DRN-3853760

The complaint

Mr M complained that he was given unsuitable advice to transfer his defined benefit (DB) British Steel Pension Scheme (BSPS), to a type of personal pension plan, in 2017.

Openwork Limited is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Openwork".

What happened

In March 2016, Mr M's employer announced that it would be examining options to restructure its business, including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund (PPF), or a new defined benefit scheme (BSPS2). Alternatively, members were informed they could transfer their benefits to a personal pension arrangement.

In May 2017, the Pension Protection Fund (PPF) made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr M's employer would be set up – the BSPS2.

In October 2017, members of the BSPS were being sent a "Time to Choose" letter which gave them the options to either stay in BSPS and move with it to the PPF, move to BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choices was 11 December 2017 (and was later extended to 22 December 2017).

Mr M was concerned about what the announcement by his employer meant for the security of his preserved benefits in the BSPS. He was unsure what to do and was referred to Openwork which is responsible for providing the pension advice. Information gathered about his circumstances and objectives at the time of the recommendation were broadly as follows:

- Mr M was 57 years old, married and had no financial dependents. He had accrued over 31 years' worth of service with BSPS.
- The cash equivalent transfer value (CETV) of Mr M's BSPS was approximately £677,900. The normal retirement age (NRA) was 65.
- Mr M had another pension which was a newly started defined contribution (DC) scheme. He also had some additional voluntary contributions (AVCs) valued at approximately £18,000. Mrs M also had pensions of her own which consisted of a DB scheme with an estimated annual pension of around £10,766 per year, and also a DC scheme with around £72,000 in it.
- Mr and Mrs M earned around £45,000 and £34,000 per year respectively and lived in a home they owned outright. They had no other debts recorded. They had around £59,000 in joint savings.

Openwork set out its advice in a suitability report on 3 December 2017. In this Openwork advised Mr M to transfer out of the BSPS and invest the funds in a type of personal pension plan. Openwork said this would allow Mr M to achieve his objectives. Mr M accepted this advice and so transferred out. In 2022 Mr M complained to Openwork about its advice, saying he shouldn't have been advised to transfer out to a personal pension but Openwork didn't uphold his complaint.

Mr M then referred his complaint to our Service. One of our investigators looked into the complaint and said it should be upheld. In response, Openwork said it hadn't done anything wrong and was acting on the financial objectives Mr M had at the time.

As the complaint hasn't been resolved, it's come to me for a final decision.

What I've decided – and why

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

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

<u>The applicable rules, regulations and requirements</u>

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 Openwork'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.

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

I've used all the information we have to consider whether transferring away from the BSPS to a personal pension was in Mr M's best interests. In particular, I have also carefully considered the final response letter from Openwork. I've carefully considered too, the various other responses made to the points contained within our investigator's view.

Having done all this, I'm upholding Mr M's complaint.

Introductory issues

After our investigator issued their 'view' letter, Openwork produced what it says was evidence from a Review that was carried out by the financial regulator (the FCA). As the FCA Review appeared to have a substantially different tone and outcome as that recommended by our investigator, Openwork asks how this can be. I understand the point being made.

The comments I've been shown about the FCA Review are generic ones, although I accept they portray an apparent degree of satisfaction from the reviewer about the file in question. However, I'm not aware of the full terms of reference of the FCA Review, the depth it went into, or whether it was making any judgement about whether the advice here was ultimately suitable. The Review was also carried out without the benefit of Mr M's later points of complaint which means it is one-dimensional and not reflective of his complaint as it is now.

My role also isn't to provide an analysis of the regulator's actions and we don't have the same function. Unlike the FCA for example, our job is not a regulatory one. We are tasked with looking beyond simply whether a firm has complied with its basic regulatory requirements. Instead, we consider information from all parties and decide, while having regard for relevant law and regulations, what we consider to be fair and reasonable in all the circumstances of the complaint.

So, I don't think the fact that the regulator had evidently carried out a separate Review impacts on my consideration about this particular complaint. Nor does it prevent me from reaching my findings independently of the FCA's previous considerations. And having done so, for the reasons set out above, I'm satisfied that Openwork's recommendation that Mr M should transfer away from his DB scheme wasn't in his best interests. In my view, the advice he was given wasn't suitable for him for the reasons I'll now set out below.

