DRN-4223047

The complaint

Mr M complains about the advice given by Lighthouse Advisory Services Limited ('Lighthouse') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme with British Steel to a personal pension arrangement. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Our investigator upheld Mr M's complaint and said Lighthouse should pay compensation. Both Mr M and Lighthouse disagreed with the investigator's conclusions about the assumptions Lighthouse should use for calculating compensation. The complaint was then passed to me.

I issued my provisional decision saying that I intended to uphold the complaint and direct Lighthouse to put things right based on a retirement age of 65 and based on the benefits available to Mr M through the BSPS2. A copy of the background to the complaint, and my provisional findings, are below in italics and form part of this final decision.

What I said in my provisional decision

What happened

In March 2016, Mr M's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) 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 private pension arrangement.

Mr M was concerned about what the announcement by his employer meant for the security of his pension, so he contacted Lighthouse for advice. In October 2016 Mr M met with Lighthouse and it completed a fact-find to gather information about Mr M's circumstances and objectives. Amongst other things this recorded that Mr M was 56; he was living with his partner; he had no children; he owned his own home, which had an outstanding mortgage on it of around £47,000; he wanted to use his tax-free cash to pay off 20% of his mortgage each year for the next three years of his mortgage tie-in; and he wanted to retire at age 60 with an income of £1,500 a month. Lighthouse also carried out an assessment of Mr M's attitude to risk, which it deemed 'high-medium.'

On 3 November 2016, Lighthouse advised Mr M to transfer his pension benefits into a personal pension arrangement and invest the proceeds in a range of funds, which overall it deemed matched Mr M's attitude to risk.

In summary the suitability report said the reasons for this recommendation were to provide Mr M with a higher tax-free cash lump sum than the BSPS would provide; provide better *death benefits; provide greater control; and provide flexibility – the ability to control his income and enjoy more of it in the early years of retirement.*

Mr M accepted the recommendation and shortly after around £368,000 was transferred to his new personal pension. Not long after the transfer, in December 2016 Mr M took a tax-free cash lump sum from his pension of around £30,000.

Mr M complained to Lighthouse, via a representative in 2020 about the suitability of the advice he received. Lighthouse upheld the complaint – it said it couldn't be satisfied the advice was suitable - and it said it would make an offer of compensation. At this point Mr M referred his complaint to our service.

In the meantime, Lighthouse appointed a third-party specialist firm to carry out a review of certain DB transfers it advised on as instructed by the Financial Conduct Authority ('FCA'). And in 2021 the third party wrote to Mr M to say that it had found the advice he received was unsuitable and it made an offer of compensation of around £69,000, later amended to around £89,000. The letter said the offer was in line with the FCA's guidance on calculating redress for unsuitable DB pension transfers and it was based on Mr M's retirement age of 56 when he accessed his tax-free cash.

Mr M declined the offer. He said the offer wasn't fair because the calculation was based on a flawed assumption as to when he would've accessed his pension benefits had he been properly advised to remain in the BSPS.

One of our investigators looked at all of this and in summary they said that because there was broad agreement that the advice was unsuitable, their focus was on the retirement age redress assumptions Lighthouse has used. They disagreed that 56 was a fair reflection of Mr M's retirement intentions. They said Mr M only accessed his tax-free cash because the transfer advice gave him the opportunity to do so. They didn't think Mr M had an immediate need to access any of his pension savings or fully retire. They said that, while Mr M told us he was still working, because the paperwork from the time recorded that it was Mr M's intention to retire at 60, this is the retirement date Lighthouse should use in calculating redress. And they said it is the benefits available through the PPF that Lighthouse should use for comparison purposes.

Mr M, through his representative disagreed. In summary he said that he has delayed accessing his pension benefits and continues to work which shows that his retirement plans were not certain at the time. He said there is no evidence to suggest he would've accessed his scheme pension early. Mr M says he accepts he intended to retire early at the time of the advice, but it was the adviser's responsibility to determine if this was realistic. He says he only accessed his tax-free cash because the adviser encouraged it. Mr M says that, because he has not yet retired and has no immediate plans to do so, his losses should be calculated on the basis that he ought to have been advised to join the BSPS2 and that his retirement date should be assumed to be the scheme's normal retirement age of 65.

