DRN-3368435

The complaint

Mr M complains about the suitability of the advice provided by AJH Financial Services Ltd ("AJH") in February 2018 to transfer the value of his safeguarded benefits in the British Steel Pension Scheme ("BSPS") to a personal pension plan ("PPP").

Mr M is represented in this complaint by a law firm ("the Representative").

What happened

The events leading up to this complaint were set out in detail by our investigator in his assessment which he provided to both the Representative and AJH. I don't intend to repeat here what our investigator stated but will instead provide a summary.

In March 2016, Mr M's employer, Tata Steel UK Ltd ("Tata Steel"), announced that it would be examining options to restructure its business including decoupling the BSPS from the company. The BSPS was a defined benefits ("DB") pension scheme that provided a guaranteed lifetime income to members. The consultation with members referred to possible outcomes regarding their safeguarded 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 DB pension schemes when their employer becomes insolvent. Tata Steel closed the BSPS to further benefit accrual from 31 March 2017.

In May 2017, the PPF announced that the terms of a Regulated Apportionment Arrangement had been agreed – this was approved by The Pensions Regulator in August 2017. Under the announced plans, Tata Steel agreed to set up and sponsor a new DB pension scheme, the BSPS2, subject to certain conditions relating to funding and size being satisfied.

In October 2017, these changes were communicated to BSPS members, including Mr M, under the *'Time to Choose'* exercise. This explained that BSPS members had three options regarding their safeguarded benefits:

1. Transfer to the PPF;
2. Transfer to the BSPS2; or
3. Transfer to an alternative pension plan such as a PPP.

Options 1 and 2 would've enabled Mr M to retain guaranteed pension income, albeit at a lower level than provided by the BSPS.

Members had to decide which option they wanted by 22 December 2017 – those that didn't choose an option remained in the BSPS and were ultimately transferred to the PPF. The details of Mr M's safeguarded benefits in the BSPS at that time were as follows:

- He had accrued 12 years and 7 months' qualifying service between August 2004 and March 2017;

- The scheme pension provided was based on his final salary, pensionable service and benefit accrual rate – as at the date of leaving the scheme in March 2017, his annual scheme pension was £7,244.71 The scheme pension comprised several elements, each part of which would be revalued by a prescribed amount over the term to the scheme normal retirement age of 65 and, once in payment, would escalate annually by a prescribed amount;

- Payment of benefits before 65 would be subject to an early retirement reduction on a sliding scale – in simple terms, the earlier benefits were taken, the greater the reduction applied to the scheme pension. Broadly, this meant a 30% reduction would apply to the scheme pension if benefits were taken at age 55 and a 18% reduction at age 60;

- The revaluation and escalation rates were guaranteed in line with the BSPS rules;

- The estimated revalued annual scheme pension payable by the BSPS at 65 was £10,095 or a reduced pension of £6,984 plus tax-free cash of £46,560. And at 60 it was £7,771 or a reduced pension of £5,599 plus tax-free cash of £37,329;

- The cash equivalent transfer value of his safeguarded benefits was £161,591.43.

Mr M was concerned about what the announcement by Tata Steel meant for the security of his safeguarded benefits in the BSPS. He decided that he wanted to transfer the value of his safeguarded benefits away to a new private arrangement. He contacted AJH to obtain advice and to facilitate the transaction and spoke with one of its advisers. On 12 January 2018, a fact find document and attitude to risk questionnaire were completed which recorded the following information about Mr M:

- He was aged 52 and his wife aged 47. They were both in good health and had two financially dependent children aged 15 and 19;

- He was employed by Tata Steel and paid gross annual income of about £35,000. He wanted to retire no later than age 60 and receive gross annual retirement income of £24,000. His wife was employed on a part-time basis by an insurance company and paid a gross annual income of about £13,000. She too wanted to retire at 60 and receive gross annual retirement income of £12,000;

- Their assets comprised the marital home valued at £135,000. They didn't have any cash savings or investments;

- Their liabilities comprised a repayment mortgage of £70,000 on the marital home which was due to be repaid in 2030 when Mr M would be aged 61. They also had credit card debt of about £20,000;

- In addition to the value of his safeguarded benefits in the BSPS, he had been a member of Tata Steel's defined contribution ("DC") pension scheme since March 2017. The value in January 2018 was about £5,000. The total annual contribution into his DC plan was 16% of his annual salary, which was about £5,600 in monetary terms. This would increase in line with changes to his salary. His State pension age was 67;

- After paying household bills they had about £1,500 surplus disposable income available every month;

- He was an inexperienced investor. His risk profile was determined to be 5 on a scale of 1 to 10, where 1 was lowest risk and 10 highest risk. The rating of 5 was described by AJH as *'Medium'* risk.

