DRN-3696036

Financial Ombudsman Service

The complaint

Mr L has complained that Sense Network Limited gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) – the British Steel Pension Scheme (BSPS) – to a Self Invested Personal Pension policy (SIPP).

What happened

The investigator who considered this matter set out the background to the complaint in her assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

In March 2016, Tata Steel UK Ltd 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, one of which was a transfer to the Pension Protection Fund ("PPF") – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

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 L's employer would be set up – the BSPS 2.

This was, however, intended to receive deferred benefits only. The main defined benefit OPS had been replaced by a new defined contribution scheme. The existing scheme was due to be closed in the near future, with the options being set out in a subsequent letter in October 2017 for deferred members to either transfer their benefits to the successor scheme, BSPS 2, the Pension Protection Fund (PPF) or into a private arrangement, such as a PPP or SIPP.

Mr L joined the BSPS in January 1997, and the scheme retirement age was 65 with the option of retiring early.

When the pensions regulator announced terms for the closing BSPS pension, members were provided with personal information and illustrations in September 2017 to help them make their choices.

The BSPS quoted a transfer value of £341,533.48 which was guaranteed until 11 December 2017.

A client review was completed on 22 August 2017, during which a fact find document was completed. This noted Mr L's circumstances at the time of advice as follows:

- He was living with his partner, and had two dependent children.
- He was employed, earning around £45,000 gross each year.
- His partner was earning £28,000 gross a year.
- The detailed expenditure breakdown showed total household expenditure of £46,209 a year.
- He owned his property valued at £160,000, with an outstanding mortgage of £80,000 due to be fully repaid in 2024.
- He also had £20,000 outstanding credit card balances held jointly with his partner.
- He was a member of two defined contribution pensions; a member of his employer's group personal pension scheme valued at £3,708, and a group personal pension with Fidelity worth £28,441.96.
- He was a member of the employer's Sharesave Scheme.
- He had £5,000 in joint savings and £125,000 inherited from his father's estate.
- Sense obtained a quote for his expected state pension, estimated to be £128.65 pw from the age of 67. It also obtained a quote for his partner, which gave an estimated weekly state pension from 67 of £155.18.
- He was recorded as being in good health, but he had a medical condition for which he was taking daily medication.

His risk profile was assessed as being an "8" on a risk scale of "1 to 10", where "1" was the lowest and "10" was the highest risk. This was categorised as being "Moderate to Adventurous".

A Knowledge and Experience assessment was carried out, where Mr L selected 'yes' to the previous purchases of shares, although no more detail was provided on this here or elsewhere in other documentation. He said he had experience through the British Steel Sharesave scheme, had past endowment policies and his two group personal pensions.

In terms of his Capacity for Loss, Mr L entered 20% as the *"maximum percentage of the investment we are currently discussing (not your whole investment capital) which you could afford to lose if markets etc do not perform as anticipated".*

There was also a fact find addendum, which provided detailed notes on discussions held with Mr L about a number of areas:

Sense explained that the 7.82% critical yield required to age 60 to match the scheme benefits from the TVAS report would be very difficult to achieve, but Mr L was recorded as feeling that this was a lower return than funds he had selected in his employer personal pension using an example of the almost 15% return generated by the Aberdeen Asia Pacific Equity fund over the previous 12 months, and 50% over the past three years

When discussing death benefits, a BSPS nomination form said no spouse's pension would be paid to an unmarried partner, and transferring to a personal pension arrangement would allow him to leave a lump sum to his family on death.

As to why a transfer should be considered now, this recorded that Mr L felt the size of the CETV at that time meant he wanted to transfer, and he was concerned the CETV on offer could be reduced in future.

The scheme pension would be likely to support him and his partner with *"all of their proposed and anticipated spending throughout their lives"*, but this would make it impossible to "*control the flow of income*", and could result in surplus income building up that would not help in their objective of passing wealth on to family.

Mr L liked the idea of complete flexibility over when and how he could draw on his pension funds. He wanted to be able to access his full tax-free cash entitlement at the age of 55.

He also felt that the cash equivalent transfer value (CETV) would provide sufficient drawdown capital, outweighing the benefits of an index-linked final salary pension for the rest of his life.

He viewed the BSPS benefits as a "possible legacy asset", with any unused pension passing to his partner and children.

The report also said that Mr L viewed the CETV as presenting him with a *"unique opportunity to transform your lifestyle".*

There was further mention of the importance Mr L put on the size of the CETV, and that he was concerned that, if a larger number of BSPS members transferred out, the trustees might withdraw the offer of an enhanced capital amount. Sense added that there had been a significant increase in CETVs for most members.

