The complaint

Mr B complains about the advice given by Hugh James Solicitors, trading as Hugh James Independent Financial Advisers ('HJS') regarding the transfer of benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS'), to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr B'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'). Alternatively, members 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 B'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.

On 18 September 2017, the BSPS provided Mr B with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £119,668.38.

In October 2017, members of the BSPS were 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 the BSPS2 or transfer their BSPS benefits elsewhere. A decision about joining the BSPS2 needed to be made by 11 December 2017. This was later extended to 22 December 2017. A decision about whether to transfer out of the BSPS to a personal pension needed to be made by the end of January 2018.

Mr B was discussing his BSPS pension with another financial adviser, which I'll call Firm C. He says that Firm C recommended that he transfer out of the BSPS and began putting together the relevant paperwork. But Firm C then contacted him to say it was unable to complete the transfer. Mr B says he spoke to Firm C over the phone, and it told him this wouldn't be a problem as it had arranged for HJS to complete the process.

HJS' recommendation report confirmed Mr B was introduced to it by Firm C. And its notes indicate the reason for this was the regulator, the Financial Conduct Authority ('FCA'), had instructed Firm C not to take on further pension work due to capacity issues. And this was why Mr B was introduced to HJS.

Mr B first met with HJS on 6 December 2017 – at which point there was still time to opt into the BSPS2. It completed a fact-find to gather information about his circumstances and objectives. Mr B was 48, married with one financially dependent child. He was in good health generally but had suffered a sporting injury in the past which had at times required surgery and absence from work. Mr B was employed full time earning approximately £32,000 per year. Mrs B was also employed. They had a surplus income in excess of £1,500 per month. Mr B owned their home, with no mortgage, with Mrs B also owning a second property outright from which she received rental income. They also had savings of around £10,000. The only debt listed was a car loan to which Mr B paid £164 per month.

In addition to the benefits held in the BSPS, Mr B was also a member of his employer's new defined contribution ('DC') pension scheme, to which he and his employer were making combined contributions equivalent to 16% of his salary. Mrs B was also noted as having good pension provisions, but details of these were not provided.

Mr B said he didn't intend to retire before age 65 and didn't envisage changing employer. Mr B expected he and his wife would need a combined income of £2,000 per month in retirement, with £1,500 being the minimum required to meet essential expenditure. He didn't have any plans that required access to tax-free cash. HJS recorded that Mr B was interested in transferring because he wanted control of his pension due to a lack of trust given what had happened with the BSPS and a scepticism towards the BSPS2 and the PPF. It also said he was interested in having flexibility and the alternative death benefits a personal pension would provide.

HJS also carried out an assessment of Mr B's attitude to risk, which it deemed to be 'balanced'. It recorded that he agreed with this but also that he wanted low volatility in his pension investments.

HJS has provided a written summary of its recommendation, dated 5 January 2018. This explained why it was a requirement for Mr B to take financial advice about a DB transfer – because of the nature of the benefits being discussed. It noted that *"the easy thing would be to say 'don't transfer' but that wouldn't be fair to you."* Rather HJS would make a recommendation based on Mr B's circumstances.

The report discussed critical yields – the rate at which the pension fund would need to grow by each year in order to purchase equivalent guaranteed benefits at retirement to those the existing scheme offered. And HJS said the rates it had calculated, 9.15% for taking a full pension at age 65 and 7.31% for drawing tax-free cash and a reduced pension, were achievable. It also said the amount of tax-free cash available under a personal pension, which HJS said was important to Mr B, would be higher and so this was a favourable indicator for recommending a transfer, Mr B would potentially be better off in a flexible drawdown plan and the improved death benefits were also a good reason to recommend a transfer.

The report then however concluded by saying that HJS recommended that Mr B did not transfer, saying because of his injury his long-term employment future was questionable and the spouse's benefit offered under the DB scheme was favourable for Mrs B. Even while explaining this conclusion though HJS said the level of income offered by the BSPS or the PPF was not enough to cover Mr B's requirements in retirement.