The fact-find document recorded notes from subsequent meetings between the adviser and Mr M. On 19 January 2018, it was noted the adviser made Mr M aware that the transfer analysis had been completed and which indicated he wouldn't receive his target annual income of £24,000 in retirement and that the critical yield of 9.6% was unlikely to be achieved. And that, based on this, the adviser couldn't recommend a pension transfer. They met again on 23 January 2018, where it was noted that Mr M understood the implications of the critical yield not being achieved but still wished to transfer regardless as he was concerned about the inflexibility of the benefits payable by the BSPS benefits and the provision his wife would receive.

As a result, he signed a letter which he and the adviser *"wrote together on the day".* That letter stated:

> *"…I have received advice from* [AJH adviser] *not to transfer the funds because of the critical yields. However I wish to proceed with the transfer as I am concerned about the final salary scheme going to the Pension Protection Fund and also if I transfer I will have more control of my monies in the future. I have agreed with* [AJH adviser] *to move my monies to* [PPP provider].

After that letter had been drafted and signed by Mr M, AJH issued its suitability report on 23 February 2018 recommending that he transfer the value of his safeguarded benefits in the BSPS to a PPP and invest it in a portfolio of funds to align with his *'Medium'* risk profile. The suitability report stated Mr M's objectives attached to his safeguarded benefits in the BSPS, which can be summarised as follows:

- **Flexibility and early retirement:** His primary objective was the ability to draw benefits flexibly so that he could choose when and how to take these. He wanted to retire no later than age 60 and receive gross annual retirement income of £24,000 (he was told by AJH that the target income was unlikely achievable based on the value of his pension arrangements);

- **Control:** He was concerned about the financial security of the BSPS and the prospect that the value of his benefits could be reduced in the future following a transfer to either the BSPS2 or PPF. As a result, he wanted to break ties with the BSPS and transfer away to remove the risk of reduced benefits; and

- **Death benefits:** He wanted to maximise the level of death benefits payable to his wife and children in the event of his early death and to provide them with flexibility in how they would be paid.

AJH confirmed in its suitability report the reasons why it recommended a transfer to a PPP in favour of the PPF and BSPS2 options for the following reasons:

- *"The TVAS Cash Flow Modeller forecasts that, when taking your benefits at age 60 based on the same income offered from your existing BSPS after Tax Free Cash, your fund will meet your life expectancy on a growth rate of 3.4% and exceed it on a high growth rate of 6.5%.*

- *You are concerned over the stability and ongoing changes with the British Steel Pension Scheme and have lost trust in the British Steel Pension Scheme.*

- *You would prefer the increased flexibility in relation to when and how your benefits are accessed, with the option to take the maximum Tax Free Cash available.*

- *You are able to access your benefits early without the need to consider early penalty factors.*

- *You are able to access up to the maximum 25% Tax Free Cash element of your pension benefits without taking any income.*

- *When taking benefits there are no restrictions on the amount of money you can withdraw at any one time.*

- *You can invest in a wide range of investment funds that have the potential for growth over the longer term*

- *The death benefits are completely tax free before the age of 75 when paid to your beneficiaries and only taxable at their marginal rate of tax after 75.*

- *You are able to vary the underlying funds and risks, including the use of a cash fund within the pension to reflect any changes in your personal circumstances. You don't want the inconvenience and cost associated with moving your pension provision from one provider to another every time you move between different stages in your retirement plan. The* [PPP] *caters for most aspects of retirement planning needs, from tax-efficient savings in the Personal Pension option through to provision of your income in retirement through the Drawdown option."*

Mr M accepted the recommendation. The pension transfer was completed in March 2018. The costs associated with the recommendation were set out in AJH's suitability report. These charges were to be deducted from Mr M's PPP, summarised as follows:

Initial charge

- £4,000 – initial adviser charge payable to AJH

Ongoing annual charges based on the PPP fund value

- 0.50% adviser charge – to provide ongoing advice payable to AJH
- 0.45% fund charge – payable to the PPP provider

This complaint

In 2021, the Representative, on behalf of Mr M, complained to AJH about the suitability of its pension transfer advice. AJH didn't uphold this complaint and so the Representative referred the matter to this service.

One of our investigators considered this complaint and recommended that it be upheld. This was because he thought that AJH's recommendation to transfer wasn't in Mr M's best interests and was therefore unsuitable. To put things right, our investigator recommended that AJH carry out a redress calculation in line with the FCA's *'Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers'* on the basis that Mr M opted for BSPS2 (rather than the PPF or PPP options) and would be a 20% income taxpayer in retirement. In addition, he recommended that AJH pay Mr M £300 compensation for the trouble and upset caused by its unsuitable recommendation which led to the loss of valuable pension income guarantees.

The Representative, on behalf of Mr M, responded and stated that it agreed with the uphold outcome. It agreed that the BSPS2 should be used for comparison purposes and on the basis that Mr M would likely take benefits at age 65.

