DRN-3652950

The complaint

Mr D complains about the advice given by Vale Independent Financial Advisers Limited ("Vale") to transfer the benefits from his defined-benefit ('DB') scheme 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 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'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

Mr D was concerned about what the announcement by his employer meant for the security of his DB scheme, so he sought advice. Mr D met with Vale in August 2017 and it completed a financial planning questionnaire with him to gather information about his circumstances and objectives. Vale also carried out an assessment of Mr D's attitude to risk, which it deemed to be 'highest medium'.

In October 2017 Mr D's employer sent out 'Time to Choose' information asking members of the DB scheme what they wanted to do with their preserved benefits – either remain in the BSPS which would then move to the PPF, join the BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017.)

In the same month Vale advised Mr D to transfer his BSPS benefits into a personal pension arrangement and invest the proceeds in an investment portfolio utilising the services of a Discretionary Fund Manager ('DFM'), which Vale deemed matched Mr D's attitude to risk. The suitability report said the reasons for this recommendation were that Vale considered the necessary investment growth was achievable, so Mr D could end up with a bigger pension; the reduction in the benefits announced by the existing scheme left Mr D in doubt about the shape of the future scheme; and while Mr D's income needs could be met by the DB scheme, and life cover could be taken out to provide death benefits for his son, Mr D's circumstances meant he could afford to take a risk in return for potentially higher retirement income.

Mr D accepted the advice and in March 2018 around £94,000 was transferred to Mr D's new personal pension.

Mr D, through his representative complained in 2020 to Vale about the suitability of the transfer advice.

Vale didn't uphold Mr D's complaint. In summary it said Mr D wanted the potential to increase his pension fund, which it said it felt was achievable given his attitude to risk and the chosen investment portfolio. It said Mr D wanted to sever ties with the BSPS because of the uncertainty around it, and in addition he wanted to access his pension before 65 and have the ability to pass his entire fund to his son upon his death.

Dissatisfied with its response, Mr D, via his representative asked this service to consider his complaint. And an investigator ultimately upheld the complaint and required Vale to pay compensation. In summary they said a transfer wasn't suitable. They said a transfer to a personal pension was unlikely to improve on Mr D's DB scheme benefits given the level of growth required to match them. They also considered Mr D's attitude to risk assessed as highest medium wasn't suitable given his limited investment experience – they thought a medium risk assessment was more appropriate.

In addition they said there were no other compelling reasons to justify a transfer out of the DB scheme – for example Mr D's retirement was 30 years in the future and his plans weren't known at this time; his pension was designed to provide a retirement income and not a tool to provide a legacy for his son; and Mr D's concerns about the future of the BSPS should have been allayed by Vale. Overall they didn't think a transfer out of the DB scheme was in Mr D's best interests.

Vale disagreed. In summary it said Mr D's attitude to risk was discussed at length – it didn't think it was unsuitable for him. It said Mr D was 30 years away from retirement and wanted to take more risk for the potential to increase his income. It said performance data for funds across three risk profiles, including medium risk, which the investigator deemed was more appropriate, show that the level of growth required has been achieved. Overall it said, given the length to retirement and his contributions to his current pension, Mr D could meet his objective of retiring early on the income he said he needed.

Despite Vale's disagreement with the investigator's conclusions, it made an offer to Mr D, as a gesture of goodwill, which it said was in line with the regulator's DB pension transfer guidance. But in doing so, it used the value of Mr D's pension fund at the point Mr D moved his pension, using the services of another adviser, from the recommended provider.

Mr D, through his representative declined the offer. In summary he said that the calculation wasn't suitable – primarily because Vale capped the loss at the point he transferred to another provider, which he said isn't fair. He said the calculation should take account of the fund value at the date of calculation.

Because things couldn't be resolved informally, the complaint was passed to me 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 Business ('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 Vale'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Vale should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

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, 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.

Mr D was 30 at the time of the advice and it's recorded that while he was unsure of his retirement age, he anticipated it being in the region of age 60. The critical yield, or growth rate required to match Mr D's benefits at age 60 if he opted into the BSPS2 was 6.34% if he took a full pension and 5.64% if he took tax-free cash and a reduced pension. The equivalent critical yields to match the benefits available if the BSPS moved to the PPF were 6.35% and 6.1% respectively.

