DRN-4630528

The complaint

Mr R complains about the advice given by Tuto Money Limited ('Tuto') regarding the transfer of benefits from a defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS'), to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr R held benefits in the BSPS from a period of employment between August 1980 and April 2012.

In March 2016, British Steel announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) 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 of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, it was announced that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed between the BSPS trustees, PPF and the pensions regulator. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by the employer would be set up – the BSPS2.

In July 2017 Mr R received a valuation from the trustees of the BSPS that said his pension benefits had a cash equivalent transfer value ('CETV') of £651,957.58.

Mr R was discussing his pension with another business, which I'll call Firm H. Firm H contacted Tuto around the beginning of August 2017, requesting that it advise Mr R about a potential transfer. I understand this was because Tuto was authorised to advise on DB pension transfers, but Firm H wasn't.

Firm H completed a fact-find with Mr R, recording information about his circumstances and objectives, which it subsequently shared with Tuto. This noted, amongst other things, that Mr R was 53, in good health and married. He and Mrs R were both employed and their income (recorded as being approximately £4,600 per month) exceeded their outgoings. Firm H said Mr and Mrs R owned their own home subject to a mortgage. But it also recorded that Mr R owned another property which was to be sold, with the proceeds intended to clear Mr and Mrs R's mortgage.

In addition to his BSPS benefits, it was recorded that Mr R held another pension, with a value of just over £19,000. And Mrs R was noted as also having a pension, although the value was not noted.

The fact-find said Mr R expected he and Mrs R would need a joint income of £16,000 per year in retirement and that he expected to retire at age 65. It said he might look to take tax-free cash ('TFC') at age 55 but there was no reason why he wanted this recorded.

Firm H recorded that Mr R was concerned about the BSPS benefits transferring to the PPF and that he wanted to 'protect' his pension. It said he expected to need more money early in retirement so wanted flexibility. And it said he didn't believe the spouse's pension was that valuable and would rather Mrs R received any remaining pension as a lump sum. It also noted that he was potentially interested in a personal pension with a specific provider.

The fact-find also contained a section to establish Mr R's attitude to risk and capacity for loss. Some of the information recorded included that Mr R had no investment experience and strongly agreed with the statements that he was uncomfortable with financial uncertainty and would prefer to know he was getting a guaranteed return than be uncertain. Based on the responses Tuto recorded that Mr R had a 'low medium' attitude to risk or five on a scale of one to ten, with one being lowest risk and ten highest. This assessment said the target portfolio for a 'low medium' risk profile investor had an estimated potential annual growth rate of 2.58%.

On 11 August 2017 it was formally confirmed that the RAA was progressing and that it was expected to take effect around 11 September 2017.

On 25 August 2017, an update was issued by the BSPS about transfer values. This said that the trustees expected to be able to provide improved CETV's to members when the steps in the RAA were carried out – including a large lump sum payment into the scheme.

Also on 25 August 2017, Tuto issued its written recommendation (which it called a personalised pension report) to Firm H, for Mr R. It said its analysis showed Mr R was likely to be financially disadvantaged by transferring as achieving the level of growth required to provide equivalent benefits to those being given up, the critical yield, was unlikely. It added that a transfer moved risk to Mr R and although he indicated a preference for flexibility there was little to be gained by transferring. Tuto also thought his preference regarding death benefits could be met by other means. So, Tuto's recommendation at that time was that Mr R not transfer his BSPS benefits.

The covering letter that Tuto sent to Firm H with this report said that if Mr R decided to follow "the insistent client process" that he should send it an email or letter in his own words explaining why he would like to transfer.

The steps of the RAA were completed, and the BSPS separated from Mr R's employer, on 11 September 2017. With an announcement confirming members would have to choose between joining the BSPS2 or remaining in the BSPS and moving to the PPF. I understand an updated transfer value for Mr R's pension was issued on 18 September 2017 with the CETV increasing to £673,227.39.

Tuto's internal notes indicate that it contacted Firm H on 14 September 2017. Tuto asked if Firm H had any update and again said that, while it recommended that he didn't transfer, Mr R had the option of following the insistent client process.

