DRN-3574857

The complaint

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

Churchill Investments Plc is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to Churchill Investments.

What happened

In March 2016, Mr K'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 K's employer would be set up – the BSPS2.

In around 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 K 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 Churchill Investments which is responsible for providing the pension advice. Information gathered about his circumstances in November 2017 were broadly as follows:

- Mr K was 43 years old, single and in good health. Mr K was living with a close relative but owned a buy-to-let property.
- Mr K earned around £33,000 per year and also earned around £6,300 from his investment property. He had modest debts.
- The cash equivalent transfer value (CETV) of Mr K's BSPS was approximately £378,739. The normal retirement age (NRA) was 65.
- Mr K had also recently joined the TATA defined contribution (DC) pension scheme which had come about as a consequence of the BSPS closing to new contributions.

Churchill Investments set out its advice in a suitability report dated 3 November 2017. In this it advised Mr K to transfer out of the BSPS and invest the funds in a type of personal pension arrangement. Churchill Investments said this would allow Mr K to achieve his objectives. Mr K accepted this advice and so transferred out several weeks later. In late

2021, he complained to Churchill Investments about its advice, saying he shouldn't have been advised to transfer out to a personal pension. However, Churchill Investments didn't uphold his complaint.

Mr K later referred his complaint to the Financial Ombudsman Service. One of our Investigators looked into the complaint and said it should be upheld. They said the firm should carry out a redress calculation.

Churchill Investments eventually changed its approach and agreed to carry out a redress calculation to establish whether Mr K had incurred any loss as a result of transferring. It says it used the FCA calculator (as instructed by the regulator) and that this showed Mr K hadn't lost any money. It says this is because its advice was to transfer to a specific personal pension provider and a specific fund, and that this fund had grown to an extent that meant Mr K could now buy back a similar pension to the BSPS2 and still be better off.

Put another way, Churchill Investments says now that no redress is due.

However, we know Mr K subsequently transferred to a different provider so our Investigator asked whether Churchill Investments had been sent a current pension value when it started to use the BSPS-calculator. It confirmed it hadn't; but instead it had used *a projection* of what it thought Mr K's pension would be worth if he'd remained in the original fund it had recommended. This isn't what the Investigator asked Churchill Investments to do.

So, we can't say that Mr K's pension value now is worth more than what he'd need to buy a pension of similar value to the BSPS2. This is because Churchill Investments doesn't know what his current value actually is. Therefore, there is a dispute about whether any redress is due to Mr K.

As the complaint hasn't thus far been resolved informally, it's time for 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 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.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Churchill Investments' 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, Churchill Investments should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr K'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 K's best interests. I have also carefully considered the final response letter from Churchill Investments. 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 K's complaint.

<u>Introductory issues</u>

I'd like to start by addressing some contextual points made by Churchill Investments. I've noted, for instance, that at various points throughout initially rebutting Mr K's complaint Churchill Investments strongly implied that it was Mr K himself who seemed set on transferring his pension and that he approached the firm with this very much in mind. Examples of this are found in Churchill Investment's original final response letter (22 January 2022) where it refers to Mr Ks *"attitude from the start was how do I transfer, not should I."* It also said, *"he fully understood what he was doing."*

As I've said, Churchill Investments now says it will use the BSPS calculator as recommended by our Investigator, which in my view is a generally positive step. However, for the avoidance of any doubt, it's important to point out that it was Churchill Investments which was the regulated party here, not Mr K. The firm was charging a considerable sum for its advice and Mr K approached it as a relatively inexperienced amateur. So Mr K had every right to expect the advice he would be given was in his best interests and that it came from someone with experience and knowledge of these types of pension situations. To be clear, Churchill Investments recommended that he transfer away from his DB scheme, so it is responsible for that advice.

The second point I'd like to make relates to the events that took place after the transfer and the potential redress that might be due. The transferred funds were subsequently moved by Mr K to another investment strategy several months after the advice. But again, to be clear, it was Churchill Investments' unsuitable advice which enabled the transfer - and the subsequent transactions that took place thereafter - to even occur in the first place. As I'll show below, the suitable advice was for Mr K to move from his existing DB scheme to the BSPS2. And having provided unsuitable advice to transfer to a personal pension arrangement, it is Churchill Investments which is now fully responsible for putting things right.

I trust this clarifies the responsibilities of the firm.

<u>Why I'm upholding the complaint</u>

Because I now know Churchill Investments has agreed to carry out a loss calculation in line with the approach being promoted by the FCA, I therefore don't see the need to address the suitability of Churchill Investments advice to Mr K in quite the same detail as I would normally.

However, I'd like to be clear that I've read everything we have in this case with great care. And I've considered everything both parties have said and presented in evidence. Our Investigator comprehensively set out why they thought we should uphold Mr K's complaint and I fully agree with their conclusions.

Churchill Investments' transfer advice was unsuitable for the following reasons:

- Churchill Investments said that at the age of 65, which in this case was Mr K's NRA, the critical yield (the investment return required to replicate the benefits available to him through the BSPS2) was 6.9%. So, I think this was already showing that by transferring away from the DB scheme, Mr K was unlikely to be able to grow his pension to a degree which made transferring financially viable.

