DRN-3389334

The complaint

Mr R complains about the suitability of the advice provided by Burley Fox Limited ("Burley Fox") in November 2017 to transfer the value of his safeguarded benefits in the British Steel Pension Scheme ("BSPS") to a self-invested personal pension ("SIPP").

Mr R is represented in this complaint by a claims management company ("CMC").

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 CMC and Burley Fox. I don't intend to repeat here what our investigator stated but will instead provide a summary.

In March 2016, Mr R'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 ("RAA") 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 R, under the *'Time to Choose'* communication 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 SIPP.

Options 1 and 2 would've enabled Mr R 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 R's safeguarded benefits in the BSPS at that time were as follows:

- He had accrued 11 years and 3 months' qualifying service between December 2005 and March 2017;

- The scheme pension provided was based on his final salary, qualifying service and benefit accrual rate – as at the date of leaving the scheme in March 2017, his annual scheme pension was £5,178. The scheme pension would be revalued by a prescribed amount over the term to the scheme normal retirement age of 65 and, once in payment, would also escalate annually by a prescribed amount;

- Payment of benefits before age 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 estimated revalued annual scheme pension payable by the BSPS at age 65 was £9,758 or a reduced pension of £6,741, plus tax-free cash of £44,942. And at age 58 it was £6,116 or a reduced pension of £4,234, plus tax-free cash of £28,228;

- In the event the BSPS fell into the PPF, the estimated revalued annual scheme pension payable by the PPF at age 65 was £8,869 or a reduced pension of £6,652, plus tax-free cash of £55,188. And at age 58 it was £6,980 or a reduced pension of £5,235, plus tax-free cash of £54,932;

- The cash equivalent transfer value of his safeguarded benefits was £121,310.64.

In response to the announcement by Tata Steel, Mr R contacted Burley Fox for advice. He met one of its advisers in October 2017. A fact find document and attitude to risk questionnaire were completed which recorded the following information about Mr R:

- He was aged 32 and in good health. His partner was also aged 32 and in good health. They were engaged to be married. They had three financially dependent children aged between 1 and 7;

- He was employed full-time by Tata Steel and paid gross annual income of about £33,000. His partner didn't work at that time but planned to do so in the future when their children were older;

- Their assets comprised the residential home valued at £120,000. They didn't have any other savings or investments;

- Their liabilities comprised a repayment mortgage of £84,000 on their residential home (the remaining term on the mortgage doesn't appear to have been recorded). He also had an unsecured personal loan and credit card debt of about £25,000. He had surplus disposable monthly income of about £1,000;

- In addition to the value of his safeguarded benefits in the BSPS, he was on course to receive the State pension at age 68 and had been a member of Tata Steel's defined contribution ("DC") pension scheme since April 2017. The total annual contribution into his DC plan was 16% of his gross annual salary. His partner didn't have any private retirement provision; and

- He had limited investment experience. His risk profile was determined to be *'Moderate'*.

In the fact find document, it was noted:

> "[Mr R] *is interested in looking at transferring his British Steel Pension scheme following the restructure. He has been sent a CETV and benefits statement.*

He said that he would like to retire at 58 as he does not want to be working shifts beyond that age and draw around £1k per month from his pension. He would also like to be able to access his TFC lump sum to clear any mortgage or debts he may have at that time.

If he does transfer his BSPS he would like to invest the proceeds utilising our APS service as he would like to maximise investment returns to retirement.”.

In November 2017, Burley Fox issued its suitability report to Mr R. The report confirmed his concerns and objectives, summarised as follows:

- **PPF:** He wasn’t convinced about the longevity of Tata Steel in the UK and was concerned about the value of his safeguarded benefits being transferred to the PPF, leading to a reduction in the level of retirement benefits;

- **Inflation:** He was concerned that, with at least 26 years until he retired, inflation could rise above the 2.5% capped revaluation rate applied to his safeguarded benefits, leaving him worse off in real terms if he left his benefits preserved in the BSPS (or BSPS2);

- **Early retirement:** His role at Tata Steel involved shift work. He wanted the option to be able to retire from his role at age 58 and start drawing pension benefits at that time, possibly combined with remaining employed but seeking a different role within Tata Steel. He wanted to receive annual retirement income of about £12,000 (net of income tax) in 2017 terms on the basis that he didn’t have a mortgage or any other liabilities at that time;

- **Tax-free cash:** He wanted to maximise the tax-free cash available from his pension benefits at retirement to clear any outstanding mortgage or buy a bigger house; and

- **Death benefits:** He preferred for any unused benefits on his death to be available to his partner and children as a death lump sum benefit rather than as a percentage of his pension income.

