Financial Ombudsman Service

The complaint

Mr C 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 Self Invested Personal Pension (SIPP).

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 C'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 SIPP.

Mr C joined the BSPS in August 2004 and had 12 years and 7 months' service before leaving in March 2017, when the scheme was closed to future accrual. His deferred pension benefits were valued in the region of £9,300 pa when, in July 2017, the BSPS confirmed that the cash equivalent transfer value (CETV) of these benefits, was just over £204,000.

Mr C didn't have a financial adviser so he contacted CST, which had the FCA-required permissions to advise in this area, for its recommendations with regards to his available options.

On 8 August 2017, Mr C signed the client agreement of the CST service proposition.

A fact find was then subsequently completed, which recorded the following details about Mr C:

- He was 38, married with three dependent children and employed with a basic salary in the region of £33,000 pa.
- He had no concerns regarding his own or Mrs C's health.
- The family home was worth in the region of £140,000 with an outstanding mortgage of around £96,000. Mr and Mrs C also had unsecured lending estimated to be in the region of £40,000. Both mortgage and other debts were covered by life assurance.
- Total investable family assets were recorded as being in the region of £1,000 held in cash, with no record of any asset backed investments.
- The only other pension recorded was the defined contribution workplace pension which started earlier that year in April.

The question: 'Are there any other factors likely to influence when you retire', was answered: 'affordability'. Subsequent notes also recorded the statement: 'Would consider retirement age 60.'

A "Dynamic Planner Risk Profiler" was completed and recorded the following questions and answers in relation to Mr C's investment experience:

- 'Have you ever invested in pensions where you could control the selection of funds?' - answered: No
- 'Have you ever invested in collective investments such as funds in stocks and shares, ISA, OEIC, unit trust or investment trust?' - answered: No
- 'Have you ever bought or sold shares on the stock market?' - answered: No

An 'attitude to risk' questionnaire was completed where Mr C described himself as a 'risk taker'.

In terms of capacity for loss, the question: 'How much of this investment could you stand to lose without having a significant impact on your future standard of living?', was answered 'Medium losses could be tolerated.' Mr C also answered, 'I have other savings and investments, which I can use for most needs.'

A "Risk Profile Report" was prepared by CST on 13 September 2017. Although the question: 'How would you describe your level of investment experience?' doesn't appear to have been answered in the original dynamic risk profiler completed by Mr C, it was now recorded as: 'Experienced, I'm comfortable with investing and have some understanding of the potential risks and rewards.' Mr C's risk profile was confirmed as "9" on a scale to "1 to 10", which equated to "very high".

On 20 September 2017, an AJ Bell illustration was produced and, following this, a Pension Transfer Report was issued on 29 September 2017. This confirmed that the critical yield based on a proposed retirement age of 65 would be 7.53% pa, if all benefits were taken as pension, or 6.44% pa for a reduced pension plus tax free lump sum.

However, based on the proposed retirement age of 60, the critical yield increased to 8.24%, if all benefits were taken as a pension, or 6.94% for a reduced pension plus tax fee cash.

A suitability report was produced and dated 11 September 2017, which set out CST's recommendations.

In the report, CST explained that the earlier analysis provided it with a 'guide' to Mr C's risk profile. It went on to say: 'we note that you have made several investments in the past without taking financial advice' and appear comfortable with the prospect of investing in higher risk assets in order to achieve a higher rate of return".

However, the recommendation made was for a 'more cautious investment approach as this transfer considers the majority of your pension provision'. The report went on to say that the adviser would consider Mr C's capacity for loss to be 'medium.'

The report further confirmed that Mr C planned to retire at 60, which was 5 years before the BSPS normal scheme retirement age. It set out the critical yields needed to match the scheme benefits at age 65 as being 6.55%, increasing to 7.06% at age 60 assuming PCLS was taken alongside a reduced income in both scenarios.

CST gave its opinion that these critical yields weren't guaranteed to be achievable. It also said that the critical yield required to buy the equivalent scheme benefits was recorded as 7.1% based on a retirement age of 65 and again CST confirmed that it could offer no guarantee that this would be achieved.

Mr C's objectives were identified in the suitability report as being:

1. To secure the generous transfer value now.
2. To be able to retire at 60 without taking a reduction in accrued pension.
3. Have any residual funds distributed to family in the event of death rather than purely a return of the contributions paid.

Under the section entitled 'advantages of transferring to a personal arrangement', it was noted that the facility for flexi access drawdown from age 57 would give the opportunity to withdraw income and /or lump sums in a tax efficient manner as and when required.

CST recommended that Mr C increase voluntary contributions to his workplace pension with excess income and that he transfer scheme benefits from the BSPS to a personal pension arrangement. The recommended contract was an AJ Bell SIPP with Brewin Dolphin, providing discretionary fund management.

The suitability report was sent to Mr C on 20 September 2017, along with the transfer documentation.

Mr C signed the client declaration on 11 October 2017 to confirm he had read the report and wished to proceed with the recommendation. CST's final response letter to the complaint confirmed that this was subject to an increased CETV.

