DRN-3628236

The complaint

Mr R complains about the advice given by Michael James trading as West Country Financial ('Michael James') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme with British Steel ('BSPS') to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr R's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

In October 2017, members of the BSPS were sent a "Time to Choose" letter which gave them the options to either stay in BSPS and move with it to the PPF, move to BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017).

Mr R was concerned about what the recent announcements by his employer meant for the security of his pension, so around October 2017 he contacted his existing financial adviser for advice. Because they didn't hold the relevant regulatory permissions to advise on DB pension transfers, they referred Mr R to Michael James. I understand that around the same time, Mr R was in the process of making his choice to opt into the BSPS2.

In November 2017 Mr R had a telephone meeting with Michael James during which it completed a fact-find to gather information about his circumstances and objectives. Amongst other things this, and the amendment note to the fact-find, recorded that Mr R was 44; he was married with two dependent children; he and his wife owned their home, which had an outstanding mortgage of around £135,000 over a remaining term of 11 years; they also owned two buy-to-let properties – one unencumbered and one which had a 100% interest-only mortgage on it of around £178,000 – providing a total rental income of £1,600 a month; they had £5,000 in savings; and their expected household income need in retirement was around £22,000 a year. Michael James also carried out an assessment of Mr R's attitude to risk, which it deemed to be 'balanced growth' - a score of 6 out of 10.

On 16 November 2017 Michael James advised Mr R to transfer his pension benefits into a personal pension and invest the proceeds in a range of funds Michael James deemed matched Mr R's attitude to risk.

In summary, the suitability report said the reasons for this recommendation were to meet Mr R's needs for early retirement at age 57, without incurring a reduction in income, with the flexibility to take greater amounts of tax-free cash; to provide the ability for Mr R to pass on his pension fund to his family in the event of his death as a tax efficient way of wealth planning; and to address Mr R's concerns about the long-term security of his retirement and the new BSPS2 scheme.

Mr R accepted the recommendation and in March 2018 around £454,000 was transferred to his new personal pension.

Mr R complained in 2021 to Michael James about the suitability of the transfer advice –Mr R says he received a letter from the Financial Conduct Authority ('FCA') telling him about instances of mis-selling in relation to transfers out of the BSPS, so he asked Michael James to review the advice it gave him.

Michael James didn't uphold Mr R's complaint. In summary it said it gathered all of the necessary personal information from Mr R including his personal circumstances, his objectives, his attitude to risk and his capacity for loss. And with this, along with analysis of the risk, benefits, advantages and disadvantages of transferring, it was decided that it was in Mr R's best interests to transfer to meet his future requirements. It said Mr R's pension had produced an average annual return of 5.1% since it began, outperforming the required critical yield by 1.5%, so there was no financial loss. It said it continues to believe the advice was suitable.

Dissatisfied with its response, Mr R referred his complaint to our service. An investigator upheld the complaint and required Michael James to pay compensation. In summary they said, the transfer wasn't financially viable because the growth rate required to match let alone exceed Mr Rs DB scheme benefits at age 57 wasn't likely achievable. They said Michael James only referred to the critical yield figure at age 65 in their suitability letter when the advice was based on a retirement age of 57. They also said there were no other compelling reasons to justify the transfer as being suitable – Mr R was 44 at the time and he didn't have set retirement plans; he could've waited until closer to his desired retirement age and considered his financial situation then before making any decision to give up guaranteed benefits; Mr R's concerns about the BSPS were a good enough reason to transfer - Michael James should've reassured Mr R about things; and in relation to death benefits, Mr R indicated he liked the DB scheme's spousal benefit, but if lump sum death benefits were important he should've been advised to take out life cover – his disposable income meant it was affordable. They said if suitable advice had been given, Mr R would've likely remained in the DB scheme and moved to the BSPS2.