The closest discount rate to the time of this transfer which I'm able to refer to was published for the period before 1 October 2017, and is 4.7% per year for 29 years to retirement. I've kept in mind that the regulator's projection rates had also 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%.

I've taken this into account, along with the composition of assets in the discount rate, Mr D's 'highest medium' attitude to risk and also the term to retirement. In my view there would be little point in Mr D giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

But here, assuming Mr D took his tax-free cash entitlement and a reduced pension in the BSPS2, the critical yield was 5.64%. This figure was higher than the discount rate and higher than the regulator's middle projection rate. I can see that Vale classified Mr D as a 'highest medium' risk investor. But while I accept Mr D was young and the term to retirement was long, Mr D lacked investment experience. In fact Vale categorised him as 'inexperienced.' So given Mr D's circumstances and importantly that he'd not invested before, I think a medium risk attitude categorisation was more appropriate here.

Given this I think it was clear Mr D was likely to receive benefits of a substantially lower overall value than those provided by the BSPS2 if he transferred to a person pension, as a result of investing in line with that attitude to risk. And with a critical yield of 6.1%, this would be the case even if the scheme moved to the PPF.

In my view, to have come close to achieving the level of growth required, would have required Mr D to take investment risk at a higher level than I think he was prepared to take. And even then I think it's more likely than not Mr D would be worse off financially at retirement if he transferred out.

I accept that Mr D was not married and it's likely the critical yield figure was based on the BSPS2 providing a spouses pension, which wouldn't have been important to Mr D at this time. But Mr D had a partner, so it's possible that he might get married in the future at which point this benefit would become important. In any event, I still consider it gives a good indication of the value of benefits Mr D was considering giving up. It's also the case that the regulator required Vale to provide it and so deems it a necessary and important part of the decision-making process.

I've also considered the cash flow forecast produced by Vale, which it says shows Mr D could meet his target retirement income need and in certain scenarios he would still have a pension fund to pass on upon his death. But firstly I can see that based on a low rate of growth, Mr D would run out of money completely at age 80. And even then it appears this is only achieved by Mr D withdrawing a static amount of income each year up to state retirement age and from then withdrawing a substantially lower amount, instead relying on his state pension. The other scenarios show the same assumptions too. I'm not necessarily persuaded that Mr D understood that he'd need to take substantially less income from his personal pension, instead relying on his state pension, to make his funds last.

In summary, even if the BSPS had moved to the PPF and Mr D's benefits were reduced, I think he was very unlikely to match, let alone exceed his benefits by transferring to a personal pension arrangement. By transferring his pension it was highly likely Mr D would be financially worse off in retirement. So based on the above alone, I don't think a transfer was in Mr D's best interest.

But I accept that 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 below whether such other reasons applied here.

Flexibility and income needs

It's recorded that Mr D wanted the ability to retire early and that his target retirement income was £1,200 a month.

But crucially Mr D was only 30 at the time of the advice. And based on what I've seen he didn't have concrete retirement plans. I think Mr D's retirement was so far in the future that he couldn't reasonably have had any firm plans. As Mr D had around another 30 years before he could think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr D to give up his guaranteed benefits now when he didn't reasonably know what his needs in retirement would be. Mr D wanted the ability to retire early. But he already had this option available to him - he didn't have to transfer out to achieve this. Of course if Mr D's needs developed later on and he had reason to transfer, I think this could've been explored closer to his intended retirement age, which as I've said was still many years away. While this wouldn't have been possible if Mr D's scheme moved to the PPF, if he opted to join the BSPS2 he would've retained the ability to transfer out nearer to retirement, if indeed it was required.

Notwithstanding the above, if Mr D took benefits from the BSPS2 at 60, he would be entitled to an annual income of around £6,700 if he took a full pension. And if the scheme entered the PPF that figure was around the same. This wouldn't have met Mr D's £1,200 a month need in full; albeit I can see that the suitability report said it was sufficient for his needs. But in my view this would've provided a strong foundation for Mr D's retirement and importantly it was guaranteed.