The report set out his annual expenditure at around £26,000 a year, which the investigator noted differed significantly from the expenditure of £46,209 recorded in the fact find. It wasn't clear to the investigator how this figure had been determined, as the fact find detailed total household expenditure.

Mr L's attitude to risk was described as meaning *"that you are prepared to take a medium degree of risk with your investment in return for the prospect of improving longer term investment performance".*

The only pension listed under 'existing pension plans' was Mr L's BSPS benefits, as of the date of leaving in March 2017.

For the death benefits available from the BSPS, the report explained that as he and his partner weren't married, *"it would be solely at the discretion of the Trustees to provide a spouse's pension to [his partner] in the event of you predeceasing [his partner]".*

The report set out Mr L's available retirement options; to remain within the scheme, transferring to a PPP or SIPP, taking out whole of life cover, or a combination of these.

Sense recommended that he not remain within the scheme, and that transferring his benefits to a personal pension arrangement would enable him to better meet his objectives. It also didn't recommend taking out a whole of life plan to provide the CETV equivalent at whatever time he died, discounting it based on future cost increases and that this would be difficult to afford on his pension.

Sense made a recommendation to transfer into a SIPP, due to it being competitively priced and giving access to a wide range of investment types.

A Transfer Value Analysis Report (TVAS) was completed. This showed that in order to buy an annuity to match the benefits provided by his existing scheme in retirement, the new pension being recommended would need to grow by 14.59% a year if retiring at 50, 9.56% if retiring at 60, and 7.82% at 65.

The pension transfer report explained it was very unlikely that investment through a personal pension arrangement would produce these annual returns. It also highlighted that if Mr L were to take the same level of income as the scheme pension through drawdown, increasing each year in line with RPI, the funds would run out by the age of 79.

The report went on to recommend the transfer, however, on the basis that Mr L would prefer flexibility of access from 55, and to leave a legacy fund for his family.

Sense recommended that Mr L transfer into an AJ Bell Investcentre SIPP, to be 100% invested into their model portfolio Clear Cut Model Portfolio 4C, the reasons given being that this portfolio was compatible with his attitude to risk, along with its performance.

The charges associated with the transfer were:

- Initial advice charge of £5,683.07
- 0.5% annual ongoing advice fee
- Total Expense Ratio (TER) of 0.9% a year
- AJ Bell annual custody fee of 0.2% a year

The AJ Bell illustration dated 13 September 2017 was dated to an assumed retirement age of 75. The growth rates in their projection to 75 years old was broken down between a 1% holding in Cash and 99% in 'funds and shares'. For the funds and shares the projected growth rates were -0.49% low growth, 2.44% medium and 5.37% high growth.

Mr L accepted the recommendation to transfer.

Mr L then received a letter from the Financial Conduct Authority informing him he may have not been correctly advised about his BSPS pension, and as a result of this he raised a complaint.

Sense declined to uphold the complaint, however. Dissatisfied with the response, Mr L referred the matter to this service.

Having considered the complaint, our investigator thought that it should be upheld. He said the following in summary:

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests.

- Although it was recorded that Mr L liked the idea of having flexibility in income withdrawals, and also wished to withdraw tax free cash at age 55, there was no record of an objective relating to the latter. And Mr L had said that there was no specific need for the capital, e.g. the mortgage would in any case be repaid by the end of 2024.

- Mr L had said that he would like the option of retiring at 60, but would likely continue working beyond this if he was still able. And so the investigator queried as to why Mr L was advised to transfer that that time. Although Mr L may had views and ideas on taking his income flexibly, these should have bene challenged by the adviser, given the risks posed to his financial security by relinquishing the guarantees within the scheme.

- The pension transfer report made no mention of the 12 years' accrual in the defined contribution scheme by age 60, as well as the £29,000 in the Fidelity pension plan.

- Whilst not of sufficient size to support his entire income need at retirement, these assets could provide the flexibility Mr L sought, for example taking tax free cash at 55 if required, whilst retaining the BSPS guaranteed benefits.

- By waiting until nearer to Mr L's retirement, he could then decide whether transferring was the right decision for him.

- But there was no compelling case for Mr L needing to access his pension benefits flexibly, or at last in a different way to that offered by the scheme.

- Whilst it was understandable that Mr L wanted to leave a lump sum to his family in the event of his death, a pension was designed to primarily support the individual in retirement. But no details of the family's needs in terms of a lump sum were recorded, and his partner may have had their own pension arrangements to rely upon. Alternatively, if a lump sum was important, then a term assurance plan could have been investigated.

