DRN-4499524

Financial Ombudsman Service

The complaint

Mr B 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 August 2017, Bhavik Shah advised Mr B 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 November 2017. A few weeks later, Mr B 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 B

In March 2023, Bhavik Shah completed its review of the advice it gave to Mr B 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 B and told him that it wouldn't be taking any further action.

FOS's assessment

Mr B 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 B's case as at 1 April 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 B explaining the 'no loss' outcome, Bhavik Shah stated, *"After transferring his pension (*[the PPP provider] *issued a schedule dated 28 Nov 2017), the client changed his adviser on 15 Dec 2017 to another firm. I am not aware of the current fund value, how much the client withdrew and when, post transferring. Assuming the value at 1/4/2023 to be the same as the transfer value in 2017 (assuming no growth in nearly the last 6 years), the calculation shows nil redress due. I attach the outputs from the redress calculator. Following discussions with my external compliance adviser I have reconsidered the conclusion of the DBAAT and remain satisfied that the advice was suitable".*

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 B's PPP as at 1 April 2023 rather than the actual transfer value.

To put things right, our investigator recommended that Bhavik Shah amend the review outcome on Mr B'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 B'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 B'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 B's complaint

Bhavik Shah states that Mr B'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 B, 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.

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

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

> *"*[Mr B] *has frugal outgoings.* [Mr B] *indicates his top priority as lump sum death benefits followed by tax free cash. By transferring into a personal pension,* [Mr B] *is able to achieve his aims of modernising his house with TFC and improving his quality of life. By transferring into a personal pension,* [Mr B's] *defined benefit pot will not die with him and his pot can be inherited by his wife and daughter.* [Mr B] *will have state pension, current occupational pension and flexible pension to cover his outgoings."*

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 B'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 B's case, as I will explain.

Mr B was then aged 55. His safeguarded benefits in the BSPS, accounting for 12 years and 7 months' pensionable service, had a transfer value of £169,384.45 and represented his main private retirement provision built up by that time. Other than his main residence, which was mortgage free, his only other recorded asset was cash savings of about £25,000 earmarked as an emergency fund. It was noted that he was then employed by his local council and had been a member of that employer's defined benefits pension scheme for about two years – and expected to remain a member until he retired.

The suitability report confirmed that:

- Mr B planned to continue working until somewhere between age 60 to 65;
- he may reduce his working hours from age 60 and top up his reduced employed income with pension withdrawals;
- he required a net (after tax) annual retirement income of around £15,000 including his state pension (but excluding his wife's own pension income); and
- he required a tax-free lump sum to cover the cost of home improvements.

It appears that the figure of £15,000 was a notional figure suggested by Mr B based on his own analysis. Furthermore, I cannot see any reference regarding how much money Mr B needed for the home improvements. This concerns me. As the professional party in the transaction, I'd have expected Bhavik Shah to have adopted a thorough approach in establishing Mr B's target income and lump sum needs 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 B's own analysis of the situation without scrutinising the notional income figure or establishing the lump sum need. So it's my view that Mr B's needs weren't properly scrutinised. This wasn't addressed by the assessor when it completed the DBAAT.

As a result, it's my view that Bhavik Shah didn't obtain the necessary information to demonstrate it had a reasonable basis for believing Mr B was able to bear the risk of the pension transfer to achieve his income objective.

In absence of evidence to the contrary, I think it's fair to say that Mr B, then aged 55, would be reliant on the income from the comparator scheme by the time he came to retire bearing in mind that these benefits represented his main private retirement provision built up by that time and he had limited time frame of about 10 years to build up additional benefits before he retired at age 65.

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

Under this question the assessor was required to consider whether the pension transfer was required to achieve Mr B'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.

Mr B was then aged 55, in good health and married. The suitability report stated that he wanted, "*to ensure that your wife would receive the whole fund if you died as you do not have life cover".* I can see that Bhavik Shah carried out limited life cover research. This research shows that it obtained quotes for whole of life cover based on a sum assured of £169,385 (which matched the BSPS transfer value) to meet the death benefit objective. But there's no mention of this in suitability report – all that's mentioned is that Mr B didn't have any existing life cover. I cannot see any evidence details of this research was provided elsewhere to Mr B to help him make an informed decision. But even if it was, I have

concerns that Bhavik Shah limited its research to whole of life cover only. There's no contemporaneous evidence that any or a combination of the following alternative ways to meet the death benefit objective were adequately considered and discounted by Bhavik Shah:

- using Mr B's disposable income to obtain level or decreasing term assurance which is usually more appropriate and cheaper than whole of life cover;

- using Mr B's available death in service benefits provided by his then employer (noted as being 3 times' his salary);

- using Mr B's personal contributions paid into the BSPS which would be refunded on his death (at that time, his personal contributions were £8,081 plus interest); and/or

- using the value of any death benefits available under Mr B's defined benefits pension scheme provided by his then employer, the local council.

