DRN-3628288

Financial Ombudsman Service

The complaint

Mr D complains about the advice given by Hugh James Solicitors ('Hugh 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 D'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 August 2017 scheme members were told that, if the Regulated Apportionment Arrangement ('RAA') was approved (under pensions law, a RAA is a restructuring mechanism which allows a financially troubled employer to detach itself from its liabilities in respect of a DB pension scheme) they would have a choice - either move into a new scheme (BSPS2) or remain in the existing scheme and move with it to the PPF.

Mr D was concerned about what the recent announcements by his employer meant for the security of his pension, so in August 2017 he met with Hugh James for advice. It appears that Mr D approached another financial advice firm in the first instance because Hugh James has provided a completed fact-find from another firm dated around the same time. This recorded information about Mr D's circumstances and objectives. I assume this firm introduced Mr D to Hugh James – perhaps because it didn't hold the necessary regulatory permissions to advise on DB pension transfers.

Hugh James also completed a fact-find, albeit in little detail. Based on the two documents, Mr D's circumstances can be summarised as follows: Mr D was 51 years old; he was married with two children; he and his wife jointly owned their home, which had an outstanding mortgage that was due to be repaid in two years' time; he had no other liabilities; he had no savings to speak of; and he and his wife had other pension provision.

A separate DB pension questionnaire recorded that Mr D wanted to retire between 60-65 ideally on an income (joint) of £20,000. It also recorded Mr B might want to access his tax-free cash at age 55 for a *"possible extension..."* Hugh James also carried out an assessment of Mr D's attitude to risk, which it deemed to be 'Balanced'.

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).

On 23 October 2017 Hugh James advised Mr D to transfer his pension benefits into a personal pension and invest the proceeds in two investment funds, which Hugh James deemed matched Mr D's attitude to risk. In summary, the suitability report said the reasons for this recommendation were: because Mr D wasn't solely reliant on the income from this pension, his other means would potentially offer the level of income he needed; there was potential given the size of the transfer value and the term to retirement for Mr D to build a greater fund value, which would allow him to take a greater level of income if desired; to provide the flexibility to change the level of income taken throughout retirement; and provide better lump sum death benefits.

Mr D accepted the recommendation and some time afterwards, around £289,000 was transferred to his new personal pension and invested in-line with the recommendation.

Using the services of a representative, Mr D complained in 2021 to Hugh James about the suitability of the transfer advice. Mr D said he believes he should not have been recommended to transfer in his circumstances and that the benefits available to him through the BSPS2 are unlikely to be matched through a private pension arrangement.

Hugh James didn't uphold Mr D's complaint. It said that it wasn't Mr D's objective to match the benefits available to him through the BSPS2. It said Mr D's income could be met from his other sources, so securing a guaranteed income through the BSPS2 wasn't his goal. Amongst other things, in summary it said the transfer was suitable because: Mr B wanted the flexibility to access his tax-free cash at 55 with the specific intention of providing an extension to his home – this was the driving force behind Mr B's intention to transfer out which could not have been met by remaining in the DB scheme; remaining in the scheme would've meant Mr B had to take his tax-free cash and income at the same time at 55 – income he didn't need; from age 65 the income from the BSPS2 or the PPF along with his other pension income would've exposed him to paying higher income tax than was necessary – by transferring Mr D had flexibility of withdrawals; and any surplus pension funds could be drawdown for exceptional expenditure or left for his family upon his death. It said it didn't believe Mr D had suffered a loss. But it said, notwithstanding its view that the advice was suitable, it offered a cash sum to settle the complaint.

Mr D rejected the offer of settlement and he asked us to consider his complaint. An investigator upheld the complaint and required Hugh James to pay compensation. In summary they said Mr D's concerns about his DB scheme's future financial stability were not sufficient reason to consider transferring out of the scheme. They said while Mr D may have liked the idea of retiring early, his reasons weren't documented so they didn't think it was a firm objective. They also didn't think Mr D's income need of £1,500 a month was realistic – they said Hugh James didn't carry out a detailed expenditure in retirement analysis, which they ought to have done given the recommendation report said its recommendation was based on Mr D's income need being accurate. They said if Mr D had opted into the BSPS2, the guaranteed income would've met his need.