- The critical yields needed to match the scheme benefits at 14.59%, 9.56% and 7.82% to ages 50, 60 and 65 respectively were unlikely to be achieved, even with Mr L's recorded risk profile. And to make the transfer worthwhile, these would need to be exceeded.

- The advice had been given during the period that this service was publishing information with which businesses could calculate future "discount" rates for cases which were being upheld and required redress calculations.

- Whilst businesses weren't required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.

- The discount rate was 4.4% pa for the period up to Mr L's normal retirement date (65), and 4.1% up to age 60.

- The mid band growth rate within the SIPP projection was 2.44%, with the higher rate band being 5.37%, and so both of these were also well below the required critical yields to match the scheme benefits. These were also set to age 75, rather than 65 or 60. It was unlikely that those for the lower ages would have been any closer to the required critical yields.

- The critical yield was important in determining whether Mr L's pension would be worth more or less in line with his attitude to risk, as per COBS 19.1.7. But there were no indications that, even with Mr L's attitude to risk, there would be sufficient returns to match the BSPS income.

- Mr L wouldn't have transferred, had he understood the associated risks and impact of the transfer. He had limited investment experience, but all of his investments were now dependent on risk based exposure.

- There were no explicit charges for Mr L in the BSPS, but those which would have been levied on the SIPP would have also impacted his retirement plans.

- Had Mr L been advised to transfer to the BSPS 2 instead, he would have benefitted from a secure, escalating pension, whether or not he retired early. That guaranteed income would have been supplemented by the state pension at a later date, and any shortfall in between could have been met by accessing his defined contributions plans. This would also have given him the flexibility the report said he required.

The investigator recommended that Sense undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr L would have opted to join the BSPS 2.

He said that any redress should in the first instance be paid to Mr L's pension plan, but if this wasn't possible, it should be paid directly to Mr L, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

He also said that Sense should pay Mr L £300 in respect of the distress and inconvenience the matter would have caused him due to the realisation that he's lost out on valuable guaranteed benefits.

Mr L made no further comment on the investigator's conclusions, but Sense said the following in summary:

- Its adviser fully took on board the guidance relating to the presumed unsuitability of a transfer, unless it could be clearly demonstrated otherwise.

- It accepted certain elements within the investigator's assessment, such as delaying the decision to transfer until closer to retirement, but it was important to take into consideration the analysis conducted in this regard with a balanced view of Mr L's circumstances and objectives.

- Had Mr L's sole reason for transfer been flexibility in accessing his pension benefits, it wouldn't have recommended the transfer. But there were other considerations and core objectives, as follows:

    - Provision for spouse's and dependants' pension (Mr L wasn't married to his partner)
    - Lump sum death benefits upon his death before retirement
    - The facility to retire early
    - Tax free lump sum at retirement
    - To increase the pension
    - The security of the pension

- It was unclear as to how the investigator had learned that Mr L had inherited £125,00 from his father's estate. The information it held indicated that Mr L's father was still alive.

- Whilst it acknowledged the point about pension funds being primarily for the individual, it asked whether it was expected that it disregard Mr L's longstanding partner's financial security by ignoring a core objective and simply consider him. It said that it would expect its adviser to consider the circumstances of both Mr L and his partner.

- It had checked the scheme booklet and the rules relating to Mr L's partner's potential entitlement in the event of his death, but this precluded the usual spouse's entitlement.

- Mr L's partner didn't have their own pension provision, other than the state pension. Sense's research had established this.

- A term assurance policy would have been for a fixed term, rather than the whole of life policy which was more appropriate here, and was discounted due to costs.

- Mr L had death in service benefits of four times' his salary and it ensured that his partner was the nominated beneficiary. A term assurance policy would only have provided short term benefits, but it wouldn't have provided an income for the rest of his partner's life, as per the objective.

- Life cover options were extensively researched and discussed with Mr L. But he had medical conditions and concerns about his life expectancy with a family history of other illnesses. This needed to be considered as part of the advice.

- The adviser repeatedly highlighted and explained the risks associated with the transfer – Mr L was placed in a fully informed position and made his decision based upon his objectives for the lump sum death benefits and the flexibility – specifically accessing his fund as and when he wished.

- Mr L hadn't engaged with in its initial investigations, and hadn't responded to requests for further information. Mr L had also received regular reviews from its appointed representative since the transfer but had never suggested that he was concerned he may have received unsuitable advice.

