DRN-4487206

Financial Ombudsman Service

The complaint

Mr E complains about the outcome of the review carried out by Bhavik Shah IFA ("Bhavik Shah") in connection with the FCA's consumer redress scheme for the British Steel Pension Scheme ("BSPS") – to make my findings easier to follow, I'll refer to this as the "redress scheme".

What happened

The sequence of events isn't in dispute, so I've only set out a brief summary of what happened.

In January 2018, Bhavik Shah advised Mr E to transfer the value of his safeguarded benefits in the BSPS to a personal pension plan ("PPP") in favour of the alternative options of either the Pension Protection Fund ("PPF") or the successor scheme to the BSPS, the BSPS2.

The pension transfer to the PPP was completed in May 2018. A few weeks later, Mr E transferred the servicing rights for the PPP from Bhavik Shah to another firm who then advised him regarding the ongoing management and investment of his PPP.

The redress scheme

In November 2022, the FCA announced its final rules (set out in PS22/14) for the redress scheme after it had identified that many former members of the BSPS were given the wrong advice. The redress scheme started in February 2023. The rules for the redress scheme require firms to identify scheme cases following certain criteria. Once identified, firms need to review the advice they gave to former BSPS members in these cases – and then tell them if the advice was suitable or not. As part of the review process, firms are required to use the FCA's BSPS Defined Benefit Advice Assessment Tool ("DBAAT"). The review can lead to one of two outcomes:

- The advice is rated as "suitable" and the case is closed; or
- The advice is rated as "unsuitable" – if so, the case progresses to a calculation and the payment of redress if it's shown the consumer suffered a financial loss

If the consumer disagrees with the outcome, they can ask the Financial Ombudsman Service ("FOS") to look at whether the review was carried out correctly in line with the rules of the redress scheme.

Bhavik Shah's review of the advice it gave Mr E

In March 2023, Bhavik Shah completed its review of the advice it gave to Mr E to transfer out of the BSPS. The DBAAT generated a suggested suitability rating of "potentially suitable" based on Bhavik Shah's answers which it then finalised as "suitable" and closed his case.

Bhavik Shah confirmed the review outcome to Mr E and told him that it wouldn't be taking any further action.

FOS's assessment

Mr E disagreed with Bhavik Shah's assessment of his case. So he referred the matter to us. While waiting for an investigator to review this complaint, Bhavik Shah decided to carry out a loss assessment on Mr E's case as at 1 October 2023 using the FCA's BSPS-specific redress calculator. This showed that he hadn't suffered a financial loss caused by the pension transfer to the PPP. In its cover letter to Mr E explaining the 'no loss' outcome, Bhavik Shah stated, *""I am not aware of the current fund value, how much you withdrew and when, post transferring. The attached fund fact sheet shows growth of 21.3% over past 5 years for the fund that I recommended. Assuming the value at 1/10/2023 (£59365.12) to be the transfer value (£51940.74) less our initial charge (£3000) revalued by 21.3% (assuming growth of 21.3% since transferring about 5 years ago), the redress calculation shows nil redress due."*

One of our investigators recommended that this complaint be upheld because he had concerns Bhavik Shah hadn't followed the FCA's rules for the redress scheme. He explained the reasons why in his assessment. He also thought that the loss assessment calculation carried out by Bhavik Shah was incorrect because it was based on a hypothetical transfer value of Mr E's PPP as at 1 October 2023 rather than the actual transfer value.

To put things right, our investigator recommended that Bhavik Shah amend the review outcome on Mr E's case under the redress scheme to "unsuitable" and then go on to calculate and pay any redress due to him in line with the redress scheme rules.

Bhavik Shah didn't accept our investigator's view. It provided substantial comments in response. In summary, it stated that it was only responsible for the pension transfer advice and not the ongoing management and investment of Mr E's PPP. It remained satisfied it had provided a suitable recommendation to transfer. It also thought that its answers on the DBAAT were correct and supported its view that the advice was suitable. In any event, it said that Mr E's complaint is about the investment performance of his PPP rather than the pension transfer – and that this complaint should therefore be directed to the firm who subsequently advised him. Since Bhavik Shah didn't agree with our investigator's view, it requested that this complaint be referred to an ombudsman for review.

This complaint has now been allocated to me to review and decide. This is the last stage of our process.

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.

Basis of Mr E's complaint

Bhavik Shah states that Mr E's complaint is about the investment performance of his PPP following the pension transfer and that it should instead be directed to the firm who subsequently advised him. I disagree. Based on the comments made by Mr E, it's my view that this complaint is about the outcome of the review carried out by Bhavik Shah in connection with the redress scheme. And so I intend to decide this complaint on that basis.