HJS has also provided a copy of another letter to Mr B, dated 9 January 2018. This said, following its meeting with Mr B on 8 January 2018 and his letter confirming he still wished to proceed with the transfer against its advice, it was happy to facilitate this for him. HJS has provided a copy of the handwritten letter from Mr B that this report referred to, but it is undated.

The report from 9 January 2018 went on to say, after careful consideration, HJS recommended that Mr B transfer his BSPS benefits to a personal pension with a specific new provider. It also recommended how the fund should be invested. The report said this was suitable because Mr B had stated he wanted to transfer to an arrangement under his control. The letter said the transfer paperwork would be submitted immediately, because of the short deadline for the BSPS to be informed.

Mr B asked the Financial Ombudsman to look into the advice he'd received in 2021. He said Firm C had advised him to transfer and indicated the provider that it would recommend. He says, as he understood it the matter had just been passed to HJS to conclude – which he felt was supported by it recommending the same pension provider that Firm C had discussed. Mr B said, at no point during his meetings and discussions with HJS did it tell him verbally not to transfer and he understood its advice to be that a transfer was right for him. He said he hadn't been provided with the written recommendations before proceeding and completing the application forms and had only read these when details of potential issues with advice to transfer became public. Mr B said the letter he'd written saying he wanted to go ahead with the transfer had been requested by HJS. He says it told him this was needed because of his injury and how this might impact his job going forward and he says he was told by HJS what to say in the letter. Mr B also says that his injury wasn't as significant as HJS had suggested.

HJS said it was not upholding Mr B's complaint as it had advised him not to transfer and his decision to do so was taken against this advice.

One of our Investigator's considered the complaint. She thought it should be upheld and that HJS should compensate Mr B for any loss the DB transfer had led to and pay £300 for the distress caused to him. Our Investigator thought Mr B was always unlikely to improve on his retirement benefits by transferring. And there was no other reason that meant transferring was in his best interests, noting that alternatives for leaving a legacy for his family had either not been explored or unreasonably discounted. But the written recommendation had indicated that HJS actually referred to several of these things as being reasons that transferring was a good idea, before eventually saying a transfer wasn't recommended. And she didn't feel that the advice HJS had provided had made it clear that a transfer wasn't suitable, as the information in the initial recommendation was contradictory. She thought that contradictory and misleading information had likely led Mr B to proceed and, if clearer advice had been given, she didn't think Mr B would've insisted on transferring. She thought, if clearer information had been given from the outset by HJS, Mr B would've opted into the BSPS2.

HJS disagreed. It said it felt the items within the recommendation that the Investigator felt were contradictory or misleading were at the most minor. But it also said there wasn't any evidence that Mr B had relied on these when he'd gone ahead. And it felt it had been clear about the options available to him and the risks.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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 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 HJS'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. This includes COBS 19.1.6G in which the regulator, the Financial Conduct Authority ('FCA'), states the starting assumption for a transfer from a DB scheme is that it is unsuitable.

Was a transfer suitable for Mr B?

HJS carried out a transfer value analysis ('TVAS') report (as required by the regulator) showing how much Mr B's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). This was completed on 20 December 2017.

The critical yields were all calculated on the basis that Mr B expected to retire at age 65 – which I think was correct. But it isn't clear from the TVAS report I've been provided whether the benefits available under the DB scheme that the report considered were those offered through the existing BSPS or the new BSPS2. This is because the details of the revaluation and escalations rates aren't entirely consistent with either of those schemes, when looking at the types of benefits accrued. However, based on the use of RPI for revaluation and escalation, the figures appear more likely to have been based on matching Mr B's existing scheme, the BSPS.

But Mr B didn't have the option to remain in the BSPS – he either needed to opt into the BSPS2 or move with the scheme to the PPF. I can see that critical yield figures were calculated for matching the benefits he'd have received through the PPF. But I think these also ought to have been calculated for the benefits the BSPS2 would offer, as details were available at the point HJS carried out its analysis.

