DRN-3716089

The complaint

Mr W 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 2018.

Mather & Murray Financial Ltd is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "MMF".

What happened

In March 2016, Mr W'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 W'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 W 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 MMF which is responsible for providing the pension advice. Information gathered about his circumstances and objectives at the time of the recommendation were broadly as follows:

- Mr W was 44 years old, married and with two dependent children. Mr and Mrs W owned a home with the outstanding mortgage due to be paid down by 2022.
- Mr W earned around £36,000 per year. Mrs W had a career with her own pension arrangements.
- The cash equivalent transfer value (CETV) of Mr W's BSPS was approximately £404,747. The normal retirement age (NRA) was 65.
- Mr W had recently joined the new TATA defined contribution (DC) scheme as a result of the BSPS closing. This DC pension isn't the subject of any complaint.

MMF set out its advice in a suitability report on 10 January 2018. In this it advised Mr W to transfer out of the BSPS and invest the funds in a type of personal pension plan, managed by a discretionary fund manager (DFM). MMF said this would allow Mr W to achieve his objectives. Mr W accepted this advice and so transferred out later in 2018. In 2021 Mr W complained to MMF about its advice, saying he shouldn't have been advised to transfer out to a personal pension.

Mr W referred his complaint to our Service. One of our investigators looked into the complaint and said it should be upheld. In response, MMF said it hadn't done anything wrong and was acting on the financial objectives Mr W had at the time. However, I've been made aware that MMF has made an offer to Mr W to settle the complaint but Mr W has rejected this. So, as the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

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

I've also taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

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 MMF's actions here.

- PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability and the provisions in COBS 19 which specifically relate to a DB pension transfer.

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

Introductory issues

I'd like to start by referring to the 'timeline' of events. I've already described above how members of the BSPS were given until 22 December 2017 to decide whether or not to join the BSPS2. I've seen that on 22 December 2017 he completed a client agreement with MMF. But I've also seen that the transfer analysis, the 'fact-find' and the suitability report were all completed in January 2018. On the face of it, what this means is that all of the dealings MMF had with Mr W were in 2018 and so after the 'hard' deadline of 22 December 2017. And the fact he signed a client agreement on the same day as the deadline expired means he was already too late to be advised by MMF ahead of the deadline.

However, there is documentation which I've seen showing Mr W had already made a choice in the "Time to Choose" exercise. This takes the form of a letter from the BSPS trustees to Mr W confirming he had elected to join the BSPS2 (if only as a precautionary measure).

I should say that none of this matters to the actual *suitability* of the advice. As I'll explain below, it was still unsuitable. But because we know Mr W had opted to join the BSPS2, when MMF was advising him to transfer away, this was preventing him from entering his already chosen course of action, which was to join the BSPS2. Redress is therefore due to Mr W as if he'd remained in the BSPS2 option, rather than the PPF.

Financial viability

MMF referred in its transfer analysis and suitability report to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. In this case, MMF used the existing scheme (BSPS) for the critical yield comparisons, rather than the 'new' BSPS2. I think the yields for BSPS2 would have been between those for the BSPS and PPF (although probably much nearer to the BSPS).

The critical yield comparison was a requirement from the regulator at the time when advising clients on DB transfers. It's also important to point out that the critical yield comparison is only one of a number of different metrics I've used to compare the different schemes. I've noted the adviser themselves said that the critical yields shown in the transfer analysis might not be achievable, but they said he would not be accessing his pension fund in this way, for example, through an annuity. The critical yield required to match the benefits at the age of 65 in the existing scheme, was described as 5.8%. It was on this rate that the suitability report focussed on.

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. MMF's risk assessment placed Mr W as a "cautious" risk investor or 4/10. The adviser said this could be increased to 5/10 given the length of time Mr W still had until his retirement.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period and was only 4.5% per year for 20 years to retirement (age 65). This was below the critical yield figure for the BSPS. However, I'd need also to include the limitation effect of growth caused by the charges and fees associated with a personal pension. These were significant in Mr W's case because he was also recommended to invest with a DFM which added more costs. So I think these would have dragged future growth down.

In my view, there would be little point from a purely financial comparison perspective, in transferring away from a DB scheme only to achieve similar financial benefits in the longer term. But I think there was no case for transferring because there was no real case made out for Mr W's pension growing by enough to make transferring worthwhile. Taking account of the costs and risks, I think it's fair to say that from a financial comparison perspective, there was a material chance that transferring to a personal pension plan would mean Mr W would likely receive lower pension benefits in the longer term.

I've also noted that using the age of 65, even in order to purchase an annuity to provide benefits of equal value to the estimated benefits provided by the existing scheme, assuming *no* spouse's pension, *no* increases in payment and *no* guarantee at retirement the estimated fund required was £576,126. To reiterate, these figures are found in MMF's own analysis based on data the regulator required businesses to refer to at the time. And because these figures are far above Mr W's CETV, they represent, in my view, a revealing window into the value of the guaranteed pension he could be giving up by transferring away to a personal plan, rather than a similar DB scheme that was on offer here.

