DRN-3843186

Financial Ombudsman Service

The complaint

Mr S 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).

What happened

The investigator who considered this matter set out the background to the complaint in her 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 S'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 S had preserved benefits from the defined benefit BSPS accrued from 23 years and six months' service. At the date of leaving the scheme, he had a preserved pension income of £12,875 which would be revalued to the scheme retirement age of 65. The cash equivalent transfer value (CETV), guaranteed until 11 December 2017, was £328,259.

A fact find recorded the following about his circumstances:

- He was 43, in good health, divorced and had two dependent children.
- He was employed with an annual gross salary of £37,000 (net monthly around £2,200). He benefited from death in service cover of four times' salary.
- Monthly expenditure was recorded as £1,482, meaning a net surplus monthly income of around £718.
- His main residence was valued at around £130,000, with a remaining mortgage of £90,800 outstanding, repayable of 19 years.
- He had cash savings of £1,000 and a car loan (repayments of £268 per month) due to be repaid in October 2018.
- He was a member of his employers group personal pension which received contributions totalling 16% per month.
- His desired retirement age was 60 and he was happy to accept a lower pension to retire early.
- He had a 'whole of life' insurance contract, with a sum assured of £10,000.

From a prescribed list of options, Mr S prioritised his objectives as follows:

> *"1. Control and flexibility of pension funds.*
> *2. Lump sum death benefits on my death before retirement.*
> *3. The security of my pension fund.*
> *4. The ability to retire early.*
> *5. To be able to increase my pension at my realistic retirement age.*
> *6. Tax free cash lump sums at retirement.*
> *7. Provision for partners and dependants pension."*

An attitude to risk assessment was completed. Mr S disagreed with the following statements:

- *"I feel comfortable about investing in the stock market I am not concerned with volatility.*
- *I have had investments in my pension in the past, joining rising and falling markets, and was not concerned with the investment volatility.*
- *I would describe myself as a risk taker when it comes to my pension."*

He strongly agreed with the following:

- *"I generally prefer investments to bank account."*

The questionnaire output categorised Mr S as being a "cautious" investor.

On 10 October 2017, a TVAS was produced based on the original BSPS. At age 65, a critical yield of 6.83% a year was required to replicate the benefits of the BSPS, or a fund value of around £1million.

At age 60, the critical yield was 8.47% a year, or a fund value again of around £1million. The critical yield to replicate benefits from the Pension Protection Fund (PPF) at age 65 was 4.65% a year, or 5.59% to age 60.

A cashflow summary was produced that was based on a consistent growth rate of 5.5% a year.

A suitability report was issued on 12 October 2017. This recorded Mr S's 'needs and priorities' as:

- *“Break your ties with BSPS as you are very concerned it will end up in PPF.*
- *To take a tax-free lump sum of £40,000 at age 55 to pay off your mortgage.*
- *If you overpay on your mortgage by £250 per month you will have repaid your mortgage in 12 years’ time – meaning less required from your tax-free cash.*
- *To start taking an income of £18,000 gross per annum from age 60.*
- *To take a further £60,000 at age 55 to help your children through University.*
- *To be able to alter your pension income levels in the future.*
- *To leave any unused pension fund at the time of your death to your children.*
- *To continue your employer’s defined contribution scheme until retirement.”*

His attitude to risk was confirmed as being “cautious”, or level two on a rising risk scale of one to five. A note said that Mr S had described his attitude to investment risk as *‘comfortable with low risk but not appropriate to take an undue risk with my pension fund’*.

His capacity for loss was gauged to be ‘adventurous’ on the basis that he had 12 years before he needed to access the pension fund.

The adviser said defined benefit pensions were suitable for the vast majority of members. It also gave examples of individuals who may not benefit from transferring out of a defined benefit scheme.

The adviser further explained that he would not normally recommend a transfer but on this occasion, a positive recommendation was given because “*…you wish to sever all links with Tata, and the way you wish to alter your pension income in retirement, and your priority to pass on as much of this pension fund to your children”’.*

CAL recommended that Mr S transfer to a Prudential Retirement Account and invest 50% in the PruFund Growth Fund and 50% in the PruFund Cautious Fund.

