

The complaint

Mr T is unhappy with the advice he received from Finesco Financial Services Limited (FFSL) to transfer benefits from his former employer's defined benefit scheme to a personal pension plan. He believes the advice was negligent and has caused him to suffer a financial loss.

Mr T is represented in bringing this complaint. But for ease of reading I will generally refer to all complainant representations as being made by Mr T.

What happened

The history leading up to this complaint is well known to the parties and has been clearly set out in the investigator's assessment, which for completeness, I have largely replicated below with small additions and amendments.

At the time of advice, Mr T was age 50, married with two dependent children aged 24 and 18. He was employed earning £16,000 per annum, increasing to £19,000 when overtime was included.

In late 2006, Mr T contacted FFSL by letter. This letter referred to a recent telephone conversation and enclosed some pension documents relating to his current defined benefit (DB) occupational pension scheme (OPS) and his deferred pension benefits from his previous employer's DB scheme (British Steel Pension Scheme – BPS).

Mr T said he was "*looking to see*:"

- a) *If I could receive a lump sum & reduced pension aged 50*
- b) *What other options are open to me*
- c) *Leave pension as it is."*

He also explained that he'd been with his current employer since leaving British Steel in February 1992 and was a member of its final salary pension scheme.

FFSL replied on 26 September 2006 setting out an explanation of the benefits available under BPS, noting "the main advantage of final salary pension benefits, is that it is the employer's responsibility to provide you with the pension, there is no investment risk on your part." It also pointed out the automatic increases available through the scheme would come at a cost in any personal pension. A meeting to discuss Mr T's situation in greater detail was suggested.

In January 2007 FFSL wrote to BPS requesting an updated valuation and scheme booklet. A transfer information sheet, issued 1 February 2007, showed Mr T had 15 years and four months service which meant he has accrued the following deferred benefits at the normal retirement age of 65:

- Member's Pension revalued to £4,822.68
- Widow's Pension revalued to £2,411.64
- Retirement Lump Sum of £10,851.03

The transfer value was quoted as £44,837. Mr T signed the accompanying “*Election for transfer*” document on 10 February 2007; before financial advice was provided.

FFSL wrote to Mr T on 1 March 2007 and explained:

- Benefits were available at age 50, subject to a penalty of 3% simple for each year prior to age 55 – so a penalty of 15% would apply.
- It wasn't possible to take the tax-free lump sum from the pension without taking the income.
- If the maximum lump sum of £10,851.03 were taken from the BSPS the income would be reduced by £1 for every £16 taken, resulting in a reduction of £678.19 per annum.
- The BSPS benefits were payable for life and included a 50% spouse's pension.

The letter also said that it would be possible to transfer the pension to a personal pension plan, take 25% tax-free cash immediately, while leaving the remainder invested until an income was required. And it said that in order to match the benefits provided by the BSPS at age 65, any personal pension would need to achieve an annualised return of 11.1% (it is assumed that this is based on no tax-free cash being taken; the Transfer Value Analysis document of 15 February 2007 indicates that a return of 13.7% would be needed but does not set out what benefits this is aiming to match; it seems reasonable that this is what would be required if a tax-free lump sum were taken). FFSL suggested the options should be discussed in more detail.

On 15 March 2007 British Steel issued a letter setting out the actuarially reduced benefits at age 50:

- British Steel Annual Pension: £2,013
- Contingent Spouse's Annual Pension: £1,006.56

A “*Pension Discussion Report*” was prepared on 3 April 2007. The purpose of this report was to “look at [Mr T's] existing pensions and also the options available to [him] in terms of drawing a lump sum from [his] preserved pension with British Steel.” The report went on to set out similar information to that in the letter of 1 March 2007.

With reference to the returns required to match the scheme benefits at age 65 it said:

this is a high level of yield required and based purely on that output we could not recommend a transfer on the basis of being able to improve the benefits through the former scheme.

However, it went on to explain that transferring would allow Mr T access to his tax-free lump sum, without taking an income. It also made him aware this could result in lower pension benefits overall.

The report went on to outline the risk factors with transferring, including the effect of charges on returns. It also advised him to read the enclosed ‘*FSA's guide to the risk of salary-related occupation pension transfers*’ and a copy of the Transfer Value Analysis report.

