DRN-3941763

The complaint

Mr G complains that he was given poor advice by Estate Capital Financial Management Limited (ECFM) to transfer the benefits from his defined benefit (DB) scheme with British Steel (BSPS) into a personal pension arrangement.

What happened

I issued a second provisional decision on 6 January to clarify my position on the case following changes I'd made to the redress methodology and regulatory changes. Following my second provisional decision ECFM offered to settle the case. The offer was in-line with what I'd set out in my decision with one exception. It wished to calculate the loss now instead of waiting until after 1 April 2023, which is when the new regulatory guidance comes into force.

Our investigator put that offer to Mr G and his representatives, but they declined the offer as Mr G wished to wait until after April 2023 for the calculation to be carried out.

Neither party made any new arguments in relation to the merits of the case. The background to the case and my provisional findings was set out in my second provisional decision and is included below and forms part of this decision.

'In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the British Steel Pension Scheme (BSPS) from the company. The consultation with members referred to possible outcomes regarding their preserved pension benefits, one of which was a transfer to the Pension Protection Fund ("PPF'J - 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 G's employer would be set up - the BSPS2.

Mr G approached ECFM in June 2017 via unbiased.co.uk - he was considering transferring out of the British Steel Pension Scheme. He was very worried the BSPS would fall into the Pension Protection Fund ("PPF'? because of its financial situation and full details of the alternative final salary scheme which was to be offered in its place, BSPS2 weren't yet available.

Mr G had accrued almost 30 years' service in the BSPS. BSPS offered him a transfer value (CETV) of £352,250.82 - and this was valid until October 2017.

In early July 2017, ECFM completed a fact find of Mr G's circumstances and an attitude To Risk ("ATR") assessment was completed. ECFM recorded that:

- *He was married, close to being 52 and had two children - one being dependent*
- *He was in good health and was employed for British Steel earning £36,000pa.*
- *He had four times his salary death-in-service*
- *He intended to retire at 57*
- *His wife was working and had a pension due soon*

- *They had an outstanding mortgage of about £4,000 due to end in 2019*
- *They had savings of about £38,000 and some shares totalling £4,000*
- *They had joint life cover of £50,000*
- *Mr G had started contributing to the new British Steel money purchase scheme, his employer matching his 10% contribution*
- *His ATR was considered as 4/10 (cautious to balanced).*

ECFM undertook a transfer value analysis (TVA$) on 17 August 2017. ECFM also issued an income drawdown report.

In September 2017, due to a positive change in the funding situation of the BSPS, it issued an updated CETV of £363,737.26 - valid until December 2017.

ECFM's investment proposal set out that £344,000 would be managed by a discretionary fund manager (DFM). On a low to medium risk tolerance, Mr G's investment would comprise equities (23%), fixed income (45%), alternative investments (29%) and cash (3%).

On 20 September 2017 ECFM completed a further TVAS and another income drawdown report was also issued.

On 26 September 2017 ECFM issued its suitability letter. This stated that Mr G wanted to ascertain the suitability of transferring his BSPS into a personal pension. It said Mr G wanted to retire at 57 with an income of £20,000. He had a forecasted state pension income of £8,296 from 67. It confirmed Mr G described himself as inexperienced in terms of investments. Within the letter, it was outlined that Mr G would receive £20,601 at the age of 65 or £15,656 (after an early retirement penalty) at 57 if he remained in the scheme.

The letter also confirmed the required rate (critical yield), as outlined in the September TVAS, to match benefits of the scheme at 65 would be 8.48% and 20.44% at 57. And to match what could be offered by the PPF, this yield was lower at 4.88% (65) and 9.66% at age 57.

Further, it confirmed that while Mr G's wife would receive 50% of his income upon death, in a personal arrangement she'd be able to then nominate the children as subsequent beneficiaries. Also, Mr G would be unable to take partial tax-free cash or reduced income to increase tax efficiency via the scheme.

The suitability letter also highlighted, from previous information gathering, that Mr G:

- *Had serious concerns over the financial stability of his employer and didn't want the pension to stay under their control.*
- *Wished for a significant portion of his pension benefits to be protected as far as reasonably possible.*
- *That his dependents would receive significant sums upon his death, and while more would be beneficial, it wasn't an "absolute priority".*
- *Was happy to receive a lower income for an earlier retirement and would like flexibility and control.*

ECFM confirmed that it recommended Mr G transfer to a well-known provider's flexible retirement account with a discretionary fund manager (DFM) in place.

In October 2017, members of BSPS were being 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 BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choices was 22 December 2017.

The application to transfer Mr G's BSPS benefits was submitted on 23 October 2017. The transfer was completed it appears in January 2018.

Mr G, via representatives, complained about the advice he received and on 7 Jan 2020 ECFM issued its final response. In summary it concluded it hadn't done anything wrong.

Our investigator looked into matters and issued his recommendation. He concluded that the advice that ECFM had given Mr G wasn't suitable. The investigator said that suitable advice would've been not to transfer and had this advice been given Mr G would've followed it - and ultimately joined BSPS2.

ECFM didn't agree with the investigator and made a number of points as to why. Including:

- *The key issue for determination is not whether the advice was suitable but whether ECFM took reasonable steps to ensure that its recommendation was suitable. Not to guarantee or prove that it is suitable. It says it did take these steps to ensure the transfer was suitable.*
- *The investigator didn't properly consider the causation of the alleged unsuitable advice. It believes Mr G would've transferred regardless of its advice.*
- *It is a flawed argument that Mr G ought to have been advised to elect to join the BSPS2 which was uncertain at the time.*
- *The investigator mistakenly concluded that Mr G's required income in retirement was joint, when it was in fact specific to his income.*
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In response to my provisional decision both parties made substantial further submissions. I've summarised below what both parties have said, concentrating on what I think are the key issues relating to this complaint.