Lighthouse also disagreed with the investigator's conclusions.

In summary they said the redress calculation methodology was designed following collaboration with the FCA to ensure consistency and compliance with the FCA's redress guidance. It said it believed that a complaint about the redress methodology employed falls outside of our jurisdiction. But it said it believes the redress offer is fair in light of Mr M's circumstances. It said the investigator had classified Mr M's case as a prospective loss case when in fact it should be classed as an actual loss case.

It said this is because Mr M accessed his benefits – his tax-free cash – at age 56, so the redress methodology treats this date as the date on which Mr M would've taken his retirement benefits from the BSPS.

It went to explain that it believes Mr M's decision to transfer his pension and his decision to take a cash lump sum are two separate and distinct events – Mr M's decision to access his pension when he did should not be conflated with the suitability of the transfer advice (which it found to be unsuitable.) It said Mr M has clearly benefitted from accessing his tax-free cash and it would be very complex to try and place an accurate value on this in calculating redress. It said it believes the investigator's conclusion about how redress should be calculated goes against relevant legal requirements and standards and asks why it is appropriate for the Financial Ombudsman Service to depart from these in this case.

Because the investigator wasn't persuaded to change their opinion, the matter was passed to me for a decision.

What I've provisionally 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 Business ('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.

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 Lighthouse'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 provisionally decided to uphold the complaint and I intend to direct Lighthouse to put things right based on a retirement age of 65. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Lighthouse *should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M's best interests.*

I firstly want to address Lighthouse's point about this service not being able to consider the redress methodology employed by Lighthouse and its belief that it falls outside of our jurisdiction. To clarify – Mr M's complaint brought to us and the one I'm addressing is about the unsuitable advice Mr M says he received to transfer out of the BSPS. And as part of my consideration of this, if I deem things didn't happen as they should have and I think Mr M has lost out as a result, it is appropriate for me, and within my powers, to determine what fair compensation should be to put things right. And this is what I will address in this decision.

Suitability of Lighthouse's advice

There appears to be broad agreement between Lighthouse and the third-party business which carried out the transfer advice review on its behalf, that the advice Mr M received to transfer his pension was unsuitable. But for the sake of completeness, taking into account all of the relevant considerations in this case and the evidence presented, ultimately I don't think the advice given to Mr M to transfer the benefits from his DB scheme to a personal pension arrangement was suitable.

In summary, this is because Mr M was giving up a guaranteed, risk-free and increasing income. By transferring, given the quoted critical yields required to match Mr M's DB scheme benefits (16.93% at age 65 and 30.22% at age 60) Mr M was very likely to obtain lower retirement benefits as a result of transferring and investing in line with his stated 'high-medium' attitude to risk. In my view, there were also no other particular or compelling reasons which would justify a transfer and outweigh this. In my view Mr H did not require flexibility and a need to access his tax-free cash early to repay, or part repay, his mortgage that was affordable (and would likely continue to be so) and on a relatively low fixed interest rate. And I think the potential for higher or different death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So I think Lighthouse should've advised Mr M to remain in the BSPS.

I will also add that, I don't think Mr M would've insisted on transferring anyway against Lighthouse's advice. I've not seen anything to suggest Mr M had the requisite skill, knowledge or confidence to go against the advice he was given. I think Mr M relied solely on the advice Lighthouse provided. So I think if he'd been told why it wasn't in his best interests to transfer and Lighthouse had explained that he could likely meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. I think Mr M would've accepted and followed that advice – I don't think he'd have insisted on transferring out of the BSPS against advice.

Does Lighthouse's redress offer fairly compensate Mr M for the unsuitable advice?

The crux of the disagreement in this case is about the redress – specifically at what age it is assumed Mr M would've taken the benefits from the DB scheme if suitable advice had been given. Lighthouse has based its offer on a retirement age of 56 because this is when Mr M took his tax-free cash following the transfer.

It says this represents the actual loss because this is when it believes Mr M would've accessed his benefits had he remained in the DB scheme.

Mr M says that he only took his tax-free cash on the encouragement of the adviser and given he is still working and has no plans to retire, the calculation should be based on his normal scheme retirement age of 65.

