

The complaint

Mr W complains that he was given unsuitable advice by Hugh James Solicitors to transfer the benefits from his defined benefit ('DB') scheme with British Steel ('BSPS') to a personal pension.

What happened

In March 2016, Mr W's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). The PPF acts as a 'lifeboat' for insolvent DB pension schemes, paying compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme. Alternatively, members of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement included 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 BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

In October 2017, members of the BSPS were sent a "time to choose" letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere.

Around the same time, Mr W sought advice from Hugh James Solicitors to discuss the options for his pension.

Hugh James Solicitors recorded some information about Mr W's circumstances. It noted that he was 43, engaged to marry with one child. Mr W was employed earning approximately £38,000. He owned his own home, which was unencumbered. He had cash assets of around £27,000 and he had no other liabilities. Mr W's attitude to risk was assessed by Hugh James Solicitors as being 'balanced.'

Hugh James Solicitors issued its recommendation on 19 October 2017.

In summary this said Mr W's objectives were to retire early at 55 (if possible); to save for a retirement fund that could provide a realistic income of £1,500 a month in retirement; to provide lump sum death benefits; and to provide flexibility and control. Hugh James Solicitors recommended that Mr W transfer his pension to meet his stated objectives. And it recommended a pension provider and two investment funds that it said was in line with his attitude to risk.

Mr W complained to Hugh James Solicitors in 2022 about the suitability of the transfer advice. In essence he didn't think the advice to give up a guaranteed pension income was suitable for him.

Hugh James Solicitors' representative replied and said that, in the interests of trying to settle the matter, it had carried out a redress calculation in line with regulatory guidance and it was willing to make an offer of settlement.

Mr W declined the offer and in doing so he raised some concerns about how the calculation had been made.

One of Investigators looked into the complaint. They thought the advice was unsuitable as Mr W wasn't likely to improve on the benefits he was already guaranteed by transferring. And they didn't think there were other compelling reasons to justify the transfer as being suitable – for example, Mr W didn't have firm early retirement plans, so it was too soon to give up his guaranteed benefits; Mr W already had flexibility to retire early, if that's what he ultimately decided; death benefits shouldn't have been considered an overriding concern; and his desire for control over his pension was overstated. They said if suitable advice had been given Mr W would've remained in the DB scheme and chosen to move to the BSPS2. They said Hugh James Solicitors should carry out a loss calculation in line with the regulator's updated guidance (PS22/13)

Hugh James Solicitors agreed to carry out the loss calculation. And this showed there was no loss.

The complaint was subsequently referred for a final decision.

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 Businesses ('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 Hugh James Solicitors' 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, Hugh James Solicitors should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr W's best interests.

Firstly - I can see that Hugh James Solicitors representative has said it doesn't consider it is necessary for this complaint to be considered by an Ombudsman. It says it carried out a loss assessment proactively at the outset of Mr W's complaint and again as it was asked to do by the Investigator, which showed no loss. It believes the complaint should be dismissed because it has already been dealt with. But ultimately the complaint remains unresolved, so it requires me to provide a final decision. Mr W has raised concerns about the overall redress method, so it is necessary for me to consider that, and if I uphold the complaint, award redress based on the situation now.

And having considered the evidence in this case, I have decided to uphold the complaint for largely the same reasons given by the investigator. Because I'm mindful that Hugh James Solicitors has ultimately carried out a loss calculation, in the circumstances I don't see the need to address the suitability of the advice it gave to Mr W in detail. So, in summary I think the advice to transfer was unsuitable for the following reasons.

- Given the critical yields produced by Hugh James Solicitors in the TVAS report of 15 October 2017, Mr W's recorded 'balanced' attitude to risk, the discount rate of 4.3% for 16 years to retirement (60) and the regulator's middle projection rate, I think Mr W was always likely to receive pension benefits, from age 60, of a lower value than those he'd have been entitled to under the BPS2 or the PPF by transferring and investing in line with that attitude to risk. And had Hugh James Solicitors produced analysis based on Mr W's actual target retirement age of 55, given the shorter term to retirement and the likelihood that the critical yields were significantly higher, I think he was even more likely to receive lower benefits than either the BPS2 or the PPF offered, if he retired earlier as he desired. For this reason alone, a transfer wasn't in Mr W's best interests.
- At 43, I'm not persuaded Mr W had likely given any serious thought to his retirement or reasonably understood what his needs would be some 12 years or more in the future. The evidence doesn't support that he had any kind of firm retirement plan – hence why I think the advice paperwork referred to a retirement age of: *"55 (if possible.)"*
- I'm certain Mr W liked the idea of retiring early. But he already had this option available to him – he didn't have to transfer to achieve things. And no doubt he was attracted to the flexibility a personal pension provided. But I think this was simply a feature or a consequence of transferring to a personal pension rather than a genuine objective of Mr W's.

