DRN-4199571

The complaint

Mr B complains about the advice given by Sterling Trust Professional Ltd ('STP') to transfer the benefits from a defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS'), to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr B is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr B.

What happened

Mr B held deferred benefits in the BSPS from a period of employment between 1989 and 2013.

In March 2016, Mr B's former employer announced that it would be examining options to restructure its business including decoupling the BSPS (the employers' DB pension scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved pension 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.

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

The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after. Updated transfer valuations were then provided by the BSPS trustees to qualifying members, reflecting the improved funding position – with the cash equivalent transfer value ('CETV') of Mr B's pension being £532,859.75.

Mr B approached STP in September 2017, for advice about his deferred pension.

STP completed a fact-find to gather information about Mr B's circumstances and objectives. It said he was 46, in good health, employed, separated from his partner and had two dependent children. His income was recorded as exceeding his outgoings. And in addition to the benefits he held in the BSPS, Mr B was noted as being a member of his new employer's pension scheme.

STP said Mr B was interested in transferring away from the BSPS for greater flexibility and to have control of the death benefits the pension provided. STP said Mr B hoped to retire at age 55.

STP also carried out an assessment of Mr B's attitude to risk, which it deemed to be 'lowest medium' or four on a scale of one to ten, with one being lowest risk and ten highest. This assessment said the target portfolio for a 'lowest medium' risk profile investor had an estimated annual growth rate of 1.59%.

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

On 17 November 2017, STP advised Mr B to transfer his pension benefits into a SIPP and use the services of a discretionary fund manager (‘DFM’) to manage his investments, at an ongoing cost. The suitability report, setting out the reasons for this recommendation, said Mr B would like to retire at age 55 and would want to access tax-free cash at that point. It said he liked the idea of having flexibility to vary his income. And he wanted to ensure his pension would pass to his children. STP said, in its opinion the rates of return that Mr B would need to achieve to replace the benefits he would be guaranteed under the BSPS2 or the PPF at age 65, the critical yields, were achievable and sustainable. And it advised him to transfer, predominantly because these returns were achievable.

I understand Mr B accepted STP’s advice and transferred his pension benefits in line with its recommendation.

Mr B complained to STP in 2022 about the suitability of the transfer advice. STP didn’t uphold Mr B’s complaint. It said it thought the advice was suitable.

Mr B referred his complaint to the Financial Ombudsman Service. One of our Investigator’s considered it and said he thought the complaint should be upheld. He didn’t think the critical yield to match the BSPS2 benefits at age 65 was likely to be achieved. And he also noted that STP said Mr B had wanted to retire early, but it hadn’t produced an analysis of the critical yields for that scenario. And these were likely to be higher.

The Investigator didn’t think that STP had done enough to show that Mr B needed flexibility to meet his objectives. And he also considered, given Mr B was some way from retirement, that any plans he might’ve discussed were unlikely to have been finalised. He also didn’t think the alternative death benefits offered by a SIPP meant a transfer was in Mr B’s best interests. And so, he recommended that STP compensate Mr B for any losses caused by the unsuitable advice and pay him £250 for the upset and worry he’d been caused.

Mr B didn’t provide any objections to the Investigator’s findings but noted that his circumstances had recently changed, and he was now married.

STP didn’t agree with our Investigator’s assessment of the complaint. It said it wasn’t required to guarantee that the transfer would be in Mr B best interests. Instead, the adviser was simply required to take reasonable steps to ensure the advice was suitable for him. STP said the Investigator had used a significant degree of hindsight, which it thought was unreasonable and that he had placed too much weight on the critical yield. STP added that it still believed that the advice was suitable, and it said Mr B had made an informed decision to proceed with the transfer, which the Investigator hadn’t considered.

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

What I’ve decided – and why

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

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

Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

I've set out below some of the key pieces of the rules and regulations that applied at the time of the advice. This is not a comprehensive list of the rules and regulations which applied at the time but provides useful context for my assessment of STP'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

STP says that its adviser was only required to take reasonable steps to ensure the advice was suitable for Mr B. I agree that under COBS, STP was required to take reasonable steps to ensure that its personal recommendation to Mr B was suitable for him (COBS 9.2.1). But it was also required, under COBS 2.1.1R to ensure it acted in accordance with his best interests. And, as I've mentioned above, additional regulations and guidance apply to advising on transferring out of DB schemes. These say that the starting assumption for a transfer from a DB scheme is that it is unsuitable. And that STP should only have considered recommending a transfer out of the scheme if it could clearly demonstrate that the transfer was in Mr B's best interests (COBS 19.1.6G). And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

- The transfer value analysis ('TVAS') report, that STP was required to carry out by the regulator, said that the critical yield to match the full pension Mr B would have been entitled to under the BSPS2 at age 65 was 5.17%. To match the benefits the PPF would've provided from age 65 the critical yield was said to be between 3.97% and 4.35%.