AJH didn't accept our investigator's assessment and provided substantial comments in response. In summary, it stated that it had complied with and considered the FCA's rules and guidance, including making Mr M aware of the risks associated with the transaction. It was satisfied it had taken reasonable steps to demonstrate suitability and that the transfer was in his best interests taking into account his objectives and wider financial situation. It stated that before engaging its services, Mr M had already made his mind up about transferring and had also signed a letter on 23 January 2018 confirming he wanted to proceed in spite of the adviser's concerns regarding the achievability of the critical yield. And so it believed he would've transferred anyway regardless of its advice. It concluded that the transfer to the PPP was the only option available to Mr M that would've met his needs and objectives.

Our investigator considered the additional comments provided by AJH but wasn't persuaded to change his opinion. Since agreement couldn't be reached, our investigator stated that this complaint would be referred to an ombudsman for review.

While waiting for this complaint to be allocated to an ombudsman, our investigator contacted the parties in connection with the FCA's consultation launched on 2 August 2022 regarding new pension transfer redress guidance. The investigator asked the Representative to confirm with Mr M that in the event this complaint is ultimately upheld, whether he preferred redress to be calculated on the current methodology or the updated guidance expected to be implemented in early 2023. The investigator told the Representative that if we didn't receive an answer that we'd assume Mr M would prefer redress on the current methodology set out in *'Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers'.* As at the date of this final decision, the Representative didn't confirm which option Mr M preferred.

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.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 and the Dispute Resolution section in the FCA's handbook, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

I'd like to clarify that the purpose of this final decision isn't to repeat or address every single point raised by AJH and the Representative on behalf of Mr M. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

Was Mr M an insistent client?

I firstly want to deal with the handwritten letter dated 23 January 2018 and signed by Mr M. The letter states that AJH had advised Mr M not to transfer based on the critical yields alone (covered in more detail below) but that he still wanted to proceed against its advice. Although not explicitly stated by AJH at the time of its advice or in its response to this complaint, I think the letter was drafted to portray Mr M as an insistent client – I cannot see any other reason why it was drafted.

An insistent client is where a client wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

The FCA doesn't have a rule that prevents regulated businesses transacting business against its advice if the client insists. However, the FCA has previously expressed its concerns and expectations about how businesses should execute insistent client business – it did this in February 2016 when it published a guidance note on insistent clients. In that note, the FCA listed its concerns as follows:

> *"We have seen cases where:*
>
> - *there was an inadequate assessment of the other options that would meet the client's objectives*
> - *excessive numbers of insistent clients resulted from the adviser's advice not being sufficiently clear*
> - *the risks of the client's preferred course of action were not clearly explained*
> - *it was a 'papering exercise', for example the adviser had processed the case on an insistent client basis but this clearly did not reflect what had happened in practice*
> - *the adviser advised the client not to transfer out of the DB scheme (although the client insisted) but then recommended a product that was not suitable (with reference to the outcome and assessment of the information gathered about the member)"*

Due to these concerns, the FCA set out three key steps it expected regulated businesses to follow:

- *"You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*
- *You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
- *It should be clear to the client that their actions are against your advice."*

In meeting these steps, the FCA clarified that the business must obtain the necessary information about its client and their investment objectives, financial situation, and knowledge and experience to enable it to make a suitable personal recommendation, in line with COBS 9.2. In addition, the business must also act honestly, fairly and professionally in the best interests of their client, in line with COBS 2.1.1R. The business must also communicate with the client (for example in the suitability report) in a way that's clear, fair and not misleading, in line with Principle 7 and COBS 4.2.1R.

Taking into account the FCA's expectations, I'm not satisfied that Mr M could be categorised as an insistent client. This is because there's no evidence that, in line with its normal advice process, AJH provided a personal recommendation and suitability report to Mr M in which it advised him not to transfer. And there's no details of any assessment it carried out of other options that could meet his objectives. Rather, according to the fact find document, the advice not to transfer was given during a verbal discussion. Therefore, it's unclear to me what information or analysis AJH presented to Mr M during their discussions – and so I cannot be certain that Mr M was in possession of the necessary information to enable him to make an informed decision when he decided to act against AJH's advice.

In addition, in the fact find document, the adviser noted with reference to Mr M and the letter, *"He signed a letter which **we wrote together** on the day"* [my emphasis]. In my view, an insistent client letter should be written by the client in their own time and words. Given that AJH's adviser helped Mr M write the letter, I cannot be certain that what is stated accurately reflected Mr M's own thoughts. I think that the FCA would be concerned such a letter had been drafted with the assistance of the adviser who apparently told its client not to transfer.

In summary, I've not persuaded that the transaction was carried out on an insistent client basis in line with the FCA's expectations. In this case, despite documenting in the fact-find document its reservations about the suitability of the pension transfer, AJH nevertheless advised Mr M to transfer in its suitability report dated 23 February 2018. I've therefore gone on to consider the suitability of its second recommendation in which it advised Mr M to relinquish his safeguarded benefits in the BSPS and transfer to a PPP. My findings are set out below.

