DRN-4266225

Financial Ombudsman Service

The complaint

Mr P complains that he was given unsuitable advice by Dobson & Hodge Limited (D&H), to transfer deferred benefits from his defined benefit (DB) pension with British Steel (BSPS) to a personal pension.

What happened

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 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. The BSPS was closed to further benefit accrual from 31 March 2017.

In August 2016 Mr P got in touch with D&H to discuss his pension. He was 54 at the time and was struggling physically to be in a manual job. He was considering early retirement and wanted to discuss his options. He said he needed around £12,000 retirement income per year and thought he would probably spend more in earlier years and reduce income later on. He said he was unconcerned if his pension was exhausted by age 75.

D&H were concerned that Mr P underestimated his income needs and said in their suitability report that from an income and investment risk aspect their advice would be to stay in the scheme and his stance was a 'dangerous' one to take. They noted the risk of Mr P exhausting his funds. However, on the basis that Mr P said retiring at 55 was more important than long term income security, they recommended him to transfer his DB benefits.

In 2023, Mr P complained about the advice he was given. He said his adviser who had since moved to a different firm and taken him on as a client told him in 2022 about a six year deadline to complain. He then contacted professional representatives who lodged a complaint on his behalf.

D&H said Mr P had complained too late. They say he would have received a letter in 2022 by the Financial Conduct Authority ('FCA') explaining about the six-year time limit and that action needed to be taken. They also pointed to the fact that there would have been lots of publicity from 2017 onwards about there being concerns surrounding British Steel workers being advised to transfer their DB pensions. So Mr P should have been aware of these issues earlier.

Mr P said he never received any letters from the FCA as he had been moving around a lot since 2017. He also said he left the steel industry in 2017 and didn't keep in contact with ex-colleagues. He said he wasn't using the internet a lot and he wasn't aware of the publicity around the BSPS pension transfers.

Our investigator thought the complaint had been made in time. D&H disagreed and asked for an ombudsman decision.

I considered the complaint and explained to D&H that I thought the complaint had been made in time and that I thought it should be upheld. D&H disagreed but offered to carry out a loss calculation for Mr P.

I asked Mr P's representatives for information that D&H required to carry out the calculation which was duly provided. Regrettably, D&H then changed their mind and provided further arguments as to why the complaint had been brought too late and why it should not be upheld.

For this reason I will now issue 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 considered D&H's and their solicitor's further comments, however my decision remains that I can consider Mr P's complaint and that it should be upheld. I'll explain my reasons below:

jurisdiction

The regulator has set rules for this service about when we can and can't consider complaints, the Dispute Resolution (DISP) rules. They are set out in the Financial Conduct Authority's (FCA) handbook.

DISP 2.8.2 (2) R states:

'The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought to reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R or DISP 2.8.7 R was as a result of exceptional circumstances,'

There is no dispute that Mr P complained outside the six-year time limit, so the key is whether Mr P was aware or ought to have been reasonably aware that he had cause for complaint more than three years before he complained. Mr P complained to D&H on 16 February 2023, so for this complaint to be time-barred I need to be satisfied that he was aware or ought to reasonably have been aware that he had cause for complaint before 16 February 2020.

The first letter sent directly to members by the FCA which told them to ask themselves certain questions about the advice they received and encouraged them to complain if they was sent in June 2020, so after 16th February 2020. There was a more urgent letter in 2022, which was directed in particular at members who had transferred in 2016 and who were approaching the six-year time limit deadline. However, again this was after February 2020. So even if Mr P received those communications, he complained less tnen three years after these letters were sent.

I'm not aware of any direct letters to members before that which would have triggered awareness that something might be wrong with the advice they had been given. D&H's own files show that over the relevant years Mr P was for extended periods only contactable by email or phone and that he had issues with receiving post where he resided. I also note that any letters sent by the FCA were sent to addresses sourced by the trustees of the BSPS. And once Mr P had transferred away from the BSPS and left employment there was no reason for them to have an up-to-date address for Mr P. For the 2022 letter addresses were sourced from advisers, but as I said this letter was sent within the three-year time limit, so is irrelevant.

Before these letters were sent there was information on the FCA website and there would have been some reports in the media and discussions on social media, however I've taken into account that Mr P left British Steel and was living a somewhat nomadic lifestyle. He says he only had minimal access to the internet and media which I find persuasive given his living situation. And as he had stopped working, I don't think it's likely he would have been exposed to ongoing discussions between members who were still working in the steel industry, their unions and solicitors and other individuals who were discussing the problematic nature of transfers between 2018 and 2020.

Even if he saw some news about British Steel in the media, he would have reasonably needed to be aware that there might be something wrong with the advice given to him in his particular circumstances. The letter sent by the FCA in 2020 was sent in acknowledgement that not everyone would be able to recognise that the advice they received might have been unsuitable in their particular circumstances.

Overall, I'm not satisfied Mr P was aware or ought to have reasonably aware he had cause for complaint before February 2020.

Merits

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 D&H'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.

The provisions in COBS 19 which specifically relate to a DB pension transfer.

COBS 19.1.6G sets out that:

"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."

It's clear from the documents D&H provided from the time of the advice that a transfer wasn't financially viable for Mr P. By transferring he would end up with significantly lower benefits than he could have had from the DB scheme and there was a real risk that Mr P could exhaust his funds relatively early into retirement. He had 37 years of service in the BSPS and this was his only retirement provision other than the state pension he would receive at 67 and a small defined contribution pension he had just started through his employer. He had a relatively low attitude to risk and a low capacity for loss.

