

The complaint

Miss J has complained that Hugh James Solicitors (Hugh James), gave her unsuitable advice to transfer her defined benefits from her 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 Miss J'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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.

Miss J met with an adviser from Hugh James on 2 October 2017 to discuss her retirement planning needs and, in particular, her BSPS entitlement.

Hugh James completed a fact find analysis to establish Miss J's circumstances and financial objectives. An assessment of Miss J's attitude to risk determined Miss J's risk appetite was "balanced".

Miss J was aged 47 and due to get married to her partner. She was employed, earning £43,000 pa.

Miss J had no debts, a home worth £170,000 and cash savings of £49,000. She had two pension arrangements - her preserved BSPS entitlement with a transfer value of £396,106 guaranteed until 22 December 2017, and the defined contribution arrangement, set up in April 2017, which was receiving employer and employee contributions totalling 20% of her salary.

At retirement (at age 65) Miss J's deferred defined benefit pension would provide an income of £26,836 pa with the option to take tax free cash and a reduced income.

The benefits if she transferred to the PPF were £21,032 pa at age 65, again with the option to take tax free cash and a reduced income.

A transfer value analysis (TVAS) had been undertaken to show the level of investment growth required in order to replace the benefits under the BPS and the PPF at age 65. This was the "critical yield", which was calculated as follows:

To match the BPS benefits at age 65, a transfer would have a critical yield of 6.09%.

To match the PPF benefits at age 65, a transfer would have a critical yield of 4.35%.

Hugh James issued a suitability report dated 19 October 2017. Hugh James recommended that Miss J transfer the defined benefits to a Prudential Retirement Account and invest 50% into the Prudential Cautious and 50% into the Prudential Growth.

Hugh James noted Miss J had the following objectives, which formed the basis of its reasons for recommending the transfer:

- The option to retire at age 55 with an income of £1,500 a month.
- To take control of her pension.
- Take advantage of the enhanced transfer value.
- To have the option to decide how death benefits are paid.
- Miss J had concerns over the existing scheme's financial viability.
- She would like flexibility on how to take benefits at retirement.

Miss J accepted Hugh James's recommendation and the transfer took place on 24 October 2017. The amount transferred was £396,106.

Miss J complained to Hugh James on 26 April 2022 raising concerns that the advice was unsuitable following contact from the FCA about this.

Hugh James declined to uphold Miss J's complaint, saying that it had conducted a loss assessment in line with the regulator's guidance and this showed that she'd suffered no loss.

This service put the "no loss" outcome to Miss J, but she indicated that she didn't accept this. As such, the investigator proceeded to assess the matter.

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 critical yield to match the scheme benefits at age 65 was 6.07%, although the suitability report quoted this as being 6.77% (and 15.19% to age 55). The discount rate for 22 years to retirement was 4.5% and, taking into account Miss J's attitude to risk, along with the regulator's low, mid and high band growth projections of 2%, 5% and 8% respectively, it was unlikely that the scheme benefits could be bettered through transferring. The critical yields were unlikely to be achievable.
- The available evidence didn't support the position that Miss J had either the desire or capacity to exercise personal control over her pension fund.
- Miss J may have had concerns about the prospects for the BPS, but these concerns should have been managed and addressed by Hugh James.
- In terms of the death benefits, although the prospect of a lump sum might have seemed appealing, the priority of pension benefits was to provide retirement security for the individual rather than act as a kind of life assurance plan. And Hugh James didn't do enough to establish to what extent Miss J was willing to accept lower overall benefits in retirement for the sake of the lump sum death benefit. And the size of any lump sum post retirement would in any case depend upon the amount remaining after Miss J's withdrawals.
- Life assurance should have been explored further if an additional lump sum was required in the short term.
- Although Miss J may have found the prospect of retiring early appealing, this should have been subject to an analysis of whether or not this was in fact feasible. Further, the suitability report set out that Miss J would be able to retire early through the scheme, but it didn't say why she preferred to put her pension funds at risk. The file didn't clearly evidence as to why Miss J wanted to retire at 55, but if she did, she should have been advised to transfer to the BPS 2 to do so.
- As Miss J was 47 at the time of the advice, it would in any case have been difficult to anticipate what her expected expenditure would be in retirement. This would make the decision to transfer hard to justify. And Miss J didn't need to make the irreversible decision to transfer with so many years left to retirement.
- A further reason for transferring was that Miss J wished to take advantage of the enhanced transfer value on offer. But although the CETV may have been lower in the future, this would only impact Miss J if she decided to transfer at a later date. And any concerns Miss J had about a lower CETV in the future could have been countered by such scheme attributes as zero running costs and guaranteed future growth.