- Had Mr L switched to the BSPS 2 or the PPF, and died, his partner would only have received the death in service benefits and the small amounts in the defined contributions schemes. Given his relationship status with his partner, this wouldn't have been sufficient to sustain them in later life.

- A cashflow analysis was undertaken with Mr L which considered a number of scenarios, and this continued to be used with him to demonstrate evolving retirement income strategies.

- After it had issued its final response letter, Mr L indicated that he was happy with the advice which had been given, but knew that a number of colleagues had received compensation. Sense suggested that this was the reason a complaint had been made.

- It was unclear as to whether the ongoing advice and review of Mr L's retirement strategy had been considered. The content of the discussions recorded on the file contradicted those which had been supplied to this service.

- It acknowledged that there were some minor discrepancies on the files, but these were inconsequential to the advice and objectives which had been taken into consideration when providing that advice to Mr L.

The investigator wasn't persuaded to change her view, however, and so confirmed to both parties that the matter would be referred to an ombudsman for review.

The investigator then informed Sense that she'd enquired of Mr L as to whether, if the complaint was upheld, his preference would be to have a loss calculation undertaken on the existing basis, or to await the new methodology for defined benefit transfer redress calculations.

As far as I can tell, Mr L didn't express a preference.

The (new) investigator then wrote to both parties to confirm that the FCA had developed a BSPS-specific redress calculator to calculate redress for cases which were included in the BSPS consumer redress scheme. But, he said, the FCA was also encouraging businesses to use the calculator for non-scheme cases.

The investigator further said that, when issuing my decision, I may require Sense to use the FCA's BSPS-specific calculator to determine any redress due to Mr L.

The investigator said that, if either party didn't think it was appropriate to use the BSPS-specific redress calculator in the circumstances of Mr L's complaint, they should let him know by 6 June 2023. In response, Sense confirmed that it would use the BSPS-specific calculator.

The complaint has now been referred to me for review.

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.

And having done so, I've reached similar conclusions to those set out by the investigator, and for broadly the same reasons.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The applicable guidance, rules, regulations and requirements

This isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business *to "act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time Sense advised Mr L were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Sense, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, Sense needed to gather the necessary information for it to be confident that its advice met Mr L's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

(1) *compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*

(2) *ensure that that comparison includes enough information for the client to be able to make an informed decision;*

(3) *give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*

(4) *take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading *"Suitability"*, COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

I've therefore considered the suitability of Sense's advice to Mr L in the context of the above requirements and guidance.

Sense's rationale for transferring

Mr L wasn't categorised as an "execution only" or insistent client, and Sense was taking him through the advice process. Therefore, Sense could be confident that he would be acting upon its advice.

In accordance with COBS 9.2.2R, fact finding was undertaken for Mr L and his circumstances and objectives were recorded – as I've noted above.

As with the investigator, and as agreed by Sense, I've noted above that the FCA's guidance was that the starting assumption for an assessment of Mr L's options was that a transfer would be unsuitable, unless it could clearly be demonstrated that it was in his best interests in order to meet specific objectives.

And so I'll therefore explore these objectives further below. But initially, I'll consider the advice to transfer from a purely financial perspective – so, in broad terms, how likely was it that Mr L would be better off financially as a result of the transfer.

The financial case to transfer

Sense obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr L's objectives from a financial perspective.

The suitability report was issued before the FCA's revised guidance which was released in late October 2017, and which provided "discount rates" for levels of growth which were deemed achievable for particular time periods until prospective retirement. But before that, similar rates were published by this service. As noted by the investigator, businesses weren't required to reference these when providing advice on transfers, but they would nevertheless have been a useful indicator of the type of investment return deemed feasible at the time.

The discount rate deemed achievable for the number of years left to the scheme retirement age of 65 was 4.4% pa, and to age 60 it was 4.1% pa. And the mid and high band growth rates used to illustrate the benefits which might be payable from a PPP (adjusted for inflation) were 2.44% pa and 5.37% pa respectively

The critical yields to age 65, at 7.82%, to age 60, at 9.56%, and to age 50, at 14.59% therefore comfortably exceeded both the discount (or growth) rate deemed achievable over the same periods, and both the mid and high growth rates used by the pension provider – the latter of which (or somewhere in between) might perhaps be a reasonable assumption for an "moderate to adventurous" risk investor.

Sense itself said it considered the critical yields to likely be unachievable, and I agree - I think it's more likely than not that the critical yields were in fact unachievable, year on year, for the number of years that Mr L had until he reached either early or normal retirement age. And as a reminder, these growth rates were required to just match the scheme benefits.

