

## The complaint

Mr H complained that he was given unsuitable advice to transfer his deferred defined benefit (DB) British Steel Pension Scheme (BSPS), to a type of personal pension plan, in 2018.

Hugh James Solicitors, trading as Hugh James Independent Financial Advisers is responsible for answering this complaint and so to keep things consistent, I'll refer mainly to "Hugh James".

## What happened

In March 2016, Mr H's former employer announced that it would be examining options to restructure its business, including decoupling the BSPS 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 personal pension arrangement.

In May 2017, the Pension Protection Fund (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 H's employer would be set up – the BSPS2.

In around October 2017, members of the BSPS were being 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 choices was 11 December 2017 (and was later extended to 22 December 2017).

Mr H was concerned about what the announcement by his former employer meant for the security of his preserved benefits in the BSPS. He was unsure what to do and was referred to Hugh James which is responsible for providing the pension advice. Information gathered about his circumstances were broadly as follows:

- Mr H was 51 years old, then unmarried and with one dependent child.
- The cash equivalent transfer value (CETV) of Mr H's BSPS was approximately £217,253. The normal retirement age (NRA) was 65.

Hugh James then set out its advice in a suitability report in February 2018. In this it advised Mr H to transfer out of the BSPS and invest the funds in a type of personal pension plan. Hugh James said this would allow Mr H to achieve his objectives. Mr H accepted this advice and so transferred out several weeks later. In late 2021 Mr H complained to Hugh James about its advice, saying he shouldn't have been advised to transfer out to a personal pension. However, Hugh James didn't uphold his complaint.

Mr H later referred his complaint to the Financial Ombudsman Service. One of our investigators looked into the complaint and said it should be upheld.

I've noted that whilst Hugh James originally said it didn't accept it had acted unsuitably by advising Mr H to transfer his pension, it then accepted the investigator's 'view' and agreed to carry out a redress calculation to establish whether Mr H had incurred any losses by transferring away. Hugh James undertook to do this using the rules in existence at the time (known as "FG17/9"). It said there was no overall financial loss incurred and also said, *"we have now received an FG17/9 redress report in respect of [Mr H's] pension transfer, prepared by independent actuarial consultants.... As you will see from the summary [he] has not suffered any loss by transferring out of the BSPS. Indeed, the calculation shows that he is better off by some £66,460. As such, no redress is due in accordance with FG17/9."*

However, Mr H didn't agree with this and in the meantime the Financial Conduct Authority (FCA) issued a direction to firms involved in these types of complaints that they should calculate redress using a BSPS-specific calculator which it had produced. I think it's fair to say that this caused somewhat of a delay in the process of allocating compensation although I accept Hugh James then attempted to speed matters up by offering to pay Mr H the £300 distress and inconvenience award, as recommended by our investigator. This was on the basis of him promptly agreeing to close the case because of the large *"surplus"* (as described by Hugh James above) showed no other redress was likely to be due.

Mr H didn't accept the offer to close the case and reiterated that he wanted and ombudsman's decision on his complaint.

My current understanding is that Hugh James has agreed to use the BSPS calculator but as yet has not done so; it says it is awaiting relevant information from a third-party about Mr H's pension value.

The complaint has therefore been passed to me.

### **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 also 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'). Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

#### *The applicable rules, regulations and requirements*

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

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Hugh James should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mr H's best interests.

I've used all the information we have to consider whether transferring away from the BPS to a personal pension was in Mr H's best interests. I have also carefully considered the final responses from Hugh James. I've carefully considered too, the reasons it has given for not yet calculating whether Mr H has incurred any losses as a result of being advised to transfer away.

### *Why I'm upholding the complaint*

Because I now know Hugh James has agreed to carry out a loss calculation in line with the approach being promoted by the FCA, I don't see the need to address the suitability of Hugh James's original advice to Mr H in quite the same detail as I would normally. However, to be clear, Hugh James's original transfer advice was unsuitable. Our investigator comprehensively set this out when he issued his 'view' and I agree what was said by way of rationale.

So, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income by transferring away. By transferring to a personal pension, the contemporary evidence showed Mr H was likely to obtain lower retirement benefits. There weren't any other particular reasons which justified the transfer.

### *Redress calculation*

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

As I don't have any direct evidence which shows Mr H made a specific choice about what he wanted to do about his BPS pension before the 22 December 2017 deadline, the BPS-redress calculation should assume that instead of transferring away, he'd have joined the PPF, as opposed to the BPS2. I have previously notified both the parties of the reasons for calculating the redress (if any is due) on this basis.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr H, as far as possible, into the position he would now be in but for Hugh James's unsuitable advice. On the evidence I have, I consider Mr H would have most likely opted to join the PPF, rather than transfer to the personal pension if he'd been given suitable advice and compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance. Hugh James should use the benefits offered by PPF for comparison purposes.

Hugh James must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:  
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

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

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 H's acceptance of my final decision.

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

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

Redress paid to Mr H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Hugh James may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr H'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 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. *I should clearly state here that these are maximum limits and they are highly unlikely to be relevant to the redress Mr H might or might not be due.*

Our investigator recommended that Hugh James should pay Mr H for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr H in his particular circumstances. This pension at the time represented almost all of his retirement provision. In his situation I think the thought of losing material benefits would have impacted heavily upon him. So I agree the recommended payment of £300 for distress and inconvenience is fair and reasonable. Hugh James should pay Mr H this amount in addition to the redress, if a loss exists, as I've set out above.

**My final decision**

I am upholding this complaint and I now direct Hugh James Solicitors, trading as Hugh James Independent Financial Advisers, to carry out the steps set out in the 'putting things right' section of this decision.

It should also pay £300 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 29 February 2024.

Michael Campbell

**Ombudsman**