D&H were aware of this and I can see they had their own concerns including whether Mr P's income requirements were realistic and that he was taking a risk with his main pension income.

Looking at it objectively, the advice to transfer his benefits was not in his best interest. Nonetheless, D&H recommended Mr P to transfer his BSPS pension into a drawdown plan.

I recognise that Mr P was struggling with the physical nature of his job and that he said he couldn't keep working in his role until normal retirement age of 65. And I can see he indicated that his short-term objectives of retiring early were more important to him at the time than long-term retirement security. I also appreciate that D&H told Mr P about some of the benefits of the DB pension and warned him about the risks of transferring. I also want to be clear that I don't think D&H persuaded Mr P in any way to transfer his pension.

However, D&H wasn't there to simply execute what Mr P wanted. It was the adviser's obligation to advise him about what was in his best interest considering the whole of his retirement. Whilst I can see they gave some warnings about the risks, they still ended up recommending a transfer which was not suitable for him. Risk warnings don't make an unsuitable recommendation suitable. And they ultimately justified the transfer by saying that Mr P couldn't meet his early retirement objective by staying in the BSPS. They also mentioned that a transfer later on might not be possible if the BSPS fell into the PPF.

Mr P didn't have the necessary capacity for loss for a transfer and given his inexperience and unsubstantiated view that he would probably not need any funds by the time he was in his mid-seventies and was happy to spend his funds early, D&H should have clearly advised against a transfer.

I then considered what Mr P likely would have done if D&H had given suitable advice, i.e. advised against a transfer. I don't deny that Mr P was keen on retiring early and certainly didn't want to work in his current role until 65. However, I don't think it follows that he would have ignored clear advice against a transfer and that he wouldn't have listened to a robust message that he couldn't reasonably afford to retire at 55.

D&H essentially advised that a transfer was the only way for him to retire at 55 and although they mention the risk of exhausting his funds, they said they modelled various levels and thought his funds shouldn't run out. The suitability report briefly mentions that continued work was discussed and discounted by Mr P. However, I haven't seen persuasive evidence that this was discussed in a meaningful way, including the possibility of working a couple more years in his current job or drawing DB income earlier and supplementing his income with a physically less demanding job or going part-time.

By recommending the transfer D&H in my view gave the impression that Mr P's objectives justified the transfer. And I don't agree this was the case. I think if they had given him clear advice not to transfer then on the balance of probabilities Mr P would have listened.

I recognise that once Mr P quit his job the following year and started drawing more income than he originally said he would need, the subject of part-time work and reducing withdrawals was discussed again. And notes from the time show that Mr P did not pay much attention to D&H concerns and wanted to spend the money as he saw fit and wasn't ready to take on other work.

However, at that point he had already retired and had access to a pension fund. He had made it clear from the start that he wasn't particularly worried about exhausting his fund. D&H had given him these warnings at the time of advice, but had still recommended that this is what he should do. And he was never told he had to work again. It was him who said he might supplement his income in future with some odd jobs. So the fact that he then didn't want to be restricted and didn't want to work again in the short-term isn't surprising in my view.

I'm not persuaded, however, that this means if he had been told a year earlier that he couldn't afford to retire early, taking benefits would not be in his best interest and that if he continued working-even if it was part-time-he could still retire early, but with a guaranteed income, that he would have ignored this advice.

In summary, I remain of the view that D&H gave unsuitable advice and if they had advised against a transfer and properly discussed alternatives that still offered the option of early retirement, Mr P would have followed that advice and remained in the BSPS.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for the unsuitable advice he was given. I consider he would have remained a member of the BSPS and subsequently moved to the PPF.

I say this because if he had decided to take BSPS benefits before the Time to Choose exercise in autumn 2017 I think he would have likely not received the relevant letters given the problems with his postal correspondence and so would have ended up automatically in the PPF. If he had still be working by this point I think he would have chosen the PPF as it had lower early retirement reductions and would have allowed for higher tax-free cash which I think would have been the most attractive option for Mr P.

I don't know exactly what Mr P would have done if he had remained in the BSPS. He might have retired at 55 and supported himself through part-time or different work or he might have deferred retirement for maybe a couple of years.

I'm satisfied he wouldn't have deferred taking his DB benefits for a significant period given he was so adamant he didn't want to work for much longer. So in the circumstances I think assuming a retirement age of 55 (at the same time he stated drawing benefits from his personal pension) is reasonable in the circumstances.

D&H must 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.

D&H should use the FCA's BSPS-specific redress calculator to calculate the redress.
A copy of the BSPS calculator output plus supporting evidence should be sent to Mr P and the Financial Ombudsman 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 promptly following receipt of notification of Mr P'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, D&H should:

- calculate and offer Mr P redress as a cash lump sum payment
- explain to Mr P before starting the redress calculation that:

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

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

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to certain award limits plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than the applicable limit I may recommend that the business pays the balance.

<u>Decision and award:</u> I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Dobson & Hodge Limited should pay Mr P the amount produced by that calculation – up to a maximum of £190,000.

<u>Recommendation:</u> If the amount produced by the calculation of fair compensation is more than £190,000 which might not be the case here, I recommend that Dobson & Hodge Limited pays Mr P the balance.
This recommendation is not part of my determination or award. Dobson & Hodge Limited doesn't have to do what I recommend.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 19 January 2024.
Nina Walter
Ombudsman