DRN-3897907

The complaint

Mr M complains about the advice given by Cambrian Associates Limited ('CAL') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme with British Steel ('BSPS') to a new 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 M'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 M'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 7 November 2017, the BSPS provided Mr M with a summary of the transfer value of his scheme benefits. These benefits had a cash equivalent transfer value ('CETV') of £77,473.06.

Mr M was concerned about what the recent announcements by his ex-employer meant for the security of his pension, so he sought advice. Mr M met with CAL towards the end of November 2017. CAL recorded some information about Mr M's circumstances. It noted that he was 51, single with two children, one of whom was still dependent. Mr M was employed earning approximately £37,000. He had a mortgage on his home of approximately £92,000, which had a remaining term of 17 years, although he was looking to reduce the term.
He had an existing personal pension valued at around £25,000 and he had no other assets or liabilities. Mr M's income exceeded his outgoings (£1,605) giving him a monthly surplus of around £595. CAL also carried out an assessment of Mr M's attitude to risk, which it deemed to be 'balanced'.

CAL issued a letter summarising its recommendation (a suitability report) on
21 January 2018. This said Mr M wanted to retire at 65 and achieve an initial income of £18,000 a year, which would reduce when his state pension started. It said he wanted to

avoid the possibility of his fund disappearing if he died young, so he wanted to leave his pension fund to his children when he died.

CAL recommended that Mr M transfer his pension as this would meet his objectives – it would provide him with flexibility and the ability to leave his entire fund to his family upon his death. CAL recommended a pension provider and fund that it said was in line with his attitude to risk. The suitability report also noted that ongoing advice was recommended, which would come at a further cost.

Mr M complained to CAL in 2022 about the suitability of the transfer advice. He said he'd received a letter from the Financial Conduct Authority ('FCA') telling him he might've received unsuitable advice, so he wanted CAL to investigate the advice he received.

CAL didn't uphold Mr M's complaint. In summary it said the advice was suitable because Mr M's circumstances meant he could afford to take some risks by transferring away; the death benefits provided by the scheme were likely irrelevant because Mr M was single and his children were almost at the age when they would no longer be deemed financially dependent; flexibility was important, which the DB scheme couldn't provide; and his desired level of income was sustainable. It also said that an additional consideration was that the BSPS2 may not have gone ahead meaning the likelihood of Mr M's benefits falling into the PPF could have increased preventing a further transfer and the ability to flexibly access his benefits later on.

Dissatisfied with its response, Mr M asked us to consider his complaint. He said he feels that transferring his pension to a defined contribution arrangement might not have been right for him.

One of our Investigators looked into the complaint. They thought the advice was unsuitable. They said it wasn't clear how Mr M's objective of retiring at 65 on £18,000 a year was arrived it. They said CAL didn't carry out an income and expenditure in retirement analysis and there was good reason to delay a transfer until his needs were better understood. They said CAL also didn't appear to have carried out analysis of whether Mr M could meet his income need without transferring. They said it was possible that his needs could've been met by retaining his DB scheme, which he could've supplemented using his state pension and his workplace and existing personal pension. But they also said that if it wasn't realistic for Mr M to achieve this target income, CAL should've told him so.

They expressed concern about how Mr M's attitude to risk was deemed 'balanced' given the inconsistent answers in the assessment and his lack of any investment experience. And given this and his capacity for loss, they said he was better off retaining his DB benefits. They said the potential for greater lump sum death benefits wasn't worth Mr M giving up his guaranteed pension for. And any concerns Mr M had about his DB scheme given the general uncertainty at the time should've been managed objectively. They said the transfer wasn't financially viable given the required investment returns needed to match Mr M's DB scheme benefits – something the adviser accepted – and improved flexibility and better death benefits didn't make up for this. They said if suitable advice had been given to remain in the DB scheme Mr M would've likely followed it and chosen to join the BSPS2.

While CAL indicated that it disagreed with the Investigator's findings and it intended to provide a response, it hasn't done so.

