DRN-3654801

The complaint

Mr S complains about the advice Acumen Independent Financial Planning Limited ('Acumen') gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme 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 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')[1], or a new defined-benefit scheme ('BSPS2'). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr S' employer would be set up – the BSPS2.

The BSPS trustees provided scheme members with an important update in August 2017. They said that the members' employer had made an expected payment into the BSPS of £550 million, as part of its agreement with The Pension Regulator and that was likely to result in an improvement to transfer values. The confirmation that the employer had made the payment referred to was announced on 11 September 2017.

On 18 September 2017 the DB scheme administrators sent Mr S information about his entitlement under the BSPS. That included that his DB fund had a cash equivalent transfer value ('CETV') of £295,144.

In October 2017 the DB scheme administrators sent its members "time to choose" packs. I haven't been provided with a copy of the pack sent to Mr S. But I'm aware those gave scheme members three options:

- To stay in the BSPS and move with it to the PPF.
- To opt to move their benefits to the BSPS2.
- To transfer out of the scheme and into a private arrangement.

Mr S chose to opt into the BSPS2 prior to approaching Acumen for advice.

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[1] The PPF acts as a 'lifeboat' for insolvent DB pension schemes. It pays compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme.

Mr S remained concerned about what the recent announcements by his employer meant for the security of his pension. He contacted a financial adviser who referred him to Acumen for advice in December 2017.

Mr S met with Acumen in late December 2017. It conducted a fact-find with him and an assessment of his attitude to risk. At that time Mr S was 43 years old, married with two children under 13. Both he and his wife were working and his wife was also paying into a DB scheme pension. They owned their own home subject to a mortgage that was due to be paid in full in 2018. They had £26,000 in savings..

After obtaining a transfer value analysis report ('TVAS') Acumen met with Mr S again on 12 January 2018. It produced a suitability report setting out its analysis and recommendations. It advised Mr S to transfer his DB funds into a named personal pension. Amongst other things it noted that Mr S was considering retiring at age 58 – although that could change in the future. It said that, after discussing it with him, it had assessed his attitude to risk to be "medium". It said the growth rates required (the critical yields) to match the benefits from the DB scheme were "unlikely to be achievable". So from an investment perspective a transfer was "likely not feasible". But it said Mr S' "desire to live on a lower income", in order to have flexible access to his funds and greater death benefits were of a higher priority to him.

Mr S signed the forms to go ahead with the transfer that day.

Mr S complained, via the Financial Ombudsman Service, that Acumen's advice was not suitable for him. We passed that complaint on to Acumen in February 2022. Mr S later contacted us and said Acumen hadn't replied to his complaint. We asked Acumen for its file. When it sent us that it included a draft reply to Mr S' complaint dated in April 2022. Mr S told us he hadn't ever received that. Amongst other things the draft reply said Acumen had fulfilled its regulatory requirements. It took reasonable steps to satisfy itself that its advice to transfer was suitable. It couldn't recommend Mr S join the BSPS2 as it wasn't established and there was no certainty it would be. It added that the PPF was "widely (and correctly)" considered to be an undesirable outcome.

One of our Investigators looked into Mr S' complaint. The Investigator didn't think Acumen's advice was suitable for Mr S. He recommended Mr S' complaint be upheld. He said Acumen should establish if Mr S had suffered a financial loss as a result of its unsuitable advice and if so pay him compensation, including £300 to address his distress and inconvenience.

Acumen didn't reply to the investigator's findings. So, because things couldn't be resolved informally, the complaint was referred to me to make 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 Acumen's 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 broadly similar reasons to those our Investigator gave. I've summarised my findings below.

When doing so I've been mindful that the regulator, the Financial Conduct Authority ('FCA'), says in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Acumen should have only considered recommending a transfer if it could clearly demonstrate it was in Mr S' best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

My findings

When it gave its advice Acumen said that transferring to a personal pension was unlikely to achieve the relevant critical yields in order to match the benefits of the DB scheme. And Acumen noted that "from an investment perspective" the transfer wasn't feasible. In other words Acumen recognised that transferring would most likely mean Mr S would be worse off in retirement by doing so. But I don't think it did enough to make this clear to Mr S nor did it give him enough information with which to make an informed decision.

Acumen said that the critical yield to match the BSPS benefits at age 65 was 6.9% and 4.7% if his pension moved to the PPF. Acumen didn't provide critical yields if Mr S decided to take the maximum tax free cash ('TFC') lump sum and a reduced pension. Similarly it didn't provide any critical yield figures if Mr S took early retirement.

Further, Acumen compared the benefits from the BSPS against the personal pension. But continuing in the BSPS in its existing form wasn't an option for Mr S. By that time the details of the BSPS2 were available. So I think Acumen should have provided a comparison of benefits from the personal pension against those from the BSPS2. Had it done so, given what I know about the BSPS2, I think the critical yields to match the benefits the BSPS2 would have provided from age 65 were likely to be between those of the BSPS and the PPF.