Michael James disagreed. It provided a substantive response, which while I have read in full, I haven't set everything out here. In summary it said:

- It's not evident that the investigator determined the case by reference to whether Michael James took reasonable steps to ensure its recommendation was suitable for Mr R – COBS 9.2.1R.
- The investigator's assessment placed disproportionate weight on the critical yield – what it called a blunt tool.
- Reference to the discount rate was not a requirement of any material rule or guidance Michael James was required to follow or a practice the FCA expected it to adopt.
- The assessment fails to have regard for Mr R's personal circumstances, in particular that he would not need to rely on the income in retirement from the scheme.
- The assessment appears to be based on the flawed assumption that Mr R had the option at the time of transferring to the BSPS2 which is also based on a mistaken assumption that the BSPS2 would inevitably come into existence.

- Insufficient weight has been placed that Mr R clearly made an informed decision to proceed.
- Causation has not been properly considered or assessed – there is no evidence to suggest that Mr R would've remained in the scheme and transferred to the BSPS2 (if this was an actual as opposed to a potential option) had he been advised to do so.
- If Mr R has deviated from the recommended investment strategy, it can't be held liable for any alleged loss.

Michael James also asked for an oral hearing. It believes Mr R needs to be questioned further. It believes the investigator's findings are in stark contrast to the evidence from the time and an oral hearing will ensure the complaint is fairly determined.

The investigator wasn't persuaded to change their opinion. They said while all of the necessary documentation might have been completed with Mr R, they still felt the advice was not in Mr R's best interests. And in relation to the critical yield and discounts rates, they said they believed they were reasonable comparisons and they did not suggest reference to the discount rate was a mandatory requirement.

The complaint was therefore referred to me to make a final decision and to decide whether to hold an oral hearing. I turned down Michael James's request for an oral hearing because I was satisfied I could make a decision on the case fairly and reasonably without hearing oral evidence. So I'm now providing my final decision.

What I've decided – and why

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

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

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Michael James' actions here.

PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 7: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

I can see Michael James has argued that its regulatory requirement was to take reasonable steps to ensure the advice it gave Mr R was suitable for– it says it didn't have to guarantee or prove that it would ultimately be suitable. And I agree that under COBS, Michael James was required to take reasonable steps to ensure that its personal recommendation to Mr R was suitable for him (COBS 9.2.1). But additional regulations apply to advising on transferring out of DB schemes. These are set out in COBS 19.1.6G in which the regulator, the FCA, states that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Michael James should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr R's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Michael James carried out a transfer value analysis report (as required by the regulator) showing how much Mr R's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). I can see this was based on Mr R's existing BSPS scheme benefits. But at the time of the advice, Mr R didn't have the option to remain in the BSPS. As Michael James understood and documented, Mr R had received his 'Time to Choose' information setting out his options as I referred to earlier on. Michael James also documented that Mr R was in the process of deciding to opt into the BSPS2 with the assistance of his existing financial adviser. So basing the analysis on the existing BSPS benefits was somewhat redundant and in my view wasn't helpful to Mr R.

I can see that in Michael James' response to the investigator's assessment, it said at the time of the advice it was not in a position to recommend a transfer to the BSPS2 – it said we've adopted a flawed assumption that Mr R had the option at the time of transferring to the BSPS2. It said there was no certainty it would come into existence – it didn't exist at the material time. While the 'Time to Choose' exercise was underway, I accept the BSPS2 wasn't guaranteed to go ahead. But details of the scheme had been provided – the BSPS2 would've offered the same income benefits but the annual increases would've been lower. And in my view, all of the communications sent out by the scheme trustees were very optimistic that the scheme operating conditions would be met. So I think it was reasonable for Michael James to have factored the benefits available to Mr R through the BSPS2 into its analysis and advice so that he was able to make a properly informed decision.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website.

Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr R was 44 at the time of the advice and it was recorded in the advice paperwork that he would like to take retirement from age 57. The critical yield required to match Mr R's scheme benefits at age 57 was set out in the TVAS report of 9 November 2017 and was 7.89% assuming Mr R took a full pension. No critical yield figure was produced on the basis of Mr R taking a cash lump sum and a reduced pension (despite the adviser recording Mr R as wanting access to the maximum tax-free cash.) The critical yield to match the benefits available through the PPF at age 57 was quoted as 4.19% per year if Mr R took a full pension. Again, no figure was provided based on taking a lump sum and a reduced pension.