ECFM said:

- *It believes it met its obligations under the relevant rules and guidance at the time.*
- *I've not made a specific finding in terms of COBS 9.2.1R as to whether ECFM took reasonable steps to ensure its advice was suitable.*
- *It is concerned about the high uphold rate for BSPS cases and thinks it has not been treated fairly in terms of this case.*
- *A disproportionate focus has been put on the critical yield and discount rates.*
- *BSPS2 hadn't been established at the point of advice so it couldn't give advice on it.*
- *There was no indication Mr G wanted a guaranteed income through an annuity.*
- *The provisional decision said that Mr G's objectives to retire early and 'security of pension fund' could be met by remaining in the scheme. But Mr G's fears of around the security of his fund was due to the position of the scheme and his concern about joining the PPF.*
- *It argues Mr G didn't consider his future was dependent on a set income for life. He wished to 'control his pension funds, accepting a lower income in retirement to achieve his objective of early retirement'.*
- *Mr G had the ability to meet his income requirements having transferred and didn't need the benefits of the PPF to achieve this.*
- *It had rerun the calculations using the enhanced and improved TVAS report and it confirms that at age 65 Mr G would've got an income of £17,180.21 with a critical yield of 3.85%. And at 57 £12,566.32 and a critical yield of 7.23%*
- *It says the new calculations and reports it has sent demonstrate its advice means that Mr G can sustain an income of £17,180.21 indexed at 1.34% until 87. To this point Mr G had received growth of 1.95% after charges - working out at annual growth of 1.05% based on the time held - and it is confident that this*

would be substantially better in the future.

- *My view of what should've happened and what Mr G could've done in the future if he remained in the scheme was based on speculation.*
- *Mr G could've made different decisions but that doesn't mean ECFM didn't take reasonable steps to ensure its recommendation was suitable for MrG.*
- *Mr G sought to provide death benefits for his family and not just his wife - the PPF cannot dothis.*
- *I failed to take proper account of the detailed discussions it had with Mr G face to face and the detailed advice and explanations provided in the suitability report which it is confident gave a balanced view of the available options.*
- *It is unhappy with the change from the PPF to BSPS2 for redress. It feels this shows how arbitrary and subjective the assessment of the advice has been - and it is artificial to seek to now impose a reassessment of advice that on a highly subjective matter especially when the advice was given in very particular and unusual circumstances.*
- *The change of approach ignores the fact it was uncertain at the time whether the BSPS2 would be established.*
- *Insufficient weight has been placed on Mr G's particularly strong desire to transfer to a personal pension arrangement. It believes he would've done so regardless of its advice.*
- *It is highly unlikely Mr G won't take tax-free cash as the majority of people do and it is the most tax efficient way of taking benefits.*
- *It had shown the PPF figures had been overstated at the time of advice. But this was used to move the goalposts and contradict the original decision. Instead of not upholding the complaint.*

Mr G's representatives said in response to the provisional decision and the change in redress communicated afterwards:

- *Mr G has postponed indefinitely his early retirement plans due to the turmoil in the financial markets*
- *It believes in the circumstances here, where Mr G hasn't retired the losses should be calculated as if he was to retire at 65 and if he was advised to join BSPS2.*
- *Mr G had approx £30,000 in savings and it was his intention to start working part- time to meet his income demands. He had other benefits that would allow him to meet this income in retirement without the need to take hispension.*
- *If the ombudsman doesn't agree that Mr G had no need to take his pension - it asks that ECF should redress Mr G on whichever of BSPS2 or the PPF gives the highest loss figure. As this indicates which of the schemes would've provided Mr G with the better benefits. And reflects the analysis that should've been done at the time.*

Following the provisional decision and responses, I wrote to both parties to explain I'd likely be making a change to my decision. I explained that in the provisional decision, I'd concluded that had ECFM given Mr G suitable advice and acted correctly, he would've opted for the PPF instead of BSPS2. This was based on my understanding that the PPF would've provided better benefits on early retirement at 57. And my belief that ECFM's figures provided in the TVAS report were likely incorrect regarding the PPF.

However, following the responses to the provisional decision and further research, I realised that this was reliant on tax-free cash being taken. I explained why I didn't think taking the maximum tax-free cash sum was likely part of Mr G's plans at the time of advice - and therefore he would likely have chosen to join BSPS2.

Furthermore, ECFM provided evidence of the early retirement factors in place specific to Mr G at 57. This in-fact showed that Mr G would've been better off in the BSPS2 even in *early retirement with tax-free cash. And this matches with both the figures from the time that I'd previously doubted (due to the values given for the PPF vs BSPS) and the figures ECFM re-run using the regulators updated calculation method. I'll explain my reasoning further in the findings of this decision.*

ECFM has also made an offer to Mr G whilst not accepting liability. It says it has run the calculations in line with where Mr G would now be had he joined the PPF and Mr G is better off for the advice it gave. It says it has tested this against the BSPS2 option as well and Mr G is still better off for transferring. And it believes this would remain the same regardless of the regulator's proposed changes to calculating redress.

ECFM says that as at the current date its calculations show there is no loss. And Mr G as the injured party is required to mitigate his losses. To mitigate his losses ECFM considers Mr G should convert his personal pension into a deferred annuity and therefore cementing the no loss position. Otherwise he hasn't mitigated his circumstances and it cannot be held liable.

In response Mr G's representatives said the calculation hadn't been made in accordance with the guidelines as it had been run at age 57 and against the PPF. But Mr G hasn't retired yet and he ought to have joined BSPS2 not the PPF. So to comply with the regulator's guidance, the calculation should be at age 65 and as if Mr G had joined BSPS2.

What I've provisionally decided - and why

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. And having done so I'll set out my findings again, in light of the new evidence and arguments received.

Following my provisional decision I also issued letters to both parties setting out some changes. So I think it would be useful here to set out a short summary of the key findings I've made so far:

(i) *ECFM breached relevant provisions in COBS 9 and COBS 19 in giving advice to Mr G to transfer out of the BSPS; in particular, it failed to take reasonable steps to ensure that its advice to transfer was suitable for Mr G.*

(ii) *Had ECFM taken reasonable steps to give him suitable advice, it should have: advised him not to transfer out in September 2017; advised him to wait for the time to choose exercise to begin (which it was known at the time of the advice was coming); and, during the time to choose exercise, should have compared the PPF and BSPS2 and then advised him to transfer to BSPS2. Had ECFM done so, Mr G would have followed that advice and transferred to BSPS2.*

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Both Mr G's and ECFM's representatives have made substantial submissions. I've not provided a detailed or direct response to all the arguments both parties have posed. That's deliberate; we are an informal service for resolving disputes between financial businesses and their customers. Whilst I have taken account and considered all of the submissions made by both parties, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

ECFM have made a number of points about our service's approach to BSPS cases and what it believes has driven this. However, I can assure ECFM I have considered this case on its own merits and I have not approached this case in a different way to any other Defined Benefit transfer case.