The FCA's suitability rules and guidance

AJH was authorised and regulated by the FCA at the time it provided its recommendation to Mr M. This meant that when it advised him it was required to follow the rules and consider the guidance in the Conduct of Business Sourcebook ("COBS") section in the FCA's Handbook.

Primarily, AJH was required under COBS 2.1.1R to *"act honestly, fairly and professionally in accordance with the best interests of its client"* in its dealings with Mr M. The suitability rules and guidance that applied when AJH provided its recommendation to Mr M were set out in COBS 9. The purpose of the rules and guidance are to ensure that businesses take reasonable steps to provide advice that is suitable for their clients' needs and so they're not inappropriately exposed to a level of risk beyond their investment objectives and risk profile. To ensure that this is the case, and in line with the requirements in COBS 9.2.2R, the business must gather the necessary information for it to be confident its advice is suitable. Broadly speaking, this section of COBS 9 sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific rules and guidance relating to pension transfers involving safeguarded benefits, as was applicable to Mr M's case – these were contained in COBS 19.

COBS 19.1.2R required the following:

> *"A firm must:*
>
> *(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client*

to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;

(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support *the firm's advice, in good time, and in any case no later than when the key features document is provided; and*

(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."

Under the heading "Suitability", COBS 19.1.6G set out the following:

"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."* [my emphasis added]

COBS 19.1.7G also stated:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8G stated that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

Businesses are required to follow these rules and consider the guidance because the FCA considers safeguarded benefits to be valuable. Based on the above regulatory rules and guidance, businesses advising on pension transfers should start by assuming that the existing DB pension scheme is suitable and to only recommend a transfer, which converts safeguarded benefits into flexible benefits, if it can clearly demonstrate it's in their client's best interests.

In assessing the suitability of AJH's recommendation, it's necessary for me to have due regard to the FCA's rules and guidance as set out above.

<u>*Mr M's situation*</u>

The situation at the time AJH advised Mr M wasn't normal because the existing DB pension scheme, the BSPS, was closing. So he was essentially forced to transfer the value of his safeguarded benefits to a new scheme. He had three options:

1. Transfer to the PPF;
2. Transfer to the BSPS2; or
3. Transfer to an alternative pension plan such as a PPP.

It's undeniable that it was a period of great uncertainty for individuals such as Mr M. Many of these individuals were in a vulnerable position due to the uncertainty surrounding the future of the BSPS. I think the uncertainty only served to emphasise the need at that time for a balanced assessment of the options available and ultimately the provision of suitable advice. It's my view that any concerns Mr M had about the security of his safeguarded benefits should've been addressed and appropriately managed by the professional party in the transaction, AJH.

Options 1 and 2 would've enabled Mr M to retain guaranteed pension income, albeit at a lower level than provided by the BSPS. There were differences between the PPF and the BSPS2. For deferred members below the scheme normal retirement age, like Mr M, the PPF would provide compensation based on 90% of their accrued pension at the scheme normal retirement age of 65 (in effect a 10% reduction in benefits). The BSPS2 didn't apply such a reduction. The BSPS2 also provided the potential for discretionary increases to the accrued pension, a higher level of spouse's pension and the option to transfer to an alternative pension to convert to flexible benefits at a later date when needs could be determined with greater accuracy than at age 52 – the PPF didn't offer these additional features.

So while the situation was somewhat unusual, Mr M still had the option to retain guaranteed pension income in either the PPF or BSPS2. Due to his age and circumstances, it's my view Mr M would've been better off choosing the BSPS2 instead of the PPF based on what was known at that time including the uncertainty concerning whether he would, in fact, be able to retire earlier than 65.

Given the FCA's view on safeguarded benefits, it's my fair and reasonable opinion that AJH should've started its advice process by assuming the BSPS2 was suitable for Mr M and to only recommend a transfer to the PPP if it could clearly demonstrate it was in his best interests.

AJH's advice to Mr M

In responding to this complaint, AJH stated that before engaging its services, Mr M had already made his mind up about transferring and it was always his intention to do this. And so it believed he would've transferred anyway regardless of its advice. Notwithstanding this point, it stated that, when advising Mr M, it had complied with and considered the FCA's rules and guidance including making him aware of the risks associated with the transaction. This included making him aware that, in its view, the critical yield figure attached to the proposed transfer was unlikely to be achieved meaning, from an economic point of view, he'd be worse off – I've covered this in more detail below. But it nevertheless advised him to transfer to achieve his objectives for flexibility, control, and to leave a legacy for his family on death.

I recognise that there wasn't a perfect solution for Mr M. And that his safeguarded benefits in the BSPS was ultimately his money to do with as he saw fit. Due to the changes happening to the BSPS, he was forced to make a decision. It's my view that he was relying on AJH to provide expert, balanced information and advice, taking into account all the information available to it at that time – so that he could then make an informed decision. I understand that there will be instances where a client seeks financial advice with preconceived notions or concerns about the financial health of an employer or DB pension scheme but, as the professional party, AJH was tasked with rationally addressing those concerns and providing an appropriately balanced view of the available options.

