DRN-3990831

## The complaint

Mr W 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 her 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 W'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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.

A fact find completed by CST for Mr W recorded the following information:

- He was 41 and married.
- He had two dependent children.
- He was employed earning around £38,000 pa, including bonuses.
- He was in good health, although he was under the care of a specialist for a specific condition.
- His wife worked part time and had no pension arrangements.
- They owned their home jointly, which was valued at around £208,500
- They had an outstanding repayment mortgage of £103,000 which was due to be repaid by the time he was 63.
- They had no protection plans in place in the event of death or illness.
- Their outgoings were around £1,900 pm.
- They had just over £11,000 in savings.
- He had a "medium" attitude to investment risk.
- His capacity for loss was also "medium".

- He planned to retire at age 67.

Mr W's BSPS benefits had a cash equivalent transfer value (CETV) of around £315,000 at the time of the advice. He had accrued a deferred pension of approximately £12,700 pa. That was projected by CST to be worth just over £23,200 pa when he reached the scheme's normal retirement age of 65. It would be payable until death and would increase annually. He also had the option to commute some of his entitlement for a tax-free cash lump sum and reduced pension at retirement.

In the event of his death, the scheme provided benefits to his family in several ways. It included a spouse's pension of 50%, a dependant's allowance for his children, and a return of his contributions which were worth just over £41,600 at that time.

He had no other deferred pensions although he was a contributing member of his employer's defined contribution scheme which he'd joined in April 2017. The combined employer and employee contributions totalled 18% of his salary. It was noted he would receive his state pension at age 67 and post-sale that was confirmed to be worth £159 pw.

CST produced a Transfer Value Analysis Report (TVAS) which was based on a retirement age of 65 and produced a critical yield of 6.11% pa if benefits were taken in the form of a reduced pension plus pension commencement lump sum (PCLS), or 7.29% pa if all benefits were taken as a pension.

CST recommended that Mr W accept the CETV and move it to an AJ Bell SIPP. It further recommended that the funds then be invested with Brewin Dolphin, a Discretionary Fund Manager (DFM), in a "cautious with risk" portfolio. A suitability report explaining the recommendation was produced on 14 September 2017 and was accompanied by a Key Features Document and a personal Illustration for the SIPP, along with a cash flow modelling projection.

The suitability report said Mr W wanted to:

- Secure the generous transfer value.
- Have the option to retire earlier than 65 without a loss of entitlement/benefit and without taking a reduction in his pension.
- Have the option to take an income of £20,000 per annum from age 65.
- Have any residual funds distributed to his wife and children in the event of his death and to his children solely in the event of both he and his wife passing away.

It also said the critical yield could not be guaranteed to be achieved. However, CST was recommending the transfer because:

- The new plan provided flexi-access drawdown which would allow him flexibility and tax efficiency when drawing retirement income.
- The value of the funds would not be subject to inheritance tax and could provide a legacy for future beneficiaries.
- Leaving the benefits within BSPS would mean his nominated beneficiaries would potentially receive nothing from the scheme.
- A transfer would secure a much higher level of death benefits over the longer term.

The proposed plan carried an initial adviser charge of £3,150, based on 1% of the transfer value, as well as an ongoing adviser charge of 0.5% of the fund value. In addition, a SIPP establishment charge of £144 applied along with a "Transfer In Charge" of £72. A quarterly administration charge of £240 per annum was also applicable. 0.75% of the fund value would also be payable as an annual management charge to the DFM. So, the annual cost of the proposed plan would be in excess of 1.3% pa.

Mr W accepted the advice and, on 25 September 2017, he completed the discharge forms.

On 30 November 2017, a further TVAS was produced which was based on a retirement age of 57. It showed a critical yield of 8.06% was required and it was projected that on the illustrated drawdown basis, his fund would run out completely by age 88.

AJ Bell confirmed that it had received the CETV on 3 January 2018. CST provided ongoing servicing to Mr W until June 2022 when Mr W moved the servicing of his account to a different financial adviser and raised his complaint with this service.

Having been asked to respond to the complaint, CST provided its final response letter on 25 October 2022.

It said it was declining to uphold Mr W's complaint as it considered that the advice was appropriate for his circumstances and objectives, including investing his fund in the hope it might increase in value sufficiently to retire sooner than the normal BSPS scheme age of 65.

Mr W didn't accept that outcome and requested that this service consider the matter.

