DRN-3652321

The complaint

Miss M complains about the advice given by Michael James to transfer the benefits from her defined-benefit ('DB') occupational pension scheme with British Steel ('BSPS') to a personal pension. she says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

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

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).

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

Michael James completed a fact-find to gather information about Miss M's circumstances and objectives. Amongst other things this recorded that Miss M was 42; she was single; she owned her own home, which had an outstanding mortgage of around £170,000; her income was going to reduce because of the loss of a shift allowance; she had recently used all of her savings and investments to meet a personal need; she wanted to retire at 55 but was happy to continue to work; and she expected to need around £20,000 a year income in retirement. Michael James also carried out an assessment of Miss M's attitude to risk, which it deemed to be 'balanced' – a score of 5 out of 10.

On 16 November 2017 Michael James advised Miss M to transfer her pension benefits into a personal pension and invest the proceeds in a range of funds Michael James deemed matched Miss M's attitude to risk.
In summary, the suitability report said the reasons for this recommendation were to meet Miss M's needs for early retirement at age 55 with the flexibility to take greater amounts of tax-free cash or income in the early years; to provide the ability for Miss M to pass on her fund to her family in the event of her death - the DB scheme's death benefits were of little value to her being single; to address Miss M's concerns about the BSPS and the new BSPS2 scheme; and because Miss M believed any future transfer value would be lower due to the decrease in her pensionable salary.

Miss M accepted the recommendation and shortly afterwards around £380,500 was transferred to her new personal pension.

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

Michael James didn't uphold Miss M's complaint. In summary it said it gathered all of the necessary personal information from Miss M including her personal circumstances, her objectives, her attitude to risk and her 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 Miss M's best interests to transfer to meet her future requirements. It said Miss M's pension had outperformed the required critical yield and so there was no financial loss. It said it continues to believe the advice was suitable.

Dissatisfied with its response, Miss M referred her 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 Miss M's DB scheme benefits wasn't likely achievable. They said Miss M was likely to receive lower retirement benefits as a result. They also said there were no other compelling reasons to justify the transfer as being suitable – Miss M was 42 at the time so her plans for retirement weren't set; she could've waited until closer to her desired retirement age and considered her financial situation then before making any decision to give up guaranteed benefits; she didn't need flexibility albeit she already had flexibility in retirement because she was contributing to her workplace Defined Contribution ('DC') pension scheme; death benefits shouldn't have been prioritised over her income need in retirement - in any event she already had the ability to pass on lump sum death benefits to family through her DC scheme; and her concerns about the DB scheme weren't sufficient reason to transfer. They said if suitable advice had been given, Miss M 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 Miss M – 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 Miss M's personal circumstances, in particular that she would not need to rely in the income in retirement from the scheme.
- The assessment appears to be based on the flawed assumption that Miss M 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 Miss M clearly made an informed decision to proceed.
- Causation has not been properly considered or assessed – there is no evidence to suggest that Miss M would've remained in the scheme and transferred to the BSPS2

(if this was an actual as opposed to a potential option) had she been advised to do so.

Michael James also asked for an oral hearing. It believed Miss M needed 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 they didn't think any new evidence had been provided and they addressed some of the key points Michael James had made. In summary they said COBS 9.2.1R wasn't the only requirement on Michael James at the time – the additional regulatory requirement was that they had to clearly demonstrate the transfer was in Miss M's best interests. They said the critical yield wasn't the only factor in determining whether the transfer was suitable, but it is important when considering valuable guarantees. They said they maintained the critical yield wasn't likely achievable. They said they thought Michael James did have sufficient information about the BSPS2 to be able to pass comment on it and that all of the available information at the time indicated it would go ahead as envisaged. They said the ombudsman would consider the request to convene a hearing.

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 referred on several occasions to its requirement to take reasonable steps to ensure the advice it gave was suitable for Miss M – 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 Miss M was suitable for her (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 Miss M's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

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

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 - there is a flawed assumption that Miss M 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 well 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 Miss M through the BSPS2 into its analysis and advice so that she 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.