Furthermore Mr D was contributing to his current workplace pension – both employer and employee contributions at a not insignificant percentage - and he had another 30 or more years of pension contributions to add to this part of his retirement provision. Given this had the potential to amount to a significant sum, I think this would've likely provided the difference Mr D needed to meet his overall retirement income need – he still of course had his state pension income to add to this when he reached 68. Moreover, Mr D's workplace pension would've provided him with extra flexibility. He could've 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 new workplace pension, would've given him the flexibility to retire early and meet his income needs.

Overall I still think Mr D could've easily met his retirement income needs by remaining in the DB scheme and supplementing his income with his other pension. And I think this was the case whether Mr D opted into BSPS2 or the scheme moved to the PPF - I don't think he needed to risk his guaranteed benefits to do so.

Death benefits

The suitability report recorded that Mr D wanted his son to benefit from his pension rather than his partner and so a lump sum benefit was preferable to a spouses pension – albeit I also note it said it wasn't an absolute priority.

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 was likely an attractive feature to Mr D given the circumstances. But whilst I appreciate death benefits are important to consumers, and Mr D might have thought it was a good idea to transfer his BSPS benefits to a personal pension because of this, the priority here was to advise Mr D about what was best for his retirement provisions.

A pension is primarily designed to provide income in retirement. So I don't think the potential for different death benefits should have been prioritised over this and Mr D's security in retirement. And I say potential, because the sum left on Mr D's death was dependent on investment returns – so if he lived a long life, and/or investment returns were lower than expected, there may not have been a large sum to pass on anyway.

I can see Vale made reference to Mr D's scheme providing a children's pension, which was available up to age 23 (if still in full-time education) in its suitability report. But given his son's age and the number of years before Mr D could consider retiring, I don't think this would've been of benefit. But the scheme provided pre-retirement benefits in the form of a children's allowance. And Mr D could nominate his son as the beneficiary of his new workplace pension, so he already had the ability to ensure the majority of his pension would be passed on in line with his wishes.

I can see that Vale produced a number of life assurance quotes (both term assurance and whole of life) and said life cover could be put in place instead of using Mr D's pension to provide this benefit -albeit it appears Vale ultimately chose not to recommend this favouring the transfer instead. And while the quotes were simply based on the transfer value instead of an amount based on what Mr D would ideally like to leave his son and how much he could afford, given Mr D's disposable income at the time, I think either way this would've been affordable. In my view, this was the suitable way forward and if Mr D genuinely wanted to leave a legacy for his son, this is what Vale ought to have explored in greater detail and ultimately recommended – I consider it would've met Mr D's objective without risking his retirement income to achieve things.

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

Control and concerns about financial stability of BSPS

Part of Vale's reasons for its recommendation to transfer out of the DB scheme was because of Mr D's concerns about the future shape of the scheme in light of the recent announcement by his employer.

I have no doubt that Mr D was concerned about his pension. I think it's likely he knew of other colleagues who were transferring and there was lots of negative sentiment about the PPF. So it's possible that Mr D was also considering transferring because of these concerns about his employer and what might happen.

But it was Vale's duty to give Mr D an objective picture and recommend what was in his best interests. At the time of the advice the available information from the scheme trustees indicated that, while not guaranteed, the new BSPS2 scheme would likely go ahead. I think this is what Vale should've been clear with Mr D to help alleviate his concerns.

Mr D was also concerned about the scheme moving to the PPF. But based on what I've seen and discussed above, Mr D's income needs would've still been broadly met through the PPF despite the 10% reduction in starting benefits. While the increases in payment in the PPF were lower, importantly the income was still guaranteed. So I think Vale ought to have reassured Mr D that, his scheme moving to the PPF was not as concerning as he thought or was led to believe.

