DRN-4189569

The complaint

Mr C's representative has complained, on his behalf, 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 C's employer would be set up – the BSPS 2.

This was, however, intended to receive deferred benefits only. The main defined benefit OPS had been replaced by a new defined contribution scheme. The existing scheme was due to be closed in the near future, with the options being set out in a subsequent letter in October 2017 for deferred members to either transfer their benefits to the successor scheme, BSPS 2, the PPF or into a private arrangement, such as a PPP.

Mr C had preserved benefits from 23 years' service. At the date of leaving (31 March 2017), he had a preserved pension income of £15,624 pa to be revalued to scheme retirement age - 65. The cash equivalent transfer value (CETV) was £428,500.

A fact find was completed on 9 October 2017 recording the following details about Mr C and his family:

- Mr C was married. He and his wife were 40 and in good health.
- He was employed earning a basic annual gross salary of £40,000, topped up to around £55,000 with overtime and bonuses. Mrs C was employed with an annual salary of £35,000 basic plus bonuses.
- Joint net monthly income was £5,750 and monthly expenditure was £2,300, providing a net disposable income of £3,450 per month.
- They had two dependent children.
- Their outstanding mortgage was £40,000, although it was anticipated this would be repaid within four years with overpayments.
- Mr and Mrs C had joint cash savings of £20,000 with no other liabilities.
- Mr C was a member of his employer's workplace pension, receiving total contributions of 16% of salary.
- Mrs C was a member of her company's defined contribution pension plan, valued at around £70,000 – she also had a deferred defined benefit pension.
- Both parties benefitted from death in service life cover, Mr C with four times' salary, and Mrs C with three times' salary.

A retirement planning and pension transfer questionnaire recorded the following details relating to Mr and Mrs C's objectives:

- The option for both Mr and Mrs C to retire at age 55 was important, with a target joint retirement income, in 2017 terms, of £30,000 pa.
- Mrs C anticipated retirement income at age 65, using her two occupational schemes, of around £14,000 a year.
- Mr C had concerns regarding the financial security of his ex-employer and didn't wish for his BSPS benefits to remain under their control.
- He wanted his BSPS benefits under his control, his family to inherit the fund upon his death *'…and not go to Tata'*, and flexible income in retirement so his income drawdown could reduce when the state pension and Mrs C's pensions became payable. He had no need for a cash lump sum at retirement.

A risk profiling exercise was undertaken which determined that Mr C had a balanced attitude to investment risk and a moderate capacity for loss.

A transfer value analysis (TVAS) was produced on 19 October 2017, which was based on the BSPS benefits.

CAL said that the post 1997 benefits were all assumed to increase by RPI capped at 5% for the purposes of the TVAS, which produced an overestimate of the growth needed to match the BSPS benefits. This was because the revaluation rates under the BSPS 2 would be lower.

The critical yield to match the BSPS benefits was 6.07% pa for a full pension at age 65, and a projected annual income of around £29,000. This would require a fund value of around £1.3m.

At age 55, the critical yield was 9.5% pa with an annual income of around £20,000.

The critical yield to match benefits from the PPF at age 65 was calculated at 4.08% pa, with an annual pension income of around £23,000.

A Prudential illustration was also produced on 19 October 2017 based on an investment return at the mid-growth rate. The estimated fund value at age 65, after allowing for all charges and inflation, was around £536,000.

A suitability report was issued on 24 October 2017 confirming a recommendation to transfer the BSPS benefits to a PPP with Prudential and invest 100% in the Prufund Growth Fund to match Mr C's attitude to risk. Mr C's main needs and priorities were summarised as being:

"*To be able to achieve an initial income of £30,000 per annum in retirement which will be an accumulation of tax free cash and income to utilise your personal allowance to minimise income tax on your retirement income at age 55 then reduce this when yours and [Mrs C's] State Pensions commence and [Mrs C's] Occupational Pension and [defined benefit pension] commence at age 65 and be able to take ad-doc withdrawals as and when required.*

- *As you have accumulated a large fund over many years of your working life, you wish to avoid the possibility of the fund's disappearance if both you and [Mrs C] were to die young.*

- *To leave your pension fund to [Mrs C] and/or your two children to inherit on your death that is free from inheritance tax under current legislation.*

- *To review the suitability of your Defined Benefit Scheme with BSPS, to see if it is in line with your objectives."*

Mr C accepted the recommendation, signing the application form on 1 November 2017.