Miss M was 42 at the time of the advice and it was recorded in the advice paperwork that she wanted to retire at 55, although she was happy to continue to work on. The critical yields required to match Miss M's benefits at age 55 were set out in the TVAS report of 13 November 2017 – these were 8.08% if Miss M took a full pension and in excess of 6% if she took a cash lump sum and a reduced pension (the actual figure isn't quoted, it was shown on a bar chart.) The critical yield to match the benefits available through the PPF at age 55 was quoted as 4.66% per year if Miss M took a full pension. A figure wasn't provided for a lump sum and a reduced pension.

But as I've said above, Miss M 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 critical yield figures based on the BSPS' normal retirement age of 65 – 6.10% based on a full pension and around 5.1% based on a reduced pension. And it was the figure of 6.1% that it quoted in its recommendation letter. But Michael James recorded that Miss M's target retirement age was 55, so I think it should've reflected the figure of 8.08% as this was the more appropriate comparison for Miss M.

I'd add here too that, given Michael's James' ultimate recommendation was that Miss M should delay her retirement age to 57 - notwithstanding my view that I don't think Miss M's retirement plans were in anyway considered set in stone as I will explain later on – I find it surprising Michael James didn't produce critical yield figures based on a retirement age of 57. I think this would've been more meaningful given this is what Michael James' advice ultimately was. I think this is further evidence that Michael James' analysis wasn't helpful to Miss M.

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 55). 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, Miss M's 'balanced' attitude to risk and also the term to retirement. In my view, there would be little point in Miss M giving up the guarantees available to her through her 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 55 was 4.66%, which was based on Miss M taking a full pension through the PPF. It was 8.08% if Miss M took benefits at 55 through the existing BSPS. So, based on taking the same benefits at age 55 through the BSPS2, I think the critical yield would've been somewhere between those figures, and likely closer to 8.08%. This was significantly higher than the discount rate and marginally above the regulator's upper projection rate.

So, given this, I think it was clear that Miss M was likely to receive benefits of a substantially lower overall value than those provided by the BSPS2 at retirement, as a result of investing in line with a balanced attitude to risk. In my view, to have come close to achieving the level of growth required, would have required Miss M to take a higher level of investment risk than I think she indicated she was prepared to take. And even then I think it's more likely than not Miss M would be worse off financially at retirement if she transferred out.

The critical yield required to match the benefits available through the PPF was 4.66%. This was higher than the discount rate and although marginally lower than the middle projection rate, I think the opportunity to improve on the benefits if the scheme moved to the PPF was limited if Miss M transferred out of the BSPS.

I also think Miss M's capacity for loss was low. At the time of the advice, Miss M's DB scheme accounted for all of her private retirement provision and she'd recently used all of her accumulated savings and investments to deal with a personal need – she'd also had to take on additional borrowing. So I don't think Miss M could afford to absorb losses on her pension.

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 Miss M's attitude to risk, which leads me to be believe she'd likely be worse off in retirement if she 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 Miss M 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 Miss M 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.

I accept Miss M was single at the time and the critical yield figure included the spouse's pension benefit the DB scheme provided, which wouldn't have been important to her at the time. But it's possible that Miss M might marry in the future. And crucially I think it is still relevant, particularly given Miss M's circumstances and the fact that I don't think she could realistically say with any certainty whether she would want to take a fixed regular income at retirement or not. Miss M wasn't expecting to retire for at least another 12 years or more – so it's entirely possible that Miss M would want at least some guaranteed income in retirement, which she could achieve by taking benefits from the DB scheme.

