DRN-4109085

The complaint

Mr J complains about the advice Thomas, Carroll Independent Financial Advisers Limited ('TCIFA') gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS') to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

Professional representatives have helped Mr J to bring this complaint. But, for ease of reading, I will refer to the representatives' comments as being Mr J's.

What happened

In March 2016, Mr J's employer 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'). The PPF acts as a 'lifeboat' for insolvent DB pension schemes, paying compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme. Alternatively, members of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr J's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

On 18 September 2017, the BSPS provided Mr J with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of around £314,800.

In the meantime Mr J was referred to TCIFA by a family member for advice about his BSPS pension. TCIFA met with him in July 2017 and conducted a fact-find. Amongst other things it noted that Mr J was 51 years old, married to Mrs J who was 52. They were both working. They had three children aged 11, 13 and 17. They owned their own home subject to an outstanding mortgage of £17,000. They had savings and investments totalling around £50,000. They both had other pension entitlements. Mr J had another DB scheme pension which would pay him £15,600 at age 60. He had also joined his employer's recently set up defined contribution ('DC') scheme. He and his employer were together contributing a sum equivalent to 17% of his salary to that. TCIFA also obtained a transfer value analysis ('TVAS') report which set out the growth rates required (the critical yields) to match the DB benefits from an alternative pension arrangement.

In October 2017, members of the BSPS were sent a “time to choose” letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere.

On 22 November 2017, TCIFA produced its first Financial Planning Report setting out its analysis and recommendations. It recommended that Mr J should transfer his BSPS benefits to a named SIPP. It appears Mr J met with TCIFA again on 28 November 2017 as he signed some forms on that date. The next day, 29 November 2017, TCIFA produced a second suitability report. It repeated some of the analysis from its earlier suitability report, including recommending that Mr J should transfer his funds to the named SIPP. It also recommended that he use the services of a discretionary fund manager to manage his investment portfolio. In summary the suitability reports said that transferring would:

- Allow Mr J to retire at age 60 while giving him flexibility to access his benefits as required and ideally earlier in retirement.
- Address his concerns about the possibility of the BSPS2 moving into the PPF in the future.
- Allow him to leave any residual pension as a lump sum to his family on his death.

Mr J accepted TCIFA’s recommendation and transferred his BSPS benefits to the named SIPP.

In December 2022 Mr J complained to TCIFA that its advice was not suitable for him. TCIFA replied in February 2023. It didn’t uphold his complaint. In brief it said its recommendations enabled Mr J to achieve his objectives and as such its advice was suitable for him.

Mr J referred his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He thought the advice was unsuitable as Mr J wasn’t likely to improve on the benefits he was already guaranteed by transferring. And he didn’t think the other reasons given for transferring made it worthwhile.

TCIFA disagreed with our Investigator’s complaint assessment. It said our Investigator had placed too much weight on the critical yields. It added that its analysis had shown Mr J could meet his income needs in retirement while also allowing him flexibility and improved death benefits. It added that Mr J had made an informed decision to transfer and had already retired which he couldn't have done if he hadn't transferred.

The Investigator wasn’t persuaded to change his opinion. So it was referred for an Ombudsman’s final decision.

Earlier this month (November 2023) we asked Mr J to update us on his retirement plans. Contrary to TCIFA’s comments that he had already retired, Mr J told us he is still employed full time by the same employer. He said he hadn't accessed the benefits from his SIPP. He added that he currently believes he will retire at age 65.

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.

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 TCIFA'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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, TCIFA should have only considered a transfer if it could clearly demonstrate it was in Mr J's best interests.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for broadly similar reasons to those our Investigator gave.

Reasons for my decision

At the time TCIFA advised Mr J the regulator required it to produce a TVAS showing the relevant critical yields. The TVAS showed the critical yields to match the benefits from both the DB scheme at Mr J's anticipated preferred retirement age of 60 and the scheme's normal retirement age of 65. Having done so TCIFA noted the critical yields were unlikely to be achieved by transferring. I agree with TCIFA's analysis here. So I don't intend to do an in-depth analysis of a comparison between the DB scheme benefits and those from the named SIPP. Save to say that, given that the critical yields were most likely not achievable I think by transferring Mr J was, potentially, making himself poorer in retirement.

