DRN-3882122

Financial Ombudsman Service

The complaint

Mr L has complained that CST Wealth Management Limited (CST) gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) – the British Steel Pension Scheme (BSPS) – to a Personal Pension Policy (PPP).

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

In March 2016, Tata Steel UK Ltd 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, one of which was a transfer to the Pension Protection Fund ("PPF") – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

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 L's employer would be set up – the BSPS 2.

This was, however, intended to receive deferred benefits only. The main defined benefit OPS had been replaced by a new defined contribution scheme. The existing scheme was due to be closed in the near future, with the options being set out in a subsequent letter in October 2017 for deferred members to either transfer their benefits to the successor scheme, BSPS 2, the PPF or into a private arrangement, such as a PPP.

On 18 September 2017, a statement of BSPS benefits was issued to Mr L which detailed a pension at date of leaving of £6,508 pa, accrued from 12 years and 5 months service and a cash equivalent transfer value (CETV) of £146,628.

Mr L met with an adviser from CST in October 2017 to discuss his retirement planning needs and options. CST then completed a fact find analysis to establish Mr L's circumstances and financial objectives. An assessment of Mr L's attitude to risk was completed and Mr L signed a risk profiling questionnaire on 23 October 2017.

Subsequently, a risk profile report was produced which confirmed a risk profile of 'highest medium'. The fact find recorded the following:

- Mr L was 37 years old and employed, earning a basic salary of £31,957 pa.
- Mrs L was 31 years old and employed, earning £43,000 pa - she had her own pension provision.
- The main residence was valued at £165,000 and had a mortgage for £119,000 and an 18-year term remaining.
- Mr L had cash funds of £800.
- Mr L had a credit card balance of £3,800.
- Mr L was a member of the defined contribution scheme which was receiving 6% employee contributions and 10% employer contributions.
- Mr L had a previous employer pension but was unaware of the details.
- Mr and Mrs L were both in good health.

A transfer value analysis (TVAS) was completed on 29 October 2017 which noted the following:

- An estimated existing annual pension of £11,220 at age 65 with a critical yield (for a transferred sum to match the scheme benefits) of 5.51%, or a lump sum of £51,735 with an annual pension of £7,760 and a critical yield of 4.89%.
- An estimated existing annual pension of £7,470 at age 57 with a critical yield of 6.78%, or a lump sum of £36,539 with an annual pension of £5,480 and a critical yield of 5.96%
- A product charge of 0.45%.
- A "Governed Portfolio" charge of 1.0%.
- An initial advice charge of 1%.
- An ongoing advice charge of 0.5% per annum.

An illustration and Key Facts Document (KFD) was produced for the PPP on 31 October 2017 and CST also issued its suitability report on the same date. CST recommended that Mr L transfer his defined benefits to a PPP. CST recorded that Mr L had the following objectives, which formed the basis of its recommendation to transfer:

- Mr L wanted to retire at age 57 and set up his own business.
- Mr L felt he had nothing to lose as the BSPS benefits were low and would have virtually no impact on his lifestyle in retirement.
- Mr L wanted to break all ties with his employer relating to the BSPS.

Mr L accepted CST's recommendation and the amount transferred was £146,628.

Mr L complained to CST in July 2022, raising concerns that the advice was unsuitable.

CST declined to uphold Mr L's complaint, saying that it didn't simply facilitate Mr L's wishes, but it didn't consider his wishes should be totally disregarded either. CST said Mr L's objective was to invest his BSPS CETV in the hope that it might increase in value sufficiently so that he could retire at age 57 in order to proceed with his ambition to build his own business.

It also said Mr L wanted to take control of his pension fund so he could withdraw income flexibly, potentially increasing his withdrawals earlier in retirement and reduce them once he received his state pension.

CST said the flexibility Mr L wanted wasn't possible via the PPF or BSPS 2 options and concluded that the advice to transfer was suitable and in line with Mr L's objectives.

