

The complaint

Mr C has complained that Tuto Money Limited (formerly Eadon & King) 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

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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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.

The advice process began in October 2017 with the completion of the retirement planning questionnaire. This was completed by Mr C’s financial adviser who referred Mr C to Tuto for transfer advice. This recorded the following information about Mr C:

- He was 55, married, in good health, with no dependent children.
- He was employed as a steelworker with plans to work until 66/67. At retirement, maximum income was required with no need for a lump sum.
- His annual income was £26,119 with Mrs C’s income being £6,240 from employment and further pension income of £3,440. These gave monthly incomes of £1,500 and £806 net respectively.
- The family home was valued at £190,000 with debts being a £6,000 mortgage and £4,000 on a credit card.
- Mr C held £15,000 in cash savings.

In addition to the above, Mr C’s attitude towards his pension and retirement was noted. Mr C wanted to be able to alter the pension income in order to fit his needs in retirement and wanted his wife to be able to do the same should she wish upon his death.

It was also noted that Mr C distrusted the BSPS trustees and wanted to move to a PPP.

Additionally, Mr C wanted to seek investment growth between the time of advice and retirement and wanted the ability to retire early should the need arise. An income of £2,000 pm was recorded as the desired income level in retirement with both Mr and Mrs C being forecast to receive £686 pm in state pensions at ages 67 and 66 respectively.

An attitude to risk (ATR) assessment resulted in Mr C being recorded as having an ATR of “7 out of 10”, where “7” was the lowest level of risk and “10” was the highest.

Finally, the notes section confirmed that there was to be no fee paid to Mr C’s own IFA for the initial advice, however ongoing advice post transfer was to cost Mr C 0.5% pa.

The ATR assessment was confirmed in a risk profile report dated 10 November 2017. This described the score as “highest medium”, and it gave examples of a target portfolio and noted the estimated growth potential of the target portfolio was 3.9% pa, adjusted for inflation.

The benefits provided by the BPS scheme were compared to those which may be provided by a transfer in the Transfer Value Analysis Report (TVAS) completed on 4 December 2017. This report calculated the critical yield figures applicable to this transfer, i.e. the rate by which the funds must grow every year to match the benefits which would have been provided by the ceding scheme had it not been transferred.

In this case, the key rates were 8.2% pa for a retirement age of 65 and 7.66% pa for retirement at age 66. Whilst additional rates were calculated showing the impact of a tax-free lump sum being taken, the file is clear that this was not in Mr C’s plans and, as such, is less relevant.

Critical yield figures showing the effect of the fund moving into the PPF were also calculated, with the rates at ages 65 and 66 being calculated as 7.06% and 6.44% respectively.

An additional TVAS report was also completed at this time giving slightly higher figures of 9.8% and 9.12% at retirement ages 65 and 66 respectively upon transfer, with the same rates as above assuming the fund entered the PPF. The difference in rates was a result of a slightly different assumed benefit level from the BPS scheme at retirement.

Tuto produced a suitability report on 4 December 2017. This referred to the possibility of the BPS benefits being transferred to a personal pension with Prudential. Additionally, it noted that the underlying investment fund had been chosen by Mr C’s IFA, although an assessment of its suitability had been undertaken by Tuto. Mr C’s IFA was also noted as being the firm which had explained the differences between the PPF and the new BPS scheme, with information paragraphs about these included in the letter.

This letter explained the critical yield figures above were considered unachievable, however based on Mr C’s other objectives of flexible income, changed death benefits and control over the pension fund itself, Tuto was recommending the transfer. The new product was confirmed as an Aviva PPP with the monies being invested into the “RSMR model portfolio 7”.

An additional suitability letter was produced on 7 December 2017. This altered some of the content above.

This again explained that the CY figures were considered unlikely to be achieved and, as such, any transfer was likely to lead to Mr C being worse off in retirement. Any mention included within the previous letter that an investment fund had already been chosen was removed from this letter.

Further, the advice outcome overall was changed to one stating that the fund should be retained within the BSPS scheme with the recommendation being to move to the BSPS2 scheme, given the additional flexibility this provided over the PPF.