Because things couldn't be resolved informally, the complaint was passed to me for a final decision.

Before issuing my final decision, I clarified to both parties that, while the Investigator had also considered the advice Mr M received to switch an existing personal pension to the new personal pension arrangement, because Mr M had told us he wasn't complaining about this, my decision would only deal with the advice to transfer out of the BSPS.

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 CAL'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, CAL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr M'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 CAL was required to carry out by the regulator, said that the critical yield - how much Mr M's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme – was 9.84% 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 8.3%. To match the full pension the PPF would've paid from 65 the critical yield was 7.6% and to match the tax-free cash and reduced pension the PPF would've offered, it was 7.17%.

- Despite the fact it was known by the point CAL instructed the TVAS that continuing in the BSPS in its existing form wasn't an option for Mr M, the analysis was based on the BSPS benefits. Furthermore, the analysis was carried out after the 'time to choose' deadline of 22 December 2017. So, at this time, the only relevant comparison of benefits was technically the PPF (unless Mr M had chosen to opt into the BSPS2 before the deadline, which doesn't appear to be the case here.) But given the timing of its fact-find meeting of 27 November 2017 and the looming 'time to choose' deadline, I think CAL ought to have prioritised its analysis and advice to meet this deadline and in doing so produced analysis based on the benefits available to Mr M through the BSPS2. I've seen no evidence to persuade me that it couldn't have met this deadline. But even if it couldn't, I think at the very least it should've advised Mr M to opt into the BSPS2 - if only as a precaution before it concluded its formal recommendation. I think it had sufficient information about Mr M's circumstances and objectives at this stage to make a judgement that, on balance, this would be more favourable to Mr M than the PPF.

- In any event, given what we know about the BSPS2, I think the critical yields to match the benefits the BSPS2 would've provided from age 65 were likely to be between those of the BSPS and the PPF.

- Given Mr M's recorded 'balanced' attitude to risk, the discount rate of 4.1% for 13 years to retirement and the regulator's middle projection rate, I think Mr M was always likely to receive pension benefits, from age 65, of a lower value that those he'd have been entitled to under the BSPS2 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 60 – that these were significantly higher and in double digits – I think he was even more likely to receive lower benefits than either the BSPS2 or the PPF offered, if he retired early. And indeed the suitability report noted that *"In my opinion, this would be not an achievable return, based on the term to retirement"*

- I do have some concerns about how CAL assessed Mr M's attitude to risk as 'balanced'. Given his age, coupled with the fact he had no other investments or savings and so his capacity for loss was low, I think his circumstances more reasonably portrayed someone who was only prepared to take a low or cautious approach to risk. And while it was recorded that Mr M said in answer to how he felt about risk: *" I appreciate that risk is required in order to try and achieve a fund which will allow me to retire early"* I think an appreciation that investment risk was required is different to a willingness to take it. I'm not persuaded what Mr M said demonstrates his willingness to take a 'balanced' risk approach. But in any event, this doesn't change my decision. Because even if I accept he was truly prepared to invest in line with a 'balanced' attitude to risk, as I concluded above, he was still likely to be worse off in retirement as a result of transferring to a personal pension arrangement. So, for this reason alone, I don't think it was in his best interests to transfer.

- CAL recommended the transfer to enable Mr M to have flexibility – the ability to take the income he needed at 65 and reduce it once his state pension became payable. But I don't think Mr M had a real need for flexibility and a strong need to vary his income throughout his retirement. I think CAL's reference to flexibility was simply a product of transferring to a different arrangement. Mr M might have been attracted to the flexibility a personal pension provided – but his objective of wanting to reduce his income when his state pension became payable was in my view solely driven by the fact that this was the only way CAL could demonstrate that Mr M's pension fund was sustainable throughout his life. This this does not, in my view, demonstrate a genuine need for flexibility.