I'll explain why I disagree with the assumption Lighthouse has used and why I don't think it is a fair in the circumstances.

For context, I'm mindful of and have taken into account the latest rules and guidance for firms set out in DISP App 4.3.16R. This says that a firm must: presume that a consumer would have taken pension benefits from their defined benefit occupational pension scheme at their normal retirement age.

However, the provisions of DISP App 4.3.17R says the above won't apply: where the evidence shows that it is more likely than not that the consumer or a beneficiary would have taken benefits from their defined benefit occupational pension scheme on an alternative date.

It gives examples of such evidence including:

- *Where the consumer has taken an annuity.*
- *The consumer would've taken early retirement benefits from their DB scheme.*
- *The firm has written confirmation that the consumer considers themselves to be retired.*

I understand Mr M is still working, so he hasn't retired. And he hasn't taken an annuity. I'm aware Mr M took a cash lump sum from his pension in December 2016 shortly after the transfer completed. But I don't think that means he would have more likely than not have taken his benefits from the DB scheme at that age had suitable advice been given and he'd remained in the scheme.

Lighthouse has argued that Mr M deciding to take a cash lump sum is a separate and distinct event from the advice to transfer out of the BSPS. But I think the two are intrinsically linked – I think Mr M's actions were ultimately influenced by the unsuitable advice. Lighthouse documented at the time, and so understood, that Mr M wanted to access part of his tax-free cash to pay off some of his mortgage. And one of the documented reasons Lighthouse recommended the transfer was to enable Mr M to facilitate this. The suitability report said transferring would ensure that Mr M was able to access a lump sum now to achieve things and defer taking income benefits, which he couldn't otherwise do.

I've explained above that I don't think it was necessary for Mr M to access his pension benefits early to repay his mortgage. And I've said that if Lighthouse had clearly explained to Mr M why it wasn't in his best interests to access his tax-free cash early to reduce his mortgage, I think he would've followed that advice. So it follows that I don't think Mr M would've accessed his benefits at age 56 had things happened as they should have and he'd been advised to stay in the DB scheme.

Furthermore, one of the fundamental differences between DB schemes and most personal pensions is that, if a member wanted to take any benefits from a DB scheme, they would need to take them at the same time. So, if Mr M wanted to take a cash lump sum at 56 from the DB scheme, he'd also have to take a regular income from it at the same time.

And, if taken early, that income would have been reduced, quite significantly, compared to what he could receive at age 65. So I think it's unlikely Mr H would have taken a tax-free *lump sum payment at age 56 from the BSPS had he been advised to remain in the scheme. Mr M was still working and hadn't retired. So he didn't need another regular income at that time. And taking one would have made him worse off in retirement.*

In contrast the rules concerning Mr M's personal pension are different. Mr M was able to take a cash lump sum and defer taking an income until later on – he didn't have to draw any income from it at the same time. I think Mr M simply took advantage of the different rules applying to his personal pension and drew a tax-free payment from it. But as Lighthouse said in its suitability report, that isn't something he could've done had he remained in the BSPS. As I said above, Mr M would also have had to take a reduced pension income.

So I think it's unlikely Mr M would've taken the same course of action if he'd been given suitable advice and remained in the BSPS. So I don't think it was fair for Lighthouse to determine that Mr M would have likely taken his retirement benefits from the DB scheme at age 56.

I also disagree with the investigator that Mr M would've most likely accessed his DB scheme benefits at age 60. Aside what I said above, I accept that the advice paperwork recorded that it was Mr M's objective or intention to retire at 60. And Mr M has said himself that this was his intention. But I'm not persuaded that Mr M had concrete plans to retire at 60.

As I've already explained, any plan Mr M might have had appears to have been based around gaining early access to his tax-free cash to repay his mortgage over time, which as I've also said, Lighthouse should've advised Mr M against because it wasn't in his best interests. I've seen nothing to persuade me that Mr M had a considered plan to retire early from his DB scheme. Mr M is now 62. He's told us that following a short sabbatical from work in 2020, he returned on a part-time basis and on an income that supports his lifestyle. Mr M continues to work and says he has no plans for retirement. As this is what actually happened, I think it is fair to be led by this.