But as I've said above, Mr R remaining in the BSPS wasn't an option. So, the critical yields applicable to the BSPS2 benefits should've been provided. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat. But I still think they would've likely been higher than those reflecting the PPF benefits.

Michael James also produced a critical yield figure based on the BSPS' normal retirement age of 65, which was 6.29% based on a full pension. The critical yield to match the benefits available through the PPF at age 65 was quoted as 3.63% per year if Mr R took a full pension. Interestingly, and despite the advice seemingly based on Mr R's target retirement age of 57, the adviser referred to the critical yield figure of 6.29% (age 65) in their recommendation report. I think the adviser should've referred to the higher figure of 7.89%, and provided their judgment on whether this was likely achievable instead, as this was the more appropriate comparison for Mr R.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 4% per year for 12 years to retirement (age 57). I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr R's 'balanced growth' attitude to risk and also the term to retirement. In my view, there would be little point in Mr R giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

Here, the lowest critical yield based on a retirement age of 57 was 4.19%, which was based on Mr R taking a full pension through the PPF. It was 7.89% if Mr R took benefits at 57 through the existing BSPS. So, based on taking the same benefits at age 57 through the BSPS2, I think the critical yield would've been somewhere between those figures, and likely closer to 7.89%. This was significantly higher than the discount rate and only marginally below the regulator's upper projection rate.

So, given this, together with this fact that Michael James' ultimate investment recommendation appears to reflect a slightly lower overall risk profile than Mr R's assessed capacity for risk (according to the provider's fact sheet it was a 'moderately cautious / balanced' profile fund), I think it was clear that Mr R was likely to receive benefits of a lower overall value than those provided by the BSPS2 at retirement, as a result of investing in line with the recommended investment risk approach. In my view, to have come close to achieving the level of growth required, would have required Mr R to take a higher level of investment risk than I think he indicated he was prepared to take.

The critical yield required to match the benefits available through the PPF was 4.19%. This was still higher than the discount rate and although marginally lower than the middle projection rate, I think the opportunity to improve on the benefits by transferring if the scheme moved to the PPF was limited.

I can see that Michael James has said there was no regulatory rule or guidance requirement to refer to the discount rate. And I accept businesses didn't have to refer to it. But while I haven't based my findings solely on this, I think it is a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice. Under COBS 19.1.2, the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension by using reasonable assumptions. So, businesses, like Michael James, were free to use the discount rate as this was considered a reasonable assumption of the likely returns. And in any event, I've considered this in tandem with the regulator's published projection rates, which providers were required to refer to. And it is this combination, along with Mr R's recommended investment risk approach, which leads me to be believe he'd likely be worse off in retirement if he transferred out of the DB scheme.

I can also see that Michael James says that the critical yield is of limited relevance here – it is a blunt tool - because it assumes Mr R would purchase an annuity on the same basis as the benefits provided by the DB scheme and she wasn't likely to do that. But I don't think the importance of the critical yield figure should be downplayed here. I still consider it gives a good indication of the value of benefits Mr R was considering giving up. It's also the case that the regulator required Michael James to provide it and so deems it a necessary and important part of the decision-making process. So Michael James needed to provide an analysis based on the critical yield and I think it is a relevant consideration here, particularly given Mr R's circumstances and the fact that I don't think he could realistically say with any certainty whether he would want to take a fixed regular income at retirement or not. Mr R wasn't expecting to retire for at least another 13 years or more – so it's entirely possible that he would want at least some guaranteed income in retirement, which he could achieve by taking benefits from the DB scheme.

I've also thought about Mr R's capacity for loss. While Mr R had other sources of income he expected to continue into retirement in the form of two investment properties, I'm mindful that rental income is not guaranteed. And as I will go on to discuss later on, Michael James' advice also appears to have ignored the fact that one of Mr R's investment properties had a 100% interest only mortgage against it, which would likely need repayment at some point meaning the property might have to be sold to raise the necessary funds. So as his only guaranteed and primary source of private pension provision at this time, I don't think Mr R could afford to absorb losses on his pension.