While critical yields don't appear to have been calculated in respect of what the BSPS2 would offer from age 65 I can make reasonable assumptions about what these were likely to be. The BSPS2 would've offered the same income benefits as the BSPS but the annual revaluation pre-retirement and escalations post-retirement would've been lower. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat compared to the BSPS. But, based on my experience of other complaints, I think they would've likely been higher than those reflecting the benefits offered by PPF, particularly at age 65. So, they were likely to fall between the critical yields for the BSPS and the PPF, and probably have been closer to those of the BSPS.

The critical yield required to match the full annual pension the TVAS estimated Mr B would've been entitled to under the BSPS at age 65 (starting at £8,139 per year) was 9.15%. Or to match the maximum tax-free cash ('TFC') and reduced annual pension he could've taken under the PPF (estimated to be £35,963 and a reduced starting pension of £5,394) the critical yield was 7.31%.

To match the full pension the PPF would've paid at age 65 (estimated to start at £6,970.61 per year) the critical yield was 6.14%. And to match the estimated TFC and reduced pension the PPF would've offered at age 65 (£36,277.97 of TFC and a pension starting at £5,427.12) the critical yield was 5.72%.

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 4.3% per year for 16 years to retirement. I've kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr B's attitude to risk and also the term to retirement. There would be little point in Mr B giving up the guarantees available to him only to achieve, at best, the same level of benefits outside the DB scheme. But here, given the lowest critical yield was higher than the discount rate and the regulator's middle projection rate, I think Mr B was likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of investing in line with his desire for low volatility and his 'balanced' attitude to risk. This would be the case even if the scheme moved to the PPF.

So, from a financial viability perspective, I don't think a transfer was in Mr B's best interests. And I don't think he was likely to be better off in retirement as a result of transferring. Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits.

HJS said in its recommendation letter that Mr B was interested in flexibility in terms of how he could draw his benefits in retirement. It also said that he was interested in maximising his TFC. But I can't see that Mr B had a genuine *need* for flexibility or access to TFC.

Mr B had no significant debts recorded that would require repayment via a lump sum and there was nothing recorded in the fact find about his future plans which indicated a need for access to a lump sum. In addition, Mr B was over 16 years from when he expected to retire. So, any plans at that stage were unlikely to be finalised. So, while I don't doubt that access to a large sum might've sounded appealing, I don't think he needed this or that it was in his best interests to make an irreversible decision to transfer his pension benefits for this purpose. And I can't see, from the fact-find, that it was actually recorded that he had expressed a preference for this anyway.

In terms of income, HJS recorded that Mr B expected that he and Mrs B would require approximately £2,000 per month in retirement. It's clear from the information in the TVAS about what the BSPS or PPF were expected to provide at retirement that this pension alone was unlikely to meet these needs. But it would've gone some way to meeting Mr B's income needs, without him taking any risk with it. And as I've explained, by transferring I think Mr B was likely to receive lower overall benefits in retirement.

Mr B was also a member of his employers new defined contribution pension. Based on his salary and the level of contribution being made and before even accounting for growth, Mr B increasing contributions or being awarded any pay rises, it's likely that by age 65 this policy would've been worth around £82,000. And he could've accessed this flexibly. Mrs B was also eight years younger than Mr B but I understand intended to also work to 65. So, her salary would've met their combined needs in Mr B's early years of retirement. Mrs B also received income from another source – rent from a property – which would also have contributed towards meeting household income requirements. And Mr B would have begun receiving state pension from age 67 – before Mrs B retired. And it was noted that Mrs B had good pension provisions of her own.

Taking all of this into account, I don't think Mr B needed to transfer and to have flexibility in how he drew his income from this pension in order to meet his income objectives. So, I don't think it was in his best interests to transfer his DB pension, which is a one-off event from which there is no going back, at the point he did and give up the guaranteed escalating benefits he'd have been entitled to just to have flexibility that he didn't need.

HJS recorded that the option of potentially leaving the pension as a lump sum to his wife and child appealed to Mr B.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension might've been an attractive feature to Mr B. But whilst I appreciate death benefits are important to consumers the priority here was what was best for Mr B's retirement provisions. A pension is primarily designed to provide income in retirement.