I think it's also important to clearly set out that Openwork commissioned a transfer analysis in late 2017. I've used Openwork's transfer analysis document – often referred to as a "TVAS" - which is dated 29 November 2017 to help me look into Mr M's complaint. However, it seems to me that Openwork used the existing BSPS to make comparisons against even though we know that staying in the BSPS wasn't an option going forward for him; Mr M needed to decide whether to move to the BSPS2, the PPF or transfer away completely to a personal pension arrangement.

Using the BSPS in the TVAS was therefore basing the comparison on 'old' data and therefore not giving Mr M the most up to date information available. I accept there was some uncertainty at the time, but as of November 2017 it seemed very likely that the BSPS2, for example, was going to be going ahead. Mr M had also been sent his "Time to Choose" document by the pension trustees. Nevertheless, we do also know that the BPS2 comparisons would have been somewhere between the 'old' scheme (BSPS) and the PPF although much nearer to the former.

I also want to point out that this was, by most standards, a large pension. Openwork also charged a considerable amount for its advice so clearly it was of the utmost importance that all the analysis was up to date and reflective of all the options Mr M had.

I also think it's important for me to point out that Mr M was 57 at the time of this advice. The relevance of this is that he was intending to retire quite soon. He'd mentioned 58-to-60 as being a possible age range at which he would retire and this coincided with Mrs M starting to wind down her own work commitments, although she was a little younger than Mr M. I've borne this in mind when looking at the analysis and comparisons from the time. I don't think there was ever any real doubt that Mr M would retire early, so the comparisons in the TVAS against a retirement at the age of 60, rather than 65, are much more relevant in his case.

Financial viability

Openwork referred in its TVAS and suitability report to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide a fund large enough to give the same annuity benefits as the DB scheme. The critical yield comparison was a requirement from the regulator at the time when advising clients on DB transfers. It's also important to point out that the critical yield comparison is only one of a number of different metrics I've used to compare the different schemes.

Openwork said that the critical yield required to match the benefits of the BSPS at the age of 60 was 18.8%. This was based on him taking a tax-free lump sum and a reduced pension upon retiring, which I think is fair. If retiring under the PPF at 60, the critical yield was 10%.

I think these yields should have immediately shown the adviser that if retiring at around the age of 60, then the chances were that Mr M would be highly likely to receive lower overall benefits in retirement. I say this with the following in mind.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 and it was only 2.7% per year for around 2 years to retirement (age 60), which is well below the critical yield figures I've referred to above. Even if assuming Mr M did work on a little longer, which would give him more time to 'smooth' out his investment returns, the discount rate for a retirement at 65 was still only 3.4%. This therefore implies that reaching a rate of growth that made transferring worthwhile from a financial perspective, was very unlikely when viewed from the prism of 2017 and the economic picture at that time.

In its final response letter to Mr M about his complaint Openwork referred to an annual growth rate of only 3% being required. This comes from a 'phone call 'meeting' Mr M had with the adviser at the time. However, this isn't comparing like-with-like as it isn't comparing the recommended personal pension with the full range of guarantees and benefits found in Mr M's existing BSPS or the opportunities he would have had with either BSPS2 or the PPF. Quoting a growth rate of only 3% therefore needed to be accompanied by a substantial warning about what was actually being compared.

I've also kept in mind that the regulator's upper investment growth projection rate at the time was 8%, the middle projection rate was 5%, and the lower projection rate was 2% although these hadn't been updated for some time. Bond yields and interest rates had been very low for years, so if anything the projected returns would realistically be lower. Openwork itself offers no explanation as to how reaching growth levels of around 10% or above would be possible and dismisses the use of the critical yield comparison as a *"blunt tool"*. However, I don't agree with this and in any event, this was a comparison it was obliged by the regulator to provide. To dismiss it completely is therefore not reasonable in my view.