- Even though STP said Mr B was interested in potentially retiring early, around age 55, it didn't calculate the critical yields required to match the benefits the BSPS2 or PPF would've provided at early retirement. And despite also saying in the suitability report that Mr B would look to access lump sums from his pension at retirement, it also didn't calculate the critical yield to match the tax-free cash and reduced pension the BSPS2 would provide, either at age 65 or for early retirement. I think this is a failing on STP's part. These calculations could've been undertaken. And without this, Mr B wasn't provided with complete information. So, he wasn't in a fully informed position. Nevertheless, I've thought about the analysis that was completed.

- STP has said the Investigator placed too much reliance on an analysis of the critical yield. However, the regulator required STP to calculate this and consider the cost of the guarantees being given up. So, I do think an analysis of the critical yield is a relevant consideration here. And STP said in its recommendation that the reason it was advising Mr B to transfer his benefits *was "predominantly based on the fact that we believe the critical yield of 5.17% per annum is likely to be an achievable and sustainable return"*. So, despite what STP has since argued, this was clearly a key reason for its advice at the time.

- 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 at the time for 22 years to retirement – applicable if Mr B retired at age 65 – was 4.5%. I think it's also worth noting the discount rate for retirement at age 55 was 4%.

- There would be little point in Mr B giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme given the additional risk this involved. By transferring Mr B would have to pay annual fees and charges for the personal pension, which would reduce any gains the funds made. Those are not charges he would have had to pay if he didn't transfer. And even if the critical yield was achieved consistently year on year, it would only enable him to replicate what was being given up.

- I've thought about the discount rates, Mr B's 'lowest medium' attitude to risk and the regulator's low and medium standard projection rates at the time of 2% and 5% respectively. And I've also considered the information in the risk assessment STP produced, which said the estimated potential annual growth for a portfolio matching Mr B's risk profile was 1.59%. I note that STP referred to past performance of the DFM and pension being recommended. But as it will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward. Having considered all of this, I think there was limited scope for Mr B to improve on the benefits the PPF would've offered from age 65 and, if there was an extended period of poor performance or his investments suffered losses, he could well have been being worse off. And I think he was always likely to receive benefits of a lower overall value than the benefits the BSPS2 would've provided. So, I don't agree that the critical yield of 5.17% was likely to be achievable and sustainable, or that a transfer was in his best interests, based on this yield.

- I also think, if retiring earlier than the normal scheme retirement age was a genuine objective, Mr B was even more likely to be worse off. That is because the critical yield at a younger age was likely to be higher given benefits would have to be paid for longer and the investment horizon to retirement was shorter.

- STP said Mr B was interested in flexibility and wanted to retire early, with age 55 being mentioned. But STP's role wasn't that of an order taker or wish fulfilment. It was to give Mr B objective advice about what was in his interests. And as I've explained it failed to undertake any analysis of the benefits that Mr B could've obtained under the BSPS2 or the PPF if retiring early – which was an option he had. And I also think there is insufficient evidence of analysis having been done to support that Mr B needed to transfer in order to meet his objectives.

- STP suggested in the suitability report Mr B would want to access lump sums at retirement. But there was no purpose that would require access to tax-free cash recorded.

- There is a suggestion in the fact-find that Mr B thought he might need an income of £30,000 per year in retirement. But I can't see that this was broken down, analysed or challenged at all. Based on the benefits the BSPS2 and PPF were projected to provide at age 65, and the fact if Mr B took them early actuarial reductions might apply, they appear unlikely on their own to have been enough to meet this level of income. But I also can't see that there was anything that supports the pension fund would be able to sustainably meet that income requirement following a transfer, if that objective was genuine.

- In response to the Investigator's opinion, STP said we didn't account for the fact that Mr B was building pension benefits with his new employer. But I can't see that STP analysed the other pension benefits Mr B was accruing either. I haven't seen evidence of anything having been recorded about the value of this pension or what it would be projected to provide at retirement. Nor does STP seem to have considered whether a combination of these other benefits Mr B was accruing and the guaranteed benefits he'd have been entitled to if he remained in his DB scheme, would've enabled him to meet his apparent objectives.

- In any event though, Mr B was only 46 at the time of the advice – some time from actually retiring. While he may have indicated in discussion with STP that he aspired to retire early, I don't think any thoughts he might've had on this were finalised or that his needs were likely to be known with any certainty. I think, when asked, most people would say they would like to retire early. But Mr B's circumstances, objectives or aims could've changed over the years that followed. And ultimately, I think it was too soon for an irreversible decision to transfer out of his DB scheme to be considered in his best interests. Particularly when he had the choice of joining the BSPS2, which would've meant he retained the option to transfer out at a later date if his circumstances required it.