In my view, disclosure of risks isn't the same as suitability. In other words, just because AJH told Mr M that the critical yield was unlikely to be achieved and that he could be worse off doesn't absolve it from any responsibility for the suitability of the transaction. In my view, financial planning isn't simply about wish fulfilment and facilitating whatever course of action a client wishes to take. If an advising business considers a course of action to be unsuitable for their client, or otherwise not in their best interests, it has the option not to facilitate the transaction.

Transfer value analysis

One of the key components in determining the suitability of a pension transfer is assessing the financial viability of the proposed transaction. The transfer value analysis system ("TVAS") rules applied at the time AJH advised Mr M. This required it to carry out a transfer value analysis to calculate the 'critical yield' applicable to the proposed transfer. The critical yield is the annual rate of investment return required on the invested transfer value, after charges, to match the capitalised value of the benefits offered by the DB pension scheme on the assumption that the value of the alternative pension is used to secure a lifetime annuity at the scheme normal retirement age – the higher the critical yield, the less likely that the alternative pension will achieve sufficient investment growth to match the revalued pension payable by the DB pension scheme.

AJH calculated the following critical yield figures:

Scheme	At age 60 based on a full pension	At age 60 based on a reduced pension and maximum tax-free cash	At age 65 based on a full pension	At age 65 based on a reduced pension and maximum tax-free cash
BSPS	9.1%	7.7%	7.3%	6.4%
PPF	8.7%	7.9%	6.5%	5.9%

The critical yield figures for the BSPS2 weren't calculated. But it was known at the time AJH advised Mr M that the BSPS2 would pay a higher level of benefits than the PPF but lower than the BSPS, so the critical yield figures for the BSPS2 at age 65 likely fell somewhere in between the figures above.

AJH's recommendation to Mr M was provided to him after the FCA gave instructions in its *'Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers'* 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 on our website. While businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would've been considered reasonably achievable when the advice was given in this case. The closest discount rates which I'm able to refer to and published by this service for the period before October 2017 is 4.3% based on Mr M taking benefits at the BSPS normal retirement age of 65 and 3.9% based on him taking benefits at age 60 in line with his early retirement objective. Furthermore, the FCA's projection rate for pensions at the time was 8% per year for the upper rate, 5% per year for the middle rate and 2% per year for the lower rate.

In my view, the discount rate and FCA projection rates when compared to the critical yield figures imply that Mr M would've needed to accept a high-risk investment approach to provide the potential for the sort of investment returns required to match the critical yield figures noted above. But that would only come with accepting the risk of significant investment loss. This is because the relationship between risk and reward is closely related.

I note that Mr M was recorded as having a *'Medium'* risk profile. The evidence I've seen indicates that he had very limited investment knowledge and experience before this pension transfer. At the time of AJH's advice, he didn't have any savings or investments other than the DC pension plan he had recently joined through his employment with Tata Steel. There's no evidence that Mr M had experience of investing significant sums of money.

Given the critical yield figures applicable in this case, I think that there was limited scope for the PPP to provide benefits that matched the relinquished benefits, let alone exceed them. And it seems that AJH agrees because in its suitability report, when expressing its view on the critical yields, it stated, *"You have also hand written a letter to confirm that you are aware that my advice is not to transfer based on these Critical Yield figures, as I believe they are unachievable considering your personal objectives".*

Of course, financial viability isn't the only consideration when giving pension transfer advice, as was set out in COBS 19.1.7B (G). A reasonable prospect of the critical yield being met or exceeded wouldn't necessarily mean that the transfer was suitable, and conversely, there might be other considerations which mean a pension transfer is suitable, despite providing overall lower benefits. I'll now go on to consider this, taking into account Mr M's objectives regarding flexibility and early retirement, control and death benefits.

Flexibility and early retirement objective

It was recorded that Mr M wanted to retire no later than age 60. In his first meeting with AJH he stated that he wanted to receive gross annual retirement income of £24,000. AJH later informed him that figure was unrealistic based on the then value of his pension arrangements.

The value of Mr M's safeguarded benefits, representing 12 years and 7 months' pensionable service, was the backbone of his retirement provision built up by that time. So it seems to me that when the time came to retire that he'd be heavily reliant on these benefits to support his standard of living in retirement. The evidence indicates that when he retired that he'd likely require a steady, secure income stream for the rest of his life from these benefits. The BSPS offered the option of commuting some of his pension income in exchange for a lump sum to meet any capital requirements.

In its suitability report, AJH recorded that it recommended the pension transfer to a PPP to enable Mr M to flexibly access his safeguarded benefits early. I think it's clear that Mr M was attracted to a flexible arrangement. But I'm not convinced, based on the evidence provided, that he had a genuine need to access his safeguarded benefits flexibly with varying levels of income and lump sums during retirement.