The DB scheme provided death benefits – a spouse's and dependents pension. These could've been useful to Mr B's wife and child in the event he predeceased them. And these were guaranteed and escalated – they were not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And while the CETV figure would no doubt have appeared attractive as a potential lump sum, the amount remaining on death following a transfer was always likely to be different to that figure – unless Mr B had passed away immediately, which was unlikely. As well as being dependent on investment performance, it would've also been reduced by any income Mr B drew in his lifetime. And given Mr B was recorded as generally being in good health, notwithstanding the injury he was recovering from, there was nothing to suggest he was less likely to live until at least his average life expectancy. So, the fund could've been significantly depleted by the time it came to be passed on and may not have provided the legacy that Mr B may have thought.

It appears that HJS obtained quotes for life insurance as an alternative. But in the suitability report it said it discounted this as the death benefits through a pension outweighed these, as they had a value that could be accessed during Mr B's lifetime. But to access lump sum death benefits through the pension meant giving up guarantees. So, I don't agree with HJS' reason for discounting this as a suitable alternative. And, based on Mr B's disposable income, this appears to have been an affordable option for him.

From what I can see Mr B also had death in service benefits through his employer for a significant amount, which also appears, in my view, to have been a more appropriate way of leaving a legacy to his family.

So, overall, I don't think the alternative death benefits available through a personal pension meant that a transfer was in Mr B's best interests, particularly given the likely decrease to his retirement benefits.

HJS recorded that Mr B had concerns about how his pension had been handled and so wanted to move his pension away from his employer and have control over how it was invested.

I don't doubt Mr B, like many of his colleagues, was concerned about his pension. His employer had been consulting on its plans for the scheme for some time. And there appears to have been a general mistrust and lack of optimism. I also don't doubt Mr B was potentially worried his pension would end up in the PPF or that he'd heard negative things about this outcome. And Mr B may well have had negative feelings towards his employer's handling of his pension so far, which I think was a reasonable emotional response. But the trustees of the pension scheme, and the new BSPS2 were not one and the same as his employer. I also note Mr B was continuing to work for the same employer, doesn't appear to have any intention to change this and was a member of the employer's new DC scheme. So, the relationship does not appear to have been broken down to the extent that HJS has suggested.

By the time Mr B first spoke to HJS, details of the BSPS2 were known. And it seemed likely this was going ahead. This scheme offered guaranteed benefits, the trustees managing it were not one and the same as Mr B's employer and it appears he was unlikely to improve on the benefits it would've offered.

But even if there was a chance the BSPS2 wouldn't go ahead, moving to the PPF wasn't as concerning as Mr B might've thought. While the increases in payment in the PPF were lower, it would still have provided a guaranteed income for the rest of his life that was not subject to any investment risk. By transferring he was taking on additional risk and, as I've explained, I don't think he was likely to be substantially better off, such that taking this risk was in his interests. So, I don't think any concerns Mr B had meant that a transfer was suitable for him.

And I also think Mr B's desire for control of his pension was overstated. Mr B was not an experienced investor, and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. And indeed, the recommendation seems to have been based on him taking ongoing financial advice about his pension, at a cost – which he wouldn't have incurred under his existing scheme. So, I don't think that this was a genuine objective for Mr B – it was simply a consequence of transferring away from his DB scheme.

Taking all of this into account, I don't think a transfer was suitable for Mr B. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr B 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.

The advice HJS provided and whether this was clear and suitable

HJS says it advised against transferring. And the recommendation letter dated 5 January 2018 concludes by saying that it recommends Mr B does not transfer – because the spouse's pension would be useful to Mrs B and Mr B's longer-term employment, and capacity to build further pension benefits, was unclear based on his injury.

But like our Investigator, I think that this report should've been a lot clearer. The report included a lot of information to consider. But the penultimate page was the first time not recommending a transfer was mentioned or really contemplated. HJS said, when summarising why talking advice about a DB transfer was necessary that saying don't transfer would be the easy thing to do. But it said it that wouldn't be fair to Mr B. And gave no suggestion this was going to be its recommendation.