- The relevant discount rate closest to when the advice was given which I can refer to was only 4.5% per year for just over 21 years to retirement (age 65), which is well below all of the critical yield figures I've referred to above.
- I've also kept in mind that the regulator's upper projection rate at the time was 8%, the middle projection rate was 5%, and the lower projection rate was 2%. And Mr K has a low attitude to risk. I've also considered the higher costs associated with a personal pension and that Mr K's limited knowledge of investing would have probably required on-going support and management from a professional adviser. I think these additional costs would have reduced potential growth even further. So, everything I've seen shows – that when viewed from the point of advice – Mr K would likely receive lower pension benefits in the longer term as a result of transferring away from the DB scheme.

- I've also considered some projections Churchill Investments used to help show that if he transferred out to a personal plan, the funds could last Mr K well into retirement. It's fair to say these were not comparing like-with-like. What Churchill Investments was showing Mr K were comparisons with plans which lacked the guarantees and benefits of a DB scheme. These also ran out at certain points, whilst his DB pension was for life.

- I've also seen nothing that showed Mr K required changing how his retirement benefits ought to be paid. He already had a new and more flexible DC pension with his existing job. This DC pension was being significantly contributed towards by both Mr K and his employer. There's no reason why by retirement this DC pension couldn't have contained a significant sum.

- This means I've seen nothing explaining why Mr K wouldn't want to continue membership of a DB scheme and to use that scheme in exactly the way it was originally intended. Indeed, I think that by retirement, whenever it eventually came, Mr K could have been in an agreeable position. On one hand he'd have an existing deferred DB scheme of reasonable 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 scheme was still underpinned by the PPF. On the other hand, he had another DC pension. So, if Mr K ever found he needed any flexibility, then he'd be able to use the latter, rather than transferring away from the former.

- I've also seen no evidence that Mr K had either the capacity or desire to exercise control over his funds. I think he would have found the complexity, scale and responsibility of managing over £378,000 of transferred funds to be onerous in the years ahead. What I've seen tends to show Mr K would have required ongoing financial advice and support, all of which would cost him money which his DB scheme didn't require from him.

- Death benefits (1) - I think the adviser told Mr K that he'd be able to pass on the whole value of a personal pension, potentially tax-free, to anyone that he nominated. So the lump sum death benefits on offer through a personal pension were probably made to look like an attractive feature to Mr K. But this needed carefully explaining; the priority here was to advise him about what was best for his retirement provisions. 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 K had lived a long life there could be nothing left at all in his personal pension plan. It also doesn't appear that Churchill Investments took into account the fact that Mr K could have nominated a beneficiary of any funds remaining in his other DC scheme. He could also have taken out a modest 'term' life insurance policy if he wanted to leave a lump-sum legacy to his adult daughter. So, to this end, Mr K already had options ensuring part of his pension wouldn't 'die with him'.

- Death benefits (2) – Mr K was not married at the time but was already in another relationship and was contemplating moving in with his partner. In this context, the guaranteed spouse's benefits found within the BSPS2 may well have been relevant to Mr K's situation at future point in time.

- It's clear that Mr K, like many employees of his company, was concerned about his pension. However, even if there was a chance the BSPS2 wouldn't go ahead, I think that Churchill Investments should have reassured Mr K that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr K 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.

Summary

I don't think the advice given to Mr K was suitable.

He was giving up a guaranteed, risk-free and increasing income within the BSPS2. By transferring to a personal pension, the evidence shows Mr K was likely to obtain lower retirement benefits. Flexibility was not defined by the adviser and in my view it was no more than a 'stock' objective used to help justify the transfer. Capital growth was also promoted as a reason to transfer but the critical yield showed that transferring for financial reasons wasn't viable and the adviser failed to explain this. I don't think there were any other particular reasons which would justify the transfer.

I think Churchill Investments ought to have advised him against transferring out of his DB scheme for these reasons. I don't think it was in Mr K's best interests for him to transfer his DB scheme to a personal pension when he had the opportunity of opting into the BSPS2. On this basis, I think Churchill Investments should have advised Mr K to opt into the BSPS2.

In light of the above, I think Churchill Investments should compensate Mr K 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 K, as far as possible, into the position he would now be in but for Churchill Investments' unsuitable advice. I consider Mr K would have most likely opted to join the BSPS2, rather than transfer to the personal pension if he'd been given suitable advice and compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance. Churchill Investments should use the benefits offered by BSPS2 for comparison purposes.

Churchill Investments must therefore undertake a redress calculation fully 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.

Churchill Investments should obtain Mr K's current pension value. It should then use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr K and our Service upon completion of the calculation.

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 K'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, Churchill Investments should:

- calculate and offer Mr K redress as a cash lump sum payment,
- explain to Mr K 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 the DC pension
- offer to calculate how much of any redress Mr K receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr K accepts Churchill Investments' offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr K 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 K's end of year tax position.

Redress paid to Mr K as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Churchill Investments 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 K'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 (this is a maximum figure), 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.

My final decision

Determination and money award: I am upholding this complaint and I now direct Churchill Investments Plc to pay Mr K the compensation amount as set out in the steps above, up to *a maximum* of £160,000.

If Mr K accepts my final decision, the money award becomes binding on Churchill Investments Plc.

My recommendation would not be binding. Further, it's unlikely that Mr K can accept my decision and go to court to ask for the balance. Mr K 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 K to accept or reject my decision before 3 February 2024.

Michael Campbell
Ombudsman