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

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

Other reasons to transfer

I've used all the information from the advice sessions to draw out the main themes on which MMF's recommendation to transfer was based. At the outset of the suitability report MMF said Mr W's stated objectives were that he wanted to retire at the age of 65.

Upon recommending the type of pension (and funds) he should transfer into MMF listed the rationale for transferring as follows:

- MMF said Mr W wanted flexibility in the way benefits could be taken, namely front-loading his retirement income to take more in the early years.

- It said he wanted to be able to take ad-hoc income from his pension as well as regular income.

- MMF implied the death benefits were better in a personal pension.

I have therefore considered all these themes.

- *Flexibility*

I think the adviser focused heavily on transferring away, rather than starting by assessing whether the BSPS2 or PPF could meet Mr W's retirement needs and objectives. I think the adviser just promoted the more so-called flexible arrangements which Mr W would find with a personal pension plan.

However, I think it's important for a moment to focus on Mr W's age. He was only approaching his 45th birthday and was still in good health. So, when Mr W said he'd need around £30,000 per year in 'today's money' when he eventually did retire aged 65, I think this could be no more than an educated guess at that point in his life. The adviser should have known there were still many permutations his life could follow. I think the £30,000 figure was arbitrary and it wasn't properly costed. Given his and Mrs W's spending habits as of early 2018, I make the assumption that this was an aspirational *joint* annual pension amount he was talking about. It also wasn't clear if the discretionary spending he'd mentioned (holidays etc) was included in this figure. The adviser had noted that Mr and Mrs W's *"joint expenditure is very modest and this will further be reduced in less than six years, when your mortgage is cleared and you will be debt free".* So I think there was every indication that this assumed retirement income was joint and would have easily catered for their modest spending lifestyle.

I therefore think MMF should have assessed the possibility of achieving reasonable retirement goals for Mr W whilst being a member of his DB scheme and moving with it to the BSPS2 as he'd already opted for. Retirement under the BSPS2, for example, would still have probably been a realistic option for Mr W given his stated objectives and the adviser should have used the annual pension details of the BSPS2, which were readily available at the time. However, I think MMF's analysis fell short on this front. It only said that if retiring at 65, Mr W could expect an annual pension of around £25,595 per year. But it didn't show figures for a reduced pension if he were to take a tax-free lump sum at the same time. Nor did it set out what the PPF annual pension would be.

However, we know Mr W had started a new DC pension scheme with TATA and that this was being significantly contributed towards by both Mr W and his employer. MMF didn't go into many details about this secondary pension provision, but given his notable disposable / spare monthly income in 2018, Mr W could have been advised to contribute more to this new DC scheme, thereby making this new DC fund a much more relevant part of his overall pension savings in the years ahead. It certainly isn't unreasonable to say that by retirement, which was still a long way off for him, Mr W could have built up a meaningful DC fund. In my view, the adviser should have comprehensively researched these opportunities and then incorporated them into their overall advice.

I can't see that Mr W required flexibility in retirement in the way MMF suggested. Taking more money at the beginning of retirement might have sounded good, but it wasn't based on anything specific. I've seen nothing that showed Mr W required changing how his retirement benefits ought to be paid or that he had a need to spend certain sums upon retiring. And so this means I've seen nothing explaining why Mr W wouldn't want to continue membership of a DB scheme and to use that scheme in exactly the way it was originally intended.

I therefore don't think there's anything showing Mr W's forecasted DB pension entitlements wouldn't have easily met his retirement income requirements, without any need to transfer from his DB scheme. We know his income needs were modest, we know he still had time to add more pension provision in a DC scheme, and ultimately it seems Mrs W also had her own DB pension. So, I don't think MMF adequately explained these things to Mr W as its advice simply assumed him transferring to a type of personal pension scheme to obtain flexibility which was poorly defined and which he didn't appear to need.

I think Mr W's circumstances here were much more aligned to him transferring to the BSPS2 and retiring from that when he felt he was ready to do so. I think that by retirement, whenever it eventually came, Mr W could have been in an agreeable position. On one hand he'd have an existing deferred DB scheme of considerable value. This would contain all the guarantees and benefits that such schemes normally bring which tend to include a promise to pay a known pension for life. Significant indexation guarantees also existed within the

BSPS2 and PPF. On the other hand, he'd have also built up a DC scheme over a reasonable period of time – anything up to 20 years. So, if Mr W ever found he needed 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 W had either the capacity or desire to exercise control over his funds. With his DB scheme, Mr W was being offered the opportunity to move with his DB scheme to the BSPS2. It's true there were some differences in this scheme when compared to the original BSPS, but it remained a DB scheme nonetheless and was run for him by trustees. Mr W himself had no experience of 'money market' investments and I think he would have found the complexity, scale and responsibility of managing over £404,000 of transferred funds to be onerous in the years ahead. What I've seen tends to show Mr W 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*

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The BSPS2 contained certain benefits payable to a spouse if Mr W died. Mr W was married and although it seems Mrs W had a pension of her own, I still think it's more likely the benefits found in the BSPS2 would have been of reassurance to Mrs W if Mr W died.