This wasn't addressed by the assessor when it completed the DBAAT. 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 B 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 B was in good health at the time. It was noted that his father aged 85 and his mother aged 81 were both in good health too. So Mr B could reasonably expect to live well into his 80s based on average life expectancy. It's fair to say that immediately following the transfer to the PPP and for the period until Mr B withdrew retirement benefits, the death benefits available would be significant (subject to investment performance) until such time as he accessed and deplete the fund value. 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 77 if taken from age 65 assuming a medium rate of return. This didn't make any allowance for Mr B taking a tax-free cash lump sum which is something he wanted to do to cover the cost of home improvements. The cashflow analysis and TVAS report clearly show the likelihood of Mr B 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 B'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 B wanted to have flexibility in taking benefits in terms of amount and timing. In connection with this it was noted that he wanted to withdraw tax-free cash to cover the cost of home improvements and reduce his working hours from age 60 and top up his reduced employed income with pension withdrawals. The expected cost of those home improvements weren't recorded. Flexibility and control might sound attractive, but I can't see that Mr B had any concrete need for it. There's no real evidence that Mr B required the flexibility of irregular lump sums or variable income during retirement. But if he did require it, there were alternative, lower risk options available:

- saving some of Mr B's disposable income while he was still working in either a pension, investment or savings account to provide flexible income or lump sums rather than transferring and losing benefit guarantees; and/or

- using the tax-free cash available under the BSPS2 (had he been advised to select that option) or the defined benefits pension scheme offered by his then employer; and/or

- obtaining a loan to cover the cost of home improvements;

The suitability report mentioned that there was a discussion between Bhavik Shah and Mr B about obtaining a mortgage to cover the cost of home improvements but this was discounted because he wanted to be mortgage free. It seems that discussion wasn't based on any facts or figures. This is because neither the suitability report nor any other evidence I've seen confirms how much money Mr B needed for the home improvements. Without understanding the capital and timing requirements for the home improvements, I struggle to see how Bhavik Shah was able to conduct any meaningful comparative analysis between the available options.

So it's entirely possible that Mr B's income and lump sum needs could've been met by the alternative options noted above but Bhavik Shah failed to establish this. Overall, it's my view that Bhavik Shah failed to adequately consider and discount alternative, lower risk options to

achieve any flexible needs rather than relinquishing a guaranteed lifetime income.

As explained in Examples 1 and 2 above, it's my view that Mr B didn't have the requisite capacity for loss to be able to relinquish his safeguarded benefits.

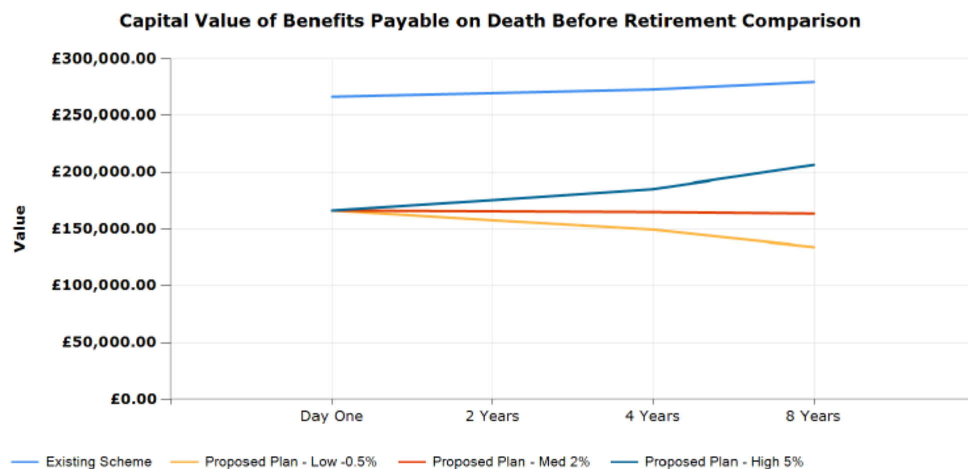
Given the above points, it's my opinion that the assessor should've answered "yes" to Example 3.

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 B's case, it was noted that he planned to reduce his working hours from age 60 before retiring at age 65. The critical yield figure calculated by Bhavik Shah was 13.62% on the basis Mr B took a full pension only (no tax-free cash) at age 65. Bhavik Shah recommended that Mr B 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 5.5% for the upper projection rate, 2.5% for the middle projection rate and 0.5% 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 13.62% was likely to be unobtainable based on the rates of return shown on the illustration and Mr B's 'medium' risk profile. The critical yield at age 60 was 25.66%, which further weakened the case for a pension transfer if Mr B took benefits earlier than age 65.

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 B 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 B was reliant on the income (Example 1) and didn't require flexibility with these benefits (Example 3).

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 B'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 and 9 in the DBAAT. The tool would've then generated a suggested rating of "potentially unsuitable". Considering the evidence in the round, I cannot see any compelling reason why a suggested rating of "potentially unsuitable" should be overturned to "suitable".

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 B's decision to transfer. This was a complex transaction involving many factors which Mr B, 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 B to transfer to the PPP when this was not in his best interests. Given Mr B'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 B hadn't suffered a financial loss as at 1 April 2023. In my view, that loss assessment is incorrect because it wasn't based on the actual transfer value of Mr B'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 and 9 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 B 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 B's case.

For step (2) above, Bhavik Shah must use the actual transfer value of Mr B's PPP attributable to the original transfer value received from the BSPS in line with scheme rules. The fact that Mr B transferred the servicing rights for his PPP or its value 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 B to accept or reject my decision before 21 March 2024.
Clint Penfold
Ombudsman