Burley Fox recommended that Mr R transfer to a SIPP. In summary, it stated that the transfer would provide investment control and greater flexibility in terms of retirement and death benefits. The costs associated with the recommendation were set out in the suitability report, as follows:

Initial charge

- £1,500 initial adviser charge

Ongoing annual charges deducted from the SIPP fund value

The ongoing charge was 2.25%, broken down as follows:

- 1.00% ongoing adviser charge
- 0.81% annual fund management charge
- 0.39% platform charge
- 0.05% platform administration charge

Mr R accepted the recommendation, following which the transfer to the SIPP was completed in early 2018 after the provider received the transfer value of £121,310.64. Burley Fox recommended that, after the deduction of its initial adviser charge, the transfer value be invested in its *'Advisory Portfolio Service'* or APS which involved actively managing the underlying investment in a portfolio across various asset classes to align with Mr R's *"Moderate"* risk profile – a separate, detailed investment report in connection with this was provided to Mr R.

This complaint

During 2021, the CMC, on behalf of Mr R, complained to Burley Fox about the suitability of its pension transfer advice. In summary, the CMC stated that the advice was unsuitable because it led to Mr R losing valuable guarantees and secure income without good reason.

Burley Fox didn't uphold this complaint. It stated that the CMC had made untrue and misleading statements when it complained on Mr R's behalf. In summary, it stated that it had considered all three options available to Mr R (the PPF, BSPS2 or pension transfer) and that a pension transfer was the only viable option to enable him to achieve his objectives relating to control, early retirement and flexibility, and death benefits. In its view, neither the BPS2 nor PPF would've enabled Mr R to achieve his objectives. It was satisfied that it had adhered to and considered relevant FCA rules and guidance including providing Mr R with all the necessary information and risk warnings to be able to make an informed decision.

One of our investigators considered this complaint and recommended that it be upheld. This was because he thought that Burley Fox's recommendation to transfer wasn't clearly demonstrated to be in Mr R's best interests. He noted that the critical yield figures attached to the transaction indicated that there was limited potential for Mr R to be better off by transferring. He reasoned that Mr R was about 26 years away from his preferred retirement age of 58, so there wasn't any urgency to transfer at that time, particularly since there was a lack of clarity about what his circumstances and retirement income needs would be so far into the future. In addition, he wasn't persuaded that it was suitable for Mr R, who was an inexperienced investor, to relinquish guaranteed income and instead take on the investment risks associated with the pension transfer to a SIPP for what he considered to be generic objectives. He thought suitable advice would've been to transfer to the BSPS2.

To put things right, our investigator recommended that Burley Fox 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 R opted for the BSPS2 and would be a 20% income taxpayer in retirement. In addition, he recommended that Burley Fox pay Mr R £300 compensation for the trouble and upset caused by its unsuitable recommendation.

Mr R accepted our investigator's assessment. But Burley Fox disagreed and stated that this complaint shouldn't be upheld. There followed an exchange of correspondence between our investigator and Burley Fox within which it provided substantial additional comments and evidence in response. Our investigator considered those additional comments and evidence but wasn't persuaded to change his mind. Since agreement couldn't be reached, this complaint was placed into the queue awaiting allocation to an ombudsman for review.

While waiting for an ombudsman to decide this complaint, Burley Fox carried out two loss assessments after 1 April 2023 using third party actuarial software: the first calculation showed that Mr R had suffered a financial loss of £728; and the second calculation showed that he hadn't suffered a loss. And so Burley Fox concluded no redress was payable and that it wasn't required to take any further action on this complaint.

The CMC didn't accept the loss assessment calculations carried out by Burley Fox. It said that the calculations were based on an incorrect SIPP fund value and Mr R taking benefits at age 58. In its view, the loss assessment should be based on the correct fund value and Mr R taking benefits at the scheme normal retirement age of 65. The CMC stated that it didn't accept Burley Fox's position that Mr R hasn't suffered a financial loss and requested that this complaint be decided by an ombudsman.

On 22 May 2023, our investigator contacted Burley Fox and the CMC to tell them that the FCA had developed a BSPS-specific redress calculator to calculate redress due under the BSPS consumer redress scheme, as set out in PS22/13. And that the FCA was encouraging businesses to use that calculator for non-scheme cases, such as this complaint made by Mr R. Our investigator stated that in my final decision I may direct Burley Fox to use the FCA's calculator and invited any comments that the parties wanted to make. The deadline for providing comments has passed.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules, guidance and good industry practice at the time. I've also carefully considered the submissions made by the CMC on behalf of Mr R and Burley Fox. Where the evidence is unclear, or there are conflicts, I've made my decision based on the balance of probabilities. In other words I've looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

Before going any further, I'd like to apologise to the parties for the length of time it has taken me to issue this final decision. To make my findings easier to follow, I've set them out under separate headings below.