The FCA's BSPS DBAAT

As noted above, the rules of the redress scheme require firms to use the FCA's BSPS DBAAT. In summary, the tool helps firms assess the suitability of pension transfer advice by

considering whether, based on the evidence on the consumer's file, any of 12 examples of unsuitability are present. For each example, the firm, in its role as assessor, should simply answer "yes" or "no" to indicate whether or not the example is present considering the consumer's circumstances and FCA guidance at the time of the advice.

If an example is present on the consumer's file it may indicate failure to comply with the FCA's suitability requirements for pension transfer advice. Once all 12 suitability questions are answered, the tool suggests a rating. If one or more examples are present, the tool will suggest that the advice is "potentially unsuitable" and the pension transfer is not likely to be in the consumer's best interests. If no examples are present, the tool will suggest that the advice is "potentially suitable". But the tool only provides a suggested rating. It's for the assessor to make a final judgment, taking account of the available evidence, whether it considers the advice is suitable or not. In all cases the assessor must explain its reasoning for the final judgment.

<u>*Bhavik Shah's review of the advice it gave Mr E*</u>

In its role as assessor, Bhavik Shah answered that none of the 12 examples of unsuitability applied to Mr E's case. This generated a suggested rating of "potentially suitable" which it then finalised as "suitable" based on the following rationale:

> "[Mr E] *will have at least 26 years of NI contributions by the time he retires: his non-discretionary spending in retirement can mostly (if not fully) be met by the state pension income. 26/35 times 8112 gives 6026.* [Mr E] *will also have income from current occupational income and personal pension created from the pension transfer.* [Mr E] *indicated that lump sum death benefits were most important followed by tax free cash. Lump sum death benefits are higher by transferring. By transferring,* [Mr E] *is able to achieve his aims and objectives."*

I've reviewed Bhavik Shah's answers on the DBAAT. For largely the same reasons, I agree with our investigator's view that Bhavik Shah didn't follow the redress scheme rules when it assessed Mr E's case. In particular, based on the contemporaneous evidence and the redress scheme instructions in CONRED 4 Annex 21, I think Bhavik Shah, in its role as assessor, should've answered "yes" to the following examples of unsuitability:

Example 1: The client is, or will be, reliant on income from the comparator scheme

Under reference 10.3 E (3) in CONRED 4 Annex 21, the assessor is directed to answer "yes" to Example 1 when the available evidence demonstrates that the firm hasn't obtained the necessary information in all of the Information Areas 5, 6 and 7 of the Information Section. The direction to answer "yes" is because the absence of that necessary information means the firm hasn't demonstrated it has a reasonable basis for believing the consumer is able to bear the risk of the pension transfer to achieve their income objective. I think this question is relevant to Mr E's case, as I will explain.

His safeguarded benefits in the BSPS, accounting for 5 years and 7 months' pensionable service, had a transfer value of £51,940.74 and represented a significant proportion of his retirement provision built up by that time. Other than his main residence, his only other recorded assets were £2,500 in cash savings and a buy to let property valued at £70,000 (which was encumbered with a mortgage of about £45,000). So I think it's fair to say that Mr E would be reliant on the income from the comparator scheme by the time he came to retire.

Bhavik Shah stated the following in its suitability report regarding Mr E's retirement income need:

“You would like to have an income of £912 per month (or £10,944 per year) after tax in retirement. This is because your outgoings are likely to reduce by £712 in retirement once your [provider] loan and buy to let mortgage is repaid. As you have rental income of £450 per month (or £5,400 per year), you require £5,544 per year from pension. Assuming an inflation rate of 2%, revaluing £5,544 over 21 years gives a yearly pension required per year of £8,403. You believe this level of income to be sufficient for your needs."

Bhavik Shah’s recommendation to transfer was based on that target annual income figure of £10,944 (after tax). It seems that this was a notional figure suggested by Mr E based on his own analysis. This concerns me. As the professional party in the transaction, I’d have expected Bhavik Shah to have adopted a thorough approach to establish Mr E’s target income need taking into account his expected basic cost of living, lifestyle expenditure, discretionary expenditure and saving. But it doesn’t appear to have done this and instead relied on Mr E’s own analysis of the situation without scrutinising the figures.

I also note that in the fact find document it was recorded Mr E had monthly disposable income of £1,112 but only had £2,500 in cash savings. He didn’t have any other liquid savings or investments. The low level of cash savings suggests to me that Mr E’s monthly spending may have been more than was represented – meaning his retirement income need may have been higher than he thought too. Furthermore, while the recorded income target takes into account the income generated by Mr E’s rental property, I cannot see that there was any consideration of the costs of maintaining the rental property during retirement and how this might impact his income and lump sum needs. This supports my view that the target income need wasn’t scrutinised.