The report explained if Mr T wished to proceed with the transfer, he would need to complete an enclosed ‘*Personal Financial Summary*’ and risk profiling questionnaire so the adviser could provide him with “*formal recommendations*”. Both of these documents were signed by Mr T on 4 April 2007. FFSL assessed Mr T as having a moderate attitude to risk (ATR) but I

note that very little was recorded on the *Personal Financial Summary*. Specifically, no general or specific financial objectives are identified; there isn't any information about Mr T's current DB scheme, no records of his investments, bank accounts, assets or liabilities (other than the mortgage on the home) and no information about his current and future expenditures.

It is unclear exactly when a further meeting took place, but illustrations for unsecured pension (income withdrawal) were produced on 17 April 2007. Mr T signed an application form for a personal pension with Provider A on 18 April 2007. On 20 April 2007 FFSL sent Mr T a "*formal recommendation report*". The letter reiterated:

it is not a recommendation to simply improve upon the benefits available from the British Steel Scheme. Therefore, in order that you understand this, I would ask that you sign a copy of the report where indicated to confirm that you are aware of the risk involved in the process.

Pages 1-5 of the recommendation report mirror the '*Pension Discussion Report*' of 3 April 2007 word for word. Pages 6-8 explain the advantages and disadvantages of unsecured income, including the risks. On page 9 the adviser reiterated he "could not possibly recommend that a transfer would result in a greater level of benefits." Pages 10-14 set out details of the product and funds recommended.

Mr T signed a declaration, dated 18 April 2007, stating he understood the transfer could result in greatly reduced benefits at age 65.

On 20 April 2007 FFSL wrote to Mr T confirming the application forms were forwarded to Provider A for processing. The letter explained no professional consultancy fee would be charged as FFSL would receive an introduction fee from Provider A. On 21 June 2007 tax-free cash of £11,636.22 was paid to Mr T's bank account. The policy document was forwarded to Mr T on 22 June 2007.

Mr T subsequently complained about the advice to transfer in December 2020. FFSL didn't uphold the complaint and so Mr T referred it to this service for an independent review.

FFSL said we didn't have jurisdiction to consider the complaint because it had been made too late. It said the advice was given more than six years ago, and Mr T was fully informed of the risks of the transfer at the time of advice in 2007 and was aware that the transfer was unlikely to improve his pension benefits. FFSL also said that following the transfer Mr T received annual statements from his personal pension plan showing the progress of his pension benefits with them and if he had so wished, he could have compared this to what he would have received from BPS. This meant that he ought reasonably to have known he had cause to complain more than three years before he did.

One of our investigators considered this but didn't agree. The investigator reasoned Mr T would not have accepted the advice in 2007 if he thought it was negligent. Further, he wasn't persuaded that Mr T possessed the financial sophistication necessary to undertake a meaningful comparison between the benefits available from his personal pension plan and those he might have been entitled to under BPS. Mr T said he only became aware he had cause to complain in 2020 after responding to an advert from a claims management company (CMC). Without persuasive evidence demonstrating otherwise, the investigator considered it reasonable that this is when Mr T became aware something may have gone wrong. And since Mr T then complained within three years, the complaint was made in time.

As FFSL didn't agree, the matter was referred to ombudsman. I issued a decision stating that the complaint had been made in time, largely for the reasons explained by the investigator.

Following this, the investigator looked into the merits of Mr T's complaint. And having done so, he concluded that the advice to transfer wasn't suitable. He said, in summary that the starting position when considering the transfer of valuable guaranteed benefits is to assume the transfer isn't suitable unless it can be clearly demonstrated that the transfer is in the client's best interest. The investigator noted that very little information was provided regarding Mr T's financial circumstances and objectives at the time of advice. He said no assets were recorded on the fact find, nor was there an analysis of income and expenditure, either at the time of advice or in retirement. The investigator also wasn't persuaded Mr T needed the lump sum, but reasoned even if there was a genuine need it was difficult to conclude that the lump sum would address this need since it wasn't quantified. He concluded that even though the risks of transferring were disclosed, and Mr T signed a disclaimer, overall he was not persuaded by the evidence available that there was a good reason for transferring Mr T's valuable benefits with BPS.

He then set out a methodology for putting things right. And said that FFSL should pay Mr T £250 to reflect the distress and inconvenience caused by the disruption to his retirement plans.

FFSL disagreed. It said when Mr T approached FFSL he had already contacted BPS about taking his pension benefits early. And he signed the "*Election for Transfer*" document on 10 February 2007, before receiving advice and just a few days after his 50th birthday which FFSL says indicates "how intent Mr [T] was on accessing his benefits as early as possible."