I've also considered the cashflow models Michael James produced at the time, which it says shows Mr R would've been able to meet his retirement income needs. Firstly I can Michael James said in the suitability letter that its modelling showed that, to match Mr R's initial pension at 57, a fund of £495,000 (the mid-rate growth by age 57) would need to provide returns net of all charges of 3.55% a year. So based on the charges Michael James indicated Mr R's pension monies would be subject to, this would need an annual return of just under 5%. But this appears to be based on Mr R taking the same level of income he could take from the DB scheme. As I said above, there seems little point in Mr R giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And given the level of return required, I think this would likely be the case.

I can see that Michael James indicated in the suitability report that the five-year annualised rate of return for the recommended fund was 10.16% per year. But as Michael James will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

Michael James' modelling also set out scenarios in which Mr R took his tax-free cash lump sum and then took income to supplement his rental income to meet his required income need of £22,000 a year rising with inflation. This showed Mr R's fund would last well beyond age 119. But I can also see this assumes Mr R ceases taking money from his pension around 67 instead relying on his state pension, his buy to let income and his wife's pension to show how he could build his pension savings throughout his lifetime – presumably demonstrating how the recommendation could meet his lump sum death benefit objective. I'll explain later on why I don't think Michael James should've prioritised lump sum death benefits over Mr R's security in retirement and that I'm not persuaded Michael James properly explored the extent to which Mr R was prepared to sacrifice a higher income in retirement in exchange for better death benefits.

So, based on financial viability alone, I don't think a transfer was in Mr R's best interests. I think even if the BSPS had moved to the PPF and Mr R's benefits were reduced, he was unlikely to be able to improve on those benefits by transferring to a personal pension. But I accept that financial viability isn't the only consideration when giving transfer advice, as Michael James has argued in this case. There might be other considerations, which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility, access to greater tax-free cash and income needs

One of the key reasons Michael James recommended the transfer was to meet Mr R's need for early retirement at age 57 and not suffer a reduction in income, with the flexibility to take greater amounts of tax-free cash or income rather than the regular income option from the DB scheme.

But I'm not persuaded that Mr R knew with any certainty whether he required flexibility in retirement. And in any event, I don't think he needed to transfer his DB scheme benefits at this stage to achieve flexibility, if that's what he ultimately required.

Mr R was 44 at the time of the advice. And while I accept it's possible he might have given some thought to his retirement, given it was still many years away, I don't think he had anything that could reasonably be described as a set retirement plan. And I think the evidence from the time supports this. For example, the various pieces of advice paperwork make seemingly different references to Mr R's intended retirement age – the pension transfer questionnaire referred to '57/58' while in the fact-find the adviser recorded: *"Mr R wants a pot of around £750-800k if possible after 55 to maybe 60/62"* in addition to: *"Plenty of years to go before retirement and planning to lessen risk closer to age 55. No set date yet as promotion in work due to many people retiring."* So it strikes me that, like most people if asked, Mr R liked the idea of retiring early, but I think it's clear that this wasn't a firm objective.

Of course Mr R already had the option of taking early retirement before the scheme's normal retirement age of 65 - didn't have to transfer out to achieve this. Mr R might have had to accept a reduced pension in doing so – but I think Michael James could've done more to explain that this wasn't a 'penalty' as it recorded Mr R believed it to be, but an actuarial reduction to reflect that Mr R couldn't expect to receive the same pension he'd be entitled to at 65 ten years earlier because it would potentially be paid for longer.

And similarly by transferring, this didn't mean that Mr R could draw the income he was entitled to from the DB scheme at 65 at age 57 without potential consequences. A shorter investment period followed by a larger income withdrawal could mean Mr R's pension fund wouldn't be able to sustain this over his lifetime. I think a better explanation of this might have allayed Mr R's concerns about being 'penalised' for retiring early from the DB scheme.

I also accept Mr R couldn't take his DB scheme benefits flexibly. Although he could choose to take a cash lump sum and a reduced annual pension, Mr R had to take those benefits at the same time. But nothing here indicates that Mr R had a likely future need to take a cash lump sum and defer taking his income. I also haven't seen anything to indicate that Mr R had a strong need to vary his income throughout retirement. So it strikes me that 'flexibility' was simply a feature or a consequence of transferring to a personal pension arrangement rather than a genuine objective of Mr R's at the time.