Mr S accepted the recommendation. CAL charged an initial advice fee of £5,000. An ongoing advice charge of 0.5% a year was also agreed. Prudential product and annual management charges added a further charge of 1% a year.

Before the application was processed, the investment recommendation was adjusted to the following split:

- 45% PruFund Cautious fund
- 45% PruFund Growth fund
- 2% Fundsmith Equity fund
- 2% Jupiter India fund
- 2% Fidelity Institutional Emerging Markets fund
- 2% Janus Henderson Global Technology fund
- 2% Invesco Perpetual Global Smaller Companies fund

Mr S later raised a complaint via this service which CAL didn’t uphold. Dissatisfied with the response, he asked this service to review the case.

Mr S has also said the adviser told him it wasn’t possible for him to manage the pension himself, and that he would need a financial adviser to remain involved. He says he’s since spoken with Prudential who confirmed he could manage the pension himself if required. This point wasn’t included in the initial complaint to CAL.

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.

- It was too early, at 43, for Mr S to make an irreversible decisions on his guaranteed scheme benefits – he still had young children, a large mortgage to repay and no recorded assets other than £1,000.

- Mr S may have had concerns about the BSPS, but these concerns should have been appropriately addressed and managed. The suitability report didn't paint the options of the BSPS 2 or the PPF in a good light. Had reassurances around them been given, Mr S would have viewed his options differently.

- Mr S could have retained his guaranteed scheme benefits and also benefitted from the flexibility offered by his defined contribution accrual.

- By the time of the advice, there was sufficient information known about the BSPS 2 – and had Mr S been advised to enter it, he would likely have done so.

- There were clear anomalies in Mr S's answers to the attitude to risk profiling exercise. He was uncertain about stock market investment and had concerns about volatility – and he didn't want to take undue risk with his pension. And he was then considered by the adviser to have an adventurous outlook, purely on the basis of the investment term until his retirement.

- Except for the small amount Mr S had accrued in the defined contribution scheme up to that point, the defined benefits were his only source of pension provision. It wasn't suitable to transfer these when the defined contributions would also be exposed to investment risk over the next 16 or so years.

- With regard to death benefits, Mr S was 43 at the time of the advice and in good health. Lump sum death benefits was recorded as being his second highest priority, but he had death in service benefits of four times' his salary and this didn't seem to have been presented to him as contributing in this regard.

- The primary purpose of retirement savings was to provide pension benefits for the individual in their retirement. And he could have left any unused tax free cash from the scheme benefits and any unused amount from his defined contribution accrual to his family if he wished.

- The cashflow modelling was predicated on a consistent annual growth rate on his pension funds of 5.5%, and that Mr S would reduce flexi access withdrawals when his state pension began. But there was no guarantee that this is what would happen, or that there would be a large fund remaining after his death.

- One of Mr S's recorded objectives was to draw down a large tax free cash sum to help his children with university fees. But Mr S had a large monthly surplus from his income and this could have helped his children. They would also have had the option of student finance.

- The eventual asset split of Mr S's PPP represented a higher level of risk than had been agreed as appropriate for him.

- The advice had been given 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 rate was 4.5% pa for the period up to Mr S's normal retirement date (65). The regulator's low, mid and upper band projected annual growth rates were 2%, 5% and 8% respectively.

- This compared to a required critical yield to match the BSPS benefits at 65 of 6.83%. Even if the critical yield to match the BSPS 2 benefits had been calculated this would have been higher than both the discount rate ant the low/mid growth rates set out by the regulator.

- Talking this into account, in addition to the composition of assets used to determine the discount rate, Mr S's attitude to risk, and his term to retirement, it was likely that he would receive benefits of a materially lower overall value by transferring.

The investigator recommended that CAL undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr S would have opted to join the BSPS 2.

But the investigator also noted the regulator's consultation on a revised methodology and enquired of Mr S 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.

He said that any redress should in the first instance be paid to Mr S's pension plan, but if this wasn't possible, it should be paid directly to Mr S, with 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 S £300 in respect of the trouble and upset that the matter would have caused him.

Mr S accepted the investigator's findings and said that he would like any redress to be calculated under the current methodology.