Dissatisfied with the response, Mr L referred his complaint to this service.

Having considered the complaint, our investigator thought that it should be upheld. He said the following in summary:

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests.
- The advice had been after the regulator had given instructions in final guidance FG17/9 as to how businesses could calculate future "discount rates" for complaints about transfers which were being upheld. Prior to that, this service was publishing information with which businesses could calculate future "discount" rates.
- Whilst businesses weren't required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.
- The critical yield to match the scheme benefits at age 65 was 5.51% and to match them at age 57 it was 6.78%. The discount rates to those ages was 4.6% and 4.4% respectively and, taking into account Mr L's attitude to risk, it was unlikely that the scheme benefits could be bettered through transferring.
- Mr L didn't need to make an irreversible decision to transfer at the age of 37, and any early retirement plans could well have also changed over the years.
- Even if Mr L did in fact require flexibility of income when he came to retire, this could have benefitted from the foundation of guaranteed pension benefits which the scheme would have been provided.
- Mr L's investment experience and financial knowledge didn't support the position that he would want to have control over his pension funds.
- Lump sum death benefits, and the legacy that this may provide for his family, might have been attractive to Mr L, but the advice needed to be given in his best interests – which was his own financial security in retirement. Mr L had also recently married, and so his wife would benefit from the 50% spouse's pension which the scheme would provide.
- Any concerns Mr L had about the BSPS and his employer should have been rationally addressed and managed by CST. There may have been uncertainty around the position at the time, but both the BSPS 2 and the PPF would offer valuable guaranteed benefits.
- Contrary to the regulator's guidance, the motives to transfer appeared to be "generic" rather than specifically tailored to Mr L.

The investigator recommended that CST undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr L would have opted to join the BSPS 2.

But the investigator also noted the regulator's consultation on a revised methodology and enquired of Mr L as to whether, if the complaint was upheld, his preference would be to have a loss calculation undertaken on the existing basis, or to await the new methodology for defined benefit transfer redress calculations.

He said that any redress should in the first instance be paid to Mr L's pension plan, but if this wasn't possible, it should be paid directly to Mr L, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

He also said that CST should pay Mr L £250 in respect of the trouble and upset that the matter would have caused him.

Mr L accepted the investigator's findings. CST didn't initially accept them, however, saying the following. I'm summarising this very briefly, for reasons which become clear below:

- The transfer met Mr L's objectives (whereas retention of the scheme benefits wouldn't).
- It wasn't certain at the time that the BSPS 2 would be implemented.
- There was no evidence that Mr L had suffered a financial loss.

The investigator then wrote to both parties to confirm that the FCA had developed a BSPS-specific redress calculator to calculate redress for cases which were included in the BSPS consumer redress scheme. But, he said, the FCA was also encouraging businesses to use the calculator for non-scheme cases.

The investigator further said that, when issuing my decision, I may require CST to use the FCA's BSPS-specific calculator to determine any redress due to Mr L.

The investigator said that, if either party didn't think it was appropriate to use the BSPS-specific redress calculator in the circumstances of Mr L's complaint, they should let him know by 5 June 2023.

CST confirmed that it would be using the BSPS-specific redress calculator if an ombudsman upheld the complaint.

CST then agreed, albeit with no admission of unsuitability of advice, to abide by the investigator's recommendation and undertake the loss calculation, in addition to paying Mr L the suggested £250 in respect of the trouble and upset caused.

This was conveyed to Mr L, but he expressed a preference to have the matter reviewed by an ombudsman for a formal determination on the merits of the case. Mr L also said that he wished to submit a new statement regarding the distress and inconvenience the matter had caused him, but I note nothing further has been received by Mr L to date.

As requested, the complaint has been passed to be for review.

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.

As CST has offered to undertake the redress calculation and pay Mr L £250 in respect of the distress and inconvenience caused to him, I'll keep my commentary relatively brief.

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 B'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, CST should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr L'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.