The investigator recommended that Hugh James undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints.

But the investigator also noted the regulator's consultation on a revised methodology and enquired of Miss J as to whether, if the complaint was upheld, her 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 Miss J's pension plan, but if this wasn't possible, it should be paid directly to Miss J, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

In response, Hugh James' representative expressed surprise that a view had been set out on the merits of the case when Hugh James had already conducted a loss assessment which had determined a no loss outcome.

It added that, if a subsequent loss assessment indicated a position of loss, it wouldn't be fair or reasonable to require Hugh James to compensate Miss J when she could have mitigated that loss.

However, it said that, if Miss J confirmed that she would like the calculation rerun on the basis of the new methodology, it would do so and Hugh James would consider a further offer on the basis of that outcome.

Miss J confirmed that she would like the loss assessment to be calculated in line with the new methodology.

There followed some considerable correspondence relating to the position of Hugh James's representative that, as the loss calculation had determined a no loss position, the case should be dismissed, and Miss J's position that she wasn't persuaded that she in fact been caused no loss.

The investigator confirmed to both parties that, as agreement couldn't be reached on the matter, it would be referred to an ombudsman for review.

Hugh James's representative disagreed, however, saying that it wasn't appropriate or necessary for the matter to be referred to an ombudsman. And if it was referred to an ombudsman, it didn't think it should be published. It said the following in summary:

- By the time the investigator had issued her view, Hugh James had already undertaken a loss calculation in accordance with FG17/9 and determined that Miss J had suffered no loss.
- Once Miss J had confirmed that she wished to have the calculation rerun under the updated methodology, this was done in June 2023. A copy of the calculation was provided, and as no further comments were received relating to this, it was assumed that it had been accepted that it was accurate.
- In accordance with DISP 3.5.1R, this service should attempt to resolve complaints at the earliest possible stage by whatever means appear to be the most appropriate.
- As the complaint had already been considered by the investigator, Miss J had accepted the outcome, and the calculation had been undertaken, there was no merit in considering the suitability of the transfer advice once more. Miss J had suffered no loss and Hugh James had complied with the investigator's recommendation. The complaint should therefore be dismissed.

The investigator replied, saying that the points raised would be considered by an ombudsman.

The investigator then contacted Hugh James's representative further, requesting that, as more than three months had by then elapsed, it provide an updated loss calculation using the BSPS-specific calculator. If this showed no loss, the investigator added, then he would check it and engage with Miss J to try to resolve the matter without the need for it to be referred to an ombudsman.

The representative commented further on this as follows:

- There was no reasonable rationale for an ombudsman to consider the matter. If the complaint was upheld at that stage, the result would be the same – a BSPS-specific calculation, but with a no loss outcome.
- In the unlikely event that a future loss calculation determined a loss, Hugh James couldn't be held responsible for this. Once it had already determined a no loss position, it was up to Miss J to mitigate her position.
- At no point had this service indicated that Hugh James should defer the calculation until an ombudsman's decision had been issued. As such, it had already undertaken the calculation, at not insignificant cost. And there was no suggestion that the calculation had been incorrect.
- The complaint should be dismissed.

The investigator responded to say that either party has the option to request an ombudsman's decision if agreement hadn't been reached on the outcome. He also didn't think that the complaint fell within any of the grounds under which a complaint might be dismissed by this service.

The investigator said that, as it appeared that Hugh James was unwilling to provide an updated calculation, the matter would await referral to an ombudsman.

A new investigator then invited Hugh James once again to submit an updated calculation. And she also requested updated details from Miss J so that this could be undertaken.

Miss J provided the required details, but Hugh James's representative stated its strong disagreement with the way in which the case was being handled, saying the following in summary:

- It had to be reasonably assumed that Miss J had accepted the investigator's provisional assessment on the matter, hence her stating her preference for waiting for the updated redress methodology.
- There had been no indication as to why Miss J was then deemed to have been in disagreement with the provisional assessment. And there was no provision under the DISP rules by which Miss J was able to withdraw her agreement on the basis that she didn't like the outcome of the calculation.
- There was provision under the DISP rules for a complaint to be dismissed if the subject matter of a complaint had already been considered. This was the case here, and Miss J had accepted the outcome. No new material evidence had come to light which might affect the outcome and Hugh James had undertaken the calculation as directed by the investigator. The complaint had therefore been resolved.