CAL didn't accept the investigator's findings, however, saying the following in summary:

- Mr S's plans centred around an intention to semi retire at 55 and fully retire at 60. Mr S had carefully considered the amount of money he would need, and at what age, which fed into his future income and lump sum requirements. Mr S was in a physically demanding job, which supported his wish to retire early. He was therefore 12 years away from his retirement beginning, not 16 as suggested by the investigator.

- Mr S was divorced and so wouldn't have benefitted from the spouse's pension – and his children would be unlikely to benefit from the dependants' pensions available from the scheme given their ages. Mr S wished to pass his pension on to his children in the event of his death.

- Fulfilment of his objectives wouldn't have been possible by retaining his scheme benefits. The early reduction factors which would apply to the BSPS benefits at either age 60 or 55 would mean that Mr S wouldn't achieve the desired level of income. By combining the transferred pension and his defined contribution accrual, Mr S could have met his objectives.

- Had the BSPS entered the PPF, Mr S would have been prevented from transferring in the future. Had CAL declined to advise him to transfer, it was unlikely Mr S would have moved into the PPF. This was also the investigator's view, as expressed in his assessment.

- As to the investigator's assertion that Mr S's capacity for loss wasn't fully considered, he would by age 60 have accrued around £100,000 in his defined contribution plan. He also had around £781 pm disposable income and so would be adding to his savings. He would also have the (likely full) state pension.

- CAL advised Mr S to invest in line with his attitude to risk, having made him aware of the potential gains and losses which were possible through such investment. By advising him not to transfer, he would have had an income shortfall and couldn't have met his other objectives.

- It agreed that the primary purpose of the BSPS pension was to provide benefits to Mr S, but he wanted to pass on any unused pension to his children. He may have had other sources of lump sums, but this would be limited.

- It was subjective to suggest that there was no guarantee that Mr S would reduce his income withdrawals when he began to receive the state pension. He would have had a surplus of income and would no longer need to draw £18,000 pa from his pension. There was no suggestion that this wouldn't be the case.

- Taking tax free cash for his children's university education may not have been the main reason to transfer, but control and flexibility were key drivers. And Mr S could take tax free lump sums flexibly as needed, rather than taking the one lump sum from the scheme. There was no other way to fund his children's university education, and student finance would have been punitively expensive.

- The critical yield took into account the provision of the spouse's pension, whereas Mr S was single. Mr S wished to gain control over his pension funds and be able to retire early. And he was prepared to take some risk to achieve this. Mr S now had control over how his pension was invested and when he takes it, along with how much he takes in the form of tax free cash. He also has control over the beneficiaries of his death benefits. Further, had he transferred to either the BSPS 2 or the PPF, there would have been early retirement penalties. This wouldn't be the case though the PPP.

As agreement couldn't be reached, the investigator said that the matter would be referred to an ombudsman for review.

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 CAL to use the FCA's BSPS-specific calculator to determine any redress due to Mr S.

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

The matter has now been referred to me to review.

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.

And having done so, I've reached similar conclusions to those set out by the investigator, and for broadly the same reasons.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

<u>*The applicable guidance, rules, regulations and requirements*</u>

This isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business *to "act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time CAL advised Mr S were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like CAL, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, CAL needed to gather the necessary information for it to be confident that its advice met Mr S's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

1. *(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*

(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and

(4) *take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading *"Suitability"*, COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

I've therefore considered the suitability of CAL's advice to Mr S in the context of the above requirements and guidance.

<u>*CAL's rationale for transferring*</u>

Mr S wasn't categorised as an "execution only" or insistent client, and CAL was taking him through the advice process. Therefore, CAL could be confident that he would be acting upon its advice.

In accordance with COBS 9.2.2R, fact finding was undertaken for Mr S and his circumstances and objectives were recorded – as I've noted above.

As with the investigator, I've noted above that the FCA's guidance was that the starting assumption for an assessment of Mr S's options was that a transfer would be unsuitable, unless it could clearly be demonstrated that it was in his best interests in order to meet specific objectives.

And so I'll therefore explore these objectives further below. But initially, I'll consider the advice to transfer from a purely financial perspective – so, in broad terms, how likely was it that Mr S would be better off financially as a result of the transfer.