The Brewin Dolphin account opening form confirmed the investment objective as being 'cautious with risk', with an intended retirement age of 75.

On 19 March 2018, CST confirmed by email that the transfer amount had been received by AJ Bell.

On 6 June 2022, Mr C raised a complaint, as he felt he may have been given the wrong advice to transfer out of BSPS, to a private pension arrangement.

On 14 October 2022, CST responded following its investigation into Mr C's complaint. Its final response was that it was satisfied that the advice Mr C received was in his best interests.

Mr C was dissatisfied with the response. 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 7.1% and to match them at age 60 it was 7.06%. The discount rates to those ages was 4.6% and 4.5% respectively and, taking into account Mr C's attitude to risk, along with the SIPP illustration mid band projected growth rate of 2.44%, it was unlikely that the scheme benefits could be bettered through transferring.

- The perceived generosity of the CETV wouldn't, of itself, constitute a reasonable justification for a transfer of defined benefits, as set out by the regulator.

- Mr C said that he would consider early retirement at 60, but this would be determined by affordability. He was 38 at the time of the advice and didn't need to make an irreversible decision to transfer based on a prospect which was many years distant. And early retirement was in any case possible from the BSPS 2 or PPF.

- Mr C had no health issues, and there was no evidence of a discussion as to why lump sum death benefits were an important consideration for him and his family. Within the scheme, Mrs C would benefit from the 50% spouse's pension which the scheme would provide. Any additional lump sum requirements could have been addressed through appropriate life assurance.

- Mr C wasn't an experienced investor and, although he was recorded as having a "medium" capacity for loss, this wasn't supported by other investments or assets held. As such, he had a limited capacity for loss, and a secure inflation proof income as provided by the scheme would have been in his best interests. Any requirement for flexibility of income could have been assessed nearer to retirement, at which point the significant sum which Mr C would by then have accrued by way of defined contributions could also have been taken into account.

- There was no imminent prospect of the BSPS entering the PPF, and any such concerns around this should have been appropriately managed.

The investigator recommended that CST undertake a loss calculation in accordance with the regulator's guidance (FG17/9) for such complaints – and on the basis that Mr C 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 C 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 C's pension plan, but if this wasn't possible, it should be paid directly to Mr C, 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 C £300 in respect of the trouble and upset that the matter would have caused him.

Neither party submitted further comments on the merits of the case. The (new) 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, she 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 C.

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 C's complaint, they should let her know by 8 June 2023.

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

But as agreement hasn't been reached on the outcome of the complaint, its been referred to me 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.

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 CST'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 deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 specifically relate to a defined benefit pension transfer.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a defined benefit 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 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.

- The TVAS report which CST 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 defined benefit scheme – was 7.53% 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 6.44%. To match the full pension at 60, the critical yield was 8.24% and to match the tax-free cash and reduced pension, it was 6.94%.

- Mr C was recorded as having a "high" attitude to risk, but CST itself said in the suitability report that this should translate into a more cautious investment strategy to take into account Mr C's circumstances and that the transfer represented the majority of his pension provision. I agree, and I think the "cautious with risk" mandate on the SIPP application form was likely to be a reasonable description of the type of risk rating which was appropriate for Mr C.

- But given this, the discount rate of between 4.5% and 4.6% between ages 60 and 65, and the regulator's middle projection rate for growth (5% pa), I think Mr C was more likely than not to receive pension benefits, from age 60 or 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.

- Early retirement may well have been appealing to Mr C, 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 38 year old. Mr C's circumstances may in any case have changed significantly between then and retirement.

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

- Whilst 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 C drew in his lifetime. And so may not have provided the legacy that Mr C 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 C. And ultimately CST shouldn't have encouraged Mr C to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

- Any desire Mr C had for flexibility could have been addressed by utilising his defined contribution accrual when he came to retire. He would, by the age of 60, have had some 22 years' defined contributions, which, given the overall contribution from him and his employer, would likely have been significant.

- Mr C may have held concerns about the prospects for the BSPS. 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 C with guaranteed income, the option of accessing tax-free cash, and early retirement. Mr C 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 C's best interest to relinquish his defined benefits and transfer them to a SIPP, especially with so many years to go to retirement. And I also haven't seen anything to persuade me that Mr C 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 C 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 C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr C 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 C and our service upon completion of the calculation.

Mr C hasn't yet retired, and cannot do so for many years. Mr C expressed a keenness to have the option to retire early if it was affordable, rather than there being a clear plan to do so. Therefore, 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, CST Wealth Management Limited should:

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

- explain to Mr C 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 C receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr C 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 C 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 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, 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 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.

Determination and money award: I require CST Wealth Management Limited to pay Mr C 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 C the balance.

If Mr C 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 C could 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 my final decision.

I also agree with the investigator that CST Wealth Management Limited should pay Mr C £300. 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 C to accept or reject my decision before 22 December 2023.

Philip Miller
Ombudsman