Michael James produced cashflow models at the time which it says shows Miss M would've been able to meet her needs despite the high critical yields. And I've considered these. Firstly I can Michael James said in the suitability letter that its modelling showed that, to match Miss M's initial pension at 55, a fund of £392,000 (the mid-rate growth by age 55) would need to provide returns net of all charges of 3.54%. So based on the charges Michael James indicated Miss M's pension monies would be subject to, this would need an annual return of just under 5%. But this appears to be based on Miss M taking the same level of income she could take from the DB scheme. As I said above, there seems little point in Miss M giving up the guarantees available to her through her 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.

Michael James indicated in the suitability report that the five-year annualised rate of return for the recommended fund was 9.13% 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's modelling also set out scenarios in which Miss M delayed her retirement to age 57 and then took her required income of £20,000 a year (including her state pension) rising with inflation. Michael James' suitability report reflected the scenario where Miss M's funds wouldn't run out until she was 118 years old assuming average market conditions. But I can also see its own analysis showed that in slightly weaker than average market conditions, Miss M would run out of money at age 79. And in weak market conditions she would run out at age 67. I'm not persuaded this demonstrates the financial viability of the transfer and that Miss M could meet her future income need despite the high critical yield.

Overall, even if the BSPS had moved to the PPF and Miss M's benefits were reduced, she was unlikely to be able to improve on those benefits by transferring to a personal pension. By transferring her pension it was highly likely Miss M would be financially worse off in retirement. So based on this alone, I don't think a transfer was in Miss M's best interests. 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 and income needs

One of the key reasons Michael James recommended the transfer was to meet Miss M's needs for early retirement at age 55 and not suffer a reduction, with the flexibility to take greater amounts of tax-free cash or income in the early years.

But I'm not persuaded that Miss M knew with any certainty whether she required flexibility in retirement. And in any event, I don't think she needed to transfer her DB scheme benefits to achieve flexibility, *if* that's what she ultimately required.

Miss M was 42 at the time of the advice. And while I accept it's possible she might have given some thought to her retirement, given it was still many years away, I don't think she had anything that could reasonably be described as a set retirement plan. And I think the evidence supports this. The advice paperwork said Miss M wanted to retire at 55. But at the same time it also said that she was happy to continue to work. In another piece of the paperwork it said that Miss M might want to change her career at 55 and work with her father. In another section it said Miss M intended to work at her current employer until she retired.

But I accept Miss M might have liked the idea of retiring early and before the scheme's normal retirement age of 65. But Miss M already had this option available to her - she didn't have to transfer out to achieve this. Miss M 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 Miss M referred to it as, but an actuarial reduction to reflect that Miss M couldn't expect to receive the same pension she'd be entitled to at 65 ten years earlier because it would potentially be paid for longer. I think this might have allayed Miss M's concerns that she'd be penalised for retiring early from the DB scheme.

I also accept Miss M couldn't take her DB scheme benefits flexibly. Although she could choose to take a cash lump sum and a reduced annual pension, Miss M had to take those benefits at the same time.

But nothing indicates that Miss M had a likely future need to take a cash lump sum and then defer taking her income. I also haven't seen anything to indicate that Miss M had a strong need to vary her 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 Miss M's.

Despite not having an apparent need for flexibility, importantly Miss M was contributing to her workplace DC pension scheme, something I'm not persuaded Michael James properly considered in terms of the role this could play in Miss M's future income generation. Michael James recorded that a total of 20% of Miss M's salary was being invested here – a combination of employer and employee contributions. So with at least 12 years' contributions ahead – and likely more – without accounting for growth, salary increases (Miss M indicated progress could be made with colleagues leaving), or increases in contribution rate, this had the potential to be worth close to £90,000 and perhaps more.

The nature of a DC scheme means this already provided Miss M with flexibility – she wasn't committed to take these benefits in a set way. Miss M could've taken lump sums as and when required and adjusted the income she took from it according to her needs. So, I think if Miss M retained her DB pension, this combined with her new workplace pension, would've likely given her the flexibility to retire early - if that's what she ultimately decided.