Nothing suggests Mr W needed to vary his income throughout retirement and he had no large, planned capital expenditure, which warranted a larger cash lump sum greater than his DB scheme would provide. Indeed Mr W had no recorded cash lump sum need.

- In any event Mr W already had flexibility. Given the recorded 20% salary contribution being made to his DC workplace pension, I think this had the potential to create a pension fund that could've given him the flexibility to retire early - *if* that's what he ultimately decided. So I don't think transferring to obtain flexibility was in his best interests.
- Mr W's income need was recorded as being £1,500 a month. But again, I don't think he could reasonably know at this time what he'd need when he retired. And Hugh James Solicitors didn't carry out a detailed income and expenditure in retirement assessment to arrive at this figure or interrogate it – it appears to have simply accepted what Mr W said without challenge.
- Without a realistic understanding of Mr W's true needs in retirement, I don't think it was in his best interests to transfer at this time. Mr W's DB pension was estimated to be around £20,600 a year at 65 – a guaranteed and escalating income for life, which wasn't likely to be bettered by transferring. I think it would've likely satisfied most, if not all of Mr W's income need, which his DC scheme pension and savings could supplement. Or he could use these to help him retire early, if that's what he decided at the time. I think this was a more appropriate way for Mr W to meet his future retirement needs rather than risking his guaranteed benefits in an attempt to do so.
- I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr W. I don't think that insurance was properly explored as an alternative – assuming Mr W genuinely wanted to leave a legacy for his family. And ultimately Hugh James Solicitors should not have encouraged Mr W to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.
- I think Mr W's desire for control over how his pension was invested was overstated. I can't see that he had an interest in or the knowledge to be able to manage his pension funds on his own.

Overall, I can't see persuasive reasons why it was clearly in Mr W's best interest to give up his DB benefits and transfer them to a personal pension. And I also haven't seen anything to persuade me that Mr W would've insisted on transferring, against advice to remain in the DB scheme. Mr W was an inexperienced investor who neither possessed the requisite knowledge nor skill to act against the advice he was given. So, I'm upholding the complaint as I think the advice Mr W received from Hugh James Solicitors was unsuitable for him.

Putting things right

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 most likely have remained in the occupational pension scheme and opted to join the BPS2 if suitable advice had been given.

Hugh James Solicitors 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>.

Hugh James Solicitors should use the FCA's BSPS-specific redress calculator to calculate the redress.

For the benefit of Mr W - the calculator uses economic and demographic assumptions to calculate how much a consumer needs in their pension arrangement to secure equivalent BSPS retirement benefits that they would have been entitled to under either BPS2 or the PPF (as uplifted to reflect the subsequent buy-out), had they not transferred out.

If the calculation shows there is not enough money in the consumer's pension arrangement to match the BPS benefits they would have received, the shortfall is the amount owed to the consumer. If the calculation shows there is enough money in the consumer's pension arrangement, then no redress is due.

The BPS calculator has been developed by actuaries and is programmed by the FCA with benefit structures of the BPS, BPS2 and PPF (including the impact of the subsequent buy-out) and relevant economic and demographic assumptions which are updated regularly. This information can't be changed by firms.

The calculator also makes automatic allowances for ongoing advice fees of 0.5% per year and product charges of 0.75% per year which are set percentages by the FCA.

A copy of the BPS calculator output should be sent to Mr W and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what Hugh James Solicitors based the inputs into the calculator on.

For clarity, Mr W has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age (65), 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, Hugh James Solicitors should:

- calculate and offer Mr W redress as a cash lump sum payment,
 - explain to Mr W before starting the redress calculation that:
 - their 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 DC 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,
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- if Mr W accepts Hugh James Solicitors' offer to calculate how much of their 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 their 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 includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Hugh James Solicitors 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.

My final decision

Determination and money award: I uphold this complaint and require Hugh James Solicitors to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Hugh James Solicitors pays Mr W the balance.

If Mr W accepts this decision, the money award becomes binding on Hugh James Solicitors.

My recommendation would not be binding. Further, it's unlikely that Mr W can 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 any final decision.

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.

Paul Featherstone
Ombudsman