FOS's approach to deciding complaints

Throughout its dealings with this Service, Burley Fox has repeatedly expressed its concerns about how we decide complaints. It says that we use letter templates which has led to different decisions containing identical content and cutting and pasting errors, as evidenced by decisions published on our website. It also says that our approach to assessing complaints about BSPS pension transfers is flawed. This is because, in its view, we don't follow FCA rules and guidance which has resulted in inconsistencies in approach by the FCA and this Service when assessing the suitability of pension transfer advice. It's concerned our investigator didn't assess this complaint on its own facts and that the recommended uphold outcome was already pre-determined.

I want to address Burley Fox's concerns. Firstly, I can assure it that we consider each case on an individual basis based on the available evidence. While some cases may appear to have similar circumstances, they can have different facts involved and so won't necessarily have the same findings or outcome. In the case of BSPS pension transfers, many members were facing the same, uncertain situation following the announcement by Tata Steel in March 2016 which resulted in a significant number being advised to transfer away. The background and circumstances were very similar for lots of members – and so it's inevitable that our decisions on complaints about BSPS pension transfers will include similar content when setting out the background, circumstances, the reasons for the recommendation to transfer and when referencing relevant FCA rules and guidance. But the similarity in content on different decisions doesn't mean the outcome of this complaint was pre-determined as Burley Fox believes to be the case.

My role, as set out in DISP 3.6.1R, is to decide this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances. And 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've carefully considered all the available evidence afresh including Burley Fox's substantial comments in response to our investigator's assessment. I'd like to make clear that the purpose of this final decision isn't to repeat or address every single point raised by the CMC, on behalf of Mr R, and Burley Fox. 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.

The FCA's suitability rules and guidance

Burley Fox was authorised and regulated by the FCA at the time it provided its recommendation to Mr R. 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, Burley Fox 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 R. The suitability rules and guidance that applied when Burley Fox provided its recommendation to Mr R 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 to ensure 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 requirements and guidance relating to pension transfers involving safeguarded benefits, as was applicable to Mr R'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 Burley Fox's recommendation, it's necessary for me to have due regard to the FCA's rules and guidance applicable at the time it advised him in late 2017.

In responding to this complaint, Burley Fox stated that in June 2017 the FCA launched a consultation, *'CP17/16: Advising on Pension Transfers'*, which included a suggestion about removing the existing 'starting assumption' guidance that a pension transfer will not be suitable and replacing it with a neutral starting position. Burley Fox stated that the FCA hadn't yet published feedback on that consultation by the time it advised Mr R and so, at the time of its advice, the FCA's starting assumption was, in effect, 'neutral'.

It appears Burley Fox referenced the FCA's consultation to indicate that the regulator had softened its approach to pension transfers at the time it advised Mr R. If this was its intention, then I don't see how this is relevant in deciding this complaint. This is because the FCA didn't remove or alter it's 'starting assumption' guidance, as confirmed in *'PS18/6: Advising on Pension Transfers – feedback on CP17/16 and final rules and guidance'* published in March 2018. In that Policy Statement the FCA stated, *"We have decided not to proceed with our proposal on the 'starting assumption'…Our recent supervisory work has shown significant evidence of unsuitable advice being provided. This includes a review of advice given to British Steel Pension Scheme members. Given our concerns about the* *significant proportion of unsuitable advice, we do not consider it is appropriate to change this assumption at the present time"*.

So, it's the case that during the period Burley Fox advised Mr R, the FCA always expected it to start by assuming a pension transfer wouldn't be suitable for him, as set out in COBS 19.1.6G.

Mr R's situation

The situation for Mr R 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, as set out in the *'Time to Choose'* pack issued to him in October 2017:

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

It's undeniable that it was a period of great uncertainty for individuals such as Mr R. 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 R had about the security of his safeguarded benefits should've been addressed and appropriately managed by the professional party in the transaction, Burley Fox.

Options 1 and 2 would've enabled Mr R to retain guaranteed 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 R, the PPF would provide compensation based on 90% of their accrued pension at the scheme normal retirement age (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 (in the event Mr R was married by retirement) and the option to transfer to an alternative pension to convert to flexible benefits at a later date, if then deemed suitable.

So while the situation was somewhat unusual, Mr R still had the option to retain guaranteed benefits in either the PPF or BSPS2. Based on his age, circumstances and uncertainty about whether he could retire earlier than age 65 (which I'll come on to later), it's my view that he would've been better off choosing the BSPS2 instead of the PPF because of the higher level of income it would pay at that age.