Sense said that, if Mr L took the same income which would be provided by the scheme at age 60, his transferred pension funds would likely run out by age 80, and that if he took the same income at age 65, it would run out by age 81. If Mr L took the same income from age 55, this was projected to run out by age 79. This, it said, compared to the average life expectancy of someone of his age of 86.

I've also noted, in Sense's response, that it said one of Mr L's objectives was to increase his pension. But this wasn't a realistic outcome, as evidenced above. It was unlikely that the overall income benefit provided by the scheme could be matched, let alone bettered, through transferring.

From a financial perspective, there needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, the guidance was that it needed to be clearly demonstrated that the transfer would be in Mr L's best interests. As such, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Mr L would be relinquishing.

But the feasibility of achieving a critical yield alone wouldn't in any case indicate suitability of a transfer, as set out in COBS 19.1.7B.

The requirement for control and flexibility - and early retirement

Before I assess these objectives in greater detail, I think it's firstly fair to say that Sense did provide warnings on the guarantees which would be relinquished, but as Sense will be aware, and as noted by the investigator, risk warnings alone wouldn't render unsuitable advice suitable. And irrespective of the detail contained in a recommendation report, this also wouldn't make otherwise unsuitable advice suitable. Sense needed to be satisfied, before providing its recommendation, that relinquishing the guarantees and taking the investment risk was a suitable course of action for Mr L.

As I've said above, part of Sense's reasoning for the recommended transfer, despite the likely inability of the transferred benefits to match those which would have been produced by the scheme, was that Mr L required flexibility of income due to his particular circumstances and objectives. And so I've given this argument careful consideration.

I'd initially say that, even without investment experience or other significant assets, I do acknowledge that Mr L may have understood the principle of risk/reward which would be associated with flexible income drawdown, and that there may have been discussions around such concepts with colleagues who were going through the same process.

I also think it's possible that Mr L had a "moderate to adventurous" risk rating, given his age and number of years to retirement – although I would caveat that with his somewhat limited investment experience.

But I don't think Mr L in any case needed to take the associated risks here. In terms of the "control and flexibility" argument, I understand that this would be that Mr L would have control over his pension funds, outside of the BSPS, and could alter the income he withdrew from a flexi-drawdown arrangement to satisfy changing income needs.

But as noted above, by age 65, Mr L would have accrued around 17 years' worth of defined contributions in the replacement scheme, or 12 years by age 60. Given the likely value of this separate pot of money on the basis of the employer and employee contribution rates, this could be used to plug any gaps between him starting to take flexible benefits and his OPS/state pension beginning. It's possible that he could have relied on the proceeds of his defined contributions plan for flexible access to pension benefits, and then taken guaranteed benefits from either the BSPS 2 or the PPF as and when needed.

Alternatively if, on the basis of an income requirement which outstripped this over the years from whatever age Mr L chose to retire (if early) left to age 65 – although I would say that I don't think the actual income requirement was demonstrably known at the time of advice, or could in any case reasonably have been known with any certainty given his distance from retirement - Mr L could then have begun to take the scheme benefits early if needed.

Mr L would have been able to choose a tax efficient level of income (or lump sum withdrawals if he later decided he wanted them) through the defined contribution accrual, until the point that he either needed, or chose, to begin taking benefits from either the BSPS 2 or the PPF. And so any need for flexibility of income could have been addressed in this way.

Mr L may then have been in the fortunate position of receiving an income which was higher than his actual needs, especially when the state pension began, but he could have simply reinvested any excess as he saw fit, or, to provide a legacy for his partner or children, immediately gift it away to avoid it being subject to inheritance tax.

Sense said in the suitability report that Mr L was willing to accept the trade-off between a secure income and investment risk to achieve his objectives. As I've said above, although Mr L didn't have any particularly extensive financial experience, I think he may have understood the principle of risk/reward, and risk warnings were provided by Sense.

But as I've noted above, Mr L was accruing further benefits in his defined contribution scheme, and given the likely accumulation of funds in that scheme, compared against the benefits accrued in the final salary scheme, at the normal scheme retirement age, around 17 years of his pension accrual at age 65 (or 12 at age 60) would likely be derived of the defined contribution scheme. As such, Mr L would already by necessity have been taking investment risk through the replacement scheme.

In light of this, and given that in the 20 years up to that point Mr L had been accruing defined benefits, I think the guarantees attached to those defined benefits would have been of considerable value and shouldn't have been relinquished lightly in favour of flexibility which, as far as I can tell, was loosely defined around the possibility of early retirement – albeit the actual likely decision making around this was some years distant.