Summary

I accept that Mr D was likely motivated to transfer out of the BSPS and that his concerns about his employer were real. And I don't doubt that control, the potential for a greater retirement income and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr D. But Vale wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what Mr D needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income, which along with his other retirement provision would likely meet his overall retirement income need. By transferring, Mr D was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

The advice was given during the 'Time to Choose' period – so I think, on balance, Vale should've advised Mr D to opt into BSPS2. While Mr D might have said at the time he intended to retire at around age 60, I think this was too far in the future to be considered a concrete plan. It's possible Mr D wouldn't retire until closer to or at 65. So I don't think that it would've been in Mr D's interest to accept the reduction in benefits he would've faced by the scheme entering the PPF as it wouldn't be offset by the more favourable reduction for very early retirement. The annual indexation of Mr D's pension when in payment was also more advantageous under the BSPS2, and by opting into this scheme, Mr D would've retained the ability to transfer out of the scheme (if his needs demanded it) nearer to retirement.

Of course, I have to consider whether Mr D would've gone ahead anyway, against Vale's advice.

I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the BSPS against Vale's advice. I say this because, while Mr D was motivated to transfer when he approached Vale, on balance, I still think Mr D would've listened to and followed Vale's advice if things had happened as they should have and it recommended he stay in the scheme. Mr D was an inexperienced investor who in my view neither possessed the necessary knowledge, skill nor confidence to go against the advice they were given. Furthermore Mr D's pension accounted for the majority of his retirement provision at the time. So, if Vale 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.

I'm not persuaded that Mr D's concerns about his employer were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Vale had explained that Mr D could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr D would have insisted on transferring out of his scheme against Vale's advice.

In light of the above, I think Vale should compensate Mr D for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And as per the above, it is the benefits available to him through the BSPS2 that should be used for comparison purposes.

With this in mind, I can see that Vale's gesture of goodwill offer it made to Mr D was calculated using his pension fund value at the point he transferred to another adviser and moved his pension funds.

It said it believes its liability should be capped at this point - it shouldn't be held responsible for another adviser's subsequent investment fund recommendations and increased adviser charges.

I think it's important to highlight to Vale that, as I've set out below, the redress 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. I consider that Vale is responsible for all of the financial loss Mr D has suffered as a result of the unsuitable advice he received. Had suitable advice been given, Mr D would not have transferred out of the scheme and been subject to fund charges or adviser charges. So, I think the entirety of his loss flows directly from Vale's actions. Taking everything into account, I think in the circumstances this represents fair compensation for Mr D.

I can see the investigator also recommended an award of £350 for the distress and inconvenience the matter has caused Mr D. So I've also thought about whether it's fair to award compensation for distress and inconvenience - this isn't intended to fine or punish Vale – which is the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mr D. Taking everything into account, including that I consider Mr D's retirement provision is of great importance to him, I think the unsuitable advice has caused him distress. So I think an award of £350 is fair in all the circumstances.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr D whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

Mr D has chosen not to wait for the new rules to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr D.

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for Vale's unsuitable advice. I consider Mr D would have most likely transferred his benefits into BSPS2 if suitable advice had been given. So Vale should use the benefits offered by BSPS2 for comparison purposes.

Vale 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.

For clarity, given that Mr D doesn't have any firm plans for retirement at this stage, as per the usual assumptions in the FCA's guidance, compensation should be based on a normal retirement age of 65 in this case.

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 D's acceptance of the decision.

Vale may wish to contact the Department for Work and Pensions (DWP) to obtain Mr D'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 D's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D'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 D 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/her/their 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 D within 90 days of the date Vale 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 Vale to pay Mr D.

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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Vale to carry out a calculation in line with the updated rules and/or guidance in any event.

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 Vale Independent Financial Advisers Limited to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £160,000.

Vale Independent Financial Advisers Limited should also pay Mr D £350 in recognition of the distress and inconvenience the unsuitable advice has caused

Where the compensation amount does not exceed £160,000, I would additionally require Vale Independent Financial Advisers Limited to pay Mr D any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Vale Independent Financial Advisers Limited to pay Mr D any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Vale Independent Financial Advisers Limited pays Mr D the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts this decision, the money award becomes binding on Vale Independent Financial Advisers 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 30 December 2022.
Paul Featherstone
Ombudsman