At the time, Openwork assessed Mr M's attitude to risk (ATR) as "balanced". I've seen other comments on the documentation which in my view show Mr M being someone who didn't want to introduce much risk into his financial portfolio. I therefore don't think the adviser had enough information or evidence to recommend transferring away from a DB scheme based on a financial comparison basis. I say this because the growth assumptions close to the regulator's lower / middle projections and also to the discount rate were most relevant here in my view. So, I think growth assumptions of around 2½-to-5% were much more realistic. These were significantly below the critical yield figures for the BSPS and I believe they would have been well below those for the BSPS2 and the PPF too, so I think this showed that achieving the critical yield(s), year-on-year, upon transferring out, was very unlikely. The likelihood was that although close to retirement, Mr M still probably had another couple of years left at work.

Even if I were to accept the chances of reaching even the lower PPF critical yield of 10% was slightly better than reaching that of the existing BSPS, I'd still need to factor in that there would be costs and charges associated with a personal pension which were not present in the DB scheme Mr M had (or one which he was able to move into in due course such as the BSPS2 or PPF). And in any event, there would be little point in transferring - from a financial comparison point of view – unless there were clear indications that growth would comfortably exceed the critical yield rate and so cope with any additional fees.

I've also noted that using the anticipated retirement age of 60 under the PPF, Openwork's own transfer analysis said that in order to purchase an annuity to provide benefits of equal value to the estimated benefits provided by the scheme, the fund required was £811,098. Because this figure is well above Mr M's CETV, it represents, in my view, a revealing window into the value of the guaranteed pension Mr M could be giving up by transferring away to a personal plan.

I therefore think it's fair to say that from a financial comparison perspective, Openwork's own figures showed that transferring to a personal pension plan would mean Mr M would likely receive lower pension benefits in the longer term, when compared against the available DB scheme.

I've also considered some projections Openwork used to help show that if he transferred out to a personal plan, the funds could last Mr M well into retirement. Again, I think most of these were based on growth projections which were based on past performance and they also ran out at certain ages, whereas Mr M's DB scheme was guaranteed for life. It's also fair to say these were not comparing like-with-like. What Openwork was showing Mr M were comparisons with plans which lacked the guarantees and benefits of a DB scheme.

Of course, according to Openwork, its recommendation that he should transfer out to a personal pension was not wholly based on the financial comparisons with his current scheme alone. Rather, Openwork said Mr M also had other reasons to transfer away. I've therefore thought about all the other considerations which might have meant a transfer was suitable for him, despite providing the overall lower benefits mentioned earlier.

I've considered these below.

<u>*Other reasons for transferring*</u>

Openwork recommended a transfer to a personal pension plan based on what it said were Mr M's wider objectives. The suitability report mentioned that retiring earlier than 65 was something Mr M was very much hoping to do and I accept this was likely. I have also used all the documents we still have from the advice sessions to summarise the following themes as supporting the recommendation to transfer away. The following areas were set out in the suitability report effectively justifying the recommendation to transfer (which I've summarised):

- Mr M would be able to alter the timing of drawing his pension benefits to more suit his needs in retirement if he transferred to a personal pension plan.
- Mr M would gain control over his pension and the investments if he transferred away.
- He could access a higher tax-free lump sum.
- The death benefits in a personal arrangement were better for him.

Openwork also said he'd benefit from:

- *"Reduced investment risk by diversifying investments across a broad range of securities.*
- *Having a spread of different fund management groups and asset managers who are best equipped to manage assets across the funds.*
- *The lowest cost way to invest in a well-diversified range of funds that provides excellent value for money".*

So, it seems the supporting reasons that Openwork recommended the transfer out to a personal pension was broadly for the flexibility and control it offered to Mr M. I have therefore considered these issues in turn.

- *Flexibility*

The adviser promoted a transfer partly to allow Mr M to retire early. They said Mr M had wanted "*to take control of your pension savings into a private arrangement and have the option to withdraw them as and when you need"*. But whilst there is nothing intrinsically wrong with such an objective, the adviser hadn't established any need for Mr M's pension to be flexible to the extent that he'd need to alter his income each year. In fact, looking carefully at all Mr and Mrs M's circumstances, I think the opposite was true: what appeared to best fit their circumstances was a steady and dependable income in retirement. In my view, irreversibly giving up a DB pension scheme wasn't in Mr M's best interests.