The investigator went on to explain that, while they understood Mr D might have had a good reason to want to access his tax-free cash at 55 – albeit they noted the advice paperwork said it was a possibility - Hugh James didn't consider the alternatives available to Mr D to meet his objective. They said this included Mr D borrowing the money given his income and the fact he had at least nine years to retirement.

They said Hugh James didn't understand how much Mr D needed to meet his objective and without this it wasn't possible to give suitable advice. They added that lump sum death benefits wasn't a sufficient reason to transfer and they didn't think the transferred funds could grow sufficiently to match let alone exceed Mr D's DB scheme benefits. They said suitable advice should've been for Mr D to opt into the BSPS2.

Hugh James disagreed. In summary it said the regulator's starting assumption that a transfer is unsuitable – COBS 19.1.6 G - should not be the basis for the Financial Ombudsman Service's starting assumption when considering the advice. It said any concerns Mr D had about the financial stability of the BSPS did not factor in the advice to transfer. It said it was a clear intention of Mr D's to take early retirement - but said that the more significant factor in this case is that Mr D expressed a wish to be able to access his tax-free cash as soon as possible from age 55. By transferring he would be able to do this and not retire early.

In relation to Mr D's required retirement income of £1,500 a month, it said the vast majority of people retire on significantly less income that when they were working and it disagrees with the investigator that the adviser should've advised Mr D that living on £1,500 a month was unrealistic – in any event his expected total household income in retirement was expected to exceed this amount. It said the suitability of the advice turned on his stated need for tax-free cash to provide him with the funds to extend his home. It disagreed with the view that the adviser ought to have obtained costings from Mr D and it said, given the amount of the potential tax-free cash against the value of Mr D's home, there was no reason to suggest the amount wouldn't be sufficient to meet his need. It explained why it didn't think borrowing the money instead was suitable for Mr D and it provided typical costings for a mortgage for the equivalent tax-free cash sum amount, which it said was unaffordable at over £1,400 a month or around £767 a month if the term was extended to ten years. It said there was no evidence Mr D wanted to build the extension in any event before he was 55 and if he wanted to do that he could've sought advice independently of the BSPS transfer. It said the investigator had not placed sufficient weight on Mr D's particular circumstances including that his BSPS benefits were surplus to his income need.

Mr D's representative responded to the investigator's assessment. It said that, while it agreed the complaint should be upheld, Mr D says the £1,500 a month income need in retirement isn't accurate – Hugh James didn't record his outgoings. It said for the purposes of the redress calculation, it should be assumed Mr D will retire at 65. And it said the notional deduction for tax should not apply to the part of the redress which reflects the compensation for the adviser/product charges.

The investigator wasn't persuaded to change their opinion, so the complaint was passed to me for a final decision.

What I've decided – and why

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

I've 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 Hugh 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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Hugh James should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Hugh James carried out a transfer value analysis report (as required by the regulator) showing how much Mr D's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). Hugh James has provided four reports – 1 September 2017, 5 September 2017, 19 September 2017 and 17 October 2017. While the first two correctly, in my view, refer to the increased transfer value Mr D received following the approval of the RAA, for some reason the latter two are based on the original lower value. All however appear to be based on Mr D's existing BSPS scheme benefits. But at the time of the advice Mr D didn't have the option to remain in the BSPS. So basing the analysis on the existing scheme was somewhat redundant and in my view wasn't helpful to Mr D.