The recommendations and final conclusions section of the letter included the following paragraphs:

“Our recommendation for you to consider transferring your defined benefit pension is based on the fact that the reasons for transfer mentioned above are more important to your overall financial planning and lifestyle objectives at this moment in time than the potential financial long term and guaranteed rewards you may achieve from your safeguarded pension scheme over the longer term.

We would however like to emphasise that, whilst we are recommending the transfer of your benefits based upon the information provided and the likelihood that you will access your benefits earlier and more flexibly than the structured benefits offered by the British Steel Pension Scheme, our core analysis shows that by transferring away from your safeguarded pension scheme there is a real possibility that you could be financially disadvantaged over the longer term”.

A client declaration stating that “*I/We have received and read my Personalised Pension Report dated 7th of December 2017 detailing the recommendations and the reasons why Eadon & King do not advise a transfer of benefits from my [incorrect name of scheme] schemes to a personal pension arrangement*” was signed by Mr C on 13 December 2019.

Also, on 13 December 2017 Mr C signed a typed letter thanking Tuto for its recommendation letter and stating his desire to transfer his pension. This said that “*my main reason for this is I wish to be in control of how and when I take scheme benefits in the future and I do not feel that I want the rigidity of taking scheme income*”.

Following this a follow up suitability letter was issued on 19 December 2019 to include the product recommended to receive the transferred funds. The recommendations and final conclusions section of this letter did not have the two paragraphs copied above – these had been deleted from this letter. An insistent client warning was added to the letter and the recommended product was detailed as per the 4 December 2017 suitability letter with the same Aviva personal pension and RSMR Model Portfolio 7 fund being recommended.

This letter and the application form for the recommended product were signed on 9 January 2018.

Having become concerned that the transfer had caused financial loss, Mr C raised his complaint in February 2022. Tuto issued its response on 21 April 2022, saying that it had advised against the transfer and processed this on an insistent customer basis only.

Dissatisfied with the response, Mr C referred the matter to this service.

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

- He'd considered the relevant rules and regulations at the time of the advice, including the following:

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).

COBS 4.2.1R: A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

- He'd also considered the guidance and good practice guide which the regulator had published in 2016 around "insistent clients", which set out three key steps:

1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.

2. You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).

3. It should be clear to the client that their actions are against your advice.

- The regulator had made it clear that the normal advice rules needed to be followed, which included obtaining 'the necessary information about the client and their investment objectives, financial situation, and knowledge and experience so as to enable you to make a suitable personal recommendation (see COBS 9.2).'
- The regulator also raised concerns about insistent client cases where it had seen the following:
 - *there was an inadequate assessment of the other options that would meet the client's objectives.*
 - *excessive numbers of insistent clients resulted from the adviser's advice not being sufficiently clear.*
 - *the risks of the client's preferred course of action were not clearly explained.*
 - *it was a 'papering exercise', for example the adviser had processed the case on an insistent client basis but this clearly did not reflect what had happened in practice.*
 - *the adviser advised the client not to transfer out of the DB scheme (although the client insisted) but then recommended a product that was not suitable (with reference to the outcome and assessment of the information gathered about the member).*