Looking at the documents we have from the advice sessions, I think the adviser probably told Mr W that he'd be able to pass on the whole value of a personal pension, potentially tax-free, to anyone he nominated. I think there was clearly a discussion about this, so the lump sum death benefits on offer through a personal pension was probably made to look like an attractive feature to Mr W. Within the BSPS2, Mrs W would receive a significant percentage of Mr W's pension if he died in retirement.

But whilst I appreciate death benefits are important to consumers, and Mr W might have thought it was a good idea to transfer the BSPS to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think MMF explored to what extent Mr W was prepared to accept a different retirement income in exchange for different death benefits.

There were significant death benefits for a remaining spouse in the BSPS2 both pre and post retirement. Mr W was only 44 and so 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 W had lived a long life there could be nothing left at all in his personal pension plan.

I can't say the extent to which life insurance was discussed in this case. But again, the adviser failed to present all the relevant options about insurance to Mr W, because they were wholly focussed on transferring him away from a DB scheme and into a personal pension plan. I don't think this was good advice or advice that was in Mr W's best interests. At 44 years old, a 'term' life insurance policy may have still been a reasonably affordable product for Mr W if he really did insist on leaving a lump-sum (rather than an annual pension) legacy for Mrs W, or indeed anyone else. Mr W could also have nominated a beneficiary of any funds remaining in his other DC scheme. So, to this end, Mr W already had options ensuring part of his pension wouldn't 'die with him'.

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

Concerns over the financial stability of the DB scheme

It's clear that Mr W, like many employees of his company, was concerned about his pension. His former employer had recently made the announcement about its plans for the scheme and MMF said he lacked trust in the company. He'd heard negative things about the PPF and MMF said he could have more control over his pension fund.

So, it's quite possible that Mr W was also leaning towards the decision to transfer because of the concerns he had about his employer. However, it was MMF's obligation to give Mr W an objective picture and recommend what was in his best interests. By the point of the advice being delivered details of BSPS2 were known and it seemed likely it was going ahead.

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

Suitability of investments

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

Summary

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

He was giving up an opportunity of a guaranteed, risk-free and increasing income within the BSPS2. By transferring to a personal pension, the evidence shows Mr W was likely to obtain lower retirement benefits. And I don't think there were any other particular reasons which would justify the transfer and outweigh this. I think MMF ought to have advised him against transferring out of his DB scheme for this reason, particularly as it meant he'd be worse off in retirement.

Mr W still had many more years before he intended to retire. So, I don't think it was in his best interests for him to transfer his DB scheme to a personal pension when he had the opportunity of moving into the BSPS2. On this basis, I think MMF should have advised Mr W to remain in BSPS and then move with to the BSPS2.

I have considered, given the circumstances of the time, whether Mr W would have transferred to a personal pension in any event. I accept that MMF disclosed some of the risks of transferring to Mr W, and provided him with a certain amount of information. But ultimately it advised Mr W to transfer out, and I think Mr W relied on that advice.

I'm not persuaded that Mr W would have insisted on transferring out of the DB scheme, against MMF's advice. I say this because Mr W was also an inexperienced investor and this pension accounted for most of his retirement provision at the time. So, if MMF had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would have accepted that advice.

In light of the above, I think MMF should compensate Mr W 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 W, as far as possible, into the position he would now be in but for MMF's unsuitable advice. I consider Mr W would have most likely remained in the BSPS and moved with it to the BSPS2, rather than transfer to the personal pension if he'd been given suitable advice. I know he had already told the trustees he was electing the BSPS2 as his preferred choice.

To be clear, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance. MMF should use the benefits offered by the BSPS2 for comparison purposes.

MMF 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.

MMF 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 W 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 W'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, MMF should:

- calculate and offer Mr W redress as a cash lump sum payment,
- explain to Mr W before starting the redress calculation that:
    - the redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest the redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr W receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr W accepts MMF's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr W 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 W's end of year tax position.

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

My final decision

Determination and money award: I am upholding this complaint and I now direct Mather & Murray Financial Ltd to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Mather & Murray Financial Ltd pays Mr W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W accepts my final decision, the money award becomes binding on Mather & Murray Financial Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 2 January 2024.

Michael Campbell
Ombudsman