That said, the critical yields at age 58 were likely to have been higher still. That's because the funds would have been invested for a shorter time before Mr S accessed them and so had less time to grow. Those funds would also then have needed to support Mr S for a longer period in retirement. That means the investments would have needed higher returns to match the guaranteed benefits from the DB scheme from an earlier age. So, in order to allow Mr S to make an informed decision I think Acumen should have provided Mr S with figures about his entitlements from both the BSPS2 and the PPF at age 58 together with the critical yields required to match them. But it didn't do that.

Further, as I've said, Acumen recognised that the critical yields were unlikely to be matched at age 65. So, by taking early retirement at age 58, the gap between the critical yield required and the likely growth rate were most likely to have increased further, meaning Mr S would likely be even worse off by transferring to a personal pension and taking early retirement.

By way of example, prior to October 2017 the Financial Ombudsman Service published future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. I'll explain that a discount rate is a measure of what an investment is likely to grow at in the future. They provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor. In Mr S' case the discount rate for retirement at age 65 – still over 21 years away – was 4.5%. That is below the rate required to match either the BSPS or PPF benefits. And that discount rate falls to 4.2% for early retirement at age 58. So, given the critical yield at an early retirement age would have most likely been higher than at age 65, they would probably be even less achievable at age 58 than they were at age 65.

I've noted that Acumen used a cashflow analysis tool – what it called a "retirement modeller" – to show how Mr S' personal pension fund could sustain him in retirement. Acumen said its model showed that the fund would last Mr S until he was 97 years old. But there are a number of unexplained anomalies with the model. For example it assumes Mr S will take a net income of £15,000 a year and Mr S' income requirement would increase by just 1% a year. At the time of its advice, financial models typically used an inflation rate of 2.5% a year. But Acumen hasn't explained why it believed Mr S would only require his income to increase by a fraction (two fifths) of that to keep pace with inflation. So, in effect, in its model, Mr S would be becoming increasingly worse off each year.

Also the model shows Mr S taking three TFC sums of £30,000 at ages 58, 62 and 65. But it provided no explanation for why it believed Mr S would take those TFC amounts at those times. There's nothing anywhere else on file to support that Mr S might want to take those sum or why he wouldn't, like most consumers, want to take the full 25% TFC lump sum that the personal pension fund would entitle him to when he took his retirement benefits. However, representing taking the TFC sums as it had would allow for the model to show a more sustainable income over a longer period, than Mr S taking the TFC in one lump sum. So, it appears to me that Acumen has shown the figures in the manner that it has in order to support its findings, rather than to represent Mr S' likely position in retirement.

Further and most notably the model is based on a regular investment return of 6.2% a year. That seems very high for someone like Mr S with a medium attitude to risk. As I've said above the discount rate for retirement at age 58 was 4.2%, well below the growth rate in Acumen's model. Also the regulator's middle projection rate at the time was 5%. So it's anything but clear why Acumen chose to use an inflated growth rate of 6.2%, that doesn't appear representative of any industry standard, for a medium risk investor. It follows that I don't find Acumen's model reliable. And, instead of making it clear to Mr S that he would likely be worse off in retirement by transferring, it gave the impression that his income security was less likely to be compromised. I don't think that was fair.

So, given that transferring would most likely see Mr S worse off in retirement, for this reason alone, I don't think it was in his best interests to transfer.

Acumen's justified the transfer saying, in part, that it allowed Mr S to retire early and to access his funds flexibly. But Mr S didn't need to give up the guaranteed benefits of his DB scheme in order to achieve those things.

Mr S was clearly considering early retirement, although the comment that his plans might change in the future indicate that those wishes weren't concrete. So they were likely to change as his early retirement age approached. But in any event, if Mr S had insisted on early retirement then both the BSPS2 and the PPF would allow him to do that. Although his benefits under those schemes would have been subject to actuarial reductions to reflect the fact that the pension would need to sustain him over a longer period. But, there's no evidence Acumen made this clear to Mr S. And, as I've already said, it didn't give him details of his entitlements from the schemes if he took early retirement nor what the critical yields were to match those benefits. So I don't think Acumen gave him all the information he needed in order to make an informed decision.

Also, Acumen said that Mr S was prepared to accept a lower income in retirement in order to give him flexible access to his benefits in the manner he chose. It's true to say that Mr S couldn't have had the same level of flexible access to his DB funds as he could from a personal pension. While he could have chosen to take those early, if he'd wanted a TFC lump sum, then he would have had to take that at the same time as drawing a regular income from his pension. Whereas the personal pension would allow him to draw down funds as he saw fit. But while I can see why that might have been an attractive prospect to him, I'm not persuaded that Mr S had any concrete need to vary his income throughout retirement. But, if he believed he did there was no requirement for him to give up the safeguarded benefits from the DB scheme in order to have some flexible access to retirement funds.