By the time Hugh James issued its suitability letter on 23 October 2017, Mr D would've likely received his 'Time to Choose' information with details about the new scheme - the BSPS2. This would've offered the same income benefits as the BSPS but the annual increases would've been lower. I accept the BSPS2 wasn't guaranteed to go ahead at this time. But in my view, all of the communications from the scheme trustees at this time were very optimistic that the scheme operating conditions would be met. So given this, I think it was reasonable for Hugh James to have used the benefits available to Mr D through the BSPS2 in 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 D was 51 at the time of the advice (soon to be 52) and it was recorded that he wanted to retire between 60 and 65. As I said above, there are several TVAS reports with different transfer values. The report dated 1 September 2017 with the increased transfer value set out the critical yield required to match Mr D's existing scheme benefits at 65 and was 7.2% assuming he took a full pension and 5.64% assuming he took a cash lump sum and a reduced pension. The critical yields to match the benefits available through the PPF

were 5.52% and 4.99% respectively.

The report of 17 October 2017 set out the critical yields for a retirement age of 60, albeit for some reason this was based on the lower transfer value. This records a critical yield of 9.58% assuming Mr D took a full pension and 6.57% for a reduced pension. And the critical yields to match the benefits available through the PPF at age 60 were 9.02% and 8.25% respectively.

But as I've said above, Mr D remaining in the existing scheme wasn't an option. So, the critical yields applicable to the BSPS2 benefits should've been provided even if that meant waiting for the details to be known. 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.

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 3.5% per year for eight years to retirement (age 60) and 4.1% for 13 years to retirement (age 65) 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 D's recorded 'balanced' attitude to risk and also the term to retirement. In my view, there would be little point in Mr D giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

But here, the lowest critical yield based on a retirement age of 60 (the earliest Mr D indicated he wanted to retire) was 6.57%, which was based on Mr D taking a cash lump sum and a reduced pension through the existing BSPS. It was 8.25% based on him taking the same benefits through the PPF. So, based on Mr D taking the same benefits at age 60 through the BSPS2, I think the critical yield would've been somewhere between 8.25% and 6.57%, and likely closer to 6.57%. Based on a retirement age of 65, I think the critical yields would've been somewhere between 5.64% and 4.99% and likely closer to 5.64%.

In both cases these rates were higher than the discount rate and above the regulator's middle projection rate. So, given this, I think it was clear that Mr D was likely to receive benefits of a lower overall value than those provided by the BSPS2 at retirement, whether at age 60 or 65, as a result of transferring out and investing in line with a balanced attitude to risk. I don't think the position was very different if the scheme moved to the PPF – I think, at best, the opportunity to improve on the benefits was limited.

I'd add here that I have some concerns about Hugh James' assessment of Mr D's attitude to risk as 'balanced'. Mr D did not hold any investment products (I don't consider a Defined Contribution workplace pension scheme counts) and in the suitability report it referred to Mr D as having little to no knowledge of financial products and investments and how they work. I think Mr D could reasonably be described as an investment novice. So, given this together with Mr D's age and the shortening term to retirement, I think a cautious approach was more appropriate here. But given I don't think the transfer was suitable based on a balanced risk approach, this doesn't affect my decision.

So based on financial viability alone, I don't think a transfer out of the DB scheme was in Mr D's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Hugh James has argued in this case. It says Mr D wasn't looking to replicate the benefits available to him through the scheme. So there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility, access to tax-free cash and income needs

Hugh James recommended the transfer to enable Mr D to have flexibility – the ability for him to move to a drawdown arrangement and take a level of income that was both desirable and sustainable throughout his lifetime, including being able to change the income level to suit his needs.