The report then went on to say that achieving the critical yields of 9.15% or 7.31% was in HJS' opinion achievable. And it referenced a number of reasons that were favourable for recommending a transfer. HJS said Mr B was likely to receive more tax-free cash, which it said was important to him (although this doesn't appear to have been recorded as an objective in the fact-find). Having sufficient money easily accessible for emergencies would be useful – which the transfer provided. And because lump sum death benefits were important to Mr B and, as these were not offered by the scheme, this was another good reason to transfer. All of which was prior to there being any indication that HJS was advising against a transfer. And even when saying Mr B should not transfer, the report indicated that the income the BSPS and PPF would provide wasn't enough to cover his requirements – effectively arguing the existing benefits potentially weren't right for Mr B.

For the reasons I've already explained I don't think these things meant that a transfer was in Mr B's interests. So, I think these statements were misleading. And I think they'd have created considerable doubt as to what HJS actually thought was best for Mr B.

HJS has said that we haven't accounted for the overall 'tone' of the report. But in my view the tone was very much that there were numerous reasons to transfer and why that would be a good thing for Mr B. It was not, in my view, in line with the regulator's starting position that a transfer won't usually be suitable for most customers. Prior to the conclusion, beyond talking about the general risks involved, there was no indication in my view that HJS thought transferring wasn't potentially in Mr B's interests or that it was going to advise him against doing so. So, I don't agree with HJS that the tone of the report made the advice clearer.

HJS says, while it doesn't agree that the letter was unclear, there was no suggestion that Mr B relied on this. So, the content of the report didn't make a difference here.

Mr B has said that he didn't receive a copy of either the letter of 5 January 2018 or the follow up letter of 9 January 2018 before meeting with HJS and completing the relevant application forms. The first recommendation letter was dated 5 January 2018. Mr B appears to have met with HJS on the next working day, 8 January 2018. Accounting for delivery times I think it is unlikely that Mr B saw this report before attending that meeting. And based on the content of the letter dated 9 January 2018, it appears the application for a transfer was made based on the meeting – and before that second letter would've been received by Mr B. HJS may have shown Mr B a copy of the first letter when it met with him on 8 January 2018. But I doubt he had any time to really consider its content. So, on balance, it appears correct that he didn't have sight of either of the letters prior to applying to transfer. And Mr B has also said he didn't read either of these letters until well after the transfer had gone through. So, taking account of what he's said, it appears to be the case that he didn't rely on these written reports when transferring.

But that doesn't mean the flaws in the recommendation are irrelevant. Given the above it appears likely that Mr B entirely relied on the discussion he had with HJS on 8 January 2018 when proceeding with the application. Mr B says HJS did not make him aware that a transfer was unsuitable for him during his verbal discussions. And he was under the impression it agreed with what he'd previously been told by Firm C, that a transfer was suitable.

The recommendation letter likely formed the basis of that discussion. As I've said, I think the letter was misleading and unclear about the overall recommendation. So, it follows in my view, that discussion about the recommendation likely had similar problems. And so, on balance I don't think it was likely to have been clear to Mr B that HJS did not think a transfer was suitable, when the application to transfer was made.

I am conscious that there is a handwritten letter from Mr B saying that he wanted to proceed with the transfer and that he understood HJS' advice. HJS said this was received on 8 January 2018, although I note the copy is undated. Again, Mr B met with HJS on 8 January 2018. And by that point, as I've explained, I don't think he is likely to have had sight of or time to consider the recommendation letter, dated the previous working day. So, I think on balance that handwritten letter was likely completed during the meeting – if as HJS says it was received on that day. Mr B says he was told what to write in the letter by HJS. And the wording of the letter does in my view suggest Mr B was likely to have had help drafting it from HJS. As a result, I don't think, in the specific circumstances of this complaint, that this is enough to say that Mr B understood the advice he had received or that he was in a sufficiently informed position to make the decision to proceed on an insistent client basis.

Would Mr B have acted differently?

Of course, I have to consider what would've happened if HJS had provided a fairer and clearer recommendation, without the misleading statements about why a transfer was potentially in Mr B's interests and given him appropriate time to consider this.