The financial case to transfer

CAL obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr S's objectives from a financial perspective.

The suitability report was issued before the FCA's revised guidance which was released in late October 2017, and which provided "discount rates" for levels of growth which were deemed achievable for particular time periods until prospective retirement. But before that, similar rates were published by this service. As noted by the investigator, businesses weren't required to reference these when providing advice on transfers, but they would nevertheless have been a useful indicator of the type of investment return deemed feasible at the time.

The discount rate deemed achievable for the number of years left to the scheme retirement age of 65 was 4.5% pa. And the low and mid band growth rates set out by the regulator were 2% and 5% respectively.

The critical yields to age 65, at 6.83%, and to age 60, at 8.47%, therefore comfortably exceeded both the discount (or growth) rate deemed achievable, and both the low and mid growth rates used by the regulator – the former of which (or somewhere in between) might perhaps be a reasonable assumption for a "cautious" risk investor.

CAL itself said in the suitability report that it considered the critical yields to likely be unachievable, and I agree - I think it's more likely than not that the critical yields were unachievable, year on year, for the number of years that Mr S had until he reached either early or normal retirement age. And as a reminder, these growth rates were required to just match the scheme benefits.

From a financial perspective, there needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, the guidance was that it needed to be clearly demonstrated that the transfer would be in Mr S's best interests. As such, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Mr S would be relinquishing.

But the feasibility of achieving a critical yield alone wouldn't in any case indicate suitability of a transfer, as set out in COBS 19.1.7B.

The requirement for control and flexibility - and early retirement

Before I assess these objectives in greater detail, I think it's firstly fair to say that CAL did provide warnings on the guarantees which would be relinquished, but as CAL will be aware, risk warnings alone wouldn't render unsuitable advice suitable. And irrespective of the detail contained in a recommendation report, this also wouldn't make otherwise unsuitable advice suitable. CAL needed to be satisfied, before providing its recommendation, that relinquishing the guarantees and taking the investment risk was a suitable course of action for Mr S.

As I've said above, part of CAL's reasoning for the recommended transfer, despite the likely inability of the transferred benefits to match those which would have been produced by the scheme, was that Mr S required flexibility of income due to his particular circumstances and objectives. And so I've given this argument careful consideration.

I'd initially say that, even without investment experience or other significant assets, I do acknowledge that Mr S may have understood the principle of risk/reward which would be associated with flexible income drawdown, and that there may have been discussions around such concepts with colleagues who were going through the same process.

But Mr S had a cautious attitude to risk, and, as set out in the suitability report, didn't want to take undue risk with his pension fund. And I don't think Mr S in any case needed to take the associated risks here. In terms of the "control and flexibility" argument, I understand that this would be that Mr S would have control over his pension funds, outside of the BSPS, and could alter the income he withdrew from a flexi-drawdown arrangement to satisfy changing income needs.

But as noted above, by age 65, Mr S would have accrued around 22 years' worth of defined contributions in the replacement scheme, or 17 years by age 60. Given the likely value of this separate pot of money on the basis of the employer and employee contribution rates, this could be used to plug any gaps between him starting to take flexible benefits and his OPS/state pension beginning. It's possible that he could have relied on the proceeds of his defined contributions plan for flexible access to pension benefits, and then taken guaranteed benefits from either the BSPS 2 or the PPF as and when needed.

And I think this could also have been the case if Mr S wished to semi retire from an earlier age, such as 57 (which at the time of the advice would be the minimum age at which benefits could be taken).

Alternatively if, on the basis of an income requirement which outstripped this over the years from whatever age Mr S chose to retire (if early) left to age 65 – although I would say that I don't think the actual income requirement was demonstrably known at the time of advice, or could in any case reasonably have been known with any certainty given his distance from retirement - Mr S could then have begun to take the scheme benefits early if needed.

Mr S would have been able to choose a tax efficient level of income (or lump sum withdrawals if he later decided he wanted them) through the defined contribution accrual, until the point that he either needed, or chose, to begin taking benefits from either the BSPS 2 or the PPF. And so, despite CAL's assertion that Mr S simply couldn't achieve his flexible income objective without transferring, any need for flexibility of income could have been addressed in this way.