<u>The applicable rules, regulations and requirements</u>

This isn't a comprehensive list of the rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business to "act honestly, fairly and professionally in accordance with the best interests of its client".

The FCA's suitability rules and guidance that applied at the time ECFM advised Mr G were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like ECFM, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

The overarching regulatory obligation is set out in COBS 9.2.1R

> *"(1) A firm must:*
>
> *(a) take reasonable steps to ensure that a personal recommendation... is suitable for its client"*

There were also specific requirements and guidance relating to transfers from defined benefit schemes - these were contained in COBS 19.1.

COBS 19.1.2 required the following: "A firm must:

> *(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*
>
> *2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
>
> *(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*
>
> *(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading "Suitability", COBS 19.1.6 set out the following:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or*
> *opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."*

COBS 19.1.7 said:

> *"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."*
>
> *COBS 19.1.7G also stated: "When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."*
>
> *And COBS 19.1.8 set out that:*

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

I've therefore considered the suitability of ECFM's advice to Mr G in the context of the above requirements.

ECFM's rationale for transferring

It's ECFM's position that Mr G prior to meeting with it was very worried about the future of the BSPS and his employer. And therefore wished to transfer.

ECFM says it had to persuade Mr G to go through the proper advice process with it as he was so intent on transferring. But Mr G was nevertheless seeking advice on his options for meeting his objectives in terms of the potential transfer. Mr G wasn't categorised as an insistent client, and so ECFM could be confident that he would be acting upon, or at least taking into account, its advice.

In accordance with COBS 9.2.2R, ECFM undertook its fact find and it was recorded his objectives were:

- 'retire 55-60

- Would like flexibility of fund (pension)

- Maybe work part time for 2 days a week from age 57

- Sort out pension situation

- Wants to take out of scheme

- Income in retirement- flexible start higher amount £20,000 pa income

- Mentioned equity in house as back up.'

The subsequent suitability report doesn't list Mr G's objectives, but it does say within it:

- *Mr G was concerned the scheme will fall into the PPF, so he would like to take control of these pension benefits*
- *He doesn't intend to retire until at least 57.*
- *Income flexibility and death benefits under an individual arrangement meant he was happy to give up his protected retirement age of 50.*
- *Mr G wishes to retire at 57 with an income of £20,000. He intends to supplement his pension income with part-time work.*
- *He has sufficient funds as to act as an emergency fund*

His objectives in terms of order of importance were recorded as:

- *Ability to retire early*
- *Security of the pension fund*
- *Provision for a spouse's and dependent's pension*
- *Increase in pension*
- *Lump sum benefits upon death before retirement*
- *Tax free lump sums at retirement*

Before I consider this further, it's important to look at whether from a purely financial perspective, the transfer was in Mr G's best interests. This is especially important here as

Mr G wanted to take little risk with his pension and protecting its value was very important to him.

ECFM produced a TVAS report for comparison purposes to determine the viability of the transfer to meet Mr G's objectives from a financial perspective.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return (critical yield) required to match the occupational pension at retirement was recorded as 8.48% per year. This compares with the discount rate of 4% per year for 13 years to retirement in this case. This gap is increased significantly with retirement at age 57 with a critical yield recorded of over 20%. It was also recorded that the critical yield if benefits were to fall in the PPF was 4.88% at age 65 and 9.66% at age 57. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year. I've taken this into account, along with Mr G's low-medium attitude to risk and also the term to retirement.

Given the above, I think Mr G was likely to receive benefits of a lower overall value than the DB scheme at retirement. I think it's unlikely Mr G could have achieved returns above the regulator's highest projection rate every year until retirement, particularly given his attitude to risk. If the fund was to have fallen into the PPF the yield is lower but even then it's still unlikely given Mr G's attitude to risk that he'd improve on the benefits available from the PPF. And given Mr G was hoping to retire early, the yield involved just to match the benefits given up is high - so Mr G was likely to be worse off in early retirement.

COBS 19.1.7G says that firms should consider a customer's attitude to risk in relation to the investment growth required to match the benefits given up. But bar some generic warnings and a comment about the critical yield being high, ECFM didn't set out in the suitability report that there was a specific risk that Mr G would be worse off given the critical yields involved and his low-medium attitude to risk.

Overall, I'm satisfied that by transferring his pension Mr G was unlikely to improve his benefits. Instead he was likely to be worse off in retirement. This is an example of ECFM being unable to show the transfer was in Mr G's best interests. I think ECFM has breached the guidance in COBS 19.1.6, and this together with other failures I'll identify later shows ECFM has not taken reasonable steps to ensure the transfer was suitable under COBS 9.2.1R.

ECFM argues that I have placed a disproportionate weight on the critical yield and the discount rate. It says the FCA does not consider the critical yield to be a factor which should have considerable weight when assessing DB transfer advice. And that discount rates are not appropriate in most cases as annuities are rarely acquired these days. It believes our rationale for considering DB transfer suitability is at odds with what the regulator expects of firms.

However, I disagree, I don't think what I've said is contradictory to what the regulator expects of firms. The discount rates give a good indication of what growth rates could be achieved for a typical investor. The discount rates were published every year so they take into account what was considered reasonably achievable at a particular point in time. And as ECFM has pointed out, they do shift towards a low risk asset weighting closer to retirement, but I don't see this as an issue. As customers regardless of decisions around suitable products for retirement, will generally wish to take less risk as they look to finalise their retirement arrangements. The discount rate is just one tool to consider the financial viability of advice and hasn't been used as definitive result in terms of assessing suitability of this transfer.

Whilst the FCA does ask adviser's to consider the assets and likely returns of the funds invested in, relative to the critical yield, we sometimes find advisers have overstated the *consumer's attitude to risk or the likely returns that can be achieved from an investment and/or the investments don't align with the consumer's attitude to risk. So our discount rates work as neutral baseline to consider alongside other factors such as the critical yield, the customers attitude to risk, the likely expected returns of the assets invested within and personal circumstances of the customer - and their best interests. And I've also looked at the standard industry projections too (i.e. the 2%/5%/8% low/intermediate/high projections) to give another perspective on what could, realistically, have been considered achievable.*

The approach I've taken is to look at the transfer as a whole to decide whether ECFM took reasonable steps to ensure the advice was suitable. I haven't just decided the case based on whether the critical yield was achievable. I've also looked at whether there were other legitimate reasons for recommending the transfer. That said, as in this case where the critical yields are high (as ECFM itself stated this itself in the suitability report) it becomes more difficult to justify a transfer is in someone's best interests and a firm has taken reasonable steps when the transfer would likely result in a reduction of benefits on a like-for- like basis. Which is the implication of a critical yield that appears unachievable.