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

Turning to Miss M's income need – while I don't think Miss M had any true understanding of what retirement income she would need, and I can't see that Michael James carried out any detailed analysis / interrogation of her expected income and expenditure in retirement, it's recorded that she thought £20,000 a year would be sufficient. 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 Miss M with at the very least a solid guaranteed income foundation upon which her other provision could supplement, to likely meet her overall income need.

For example, Michael James' analysis showed that at 55, under the existing scheme Miss M would be entitled to an annual pension of around £13,800. 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 Miss M's income need, I think Miss M could've used her workplace DC pension to supplement things – at least until her state pension became payable. Miss M's DC pension would've likely had a not insignificant amount at this stage that she could draw on flexibly, as and when needed, to top up her income or take a lump sum. Assuming Miss M delayed her retirement plans to age 57 as Michael James suggested would be beneficial to her, her DB scheme income would've been greater meaning that the gap she needed to fill using her DC scheme would've likely been smaller. Furthermore, if Miss M did continue to work until her normal retirement age, which I don't think was out of the question based on the evidence, Miss M's DB scheme income would've likely met her income need in full – under the existing scheme Michael James recorded she'd be entitled to a little under £25,000 a year.

Either way, I still think Miss M had a better chance of achieving her future retirement income needs by opting into the BSPS2 (the benefits under which were guaranteed and escalated) rather than relying on investment growth in a personal pension to achieve things.

If the BSPS2 hadn't gone ahead, Miss M would've moved with the scheme to the PPF. And while the income Miss M would receive was likely lower than the pension she'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, Miss M's retirement plans and needs weren't formulated and she would've had her DC scheme to draw on flexibly until her state pension became payable.

So overall, I think Miss M could've likely met her income needs in retirement through the BSPS2 or the PPF and I don't think it was in Miss M best interests for her to transfer her pension just to have flexibility, that I'm not persuaded she really needed.

Death benefits

Michael James also recommended the transfer to provide the ability for Miss M to pass on what remained of her pension fund to her family in the event of her death. Miss M thought the DB scheme's death benefits were of little value to her because she was single.

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 Miss M. But whilst I appreciate death benefits are important to consumers, and Miss M might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Miss M about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement – it is not a legacy planning tool.

I appreciate that Miss M might not have thought the existing death benefits attached to the DB scheme were of benefits given her circumstances at the time. But Miss M might have married in the future in which case the spouse's pension provided by the DB would've been useful to her spouse if Miss M predeceased them. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, there may not have been a large sum left, particularly if Miss M lived a long life and/or investment performance was lower than expected. In any event, Michael James should not have encouraged Miss M to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

I'm mindful here that Miss M already had lump sum death benefits available to her through her DC scheme – she also had death-in-service benefit And I see no reason why Miss M couldn't have nominated members of her family as beneficiaries of these if she hadn't already done so.

I can see that Michael James provided quotes for a whole of life and a term policy as an alternative way of providing lump sum death benefits. And these cost £273 a month and £67 a month respectively. These were discounted by Miss M because while she wanted to leave some benefit to her family, she didn't want to take out a policy or use her disposable income to fund it. In my view this gives me cause to question just how much of a priority lump sum death benefits were to Miss M - but I don't think Michael James presented this option to Miss M in a balanced way.

Basing the quote on the transfer value of Miss M's pension benefits essentially assumed that she would pass away on day one following the transfer, and that isn't realistic. Ultimately, Miss M wanted to leave whatever remained of her pension to her family which would be a lot less than this if she lived a long life and/or if investment returns were poor.

So, the starting point ought to have been to ask Miss M how much she would ideally like to leave to her family, taking into account her existing benefits I described above, and this could've been explored on a whole of life or term assurance basis, which in my view was likely to be cheaper to provide. And it is this that I think Michael James ought to have ultimately recommended rather than recommending Miss M transfer out of her DB scheme to achieve things.