Despite this, importantly Mr R was contributing to his workplace DC pension scheme. And the nature of a DC scheme means this already provided Mr R with flexibility – he wasn't committed to take these benefits in a set way. Michael James recorded that a total of 16% of Mr R's salary was being invested here – a combination of employer and employee contributions. So by age 57, without accounting for growth, salary increases or increases in contribution rate, this could be worth close to £100,000 and perhaps more. I think Mr R could've taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr R retained his DB pension, this combined with his new workplace pension, would've likely given him the flexibility to retire early - if that's what he ultimately decided.

So in any event, Mr R didn't need to transfer his DB scheme benefits at this stage to a personal pension arrangement in order to achieve flexibility in retirement. But if Mr R did in fact have a greater need for flexibility beyond that which he already had, I think this could've been explored closer to his intended retirement age. Michael James recorded that Mr R was in the process of choosing to opt into the BSPS2, so he would've retained the ability to transfer out nearer to retirement, if his needs later demanded it. I think Michael James could've explained this more clearly to Mr R.

I can see Michael James recorded that Mr R might want to buy a holiday home abroad as well as embark on travelling in the first five years, so the larger tax-free cash available through a personal pension would be nice. I've already said that I don't think Mr R's retirement plans were set in stone. And specially in relation to the purchase of a holiday house abroad, I'm not persuaded Mr R could know for certain that's what he wanted to do or would be able to do given the length of time to retirement. For example, property prices would likely change in the meantime and buying abroad also means that exchange rates could play a not insignificant part in terms of affordability.

Nevertheless, Michael James made no attempt to establish how much Mr R was likely contemplating spending – just that he wanted access to greater levels of tax-free cash. And by not attempting to do so, even as a ballpark figure, Michael James has not demonstrated that Mr R couldn't achieve things by remaining in his DB scheme and taking the tax-free cash option along with that from his DC pension. Furthermore, despite Michael James recording that both Mr R and his wife were likely to receive inheritances of around £300,000 in total before their intended retirement, it did not consider the role this might play in helping Mr R to achieve his potential lump sum cash retirement objectives.

While as I said earlier on, I also don't think Michael James considered when and how Mr R might need to repay the interest only mortgage which would ultimately become repayable – and so he might need to use part of the future inheritance to clear this if he didn't want to sell it – I still think it's entirely possible that Mr R could achieve his stated objective, *if* that's what he ultimately decided to do, without needing access to a greater level of tax-free cash than his DB scheme could provide.

Turning to Mr R's income need – while I don't think Mr R had a true understanding of what retirement income he would need, and I can't see that Michael James carried out any detailed analysis of his likely expected income and expenditure in retirement, it was recorded as being £22,000 a year based on current living costs. And based on this, I've seen nothing to indicate that the income from the BSPS2 or the PPF (if the new scheme didn't go ahead) wouldn't have provided Mr R with a solid guaranteed income foundation upon which his other provision could supplement, to likely meet his overall income need.

For example, Michael James' analysis showed that at 57, under the existing scheme Mr R would be entitled to an annual pension of around £17500. Because of the reduced revaluation factors, under the BSPS2 this figure would be lower, but in my view still close to it. Although this alone wouldn't meet Mr Rs income need, his rental income of £12,000 net a year would supplement things. In addition, Mr R would've likely had a not insignificant amount in his workplace DC pension, which he could draw on flexibly, as and when needed, to top up his income or take a lump sum. I'm mindful too that Mr R was intending to save his excess income in the years to his retirement to give him further scope to supplement his income / improve his standard of living before his state pension being payable and before his wife received her workplace and state pension. So it seems likely that if Mr R did decide to retire at 57 (by no means certain) and he opted to take the tax-free cash option to help support any lump sum cash need and accept a reduced pension as a result, he could've still achieved his income need by remaining in the DB scheme and using his other means to supplement things.

If the BSPS2 hadn't gone ahead, Mr R would've moved with the scheme to the PPF. And while the income Mr R would receive was likely lower than the pension he'd be entitled to under the BSPS2, I don't think it was substantially lower such that it would've made a difference to the recommendation. As I've said above, while Mr Rs retirement plans and needs weren't formulated, he would've had his rental income along with his DC scheme and savings to draw on flexibly until his state pension became payable.