But as I set out in detail in the provisional decision, I also considered Mr G's circumstances and whether regardless of the real potential to be financially worse off, his circumstances were such that it would still be in his best interests to transfer.

Since my provisional decision, ECFM says it has re-run the calculations regarding the PPF, producing a TVAS report which it says has been enhanced and improved by the regulator since the advice was provided. It says this now shows the critical yield for the PPF at 3.85% at 65 and 7.2% at age 57. It says, that I should reconsider my provisional decision on this basis alone.

However, I am not sure given the reasoning I explained in my provisional decision, why ECFM would think this would make a material difference to the outcome. The critical yields at 57 and 65 for the PPF are lower now under the new calculation. But given the regulator's standard projection rates and Mr G's attitude to risk and investment strategy, these still represent a big risk that Mr G will be worse off financially in transferring. Furthermore, I need to consider the suitability of the advice based on the information available at the time.

My understanding of ECFM's position is that the basis of the recommendation was the benefit to Mr G in terms of other objectives being met - including flexibility of income and control. It says its modelling showed that Mr G's objective of £20,000 a year in income at age 57 could be met by its recommendation to transfer. And if Mr G's fund was to have gone into the PPF, this couldn't be so easily achieved, or at all.

<u>The requirement for flexibility</u>

The starting point for ECFM should've been that the transfer wasn't in Mr G's best interests. Looking at the advice process and the suitability report I have my doubts that this was the case. Given the financial viability of the transfer set out above, it's my view there would need to be very strong reasoning as to why a personal pension arrangement was clearly a better option than staying within the scheme.

I've also thought about Mr G's capacity to take financial risks with his pension funds. Mr G had joined his employer's defined contribution scheme, but even so, given the limited amount of time until either age 57 or the scheme retirement age of 65 the defined benefits accrued through the BSPS would have been his only source of guaranteed income (other than the state pension which wouldn't be payable until age 67). This represented nearly 30 years of employment. It seems that Mr G understood that these benefits were very important for his future. It was recorded he didn't consider it appropriate to expose himself to anything other than a minimal amount of risk to grow his pension. And Mr G was recorded as saying - "A significant portion of my pension benefits which should be protected as far as is reasonably possible."

It was also recorded that security of his pension fund was more important to Mr G than attempting to increase his pension in retirement. Within the BSPS, Mr G had guaranteed benefits and even in what I think Mr G considered the worst-case scenario, the pension falling into the

PPF, Mr G still had guaranteed benefits just at a lower level. This was the cornerstone of Mr G's retirement planning and protecting this was what led him to seeking advice from ECFM.

Given the above, I don't think it was reasonable to sacrifice Mr G's guaranteed income in retirement for the sake of flexibility of income which would likely mean Mr G was also worse off in retirement.

ECFM argue that Mr G had never shown any interest in an annuity or a guaranteed income in retirement - pointing out Mr G favoured control and flexibility. But Mr G was a layman and came to ECFM for expert advice. ECFM should've explained the benefits of the scheme's guaranteed income. And explored how alongside his other assets he could meet his objectives, and retain a guaranteed income likely higher than what would be achievable by transferring to a more flexible arrangement. Had it done so I think he would've favoured this.

Instead ECFM said the below about remaining in the scheme in the suitability report. "leaving the benefits with the current scheme - discounted because you cannot access the flexibility required. You cannot access the benefits without early retirement penalty until 65."

COBS 19.1.2 required ECFM to 2) 'ensure that that comparison includes enough information for the client to be able to make an informed decision';

And

4) 'take reasonable steps to ensure that the client understands the firm's comparison and its advice."

I think ECFM should've done a lot more to set out the advantages of remaining in the scheme. Very little was set out about Mr G's options regarding not transferring. I think this is a failing of COBS 19.1.2. The comparison didn't include enough information for Mr G to make an informed decision. Furthermore, as I'll discuss later, ECFM should've also considered Mr G's to options under the likely to be established, BSPS2, but it didn't.

ECFM has made repeated arguments, essentially arguing that it took reasonable steps in providing advice such as completing a fact-find, TVAS report, suitability report and therefore it wasn't required to ensure the advice was suitable as Mr G accepted their recommendation.

But here is another example, where I don't think ECFM took those reasonable steps. It says it provided Mr G with a TVAS document and Income Drawdown report but I don't think it is fair to expect a lay person to draw conclusions from the figures alone, without expert commentary - which is what the suitability report is for. And the suitability report didn't provide enough information for Mr G to make an informed decision.

Within the suitability report, it didn't set out how Mr G could meet his requirements without transferring - which ECFM was aware of - as it said under other considerations - 'any income in retirement can be met by your British Steel final salary and money purchase benefits, together with the state pension when you become eligible at 67'. And it didn't give any advice about the impending BSPS2 - which I'll cover in more detail later. There was no analysis or discussion about how Mr G may be able to achieve his objectives by remaining in the scheme. This is a failing of the advice process and what was required of ECFM as a professional adviser. It didn't take reasonable steps to provide Mr G with enough information to make an informed choice.

The little ECFM did say about Mr G's entitlement in the scheme, didn't represent a fair or balanced picture of Mr G's options. ECFM said he couldn't access the benefits without receiving early retirement penalties - but in fact this would just be an adjustment based on the fact he'd be receiving benefits earlier and for longer than if he took benefits at 65. Yet the same would apply if he chose to take benefits early under a personal pension arrangement - as the fund would've had less time to grow and will be drawn upon over more years. Given this was all ECFM said about the scheme, it doesn't represent a balanced picture.