A key point here is that Mr M couldn't access the money in the PPP until age 55 at the earliest. So I don't think there was any need to transfer his safeguarded benefits at age 52, especially given the high critical yield figures attached to the transaction.

Mr M was about eight years away from his target of retiring at age 60. While I don't doubt he would've liked the flexibility to draw any level of benefit he wanted, plans can change over such a long period of time. It was recorded that he didn't have any savings or investments other than the value of his pension arrangements so his ability to retire at age 60 would depend entirely on the income produced by his safeguarded benefits and DC pension savings.

AJH portrayed the PPP option in the suitability report as allowing for early retirement without the "penalties" which would be applied to the PPF or BSPS2 options. The reality was of course that the PPP would've had less time to grow if accessed earlier at age 60 and any resulting income would need to last longer. I cannot see that this was explained to Mr M so that he could understand accessing any of the available options early would likely lead to reduced retirement income during his lifetime compared to taking benefits at age 65.

So, given the timeframe of eight years, I think it's fair to say that in 2018 it was uncertain what Mr M's financial situation might look like in the future and whether he could, in fact, retire no later than age 60.

But if I assume it was a realistic objective that Mr M could retire at 60, I make the following observations.

I note that Mr M had been an active member of the Tata Steel DC pension scheme since March 2017. The value in January 2018 was about £5,000. He and his employer were, in total, contributing 16% of his gross annual salary of about £35,000 into the DC pension plan, which was about £5,600 in monetary terms. This would increase in line with increases in his salary. In the suitability report it stated Mr M, *"will remain in this Scheme until your retirement making personal contributions and receiving employer contributions".* So I think it's fair to say that Mr M would remain a member of the DC pension scheme until such time as he could afford to retire, whenever that would be. And in the event Mr M left that employment, I think it's likely that he'd find alternative employment, albeit perhaps outside the steel industry, and, with the legal requirements of auto-enrolment, would join a different DC pension scheme and pay a minimum of 8% of his earnings into it.

Therefore, I think it's fair to say that over the eight year period to age 60, it's likely that Mr M would build up significant DC pension savings – the contributions alone over that eight year period would be about £45,000, ignoring any investment growth and increased level of contributions linked to changes to his salary.

So if Mr M did have a genuine need for flexible benefits no later than age 60, it seems that this this could've been met in the first instance by using his DC pension savings. This course of action would've enabled Mr M to delay accessing his safeguarded benefits in the first instance, meaning the early retirement factor wouldn't be as great as at age 60. This would then be followed by the full state pension at 67. So, from 65 onwards, most of Mr M's core retirement income need could've been met by guaranteed and escalating pensions which would've offered some inflation protection unlike the recommended PPP.

Transferring to the PPP led to the investment, inflation and longevity risks associated with providing the retirement benefits moving from the DB pension scheme to Mr M. But I don't think he needed to take on these risks at that time for the reasons explained above.

The course of action recommended by AJH led to Mr M concentrating his retirement benefits on a DC basis which offered no guarantees but was based entirely on investment performance. The alternative, blended approach I've suggested above may have enabled Mr M to achieve his early retirement objective but with significantly less risk. I haven't seen evidence that AJH adequately considered and discounted this alternative course of action at the time. The available evidence simply doesn't support the position as to why flexibility would've been a sufficiently compelling reason for Mr M to relinquish valuable benefit guarantees at that time.

In conclusion, while I understand Mr M's reasons and motivations for flexible benefits and early retirement, I don't think AJH clearly demonstrated why it was in his best interests to relinquish his safeguarded benefits at that time to achieve future flexibility. I simply don't agree the perceived advantage of flexibility and control of income outweighed the guaranteed benefits offered by the BSPS2.

Control objective

Given the level of uncertainty surrounding the BSPS at the time, I can understand that Mr M was concerned about the financial security of his safeguarded benefits and so wanted to have control over these by transferring them away to a PPP.

The suitability report included a list of reasons why a pension transfer might be suitable – the list included, *"Concerns over Scheme Solvency"* which was followed by an explanation about the PPF.

The PPF was introduced by the government in 2005 as a 'lifeboat' scheme to protect members of DB pension schemes with the promise of providing a minimum level of benefits. The revaluation and escalation rates are set by law. Depending on his age on transfer to the PPF, Mr M could expect to receive a minimum of 90% of his scheme pension, although this would be affected by the revaluation and escalation rates under the PPF. This contrasted with the recommended PPP where there's no promise of a minimum level of benefits payable. At the time of AJH's recommendation, the PPF's financial position remained robust with an increase in its surplus funds to £6.1bn. So I don't think there wasn't any reason at that time to question the financial viability of the PPF to provide benefits in the future.

Had AJH advised Mr M to transfer to the BSPS2 he would've maintained safeguarded benefits and retained the option to transfer to a PPP at a later date, if then deemed suitable, when he could immediately access benefits and, crucially, determine his retirement income and lump sum needs with greater accuracy than at 52. I think this is a key point.