I don't believe that the circumstances surrounding the BSPS altered the FCA's position or its expectations of firms. Given the FCA's view on safeguarded benefits and what was known at that time, it's my fair and reasonable opinion that Burley Fox should've started its advice process by assuming the BSPS2 was likely to be the most suitable option for Mr R and to only recommend a transfer to the SIPP if it could *clearly* demonstrate it was in his best interests, as referenced in COBS 19.1.6G.

Mr R's objectives

Based on the fact find document and suitability report, Mr R had several objectives regarding his safeguarded benefits, which can be distilled into four broad areas, summarised as follows:

- **Control:** He was concerned about the longevity of Tata Steel and that the value of his safeguarded benefits could be transferred to the PPF, leading to a reduction in the level of benefits he would receive when he retired. Due to these concerns, he wanted control over his pension benefits by transferring away;

- **Flexibility and early retirement:** He wanted the flexibility to retire early from age 58 and, at that point, receive annual retirement income of about £12,000 (net of income tax) in 2017 terms;

- **Maximising benefits:** He was concerned about inflation eroding the value of his safeguarded benefits and so wanted to transfer away to provide the potential for higher investment growth to maintain his benefits in real terms, with the aim of receiving a higher level of income and tax-free cash to clear any outstanding mortgage or buy a bigger house; and

- **Death benefits:** He wanted to ensure that, in the event of his earlier death, any unused pension benefits be passed on to his family.

I recognise that Mr R's safeguarded benefits was ultimately his money to do with as he saw fit. However, he was relying on Burley Fox 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, Burley Fox was tasked with rationally addressing those concerns and providing an appropriately balanced view of the available options.

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 a choice 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 Burley Fox advised Mr R. 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 (or other selected 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.

In response to our investigator's assessment, Burley Fox commented that the TVAS is no longer relevant in the current market after it was replaced by the Appropriate Pension Transfer Analysis ("APTA") rules in October 2018 – my interpretation of this is that Burley Fox is seeking to downplay the importance of the critical yield figures applicable to Mr R's case. Whilst undeniably useful in demonstrating the amount needed to replicate scheme benefits, since the APTA rules didn't apply at the time of the advice complained about, they're of little relevance in deciding this complaint.

Burley Fox calculated the following critical yield figures for Mr R (it calculated the figures for the BSPS2 using information available at the time):

Scheme	At age 58 based on taking a reduced pension and maximum tax-free cash	At age 58 based on taking a full pension	At age 65 based on taking a reduced pension and maximum tax-free cash	At age 65 based on taking a full pension
BSPS2	5.2%	5.6%	5.3%	5.5%
PPF	5.8%	6.1%	4.9%	5.2%

The TVAS report is based on the SIPP having an ongoing annual charge of 2% of the SIPP fund value. However, the ongoing charge was a higher figure of 2.25%, as set out in the suitability report. In addition, the initial adviser charge of £1,500 doesn't appear to be accounted for in the TVAS report. If my understanding is correct, this means that the critical yield figures presented to Mr R were understated – this is because the invested transfer value would need to achieve a higher level of investment growth than stated to account for the initial adviser charge and higher ongoing charge than appears to have been assumed in the TVAS report.

Burley Fox's recommendation to Mr R 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.

In response to our investigator's assessment, Burley Fox expressed concern about this Service referring to discount rates when deciding complaints about pension transfers because there wasn't any regulatory requirement for it to refer to these when it advised Mr R. In its view, the discount rates don't have any relevance in assessing the suitability of its advice.

I agree with Burley Fox that businesses weren't required to refer to discount rates when giving pension transfer advice. But I consider that they provide a useful indication of what growth rates would've been considered reasonably achievable when the advice was given in this case. The discount rates we refer to are based on a typical investment spread across shares and bonds. Over the last thirty years, the bond component in the discount rates has increased to reflect the more cautious approach typically being taken when members transfer a large number of years' of DB qualifying service. The closest discount rate which I'm able to refer to and published by this Service for the period before October 2017 is 4.6% based on Mr R taking benefits at his preferred retirement age of 58. 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.

I've taken this into account, along with the composition of assets in the discount rate, Mr R's *'Moderate'* attitude to investment risk and the investment timeframe to age 58. Based on these factors, I think the critical yield figures at age 58 meant that there was limited scope to match the benefits payable by the BSPS2, let alone exceed them. There would usually be no point relinquishing safeguarded benefits in order to 'stand still', given the risk that the transfer might underperform. So, from an economic point of view, it's questionable whether there was a reasonable prospect that Mr R would be financially better off by transferring on a like-for-like basis when compared to the scheme pension.

I acknowledge that Burley Fox stated the investment performance achieved by the SIPP since the transfer means that he's currently better off. In my view, subsequent investment performance of the SIPP is irrelevant in deciding this complaint. This is because I'm required to make a decision regarding suitability based on the contemporaneous evidence. Put another way, investment performance wouldn't transform an unsuitable recommendation into a suitable one and vice versa.