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

Control or concerns over financial stability of the BSPS

I understand that Miss M, like many of her colleagues, was concerned about her pension. Her employer had recently made the announcement about its plans for the scheme and so she was likely worried her pension would end up in the PPF. There were lots of negative things circulating about the PPF. So it's quite possible that Miss M was leaning towards the decision to transfer because of the concerns she had about her employer, her negative perception of the PPF and her concerns about the BSPS2. But it was Michael James' obligation to give Miss M an objective picture and recommend what was in her 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 the benefits available to Miss M through the BSPS2 into account, particularly as she was in the process of choosing to opt into it. I think this should've alleviated some of Miss M'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 Miss M that the scheme moving to the PPF wasn't as concerning as she thought or been led to believe. Importantly Miss M still had the option of taking early retirement through the PPF. Miss M didn't have any firm retirement plans at this stage - but I think the income available to Miss M through the PPF would've still provided a solid base, which her DC scheme could supplement to meet her overall income need at retirement. Crucially she was also unlikely 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. Miss M might not have been able to later transfer out of the PPF – but given what I said earlier on about her already having a degree of flexibility, I don't think there was an apparent need for her to do so.

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

Summary

I accept that Miss M was likely motivated to transfer out of the BSPS and that her concerns about her 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 Miss M. But Michael James wasn't there to just transact what Miss M might have thought she wanted. The adviser's role was to really understand what Miss M needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Miss M was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Miss M 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. Miss M didn't have any firm retirement plans, so she shouldn't have been advised to transfer out of the scheme just to have flexibility that I'm not persuaded she really needed, and the potential for higher death benefits wasn't worth giving up the guarantees associated with her DB scheme. So, I don't think it was in Miss M's best interests for her to transfer her DB scheme to a personal pension at this time when she had the opportunity of opting into the BSPS2.

So, I think Michael James should've advised Miss M 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 Miss M indicated she wanted to retire at 55, as I've already explained this was more than 10 years away and Miss M's plans could've changed. So, I don't think that it would've been in her best interest to accept the reduction in benefits she 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, Miss M would've retained the ability to transfer out of the scheme nearer to her retirement age - *if* her needs demanded it. The annual indexation of her pension when in payment was also more advantageous under the BSPS2

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

I've considered this carefully, but I'm not persuaded that Miss M would've insisted on transferring out of the BSPS against Michael James' advice. I say this because, while as I've already said Miss M was likely motivated to transfer when she approached Michael James, on balance, I still think Miss M would've listened to and followed its advice if things had happened as they should have and Michael James had recommended she not transfer out of the scheme. I accept Miss M had some prior investment experience – precisely to what degree I can't tell because Miss M had liquidated her existing investments and there was no detail recorded about them. But I've not seen enough to persuade me that Miss M was an experienced investor, who possessed the requisite skill, knowledge or confidence to against the advice they was given, particularly in complex pension matters. Miss M's pension accounted for all of her private retirement provision at the time – so, if Michael James had provided her with clear advice against transferring out of the BSPS, explaining why it wasn't in her best interests, I think she would've accepted that advice.

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

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

In light of the above, I think Michael James should compensate Miss M 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 Miss M. 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 Miss M. Taking everything into account, including that I consider Miss M's retirement provision is of great importance to her given its significance in her overall retirement income provision, I think the unsuitable advice has caused her 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 Miss M, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Miss M would most likely have remained in the occupational pension scheme and opted to join 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 Miss M and our Service upon completion of the calculation.

For clarity, Miss M has not yet retired, and she 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 Miss M's acceptance of my final decision.

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

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

Redress paid to Miss M 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 Miss M's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Michael James should also pay Miss M £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 to pay Miss M 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 pays Miss M the balance.

If Miss M accepts this decision, the money award becomes binding on Michael James.

My recommendation would not be binding. Further, it's unlikely that Miss M can accept my decision and go to court to ask for the balance. Miss M may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 16 August 2023.
Paul Featherstone
Ombudsman