TCIFA said our Investigator placed too much weight on the critical yield comparison. It said Mr J was willing to take an investment risk given its drawdown projections. I've noted its first suitability report said that if Mr J took equivalent benefits to those of his DB scheme then – assuming his investments grew at the regulator's mid-level projection rate of 5% – the fund would last Mr J beyond his life expectancy. But there would be little point in Mr J giving up the safeguarded benefits of his DB scheme only to achieve benefits of an equal level outside of the scheme. That's because he would be putting his funds at risk in order to do so. And the regulator said at the time (COBS 19.1.7B) that advising firms should not consider a rate of return that matched the DB scheme benefits as sufficient in itself to justify a transfer.

In addition while a year-on-year average growth of 5% was not impossible, it was anything but guaranteed. Further, as far as I can see, TCIFA hasn't produced cash flow scenarios which model what would happen if there was a market crash or a sustained period of poor performance. So I'm not persuaded that TCIFA's drawdown projections demonstrate that it was in Mr J's best interests to put his funds at risk.

Also, one of TCIFA's reasons for recommending a transfer was to allow Mr J to access funds earlier. But any sums he drew down from his personal pension in the early years of retirement would reduce the remaining pension pot and have the knock-on effect of lowering the sums available to benefit from any investment growth. So drawing down funds from an earlier date could decrease one or all of the following:

- The amounts Mr J could take as income later in retirement.
- The time frame he would have funds available for.
- The remaining sum available as a death benefit.

It follows that Mr J taking money from his SIPP early, particularly if he drew down larger sums in early retirement, could have a significant effect on his income security for his remaining retirement years. In contrast the benefits from the DB environment would continue to grow in line with the relevant indexation regardless if Mr J took it early. So I'm not persuaded that transferring was in Mr J's best interests.

In any event Mr J had no need to transfer his DB scheme benefits in order to retire at age 60.

Mr and Mrs J said they needed a gross income in retirement of £2,300 a month. Their other pensions income, before considering the BSPS scheme, would give them an income of £1,900 a month. A shortfall of £400 a month or £4,800 a year. Mr J's entitlements from the BSPS2 at age 60 was £12,739 if he took a full pension or a tax free cash ('TFC') lump sum of £58,304 and a reduced pension of £8,745. Those figures are comfortably above the amount required to bridge the shortfall in Mr and Mrs J's desired retirement income at age 60. And their income would increase again when their state pensions became payable at age 67. So Mr J didn't need to transfer his BSPS benefits in order to be able to take early retirement. But I don't think TCIFA's suitability reports do enough to make this clear.

That said, its true to say that Mr J couldn't have had the same level of flexible access to his DB funds as he could from a SIPP. While he could have chosen to take DB benefits early, if he'd wanted to take a TFC lump sum, then he would have had to take that at the same time as drawing a regular income from his pension. Whereas the SIPP would allow him to draw down funds as he saw fit.

But while I can see why that might have been an attractive prospect for him, I'm not persuaded Mr J had any concrete need to vary his income throughout retirement. But, if he believed he did there was no requirement for him to give up the safeguarded benefits from the DB scheme in order to have some flexible access to retirement funds.

TCIFA noted that Mr J and his employer had begun contributing to a recently set up DC pension scheme. Mr J and his employer were together contributing a sum equivalent to 16% of Mr J's salary to that pension. TCIFA said Mr J could anticipate that his DC pension would be worth around £80,000 by the time he turned 60.

The nature of a DC pension means this already provided Mr J with flexibility – he wasn't committed to take its benefits in a set way. Mr J could have taken lump sums as and when required and adjusted the income he took from it according to his needs. He also had savings of around £50,000 that he could have made withdrawals from if he wanted to. So, I think if Mr J retained his BSPS DB pension, this combined with his other DB pension and his DC pension, would have likely given him flexible access to pension funds if that was what he needed. So he didn't need to transfer from the BSPS scheme to have some flexible access to cash. It follows that I don't think it was in his best interests to recommend a transfer and potentially to put his funds at risk by doing so.

Also, if TCIFA had advised Mr J to join the BSPS2 and he had later decided he needed greater flexibility than the scheme provided, then he could have chosen to transfer from that scheme nearer to his retirement age. So it wasn't a decision he needed to make straightaway.

TCIFA also recommended the transfer because it would allow Mr J to leave any residual pension to his family on his death and they could access that in a way they saw fit. In contrast the DB scheme would pay a set amount for his children while they remained in education, after that the scheme would pay 50% of Mr J's pension entitlement to Mrs J. In contrast he could leave any sums remaining in his SIPP on his death to his family. But I don't think the possibility of more attractive death benefits was a sufficient reason to recommend a transfer.