In my view, Bhavik Shah didn’t obtain the necessary information to demonstrate it had a reasonable basis for believing Mr E was able to bear the risk of the pension transfer to achieve his income objective.

Given the above points, it’s my opinion that the assessor should’ve answered “yes” to Example 1.

Example 2: The aim of the transfer is to pass the value of the pension to beneficiaries on the member’s death, but the firm has not demonstrated that the consumer can bear the risk of the transfer that would be needed to achieve this objective

Mr E was then aged 46 and unmarried. The suitability report stated that he wanted to transfer to the PPP to achieve his aim of passing the value of any unused pension to his partner following his death. Under this question the assessor was required to consider whether the pension transfer was required to achieve Mr E’s death benefit objective and – if so – whether he was able to bear the risk of the transfer.

Under reference 10.5R (3), the assessor is required to identify whether there was an alternative way to meet the objective without giving up comparator scheme benefits.

In Mr E’s case, the assessor stated that life cover research was missing from his file. But the suitability report stated that whole of life cover based on a sum assured of £51,940.74 (to match the BSPS transfer value) was available at a cost of £55.72 pm to meet the death benefit objective – but this was discounted by Mr E due to cost.

However, there’s no contemporaneous evidence that any or a combination of the following alternative ways to meet the objective were adequately considered and discounted by Bhavik Shah:

- using Mr E's disposable income to obtain level or decreasing term assurance which is usually more appropriate and cheaper than whole of life cover;
- using Mr E's available death in service benefits (based on four times' his salary);
- using Mr E's personal contributions paid into the BSPS/BSPS2 which would be refunded on his death (at that time, his personal contributions were £11,552 plus interest); and/or
- using the value of Mr E's DC workplace pension plan to provide death benefits.

With reference to 10.5R (4), the assessor is required to decide whether the firm has a reasonable basis for believing that the recommendation to transfer in order to pass the value of the pension to beneficiaries on death met the consumer's investment objectives; and that the consumer is able financially to bear any transfer-related risks consistent with their investment objective.

As explained in Example 1 above, it's my view that Bhavik Shah failed to demonstrate that Mr E had the requisite capacity for loss to be able to relinquish his safeguarded benefits. I think it's also clear that lower risk suitable alternative options were available to achieve his death benefit objective but Bhavik Shah failed to adequately consider these, as noted above.

Finally, Mr E was in good health at the time. Bhavik Shah recorded that he had a life expectancy of age 86. It's fair to say that immediately following the transfer to the PPP and for the period until Mr E withdrew retirement benefits, the death benefits available would be significant (subject to investment performance) due to the simple fact he couldn't access and deplete the fund value until at least age 55. But once he started withdrawing money from the PPP to meet income and lump sum needs, it would likely mean that the size of the fund remaining in later years – when death is more likely – could be much smaller than expected.

The TVAS report showed that based on taking a similar level of benefits in retirement as the BSPS, the PPP fund value would last until age 76 if taken from age 65. This didn't make any allowance for Mr E taking a tax-free cash lump sum which is something he wanted to do at age 55 to reduce the mortgage on his rental property. The cashflow analysis and TVAS report clearly show the likelihood of Mr E exhausting his pension savings during his lifetime, meaning there will be minimal death benefits available based on his life expectancy.

Taking into account the above, it's my view that Bhavik Shah didn't have a reasonable basis for believing that the recommendation to transfer in order to pass the value of the pension to beneficiaries on Mr E's death met his objective or that he was able financially to bear any transfer-related risks consistent with this investment objective.

Under reference 10.6E (1), (2) and (3), the assessor is directed to answer "yes" to Example 2 when the available evidence demonstrates that:

- the consumer didn't have the requisite capacity for loss because they were not able to forego comparator scheme benefits to achieve this objective; and/or

- a lower risk suitable alternative was available to achieve this objective; and/or

- it was likely that the consumer would exhaust their pension savings during their lifetime and so there will be minimal death benefits available.

Given the above points, it's my opinion that the assessor should've answered "yes" to Example 2.

Example 3: The aim of the transfer is to access income-related benefits flexibly but

the firm has not demonstrated that the consumer can bear the risk of the transfer that would be needed to achieve this objective

Under reference 10.9E, the assessor is required to answer "yes" to this question where the following apply:

- (1) the consumer doesn't have the requisite capacity for loss because they weren't able to forego scheme benefits to achieve this objective; and/or

- (2) there is an alternative way for the consumer to meet their objectives using other assets instead of transferring their BSPS scheme.

