

## **The complaint**

Mr C complains about the advice given by Furnival Evans Limited ('FEL') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme with British Steel ('BSPS') to a personal pension arrangement. He says the advice was unsuitable for him and believes this has caused a financial loss.

## **What happened**

In March 2016, Mr C'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'). The PPF acts as a 'lifeboat' for insolvent DB pension schemes, paying 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. Alternatively, members of the BSPS 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 included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr C's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

In October 2017, members of the BSPS were sent a "time to choose" letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere.

On 13 November 2017, the BSPS provided Mr C with a summary of the transfer value of his scheme benefits. These benefits had a cash equivalent transfer value ('CETV') of £84,572.59.

Mr C says that, like many of his colleagues, he was concerned about what was happening. And after speaking with the Financial Conduct Authority ('FCA') and the Pension Advisory Group (I understand this is Pension Wise) for general information and how to find a reputable adviser, he met with FEL for some advice.

On 24 November 2017 FEL recorded some information about Mr C's circumstances in a fact-find document. Amongst other things this recorded that Mr C was 56; he was married; he worked full-time earning around £41,000; his wife was dependent on him; his health was poor – he was "very ill" and he'd just had another operation; he and his wife had a mortgage on their home of approximately £100,000 on an interest-only basis with a remaining term of seven years; he had around £26,000 in cash / savings; and his monthly expenditure was around £1,800.

On 8 January 2018, FEL issued a suitability letter setting out its recommendation. It summarised Mr C's objectives – he wanted to move his pension away from his employer because he felt let down; he was unhappy about the prospect of moving to the PPF, which would result in reduced benefits; because of ill health he wanted his wife to have access to the whole of his pension rather than a small regular sum upon his death; and he was happy to accept investment risk to achieve things.

FEL recommended that Mr C transfer his pension to provide him with lump sum death benefits, because he was willing to accept investment risk in order to achieve flexibility and to address his concerns about the scheme. FEL recommended a pension provider and fund that it said was in line with Mr C's attitude to risk.

Mr C complained to FEL in 2022 about the suitability of the transfer advice. He said he told the adviser about his ill health and that he thought it would benefit his wife to receive the full lump sum of his pension if he transferred out. He said, having spoken with other colleagues, he now believes the advice was not suitable because his health condition wasn't a terminal one.

FEL didn't uphold Mr C's complaint. It said that Mr C wanted to transfer because he felt the lump sum death benefits were more beneficial given his health and he was unhappy with the changes being made to the DB scheme. It said Mr C was happy to accept investment risk and already having a private pension he understood those risks. It said it believes the advice was suitable taking into account the above and that Mr C was in an informed position following the advice it gave.

Dissatisfied with its response Mr C brought his complaint to us. He maintained his concern that he'd been given unsuitable advice.

One of our Investigator's looked into the complaint and they upheld it and required FEL to pay compensation. They said the advice wasn't suitable. They said that, while impaired health could be a valid reason to transfer the benefits from a DB scheme and they acknowledged the worry Mr C likely felt about his health at the time, given he wasn't in a position where he was unable to continue to do his job or his life expectancy was less than 12 months, they didn't think he had a need to transfer on health grounds. They said Mr C wasn't likely to be better off by transferring either. They said suitable advice should have been for Mr C to opt into the BSPS2 and they thought Mr C would've followed that advice had it been given.

FEL disagreed. The key points it made are as follows. It said Mr C was not healthy at the time of the advice and it referred to the documentation which recorded that Mr C hoped to retire at 65 but that he'd be lucky to get there because of his health. It copied a number of sections from the advice paperwork in relation to the situation and risk at the time. It challenged the Investigator's reference to Mr C's DB pension as being inflation proof – it said it is partial inflation proof at certain times referring to the current high inflation rate. And it explained that it could not have advised Mr C to transfer to the BSPS2 because the exact details weren't known or whether the scheme would be viable.

It concluded by referring to an email Mr C sent in April 2018 after the guaranteed transfer date of March 2018, in which he said that the transfer hadn't yet taken place and his pension had moved to the new BSPS2. He said he'd been asked to sign a form to confirm he still wanted the transfer to go ahead but he'd not been given a timescale as to when that would happen. FEL argues that it did not give advice for Mr C to come out of the BSPS2, which is what happened. It said that without its knowledge or advice, Mr C chose to come out of the BSPS2 at a time when he did know what the benefits were under the new scheme. It said he alone chose to transfer out – he signed another form giving his permission for the transfer to take place. It said based on this, the complaint should be rejected.

Because the investigator wasn't persuaded to change their opinion, the complaint was referred for a final decision.