TCIFA's priority was to advise Mr J about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – not a lump sum to family after death. But in transferring out of his DB scheme Mr J was essentially giving up a guaranteed, index linked, increasing income in retirement, for the potential for a lump sum for his family that they may not receive for many years to come.

I don't doubt that the CETV figure would have appeared an attractive sum to be able to leave as a legacy. But, in reality, the amount remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance the fund would be depleted by Mr J's withdrawals from it in his lifetime. So, how much would remain in it on his death depended on a number of factors. And there may not have been much left in his SIPP if he lived a long life, the investments performed poorly, or if he took large sums from it early in his retirement.

It follows that I don't think different death benefits available through a transfer justified the potential decrease of retirement benefits for Mr J. And ultimately TCIFA should not have encouraged Mr J to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

In reply to our Investigators complaint assessment TCIFA has stressed the unusual situation that BSPS members like Mr J found themselves in. I understand Mr J approached TCIFA because he was concerned about the stability of the BSPS and the actions and indeed the future of his employer. I can also understand Mr J's concerns about the safety of his pension. His employer had been consulting about the future of the scheme and there was still a possibility that the BSPS2 wouldn't go ahead. I'm also aware that many scheme members were concerned that, in time, the BSPS2 itself might also move to the PPF. And that had likely motivated Mr J to seek advice.

But I think TCIFA could have done more to allay Mr J's fears about this. Prior to Mr J seeking advice the PPF announced that the terms of the RAA had been agreed. Subsequently, in the period when TCIFA was advising Mr J, on 28 August 2017 the BSPS administrators provided scheme members, including Mr J, with an important update in respect of BSPS transfer values. The update said an expected payment into the BSPS of £550 million by Mr J's employer, as part of its agreement with The Pension Regulator, was likely to result in an improvement to transfer values. The confirmation that Mr J's employer had made the payment was announced on 11 September 2017. And that led to the BSPS sending Mr J an updated CETV. Then, in October 2017, before TCIFA produced its suitability reports, the BSPS sent Mr J his "time to choose" letter which included information about his likely entitlements under the BSPS2. So I think TCIFA should have been aware that it was more likely than not that the BSPS2 would go ahead.

In those circumstances, while entry into the PPF was still a possibility, I think TCIFA should have explained to Mr J that this was unlikely to be his only option. TCIFA's role was to objectively address any concerns Mr J might have had. Its job wasn't to simply transact what he might have thought he wanted to happen. And, even if Mr J's pension had moved to the PPF, it would have still given him a guaranteed income that would comfortably have met his needs. He would be unlikely to improve on these benefits by transferring. He could also have still taken early retirement from the PPF. For example at age 60 it would have paid him a full pension of £12,462. So, entering the PPF was probably not as concerning as Mr J might have thought, and I don't think any fears he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons why it was clearly in Mr J's best interest to give up his DB benefits and transfer them to a personal pension. I also haven't seen anything to persuade me that Mr J would've insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think TCIFA's advice to Mr J was unsuitable for him.

Putting things right

A fair and reasonable outcome would be for the TCIFA to put Mr J, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr J would most likely have remained in the DB scheme and opted to join the BSPS2 if TCIFA had given suitable advice. That's because the BSPS2 offered superior revaluation rates and index linked increased than the PPF.

TCIFA 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.

TCIFA 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 J and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what TCIFA based the inputs into the calculator on.

For clarity, Mr J has confirmed he has not yet retired and has no plans to do so at present. 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 J acceptance of my final decision.

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

- calculate and offer Mr J redress as a cash lump sum payment,
- explain to Mr J 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 J receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr J accepts TCIFA's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr J for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr J's end of year tax position.

Redress paid to Mr J 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, TCIFA 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 J'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.

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Thomas, Carroll Independent Financial Advisers Limited to pay Mr J the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Thomas, Carroll Independent Financial Advisers Limited pays Mr J the balance.

If Mr J accepts this decision, the money award becomes binding on Thomas, Carroll Independent Financial Advisers Limited.

My recommendation would not be binding. Further, it's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J 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 J to accept or reject my decision before 28 December 2023.

Joe Scott
Ombudsman