The suitability report stated that Mr E wanted to have flexibility in taking benefits in terms of amount and timing. Flexibility and control might sound attractive, but I can't see that Mr E had any concrete need for it. I'm not persuaded that it was appropriate for an inexperienced investor to relinquish the guarantees attached to his main retirement provision (built up by that time) in exchange for more risk so that he could access flexible benefits many years in the future. There's no real evidence that Mr E required the flexibility of irregular lump sums or variable income during retirement.

As explained in Examples 1 and 2 above, it's my view that Mr E didn't have the requisite capacity for loss to be able to relinquish his safeguarded benefits. Furthermore, there's no contemporaneous evidence that any or a combination of the following alternative ways to meet Mr E's flexibility objective were adequately considered and discounted by Bhavik Shah at the time:

- saving some of Mr E's disposable income in either a pension, investment or savings account to provide flexible income or lump sums rather than transferring and losing benefit guarantees;
- using the flexible benefits available in Mr E's DC workplace pension; and/or
- using the tax-free cash available under the BSPS2 (had he been advised to select that option).

Given the above points, it's my opinion that the assessor should've answered "yes" to Example 3.

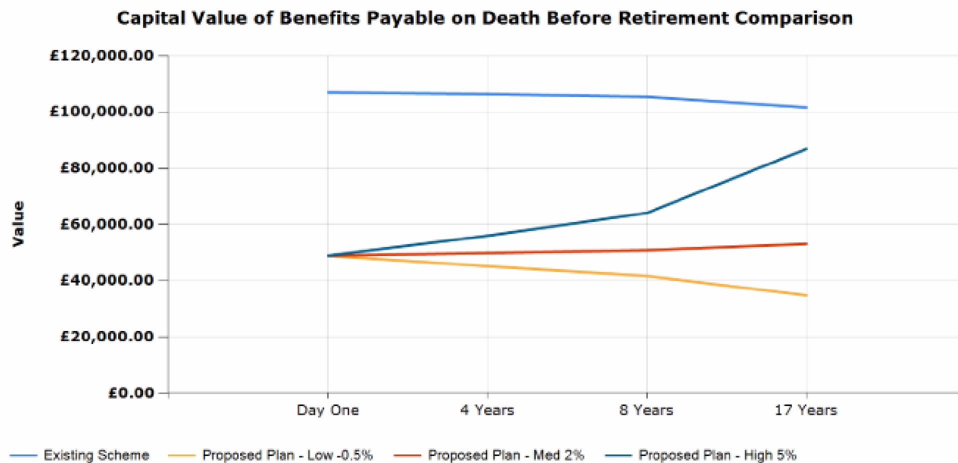
Example 9: The firm's transfer analysis does not support a recommendation to transfer

Under reference 10.27E (1) (a), the assessor is required to answer "yes" to this question when the firm hasn't demonstrated that the transfer analysis supports the recommendation to transfer, for example because: (i) the critical yield indicated in the transfer value analysis is likely to be unattainable, factoring in the term to retirement and the consumer's attitude to investment risk; or (ii) the capitalised value of death benefits (where this is a priority objective) is significantly higher under the comparator scheme(s) than that available from the proposed arrangement.

In Mr E's case, he didn't have any plans to retire earlier than the scheme normal retirement age of 65. It was noted that he planned to retire from age 67. The critical yield figure calculated by Bhavik Shah was 8.33% on the basis Mr E took a full pension at age 65. Bhavik Shah recommended that Mr E invest the value of his PPP into a fund that aligned with his recorded 'medium' risk profile. The key features illustration for the PPP showed that the assumed growth rates were 4.7% for the upper projection rate, 1.8% for the middle projection rate and -1.2% for the lower projection rate. Those figures took into account

assumed annual future inflation of 2.5%. It’s my view that the critical yield of 8.33% was likely to be unobtainable based on the rates of return shown on the illustration and Mr E’s ‘medium’ risk profile.

Furthermore, according to the TVAS report, the capitalised value of death benefits under the BSPS were significantly higher than the PPP at all points, as shown in the excerpt below:



I think these factors showed that it was likely Mr E would be financially worse off as a result of the pension transfer.

Given the above points, it’s my opinion that the assessor should’ve answered “yes” to Example 9, particularly given my view that Mr E was reliant on the income (Example 1) and didn’t require flexibility (Example 3).