- Mr C had said in his submissions to this this service that he couldn't recall ever speaking to Tuto and that all his conversations had been with his own IFA who "talked up" the benefits of transferring.
- Mr C also couldn't recall ever being advised not to transfer – rather that he was initially told that he wasn't "allowed" to do so, with this then changing. Mr C also had no recollection of reading or signing the insistent client letter.
- The investigator had concerns about the process followed here. He accepted that the available evidence didn't support the position that the earlier version of the suitability letter dated 4 December 2017, which recommended the transfer, was issued to Mr C. But it did indicate that the transfer had been discussed in some detail with Mr C at that early stage to the point that a product recommendation had already been discussed, with an underlying recipient fund being recommended by Mr C's IFA.
- Although the later letter dated 7 December 2017 changed the advice to not transfer, it didn't change the fact that such considerations had already been made. It further confirmed that verbal discussions about the differences between the BPSP 2 and the PPF had been held with Mr C's IFA, rather than with Tuto.
- Important information was contained within the suitability letter, but it was reasonable to conclude that a consumer would place more store in what they'd been told verbally by their existing IFA. Without records as to what exactly was discussed, the investigator couldn't be certain that the information contained in the suitability report would have adequately clarified any misconceptions Mr C may have held at the time.
- The investigator also had concerns about the content of the "recommendations and final conclusions" sections of the suitability report. This wasn't clear in its rationale and could easily be construed as justifying a recommendation to transfer.
- The contradictory paragraphs were removed from the subsequent letter dated 19 December 2017, but it was the earlier version which was signed by Mr C on 13 December 2017.
- The investigator didn't doubt the validity of Mr C's signature on the insistent client letter which was also signed by Mr C on 13 December 2017. But as the letter was typed rather than handwritten, it was impossible to determine whether it had been written by Mr C or typed on his behalf and provided to him to sign.
- By the time of the corrected 19 December 2017 letter, Mr C had already signed the previous report and the insistent client letter. There should have been considerable additional commentary about the removal of the conflicting paragraphs and the reason for this to ensure that Mr C was aware of the advice being given. The simple removal of the paragraphs wasn't sufficient.
- Overall, the investigator didn't think that the insistent client process had been properly followed. The advice documentation issued to Mr C had been insufficiently clear about the advice and its implications.
- He'd also considered whether Mr C would have proceeded with the transfer even if full and clear information had been given to him, but he didn't think there was enough information to support that conclusion.

- Whilst the investigator had concluded that Mr C would have remained in the BPS if the appropriate process had been followed, he'd nevertheless considered the suitability of the recommended recipient product for the transfer sum.
- But he had no concerns about the recommended PPP as the associated charges were lower than those which would have been chargeable under a stakeholder arrangement.
- He also had no concerns regarding the recipient funds. He noted that Mr C had been attributed a medium-high risk investment approach, but Mr C had an extended investment timeframe over which he'd be able to ride out any short term volatility in the value of his pension funds. Further, Mr C would build up other pension provision over this timeframe within the defined contribution scheme.

However, as the investigator was of the view that the pension benefits should have been retained within the BPS, he recommended that Tuto undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that he would have opted to join the BPS 2 and retired at 65.

He said that any redress should in the first instance be paid to Mr C's pension plan, but if this wasn't possible, it should be paid directly to Mr C, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

The investigator also said that Tuto should pay Mr C £300 in respect of the trouble and upset that the process would have caused and the impact it would have had on his retirement planning.

Mr C made no further comment upon investigator's findings. Tuto requested an extension to respond, which the investigator granted for a period of a further four weeks.

The investigator then informed Tuto that he'd enquired of Mr C 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 proposed by the regulator in CP22/15.

Tuto responded to say that the substantive issue of the matter remained in dispute – which was whether or not the advice had been suitable. It said that it had requested that the matter be referred to an ombudsman for review, and so it wasn't obliged to undertake any calculation prior to that.

It then said that it was now considering an offer to Mr C without any admission of liability. And in selecting which "counter metric" to measure against (the PPF or BPS 2) it said it was relying upon the position taken by the regulator in CP22/15.

It added that the current market position almost invariably showed no loss, which based upon the current interest rate/gilt yield trend would continue well into the future.

Mr C confirmed that he would like any redress to be calculated under the new methodology. Tuto then said that its preliminary calculations had determined that Mr C had suffered no loss, but it needed up to date information from Mr C as to the fund value, and any added or withdrawn funds. It therefore requested that no decision be made on the complaint until it had the required information and had undertaken the redress calculation.

It further requested that, if a decision was to be made before this had happened, that it be a provisional rather than final decision, so that it could have the opportunity to respond.

The investigator confirmed that Mr C had requested that any redress calculation be undertaken in accordance with the new methodology, and that the case was awaiting an ombudsman's attention. It would remain so whilst Tuto completed its redress calculations, the investigator added.

The 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, he 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 Tuto to use the FCA's BSPS-specific calculator to determine any redress due to Mr C.

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 C's complaint, they should let him know by 5 June 2023.

Neither party submitted further comments in respect of this.

The complaint was then referred to me for review.

I issued a provisional decision on the matter on 13 October 2023, in which I set out my reasons for upholding the complaint. The following is an extract from that decision.

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

And having done so, I've reached broadly the same conclusions as the investigator and for similar reasons.