I've considered this carefully. I've borne in mind that Mr B has told us that Firm C had already suggested to him that a transfer was suitable. So, he might've already been under the impression, before speaking to HJS, that this was right for him. And, although I think he was likely told what to say in the handwritten letter he completed about transferring, I'm conscious that he did write this, and didn't question its content.

But I think it's clear that Mr B was an inexperienced investor. He was recorded as having a balanced attitude to risk, but he also seems to have been clear he didn't think it was appropriate to take anything other than a minimal risk with his pension – as HJS stated this in its recommendation letter. And this pension accounted for the majority of his retirement provisions at the time.

With that in mind, if HJS had provided Mr B with clear and unambiguous advice (and the proper time to read and digest it) that transferring was not in his best interests – particularly if it had been clear he was very unlikely to improve on the benefits he was due under the scheme, including those the PPF would offer, that there were suitable alternative death benefits available through insurance and that he didn't need flexibility or control and had challenged any thoughts he had about why this was appealing - I think he would've accepted that advice.

I'm not persuaded that Mr B's concerns about what had happened to that point with his pension and any thought's he might have had after discussions with Firm C were so insurmountable that he would've insisted on the transfer had he fully understood that a professional adviser, whose expertise he says Firm C recommended to him, didn't think it was suitable for him or in his best interests. I think a clearer explanation from HJS would've carried significant weight. And so, but for the failings in the advice process by HJS, I don't think Mr B would've transferred his pension.

In light of the above, I think HJS should compensate Mr B for any losses the transfer has resulted in.

By the time that HJS made its recommendation, it was no longer possible for Mr B to opt into the BSPS2. But he'd had this option when he first met with HJS and it completed its fact find.

HJS seems to have started its advice process by 6 December 2017 at the latest, when it completed a fact find with Mr B and gathered a significant amount of information about his circumstances. HJS would've been aware at that point of the impending deadline to opt into the BSPS2. Details of the BSPS2 were known at that time, including revaluation and escalation rates of the pension benefits it provided. And while it was the case that the PPF might provide greater benefits for people who retired very early, it was also generally known that, for those expecting to retire at the scheme normal retirement age the BSPS2 was generally likely to provide greater benefits.

HJS was also aware of how long its advice process was likely to take and that this might not be completed before the deadline to join the BSPS2 had elapsed.

Given HJS was acting as Mr B's adviser at that time, and the requirement of it to have due regard for and to act in his interests, I think it would've been appropriate for HJS to suggest to Mr B that he should opt into the BSPS2 while he had the option to do so. On the understanding that it would still consider and advise on whether a transfer away from his DB scheme entirely, was suitable. I think HJS was in a position to suggest this to Mr B. And, for the same reasons I think he'd have followed its advice had this been clearer, I think Mr B would've followed this suggestion.

On balance therefore, if HJS had done this and had given clearer advice, I think Mr B wouldn't have transferred his pension benefits and would instead now hold benefits in the BSPS2. So, I think compensation, using the regulator's defined benefits pension transfer redress methodology, should be on this basis.

Our Investigator recommended that HJS also pay Mr B £300 for the distress caused by the unsuitable advice. I don't doubt that Mr B has been caused distress and concern by finding out the advice may not have been suitable – particularly given the circumstances and uncertainty under which he first asked for this advice. And I'm conscious this upset wouldn't have happened but for the unsuitable advice. So, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in. I consider Mr B would have most likely remained in the DB scheme and opted into the BSPS2 had HJS done everything it should've here.

HJS 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.

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

For clarity, Mr B 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 of 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 PS22/13 and 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 B's acceptance of the decision.

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

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

Redress paid to Mr B 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, HJS 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 B'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.

In addition, HJS should pay Mr B £300 for the distress caused by the disruption to his retirement planning.

Where I uphold a complaint, I can award 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 require Hugh James Solicitors, trading as Hugh James Independent Financial Advisers to pay Mr B 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 Hugh James Solicitors pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on Hugh James Solicitors.

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 26 October 2023.

Ben Stoker
Ombudsman