Acumen had noted that Mr S and his employer had begun contributing to a recently set up defined contribution ('DC') pension scheme. There are conflicting figures on file but it seems that Mr S and his employer were together contributing around 16% of Mr S' salary to that pension. That was around £5,530 a year. He could have anticipated continuing to contribute to that pension (or a similar one if he were to change jobs in the future) for the remainder of his working life. So by the time Mr S reached early retirement age, his DC pension should have built a sizeable pot. Indeed without allowing for Mr S increasing his contributions, his salary growing, or any return on the investment, by age 58 he could have a pot in the DC pension of around £78,500, by age 65 that could have increased to around £115,000.

The nature of a DC pension means this already provided Mr S with flexibility – he wasn't committed to take its benefits in a set way. Mr S could have taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr S retained his DB pension, this combined with his new DC pension, would have likely given him the flexibility to retire early - *if* that was what he ultimately decided.

In addition if Acumen had advised Mr S to join the BSPS2 and he decided he needed greater flexibility than the scheme provided, then he could have chosen to transfer from that scheme nearer to his retirement age. That was still over 14 years away. And I think this was something he could have explored closer to his intended retirement age, it wasn't a decision he needed to make straightaway.

I've noted Acumen said in its draft reply to Mr S' complaint (which he didn't receive), that at the time of the advice it couldn't recommend a transfer to the BSPS2 because there was no certainty it would come into existence. I accept the BSPS2 wasn't guaranteed to go ahead. But details of the scheme had been provided and the time to choose exercise had concluded when Acumen gave its advice. And all the communications from the scheme trustees were very optimistic that the BSPS2 operating conditions would be met. So, I think Acumen should have factored the benefits available through the BSPS2 into its analysis. But it didn't do so.

Acumen also said the death benefits available from the personal pension were of a higher priority to Mr S than his income in retirement. That might have been the case. But Acumen was tasked with advising Mr S about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension and dependents' benefits, that could have been valuable to his family in the event of his death.

If following the transfer to a personal pension Mr S had died immediately then the CETV sum would have been paid to his wife as a death benefit. I understand that would most likely have appeared attractive as a potential lump sum. But, in reality, the sum remaining on death following a transfer was always likely to be different. How much would remain in the fund on Mr S' death depended on a number of factors. And there may not have been a large sum left in Mr S' personal pension if he lived a long life, the investments performed poorly or if he took large sums from the fund early in his retirement. In any event, Acumen should not have encouraged Mr S to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Further, I'm aware that Mr S had death in service cover from his employer. So that would have paid a considerable lump sum in the event he died while still working for the same employer. But, if he wanted to leave a legacy for his family, which didn't depend on his job, investment returns or how much of his pension fund remained on his death, I think Acumen should have instead explored life insurance. I appreciate life insurance can be expensive. So, the starting point ought to have been for Acumen to ask Mr S how much he would ideally like to leave to his family, and this could have been explored on a whole of life or term assurance basis. But there's little evidence it did so

Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr S. Also I don't think insurance was properly explored as an alternative. And ultimately Acumen should not have encouraged Mr S to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

I've also noted that, as well as saying that BSPS2 wasn't guaranteed, Acumen said the PPF was considered to be an "undesirable outcome". I understand that Mr S may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was Acumen's role to objectively address those concerns. As I've already said, at the time, all signs pointed toward the BSPS2 being established. But even if not, the PPF would still provide Mr S with guaranteed income and the option of accessing TFC. Mr S was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interests.

Overall, I can't see persuasive reasons why it was clearly in Mr S' best interests to give up his DB benefits and transfer them to a personal pension. And I haven't seen anything to persuade me that Mr S would have insisted on transferring, against advice to remain in the DB scheme.

For the above reasons I think Acumen's advice to Mr S to transfer out of the DB scheme and into a personal pension was unsuitable for him as it was not in his best interests. So, I think Acumen should compensate Mr S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr S would have most likely remained in the DB scheme and maintained his choice to join the BSPS2 if Acumen had given suitable advice.

Acumen 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.

Acumen 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 S and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what Acumen based the inputs into the calculator on.

For clarity, Mr S 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 of 65, 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 PS22/13 and 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 S' acceptance of the decision.

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

- calculate and offer Mr S redress as a cash lump sum payment,
- explain to Mr S before starting the redress calculation that:
  - his 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 his redress prudently is to use it to augment his personal pension offer to calculate how much of any redress Mr S receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr S accepts Acumen's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr S for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr S's end of year tax position.

Redress paid to Mr S as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Acumen may make a notional deduction to cash lump sum payments to take account of tax that Mr S would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr 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.

Also, as I think that learning that he might have unnecessarily put his pension funds at risk was a source of distress and inconvenience for Mr S, I think Acumen should also pay him £300 to address that.

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, I may recommend that the business pays the balance.

My final decision

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Acumen Independent Financial Planning Limited pays Mr S the balance.

If Mr S accepts this decision, the money award becomes binding on Acumen Independent Financial Planning Limited.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 8 November 2023.

Joe Scott
Ombudsman