ECFM's core argument is that Mr G required £20,000 in income at 57 and this trumped everything else. And the flexibility that a personal pension arrangement gave with the ability to *draw benefits at age 57 to meet this requirement meant its advice was suitable. I agree that retiring early was of importance to Mr G, as the advice process moved on he settled on age 57 with a plan to work part-time but given this was still over five years away, I don't think it was an absolute that had to be achieved at all costs. When Mr G first met with ECFM he said retire between 55-60 and then later he would work until at least 57. Yet ECFM focused entirely on the rigid picture of £20,000 of income at 57.*

As I said above ECFM was aware Mr G could've met his objectives without transferring but made no positive comments or analysis on this basis. I think ECFM should've done more to discuss the alternatives available to Mr G that would've kept his guaranteed benefits in place. If Mr G's circumstances were to change, by remaining in the scheme Mr G's benefits available would've increased year on year the closer he got to retirement. This should have all been weighed up and explained to Mr G, but it wasn't. The focus of the suitability report and it appears the whole advice process was weighted on transferring. So I don't think ECFM applied COBS 19.1.6 in its thinking when it gave advice to Mr G.

A lot of ECMF's arguments for why it was right to recommend a transfer was that Mr G was worried about entering the PPF. But I don't think ECFM did anything to test or allay these concerns. Furthermore , I think even in that scenario, Mr G could have met his objectives. But this was never considered or set out by ECFM in the suitability report.

This is another failure of the advice process, ECFM should have at least presented and discussed these options with Mr G as a means of supplementing his income and its failure to do so means that its analysis as required by COBS 19 is deficient. This is another example of ECFM failing to take reasonable steps to ensure its advice was suitable.

I say the above because, looking at that scenario (the supposed worst case), it was recorded that at age 57 Mr G could receive £13,078 a year from the PPF or £12,566.32 under its new calculations - post advice. This left Mr G approximately £7,500 a year short of his required £20,000 income at age 57 - when Mr G planned to start part time work. I don't think it was out of the question by any stretch of the imagination that Mr G could've made up this shortfall and met his objectives without risking his only source of guaranteed income. And without taking the risk of being substantially worse off in retirement.

Mr G didn't plan to fully retire at 57, he said he'd like to work part-time. It was recorded that Mr G's salary at the time of advice was £36,000; at that point in time he had a surplus income of £1,000; approximately £40,000 in savings; his mortgage was due to be paid off in under two years which would increase his surplus income; and his annual contributions to the new DC scheme totalled 20% of his salary - £7,200. If he were to work until age 57 he would have contributions of approximately £36,000 in this scheme.

It wasn't recorded if Mr G would look to go part-time with his current employer or elsewhere, but two/fifths of his salary would equate to £14,400. I understand this is a very crude methodology and that often part-time work tends to be low paid. But even if we go by the minimum wage, £9.50, this would equate to a yearly income of approximately £19,800 and at two days a week, £8,000 per year. Therefore, working two days a week part-time, I think Mr G would likely achieve the £20,000 income required at retirement at 57 alongside his pension from the PPF. And once Mr G reached aged 67 his state pension would kick in and he would no longer require any additional income on top of his guaranteed benefits.

And that scenario is without Mr G having to take benefits from his money purchase pension or other assets and income resources, which if required could've been used to meet his income requirements. But ECFM never did any of this analysis, it never discussed this with Mr G, despite him telling ECFM that he'd consider working part-time. ECFM should've known from its analysis that financially Mr G's likely best option was to remain in the scheme for as long as possible - yet didn't set out the ways in which this may have been achievable.

ECFM has argued that it couldn't be guaranteed Mr G could find part-time work but neither *could it be guaranteed that its cash flow forecasts would be achieved either. The product it recommended exposed Mr G's pension funds to investment risk and charges that would most likely make Mr G poorer in retirement.*

ECFM says this argument is hypothetical and less certain than its figures based on investment returns. But I don't think it's unfair or unreasonable to say Mr G would likely be able to find a part-time job that paid minimum wage, which is all he would need to do to meet any shortfall from the 'worst case' scenario of the scheme entering into the PPF. Whereas in my view positive investment returns over many years is less predictable. Regardless, ECFM never put this option to Mr G for him to consider which is another example where it failed to take reasonable steps to ensure its advice was suitable.

ECFM argues that Mr G's fund has performed up to now above the growth it says is required to meet the guaranteed benefits in the PPF and it is confident this will continue. Using the mid-range growth rate it says Mr G can sustain income of £17,000 until 87 (and this hasn't taken into account the state pension being paid at 67). But past performance is no indication of future performance, and requiring mid-rate growth over many years is indicative of the risk applied in transferring Mr G's guaranteed benefits. It also doesn't take account of the fact Mr G's circumstances could change and in transferring his benefits, he is taking on the potential of an even bigger loss if he was to decide to retire later. Most importantly, this is not an argument relevant to whether ECFM took reasonable steps to provide suitable advice at the time.

In regard to this being hypothetical and an assumption about what Mr G would've wanted to do. As at the time this wasn't sufficiently discussed or tested by the adviser, we don't have any testimony from the time as to what Mr G thought possible. So I have to consider what would've most likely happened had Mr G been given the information required to make an informed decision.

I think considering Mr G's financial circumstances at the time of advice and his clear concern for his pension to be protected, remaining in the scheme met his objectives. It protected his benefits and still gave him the opportunity of meeting his idea of early retirement. By transferring, his pension was put at risk, not protected, and Mr G was likely to receive less in retirement than he would remaining in the scheme.

These arguments are based on the 'worst case' scenario of Mr G joining the PPF but as I explained previously and will build on below, I think acting reasonably and in Mr G's best interests, ECFM ought to have considered the benefits he would've received in BSPS2 - which were more beneficial than those available in the PPF.

<u>Death benefits</u>

Death benefits weren't the main basis of advice but ECFM have mentioned them in response to the investigator's view to justify the transfer. ECFM say that due to the transfer, he'll be able to ensure his children benefit on his death.

Mr G was recorded as saying "My dependants will receive significant sums upon my death and whilst a greater amount might be beneficial, it is not an absolute priority for me."

So I don't think this was a priority for Mr G. And he had generous death in service cover if he died before retirement and his family would have received the value of his defined contribution pension too if he died.

Furthermore, the death benefits within the PPF would've been valuable if Mr G was to pre-decease his wife. She would've received a 50% spouse's pension for the remainder of her life.