CAL has referred to the likely value of the accrued defined contribution pot as a reason as to why Mr S had greater capacity for loss than had been assumed by the investigator. But it hasn't taken into account the possibility that it was this pot of money which Mr S could have used and accessed as required, if indeed he wished to retire at age 60 (or slightly earlier), until the valuable, unreduced, scheme benefits began at age 65.

Mr S may then have been in the fortunate position of receiving an income which was higher than his actual needs, especially when the state pension began, but he could have simply reinvested any excess as he saw fit, or, to provide a legacy for his children, immediately gift it away to avoid it being subject to inheritance tax.

As Mr S was accruing further benefits in his defined contribution scheme, and given the likely accumulation of funds in that scheme, compared against the benefits accrued in the final salary scheme, around 22 years of his pension accrual at age 65 (or 17 at age 60) would likely be derived of that scheme. As such, Mr S would already by necessity have needed to take investment risk in the future through the replacement scheme.

In light of this, and given that in the 23 years up to that point Mr S had been accruing defined benefits, I think the guarantees attached to those defined benefits would have been of considerable value - especially to a “cautious” investor. And they shouldn’t have been relinquished lightly in favour of flexibility which, as far as I can tell, was loosely defined around the possibility of early retirement – albeit the actual likely decision making around this was some years distant – and which, as set out above, could in any case likely have been achieved by accessing his defined contribution accrual before the scheme benefits.

As with others in his position, I think it’s fair to say that Mr S may have been concerned about the future of the BSPS and his associated benefits. And I appreciate that there will be instances where a client seeks financial advice with preconceived notions or concerns about the financial health of an employer or pension scheme.

But although Mr S was recorded as wishing to break ties with the BSPS, there was no prospect of the BSPS funds being lost to the employer. Further, although Mr S was apparently also concerned by the prospect of the scheme entering the PPF, the whole point of the BSPS consultation, which had resulted in the agreement being announced in August 2017, had been to avoid the necessity of the BSPS pension funds entering the PPF, and by the point of the advice (and in fact by the point of the “Time to Choose” exercise) the BSPS 2 seemed more likely than not to be a viable alternative.

There were still conditions which still needed to be met for the BSPS 2 to be established, but when the advice was given, there was no imminent prospect of the BSPS entering the PPF without there being an alternative to this – the BSPS 2. In fact, I think it’s reasonable to say that all indications were to the contrary.

The prospect of Mr S’s accrued benefits needing to enter the PPF, and so there being a 10% reduction in benefits payable, had receded. But even if this remained the more likely outcome, this would still have provided him with valuable benefit guarantees, and a more favourable early retirement reduction if he did in fact take scheme benefits earlier than age 65.

Mr S therefore didn’t need to make any decisions about transferring out his defined benefits at that point. The prospect of Mr S’s accrued benefits needing to enter the PPF had receded. But even if this remained the more likely outcome, this would still have provided him with valuable benefit guarantees, and a more favourable early retirement reduction if he did in fact take scheme benefits earlier than age 65.

Mr S’s plans, including retirement, may in any case have changed significantly in the 17 intervening years between then and him reaching age 60. Any flexibility requirements could have been addressed nearer to, or at, the point of Mr S’s retirement – and Mr S would have been able to transfer out of the BSPS 2 if needed.

There may have been lower CETVs offered in the future if gilt yields and other market factors changed, but for the reasons given, I think that Mr S could have achieved a degree of flexibility with his pension benefits without needing to transfer at all. And even if he did ultimately decide that flexi access drawdown was his preferred option – and again, this could have been established closer to his actual retirement age – Mr S or his adviser could then assess at that point whether the transfer represented good value.

And so on the basis of what I've said above, it follows that I don't think the mooted possibility of early retirement, or any other requirement around control over, and flexibility of, income, was sufficient reason for Mr S to transfer his deferred benefits.

Death benefits

I've carefully considered what CAL said in the suitability report about the different format of the death benefits being appealing to Mr S and that he wished to leave any unused pension funds to his children.