Example 11: The consumer is under 50 and cannot bear the risks of transfer

Under reference 10.32E, the assessor is directed to answer “yes” to this question where the consumer is under age 50 and the following apply:

- (1) the consumer was unable financially to bear the long-term investment risks associated with an investment in the proposed arrangement; and/or

- (4) the consumer’s objectives for the transfer, their intended retirement date, and investments were uncertain or not clearly defined and the firm’s recommendation to transfer has exposed the consumer to financial and other risks that they did not need to take with this investment.

For the reasons I explained in Example 1 above, it’s my view that Mr E was unable to financially bear the long-term investment risks associated with investment in the recommended PPP given his level of reliance on this money to support his standard of living in retirement.

Mr E was then aged 46. He didn’t have any plans to retire earlier than the scheme normal retirement age of 65. It was noted that he planned to retire from age 67. Transferring to the PPP led to the investment, inflation and longevity risks associated with his safeguarded benefits being transferred from the BSPS to Mr E over a substantial period of time. There’s no evidence he had the knowledge and experience to understand those risks.

The further a consumer is from retirement, the less definite their plans for retirement are

likely to be. Significant changes to the consumer's circumstances are also more likely to occur such as changes to marital status, financial dependants and their financial situation, all of which can impact the reliance the consumer has on the income from the comparator scheme. Under the recommended PPP, Mr E couldn't access any benefits until age 55 at the earliest. In my view, with such a time frame until pension benefits could be accessed, it made the case for a pension transfer at that time more difficult to justify. Given that Mr E was then age 46 and so at least 20 years away from when he planned to retire, I think the situation was uncertain and so Bhavik Shah's recommendation to transfer exposed him to financial and other risks that he didn't need to take with his safeguarded benefits at that time.

Given the above points, it's my opinion that the assessor should've answered "yes" to Example 11.

Conclusion

Based on the above considerations, it's my opinion that Bhavik Shah failed to follow the FCA's rules for the redress scheme when it assessed Mr E's case. Specifically, for the reasons explained above, it's my view that had it followed the guidance correctly, it would've answered "yes" to unsuitability examples 1, 2, 3, 9 and 11 in the DBAAT. Had it done so, the tool would've generated a suggested rating of "potentially unsuitable". I've not seen any evidence that persuades me it would be appropriate to disregard that suggested rating and change it to a "suitable" outcome.

Causation

I've considered the points under reference 11.7G (1) to (9) in the Causation Section under the redress scheme rules to decide whether I think it's more likely than not that Bhavik Shah's non-compliant conduct was the effective cause of Mr E's decision to transfer. This was a complex transaction involving many factors which Mr E, as a layperson, wouldn't have been familiar. It's my view, given his lack of investment knowledge and experience, that he was heavily reliant on Bhavik Shah, as the professional party in the transaction, to take those factors into account and provide balanced and suitable advice regardless of his own views.

Overall, it's my view that Bhavik Shah's conduct is more likely than not to have caused Mr E to transfer to the PPP when this was not in his best interests. Given Mr E's reliance on Bhavik Shah to provide suitable advice, I think it's unlikely he would've still decided to transfer to a PPP against its advice had it advised him to opt for the BSPS2 instead.

Bhavik Shah's loss assessment

Bhavik Shah previously carried out a loss assessment that showed Mr E hadn't suffered a financial loss as at 1 October 2023. In my view, that loss assessment is incorrect because it wasn't based on the actual transfer value of Mr E's PPP attributable to the original transfer value received from the BSPS. The use of a hypothetical transfer value isn't in line with the redress scheme rules.

Putting things right

Bhavik Shah must do the following:

1. Amend the DBAAT so that unsuitability examples 1, 2, 3, 9 and 11 are marked as 'yes' on the relevant tab and the *'Assessor's suitability rating'* is marked as "unsuitable" – and then update the section covering rationale with appropriate comments to support the conclusion;

2. Calculate and pay any redress due to Mr E in line with the redress scheme rules; and

3. Ensure that any relevant records and reporting to the FCA are updated accordingly to reflect the change in outcome on Mr E's case.

For step (2) above, Bhavik Shah must use the actual transfer value of Mr E's PPP attributable to the original transfer value received from the BSPS in line with scheme rules. The fact that Mr E transferred the servicing rights for his PPP to another firm after the pension transfer doesn't alter Bhavik Shah's obligation to use the actual transfer value in the redress calculation.

The BSPS calculator instructions set out in CONRED 4 Annex 21 13.1 (5) R set out that:

'DC pension arrangement' means any pension arrangement holding the value of the consumer's pension benefits which originated from the BSPS, ***including where the arrangement has been subsequently switched to a new arrangement****;* [my emphasis]

My final decision

I uphold this complaint. I direct Bhavik Shah IFA to follow the steps set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 18 March 2024.
Clint Penfold
Ombudsman