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 in the context of Mr R's recorded objectives.

<u>*Control objective*</u>

It's clear that one of Mr R's main motivations for considering a pension transfer was due to his concerns about the BSPS and the risk that this might fall into the PPF. I accept that such concerns were common among steelworkers at the time, and that it would've been a major motivation behind many of them transferring out. So I can understand why Mr R wanted to have control over his benefits by transferring to a SIPP.

That being said, Burley Fox's advice was provided in November 2017, after the *'Time to Choose'* pack had been issued to members. I think that the risk of the BSPS falling into the PPF had receded by a large extent by that point, as the RAA had been approved and the BSPS2 was being proposed primarily because it could provide benefits in most situations that were higher than PPF benefits. But, in any event, I don't consider a transfer to the PPF was an outcome for Mr R to avoid at all costs. I'll explain why.

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 R 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 SIPP where there's no promise of a minimum level of benefits payable. At the time of Burley Fox's recommendation, the PPF's financial position remained robust. So there wasn't any reason at that time to question the financial viability of the PPF to provide benefits in the future.

A transfer to the BSPS2 would've removed any immediate concerns Mr R 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 an alternative scheme before any transfer to the PPF occurred. So I don't think that there was any immediate concern about options disappearing for Mr R or that there was an urgency to transfer to a SIPP at that time to avoid a transfer to the PPF. In my view, Mr R was reliant on Burley Fox 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 R the features, risks and benefits of those alternative options and allaying his misapprehensions.

If Mr R 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 SIPP 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 Burley Fox to provide expert advice on this point, but I think it failed to do this. In my view, the suitability report didn't deal with Mr R's concerns about the PPF. So he likely thought that a transfer to the PPF was an outcome to avoid at all costs and probably reinforced his view a transfer to a SIPP was the best course of action.

In summary, I think that Burley Fox failed to adequately allay Mr R's misapprehensions and that he therefore made the decision to transfer to the SIPP from an uninformed position regarding the BSPS2 and PPF options.

Flexibility and early retirement objective

It was recorded that Mr R worked shift patterns and wanted to be able to retire from his role at age 58 and start drawing pension benefits at that time, possibly combined with seeking a different employed role within Tata Steel. He wanted to receive annual retirement income of about £12,000 (net of income tax) in 2017 terms on the basis that he didn't have a mortgage or any other liabilities at that time.

If benefits were taken early under BSPS2 then the income paid to Mr R would be reduced. But the reduction wasn't a penalty but applied to reflect the fact that the scheme would have to support the income for longer than anticipated, and to protect the interests of scheme members generally.

I think it's clear that Mr R was attracted to a flexible arrangement. Many people want to retire early. But this can only happen if they have the financial means to support themselves in retirement. Financial planning generally involves managing client expectations and a need for compromises. Mr R may have wanted to retire from age 58 but it was for Burley Fox, as the expert, to establish if this was feasible and to manage his expectations and help him modify his objectives to reflect the reality of his circumstances, if necessary. The further away from retirement an individual is, the harder it is to establish what their likely income need is. And in Mr R's case, being aged 32 at the time of the advice, I think it would've been very difficult to predict with any degree of certainty what his expected expenditure during retirement would be – and therefore what realistic level of income he would need from age 58 onwards to cover this and whether, in fact, he could retire early.

While I don't doubt he would've liked the flexibility to retire at age 58, plans can change over such a long period of time. Notwithstanding this, Mr R was then aged 32 and couldn't access the money in the SIPP until age 55 at the earliest anyway. So I don't think there was any need to transfer at that time, especially given the critical yield figures attached to the transaction.

I'm concerned about the way in which Mr R's retirement income need was established. It seems that the target annual retirement income figure was a notional figure put forward by Mr R rather than being based on a proper analysis of his likely expected fixed outgoings and discretionary spending and the required income need to cover this. So I'm not persuaded that Burley Fox took reasonable steps to establish Mr R's realistic retirement income need before it advised him to transfer.

Despite this, in response to this complaint, Burley Fox said that Mr R's early retirement and income need couldn't be met by either the BSPS or PPF and that a transfer to a SIPP was the only viable option. But this is contrary to its own analysis at the time. Its suitability report included three forecasts to show the level of projected income provided by the BSPS and SIPP at age 58 assuming that he took the maximum tax-free cash lump sum. The forecast for the BSPS at age 58 showed that the projected annual income of £4,234 was insufficient resulting in Mr R having a shortfall of around £7,000 each year between ages 59 and 68 (when he expected to receive his State pension). The forecast for the SIPP showed that the fund would be depleted by age 66 and that Mr R wouldn't have any income until his State pension started at age 68.