- In any event, Mr M already had flexibility. He was contributing to his workplace pension scheme – a defined-contribution ('DC') scheme which already provided flexibility in how and when he could access his benefits. 18% of Mr M's salary was being invested here. And according to CAL's analysis, this could be worth around £127,000 when Mr M reached 65. I think this would've given Mr M flexibility – the ability to take lump sums and vary his income - *if* that's what he ultimately required. So I don't think transferring to obtain flexibility was in his best interests.

- Mr M said he wanted a retirement income of £18,000 a year. But CAL doesn't appear to have carried out a detailed income and expenditure in retirement analysis to interrogate this amount – the budget planner it completed was based on his current spending. I think this would've been helpful to determine how realistic this figure was, particularly given Mr M's annual pension under the existing scheme at 65 was estimated to be around £5,200. I think his target income looks ambitious given the means he had to try and achieve it. And I think CAL should've been honest with him so he could re-assess things. It appears CAL may have done this to some extent – the fact-find for example recorded that Mr M wanted to retire at 60 on an income £18,000, but the later suitability report only talked about him retiring at 65. But I think it could've done more. And just because Mr M's DB scheme income wasn't going to meet his needs doesn't mean it was in his best interests to transfer out to try and achieve things.

- I think in the circumstances Mr M stood a better chance of meeting his needs by remaining in his DB scheme. It provided a guaranteed and escalating income for life, which wasn't going to be bettered by transferring. I think it provided a solid income foundation upon which his DC pension and existing personal pension could supplement together with his state pension. Mr M had a not insignificant disposable monthly income, which he could also use to accumulate a savings fund during the years to retirement to further support his future income need. In the circumstances, I think this was a more appropriate way for Mr M to meet his future retirement income need rather than risking his guaranteed benefits to try and do so.

- Mr M was keen to be able to leave his pension fund to his family upon his death rather than have an unused spouse's pension. But while I accept Mr M was single at the time, the priority here was to advise him about what was best for his retirement.

- 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've also been reduced by the income Mr M drew in his lifetime. And so it may not have provided the legacy that Mr M may have thought it would.

- Mr M was contributing to his workplace pension, which would've provided lump sum death benefits to his nominated beneficiaries. But if Mr M had genuinely wanted to leave a legacy for his family, CAL could've explored life insurance as an alternative. I can see reference was made to a whole of life policy, but this was discounted in favour of the transfer. But given Mr M's recorded disposable income, I think he could've met the quoted premium of £39 a month. The alternative of term assurance might've been cheaper still. So, I think this is what CAL ought to have recommended to meet this objective.

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

- While not given as a reason for the recommendation, I can see the fact-find referred to Mr M's concerns about his DB scheme and that he didn't want his pension to remain under the control of his employer. I accept that Mr M may have legitimately held concerns about how his employer had handled his pension and like many of his colleagues, he was no doubt concerned about the prospect of entering the PPF. But it was CAL's role to objectively address those concerns. At the time of the fact-find meeting, all signs pointed toward the BSPS2 being established. And if things had happened as they should have and if CAL had prioritised its advice and properly considered the benefits available to Mr M under the BSPS2, I think this would've addressed some of his concerns. But even if the BSPS2 didn't go ahead, the PPF still provided Mr M with a guaranteed and escalating income. Mr M 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 interest.

Overall, I can't see persuasive reasons why it was clearly in Mr M'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 anything to persuade me that he would've insisted on transferring, against advice to remain in the DB scheme. Mr M had no real investment knowledge or experience and nothing suggests to me that he had the requisite confidence or skill to go against the advice he was given, particularly in complex pension matters. So, I'm upholding the complaint as I think the advice Mr M received from CAL was unsuitable for him.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr M 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 timelier manner.

CAL 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.

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

For clarity, Mr M 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 (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 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 M'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, CAL should:

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

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

<u>Determination and money award</u>: I uphold this complaint and require Cambrian Associates Limited to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £170,000.

<u>Recommendation:</u> If the compensation amount exceeds £170,000, I also recommend that Cambrian Associates Limited pays Mr M the balance.

If Mr M accepts this decision, the money award becomes binding on Cambrian Associates Limited.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 12 December 2023.
Paul Featherstone
Ombudsman