- STP said Mr B wanted control of the death benefits his pension would provide. And a SIPP would offer lump sum death benefits, that could potentially be passed to his children. But Mr B was still relatively young and in good health, so there was no reason to believe he wouldn't be reliant on his pension to meet his own needs in retirement – which is a pensions primary purpose, not to provide a legacy to the holder's estate. His circumstances also could've changed, meaning the death benefits the existing scheme provided – a spouse's pension - could've still become useful. And indeed, he has confirmed this has occurred.

- Also, while the CETV figure would no doubt have appeared attractive as a potential lump sum, the amount remaining on death following a transfer was always likely to be different. It would be subject to market risks and fluctuations and would be reduced by any income Mr B took during his lifetime. So, the pension may not have provided the legacy Mr B might've thought it would.

- Overall, I don't think different death benefits available through a transfer meant it was in Mr B's best interests. And ultimately STP should not have encouraged Mr B to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

- I can't see that Mr B had an interest in or the knowledge to be able to manage his pension funds on his own. And the recommendation seems to have been based on a DFM managing it on his behalf – at additional annual cost.

- And although Mr B may've had concerns about what was happening with his deferred benefits, I don't think this meant a transfer was in his best interest. There had been a number of key announcements that all pointed toward the BSPS2 being established. Which was expected to provide better benefits than the PPF and still gave Mr B the option to transfer closer to retirement. And STP's recommendation looked at the benefits the BSPS2 would've provided So, based on what had happened to that point, I think the relevant parties, were confident the BSPS2 would go ahead. But even if this hadn't happened, the PPF still provided Mr B with a guaranteed income and the option of accessing his benefits early. So, entering the PPF was not as concerning as Mr B might've thought at the time.

Overall, I can't see persuasive reasons why it was clearly in Mr B's best interest to give up his DB benefits and transfer them to a personal pension.

STP says that Mr B made an informed decision to transfer and that he wrote a handwritten letter confirming he wanted to proceed. But the letter which Mr B sent doesn't reference why he wanted to transfer and rather just says he wants to go ahead having read STP's recommendation – so was sent after he'd already been advised to transfer. So, while I can see that STP did give information about some of the risks involved in a transfer, when it made its recommendation, ultimately it advised Mr B to transfer. I think he relied on that advice. And I haven't seen anything to persuade me that Mr B would've insisted on transferring, against advice by STP, a professional adviser whose expertise he had sought out, to remain in the DB scheme.

As a result, I'm upholding this complaint as I think the advice Mr B received from STP was unsuitable.

STP recommended that Mr B use a DFM to manage his pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr B should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage his funds if suitable advice had been given.

While early retirement was referenced in the advice, as I've explained, I think Mr B's plans were unconfirmed. So, I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF. And by opting into the BSPS2, Mr B would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think, had he received suitable advice not to transfer, Mr B would've opted into the BSPS2 – which I'm satisfied was an option for him.

Our Investigator recommended that STP make a payment for the distress caused to Mr B. Mr B received advice from STP in November 2017. He first complained about that advice in 2022, after speaking to his professional representative. I haven't seen anything that suggests the advice caused him ongoing distress during that period as the first indication he potentially had any concerns about the advice seems to have been when he first discussed matters with his representative. Nor can I see he's been caused any significant inconvenience in that time. And indeed, his representative has brought his complaint for him, so the impact of having to make a complaint – which I wouldn't usually recommend compensation for anyway – has also been minimal.

Nevertheless, I do accept Mr B may potentially have been worried to find that the advice might not have been suitable for him, particularly given the circumstances under which he first asked for this advice, when there was a lot of uncertainty regarding the pension scheme. As Mr B's BSPS benefits were likely to be important to his longer-term financial planning, I think finding out about this potential issue has likely caused him some concern. Which wouldn't have occurred but for the advice that is the subject of this complaint. So, in the circumstances, I think the recommended award of £250 is fair and reasonable.

Putting things right

A fair and reasonable outcome would be for STP to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would have most likely remained in the occupational pension scheme and opted to join the BSPS2 if suitable advice had been given.

STP 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.

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

For clarity, Mr B has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his SIPP
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts STP's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, STP 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 B'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.

In addition, STP should pay Mr B £250 for the distress caused by the disruption to his retirement planning.

My final decision

I uphold Mr B's complaint and require Sterling Trust Professional Ltd to carry out the steps outlined in the 'putting things right' section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 15 January 2024.

Ben Stoker
Ombudsman