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

Mr D was soon to be 52 at the time of the advice and while he'd likely given some thought to his future retirement, given he indicated that he wanted to retire at some point between 60 and 65, I don't think he had anything that could reasonably be described as firm plans for retirement. I'm sure Mr D liked the idea of retiring early – I think most people if asked would say they wanted to retire before their normal retirement age. And Mr D already had this option available to him – he didn't have to transfer out to achieve this. I accept Mr D could not take his DB scheme benefits flexibly. Although he could choose to take a cash lump sum and a reduced annual pension, Mr D had to take those benefits at the same time. But I'm not persuaded that Mr D had a concrete need to take his tax-free cash at 55 and defer taking his income to a later date. I'm also not persuaded he had a strong need to vary his income throughout retirement. To my mind, these seem more of a 'nice to have' rather than a genuine objective of Mr D.'s

I can see that Hugh James says that the significant factor in this case is that Mr D expressed a wish to be able to access his tax-free cash as soon as possible from age 55 and that the suitability of the advice turned on this need to provide him with the funds to extend his home. But in my view, I'm not persuaded Mr D had a firm plan to access his tax-free cash at this time and so was a compelling reason to recommend a transfer – albeit despite Hugh James' argument that the suitability turned on this objective the reasons it gave in the suitability report for the recommendation to transfer make no mention of this.

I accept Mr D's circumstances indicate he had good reason to want to extend his family home. But the advice paperwork records that this was only a possibility. It's not clear to me why Mr D would need or could only carry this out when he reached 55 and so need a cash lump sum at this point. It seems likely to me this was driven by 55 being the earliest date Mr D could access his pension benefits.

Because this was recorded as an objective – and if it was a significant factor in the recommendation as Hugh James says – I would've expected Hugh James to have interrogated Mr D's intention. Both in terms of understanding how much, broadly, Mr D might need to achieve things, as well as the reasonable alternatives that might be available to him instead of transferring his guaranteed pension to achieve things. It seems the assumption made here is that Mr D needed access to the maximum tax-free cash to build an extension. But because Hugh James didn't ask Mr D if that was the case and whether he knew how much he might need, I'm not persuaded this was a reasonable assumption to make – it's entirely possible that Mr D needed a lot less than this.

I think Hugh James should also have discussed the alternative available to Mr D to fund his objective – for example by considering the option of him borrowing the money. Mr D intended to continue working for at least the next eight years or more, so it's possible that given his mortgage doesn't appear to have been significant he could've explored a form of secured (or unsecured) borrowing. I can see Hugh James has argued the cost was prohibitive. But this is on the assumption that Mr D needed around £80,000, which as I've said might not have been the case. It has also argued that Mr D didn't want to consider the extension before he was 55. But again, there's nothing to indicate why things had to happen at this point. Without exploring these things I'm not persuaded Hugh James was in a position to say that it was in Mr D's best interests to transfer out to achieve things.

On the basis that it doesn't appear it was necessary for Mr D to access his tax-free cash before taking an income, I think Mr D could likely achieve his objectives – both income and lump sum need - by retaining his DB scheme benefits. Importantly Mr D and his employer were contributing to his DC workplace pension at a contribution rate of 16% of his salary. So based on contributions alone and not accounting for any growth, increases in Mr D's salary or increases in the contribution rate, Mr D's pension could be worth in excess of £50,000 at age 60 or £82,000 at age 65. Taking into account investment growth, this had the potential to worth significantly more (Hugh James indicated that at a 5% growth rate it could be worth around £128,000 at age 65.)

This means that at age 65, if Mr D opted into the BSPS2, he could take a pension of around £15,000 a year or £10,000 and a lump sum of around £68,000 (Hugh James' analysis recorded that the existing scheme would provide a full pension of £15,587 and a reduced pension of £10,300.) Any shortfall in income and/or lump sum need could be met by Mr D accessing income or lump sums from his DC scheme – Mr D would've likely had a significant pension to draw on flexibly, as and when he needed, to top up his income or take additional lump sums. Mr D also had another DB scheme estimated in 2011 to be worth around £5,400 a year at 65. Furthermore Mr D's wife had two pensions which could supplement their household income when she retired – likely a few years after Mr D.

Mr D indicated that he (jointly) would need £20,000 a year in retirement - his minimum expenditure need was £1,500 a month. And while Hugh James didn't carry out a detailed income and expenditure analysis to arrive at this figure, it seems Mr D could meet his income need by opting into the BSPS2.