I don't think I need to dwell on the matter of suitability here. Tuto was itself of the view that the transfer wouldn't be in Mr C's best interests, for the reasons set out in both the initial and subsequently amended suitability reports. And I agree that those reasons are compelling.

But I have concerns, as with the investigator, as to the "insistent client" process which was followed and the information which was conveyed to Mr C in the two suitability reports.

I'd firstly say that I agree with the investigator that it's impossible to know whether, although bearing his signature, the insistent client letter was drafted by Mr C himself, or was typed for him.

But aside from that particular issue, I think the process is in any case significantly undermined by other aspects. For example, addressing the first suitability report, the messaging here was in my view ambiguous at best. It opened the section entitled "Our Recommendation and Final Conclusions" as follows:

"Taking into account your retirement objectives and both the advantages and disadvantages associated with a transfer I believe that on balance there are sufficient reasons for you to consider transferring your British Steel Scheme to a personal pension arrangement."

This isn't the type of opening line I would expect to see from a suitability report which was purporting to advise against the transfer.

It's fair to say that some paragraphs then set out persuasive reasons as to why Mr C shouldn't transfer his benefits, such as unachievably high critical yields, the transfer of risk to Mr C for a lengthy amount of time, and the ability to make up any death lump sum requirement through an inexpensive life assurance policy. And it recommended that Mr C transfer into the BSPS 2, as he'd be able to transfer out of that scheme in the future if he needed or wanted to.

But the closing paragraphs then reverted to a recommendation to transfer away from the BSPS to achieve other objectives such as flexibility in accessing the pension funds.

And as pointed out by the investigator, this was the version which Mr C signed, and was then the basis of his insistent client declaration.

The subsequent report may have corrected some of the latter paragraphs, but it still opened with the above comment. And so I think it's likely that, quite aside from whatever discussions were being held with his own IFA, the inconsistent messaging in the initial report sent to Mr C, along with the same opening paragraph in the recommendation section of the subsequent report, would have served to at the very least confuse him, and at the worst, persuade him that, despite some negative wording about the transfer, the recommendation was nevertheless that he should proceed.

This would very much have diluted and undermined the "insistent client" process, and wouldn't have adhered to the clear messaging guidance around this as set out by the regulator. It effectively falls at the first hurdle from the guidance and good practice guidelines as set out by the investigator:

1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.

And so I'm currently persuaded that the insistent client process undertaken here was flawed to the extent that Mr C wasn't in a properly informed position to be able to make that kind of important decision for himself.

And I think, had Tuto been clearer in its rationale for not transferring, and without the mixed messages, Mr C wouldn't have transferred.

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 C, as far as possible, into the position he would now be in but for the unsuitable transfer. I consider Mr C would most likely have remained in the occupational pension scheme and opted to join the BSPS 2 if the insistent client process had been followed properly here.

If any final decision remains along these lines, therefore, Tuto Money Limited should 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>.

Tuto Money 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.

For clarity, Mr C has not yet retired, and has no plans to do so at present. 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 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, Tuto Money 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 Tuto Money 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 its 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 such as Tuto Money Limited 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 £160,000, 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 £160,000, I may recommend that the business pay the balance.

Determination and money award: *If my decision remains the same, I would require Tuto Money Limited to pay Mr C the compensation amount as set out above, up to a maximum of*

£160,000.

Recommendation: *If the compensation amount exceeds £160,000, I would also recommend that Tuto Money Limited pays Mr C the balance.*

If Mr C accepts a final decision along these lines, the award would be binding on Tuto Money Limited.

My recommendation wouldn't be binding on Tuto Money 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 any final decision along these lines.

I also agree with the investigator that Mr C will have been greatly concerned by the uncertainty around his retirement planning caused by this matter. As such, I also agree that a further payment of £300 would be warranted here."

In response, Mr C confirmed that he accepted my findings. Tuto made no further comment.

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.

Neither party has objected to my provisional findings. As such, my decision remains the same, and for the same reasons as set out above.

Putting things right

Tuto Money Limited must undertake the direction as set out in the provisional decision.

My final decision

My final decision is that I uphold the complaint and direct Tuto Money 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 11 December 2023.

Philip Miller
Ombudsman