And it's fair to say that, if Mr S remained unmarried, the death benefits offered by the transfer would likely be more beneficial to Mr S's children, given that the scheme rules only allowed for a spouse's pension once his children were no longer financially dependent. And I agree with CAL that, given that Mr S was in good health, there seemed to be no reasonable or certainly foreseeable prospect of the dependants' pensions being payable.

But the investigator made the point that accrued pension provision is intended to provide for an individual's retirement rather than a desire to leave a legacy in the form of a lump sum. And I agree - the recommendation needed to be given in the context of Mr S's best interests rather than any lump sum legacy for his family.

And in any case, if Mr S died whilst still employed, his children would have received the death in service benefit, at four times' his salary, plus a return of his defined contributions up that point. By age 60, with 17 year's defined contributions, Mr S would have accumulated a significant amount of pension savings. And there was also a guaranteed payment period of the full scheme pension for five years.

And I think it has to be assumed that, by the time Mr S retired, his children would be financially independent and so wouldn't be reliant upon any unused pension assets.

And all of this of course presupposes that Mr S would remain single from age 43 onwards – and I'd refer back to my point above that, with another 17 years until prospective retirement, Mr S's circumstances could have changed significantly. There was no recorded prospect of Mr S remarrying at the time of the advice, and so I haven't factored this into the above assessment, but given the number of years to retirement, and the benefits to be gained by retirement age for Mr S (or rather a spouse) if indeed he did remarry, I don't think it can necessarily be ruled out as a possibility.

I therefore think that Mr S more likely than not had an entirely understandable desire to leave a financial legacy for his children, but given the other sources of lump sum payments, in addition to a likely mortgage free property by the time he retired, I don't think the lump sum which would have derived from transferring was essential, and certainly not to the extent that it would justify Mr S compromising the security of his own financial future whilst still living.

So for the reasons given, I don't think the prospect of a lump sum benefit by way of transferring his defined benefits constituted sufficient reason to transfer and lose otherwise valuable guaranteed benefits for Mr S personally.

What should CAL have done – and would it have made a difference to Mr S's decision?

There were understandably concerns relating to the BSPS at the time of the advice - and I fully acknowledge this. It's fair to say that this was a period of great uncertainty for individuals such as Mr S. But this only serves to emphasise the need for a balanced assessment of the options available and, ultimately, suitable advice.

Furthermore, as I've also said above, there was no need for Mr S to make any decision about transferring his BSPS benefits at this point in time and it was the responsibility of CAL to explain to Mr S why he didn't need to make any irreversible decision on relinquishing valuable scheme pension guarantees at that time. As I've said above, there was no imminent prospect of Mr S's scheme benefits needing to enter the PPF, which would have ruled out a later transfer. On the contrary, whist I acknowledge it wasn't at that point guaranteed, I think the indications were that the BSPS 2 would more likely than not be successfully implemented.

I've also thought very carefully about whether the service provided to Mr S was a balanced appraisal of the options available to him. Mr S, amongst many others in a similar position, may have been concerned by developments relating to his employment and the BSPS, but he was nevertheless entitled to an impartial review of his options.

And looking at those options, especially relating to flexibility and lump sum death benefits, I don't think enough weight or consideration was given to the means, such as the defined contributions plan, or the (likely) mortgage free property, as set out above, of providing a financial legacy for his children beyond the benefits which would in any case be payable from the scheme.

For the reasons given above, I don't think the perceived advantage of flexibility and control of income outweighed the guaranteed benefits in the scheme, and I'm satisfied that Mr S's income needs could likely have been met by well-planned access to his different types of accrued benefits by the time he came to retirement. The available evidence simply doesn't support the position as to why control or flexibility would have been sufficiently compelling reasons for Mr S to relinquish 23 years' valuable benefit guarantees – especially at the age of 43.

Any concerns Mr S may have harboured about the existing scheme could have been successfully allayed, such that he appreciated the important guaranteed benefits, even under the PPF, which he would be relinquishing for the sake of income flexibility which he simply didn't need or could in any case access in other ways, and a future pension which would, other than the state pension from age 67, be entirely dependent upon investment returns – rather than being partially dependent upon them as would otherwise have been the case through the defined contribution scheme.