Having assessed 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 6.11% and to match them at age 57 it was 8.06%. The discount rate to age 65 was 4.6% and, taking into account Mr W's attitude to risk, along with the regulator's mid band growth projection of 5% pa, it was unlikely that the scheme benefits could be bettered through transferring.

- Mr W was over 20 years from retirement, and the suitability report set out that he didn't wish to set in his stone his wishes at the time. But this was precisely what Mr W would be doing by accepting CST's recommendation and making the irreversible decision to transfer out. Mr W had a low expectation of essential expenditure by retirement and it was likely that the BSPS benefits would meet his needs. Further, by transferring to the BSPS 2, Mr W would have had the option of transferring and taking benefits flexibly nearer to retirement if required

- According to the TVAS, the post transfer fund would run out by age 91 if he retired at 65, and by age 88 if he retired at 57. It didn't seem that this information had been provided to Mr W prior to his agreement to transfer. Further, Mr W didn't have the capacity for loss, in terms of other assets, to tolerate the financial risk of that being borne out.

- Exhausting his pension funds would provide no lump sum legacy for his family, which hadn't in any case been demonstrated to be required, but the purpose of retirement benefits was to provide an income for the retiree. If Mr W's family had required a lump sum in addition to the death in service benefits and those which would be provided by the defined contribution plan, this could have been addressed by looking into separate life cover.

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 W 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 W 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 W's pension plan, but if this wasn't possible, it should be paid directly to Mr W, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

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 W.

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 W'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, it's been referred to me for review.

CST has since indicated that, whilst it doesn't know the precise current value of Mr W's SIPP, its estimate is that he has suffered no loss according to the redress calculator.

**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 W'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 W's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 6.11% to age 65. Or to match the scheme benefits at age 57, it was 8.06%.

- Mr W was recorded as having a "medium" 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 what Mr W had told it about being "very cautious by nature" in respect of his BSPS benefits. I think this would in any case be somewhat at odds with the very principle of the transfer, where all the investment risk would thereafter be borne by Mr W. But I think the "cautious with risk" mandate to be adopted within the SIPP was likely to be a reasonable description of the type of risk rating which was appropriate for Mr W.

- Given this, along with the discount rate of 4.6% to age 65, and the regulator's middle projection rate for growth (5% pa), I think Mr W was more likely than not to receive pension benefits, from age 57 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 W, 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 41 year old. Mr W said that he intended to retire at age 67, although he wished to have the option to retire earlier. Mr W'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 W 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 two 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 W drew in his lifetime. And given that the drawdown income from the transferred funds was predicted to run out by ages 88 or 91 (dependent upon whether Mr W retired at 57 or 65 respectively) this may well not have provided the legacy that Mr W 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 W. As set out by the investigator, there was no clear rationale as to why such lump sum benefits, beyond those which would in any case be provided by the death in service provision and the defined contributions accrual, would be required. And ultimately CST shouldn't have encouraged Mr W to prioritise the potential for alternative death benefits through a SIPP over his security in retirement.

- Any desire Mr W had for flexibility could have been addressed by utilising his defined contribution accrual when he came to retire. He would, by the age of 65, have had some 24 years' defined contributions, which, given the overall contribution from him and his employer, would likely have been significant.

- The suitability report didn't specifically record that Mr W had concerns about the prospects for the BSPS. But even if he did - and I acknowledge that this wasn't an uncommon sentiment at the time amongst his colleagues - at the time of the advice, all signs pointed toward the BSPS 2 being established. But even if not, the PPF still provided Mr W with guaranteed income, the option of accessing tax-free cash, and early retirement. Mr W was unlikely to improve on these benefits by transferring.

Overall, I can't see persuasive reasons as to why it was clearly in Mr W'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 W 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 W 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.

I've noted what CST has said more recently about Mr W likely having suffered no loss as a result of the transfer. And this may be the case. But it should now undertake the calculation to determine this.

A fair and reasonable outcome would be for the business to put Mr W, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr W 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 W and our service upon completion of the calculation.

Mr W hasn't yet retired, and cannot do so for many years. Mr W expressed a keenness to have the option to retire early, rather than there being a clear plan to do so. As set out above, he said that he intended to work to at least age 65. 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 W'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 W redress as a cash lump sum payment,

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

- if Mr W 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 W 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 W's end of year tax position.

Redress paid to Mr W 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 W'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 W 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 W the balance.

If Mr W 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 W could accept my decision and go to court to ask for the balance. Mr W may want to consider getting independent legal advice before deciding whether to accept my final decision.

## 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 W to accept or reject my decision before 27 December 2023.

Philip Miller
**Ombudsman**