For example, no case whatsoever was made out for a flexible income and in any case 'flexibility' wasn't really defined by the adviser. Instead, Mr and Mrs M had come up with an annual income figure which they said they'd need each year in retirement for them to maintain a reasonable standard of living and this broadly matched their current outgoings. So, I've seen nothing explaining why Mr M wouldn't want to continue membership of a DB scheme and to use that scheme in exactly the way it was originally intended.

I say this because all the indications were that Mrs M could achieve most of their joint income requirements upon Mr M's retirement from her current income sources as she'd still be working. And she'd have yet to access her own pension savings.

An annual aspirational income of around £18,000 in retirement was mentioned in the 'fact find', but I think this might have been a net requirement, rather than a gross figure. So I've therefore assumed a gross figure of around £24,000 per year as being the approximate amount of income Mr and Mrs M would need after Mr M took retirement from the steel industry and started to draw his benefits. It seems Mrs M would meet over half of their required amount meaning that the remaining income gap would need to be filled by Mr M and his pension income going forward.

However, the figures showed that this would be easily achievable if Mr M moved to the PPF and retired close to his 60th year. Openwork's own analysis showed that an annual pension in the PPF at the age of 60 would have been around £18,000 – and this is with Mr M also accessing a six-figure tax-free lump sum upon his retirement. We know Mr and Mrs M already had substantial liquid savings between them, and there was no mention of a known need for a further or large capital sum. So I therefore think all the evidence was pointing to Mr and Mrs M being able to enjoy a reasonable retirement whilst him still maintaining all the benefits and guarantees of a DB type scheme. Mrs M would have probably retired sometime after Mr M and then switched on her own pensions. Both also expected full state pensions at the ages of 66 and 67 respectively.

All this means that I don't think there's anything showing Mr and Mrs M's combined pension entitlements in both the DB and DC schemes wouldn't have fairly easily met their anticipated future income requirements when retired. This could be achieved without any need for Mr M to transfer away from a DB scheme. Of course, we know Mr M also had joined the new TATA DC scheme. I think it's easy to discount this scheme because it had only really just started. However, it already had around £3,750 in it and there were substantial contributions from both him and his employer going in every month – some 16% of his overall salary. So even around two more years would see reasonable amounts going in, and hopefully, some modest growth. Mr M also had an AVC fund with around £18,000 in it.

I therefore think that by retirement, whenever it eventually came, Mr M could have been in an agreeable position. On one hand he'd have an existing deferred DB scheme of very considerable value. This would contain all the guarantees and benefits that such schemes normally bring which tend to include a promise to pay a known pension for life. Significant indexation guarantees also existed within BSPS2 and the PPF. On the other hand, he'd have also built up a modest DC scheme total; it's not unreasonable to say the total would have been over £30,000 by retirement. So if Mr M ever found he needed some flexibility, then he'd be able to use the latter, rather than transferring away from the former. He and Mrs M also had cash savings.

I've also seen no evidence that Mr M had either the true capacity or desire to exercise personal control over his funds. With his DB scheme, Mr M was being offered the opportunity to transfer to the new BSPS2 or PPF. It's true there were some differences in these schemes when compared to the original BSPS, but they remained DB type schemes nonetheless and were run for him by trustees.

I accept that Mr M may have had an understanding of pensions and a reasonable grasp of wider financial matters. But there's no evidence he was an experienced 'money market' investor. In fact, the documents I've seen clearly say he was inexperienced. He had started another (DC) pension as a consequence of the BSPS being closed to new contributions several months before this advice was given. But I've seen nothing showing the investment strategy for this pension was anything other than an 'off the shelf' mix of investments commonly found in most company DC schemes. I think Mr M would have found the complexity, scale and responsibility of managing over £677,000 of his own transferred funds from his DB scheme to be onerous in the years ahead. This was a very large amount of money and what I've seen tends to show Mr M would have required ongoing financial advice and support, all of which would cost him money which his DB scheme didn't require from him.