On 22 September 2017, Mr R sent an email to Firm H. This said "It is my intention to transfer from the British Steel Pension scheme in order to, in my opinion, protect my pot of money by placing it where I can have greater trust and faith of protecting it and enhancing its value. My fear is that if it goes to PPF all control will be lost along with options that I prefer to have, with FA guidance, control of. Furthermore, if I do not transfer and become deceased so will my pension pot, leaving my wife with only a widows pension and no options." Firm H forwarded this message to Tuto along with some forms to facilitate the transfer, which had been signed on 20 September 2017.

On 26 September 2017, Tuto produced a personalised pension report addendum. This said as Mr R now wished to be considered an insistent client, Tuto would provide a recommendation about where to place the transferred funds. Tuto recommended a personal pension with the named provider that had been referred to in the fact find Firm H completed as being one Mr R was interested in. I understand the transfer went ahead in line with this recommendation around December 2017.

Mr R complained to Tuto in 2023 about the suitability of its advice. Tuto didn't uphold Mr R's complaint, noting that it had advised him not to transfer and he had proceeded against this advice.

Mr R referred his complaint to the Financial Ombudsman Service. One of our Investigators looked into the complaint and said it should be upheld. He thought the recommendation made that Mr R not transfer was appropriate. But he didn't think Tuto had done enough to check that Mr R understood this recommendation and that he genuinely was an insistent client. Tuto hadn't contacted Mr R as all communication was done through Firm H – and the Investigator thought Firm H could've influenced his decision. And he thought the reasons for disregarding the advice in Mr R's email, such as protecting his pension and enhancing its value, ought to have led Tuto to question if Mr R had understood its initial recommendation, as it had said that the transfer was unlikely to achieve these things. The Investigator felt, if Tuto had contacted Mr R directly to explain the advice, it was likely on balance that he'd have accepted this. And the Investigator thought in the circumstances he'd have likely moved his pension to the BSPS2.

Tuto said it wasn't required to have direct contact with Mr R. And it didn't agree that Mr R's decision to transfer meant he hadn't understood the advice or that it should've done more before facilitating the transfer. Tuto also said it thought it was unlikely that a redress calculation, in line with the methodology set by the regulator, the Financial Conduct Authority ('FCA'), was likely to result in compensation being due to Mr R.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). 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.

Mr R is concerned that transferring his BSPS benefits was not suitable for him. But Tuto's advice was that the transfer wasn't suitable for Mr R at the time. So, I don't see the need to address the suitability of this advice in detail as both parties broadly agree. I would note though that I agree that transferring his BSPS benefits was unsuitable for Mr R. The initial recommendation explained that the reasons for Tuto's advice were broadly;

- The returns needed to match the benefits being given up were unlikely to be achieved and so Mr R ws likely to be worse off.
- Mr R was giving up valuable guarantees.
- Although he was interested in flexibility there was little to be gained at the time by

transferring.

- The alternative death benefits were not the only way to provide a legacy to Mrs R and alternatives meant Mr R wouldn't have had to take the risk of transferring.

I agree with these reasons for not transferring. I'd also note that while flexibility might've appealed to Mr R and it appeared that he discussed with Firm H that he might look to take TFC, he had no specific plans at the time. And he would have been entitled to take TFC and a guaranteed pension from age 55 under the BSPS2 or the PPF. Joining the BSPS2 would've also meant Mr R retained the option to transfer at a later date. The consultation and speculation around the BSPS was no doubt a cause for concern, and Mr R might've heard potentially negative things about the PPF. But even if his pension had moved to the PPF this would still have provided him with a guaranteed, protected income which he was unlikely to be able to improve upon by transferring. So overall, I can't see any persuasive reasons why a transfer was in Mr R's best interests.

As I've said though, there doesn't appear to be a disagreement about this. So, I've gone on to consider whether it was fair for Tuto to treat Mr R as an insistent client.

