DRN-4300321

The complaint

Mr P 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).

Mr P has also said that he was also unsuitably advised to withdraw tax free cash from the transferred sum.

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 P'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 P met with an adviser from CAL to discuss his retirement planning needs. CAL then completed a fact find analysis to establish Mr P's circumstances and financial objectives on 25 August 2017. An assessment of Mr P's attitude to risk determined that Mr P's risk appetite was 'defensive'. The fact find also recorded the following about Mr P:

- He was 56 years old, in good health, and married to Mrs P, aged 55, who was also in good health.
- They had two financially non-dependent children.
- Mr P was employed, earning £36,000 pa, plus potential bonuses of £2,000.
- Mrs P was employed, earning £7,000 pa.
- Joint net disposable income was £1,000 pm.
- Their home was valued at around £200,000 and there was no mortgage outstanding.
- They held cash deposits of £250,000.

- Mr and Mrs P wanted to retire at age 58.
- Mr P was contributing 6% and his employer was contributing 10% to the replacement group personal pension.
- Mrs P was also contributing to her own pension plan.

A transfer value analysis (TVAS) was completed on 19 October 2017 which set out a pension of £26,861 pa, with a critical yield (the required rate of return to match the scheme benefits) of 10.69% pa, at age 65. At age 58 a critical yield of over 50% was applicable. In comparison to the PPF, a critical yield of 4.52% applied to age 65, with 18.75% applicable at age 58.

CAL issued a suitability report on 21 October 2017. It recommended that Mr P transfer his defined benefits to a Prudential PPP and invest in the PruFund Cautious Fund. CAL recorded that Mr P had the following objectives, which formed the basis of its reasons for recommending the transfer:

- Flexibility in retirement to be able to reduce pension income once Mr and Mrs P's state pensions commence, along with other another deferred pension held by Mr P Mrs P's own pension provision.

A "Retirement Modeller" was produced on 25 October 2017 and Mr P signed a Prudential application on 27 October 2017, accepting CAL's recommendation.

Mr P complained to CAL on 4 October 2022, raising concerns that the advice was unsuitable for the following reasons:

- He had lost valuable guarantees which may lead to him being financially worse off in retirement.
- He wasn't advised to use his defined contributions for early retirement and that leaving his BSPS pension to age 65 would have not incurred penalties.
- He wasn't informed of the option to stay in the BSPS.
- The advice to take 25% tax free cash was unsuitable.

CAL declined to uphold Mr P's complaint, saying the transfer recommendation was suitable.

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

- The regulator's guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual's best interests.

- The advice had been after the regulator had given instructions in final guidance FG17/9 as to how businesses could calculate future "discount rates" for complaints about transfers which were being upheld. Prior to that, this service was publishing information with which businesses could calculate future "discount" rates.

- Whilst businesses weren't required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.

- The discount rates for one year to retirement and eight years to retirement were 2.5% and 3.5% respectively and, taking into account Mr P's attitude to risk, along with the regulator's low, mid and high rate growth projections (2%/5%/8%), and the 5.5% pa growth rate used in the income modeller, it was unlikely that the scheme benefits could be bettered through transferring.

- Mr P's prior history had been risk averse – repaying his mortgage and accumulating cash deposits of £250,000. Mr P had also indicated in the risk profiling exercise that he strongly disagreed with the prospect of feeling comfortable with stock market investment, and also strongly disagreed with the statement that he was a financial risk taker. A transfer to a risk based environment wasn't therefore aligned to Mr P's risk attitude, nor in his best interests

- Any desire to leave a lump sum legacy for his family could have been met, risk free, by accessing benefits in the PPF and taking the tax free sum lump sum of £112,053, alongside the considerable amount held in savings. There were also important benefits, such as the guaranteed, escalating spouse's pension, which would have been payable to Mrs P in the event of Mr P's death.

- Mr P could also have relied upon their savings for the required income before accessing his BSPS benefits.

- Any concerns Mr P had about the future of the scheme should have been appropriately managed by CAL – and even if the scheme needed to move into the PPF, it should have been explained that this still represented important guaranteed benefits. Based upon the critical yields, a PPP was unlikely to match the benefits Mr P would receive from either the BSPS 2 or the PPF.

- CAL hadn't clearly demonstrated that the transfer was in Mr P's best interests and there was no compelling need for Mr P to transfer.

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 P would have opted to join the PPF. Mr P had already begun accessing his pension benefits at 58, and so this should be used as his actual retirement age.

If the redress was paid directly to Mr P, 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 P £200 in respect of the trouble and upset that the matter would have caused him.

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 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 deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 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 P'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 P's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 10.69% to match the benefits he'd have been entitled to under the scheme at age 65. To match them at 58, the critical yield was over 50%. And to match the PPF benefits, these were 4.52% and 18.75% respectively.

- Given Mr P's recorded "defensive" attitude to risk, the discount rate of between 2.5% and 3.5% between ages 58 and 65, and the regulator's low projection rate for growth (2% pa) which I think would be relevant for his attitude to risk, I think Mr P was more likely than not to receive pension benefits, from either age 58 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.

- In terms of the alternative lump sum benefits a transfer offered to his family, the priority here was to advise Mr P about what was best for his retirement. While the CETV figure may have appeared attractive as a potential lump sum, Mr and Mrs P had significant cash savings and, as set out by the investigator, this could have been enhanced by Mr P accessing the tax free cash from his BSPS benefits if required. A transferred lump sum would also be dependent on investment performance, and so may not have provided the legacy that Mr P may have thought it would. Mrs P 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 P. There was no identified need for a lump sum in the event of Mr P's death, given Mr and Mrs P's likely situation in retirement (substantial cash savings and no mortgage) and the financial independence of their children.

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

- Mr P may have had concerns about the pension scheme and the prospect of it 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 P with guaranteed income and the option of accessing tax-free cash. And on the basis that Mr P was intending on retiring early, there were in any case advantages to transferring into the PPF. As set out by the investigator, given the critical yields and Mr P's attitude to risk, Mr P 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 P'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 P 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 P received from CAL was unsuitable.

I've also considered the additional aspect of Mr P's complaint relating to what he considers to have been the recommendation to take tax free cash at age 58. But I can see from the suitability report that it wasn't envisaged that Mr P would either need, or take, a large tax free cash lump sum, and instead would manage his income requirements tax efficiently by taking smaller amounts as a combination of tax free cash and income.

I also can't see that there was any subsequent recommendation that Mr P access his benefits for the sole purpose of taking tax free cash, as then happened in 2018.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr P would more likely than not have remained in the occupational pension scheme and, given the expected advantages of the PPF on the basis of planned early retirement, opted to join the PPF 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 P and our service upon completion of the calculation.

Mr P retired and began accessing his pension benefits when he was 58. And so the calculation should be undertaken on the basis of retirement at that 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 P'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 P redress as a cash lump sum payment,

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

- if Mr P accepts Cambrian Associates Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr P 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 P's end of year tax position.

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

If Mr P 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 P could accept my decision and go to court to ask for the balance. Mr P 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 P £200. I think it's likely that he'll have experienced not inconsiderable levels of concern over this matter.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 21 December 2023.

Philip Miller
Ombudsman