- *Achieving higher tax-free cash*

I think Openwork promoted to Mr M that he could access more tax-free cash if he transferred to a personal pension plan. It said he'd be able to access 25% of his pension as a lump-sum and that this was much more than he'd get with the DB scheme. It said he'd then be able to use the remaining funds more flexibly.

It's usually the case that more tax-free cash can be accessed from a personal pension when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But Openwork should have been telling Mr M at the time that extra tax-free lump sums being removed from a personal pension also came with consequences in that the amount left for his later retirement years would obviously decrease.

I therefore don't think that accessing tax-free cash should have been used as rationale for Mr M transferring away from a DB scheme. The implication was that more tax-free cash would mean more money but as I've shown above, this needed to be explained very carefully. What the 'higher' tax-free cash meant was that his overall pension benefits were just being paid differently. And as I've said, Mr M already had £59,000 in joint savings and would have released an even larger (tax-free) sum upon retiring from either the BSPS2 or PPF.

There was no indication that Mr M needed access to a large amount of tax-free cash and I've considered the financial and economic environment during which this advice was given. In 2017, we were in a period of sustained ultra-low interest rates, low inflation and low bond yields. I therefore think the case for retaining a large cash amount which he didn't appear to have any use for was very weak, particularly when considering what Mr M would be giving up to access that extra cash.

- *Death benefits*

Death benefits are an emotive subject. When asked, I think most people would like their loved ones to be taken care of when they die. The BSPS2 and PPF contained certain benefits payable to his spouse if Mr M died. The benefits included related to both pre-retirement and post-retirement and I see no need to set them out in detail here. However, as an example, Mrs M would have been entitled to 50% of Mr M's pension whilst in payment, if he pre-deceased her. This would have lasted for the rest of her life.

I think the value of these benefits were most likely underplayed because the spouse's pension provided by the BSPS2 or PPF would have been useful to Mrs M as I've seen no evidence of why she'd need a lump sum instead. It's true she had her own pensions, but overall whilst these were decent amounts, they couldn't be classed as high pensions. I therefore think his wife would have found an ongoing annual pension a source of comfort and security if Mr M passed away first. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

I think the adviser discussed with Mr M that he'd be able to pass on the value of a personal pension, potentially tax-free, to anyone he nominated. So, the lump sum death benefits on offer through a personal pension was probably made to look like an attractive feature to him. But I can't see there was a clear direction from Mr M specifying that he'd be wanting to pass on benefits to anyone other than his wife. And whilst I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer the BSPS to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement rather than to pass on to someone after death.

Mr M was still only 57 and was in good health. An obvious drawback with a personal plan's death benefits is that the amount left to pass on – to anyone – may be substantially reduced as the pensioner starts to withdraw his or her retirement income. To this end, if Mr M had lived a long life there could be very little left in his personal pension plan. However, Mr M could also have nominated a beneficiary of any funds remaining in his other DC schemes.

I can't say if, or the extent to which, life insurance was discussed. At 57, a short 'term' insurance policy might also still have been affordable. So, if a lump sum, rather than an annual pension really was so important, this might have been a useful product in the medium term if Mr M passed away first. It could have been a source of payment, for example, if Mr M passed away before Mrs M reached state pensionable age. So, to this end, Mr M already had some alternative options if he really did want to leave a cash lump-sum legacy, although we know that they had access to reasonable amounts of cash comprising their existing savings and the likely tax-free lump sum if Mr M took a reduced pension from either the BSPS2 or PPF.

Overall, in this case I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr M. I think this objective, listed as it was in the suitability report, was no more than a generic comment and not meaningful to Mr M's situation.

- *Concerns over financial stability of the DB scheme*

It's clear that Mr M, like many employees of his company, was concerned about his pension. His employer had recently made the announcement about its plans for the scheme and Openwork said he lacked trust in the company. He'd heard negative things about the PPF and Openwork said he could have more control over his pension fund. So, I think it's quite possible that Mr M was also leaning towards the decision to transfer because of the concerns he had about his employer and a negative perception of the PPF. However, it was Openwork's obligation to give Mr M an objective picture and recommend what was in his best interests. By the point of the advice being delivered details of BSPS2 were known and it seemed likely it was going ahead. So, I think this should have alleviated any concerns about the scheme moving to the PPF.