The obligations set out in PRIN require, amongst other things, that businesses 'must pay due regard to the interests of its customers and treat them fairly' and '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.' Furthermore, the COBS rules required Tuto to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In relation to assessing suitability, Tuto was required to gather and have consideration for information about, amongst other things, Mr R's experience or knowledge.

In February 2016 the FCA also provided guidance on its website about what steps it expected businesses to take when advising an insistent client. The three key steps being briefly to provide suitable advice, be clear about the risks and that the clients actions were against the business' advice. The FCA also gave examples of good practice with one example being that an adviser discussed the client's reasons and the risks of not accepting the personal recommendation – documenting these discussions separately to the original recommendation.

So, in summary Tuto had to find out what Mr R's objectives were and why he was considering transferring his BSPS benefits. Its role wasn't just to facilitate what Mr R might've thought he wanted. And overall, it had to act in his best interests. It also needed to explain clearly why acting against the advice was not in his best interests. And good practice here, in my view, would've been to establish that Mr R understood the advice and discuss why he wished to disregard this.

I understand that all of the correspondence in this case was done via Firm H - which I understand didn't have the relevant permissions to advise Mr R on the transfer itself. I want to make it clear that I'm not making a finding about Firm H here. Rather, as I'll explain, I think it's involvement and how Tuto dealt with Mr R through Firm H meant it wasn't clear that Mr R truly understood the advice or the disadvantages of the transfer or that he should truly have been considered an insistent client.

Firm H was assisting Mr R, including completing the fact-find for him. Mr R has said he had no direct contact with Tuto and it has not disagreed with this. So, throughout the advice process Tuto dealt with him indirectly. Tuto has said it was not required to have direct contact with Mr R. And I agree, it wasn't required to do so. But by not having direct contact with him, it is more difficult for it to show that it had a full and clear understanding of his circumstances and that he fully understood the advice that he was given.

In addition, the fact find which Firm H completed about Mr R said he had no investment experience. And the two pensions he held, which were both workplace pensions, show that he appeared to have little experience of managing pensions or investments himself. Which supports that he was an inexperienced investor with limited relevant knowledge. In my view this ought to have put Tuto on notice that it had to be careful if it was to take matters through the insistent client route. But overall, I don't think Tuto took a reasonable amount of care here.

I think there was a significant risk that Mr R could've been influenced by Firm H in respect of the transfer. Even though Firm H wasn't a pension transfer specialist. And I think that Tuto ought to have recognised that by dealing with Mr R indirectly that there was a risk Mr R may not have fully understood the consequences of transferring. That's particularly the case given Mr R's level of experience.

Mr R says he doesn't recall receiving the written advice from Tuto. Rather he just remembers discussing the transfer with Firm H. The information I've seen shows that Tuto sent its recommendations via Firm H. And while I understand declaration pages have been signed, it possible any information that was relayed to Mr R was incomplete and that he didn't have the opportunity to review Tuto's advice in full.

Mr R says he also doesn't remember sending the email – which was to Firm H – on which proceeding on an insistent client basis was based. And because Tuto had no direct contact with him, it can't demonstrate that Mr R understood the context in which he was making these statements or that these truly reflected his own opinions rather than being something Firm H indicated he needed to say.

The reasons given for Mr R wanting to proceed in the email that has been provided included protecting his pension pot and hoping to enhance its value. This repeated reasons already given in the fact-find for wanting to transfer. But transferring was unlikely to achieve these objectives. Remaining in the DB scheme, even if it moved to the PPF, meant Mr R would receive a guaranteed pension for life with the pension scheme bearing the risk. So, his pension was already protected. Whereas transferring meant he took on risk – including that his pension pot could be exhausted entirely within his lifetime. And the critical yields indicated that Mr R was unlikely to be able to achieve the growth required to match the benefits he would've been entitled to and guaranteed through his DB pension. So, he was likely to be financially disadvantaged, rather than enhance the pensions value.