It also said the letter FFSL sent to Mr T on 1 March 2007 provided only factual information regarding how Mr T could draw a cash lump sum from his pension and made no recommendation. FFSL said "it was left in the hands of Mr [T] to digest this and contact [FFSL] to discuss matters further if he so wished."

FFSL also pointed out that in "2007 there was not the same clarity as there is today in relation to an insistent client and the process that an advisor should follow in such circumstances" noting that there were no rules or specific guidance in the regulator's handbook regarding insistent clients.

And it said that FFSL did not recommend the transfer of the BPS benefits in order to potentially improve Mr T's pension in retirement noting that the FFSL adviser "provides compelling reasons to leave the benefits where they are within the BPS but recognises Mr [T]'s need to raise capital and responds to it." FFSL conceded that the fact find document could have been more comprehensive but explained the advice process took place over several months and the adviser was well informed about Mr T's circumstances and objectives. FFSL explained that at the time of advice Mr T had no significant savings or investments and no surplus income. He also didn't want to go into debt, but he required capital to fund his son's wedding (though this was not recorded in the advice documents).

FFSL said Mr T was provided ample risk warnings to alert him to the valuable benefits he would be giving up if he transferred his BPS benefits and that all other avenues and potential resources were considered as a means of raising the capital Mr T is said to have required. It said Mr T made the decision to transfer from an informed position and that the advice was suitable to meet his objectives. And although it could have done more to document the reasons behind Mr T's needs, FFSL said "he would still have proceeded with the transfer as he was determined to access his pension benefits to release the maximum lump sum available."

The investigator considered everything FFSL said but wasn't persuaded to change their opinion. Specifically the investigator questioned the relevance of FFSL's comments about insistent clients as this would have only come into play if the advice had been not to transfer and here FFSL recommended Mr T transfer his deferred BSPS pension.

The investigator also said that although FFSL have asserted Mr T would have transferred regardless of the advice because he was motivated to access cash, the documents from the time of advice don't make it clear why these funds were required or "what alternatives were considered to fund this undefined 'need'." Therefore he wasn't able to conclude that alternatives were explored or "that there was any meaningful effort to dissuade Mr [T] from this [course] of action."

FFSL replied noting that there was no explicit "insistent client" process at the time and that it followed the guidance from its compliance consultants and good industry practice throughout the advice process in 2007. And it said once again that although the "soft facts" could have been better recorded, the fact find is quite clear that Mr T had no alternative resources to meet his need for capital, something it claims is undisputed. It also pointed out that Mr T required further funds even after taking the tax-free cash. FFSL said this indicated that Mr T had "no recourse to alternative funding but also that his budgeting position meant that he was unable to accumulate savings from 'surplus' income." FFSL concluded that Mr T "would have pursued the transfer in any event because of his genuine need to raise capital at that time."

The investigator remained of the view that the advice was unsuitable, so the complaint was referred to me to make a final decision on the merits.

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 Business ('PRIN') and the Conduct of Business rules ('COB'). 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 parties to this complaint have provided detailed submissions to support their position and I am grateful to them for doing so. I have considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision is not to address every point raised in detail, but to set out my findings and reasons for reaching them.

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 FFSL's actions here.

PRIN 3: *A firm must conduct its business with due skill, care and diligence.*

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.*

PRIN 9: A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

And the provisions in COB 5.3 which deal with the obligations when giving a personal recommendation and assessing suitability.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint; I'll explain why.

The then regulator, the Financial Services Authority ('FSA'), stated in 'COB' that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, FFSL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr T's best interests (COB 5.3.29G). This is known as the 'presumption of unsuitability' and has been renumbered to COBS 19.1.6G in the current handbook.

What this means is FFSL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr T's best interests. And having looked at all the evidence available, I'm not satisfied it was.

Financial viability

FFSL carried out a Transfer Value Analysis report (as required by the regulator) showing how much Mr T's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (this is commonly referred to as the critical yield).

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr T was 50 at the time of the advice and expected to retire at age 65. The investment return (critical yield) required to match the BSPS benefits at retirement was quoted as either 11.1% or 13.7% per year (the TVAS says: "Taking transfer value of £44,837.00, it would need an annual investment return to retirement 13.7%." The Recommendation Report says the critical yield needed is 11.1%). This compares with the discount rate of 6.1% per year for 14 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7% and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr T's moderate attitude to risk and also the term to retirement. In my view there would be little point in Mr T 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, given the critical yield was in excess of 11%, I think Mr T was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of transferring and investing in line with a moderate ATR. The return required was significantly higher than the discount rate and far in excess of the regulator's upper projection rate. In my view, to have come close to achieving the growth required would've required Mr T to take a significantly greater level of risk than he indicated he was prepared to take. And even then, I think he'd still likely be worse off.