So overall, I think Mr R could've likely met his income needs in retirement through the BSPS2 or the PPF. And I don't think it was in Mr R's best interests for him to transfer his pension just to have flexibility or the option of a larger tax-free cash lump sum, that I'm not persuaded he really needed.

Death benefits

Michael James also recommended the transfer to provide the ability for Mr R to pass on what remained of his pension fund to his family in the event of his death. The fact-find recorded that while Mr R was happy for his wife to get the 50% spouse's pension, he felt there was greater flexibility with the personal pot and it would stay in the family.

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 lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr R. But whilst I appreciate death benefits are important to consumers, and Mr R might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr R about what was best for his retirement provisions.
A pension is primarily designed to provide income in retirement – not as a legacy planning tool. And as I said above in relation to the cashflow forecasts, I'm not persuaded Michael James explored to what extent Mr R was prepared to accept and draw a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr R said he was happy with the 50% spouse's pension and I think it would've been useful to his spouse if Mr R predeceased her. I don't think Michael James made the value of this benefit clear enough to Mr R. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Michael James should not have encouraged Mr R to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

I'm mindful too that Mr R already had lump sum death benefits available to him through his workplace DC scheme – he also had death-in-service benefit, which would've paid out in the event of Mr R's death before retirement. And Mr R could've nominated his wife and/or children as beneficiaries of these if he hadn't already done so.

But if Mr R genuinely wanted to leave a legacy for his spouse and/or children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Michael James should've instead explored and ultimately recommended additional life insurance. I appreciate that the suitability report mentioned a whole of life policy, which was quoted at £337.85 a month and a level term plan quoted at 88.66 a month. The adviser recorded that Mr R said: *'the Whole of Life cover sounds quite steep...'* And although Mr R would consider the level term policy in the future, he preferred the option of transferring to allow for greater death benefits.

But I don't think that this was a balanced way of presenting this option to Mr R. Despite Michael James recording Mr R's death in service benefit and that he had life cover with his mortgage, it still based the quotes on a sum assured for the full transfer value. Basing the quote on the transfer value of Mr R's pension benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mr R wanted to leave whatever remained of his pension to his wife, which would be a lot less than this if he lived a long life and/or if investment returns were poor. So, the starting point ought to have been to ask Mr R how much he would ideally like to leave to his wife, taking into account his existing cover above and this could've been explored on a whole of life or term assurance basis, which was likely to be a lot cheaper to provide and affordable given Mr R's monthly disposable income.

Overall, I don't think different death benefits available through a transfer to a personal pension arrangement justified the likely decrease of retirement benefits for Mr R. And I don't think that insurance was properly explored as a suitable alternative.

Control or concerns over financial stability of the BSPS

I understand that Mr R, like many of his colleagues, was concerned about his pension. His employer had recently made the announcement about its plans for the scheme and so he was likely worried his pension would end up in the PPF. There were lots of negative things circulating about the PPF. So it's quite possible that Mr R was leaning towards the decision to transfer because of the concerns he had about his employer, his negative perception of the PPF and his concerns about the BSPS2. But it was Michael James' obligation to give Mr R an objective picture and recommend what was in his best interests.

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going ahead. So, the advice should've properly taken into account the benefits available to Mr R through the BSPS2, particularly as he was in the process of choosing to opt into it. I think this should've alleviated some of Mr R's concerns about the scheme moving to the

PPF.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that Michael James should've reassured Mr R that the scheme moving to the PPF wasn't as concerning as he thought or been led to believe. Importantly Mr R still had the option of taking early retirement through the PPF. Mr R didn't have any firm retirement plans at this stage - but I think the income available to Mr R through the PPF would've still provided a solid base, which his other means including his DC scheme could supplement to meet his overall income need at retirement. Crucially I don't think he was likely to be able to exceed this by transferring out. And although the increases in payment in the PPF were lower, the income was still guaranteed and was not subject to any investment risk. Mr R might not have been able to later transfer out of the PPF – but given what I said earlier on about him already having a flexibility, I don't think there was an apparent need for him to do so.