The suitability report referred to these potential disadvantages. So, the same objectives being stated as reasons for wanting to proceed against the advice, in my view, indicated that Mr R may not have read or understood the advice – particularly as there was no acknowledgement in the email that it wasn't in his best interests to show he'd understood the risks and disadvantages. And I think, if Tuto was acting in Mr R's interests, this ought to have prompted it to think again about how it was transacting this advice and arrange direct contact with him to discuss the advice, to ensure it had been understood.

Tuto didn't though do this. And in fact, it seems to have introduced to Firm H the suggestion of proceeding on an insistent client basis. In the covering letter it sent Firm H with the initial advice it said that Mr R had the option to follow the insistent client process and how he could do so. While Firm H might've already been aware of this, I don't see that introducing and repeating this at the same time as saying that a transfer was not suitable was clear. And if anything may've prompted Firm H to believe that Tuto thought disregarding the advice was appropriate and led it to relay that message to Mr R.

I also note that Tuto's contact notes indicate it asked Firm H for an update on Mr R on 14 September 2017. In this it repeated that while it had advised him not to transfer he could follow the insistent client process. I'm not sure that Tuto doing this, and again emphasising the option to disregard its advice can be said to have been in Mr R's best interests given it had concluded that a transfer was unsuitable.

Taking all of this into account, I don't think Mr R should've been considered an insistent client here. I think the reasons relied on for disregarding the advice indicated he likely had not understood it and so had not made an informed choice. But rather than take the relevant care to ensure it was acting in his interests by clarifying this with him, it appears that Tuto instead suggested using the insistent client process to the third-party advisory firm involved. I think if Tuto had been acting in Mr R's interests it would've taken extra steps to ensure he understood the advice and was not being influenced by Firm H.

I've thought about what Mr R would've done differently if these extra steps had been taken. Mr R said that would've depended on what Tuto said to him. I don't doubt that Mr R engaged with Firm H thinking that he might want to transfer – given the situation with the BSPS at the time. But I don't think his mind was made up. And Firm H wasn't a pension transfer specialist, which is why Tuto became involved. Mr R has said he would've listened to what Tuto said. And, as an inexperienced investor, who it was noted at several different points wished to protect and safeguard his pension, I think it's likely he would've done so. And I think if Tuto, a professional adviser whose expertise he had been recommended, had clarified with him that it didn't think a transfer was suitable and ensured that he understood the reasons for this, I think that would've carried significant weight. So, I don't think Mr R would have insisted on transferring.

Mr R was 53 at the time of the advice. And had suggested he might potentially access TFC at age 55 (which I understand he has done following the transfer). But at the time of the advice he had no specific purpose in mind or an identified need to do so. And the fact-find indicated that he didn't expect to retire until age 65. So, although the pension provided by the PPF at early retirement generally was more generous that the BSPS2, because he didn't intend to retire early and access to TFC, flexibly, wasn't a need but rather a 'nice to have' 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. By opting into the BSPS2, which more was known about in the time following the initial advice before the transfer went ahead, Mr R would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. And the annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think, Mr R would've opted into the BSPS2 had Tuto taken relevant care here.

Putting things right

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in had a more suitable advice process been followed.
I consider Mr R would have most likely remained in the occupational pension scheme and opted to join the BSPS2.

Tuto must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

Tuto should use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr R and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what Tuto based the inputs into the calculator on.

I understand that Mr R took TFC from his pension at age 55. But he has not retired. The FCA explains in DISP App 4 that the starting assumption for a redress calculation should be that benefits would be taken at the normal retirement age of the DB scheme (which here was 65). It also explains what might make it reasonable to depart from that assumption. Taking tax-free cash from the new pension on its own, is said to be unlikely to be enough to depart from the starting assumption. And in the circumstances here, I don't think it would be fair to depart from using the normal retirement age of 65. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Tuto should:

- calculate and offer Mr R redress as a cash lump sum payment,
- explain to Mr R before starting the redress calculation that:
    - the redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest the redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr R accepts Tuto's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr R for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr R's end of year tax position.

Redress paid to Mr R as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Tuto may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr R's likely income tax rate in retirement – presumed to be 20%**.** So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 17 May 2024.

Ben Stoker
Ombudsman