In my view, Mr T's capacity for loss was low. The fact find didn't record any savings or other assets of Mr T's. And while he was a member of another DB scheme at the time of advice, there is no supporting evidence to show that Mr T's income needs would be met solely by this pension. Although the information available is limited, I think it's likely Mr T would be reliant on both this and his deferred BPS pension to meet his income needs through retirement.

For this reason alone a transfer out of BPS wasn't in Mr T's best interests.

Of course financial viability isn't the only consideration when giving transfer advice, as FFSL has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

Flexibility – access to tax-free cash

The main reason FFSL recommended Mr T transfer his BPS benefits was to gain access to a cash lump sum. I've reviewed all of the information provided to me from the time of advice and I've seen nothing that establishes the purpose of accessing a cash lump sum or the amount required. Since Mr T complained, FFSL have said Mr T wanted the money to help fund his son's wedding. And it says it isn't disputed Mr T needed access to cash and he continued to make withdrawals from his pension after the transfer. But I'm not persuaded that this evidences a genuine need to access the tax-free cash earlier than the normal scheme retirement age. Accessing tax-free cash is not an objective in itself. Tax-free cash is a means of achieving an objective. And in this case, I've not seen sufficient evidence that persuades me Mr T had a genuine objective that could only be met by transferring his BPS benefits and taking tax-free cash.

FFSL said that Mr T had need for these funds to help pay for his son's wedding. This wasn't recorded at the time of advice, but even if this was the true position, I'm not sure this was a compelling reason to transfer and forgo valuable guaranteed benefits. Not only did FFSL fail to establish the actual purpose of accessing the lump sum, it also did not establish how much money Mr T actually needed (if any at all) – the advice was purely based on him accessing the maximum lump sum possible.

I appreciate FFSL have also said Mr T didn't want to go into debt, but if FFSL had probed the need for the tax-free cash as it should have done it may have been able to suggest alternative means of funding. But since no need was identified no alternatives were meaningfully explored.

Overall, I don't think Mr T had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date – so I don't think it was in his best interests to transfer his BPS benefits.

Summary

I don't doubt that access to tax-free cash lump sum and the flexibility of a personal pension would have sounded like attractive features to Mr T. But FFSL wasn't there to just transact what Mr T might have thought he wanted. The adviser's role was to really understand what Mr T needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr T was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr T 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 T should not have been advised to transfer out of the scheme just to achieve a unquantified short-term objective.

So, I think FFSL should've advised Mr T to remain in BPS.

Of course, I have to consider whether Mr T would've gone ahead anyway, against FFSL's advice. FFSL argues that this is the case, saying Mr T was adamant about accessing his tax-free cash and in fact, had already signed the "Election for Transfer" document before the advice was provided.

I've considered this carefully, but I'm not persuaded that Mr T would've insisted on transferring out of BPS, against FFSL's advice. I say this because Mr T was an inexperienced investor with a moderate attitude to risk and this pension accounted for a not insignificant amount of his retirement provision. So, if FFSL had provided him with clear advice against transferring out of BPS, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr T's unquantified need for a cash lump sum was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out didn't think it was suitable for him or in his best interests. If FFSL had explained that there was no pressing need for Mr T to access his benefit now or risk his guaranteed pension to achieve things, I think that would've carried significant weight. So, I don't think Mr T would have insisted on transferring out of BPS.

Putting things right

In light of the above, I think FFSL should compensate Mr T for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I also consider an award for the stress and inconvenience caused to Mr T's retirement planning appropriate. So FFSL should pay Mr T a further £250 to reflect this impact.

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

FFSL 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>.

FFSL should use the FCA's BPS-specific redress calculator to calculate the redress. A copy of the BPS calculator output should be sent to Mr T and our Service upon completion of the calculation.

For clarity, Mr T has not yet retired, and he has no concrete 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 T'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, FFSL should:

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

Redress paid to Mr T 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, FFSL 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 T'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.

Where I uphold a complaint, I can consider 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 required Finesco Financial Services Limited to pay Mr T 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 Finesco Financial Services Limited pays Mr T the balance.

If Mr T accepts this decision, the money award becomes binding on Finesco Financial Services Limited.

My recommendation would not be binding. Further, it is unlikely Mr T can accept my decision and go to court to ask for the balance. Mr T 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 T to accept or reject my decision before 2 August 2023.

Jennifer Wood
Ombudsman