ECFM argues that Mr G sought to provide death benefits flexibly for his family and not just for his wife and the PPF couldn't provide this. However, whilst a personal pension arrangement would allow Mr G to nominate his children as beneficiaries - the outcome of this is dependent on the position of the fund at the time of death. Mr G was noted to be in good health and there is nothing to suggest he wouldn't be expected to live to the *average life expectancy. Therein lies the risk that on death there may be very little left in the fund to pass onto his children in any event. Furthermore, if Mr G genuinely wanted to leave a legacy for his children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think ECFM should've instead explored life insurance.*

Whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr G about what was best for his own retirement provisions. A pension is primarily designed to provide income in retirement. So there generally shouldn't be a disproportionate emphasis on death benefits compared to someone's own retirement needs. Overall, I don't think different death benefits justified the likely decrease of retirement benefits.

Could ECFM have considered Mr G's options within BSPS2?

So far I've mostly focussed on the option of transferring against what ECFM said Mr G saw as the worst case scenario, joining the PPF. But at the time of advice it was already known that it was likely BSPS2 would be set up which would retain most of the benefits of the current BSPS scheme.

Much of ECFM's arguments about why it recommended transferring were due to Mr G's concerns about having to enter the PPF. But as I've set out above, I think this was still a more suitable option than transferring given his circumstances and objectives.

ECFM says it was unable to give advice or take account of BSPS2 as it hadn't been established. I disagree. And its position is in direct contradiction to what was concluded in a report produced at the request of the FCA.

The regulator asked Grant Thornton to produce a report analysing the information available to PTS (Pension Transfer Specialists such as ECFM) during the 'Time to Choose Period'. Preliminary details were announced about the time to choose period on 11 September 2017. And it effectively ran from October 2017 to December 2017. In this report Grant Thornton looked at what the steps it expected a competent and reasonable adviser should've taken in this period.

In this report it said:

"In August 2017 an update was added to the BSPS website which confirmed that the Time to Choose exercise would take place later that year, and that members would receive further details regarding their options by October 2017. Again, we consider that unless it could be clearly demonstrated that a transfer was in the client's best interests when compared to the existing BSPS scheme, PTSs should have delayed completion of their advice process unless further information was known."

On receipt of the Time to Choose information, PTSs would then have had sufficient scheme information to compare the options of a transfer with the likely benefits available from PPF or BSPS2.

The uncertainty surrounding whether or not BSPS2 would proceed presented PTSs at the time with certain challenges when providing advice to clients, and they should have explored all of the potential options available to the client. Given that it was not possible for a client to retain their benefits in the BSPS scheme, the PTS should have compared the likely options available under PPF with BSPS2, and each of these options against the possibility of transferring to a scheme with flexible benefits. We consider a PTS should have taken care to present the PPF as a valid option for consideration if BSPS2 did not proceed, rather than giving the impression that the client's benefits transferring to PPF was the worst of all possible scenarios."

ECFM didn't wait or advise Mr G to take part in the time to choose exercise. Instead it pushed ahead with its transfer recommendation. Its advice focused on transferring to avoid the worst case scenario of joining the PPF and it presented no comment on how Mr G's *requirements could be met under BSPS2.*

And its clear ECFM was aware of the potential BSPS2 scheme as ECFM noted in the suitability report background:

> You are now a deferred member of the British Steel pension scheme and are concerned that it will fall into the Pension Protection Fund (PPF) and affect the value of benefits offered to you. You would therefore like to gain control of these pension benefits.
>
> A Regulated Apportionment Arrangement (RAA) has been agreed between Tata Steel UK Limited (TSUK) and the BSPS Trustee. The agreement took effect on 11 September 2017. The old BSPS will continue to pay benefits in full until it goes into a PPF assessment period, which is planned for the end of March 2018. All members and pensioners of the BSPS will be offered an option either to transfer to a new pension scheme sponsored by Tata Steel UK offering modified benefits, or to remain in the BSPS and so receive PPF compensation. The new pension scheme will be subject to certain qualifying conditions relating to factors such as size and funding level. It will pay the same benefits as the old BSPS except that future increases will be smaller. The modified benefits are expected to be better than PPF compensation for the vast majority of current pensioners and for many other members.
>
> Your deferred pension currently stands at £14,756.52 per annum. Under the PPF your pension would increase until retirement in line with the increase in the Consumer Price Index (CPI), up to a maximum of 2.5% or 5% in any year. You would then be entitled to receive a pension compensation equal to 90% of the scheme pension at age 65 (subject to a compensation cap – currently £34,655). An adjustment would be made to this figure for earlier retirement. Under the new BSPS scheme your pension would also increase until retirement in line with the increase in CPI.

But ECFM chose to make no further comment on this in its suitability report which instead focused almost entirely on the benefits of transferring Mr G's benefits to a personal pension arrangement - despite the knowledge of the above.

Mr G didn't need to make any decision about whether to transfer until more details were known about the options which might later be available. I think a competent adviser acting reasonably would've recommended that Mr G wait to see his options under BSPS2 before transferring. But ECFM didn't do so. This is another failing in ECFM's advice process and I don't think it acted in Mr G's best interests. It didn't take reasonable steps to ensure its advice was suitable.

<u>Mr G's concerns about the scheme and benefits entering the PPF</u>

ECFM has said in response to my PD:

> *"The Provisional Decision now interprets Mr G's objectives to have been to retire early and "security of pension fund"* ***(my comment - these objectives were recorded by ECFM at the time of advice)*** *and asserts that both of these would be met by remaining in the Scheme. However, based on our discussions with Mr G, it was clear that his concerns over the security of the fund were based on his concerns over the PPF and his wish to avoid his accrued benefits being transferred to the PPF (which he viewed, rightly or wrongly, as representing a risk to the security of his pension fund...)*
>
> *Provided Mr G understood that by taking control of his funds he was forgoing a guaranteed income for life (whether from the PPF or BSPS2 if it were created) - this was a decision that only he could make."*

But ECFM's job wasn't just to do as Mr G wanted, instead it was to provide him with all the relevant information and give expert advice and a recommendation as to how to proceed.

As I've explained above, it didn't do this. And its comments highlighted above appear to suggest that it was led by Mr G's views rather than challenging them whilst giving expert advice as a competent adviser ought to have done.

I appreciate that there will be instances where a client seeks financial advice with predetermined ideas or concerns about the financial health of an employer or pension scheme, as was the case here, but as the professional party, the IFA is tasked with rationally addressing those concerns and providing an appropriately balanced view of the available options.