- If the current position of this service was maintained, it would need to advise its clients in the future that it shouldn't offer to comply with an investigator's recommendation at the provisional assessment stage and instead request an ombudsman's decision. This would be an unsatisfactory position.
- As Miss J didn't respond to the investigator's view within the specified time limits, this service didn't have the jurisdiction to consider her complaint afresh.
- The representative also enquired as to the expertise of this service in being able to check the redress calculations, and why such checks weren't done between June 2023 (when the calculation was first sent to Miss J and October 2023) – and why inputs weren't requested and deadlines explained so that Hugh James could make an informed decision as to whether it would incur the cost of undertaking the calculations.
- It also enquired as to why checks couldn't now be undertaken on the previously supplied redress calculation from June 2023. If no issues could be identified, then the matter should be considered to be at an end.
- Regarding the further request from the new investigator for an updated calculation, the representative had no confidence that if it complied this service would check it and, if Miss J again disagreed with the calculation outcome, a final decision would be issued promptly to avoid the need for a further calculation.
- The investigator's finding that Miss J would be worse off in retirement was undermined by the "no loss" outcome determined by the calculation. It was demonstrably not the case that Miss J would receive a lower level of benefits as a result of the transfer.
- It wouldn't be appropriate for an ombudsman's decision to make any findings on the merits – rather this should simply refer to Hugh James having undertaken the calculation in accordance with the investigator's recommendation and that this had determined a no loss outcome.

The investigator acknowledged the points made, but didn't feel that they amounted to grounds to dismiss Miss J's complaint. He said that an ombudsman would take into account the submissions.

The matter has now been referred to me for review.

What I've decided – and why

Jurisdiction and grounds for dismissal

I've noted the comments relating to our jurisdiction to consider this matter, but I think there may be a fundamental misunderstanding of the factors which inform our jurisdiction to consider a complaint – or perhaps a confusion between this and the provisions under which we might dismiss a complaint.

To clarify, the rules and provisions relating to jurisdiction focus on whether we are able to consider the merits of a complaint, e.g. taking into account aspects such as timeliness and territorial scope. If those requirements are satisfied, a case is within our jurisdiction and cannot fall outside of our jurisdiction on the basis of the manner in which the case then progresses. And it's a matter of this service's discretion as to whether we continue to

consider a complaint if a response hasn't been received within a particular timeframe following the issue of a provisional determination.

Consideration of whether a case should be dismissed (which I address further below) would only then follow once the matter of jurisdiction of whether we can consider a case has been decided.

I've noted the representative's assertion that, even if the matter was determined to fall with our jurisdiction, a decision shouldn't address the merits, but rather it should note that Hugh James followed the investigator's recommendation, undertook the calculation, and determined a no loss position.

But I think it's worth noting Miss J's comments relating to the calculation. She did have some concerns relating to some of the assumptions being made, but her primary concern was that Hugh James didn't accept that the advice it had given was unsuitable. And she remained very concerned that she'd left a "safe" defined benefit scheme on the advice of a business which would benefit financially from her decision to do so, both in terms of the initial advice fee and the ongoing charges. These charges, Miss J said, wouldn't have been applicable had she remained within the scheme.

I think this also addresses the representative's concerns over what it considers to have been the failure of this service to check the calculation undertaken in June 2023 and confirm the outcome to Miss J. The position was, and remains, that although Miss J confirmed her agreement with the investigator's findings, she was concerned both at the position maintained by Hugh James that the advice was suitable, in addition to the outcome of the loss calculation.

Either party is entitled to request an ombudsman's decision if they disagree or have concerns with the outcome proposed within a provisional assessment, in this case as issued by the investigator. And Miss J clearly had concerns.

I'd add that there's been a great deal of uncertainty and mistrust surrounding the issues relating to the BSPS transfers. Whilst I acknowledge the points made by the representative, I don't think a request to have the matter reviewed by an ombudsman, for final ratification and a decision on suitability which becomes binding on both parties if upheld and accepted by Miss J, is necessarily unreasonable in the circumstances. And whilst I understand the points being made about Miss J having initially accepted the investigator's view on the matter, for the reasons given above I don't think this would represent a reasonable justification to dismiss the complaint.