Although not specifically mentioned in the suitability report, as with others in his position, I think it's fair to say that Mr L may have been concerned about the future of the BSPS and his associated benefits. And I appreciate that there will be instances where a client seeks financial advice with preconceived notions or concerns about the financial health of an employer or pension scheme.

But there was no prospect of the BSPS funds being lost to the employer. Further, the whole point of the BSPS consultation, which had resulted in the agreement being announced in August 2017, had been to avoid the necessity of the BSPS pension funds entering the PPF, and by the point of the advice (and in fact by the point of the "Time to Choose" exercise) the BSPS 2 seemed more likely than not to be a viable alternative.

There were still conditions which still needed to be met for the BSPS 2 to be established, but when the advice was given, there was no imminent prospect of the BSPS entering the PPF without there being an alternative to this – the BSPS 2. In fact, I think it's reasonable to say that all indications were to the contrary.

The prospect of Mr L's accrued benefits needing to enter the PPF, and so there being a 10% reduction in benefits payable, had receded. But even if this remained the more likely outcome, this would still have provided him with valuable benefit guarantees, and a more favourable early retirement reduction if he did in fact take scheme benefits earlier than age 65.

Mr L therefore didn't need to make any decisions about transferring out his defined benefits at that point. And I've noted that Sense also accepts that point, albeit with caveats around the death benefits, which I address below. The prospect of Mr L's accrued benefits needing to enter the PPF had receded. But even if this remained the more likely outcome, this would still have provided him with valuable benefit guarantees, and a more favourable early retirement reduction if he did in fact take scheme benefits earlier than age 65.

Mr L's plans, including retirement, may in any case have changed significantly in the 12 intervening years between then and him reaching age 60, or 17 years to age 65. Any flexibility requirements could have been addressed nearer to, or at, the point of Mr L's retirement – and Mr L would have been able to transfer out of the BSPS 2 if needed.

There may have been lower CETVs offered in the future if gilt yields and other market factors changed, but for the reasons given, I think that Mr L could have achieved a degree of flexibility with his pension benefits without needing to transfer at all. And even if he did ultimately decide that flexi access drawdown was his preferred option – and again, this could have been established closer to his actual retirement age – Mr L or his adviser could then assess at that point whether the transfer represented good value.

And so on the basis of what I've said above, it follows that I don't think the mooted possibility of early retirement, or any other requirement around control over, and flexibility of, income, was sufficient reason for Mr L to transfer his deferred benefits.

Death benefits

I think this is arguably the mainstay of Sense's argument for the suitability of the transfer. And so I've carefully considered what Sense said in the suitability report about the different format of the death benefits being appealing to Mr L, given his relationship status, and indeed what Sense has said in response to the investigator's assessment.

And it's fair to say that, if Mr L remained unmarried, the death benefits offered by the transfer would likely be more beneficial to Mr L's partner, given the scheme rules.

The investigator made the point that accrued pension provision is intended to provide for an individual's retirement rather than a desire to leave a legacy in the form of a lump sum. And in general terms I'd agree - the recommendation needed to be given in the context of Mr L's best interests, and any dependent children would in any case receive a dependant's pension from the scheme until leaving full time education.

But I do acknowledge the point about Mr L's partner, and the lack of their own pension provision in the event of Mr L's death. However, as longstanding partners, who'd had children together, they would of course also likely have had a joint vested interest in Mr L's security in retirement, especially if Mr L's partner had no private pension provision of their own.

So there was a financial trade off to be considered between the likelihood for Mr L and his partner to be able to benefit from the higher guaranteed income than would be received by way of a transfer, for a reasonable number of years, and the prospect of Mr L's partner being able to benefit from a lump sum payment in the event of his death.

In my own consideration of this, I've firstly noted that Mr L was recorded as being in good health. And other than a medical condition which was being managed by medication, he had no health issues which might mean that death benefits, or any likelihood to not benefit from a pension income derived of the scheme for a reasonable amount of time, were of concern at that point.

If Mr L died whilst still employed, his partner would have received the death in service benefit, at four times' his salary, plus a return of his defined contributions up that point. That would have amount to around £180,000, plus his defined contributions, in addition to the fund value of his defined contributions, plus the value of his Fidelity pension plan. Dependent upon what point before retirement this occurred, Mr L's partner could therefore in any case have received comfortably in excess of £200,000 as a lump sum.

By age 60, with 12 year's defined contributions, and assuming modest fund growth and salary increases of 2% pa, Mr L would have likely accrued around £110,000. At age 65, this would be in the region of £170,000. And there was also a guaranteed payment period of the full pension for five years. As at the date of leaving, this was around £14,000 pa, and so would have provided a further (at least) £70,000, in addition to the then fund value of the Fidelity plan.