I don't think this happened here. The whole point of the BSPS consultation, which resulted in the agreement being announced in August 2017, had been to avoid the necessity of the BSPS pension funds entering the PPF, and by the point of the advice the BSPS 2 seemed more likely than not to be a viable alternative. When the advice was given, there was no imminent prospect of the BSPS entering the PPF. And the indication was that it wouldn't.

ECFM says it was recorded at the time that ' Mr G had serious concerns regarding the financial stability of my ex-employer and I do not wish for my benefits to remain under his control.

But as I said it was its job as an adviser to look into these concerns and provide the information available at the time with comment that I think should've allayed these concerns. Under either of the BSPS2 and PPF, Mr G's employer wouldn't have had control of his benefits - this wasn'texplained.

So at the time of advice, ECFM was aware that it was unlikely Mr G's benefits would need to enter the PPF. Despite this it made no positive comments about the security likely offered by BSPS2 or even falling into the PPF.

Mr G's top two objectives were the ability to retire early and security of pension fund - both could be met by remaining in the scheme or in the PPF. By transferring the security of his pension fund was lost.

<u>What should ECFM have done - and would it have made a difference to Mr G's decision?</u>

Mr G may have been concerned by developments relating to British Steel and the BSPS, but he was entitled to an impartial review of his options with any preconceptions robustly tested and discussed. But I don't think ECFM provided this.

For the reasons given above, I don't think the perceived advantage of flexibility of income outweighed the guaranteed benefits in the scheme. And Mr G would have needed returns in excess of what is usually achievable for someone with his attitude to risk just to match the benefits he'd given up.

I think had this been explained clearly to Mr G, he would've understood the worth of his guaranteed benefits within the scheme and PPF. Such that he'd have wished to guarantee his benefits and not transfer. I don't think with his fears about the scheme properly discussed and allayed, he'd have wished to transfer for income flexibility that he didn't really need given the options available to him in the scheme alongside other potential income opportunities/substitutes.

The critical yield is usually a telling indicator of the value of the benefits being given up. And as the critical yields to just match either the PPF or BSPS/2 benefits were considerably higher than the discount rate at early retirement and higher at normal retirement. I think it was unlikely to be achievable, year on year, to even match the scheme benefits.

The justification for transferring has been that it was nevertheless suitable in view of Mr G's stated objectives and the concerns about the BSPS. And whilst I accept that the critical yield isn't the only factor to consider, I don't think that ECFM's justifications for over-riding the starting position that a transfer would be unsuitable, stands up to scrutiny. ECFM hasn't shown it was clearly in Mr G's best interests to transfer.

In terms of the responsibilities of Mr G in deciding whether to still proceed (and as I've said above, I accept that Mr G was given risk warnings and was more likely than not capable of *understanding them), I don't disagree that properly informed, correctly advised individuals would be in a position to take that kind of responsibility and decide for themselves if they wanted to transfer their defined benefits. The problem here is that this was a complex matter involving many factors with which Mr G, as a layman on pension matters, wouldn't have been familiar.*

For the reasons given above, my view is that Mr G simply wasn't placed in a properly informed, or suitably advised, position to be able to take that kind of personal responsibility.

Taking account of Mr G's circumstances, including his attitude to risk, his objectives and the guarantees which the BSPS offered and would have persisted with either the BSPS2 or the PPF, my view is that ECFM should have advised against the transfer.

Had ECFM done so and explained to Mr G that he should wait for the 'time to choose' exercise before making any decisions, Mr G would've been able to appraise his options under BSPS2 against the PPF.

It appears that as the trustees had been notified of the transfer in advance of the 'Time to Choose' exercise, Mr G wasn't part of it and so didn't get to see his entitlement. But in the event that he had, I think he would've wished to join the BSPS2 scheme.

In my first provisional decision I had said that in this scenario Mr G would've instead chosen to join the PPF. I said this with the belief that the early retirement factors for his circumstances were beneficial for him against those of the BSPS2 (as was our general understanding - although I hadn't appreciated that this was usually reliant on the maximum tax-free cash also being taken). Also at the time I'd doubted the figures ECFM had presented for the PPF were correct as it didn't fit our understanding of this scenario - as its figures showed Mr G better off in early retirement within the scheme and not the PPF.

However, after my provisional decision, ECFM provided information about the early retirement factors of the PPF and BSPS2 specific to Mr G's situation. This showed that in his particular circumstances the better early retirement factors in place for the PPF weren't enough to overcome the 10% reduction in benefits when compared to BSPS2.

ECFM also provided new calculations using the FCA's updated tool and this showed that Mr G would be better off in early retirement in BSPS2. This wouldn't have been available at the time of advice but it does seem to back up the earlier calculations, which showed the same outcome although different figures.

Had ECFM waited for the 'time to choose exercise' as it should've done Mr G would've been able to compare the PPF benefits against his likely BSPS2 entitlement.

As ECFM has been at pains to point out, Mr G saw going into the PPF as a worst-case scenario at the time of advice. And Mr G ought to have been told that BSPS2 had the added flexibility that he could transfer out at a later date, whereas this couldn't be achieved from the PPF. So in transferring to BSPS2, Mr G could keep his safeguarded benefits without losing the chance to access his benefits flexibly at a later date if he wished to do so. By joining the PPF this couldn't be done.

I think if he had it explained to him with the figures (which it seems would've shown he'd be better off in the BSPS2 in all circumstances) in front of him that he'd retain the opportunity to transfer at a later date and if he chose not to take early retirement he'd be much better off in BSPS2, this would've outweighed the potential fairly marginal benefits of taking early retirement with tax free cash under the PPF (which seems not to apply here in any event).

Even if Mr G would've been better off in the PPF in early retirement with the maximum tax-free cash sum - I've also noted that taking a tax-free cash lump sum at retirement was bottom of Mr G's list of objectives recorded by ECFM. And the suitability report also said 'the personal pension option offers the potential for a tax-free amount of up to a maximum of 25% of the fund value. You do not require a lump sum payment on retirement'.

So given all the above, it is clear that properly informed Mr G would've chosen the BSPS2 over PPF.