In October 2022, Mr C complained through his representative to CAL, expressing concern about the suitability of the advice. CAL investigated but found the advice to have been suitable. Mr C subsequently referred his complaint 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 said that Mr C's main objective was to retire at 65, but this wasn't entirely accurate – he said that he wanted the option to be able to do so – and early retirement was in any case available to him from his safeguarded BSPS benefits. Mr C couldn't in any case retire until 57, rather than 55 as set out in the suitability report, and this would be dependent upon overall affordability.

- Although the scheme pension payable with early retirement would be reduced, this simply reflected the longer period of payment, and Mr C should have been appropriately informed that this wasn't a "penalty" – and that if he retained his scheme benefits he wouldn't need to worry about an alternative pension fund depleting.

- It was difficult to know, given that Mr C was 40, what his plans might be in 17 years' time, or whether early retirement would be affordable. Mr C didn't need to make an irreversible decision to transfer at that age.

- Although the transfer was recommended on the basis of Mr C being able to flexibly access his BSPS benefits early, Mr and Mrs C would likely have accrued additional savings by that time through their disposable income. Mr C could have accessed these, along with the 17 years' defined contributions which he would have accrued by that point, on top of his BSPS pension if necessary. He would then have broadly satisfied his income needs through guaranteed and non-guaranteed benefits, with Mrs C's pensions then beginning, along with the state pensions.

- The recommendation placed a heavy emphasis on Mr C's desire to leave a lump sum legacy from his pension benefits. But Mr C could have left a legacy in other ways – the death in service benefits pre-retirement and the spouse's benefits both pre and post retirement. There was also the accrued savings and the defined contributions which Mrs C could rely upon in the event of Mr C's death. But pension benefits were in any case designed to provide an income to the individual.

- The objective to have control over his pension funds had been overstated – Mr C had no investment experience, nor the knowledge to appropriately manage his pension funds. If he'd been made aware of the option of combining the guaranteed and non-guaranteed benefits which he would have accrued by retirement with which any flexibility requirements could have been met, Mr C would have looked at things differently.

- In the event that the benefits entered the PPF, Mr C would still have benefited from guaranteed protections, and this should have been appropriately communicated to him.

- 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 discount rates to ages 57 and 65 were 4.3% and 4.6% respectively and, taking into account Mr C's attitude to risk, along with the regulator's low, mid and high rate growth projections (2%/5%/8%), and the growth rate of 6.2% pa used in the cashflow modelling, it was unlikely that the scheme benefits could be bettered through transferring.

- This was further illustrated by the comparison between the fund which would be required at age 65 to replace the scheme benefits (£1.3m) and the PPP's projected fund value at the same age of £536,000. This confirmed that the CETV shouldn't have been regarded as representing value for money.

The investigator recommended that CAL undertake a loss calculation in accordance with regulator's policy statement PS22/13, and as set out in the regulator's handbook in DISP App 4 – and on the basis that Mr C would have opted to join the BSPS 2. Mr C had no plans to retire at present (and indeed couldn't do so for many years) and so the investigator said that the calculation should be based upon an assumed retirement age of 65, as per the regulator's usual assumptions in its guidance.

If the redress was paid directly to Mr C, CAL could make 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 C £300 in respect of the trouble and upset that the matter would have caused him.

The investigator then contacted both parties to slightly amend the redress wording, reflecting the introduction of the regulator's BSPS redress calculator.

Neither party submitted any further comments in response to the investigator's assessment.