- The TVAS report which CST was required to carry out by the regulator said that the critical yield - how much Mr L's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 5.51% 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, it was 4.89%. To match the full pension at 57, the critical yield was 6.78% and to match the tax-free cash and reduced pension, it was 5.96%.

- Given Mr L's recorded "highest-medium" attitude to risk, the discount rate of between 4.4% and 4.6% between ages 57 and 65, and the regulator's middle projection rate for growth (5% pa), I think Mr L was more likely than not to receive pension benefits, from age 65, of a lower value that those he'd have been entitled to under the BSPS 2 (or the PPF) by transferring and investing in line with that attitude to risk. And given what the TVAS noted about the critical yields for retirement at age 57, I think he was even more likely to receive lower benefits than either the BSPS2 or the PPF offered if he retired early.

- Early retirement may well have been appealing to Mr L, as it might reasonably be appealing to a great many people, but he had no clear or pressing plans to do so, which I think is understandable for a 37 year old. Mr L's circumstances may in any case have changed significantly between then and retirement. And I note that, as Mr L has since had a child, he no longer envisages retiring before age 67.

- In terms of the alternative lump sum benefits a transfer offered to his family, the priority here was to advise Mr L about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's (and dependants') pension, that could have been valuable to his family in the event of his death.

- While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would have also been reduced by any income Mr L drew in his lifetime. And so may not have provided the legacy that Mr L may have thought it would.

- Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr L. And ultimately CST shouldn't have encouraged Mr L to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

- I think Mr L's desire for control over how his pension was invested was likely overstated. As with the investigator, I can't see that he had an interest in managing, or the knowledge to be able to do so, his pension funds on his own. And the recommendation seems to have been given on the basis he'd receive, and pay for, ongoing support with his pension. So, I don't think that this was likely a genuine objective for Mr L – it was simply a consequence of transferring away from his defined benefit scheme.

- Mr L may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was CST's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BSPS 2 being established. But even if not, the PPF still provided Mr L with guaranteed income and the option of accessing tax-free cash. Mr L 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 interest.

Overall, I can't see persuasive reasons as to why it was clearly in Mr L's best interest to relinquish his defined benefits and transfer them to a PPP. And I also haven't seen anything to persuade me that Mr L would have insisted on transferring, against advice to remain in the defined benefit scheme.

So, as with the investigator, I'm upholding the complaint as I think the advice Mr L received from CST was unsuitable.

Putting things right

As set out in the investigator's further comments relating to the BSPS-specific redress calculator, I consider that it would be appropriate to use that calculator here, given the BSPS-specific circumstances.

A fair and reasonable outcome would be for the business to put Mr L, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr L would more likely than not have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given.

CST Wealth Management Limited 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.

CST Wealth Management Limited 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 L and our service upon completion of the calculation.

Mr L hasn't yet retired, and cannot do so for many years yet. 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 L'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, CST Wealth Management Limited should:

- calculate and offer Mr L redress as a cash lump sum payment,

- explain to Mr L before starting the redress calculation that:

- its 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 L receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr L accepts CST Wealth Management Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr L for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr L's end of year tax position.

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

Determination and money award: I require CST Wealth Management Limited to pay Mr L the compensation amount as set out above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I would also recommend that CST Wealth Management Limited pays Mr L the balance.

If Mr L accepts this final decision, the award will be binding on CST Wealth Management Limited.

My recommendation wouldn't be binding on CST Wealth Management Limited. Further, it's unlikely that Mr L could accept my decision and go to court to ask for the balance. Mr L may want to consider getting independent legal advice before deciding whether to accept my final decision.

I also agree with the investigator that CST Wealth Management Limited should pay Mr L £250. I think it's likely that he'll have experienced not inconsiderable levels of concern over this matter.

My final decision

My final decision is that I uphold the complaint and direct CST Wealth Management Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 4 December 2023.

Philip Miller
Ombudsman