### **What I've decided – and why**

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('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 FEL'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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, FEL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the Investigator. My reasons are set out below.

- The transfer value analysis ('TVAS') report, that FEL was required to carry out by the regulator, said that the critical yield - how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme – was 9.86% to match the full pension he'd have been entitled to under the scheme at age 65. Or to match the maximum tax-free cash and reduced pension the scheme would provide at that age, was 6.53%. To match the full pension the PPF would've paid from 65 the critical yield was 6.21% and to match the tax-free cash and reduced pension the PPF would've offered, it was 5.66%.

- Despite the fact it was known by the point FEL instructed the TVAS that continuing in the BPS in its existing form wasn't an option for Mr C, the analysis was based on the BPS benefits. That said, because the TVAS and the formal written advice was given after the 22 December 2017 "time to choose" deadline, the only relevant comparison of benefits at this time was technically the PPF.
- But I think FEL ought reasonably to have been in a position to complete its analysis and advice sooner than it did so it could take the benefits available to Mr C under the BPS2 into account. It was aware of the looming 22 December 2017 deadline by which Mr C had to make his choice about what to do with his benefits. And I've seen nothing to show that it was prevented from acting sooner or that it wasn't in a position to prioritise the advice given to him so it could complete its advice process before the December deadline.
- FEL has argued that the details of the BPS2 weren't available. I disagree. The details were available – at the time FEL first met Mr C in November 2017 he would've received his 'time to choose' information, which contained the necessary details. While the BPS2 wasn't guaranteed to go ahead at this time, everything pointed to it likely doing so. So this is the position I think it was reasonable for FEL to have adopted – I think its analysis should've included the benefits available to Mr C under the BPS2.
- In any event, given what we know about the BPS2, I think the critical yields to match the benefits the BPS2 would've provided from age 65 were likely to be between those of the BPS and the PPF.
- I have some concerns about how FEL arrived at Mr C's attitude to risk of 'medium'. For example, one of the key answers he gave in its assessment of his risk profile was that he would rather know he was getting a guaranteed rate of return than be uncertain about his investment. I think this ought to have prompted FEL to adopt more caution in its overall risk classification, particularly alongside Mr C's broader circumstances, his age and what I consider to be a low capacity for loss given his BPS benefits accounted for the majority of his private retirement provision. I think Mr C better suited a cautious attitude to risk – I think this was more appropriate here.
- Nevertheless, given his recorded 'medium' attitude to risk, the discount rate of 3.5% for eight years to retirement and the regulator's middle projection rate, I think Mr C was always likely to receive pension benefits, from age 65, of a lower value than those he'd have been entitled to under the BPS2 or the PPF by transferring and investing in line with that attitude to risk. And indeed the suitability report noted that *"...in our opinion, when taking into account your attitude to risk for investment purposes then we would not expect either rate to be achieved each and every year between now and retirement."*
- One of the main reasons FEL gave for the recommendation was because of Mr C's ill health and so that his wife would receive all of his pension as a lump sum as opposed to a small regular income upon his death. I acknowledge that Mr C had a health condition and he was no doubt concerned about his health the time. FEL recorded that Mr C was very ill, he was off work and that he wasn't sure how long he would live. Mr C has said that he told FEL he was only very ill at the start of his condition and that his recovery from his operations took longer than he expected. He

says he continued to work full-time and only had around 10 days off work after each operation.