However, even if there was a chance the BSPS2 wouldn't go ahead, I think that Openwork should have reassured Mr M that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr M through the PPF would have still probably provided a significant portion of the income he would have needed at retirement, and he was still unlikely to be able to exceed this by transferring out, given his ATR and the effect of pension charges and fees. And although the increases in payment in the PPF were lower, the income was still guaranteed and was not subject to any investment risk. So, I don't think that these concerns should have led to Openwork's recommendation to Mr M to transfer out of the DB scheme altogether.

<u>*Other issues*</u>

I mentioned above, three bullet-pointed themes Openwork put forward at the time of the advice which it told Mr M *"you will benefit from"* as a result of transferring. But I think these were just some of the consequences of transferring. Essentially, Mr M didn't really benefit from any *"reduced investment risk"* by diversifying investments across a broad range of securities because if he'd remained in a DB type scheme all this type of thing was looked after for him. Also, his money was already likely invested in a *"spread of different fund management groups and asset managers"*. And the *"lowest costs"* Mr M would incur was by not transferring but by moving to either the BSPS2 or the PPF; there were next to no costs involved in this for Mr M. Therefore, the adviser raising these apparently positive issues was completely meaningless.

Suitability of investments

Openwork recommended that Mr M invest his funds in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M and I don't think he would have insisted on transferring out of the scheme if clear advice had been given to him, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in a DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

Summary

I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income within either the BSPS2 or PPF. By transferring to a personal pension, the evidence shows Mr M was likely to obtain lower retirement benefits. And as I've comprehensively explained, I don't think there were any other particular reasons which would justify the transfer and outweigh this. So I think Openwork ought to have advised him against transferring away from the BSPS for these reasons.

Openwork was the regulated party here. So its job wasn't to transact what Mr M – an inexperienced person in these matters – might have thought was a good idea. It was being paid a substantial fee for the advice and the adviser's job was to look carefully into Mr M's circumstances and make recommendations that were in his best interests. For the reasons I've given, I think there were shortcomings in many areas.

In certain cases, usually where the consumer is closer to their chosen retirement age, the PPF offered the more attractive retirement tax-free lump sum and ongoing annual pension. Our investigator pointed out that this scenario appeared to apply here. So I think Mr M's circumstances here were aligned to him transferring to PPF and retiring from that when he felt he was ready to do so. I don't think it was in Mr M's best interests for him to transfer to a personal pension when he had the opportunity of opting into the PPF.

I have considered, given the circumstances of the time, whether Mr M would have transferred to a personal pension in any event. I accept that Openwork disclosed some of the risks of transferring to Mr M, and provided him with a certain amount of information. But ultimately it advised Mr M to transfer out, and I think Mr M relied on that advice. I'm not persuaded that Mr M would have insisted on transferring out of the DB scheme, against Openwork's advice as this pension accounted for almost all of his retirement provision at the time. I think if Openwork had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

In light of the above, I think Openwork should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Openwork's unsuitable advice. I consider Mr M would have most likely opted to join the PPF, rather than transfer to the personal pension if he'd been given suitable advice and compensation should be based on an early retirement age of 60. Openwork should use the benefits offered by the PPF for comparison purposes.

Openwork must then 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.

Openwork 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 M and our Service upon completion of the calculation together with supporting evidence of what Openwork based the inputs into the calculator on.

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 M's 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, Openwork should:

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

Redress paid to Mr M as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Openwork 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 M'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.

Our investigator recommended that Openwork should pay Mr M for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr M in his particular circumstances. This pension at the time represented most of his retirement provision and it was a very large amount. In his situation I think the thought of losing material benefits would have impacted upon Mr M. So I agree the recommended payment of £300 for distress and inconvenience. Openwork should pay Mr M this amount *in addition* to the redress I've set out above.

My final decision

Determination and money award: I am upholding this complaint and I now direct Openwork Limited to pay Mr M 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 Openwork Limited pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M accepts my final decision, the money award becomes binding on Openwork Limited. My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 22 December 2023.

Michael Campbell
Ombudsman