DRN-4010639

The complaint

Mr B has complained that Cambrian Associates Limited (CAL) gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) – the British Steel Pension Scheme (BSPS) – to a Personal Pension Policy (PPP).

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business, including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, one of which was a transfer to the Pension Protection Fund ("PPF") – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

In May 2017, the Pension Protection Fund (PPF) made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr B'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 PPP.

Mr B was given a cash equivalent transfer value (CETV) from the BSPS of £416,104 on 16 October 2017. He had 29 years' pensionable service from 1984 to 2013 which would provide him with a preserved pension of £16,675 pa.

In the event of his death, there was a spouse's pension of £8,338 and also a dependant's pension for children still in full time education. If this occurred before retirement, his personal contributions of £54,657 would also be paid out as a lump sum.

Mr B met with CAL on 17 November 2017 and a fact find was completed. This recorded the following:

- He was 54 and his wife was 53.
- They were both in good health.
- They had three children but all were independent.
- He was employed earning £57,358 pa. He'd been with the same employer since 2013.
- Mr B was in a defined benefit scheme with that employer.
- His wife was employed part time and earned £8,890 pa.
- They owned their own home with no outstanding mortgage. It was valued at £190,000.
- They had £12,000 in a savings account.
- They had no debts.

The fact find meeting notes confirmed that Mr B's objectives were as follows:

- He wanted to retire at age 60 on a pension income of £30,000 pa.
- He wanted the ability to pass on his pension fund to his wife in the event of his death.
- He wanted to be able to allow for a reduction in his pension when his current employer's pension started at age 62 and also when he took his state pension at age 67.

Mr B's attitude to risk was also covered in the fact find. After answering a number of statements relating to his attitude towards finances in terms of agreeing, disagreeing or being neutral, Mr B was rated as having a 'cautious' attitude to risk.

A transfer value analysis (TVAS) report was completed which showed a projected income of £22,179 pa at age 65, or £18,187 pa at age 60.

Critical yield figures – the yearly level of growth in the transferred pension fund required to match the scheme benefits - were produced. For retirement at age 65 the critical yield was 8.75% pa and for retirement at age 60, the figure was 15.44%.

CAL recommended a transfer to a Prudential Retirement Account, investing 50% in the Prufund Cautious Fund Series E and 50% in the Prufund Growth Fund Series E.

A suitability report was produced on 27 November 2017. This recorded that Mr B was concerned about the possibility of the BSPS transferring into the PPF and that he was also aware that in the event of his death, his BSPS pension would be reduced by 50% for his wife and would leave no inheritable lump sum for either his wife or children.

His objectives were reiterated within that report as follows:

- Being able to retire at 60 with a pension income of £30,000 gross pa.
- Being able to alter income levels in the future.
- Having a fund that could be passed to his beneficiaries in the event of his death.
- Wanting to sever all links with Tata Steel UK as he was concerned about the financial stability of the company, and therefore the security of his pension.

Mr B accepted CAL's recommendation to transfer.

Mr B then complained about the advice in September 2022. CAL declined to uphold the complaint, and, dissatisfied with the response, Mr B referred the matter to this service.

Having considered the complaint, our investigator thought that it should be upheld. He said the following in summary:

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests. CAL confirmed in the suitability report that it took this into account.

- There was inconsistency in Mr B's apparent concerns about the BSPS – the objectives section had recorded Mr B as wishing to break all ties with it, but in the "defined benefit questionnaire" he'd said that he had no reason to question the financial stability of his ex-employer or the manner in which the BSPS was being administered. But even if he did have concerns, these should have been appropriately managed by CAL.

- Although the transfer was recommended on the basis of Mr B being able to flexibly access his BSPS benefits from age 60, Mr and Mrs B would have accrued significant savings by that time through their disposable income. Mr B could have accessed these, on top of his BSPS pension, until his other defined benefit pension began when he was 62/63. He would then have broadly satisfied his income needs through guaranteed benefits.

- By transferring, much of Mr B's pension was now subject to investment risk and he planned to work beyond 60 due to concerns about the PPP's prospects.

- Mr B was still six years away from prospective retirement and so there was no need to transfer at that point – he had previously been in a strong position with two defined benefit scheme accruals.

- Mr B had a cautious risk attitude, and some of his answers in the risk profiling exercise suggested that there was a lack of understanding on his behalf as to what was involved in moving from a defined benefit scheme to a PPP where all the risk would be transferred to him.

- It wasn't clear why lump sum death benefits would be so important to Mr (and Mrs) B. they had no dependent children, owned their home outright and both had death in service benefits. Further, pension benefits were designed to provide an income to the individual.

- 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 8.75% and to match them at age 60 it was 15.44%. The discount rates to those ages were 3.8% and 3.1% respectively and, taking into account Mr B's attitude to risk, along with the regulator's low, mid and high rate growth projections (2%/5%/8%) it was unlikely that the scheme benefits could be bettered through transferring.

- The income modeller projected that, at a growth rate of 4% pa, the pension funds would be exhausted by the time Mr B was 94. But this assumed growth rate seemed high, given Mr B's attitude to risk. And in CAL's response to Mr B's complaint, its assumed growth rate for a cautious investor was in any case lower than this.

The investigator recommended that CAL undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr B 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 B 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 B's pension plan, but if this wasn't possible, it should be paid directly to Mr B, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

He also said that CAL should pay Mr B £300 in respect of the trouble and upset that the matter would have caused him.