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 CAL'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, CAL should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

- The TVAS report which CAL was required to carry out by the regulator said that the critical yield - how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 6.07% to match the benefits he'd have been entitled to under the scheme at age 65. To match them at 55, the critical yield was 9.5%. And so for age 57, it was likely somewhere in between.

- Given Mr C's recorded "balanced" attitude to risk, the discount rate of between 4.3% and 4.6% between ages 57 and 65, and the regulator's middle projection rate for growth (5% pa), I think Mr C was more likely than not to receive pension benefits, from either age 57 or 65, of a lower value that those he'd have been entitled to under the BSPS 2 by transferring and investing in line with that attitude to risk.

- Early retirement was clearly appealing to Mr C, as it might reasonably be appealing to a great many people, but as noted by the investigator, Mr C was looking at this as an option, rather than a requirement. And given Mr C's age at the time, being some 17 years from the point at which he could retire, I think this is entirely reasonable. And as also set out by the investigator, it's likely that Mr and Mrs C would likely also have been able to meet their income needs in retirement through accessing their defined benefits and defined contributions accruals (flexibly if required in the case of the latter), along with the savings they would have accrued - and then further enjoyed the state pensions when they began.

- In terms of the alternative lump sum benefits a transfer offered to his family, the priority here was to advise Mr C about what was best for his retirement. 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 C 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 C may have thought it would. Mrs C 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 C. There was no identified need for a lump sum in the event of Mr C's death, given Mr and Mrs C's likely situation in retirement, and the likely financial independence of their children by the time they came to retire. And if a legacy was important to them, this could have been achieved in other ways – they would have had an unencumbered property valued at £155,000 (in 2017) 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 C to prioritise the potential for alternative death benefits through a personal pension over his own security in retirement.

- As with the investigator, I think Mr C's desire for control over how his pension was invested was likely overstated. 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 balanced risk attitude and lack of other experience I don't think that this was likely a genuine objective for Mr C – it was simply a consequence of transferring away from his defined benefit scheme.

- Mr C may have 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 C with guaranteed income and the option of accessing tax-free cash. Mr C was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons as to why it was clearly in Mr C's best interest to relinquish his defined benefits and transfer them to a PPP. CAL itself pointed out to Mr C in its suitability report that it would be very unwise for him to transfer his benefits – and I agree. But for the reasons set out above, I don't think the reasons it provided to then in any case transfer were sufficiently compelling.

And I also haven't seen anything to persuade me that Mr C would have insisted on transferring, against advice to remain in the defined benefit scheme.

So, as with the investigator, I'm upholding the complaint as I think the advice Mr C received from CAL was unsuitable.

Putting things right

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

A fair and reasonable outcome would be for the business to put Mr C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr C would more likely than not have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given.

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 C and our service upon completion of the calculation.

Mr C hasn't yet retired, and cannot do so for many years. As early retirement was set out as a desirable option, rather than a firm objective, I don't think it can reasonably be concluded that it's more likely than not that Mr C will access his ex-BSPS benefits before the normal scheme retirement age, especially with the flexibility that the defined contributions accrual and Mrs C's pension provision might afford. And so the calculation should be run to the scheme's normal retirement age.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr C's acceptance of my final decision.

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

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

- explain to Mr C before starting the redress calculation that:

  - its redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and

- a straightforward way to invest their redress prudently is to use it to augment their defined contribution pension

- offer to calculate how much of any redress Mr C receives could be augmented rather than receiving it all as a cash lump sum,

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

and

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

Redress paid to Mr C as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr C's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that the business pays the balance.

Determination and money award: I require Cambrian Associates Limited to pay Mr C the compensation amount as set out above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I would also recommend that Cambrian Associates Limited pays Mr C the balance.

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

I also agree with the investigator that Cambrian Associates Limited should pay Mr C £300. I think it's likely that he'll have experienced not inconsiderable levels of concern over this matter and he has faced uncertainty over his 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 C to accept or reject my decision before 27 December 2023.

Philip Miller
Ombudsman