A transfer to the BSPS2 would've also removed any immediate concerns Mr M had about the PPF. After all, the whole reason the BSPS2 was conceived was to provide a new long-term DB pension scheme for former members of the BSPS. And if it was the case, in the future, that the BSPS2 was at risk of being transferred to the PPF, then I think it likely that, similarly to the BSPS, members would be given the opportunity to transfer out to a PPP before any transfer to the PPF occurred. So I don't think that there was any immediate concern about options disappearing for Mr M or that there was an urgency to transfer to a PPP at that time to avoid a transfer to the PPF. In my view, Mr M was reliant on AJH to provide a fair and balanced assessment of the BSPS2 and PPF and to act in his best interests in this regard. This ought to have involved discussing with Mr M the features, risks and benefits of those alternative options and allaying his misapprehensions.

If Mr M was concerned about his safeguarded benefits being transferred to the PPF which would result in him losing 10% of his scheme pension, then I question why he would accept the risk of transferring to a PPP which exposed him to unlimited downside risks where the loss could be significantly greater than 10%. This simply doesn't make sense to me and suggests that he didn't have the knowledge and experience to understand the features, risks and benefits of the PPF compared to the pension transfer. He was relying on AJH to provide expert advice on this point, but I think it failed to do this. The suitability report doesn't deal with Mr M's concerns about the PPF. So he likely thought a transfer to the PPF was an outcome to avoid at all costs and probably reinforced his view that a transfer to a PPP was the best course of action.

In summary, I think that AJH failed to adequately allay Mr M's misapprehensions and that he therefore made the decision to transfer to the PPP from an uninformed position regarding the BSPS2 and PPF.

Death benefits objective

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 recommended PPP offered flexible death benefits. Based on the applicable tax rules, if death occurred under 75 the benefits are paid free of income tax – after 75 the benefits are taxed at the beneficiary's marginal rate of income tax. It's fair to say that immediately following the transfer to the PPP and for the period until Mr M could draw any benefits from 55 onwards, the death benefits available would be significant (subject to investment performance) due to the simple fact he couldn't access and deplete the fund value for at least 3 years.

But Mr M was recorded as being in good health. So he could expect life expectancy into his 80s. There weren't any immediate health concerns that indicated a pension transfer was a suitable course of action at that time.

The value of Mr M's safeguarded benefits would represent the backbone of his retirement provision by the time he came to retire. Withdrawing money from the PPP to meet his income and lump sum needs from age 60 would likely mean that the size of the fund remaining in later years – when death is more likely – could be much smaller than expected.

If it was a genuine objective for Mr M to provide a lump sum to his family on his death, then life cover could've achieved the same objective of providing a lump sum while enabling him to maintain safeguarded benefits in the BSPS2. I note that Mr M had disposable income available every month after paying his bills which he could've used to pay for life cover to achieve the death lump sum objective. In the suitability report reference was made to the possibility of obtaining life cover, as follows:

> *"As you are concerned about the death benefits from the Scheme, I have also researched a Whole of Life Protection policy for you, on the open market via a system known as Synaptics. My research detailed quotes, for example from Vitality Life providing a sum assured of £161,591 for a monthly premium of £51.02 (prior to any medical underwriting). However, you are more concerned with the actual loss of monies from the pension fund on death rather than being concerned with affecting a life assurance policy to cover this."*

I cannot see evidence that AJH adequately quantified Mr M's death lump sum need, over what term or how this might change over time. Rather, it appears AJH assumed Mr M required life cover that matched the transfer value. That level of cover may have been incorrect. Furthermore, it appears AJH assumed that Mr M required cover for the rest of his life. Again, this may have not been necessary. Using a whole of life policy may have led to Mr M being charged for benefits or longer term life cover that he might not have needed. In my view, a decreasing term assurance policy may have been more appropriate for comparative purposes since it more closely matches the shape of a decreasing pension fund value once accessed. And decreasing term assurance is generally cheaper than whole of life cover, so the cost was likely to be less than £51.02 and may have been more attractive to Mr M. I cannot see evidence that AJH considered and presented decreasing term assurance quotes to Mr M to help him make an informed decision regardless of his own views about the relevance of life cover. Afterall, Mr M wasn't the expert here – AJH was.

As for the comment in the suitability report that Mr M was more concerned with the actual loss of monies from the pension fund on death rather than being concerned with affecting a life assurance policy to cover this, it's clear that there was no loss of monies. Rather, it's the case that the death benefits payable by the BSPS2 would've been in a different format rather than being "lost" as Mr M apparently believed.

But, in any case, I note that through his employment, Mr M had life cover based on a multiple of four times' his salary, meaning a lump sum of about £140,000 would be paid in the event he died while still employed by Tata Steel – this was payable regardless of whether his safeguarded benefits were transferred to BSPS2, PPF or a PPP. In addition, the value of his Tata Steel DC pension plan would be paid as a lump sum to his nominated beneficiary(ies). So, it seems to me that in the immediate future, certainly while Mr M remained employed by Tata Steel, that a lump sum of at least £140,000 would be paid on his death. It was noted that Mr M intended to remain employed by Tata Steel until he retired.

