) take into account all of the retail client's relevant circumstances;
2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;
3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and
4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested…

And despite BRG's comments, I don't agree that the critical yield is not an appropriate measure of this. While BRG did provide the critical yields, the suitability report significantly downplayed the significance of these figures making statements such as;

If you are looking to take your benefits flexibly and in a different way to those offered by your ceding scheme or have no intention of ever taking an annuity, then this figure may be deemed somewhat irrelevant. – page 12

and

… the fact you have no intention, at present, of buying an annuity at your retirement age achievement of the critical yield is not a significant factor in determining advice. – page 13

So BRG effectively told Mr L to ignore the critical yield. This seriously undermined the comparison the regulator asked BRG to give Mr L and I think it would've made it very hard for Mr L to understand whether or not he'd be better off remaining in the BSPS.

And in any event, I'm not persuaded that the gross growth rate of 5% was consistently achievable, based on the discount rate I've referred to above and the information BRG gave about the expected return of the recommended portfolio. So, I don't agree that Mr L would necessarily have been able to meet his target income, which again from what I can see was what he was already guaranteed, for the rest of his life if he transferred to the SIPP.

Overall, based on the above alone, I don't think a transfer was in Mr L's best interest. Nevertheless, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

BRG has said that Mr L wanted flexibility with his pension. But Mr L has said that this was not one of his objectives.

I don't think Mr L required flexibility in retirement. The suitability report stated that Mr L's objectives included wanting to access the maximum available TFC and that part of the reason for this was to clear his mortgage and provide for his children / grandchildren. But Mr L was only 48 at the time of the advice – so couldn't take TFC at that point. And the fact find completed at the time indicated that Mr L only had approximately £1,000 outstanding on his mortgage – which likely would've been cleared long before he could take TFC. And Mr L has said he does not have grandchildren. So, I don't think this was a genuine objective and, in any event, Mr L would have been able to take tax free cash from his existing scheme at retirement.

I also can't see evidence that Mr L had a strong need for variable income in retirement. The suitability report talked about the transfer allowing Mr L to take required income when he needed it. But again, the only mention of a target income seems to be what he was guaranteed under his existing scheme. BRG also said his other retirement provisions would provide him sufficient income in retirement. There is a dispute over the accuracy of some of those additional provisions – in particular Mr L disputes the inheritance that has been referenced and he has also said he doesn't have a rental income (listed on page 9 of the suitability report). But regardless, I don't see that these additional provisions meant he had any need for a variable income from this pension, as opposed to the guaranteed escalating income that the existing scheme provided.

Mr L has talked about being interested in potentially retiring early – although this wasn't a necessity and these plans were not set in stone. But the suitability report provided by BRG didn't reference this as one of the reasons it was recommending the transfer. So, this doesn't seem to have formed part of the reasoning. In any event, I understand Mr L would still have had the option of retiring early from his existing scheme – albeit this would impact the level of pension payable. And I also note he was a member of his employers defined contribution pension scheme. So, given he was 48 and would be adding to that pot for some time before retiring, he could potentially have used that pension flexibly prior to taking his BSPS benefits at the scheduled scheme retirement age.

Death benefits

BRG has said, and noted in the suitability report, one of Mr L's main objectives was for his new scheme to potentially provide superior death benefits. And that he'd like to leave any remaining funds to his spouse and family in the form of a lump sum or drawdown. Mr L has again disputed that this was one of his aims at the time and said this was something that

BRG simply sold to him as a benefit of transferring.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension were likely an attractive feature to Mr L. But whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr L about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

The fact find provided noted that Mr L already had a life insurance with a sum assured of £200,000. Which indicates a significant lump sum was already going to be provided to his family (particularly considering the outstanding commitments noted were minimal – such as the remaining mortgage being £1,000). And I see no reason extending that cover couldn't have been explored, if Mr L felt that amount was not sufficient. BRG noted in the suitability report that whole of life cover was discounted due to cost. But I can't see that any details of cost were provided in order to make an informed comparison of these apparent costs against the significant potential risk attached to the transfer and the potential loss of benefits involved.

The BSPS scheme also included a spouse's pension - which would've remained the case either through the PPF or under BSPS2. This would've been useful to Mr L's wife if he predeceased her. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was – and that sum would've been eroded by any drawdowns made by Mr L in retirement. And I think that benefit was downplayed in BRG's advice.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr L.

Concerns about financial stability of the BSPS

The signed suitability report I've seen makes no mention of the stability of the BSPS fund being a factor in the advice given. Mr L has acknowledged that he had concerns about the BSPS pension, and potentially transferring into the PPF, when he first contacted BRG. So, I do accept that this was a consideration. But if this did play such a significant part, as BRG has since suggested, I would've expected it to be referenced in the recommendation itself.

And while Mr L may've had concerns it was BRG's obligation to give Mr L an objective picture and recommend what was in his best interests. And I don't think I can reasonably say it did that.

In the TVAS report it has provided I think BRG gave some rather misleading statements to Mr L about the PPF and his existing scheme, particular considering the climate at the time around the BSPS and his underlying concerns. In particular;

The PPF provides very valuable benefits, and in some cases, Pension Commencement Lump Sums and Children's Pensions, that will frequently provide better benefits than the scheme. However, the number of "small print" terms where the benefits are noticeably worse than the original scheme will mean that members will receive benefits of a much lower value than the headline 90% or 100% would suggest. – page 21

and

It is very important to understand that the benefits provided by a Defined Benefit scheme are not guaranteed. The scheme only promises to pay the benefits, subject to there being *sufficient assets in the fund.* – page 22

And I think this is likely to have impacted Mr L's thinking.