At age 60, I also think Mr D could meet his objectives by opting into the BSPS2, at least until his state pension became payable. Under the existing scheme, Mr D could take an annual income of around £12,000 or £8,300 and a cash lump sum of around £55,000. Again, I think this could be supplemented from Mr D's DC scheme and his wife's earned income. Mr D could also choose to take his other DB scheme benefits early if needed. Once Mr D's wife retired, her pensions could also supplement things.

So I don't think Mr D would've had to sacrifice flexibility in retirement by opting into the BSPS2. But if Mr D 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. And by opting into the BSPS2, Mr D would've retained the ability to transfer out nearer to retirement, if indeed it was required. I think Hugh James could've explained this more clearly to Mr D.

If the BSPS2 hadn't gone ahead, Mr D would've moved with the scheme to the PPF. And while the income Mr D would receive was lower than the pension he'd likely be entitled to under the BSPS2 (on the basis of a full pension) I don't think it was substantially lower such that it would've made a difference to the recommendation.

As I've explained in detail above, Mr D would've likely had other means to draw on until his state pension became payable.

I can see Hugh James has argued Mr D's BSPS pension was surplus to requirements – his other means met his overall income need. But it seems this was only the case once Mr D reached 67 when his state pension became payable. Prior to this I think Mr D would rely on his BSPS benefits, which represented at the time the vast majority of his own private pension provision. And just because ultimately Mr D's total income would be in excess of his stated need, does not in my view demonstrate a strong need for flexibility or that a transfer to a personal pension arrangement was in his best interests. I do not consider excess income to be detrimental.

So overall, I think Mr D could've likely met his objectives and income needs in retirement through the BSPS2 or the PPF and I think he already had the flexibility to achieve his goals. So I don't think it was in Mr D's best interests for him to transfer his pension to have additional flexibility, that I'm not persuaded he really needed.

Death benefits

Hugh James also recommend the transfer because it provided lump sum death benefits, and dependant on Mr D's age at death, the proceeds could be passed to his beneficiaries free of tax.

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 D. But whilst I appreciate death benefits are important to consumers, and Mr D 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 D about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – it is not a legacy planning tool. And I don't think Hugh James explored to what extent Mr D was prepared to accept 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 D was married and so the spouse's pension provided by the scheme would've been useful to his spouse if Mr D predeceased her. I don't think Hugh James made the value of these benefits clear enough to Mr D. They were guaranteed and escalated – the spouse's pension under the BSPS2 would also be calculated as if no tax-free cash had been taken. Furthermore, it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was – so if Mr D lived a long life and/or investment returns were poor, there may not have been a large sum left, if any at all, to pass on when he died. In any event, Hugh James should not have encouraged Mr D to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

I'm mindful that Mr D already had lump sum death benefits available to him. He had death in service benefit which would provide his family with a lump sum before retirement. He also had his DC scheme pension, which he could nominate his wife, or other family members to receive upon his death if he hadn't already done so.

I can understand why in Mr D's broader circumstances that he likely wanted to leave a legacy for his family. And if that genuinely was the case, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Hugh James could've explored additional life insurance further.

I can see in the suitability report the adviser referred to a level term assurance quote for a sum assured based on the transfer value – the lowest premium quoted was around £43 a month – and this was discounted by them because: *"there was no cash-in value and the cover remains the same."*

But I don’t think this was a balanced way of presenting this option to Mr D. Firstly, basing the quote on the transfer value essentially assumes that Mr D would pass away on day one following the transfer. But that isn’t realistic. Ultimately, Mr D wanted to leave whatever remained of his pension to his family, 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 D how much he would ideally like to leave to his family or what he thought they would need, after taking into account the above existing benefits and also his wife’s own pension income. And this could’ve been explored on a whole of life or term assurance basis. But in any event, just because a term assurance policy had no cash-in value and the cover provided remains the same, is not, in my view, a compelling reason to discount this option and recommend a transfer instead. Even with a sum assured equivalent to the transfer value, I’ve seen nothing to suggest this wasn’t affordable for Mr D and I consider life assurance should’ve been what Hugh James recommended to meet this objective.