Hugh James's representative has mentioned how it might advise its clients in the future on the basis of the handling of this type of case. This is of course entirely up to it, and we deal with individual cases, even though there may be similar outcomes deriving from similar sets of circumstances. As I've said above, this is a very particular set of circumstances, in which a sense of uncertainty and mistrust has prevailed.

For the reasons given, I therefore think it's appropriate for me to consider the merits of this case.

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

As Hugh James has previously offered to undertake the redress calculation, and hasn't provided a substantive response to the investigator's assessment on the merits, I'll keep my commentary on the matter of suitability relatively brief.

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 Hugh James'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, Hugh James should have only considered a transfer if it could clearly demonstrate that the transfer was in Miss J'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 Hugh James was required to carry out by the regulator said that the critical yield - how much Miss J's pension fund would need to grow by each year in order to provide the same benefits as her defined benefit scheme – was 6.07% to match the pension she'd have been entitled to under the scheme at age 65. The suitability report said that this was 6.77% - so higher still – and that required to match the scheme benefits at 55 was 15.19%.
- Given this, along with the discount rate, and the regulator's middle projection rate for growth (5% pa), I think at the time of the advice Hugh James ought to have appreciated that these yields were likely unachievable, year on year, to match the scheme benefits. I've noted what Hugh James's representative has said about the "no loss" outcome of the calculation indicating that the transfer wouldn't mean that Miss J will be worse off due to the transfer. But I'm considering the advice in the context of what was known at the time. And at the time, the indications were that Miss J was more likely than not to receive pension benefits, from age 55 or 65, of a lower value than those he'd have been entitled to under the BPS 2 by transferring and investing in line with her balanced attitude to risk.

- As set out by the investigator, I also don't think the objective of control over Miss J's pension funds was well supported by her other circumstances, investment history (only cash savings recorded) or experience.
- Miss J may have held concerns about the prospect of the BSPS. But it was Hugh James'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 still provided Miss J with guaranteed income and the option of accessing tax-free cash. At the time of the advice, Miss J was unlikely to improve on her scheme benefits by transferring.
- In terms of the alternative lump sum benefits a transfer offered to her family, the priority here was to advise Miss J about what was best for her retirement. And the existing scheme offered death benefits, by way of a spouse's pension (Miss J was due to marry), that would have been valuable in the event of her death.
- Early retirement may well have been appealing to Miss J, as it might reasonably be appealing to a great many people, but she had no clear or pressing plans to do so, which I think is understandable for a 47 year old. Miss J's circumstances may in any case have changed significantly between then and retirement. Any decision around early retirement or a need for flexibility of income could have been addressed nearer to her retirement date.

Overall, I can't see persuasive reasons as to why it was clearly in Miss J's best interest to relinquish her defined benefits and transfer them to a PPP. And I also haven't seen anything to persuade me that Miss J 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 Miss J received from Hugh James 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 Miss J, as far as possible, into the position she would now be in but for the unsuitable advice. I've noted above – and addressed – the comments of Hugh James's representative about the loss calculation previously undertaken. But this should be rerun, and on the basis that Miss J would have joined the BSPS 2. Miss J expressed a desire to retire early, in which case the reduction in benefits through joining the PPF may have been lower. But I don't think it could be reasonably concluded, given Miss J's age at the time, that this was more likely than not to ultimately be the case. As far as I can tell, Hugh James has also used the assumed retirement age of 65 in previous calculations.

So compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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. A copy of the BSPS calculator output should be sent to Miss J and our service upon completion of the calculation.

The calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, it should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Miss J'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 Miss J redress as a cash lump sum payment,
- explain to Miss J 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 Miss J receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss J accepts the offer of Hugh James Solicitors to calculate how much of its redress could be augmented, request the necessary information and not charge Miss J 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 Miss J's end of year tax position.

Redress paid to Miss J 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 Miss J'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 Hugh James Solicitors to pay Miss J 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 Hugh James Solicitors pays Miss J the balance.

If Miss J accepts this final decision, the award will be binding on Hugh James Solicitors.

My recommendation wouldn't be binding on Hugh James Solicitors. Further, it's unlikely that Miss J could accept my decision and go to court to ask for the balance. Miss J may want to consider getting independent legal advice before deciding whether to accept my final decision.

My final decision

My final decision is that I uphold the complaint and direct Hugh James Solicitors to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 10 January 2024.

Philip Miller
Ombudsman