And all of this of course precludes the possibility that Mr L and his partner may have married in the interim. There was no recorded prospect of that at the time of the advice, and so I haven't factored this into the above assessment, but given the number of years to retirement, and the benefits to be gained by retirement age for Mr L's partner if they still had no pension provision of their own, I don't think it can necessarily be ruled out as a possibility. People do marry for financial benefit.

An analysis of a whole of life policy to make up the difference in terms of the lump sum benefit for Mr L's partner had been undertaken, and discounted on the basis of cost, but again, given the likely value of Mr L's defined contributions plans by retirement age which could have been used to fund such a plan, if he remained unmarried and his partner still had no pension provision of their own, then this is something which could have been revisited at the time.

I therefore think that Mr L more likely than not had an entirely understandable desire to leave a financial legacy for his partner, who would at the time of the advice have been dependent upon his pension provision, but given the other sources of lump sum payments, in addition to the mortgage scheduled to be repaid by 2024, I don't think the lump sum which would have derived from transferring was essential, and certainly not to the extent that it would justify Mr L compromising the security of his own, and his partner's, financial future whilst still living.

So for the reasons given, I don't think the prospect of a lump sum benefit by way of transferring his defined benefits constituted sufficient reason to transfer and lose otherwise valuable guaranteed benefits for Mr L personally, and his partner.

What should Sense have done – and would it have made a difference to Mr L's decision?

There were understandably concerns relating to the BSPS at the time of the advice - and I fully acknowledge this. It's fair to say that this was a period of great uncertainty for individuals such as Mr L. But this only serves to emphasise the need for a balanced assessment of the options available and, ultimately, suitable advice.

Furthermore, as I've also said above, there was no need for Mr L to make any decision about his BSPS benefits at this point in time and it was the responsibility of Sense to explain to Mr L why he didn't need to make any irreversible decision on relinquishing valuable scheme pension guarantees at that time. As I've said above, there was no imminent prospect of Mr L's scheme benefits needing to enter the PPF, which would have ruled out a later transfer. On the contrary, whist I acknowledge it wasn't at that point guaranteed, I think the indications were that the BSPS 2 would more likely than not be successfully implemented.

I’ve also thought very carefully about whether the service provided to Mr L was a balanced appraisal of the options available to him. Mr L, amongst many others in a similar position, may have been concerned by developments relating to his employment and the BSPS, but he was nevertheless entitled to an impartial review of his options.

And looking at those options, especially relating to flexibility and lump sum death benefits, I don’t think enough weight or consideration was given to the means, such as the defined contributions plans, as set out above, of providing for Mr L’s partner beyond the benefits which might be payable from the scheme.

For the reasons given above, I don’t think the perceived advantage of flexibility and control of income outweighed the guaranteed benefits in the scheme, and I’m satisfied that Mr L’s income needs could likely have been met by well-planned access to his different types of accrued benefits by the time he came to retirement. The available evidence simply doesn’t support the position as to why control or flexibility would have been sufficiently compelling reasons for Mr L to relinquish 20 years’ valuable benefit guarantees – especially at the age of 48.

Albeit not specifically mentioned in the suitability report, any concerns Mr L may have harboured about the existing scheme could have been successfully allayed, such that he appreciated the important guaranteed benefits, even under the PPF, which he would be relinquishing for the sake of income flexibility which he simply didn’t need or could in any case access in other ways, and a future pension which would, other than the state pension from age 67, be entirely dependent upon investment returns – rather than being partially dependent upon them as would otherwise have been the case through the defined contribution scheme.

Tax free cash for whatever purpose would have been available both from his accrued defined contribution and defined benefit pension funds. Death benefits beyond the five years’ guaranteed payment period were also payable from the defined benefit scheme, should Mr L’s relationship circumstances change in the future, albeit in a different format from those available from the SIPP.

The critical yield is usually a telling indicator of the value of the benefits being relinquished. As I’ve set out above, the critical yields were higher than the discount rate and the mid (and higher) band growth rate set out by the pension provider. And I’d reiterate that I think it was unlikely to be achievable, year on year, to even simply match the scheme benefits, as also noted by Sense.

Taking account of Mr L’s circumstances, including his recorded attitude to risk, his objectives and the guarantees which the BSPS offered and would have persisted with either the BSPS 2 or the PPF, my view is that Sense should have advised against the transfer.