So it seems, that in isolation, nether the BSPS (or BSPS2) nor SIPP would enable Mr R to retire at age 58 and provide his target income during retirement – rather, the analysis showed that under both options Mr R would need to rely on additional income from other sources, such as that provided by his Tata Steel DC plan, or delay his retirement. With such a substantial time horizon until pension benefits could be accessed, it makes the case for a pension transfer – for the sake of achieving early retirement – more difficult to justify, particularly when Burley Fox's own analysis showed that the SIPP fund value would be depleted by age 66.

The forecasts showed that Mr R's income need could be met by the BSPS if he took benefits at the normal retirement age of 65. I note that it was recorded that Mr R could possibly continue working beyond age 58 but in a different role within Tata Steel – so it seems to me that his objective was to retire early from his *specific* employed role rather than from employment altogether, so it's possible he wouldn't need to start drawing pension benefits at age 58 in any event, further undermining the case for a pension transfer at that time.

Had Burley Fox advised Mr R to transfer to the BSPS2 he would've maintained safeguarded benefits and retained the option to transfer to a SIPP 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 far greater accuracy than at age 32. I think this is a key point. This approach would've entailed significantly less risk for Mr R compared to the pension transfer at that time.

Mr R's safeguarded benefits accounted for 11 years and 3 months' qualifying service. They represented the backbone of his retirement provision built up by that time. I think it's fair to say that when the time came to retire, he and his partner would be reliant on the value of these benefits to support their standard of living in retirement, particularly given that it was recorded that his partner didn't have any private or workplace pension arrangements in her name. Where there is such a need for a minimum level of income it's difficult to justify relinquishing guaranteed income in exchange for flexible income that doesn't have any guarantees, particularly where the client's retirement income need wasn't adequately established. Transferring to the SIPP led to the investment, inflation and longevity risks associated with providing the retirement benefits moving from the DB pension scheme to Mr R for the period until he retired. It also led to Mr R concentrating all his private retirement provision on a DC basis which offered no guarantees but was based entirely on investment performance and charges.

In summary, based on the information available in 2017, it's my view that there was insufficient information and analysis to show that Mr R could retire early from age 58 and that transferring was clearly in his best interests.

That said, if it was a genuine requirement that Mr R have access to flexible benefits at age 58, I make the following observation. He had been an active member of the Tata Steel DC pension scheme since April 2017. He and Tata Steel were, in total, contributing 16% of his gross annual salary of £33,000 into his DC pension plan every year, which was about £5,300 in monetary terms. This would increase in line with increases in his salary. It was noted that Mr R intended to continue working in the same role for Tata Steel until at least age 58, and possibly beyond if he changed roles. So I think it's fair to say that he would continue to be employed by Tata Steel for the foreseeable future. And in the event he left that employment, I think it's likely that he'd find alternative employment 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.

So over the 26-year period to age 58, it's likely that Mr R would build up significant DC pension savings. Based on contributions alone, I estimate that about £137,000 would be invested in his DC pension plan over that timeframe if he continued to be employed by Tata Steel. This ignores likely increases in his salary (and therefore higher pension contributions) and investment growth.

So if Mr R did have a need for flexible benefits from age 58, I think this could've been met in the first instance by using his likely significant DC pension savings. This course of action would've enabled Mr R to maintain his safeguarded benefits in the BSPS2 to provide guaranteed, escalating income to meet his core income need in retirement from age 65. The estimated revalued annual scheme pension payable at age 65 was £6,741 for the BSPS and £6,652 for the PPF, assuming Mr R opted to take maximum tax-free cash. I think it's likely that the revalued pension payable by the BSPS2 at age 65 likely fell somewhere in between these figures of £6,652 and £6,741. He could then use the tax-free cash from the BSPS2 to supplement his income until he started drawing his State pension at age 68 – at which point his recorded need would be covered by a combination of BSPS2 and State pension income, both of which would be secure and escalate in payment. And if it turned out the DC pension savings didn't provide adequate income for the *full* seven-year period between age 58 and 65, Mr R could take his benefits from BSPS2 at some point in between, meaning the early retirement factor wouldn't be as great as at age 58.

The alternative, blended approach I've suggested above may have enabled Mr R to achieve his flexibility objective but with significantly less risk. I haven't seen any evidence that Burley Fox adequately considered, presented and discounted this alternative blended approach in meeting Mr R's objectives.

In conclusion, the contemporaneous evidence simply doesn't support the position as to why flexibility and early retirement objectives would've been a sufficiently compelling reason for Mr R to relinquish valuable benefit guarantees at that time. I haven't seen any evidence that shows the pension transfer to the SIPP led to Mr R gaining any clearly defined advantage compared to the alternative option of transferring to the BSPS2.