Tax free cash for whatever purpose, be it university education funding or his own spending, would have been available both from his accrued defined contribution and defined benefit pension funds. Death benefits beyond the five years' guaranteed payment period were also payable from the defined benefit scheme, should Mr S's relationship circumstances change in the future, albeit in a different format from those available from the PPP.

The critical yield is usually a telling indicator of the value of the benefits being relinquished. As I've set out above, the critical yields were higher than the discount rate and the low/mid band growth rates set out by the pension provider. And I'd reiterate that I think it was unlikely to be achievable, year on year, to even simply match the scheme benefits, as also noted by CAL.

Taking account of Mr S's circumstances, including his recorded attitude to risk, his objectives and the guarantees which the BSPS offered and would have persisted with either the BSPS 2 or the PPF, my view is that CAL should have advised against the transfer.

And I think that, had this happened, Mr S would have followed that advice and not transferred his benefits to the PPP.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to the conclusion that the recommendation to transfer wasn't suitable for Mr S, nor was it in his best interests. The key contributing factors here are: the lack of a comprehensive and balanced portrayal of Mr S's options and the future benefits available from both the BSPS defined benefits and defined contributions – a failure to adhere to COBS 19.1.2 (2) and 19.1.8.

Furthermore, at least three of the key benefits sought by Mr S were available without needing to transfer – possible early retirement and flexibility through utilising the different types of scheme benefits which would have been available to him, along with lump sum death benefits through the other means available, both before and after retirement.

My view is that, taking account of the critical yields, and Mr S's recorded "cautious" attitude to risk with regard to his pension funds, and matching that with the likely corresponding investment returns, it was unlikely (as also indicated by CAL), albeit I acknowledge, not impossible, that the benefits available from the BSPS, or a successor scheme, could be bettered through the transfer.

As the other reasons for transferring were insufficiently compelling, when considered against the valuable benefits being relinquished, as set out in COBS 2.1.1R and the guidance of COBS 19.1.6, CAL would - or should - then have drawn, and conveyed, the conclusion that transferring wasn't in Mr S's best interests.

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 S, as far as possible, into the position he would now be in but for the unsuitable advice.

In terms of the option Mr S would have chosen, had he been suitably advised, I've noted that there would be a 10% reduction in the starting pension entitlement within the PPF, whereas the BSPS 2 wouldn't cut the starting entitlement for deferred members.

Regarding death benefits, under the BPSP 2 the spouse's pension would be set at 50% of Mr S's pension at the date of death, and this would be calculated as if no lump sum was taken at retirement. But as Mr S was single at the time, and unless he had undisclosed plans to marry, I don't think this particular enhancement over the PPF benefits would have had much resonance for him at that time.

The reduction for early retirement under the PPF was lower and the commutation factors for the tax free cash entitlement were also slightly more favourable. And so, on the basis of prospective early retirement, both the starting income and the tax free cash would likely have been higher with the PPF.

One of Mr S's recorded objectives was the possibility of being able to retire early. And so this would have been a point which required careful consideration when weighing up whether he should opt for the BSPS 2 or remain in the BSPS with a likely subsequent move into the PPF.

But for the reasons set out above, even if Mr S envisaged retiring early, I think it's likely that, properly advised, he could have accessed his defined contribution scheme benefits to make up any income shortfall in the period between retirement and starting to take his defined benefits, which could then have been deferred until normal scheme retirement age. The advantages of early retirement through the PPF wouldn't therefore have applied.

And so, for the reasons given, my view is that it's the benefits offered by the BSPS 2 which should be used for comparison purposes.

I therefore consider that Mr S would most likely have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given. And as I've set out above, given the amount of time left to retirement, I don't think it could be assumed that Mr S would take his defined benefits before age 65, especially with the possibility, as outlined above, of accessing his accrued defined contributions flexibly if required.

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 S and our service upon completion of the calculation.

Mr S hasn't yet retired, and cannot do so for several years. 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 S'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 S redress as a cash lump sum payment,

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

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

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

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

As with the investigator, my view is that this matter will have caused Mr S a not inconsiderable amount of concern about his security in retirement. As such, I agree that Cambrian Associates Limited should also pay Mr S £300 in respect of this.

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 S to accept or reject my decision before 11 December 2023.

Philip Miller
Ombudsman