And I think that, had this happened, Mr L would have followed that advice and not transferred his benefits to the PPP.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to a clear conclusion – that the recommendation to transfer wasn’t suitable for Mr L, nor was it in his best interests. The key contributing factors here are: the lack of a comprehensive and balanced portrayal of Mr L’s options and the future benefits available from both the BSPS defined benefits and defined contributions – a failure to adhere to COBS 19.1.2 (2) and 19.1.8.

Furthermore, at least three of the key benefits sought by Mr L were available without needing to transfer – possible early retirement and flexibility through utilising the different types of scheme benefits which would have been available to him, along with lump sum death benefits through the other means available, both before and after retirement.

My view is that, taking account of the critical yields, and even Mr L's recorded "moderate to adventurous" attitude to risk with regard to his pension funds, and matching that with the likely corresponding investment returns, it was unlikely (as also indicated by Sense), albeit I acknowledge, not impossible, that the benefits available from the BSPS, or a successor scheme, could be bettered through the transfer.

As the other reasons for transferring were insufficiently compelling, when considered against the valuable benefits being relinquished, as set out in COBS 2.1.1R and the guidance of COBS 19.1.6, Sense would - or should - then have drawn, and conveyed, the conclusion that transferring wasn't in Mr L's best interests.

Putting things right

As set out in the investigator's further comments relating to the BSPS-specific redress calculator, I consider that it would be appropriate to use that calculator here, given the BSPS-specific circumstances.

A fair and reasonable outcome would be for the business to put Mr L, as far as possible, into the position he would now be in but for the unsuitable advice.

In terms of the option Mr L would have chosen, had he been suitably advised, I've noted that there would be a 10% reduction in the starting pension entitlement within the PPF, whereas the BSPS 2 wouldn't cut the starting entitlement for deferred members.

Regarding death benefits, under the BPSP 2 the spouse's pension would be set at 50% of Mr L's pension at the date of death, and this would be calculated as if no lump sum was taken at retirement. But as Mr L was single at the time, and unless he had undisclosed plans to marry, I don't think this particular enhancement over the PPF benefits would have had much resonance for him at that time.

The reduction for early retirement under the PPF was lower and the commutation factors for the tax free cash entitlement were also slightly more favourable. And so, on the basis of prospective early retirement, both the starting income and the tax free cash would likely have been higher with the PPF.

One of Mr L's recorded objectives was the possibility of being able to retire early. And so this would have been a point which required careful consideration when weighing up whether he should opt for the BSPS 2 or remain in the BSPS with a likely subsequent move into the PPF.

But for the reasons set out above, even if Mr L envisaged retiring early, I think it's likely that, properly advised, he could have accessed his defined contribution scheme benefits to make up any income shortfall in the period between retirement and starting to take his defined benefits, which could then have been deferred until normal scheme retirement age. The advantages of early retirement through the PPF wouldn't therefore have applied.

And so, for the reasons given, my view is that it's the benefits offered by the BSPS 2 which should be used for comparison purposes.

I therefore consider that Mr L would most likely have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given. And as I've set out above, given the amount of time left to retirement, I don't think it could be assumed that Mr L would take his defined benefits before age 65, especially with the possibility, as outlined above, of accessing his accrued defined contributions flexibly if required.

Sense Network Limited 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.

Sense Network Limited 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 L and our service upon completion of the calculation.

Mr L hasn't yet retired, and I'm unaware that he has any plans to do so early 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 L'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, Sense Network Limited should:

- calculate and offer Mr L redress as a cash lump sum payment,

- explain to Mr L before starting the redress calculation that:

  - its 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 their redress prudently is to use it to augment their defined contribution pension

- offer to calculate how much of any redress Mr L receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr L accepts Sense Network Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr L for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr L's end of year tax position.

Redress paid to Mr L as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses 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 L'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 £160,000, 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 £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Sense Network Limited to pay Mr L the compensation amount as set out above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I would also recommend that Sense Network Limited pays Mr L the balance.

If Mr L accepts this final decision, the award will be binding on Sense Network Limited.

My recommendation wouldn't be binding on Sense Network Limited. Further, it's unlikely that Mr L could accept my decision and go to court to ask for the balance. Mr L may want to consider getting independent legal advice before deciding whether to accept my final decision.

As with the investigator, my view is that this matter will have caused Mr L a not inconsiderable amount of concern about his security in retirement. As such, I agree that Sense Network Limited should also pay Mr L £300 in respect of this.

My final decision

My final decision is that I uphold the complaint and direct Sense Network Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 8 November 2023.

Philip Miller
Ombudsman