Maximising benefits objective

It was recorded that Mr R was concerned about inflation eroding the value of his safeguarded benefits. So he wanted to transfer away to provide the potential for higher investment growth with the aim of receiving a higher level of income and tax-free cash to clear any outstanding mortgage or buy a bigger house.

There was a cap on how much Mr R's preserved benefits would be revalued in deferment and escalate in payment – that cap meant there was a risk the value of his pension would reduce in real terms in periods of high inflation. I understand that Mr R may have been concerned about future inflation and the impact this might have on the value of his scheme pension in real terms. But I don't think this was sufficient reason to relinquish secure income that provided a baseline level of guaranteed income in exchange for an income stream based entirely on future, unknown investment returns that offered no guarantee of providing a higher return in real terms. I think it's important to bear in mind that Mr R was also building up additional pension provision in his Tata Steel DC plan that would provide for the sort of potential to outperform inflation such as the recommended SIPP. And his State pension would increase fully in line with inflation in any event. So I'm not convinced it was necessary to relinquish his safeguarded benefits because there was a risk this element of his overall retirement provision might not keep pace with inflation.

Burley Fox recommended a transfer to maximise the tax-free cash available from the SIPP (compared to the BSPS) to enable him to repay any outstanding mortgage or buy a bigger house. While the outstanding repayment mortgage loan was stated as £84,000, I cannot see that the remaining term was recorded. So it's unclear to me what, if any, mortgage balance might be remaining at age 58 and whether it was necessary to transfer to SIPP at that time to try and maximise the tax-free cash available in 26 years' time. I note that Mr R would, in any event, be entitled to tax-free cash under the Tata Steel DC pension scheme and BSPS2 – which may have provided a lump sum sufficient to achieve Mr R's objectives.

In conclusion, it's my view Burley Fox didn't adequately demonstrate why a transfer to the SIPP to maximise income and tax-free cash was clearly in Mr R's best interests, further undermining the case for a pension transfer at that time.

Death benefits objective

In responding to our investigator's assessment, Burley Fox questioned why there was reference to Mr R having a death benefit related objective. It stated that our investigator's focus on death benefits was flawed because its advice to transfer wasn't based upon changing the format, shape or value of death benefits in any way.

I'm confused by Burley Fox's position on this. In its suitability report provided to Mr R it stated, under the section setting out Mr R's objectives, the following:

> *"In addition to the flexible income options you also like the fact that upon your death the remaining pension fund can pass to* [Mr R's partner] *and your children: You advised that you would prefer for* [Mr R's partner] *to have access to a lump sum, rather than a percentage of your pension, which would apply if you retained a scheme pension. You also like the ability to be able to pass on any money left in the pension upon* [Mr R's partner] *death to the children."*

Based on this, I think it's fair to say that Mr R had a death benefit related objective attached to his safeguarded benefits and so I will proceed on this basis.

The recommended SIPP offered flexible death benefits. Based on the applicable tax rules, if death occurred under age 75 the benefits are paid free of income tax – after age 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 SIPP and for the period until Mr R withdrew retirement benefits, 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.

But Mr R was recorded as being in good health. So he could expect life expectancy into his 80s. Burley Fox estimated that Mr R had a life expectancy of age 88. There weren't any immediate health concerns that indicated a pension transfer was a suitable course of action at that time.

Withdrawing money from the SIPP to meet his income and lump sum needs possibly from age 58 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 Mr R wanted 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, according to the fact find document, he 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. I can see that Burley Fox obtained a quote for level term assurance to age 65 based on a sum assured of £121,310 to reflect the transfer value. The monthly cost was stated at £8.73. Burley Fox didn't express any view in the suitability report on whether Mr R should purchase the life cover or not – rather, it simply stated the detail and left it for Mr R to decide whether he wanted to purchase it.

It appears that Burley Fox assumed Mr R required life cover that matched the transfer value to the scheme normal retirement age of 65. I cannot see evidence that it adequately quantified Mr R's death lump sum need taking into account any existing cover, over what term or how this might change over time. So cover of £121,310 may have been inappropriate.

But, in any case, I understand that through his employment Mr R had death in service life cover based on a multiple of four times' his salary, meaning a lump sum of about £132,000 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 SIPP. In addition, Mr R's BSPS contributions of about £17,000 plus interest at 3% compound and the value of his Tata Steel DC pension plan as a lump sum be payable to his nominated beneficiaries. I note that Mr R wasn't married at that time, but, in the event his marital status changed (it was noted that he was engaged), his partner would receive a 50% spouse's pension had he opted for the BSPS2.