Considering Mr G's objectives and attitude to risk, it also ought to have been explored whether Mr G could leave his benefits until the scheme retirement age - which would likely put him in the most advantageous financial position in retirement. There would be no early reductions and by retaining his guaranteed benefits in BSPS2 his funds wouldn't be subject to investment risk. Mr G had savings and access to his other pension, this alongside part- time work could have gone a long way to bridging the gap until age 65 - when he could've drawn his benefits unreduced and payable for life. I think that could've appealed to Mr G given his objectives but ECFM didn't look into this. As explained earlier it dismissed the option of remaining in the scheme (either through PPF or BSPS2) without exploring it further. This represents a failure to take reasonable steps to ensure the suitability of the advice.

ECFM says comparing Mr G's entitlement under BSPS2 for the purposes of redress is unfair and unreasonable. As it couldn't have foreseen having to pay redress against the BSPS2 as it wasn't established at the time of advice. And that it couldn't give advice based on BSPS2 at the time, but I've already explained why I don't agree with this and what it should've done.

Furthermore, the purpose of redress is to put a customer back in the position they would've been in but for the unsuitable advice. In advising Mr G to transfer, ECFM would've known in doing so that Mr G wouldn't then join BSPS2 if it were to be established - which looked likely at the time of advice.

ECFM carried out a loss calculation which showed no loss against the PPF, however this should've been carried out in comparison with BSPS2. It also carried out the calculation at age 57 which in my view goes against what FG17/9 and the new FCA policy statement PS22/13 says it should do in this scenario. I don't think this calculation represents a fair and reasonable settlement. In my view there is no credibility to their argument that Mr G should convert his personal pension (which it is my position he wouldn't have if it wasn't for their unsuitable advice) to a deferred annuity to mitigate his losses.

For the avoidance of doubt the calculation should be run until his normal retirement date in the OPS or the earliest at which Mr G could take benefits from the OPS without a reduction in benefits. This is in line with the regulator's guidance and what I think is fair and reasonable in the circumstances.

FG17/9 says:

> *"Consumer's retirement age*
>
> *17. The earliest age at which the customer could have retired from the DB pension scheme without both:*
>
> *• requiring the consent of the employer; and suffering a reduction in benefits.*
>
> *18. Where a customer has benefits payable from different ages, the redress calculation should reflect the most favourable option for the customer."*

The FCA has since carried out a consultation to provide clarity to certain aspects of FG17/9 and it has released PS22/13 which will come into effect on 1 April 2023. The relevant part here says:

> *'A firm must presume that a consumer would have taken pension benefits from their defined benefit occupational pension scheme at their normal retirement age in their defined benefit occupational pension scheme or on death if their death preceded their normal retirement age.'*

This presumption can be rebutted if there is evidence that it is more likely than not that the customer would have taken benefits earlier from the OPS.

The guidance goes on to say the presumption 'is unlikely to be rebutted where there is evidence from the time of the pension transfer advice that indicates that there is a risk that the consumer's intentions were influenced by the firm's non-compliant pension transfer advice'.

Whilst Mr G was interested in retiring early, ECFM's advice to transfer on this basis was unsuitable and reasonable steps weren't taken to consider whether Mr G could achieve his goals without accessing his OPS benefits early. So, I think his intentions to access his benefits *early were influenced by ECFM's unsuitable advice.*

Furthermore, at the present time Mr G hasn't taken his benefits (and he has already reached age 57) and has no current plans to do so - this is the clearest indication of whether he would've taken benefits at 57. As he hasn't taken his benefits and says he has no plans to do so at the present time, I consider a fair retirement date to use is his normal retirement date (or the earliest date without reduction) and this in line with the regulators guidance and I think this is fair for the reasons I've already explained in this decision.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to a conclusion that the recommendation to transfer wasn't suitable for Mr G, nor was it in his best interests. The key contributing factors here are: Mr G's attitude to risk and its incompatibility with the type of investment risk which would have been required to match the scheme benefits - a failing under COBS 19.1.7; and the lack of a comprehensive and balanced portrayal of Mr G's options - a failure to adhere to COBS 19.1.2 (2) and 19.1.8.

Furthermore, the most important objectives to Mr G, the option of early retirement and protecting his fund were available without needing to transfer. And in fact, in transferring the protection of his benefits were lost.

It follows that my view is that, taking account of those critical yields, Mr G's low to medium attitude to risk with regard to his pension funds and matching that with the likely corresponding investment returns, it was unlikely that the benefits available from the BSPS2 or the PPF, could be bettered through the transfer. As the other reasons for transferring were in my view insufficiently compelling, when considered against the valuable benefits being given up, as required by COBS 2.1.1R and COBS 19.1.6, ECFM would - or should - have drawn the conclusion that transferring wasn't in Mr G's best interests.

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 neither party has made any new arguments, I see no reason to depart from the findings set out in my second provisional decision and as set out above.

ECFM has offered to settle the case and calculate the redress now, instead of after April 2023, and pay additional compensation for the distress and inconvenience. This offer was rejected, as is Mr G's right. So instead to settle the case ECFM should comply with the redress methodology I set out in the provisional decision and as set out again below.

Putting things right

A fair and reasonable outcome would be for ECFM to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr G would have remained a member of BSPS and subsequently moved with it to the BSPS2. So calculations should be undertaken on this assumption and the retirement date used should be age 65. ECFM must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/19 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr G whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published.

He would like his complaint to be settled in line with new guidance /rules. I consider it’s fair that ECFM calculates Mr G’s redress in line with new guidance and rules when they come into effect.

The basic objective of the proposed amendments to the redress methodology still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and policy statement, I’m satisfied that the changes still reflect a fair way to compensate Mr G.

ECFM must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

I note Mr G's representatives had questioned due to his circumstances now as a carer whether he would pay tax - but it's likely considering the size of his pension he will pay tax when he comes to withdraw it regardless. So, I think the above is fair.

The compensation amount must where possible be paid to Mr G within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and ECFM has received notification of Mr G's acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes ECFM to pay Mr G.

Income tax may be payable on any interest paid. If ECFM deducts income tax from the interest, it should tell Mr G how much has been taken off. ECFM should give Mr G a tax deduction certificate in respect of interest if Mr G asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

In addition, I think the uncertainty over his retirement position and the potential to be significantly worse off in retirement will have caused trouble and upset to Mr G. ECFM should pay Mr G £300 for the trouble and upset caused by the unsuitable advice to transfer his benefits.

My final decision

I uphold Mr G’s complaint and direct Estate Capital Financial Management Limited to put matters right as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr G to accept or reject my decision before 2 March 2023.

Simon Hollingshead
Ombudsman