So I don't think that Mr R's concerns about his DB scheme was a compelling reason to recommend a transfer out of the DB scheme altogether.

Summary

I accept that Mr R was likely motivated to transfer out of the BSPS and that his concerns about his employer and the scheme were real. And I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr R. But Michael James wasn't there to just transact what Mr R might have thought he wanted. The adviser's role was to really understand what Mr R needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr R was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr R didn't have any firm retirement plans, so he shouldn't have been advised to transfer out of the scheme just to have flexibility or the option of having access to a greater level of tax-free cash that I'm not persuaded he really needed, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme. So, I don't think it was in Mr R's best interests for him to transfer his DB scheme to a personal pension at this time when he had the opportunity of opting into the BSPS2.

So, I think Michael James should've advised Mr R to opt into the BSPS2.

As I said earlier on, Michael James believes it couldn't advise on the BSPS2 because there was no certainty it would come into existence – it wasn't an option at the time. I appreciate that the BSPS2 wasn't guaranteed to go ahead at this time. But as I've already said, I think everything pointed to it going ahead, so this ought to have been the position Michael James adopted – I think it is fair and reasonable for it to have done so. And while Mr R indicated he wanted to retire at 57, as I've already explained this was more than 12 years away and Mr R's plans could've changed. So, I don't think that it would've been in his best interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. And by opting into the BSPS2, Mr R would've retained the ability to transfer out of the scheme nearer to his retirement age - if his needs later demanded it.

Also, because Mr R was married, his wife's pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mr R chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

So, I think Michael James should've advised Mr R to opt into the BSPS2.

Of course, I have to consider whether Mr R would've gone ahead anyway, against Michael James' advice. Michael James argues this is the case saying Mr R was attracted by the beneficial characteristics of the personal pension and their alignment with his objectives; he was attracted by the substantially enhanced CETV applying to the transfer; he had a desire to break all ties with his employer; and he wanted to avoid the risk of being transferred to the PPF.

I've considered this carefully, but I'm not persuaded that Mr R would've insisted on transferring out of the BSPS against Michael James' advice. I say this because, while as I've already said Mr R was likely motivated to transfer when he approached Michael James, on balance, I still think Mr R would've listened to and followed its advice if things had happened as they should have and Michael James had recommended he not transfer out of the scheme. Mr R was not in my view an experienced investor or someone who possessed the requisite skill, knowledge or confidence to against the advice they was given, particularly in complex pension matters. Mr R's pension accounted for a significant portion of his retirement provision at the time – so, if Michael James had provided him with clear advice against transferring out of the BSPS, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr R's concerns about his employer or the scheme were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. Regarding Mr R's desire to break all ties with his employer - it's clear that he still worked for the same employer and he intended to continue to do so. Mr R was also a member of the new DC pension scheme. So, Mr R wasn't going to achieve a separation from his employer by transferring, as he would remain tied to his employer in other respects.

So if Michael James had explained this (as it ought to have done) and that Mr R could likely meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr R would've insisted on transferring out of the BSPS if Michael James had given suitable advice that he not do so and that he should opt into the BSPS2.

In light of the above, I think Michael James should compensate Mr R for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr R. So I've also thought about whether it's fair to award compensation for distress and inconvenience - this isn't intended to fine or punish Michael James – which is the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mr R. Taking everything into account, including that I consider Mr R's retirement provision is of great importance to him given its significance in his overall retirement income provision, I think the unsuitable advice has caused him some distress. So I think an award of £300 is fair in all the circumstances.

Putting things right

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

Michael James 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.

Michael James should use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr R and our Service upon completion of the calculation.

For clarity, Mr R has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of my final decision.

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

- calculate and offer Mr R redress as a cash lump sum payment,
- explain to Mr R before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr R accepts Michael James' offer to calculate how much of their 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 their 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, Michael James 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.

Michael James should also pay Mr R £300 for the distress and inconvenience the matter has caused.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Michael James trading as West Country Financial to pay Mr R the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Michael James trading as West Country Financial pays Mr R the balance.

If Mr R accepts this decision, the money award becomes binding on Michael James trading as West Country Financial.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my 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 any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 21 August 2023.
Paul Featherstone
Ombudsman