- While there appears to be some differing views about the degree or seriousness of Mr C's ill health at the time, taking everything into account I'm not persuaded a transfer to provide lump sum death benefits was in Mr C's best interests at the time. It does not appear to be the case that Mr C's ill health was serious enough that he needed to consider an immediate higher income for example. Mr C's target retirement age was recorded as being 65, so it appears he hoped and planned to continue working. Mr C says he was still working and the only time he had off was around his operations including around the time of the fact-find meeting in November 2017.
- I accept the CETV figure would've appeared attractive as a potential lump sum and could increase the death benefits available to Mr C. And I accept in some circumstances serious ill health might mean a transfer is suitable. But in Mr C's case, I think he already had sufficient lump sum death benefits. Mr C had death-in-service benefit of four times his salary and his existing personal pension, recorded as having a value of around £100,000, would've been available to his wife. Furthermore, it's recorded that he had two life policies, which provided cover of £150,000 and £100,000 respectively. Mr C says these policies provided cover until age 80. In these circumstances I think the death benefits provided by his DB scheme by way of a spouse's pension – a guaranteed and escalating income – would've been useful to his wife upon his death.
- Ultimately a pension is designed to provide an income in retirement. And in my view, this was still the priority here. Mr C's health might have given him concerns about his life expectancy. But Mr C not reaching his life expectancy was only a possibility - it was also possible he would exceed this and he'd be reliant on his pension to provide him with an income throughout his retirement and he'd need it to last longer. If Mr C transferred out of the DB scheme he would be relying on investment returns to ensure sufficient capital remained in the personal pension to provide the death benefits, whereas the spouse's pension was guaranteed and escalated.
- Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr C.
- FEL also said Mr C wanted the option for flexibility in case his circumstances changed in the future. But I think this was simply a feature or a consequence of transferring to an alternative arrangement rather than a genuine objective. FEL didn't carry out an income and expenditure in retirement analysis to determine what his income needs were. But nothing indicates Mr C had a need for variable income in retirement or flexibility beyond that which he already had with his existing personal pension.
- Mr C may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. Mr C also had reservations about the BPS2. But it was FEL's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BPS2 being established. But even if not, the PPF still provided Mr C with guaranteed income, the option of accessing tax-free cash and a spouse's pension upon death. Mr C was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've 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 C's best interest to give up his DB benefits and transfer them to a personal pension at this time. And I also haven't seen enough to persuade me that Mr C would've insisted on transferring, against advice to remain in the DB scheme. Mr C might have made enquiries with both the FCA and Pension Wise and I accept he was likely motivated to transfer before he met with FEL. But I don't think this is evidence that Mr C was intent on transferring and would've ignored professional advice and insisted on transferring. Mr C had little investment knowledge and experience and nothing suggests to me that he had the requisite confidence or skill to act against advice, particularly in complex pension matters. I think he relied solely on the advice he was given.

So, I'm upholding the complaint as I think the advice Mr C received from FEL was unsuitable for him.

I've thought about FEL's point that the complaint should not be upheld because it was Mr C's own decision to transfer out of the BSPS2 – FEL did not advise him to come out of the BSPS2. But I'm not persuaded by FEL's argument. FEL advised Mr C to transfer his BSPS benefits to an alternative arrangement. I've said I think it ought to have prioritised its advice and completed things before the 22 December 2017, and that it was fair and reasonable for it to have produced analysis of the benefits due to Mr C under the BSPS2 because they were available at the time. So, if things had happened as they should have and in a timely manner, FEL should've advised Mr C to remain in the DB scheme and opt into the BSPS2.

But this didn't happen. The only reason Mr C's BSPS benefits were moved to the BSPS2 was because the trustees couldn't complete the transfer of Mr C's pension by the March 2018 deadline. I don't think this situation was unique to Mr C. Because the PPF wouldn't allow transfers out, I think the reason the scheme trustees moved Mr C's pension to the BSPS2 (temporarily) was simply to allow the transfer to still take place. While Mr C might have been asked by the trustees to sign a form to say that he still wanted the transfer to go ahead, I'm not persuaded this means he was acting alone or that the transfer was ultimately carried out on this basis.

Mr C received advice from FEL to transfer his BSPS benefits. FEL would've had to sign a form for the trustees to say that it had provided Mr C with advice and this is what allowed the trustees to transfer his benefits to the recommended personal pension provider. That advice was still valid. I've said I think Mr C relied on the advice he was given and so reasonably assumed it was suitable for him and in his best interests. I don't think a delay in effecting the transfer or the fact his pension was temporarily moved to the BSPS2 would've changed anything for Mr C. Why would he have changed his mind about transferring? I don't think he had any reason to do so or any reason not to sign the trustees form to say he still wanted to go ahead. Afterall, this was the advice FEL had given him and the advice he accepted.

So I disagree that Mr C's complaint should not be upheld. I think it should be upheld for the reasons I have given above.

I can see that FEL also posed some hypothetical questions in its response to the Investigator's assessment. But I don't think these are relevant to Mr C's complaint, so I don't think is appropriate for me to comment further.

Finally, I can see the Investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr C. 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 FEL – which is the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mr C. Taking everything into account, including that I consider Mr C is now at the age when his retirement provision is of even greater importance to him

and he's worried he's suffered a financial loss as a result of transferring, I think the unsuitable advice has caused him distress. So I think an award of £300 is fair in all the circumstances.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr C would most likely have remained in the occupational pension scheme and opted to join the BSPS2 if suitable advice had been given and in a timely manner.

FEL 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>.

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

For clarity, my understanding is that Mr C has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr C'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, FEL should:

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

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

### **My final decision**

Determination and money award: I uphold this complaint and require Furnival Evans Limited to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Furnival Evans Limited pays Mr C the balance.

If Mr C accepts this decision, the money award becomes binding on Furnival Evans Limited.

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 21 November 2023.

Paul Featherstone

**Ombudsman**