Overall, I don’t think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr D. And I don’t think that insurance was properly considered as an alternative.

Summary

I accept that Mr D was likely motivated to transfer out of the BSPS and that his concerns about 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’ve sounded like attractive features to Mr D. But Hugh James wasn’t there to just transact what Mr D might have thought he wanted. The adviser’s role was to really understand what Mr D needed and recommend what was in his best interests.

Ultimately, I don’t think the advice given to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr D 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 D should not have been recommended to transfer to achieve flexibility that I’m not persuaded he really needed, and the potential for higher or different death benefits wasn’t worth giving up the guarantees associated with his DB scheme. So, I don’t think it was in Mr D’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 Hugh James should’ve advised Mr D not to transfer out of the scheme and to opt into the BSPS2 instead.

I appreciate the BSPS2 wasn’t guaranteed to go ahead at this time. But I think everything pointed to it likely going ahead, so this ought to have been the position Hugh James adopted. Because Mr D’s retirement plans weren’t fully formulated and he indicated he’d likely retire between 60 and 65, 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 D would’ve retained the ability to transfer out of the scheme nearer to his retirement age - if his needs demanded it. Also, Mr D was married, and 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 D chose to do so).
The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So I think Hugh James should’ve advised Mr D to opt-into the BSPS2.

Of course, I have to consider whether Mr D would've gone ahead anyway, against Hugh James’ advice.

I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the BSPS against its advice if things had happened as they should have and it had recommended he opt into the BSPS2. I say this because, while as I've already said, Mr D was likely motivated to transfer when he approached Hugh James, on balance, I still think Mr D would've listened to and followed its advice. As Hugh James recorded, Mr D was an inexperienced investor, so I don't think he possessed the requisite skill, knowledge or confidence to against the advice he was given, particularly in complex pension matters. Mr D's pension accounted for the majority of his private retirement provision at the time and in my view, his attitude to risk was more cautious than Hugh James assessed it as. So, if Hugh James had provided Mr D 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 D's concerns about 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. So if Hugh James had explained that Mr D 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 D would've insisted on transferring out of the BSPS if Hugh James had given suitable advice that he not do so and that he should opt into the BSPS2 instead.

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

I've thought about Mr D's representative's point regarding the 15% deduction from any redress payable, to take into account the tax Mr D would've paid had this been taken as income. It believes this is unfair as it doesn't account for the charges that would've been deducted from the fund value over that time. While I appreciate the representative feels this may unfairly reduce the redress payable, I'm mindful that it is not possible to provide exact compensation in these circumstances, as the only way to achieve this would be to put Mr D back into the scheme as if the transfer out hadn't happened. So, overall, I remain of the view that the redress proposed fairly compensates Mr D for the impact of the unsuitable advice he received.

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr D. 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 Hugh 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 D. Taking everything into account, including that I consider Mr D's retirement provision is of great importance to him given its significance in his overall retirement income provision and his age, 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 D, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr D would most likely have remained in the occupational pension scheme and opted to join the BSPS2 if suitable advice had been given.

Hugh 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.

Hugh 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 D and our Service upon completion of the calculation together with supporting evidence of what Hugh James based the inputs into the calculator on.

For clarity, Mr D 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 D'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, Hugh James should:

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

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

Hugh James should also pay Mr D £300 for the distress and inconvenience the unsuitable advice 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

<u>Determination and money award</u>: I uphold this complaint and require Hugh James Solicitors to pay Mr D 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 Hugh James Solicitors pays Mr D the balance.

If Mr D accepts this decision, the money award becomes binding on Hugh James Solicitors.

My recommendation would not be binding. Further, it’s unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 5 October 2023.
Paul Featherstone
Ombudsman