Mr B accepted the investigator's findings. CAL didn't accept them, however, saying the following in summary:

- The investigator hadn't considered the total household income in retirement. Had Mr B retained his scheme benefits, he would have had too much income, which would likely have been saved on deposit and eroded by inflation. Transferring provided the flexibility to withdraw income as he needed it, and would have provided enough, combined with the other sources, to meet Mr B's needs, along with any unused funds then providing a lump sum for his family in the event of his death.

- Mr B had worked for 29 years to accrue his pension benefits and he wished to pass on any unused benefits to his family. If Mrs B predeceased him, the benefits would be lost in the event of his own death. Given Mr and Mrs B's other sources of secure income, the death benefit provided by the PPP for their children would be an important and valuable legacy.

- It disagreed that Mr B would need to work beyond 60 as a result of the transfer. The PPP fund value was more than sufficient to provide Mr B with the income he would need from age 60 and then reduce this as guaranteed income from other sources begins.

- As to inconsistencies in what Mr B had said about his concerns regarding the BSPS, Mr B had made it clear that he wished to transfer and as quickly as possible.

- CAL had also discussed Mr B's options with him, which included retaining his scheme benefits.

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 CAL to use the FCA's BSPS-specific calculator to determine any redress due to Mr B.

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

No further comments were received from either party regarding this, but as agreement hadn't been reached on the matter, it's been referred to me for review.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of B's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, CAL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B'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 CAL was required to carry out by the regulator said that the critical yield - how much Mr B's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 8.75% to match the benefits he'd have been entitled to under the scheme at age 65. To match them at 60, the critical yield was 15.44%.

- Given Mr B's recorded "cautious" attitude to risk, the discount rate of between 3.1% and 3.8% between ages 60 and 65, and the regulator's middle projection rate for growth (5% pa), I think Mr B was more likely than not to receive pension benefits, from either age 60 or 65, of a lower value that those he'd have been entitled to under the BSPS 2 (or most likely the PPF) by transferring and investing in line with that attitude to risk.

- Early retirement was clearly appealing to Mr B, as it might reasonably be appealing to a great many people, but this would likely also have been possible by accessing his BSPS benefits at age 60 and his separate defined benefits at age 62, along with the savings which he and Mrs B would have accrued by that time though disposable income.

- Mr W may then have been in the fortunate position of receiving an income which was higher than his actual needs, especially when the state pension began, but he could have simply reinvested any excess as he saw fit, or, to provide a legacy for his family, immediately gift it away to avoid it being subject to inheritance tax.

- In terms of the alternative lump sum benefits a transfer offered to his family, the priority here was to advise Mr B about what was best for his retirement. While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer would likely be different if Mr B was drawing upon it, especially to a significant degree in the early years after retirement. It would also be dependent on investment performance, and so may not have provided the legacy that Mr B may have thought it would. Mrs B would also be denied the guaranteed, escalating 50% spouse's pension which would otherwise have been provided by the scheme for the rest of her life, not to mention the five year guaranteed period of full payment after the pension had begun to be paid.

- Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr B. There was no identified need for a lump sum, given Mr and Mrs B's likely situation in retirement, and the financial independence of their children. And if a legacy was important to them, this could have been achieved in other ways – they had an unencumbered property valued at £190,000 and would also have had savings which could be passed to their estate in the event of their deaths.

- My view is that CAL shouldn't have encouraged Mr B to prioritise the potential for alternative death benefits through a personal pension over his own security in retirement.

- Notwithstanding the seemingly contradictory records regarding Mr B's concerns, or otherwise, about the BSPS and his ex-employer, I think Mr B's desire for control over how his pension was invested was likely overstated. As with the investigator, I can't see that he had an interest in managing, or the knowledge to be able to do so, his pension funds on his own. Given his cautious risk attitude and lack of other experience I don't think that this was likely a genuine objective for Mr B – it was simply a consequence of transferring away from his defined benefit scheme.

- Mr B may nevertheless have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was CAL's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BSPS 2 being established. But even if not, the PPF would still provide Mr B with guaranteed income and the option of accessing tax-free cash. Mr B was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons as to why it was clearly in Mr B's best interest to relinquish his defined benefits and transfer them to a PPP. And I also haven't seen anything to persuade me that Mr B 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 B received from CAL was unsuitable.

Putting things right

As set out in the investigator's further comments relating to the BSPS-specific redress calculator, I consider that it would be appropriate to use that calculator here, given the BSPS-specific circumstances.

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

Cambrian Associates 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.

Cambrian Associates 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 B and our service upon completion of the calculation.

Mr B hasn't yet retired, and although I've noted Cambrian Associates Limited's assertion that this should still be possible for him, he has clearly become concerned about the prospects of the PPP and so has delayed this. He's still working and his plans are now uncertain. So 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 B'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, Cambrian Associates Limited should:

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

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

- if Mr B accepts Cambrian Associates Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B as a cash lump sum 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 B's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

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 Cambrian Associates Limited to pay Mr B 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 Cambrian Associates Limited pays Mr B the balance.

If Mr B accepts this final decision, the award will be binding on Cambrian Associates Limited.

My recommendation wouldn't be binding on Cambrian Associates Limited. Further, it's unlikely that Mr B could accept my decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept my final decision.

I also agree with the investigator that Cambrian Associates Limited should pay Mr B £300. I think it's likely that he'll have experienced not inconsiderable levels of concern over this matter – which has also seemingly fed into his revised retirement plans.

My final decision

My final decision is that I uphold the complaint and direct Cambrian Associates Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 13 December 2023.

Philip Miller
Ombudsman