So it seems to me that in the immediate future, certainly while Mr R remained employed by Tata Steel, that a lump sum of at least £149,000 would be paid on his death. It appears that Mr R intended to remain employed by Tata Steel until he retired, so I think it's fair to say that there wasn't any expectation the death in service benefits would disappear in the foreseeable future.

This leads me to conclude that there wasn't any immediate need to transfer at that time to provide death benefits in a different format bearing in mind the cover already in place while Mr R remained employed by Tata Steel.

While I understand that death benefits are important to consumers, the priority here, in my opinion, was to advise Mr R about what was best for his own retirement provision. A pension is primarily designed to provide income in retirement. It's my view that Mr R had no health issues at the time Burley Fox 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 him transferring to a SIPP at that time to provide a lump sum death benefit.

If properly informed, would Mr R have transferred anyway?

For the reasons explained above, I'm not persuaded that a pension transfer was clearly in Mr R's best interests. As a result, I think it's fair and reasonable to uphold this complaint.

In potential mitigation of Burley Fox's advice, I've also thought about whether Mr R, if placed in a fully informed position, would nevertheless have decided to transfer the value of his safeguarded benefits to a SIPP. This was a complex transaction involving many factors which Mr R, 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 Burley Fox, as the professional party in the transaction, to take those factors into account and provide suitable, balanced advice.

Mr R might have chosen to transfer against advice on the basis of his concerns. However, bearing in mind that many members transferred to the BSPS2 even though such concerns were widely held, and bearing in mind also his lack of investment experience and "*Moderate"* risk profile, I don't think, on balance, that he would've insisted on transferring. Given Mr R's reliance on Burley Fox, I think it's likely he would've accepted a recommendation for the BSPS2 had it advised him to take that course of action.

Putting things right

A fair and reasonable outcome would be for Burley Fox to put Mr R, as far as possible, into the position he would now be in but for the unsuitable advice he was given. My view is aligned with that of our investigator.

Our investigator concluded that, if properly advised, Mr R would've transferred to the BSPS2 and his benefits would now be preserved in that scheme. In response, Burley Fox stated that was an unfair comparison because, in its view, the BSPS2 didn't exist at the time of its advice and was merely a proposal and not guaranteed to go ahead. It also said that there isn't any evidence Mr R has suffered a financial loss and, in its view, payment of redress would be a windfall payment for him.

While some information on the benefits of BSPS2 were still to be confirmed, it's my view that by November 2017 the risk of the BSPS falling into the PPF had receded by a large extent, as I've explained above. So I think Burley Fox should've considered the BSPS2 as a viable option as indeed it did in its suitability report. So, in addition to the PPF, I think it's fair to consider the BSPS2 as a potential comparator scheme for redress purposes.

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. Given the timeframe, I'm not convinced that it could be reasonably determined in 2017 that the PPF was the likely better option for him. And so I think, given the lack of clarity surrounding Mr R's ability to retire early, the BSPS2 was likely the better option for him based on what was known at the time and that at age 65 the BSPS2 would provide a higher level of benefits than the PPF.

In summary, as noted in my findings above, I think it's likely that, properly advised, Mr R 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. And so, with the aim of placing him into the correct financial position, I think it's fair and reasonable that the benefits offered by the BSPS2 should be used for comparison purposes. As such, the calculation on the basis of entering the BSPS2 should be carried out. This should be on the basis Mr R takes benefits at the BSPS2 normal retirement age of 65.

Burley Fox 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.

Burley Fox should use the FCA's BSPS-specific redress calculator to calculate the redress rather than using third party actuarial software. This is because in its 'Dear CEO letter' of 19 May 2023, the FCA expressed its concerns about businesses using such software. A copy of the BSPS calculator output should be sent to the CMC and our Service upon completion of the calculation.

For clarity, Mr R hasn't yet retired. So, compensation should be based on the BSPS2's normal retirement age of 65, as per the usual assumptions in the FCA's guidance, and not at age 58, for the reasons I've explained above.

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 R's acceptance of this final decision.

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

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

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

In addition, Burley Fox should pay Mr R £300 compensation for the trouble and upset caused by its unsuitable recommendation.

My final decision

<u>Determination and money award:</u> I uphold this complaint and require Burley Fox Limited to pay Mr R 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 Burley Fox Limited to pay Mr R any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I would only require Burley Fox Limited to pay Mr R any interest as set out above on the sum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that

Burley Fox Limited pays Mr R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr R.

If Mr R accepts this final decision, the money award becomes binding on Burley Fox Limited. My recommendation wouldn't be binding. Further, it's unlikely that Mr R can accept this final decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 19 July 2023.
Clint Penfold
Ombudsman