So, taking everything into account, I think it is fair to assume in this case that if suitable advice had been given, Mr M would most likely access his pension benefits at the DB scheme's normal retirement age of 65.

I can see the investigator also said that the redress calculation should take into account the benefits available to Mr M through the PPF because they said Mr M would've most likely remained in the BSPS and moved with the scheme to the PPF with suitable advice. But given what I've said above about Mr M's retirement plans not being set in stone, 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, as it wouldn't be offset by the more favourable reduction for very early retirement. I'm mindful too that Mr M was concerned about the potential loss of benefits if the scheme moved to the PPF. By opting into the BSPS2, Mr M would've retained the ability to transfer out of the scheme nearer to his retirement age - if his needs demanded it. In addition, the annual indexation of his pension when in payment was also more advantageous under the BSPS2.

So, if things had happened as they should have, I think Mr M would've remained in the BSPS and then likely opted to join the BSPS2 following the time to choose exercise.

In light of the above, I think Lighthouse should compensate Mr M for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice.

And for the reasons above, this should be based on Mr M taking benefits from the BSPS2 at age 65.

Putting things right

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

I intend to direct Lighthouse to 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.

Lighthouse should use the FCA's BSPS-specific redress calculator to calculate the redress. If Lighthouse does not yet have access to the calculator it should contact the supervision department of the FCA to seek access to it as soon as possible. A copy of the BSPS calculator output should be sent to Mr M and our Service upon completion of the calculation.

For clarity, Mr M 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 M'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, Lighthouse should:

- *calculate and offer Mr M redress as a cash lump sum payment,*
- *explain to Mr M 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 M receives could be augmented rather than receiving it all as a cash lump sum,*
- *if Mr M accepts Lighthouse's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of their redress augmented, and*
- *take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.*

Redress paid to Mr M 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, Lighthouse 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 M'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.

Mr M accepted the findings in my provisional decision. He also asked me to consider making an award for the distress and inconvenience the unsuitable advice has caused. Mr M explained the impact the long-drawn-out process of getting compensation for the unsuitable advice has had on his health.

Lighthouse said that while it disagrees with my provisional decision, it said it was willing to make an offer of compensation to resolve things without the need for a final decision. It said it would start the process of calculating the settlement offer and would take the necessary steps as quickly as possible. It asked that the Financial Ombudsman Service hold off progressing matters until it has attempted settlement with Mr M.

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.

Having done so, while I'm mindful that Lighthouse has said it is prepared to make an offer of settlement to Mr M in line with the instructions I set out in my provisional decision and has asked me to consider not progressing things to a final decision, in the circumstances I think it is appropriate, fair and in the interests of both parties for me to issue a final decision. In my view, issuing a final decision will give certainty and bring finality to both parties to this dispute.

Mr M has asked me to consider making an award for distress and inconvenience to reflect the impact the unsuitable advice has had on him. I've thought carefully about what Mr M has said – I'd already considered whether an award for distress and inconvenience was warranted when issuing my provisional decision. And having done so, I'm not persuaded that an award is appropriate or fair in this case. Mr M has told us that he continues to work and says he has no plans for retirement. And while I understand Mr M's feelings about how long the whole process has taken, I'm satisfied Mr M will be fairly compensated by the steps I've said Lighthouse should take to put things right.

So, because neither party has persuaded me to change my mind, I've reached the same overall conclusion and for the same reasons as set out in my provision decision.

I uphold this complaint and direct Lighthouse to put things right.

Putting things right

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

Lighthouse 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.

For clarity, and as set out in my findings above, Mr M 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 of 65 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 PS22/13 and 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 M's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Lighthouse should:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M 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 M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Lighthouse's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

Redress paid to Mr M 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, Lighthouse 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 M'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

<u>Determination and money award</u>: I uphold this complaint and require Lighthouse Advisory Services Limited to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Lighthouse Advisory Services Limited pays Mr M the balance.

If Mr M accepts this decision, the money award becomes binding on Lighthouse Advisory Services Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 1 August 2023.
Paul Featherstone
Ombudsman