At the same time, the figures I've referenced above show, even if Mr L transferred into the PPF he was likely to be better off than by transferring to a SIPP. And he would've been better off still if he opted to join the BSPS2. But I can't see that this was properly or objectively explained to him in terms he could clearly understand.

Summary

Overall, I'm satisfied that the advice given to Mr L was not suitable. He was giving up a guaranteed, risk free and increasing income. By transferring he was highly likely to receive lower retirement benefits and as I have explained above, I don't think there were any other particular reasons which would justify a transfer and outweigh this.

I appreciate that at the time the advice was given there was a lot of uncertainty around the BSPS. And I don't doubt Mr L was worried about his pension. However, it was the adviser's responsibility to objectively weigh up the options for Mr L and what was in his best interests. He should have advised him what was best for his circumstances and explained what he was giving up in the BSPS, that moving to the PPF was not as concerning as he thought and fully explained and explored BSPS2.

Taking everything into account I think BRG should have advised Mr L to join the BSPS2. I say this because although Mr L was interested in retiring early, he didn't have firms plans around doing so, or at what age he may retire. So, this was subject to change. And he had other provisions, including his defined contribution pension which he'd have contributed to for several more years post advice, which he could potentially have used flexibly prior to taking his retirement benefits under BSPS2 at his scheduled retirement age. So, I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, even though it may've provided more favourable reductions for early retirement. Also, Mr L was married, so his wife could've benefitted from the spouse's pension available through BSPS2. And the annual indexation of his pension when in payment was also more advantageous under the BSPS2.

On balance I think Mr L would have listened to the adviser and followed their advice. Mr L doesn't appear to have been a particularly experienced investor. And this pension seems to have made up a large part of his retirement provisions – certainly the largest part that was guaranteed. So, if BRG had provided him with clear advice against transferring out of the BSPS, explaining why it wasn't in his best interests, I think he would've accepted that advice.

So, I think BRG should compensate Mr L for the unsuitable advice, using the regulator's pension review methodology. And it's the benefits offered by the BSPS2 which should be used for comparison purposes.

I've thought about the fact that S was responsible for managing Mr L's investments. I understand that the value of Mr L's pension fell while being managed by S. This prompted him to take advice from a third party and eventually move his pension away from S – to limit the losses and prevent the fund value deteriorating further. And I recognise that S could be separately held responsible for some of Mr L's losses.

I'm aware Mr L may be able to take his claims about S to the Financial Services Compensation Scheme ('FSCS'). As a scheme of last resort, it's possible the FSCS won't pay out if a third party could also be held liable. This means requiring BRG to pay only part of the losses could risk leaving Mr L out of pocket.

In any event though, the complaint from Mr L I've considered was about the advice given by BRG on the whole and whether it was suitable. And on balance, I think it would be fair to hold BRG fully responsible for Mr L's loss. I'd like to be clear this isn't because complaints about S are being considered by the FSCS. Rather it is because BRG advised Mr L to transfer out of the BSPS; it set up the SIPP and arranged for his existing pension benefits to be transferred. It was only as a result of BRG's involvement that Mr L transferred his BSPS benefits to the SIPP. BRG's role was pivotal, since the eventual investments were fully reliant on its advice to transfer the funds. If that unsuitable advice hadn't been given, Mr L couldn't have invested as he did. So, in my view, the entirety of his loss stems from BRG's unsuitable advice to transfer away from the BSPS.

Our Investigator also recommended BRG pay Mr L £300 for the distress caused by the unsuitable advice. Mr L has talked about the significant alarm he was caused as a result of what happened with his pension fund after the unsuitable advice was provided. And I don't doubt that this was distressing and concerning – given the sums involved and that Mr L had already been through a period of uncertainty when changes to the BSPS were first indicated. This additional period of worry wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr L, as far as possible, into the position he would now be in but for BRG's unsuitable advice. I consider Mr L would have most likely transferred into BSPS2, and not taken benefits from that scheme until age 65, if suitable advice had been given. So BRG should use the benefits offered by BSPS2 for comparison purposes.

BRG must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr L's acceptance of the decision.

BRG may wish to contact the Department for Work and Pensions (DWP) to obtain Mr L's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr L's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr L's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr L as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the ‘compensation amount’. This amount must where possible be paid to Mr L within 90 days of the date BRG receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes BRG to pay Mr L.

It’s possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won’t apply.

In addition to the compensation amount calculated as above, BRG should also pay Mr L £300 for the distress caused by its actions.

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Better Retirement Group Ltd to pay Mr L the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Better Retirement Group Ltd to pay Mr L any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Better Retirement Group Ltd to pay Mr L any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Better Retirement Group Ltd pays Mr L the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr L.

If Mr L accepts this decision, the money award becomes binding on Better Retirement Group Ltd.

My recommendation would not be binding if Mr L does not accept it. Further, it’s unlikely that Mr L can accept my decision and go to court to ask for the balance. Mr L 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 L to accept or reject my decision before 24 June 2022.

Ben Stoker
Ombudsman