So I think it's fair to say that there wasn't any immediate need to transfer at that time to provide death benefits bearing in mind the cover already in place while Mr M remained employed by Tata Steel. With no immediate health concerns, this existing cover enabled AJH and Mr M enough time to properly investigate obtaining additional life cover so that he could maintain safeguarded benefits in the BSPS2.

It's my view that Mr M had no health issues at the time AJH advised him which might reasonably have prompted him to relinquish the guarantees attached to his own retirement income for the sake of an enhanced safety net for his family. So I'm not convinced there was any real merit in Mr M transferring to a PPP at that time to provide a lump sum death benefit.

If properly informed, would Mr M have transferred anyway?

I'm not persuaded that a pension transfer was clearly in Mr M's best interests and that AJH's recommendation could be regarded as suitable in the circumstances at that time. So I think it's fair and reasonable to uphold this complaint.

In potential mitigation of AJH's advice, I've also thought about whether Mr M, if placed in a fully informed position, would nevertheless have decided to transfer the value of his safeguarded benefits to a PPP. This was a complex transaction involving many factors which Mr M, as a layperson, wouldn't have been familiar. It's my view, given his lack of investment knowledge and experience, that he was heavily reliant on AJH, as the professional party in the transaction, to take those factors into account and provide suitable, balanced advice regardless of his own views. Given Mr M's reliance on AJH to provide expert advice, I think it's unlikely, on balance, he would've transferred to a PPP against its advice had it advised him to opt for the BSPS2.

Putting things right

A fair and reasonable outcome would be for AJH to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice he was given.

Our investigator concluded that, if properly advised, Mr M would've opted for the BSPS2. I agree. There were differences between the BSPS2 and PPF. These differences meant that the PPF was likely the better option for unmarried, deferred members who expected to retire early or take the maximum tax-free cash available even allowing for the 10% reduction in the starting entitlement. But the BSPS2 was likely the better option for married pensioners and deferred members who expected to draw benefits at or close to the scheme normal retirement age of 65. Mr M is married. I think it's likely that, properly advised, Mr M would've envisaged accessing any DC pension savings in the first instance to meet his income and lump sum needs before starting to take his safeguarded benefits from the BSPS2.

As such, the calculation on the basis of entering the BSPS2 should be carried out using the most recent financial assumptions at the date of the actual calculation. This should be on the basis Mr M takes benefits at the scheme normal retirement age of 65.

FCA consultation

On 2 August 2022, the FCA launched a consultation on new DB pension transfer redress guidance and set out its proposals in a consultation document – CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA stated that it considers the current redress methodology in Finalised Guidance (FG) 17/9 remains appropriate and fundamental changes aren't necessary. However, its review identified some areas where it considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance – https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has stated that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 while the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We previously asked Mr M whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance and rules to be published. He didn't make a choice. So, as set out previously, I've assumed in this case he doesn't want to wait for any new guidance. It's my view that FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr M.

AJH must therefore undertake a redress calculation in line with the FCA's pension review guidance as updated by it in its *'Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers'*. This calculation should be carried out as at the date of this final decision and using the most recent financial assumptions at that date. In accordance with the FCA's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of this final decision.

AJH wish to contact the Department for Work and Pensions ("DWP") to obtain Mr M's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the BSPS on Mr M's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M's PPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the PPP if it would conflict with any existing protection or allowance.

If a payment into the PPP isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could've been taken as tax-free cash and 75% would've been taxed according to his likely income tax rate in retirement – presumed to be 20%, as previously stated by our investigator. So making a notional deduction of 15% overall from the loss adequately reflects this.

If this complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect AJH to carry out a calculation in line with the updated rules and/or guidance in any event.

In addition, AJH should pay Mr M £300 compensation for the trouble and upset caused by its unsuitable recommendation which led to the loss of valuable pension income guarantees.

The compensation amount must, where possible, be paid to Mr M within 90 days of the date AJH receives notification of his acceptance of this final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement for any time, in excess of 90 days, that it takes AJH to pay Mr M.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply. 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. I require AJH Financial Services Ltd to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £160,000. Where the compensation amount doesn't exceed £160,000, I would additionally require AJH Financial Services Ltd to pay Mr M any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I would only require AJH Financial Services Ltd to pay Mr M any interest as set out above on the sum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I recommend that AJH Financial Services Ltd pays Mr M the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr M. If Mr M accepts this final decision, the money award becomes binding on AJH Financial Services Ltd. My recommendation wouldn't be binding. Further, it's unlikely that Mr M can accept this final 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 this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my final decision before 7 February 2023.
Clint Penfold
Ombudsman