DRN-3629248

The complaint

Mr O complains about the advice given by Michael James, trading as West Country Financial ('WCF') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS'), to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr O is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr O.

What happened

In March 2016, Mr O's employer announced that it would be examining options to restructure its business, including decoupling the BSPS (the employers' DB scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund ('PPF'), or a new defined-benefit scheme ('BSPS2'). Alternatively, members of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr O's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

On 18 September 2017, the BSPS provided Mr O with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £225,080.14.

I understand Mr O first spoke to WCF, about advice regarding his BSPS pension, in September 2017. Information from WCF indicates Mr O was referred to it by another financial adviser.

WCF completed a fact-find to gather information about Mr O's circumstances and objectives. Mr O was 46, married, with two children. He was employed full time and his household income was recorded as exceeding his outgoings. He had an outstanding mortgage of approximately £30,000 with a remaining term of roughly twelve and a half years. He also had a car loan to which he was paying £160 per month with about four years left to run. In addition to the benefits held in the BSPS, Mr O was also a member of his employer's new defined contribution ('DC') pension scheme.

WCF noted that Mr O hoped to retire at age 60. And said he expected to need an income of £15,000 per year in retirement. It said he was interested in potentially taking a tax-free lump sum from his pension benefits to clear any remaining debts. WCF recorded that Mr O had lost trust in his employer's handling of the pension. His three main reasons for considering a transfer were recorded as being to take control of his pension – although it was noted that he had no investment experience – have access to a bigger lump sum and the flexibility to retire when he wanted to.

WCF also carried out an assessment of Mr O's attitude to risk. This was noted in some of the original notes as being 'cautious'. The recommendation however referred to Mr O's "natural attitude to risk" as being 'balanced', or a six out of ten, with one being lowest risk and ten highest. But it had agreed that it was more appropriate to invest at a 'cautious balanced' level, or a four out of ten. An internal review of the advice by WCF highlighted this inconsistency and that Mr O's original attitude was considered 'cautious'.

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

WCF has provided a copy of a suitability report, dated 13 November 2017, in which it advised Mr O to transfer his pension benefits into a personal pension with a named provider and invest in the provider's managed funds. The suitability report said the reasons for this recommendation were that Mr O wanted to take retirement before age 65 without his pension being reduced, wanted the ability to pass his pension fund on to his family as a lump sum in the event of his death, preferred to have flexibility in terms of how he could take his benefits and had no confidence in his employer's management of the pension. WCF said Mr O valued these things over the guarantees he was giving up. And so, it thought a transfer was suitable as it met his objectives.

Mr O complained in 2021 to WCF about the suitability of the transfer advice. WCF didn't uphold Mr O's complaint. It said the advice was suitable based on Mr O's objectives, it had given a full explanation of the reasons for this, and Mr O had proceeded clearly having understood the reasons for the advice.

Mr O referred his complaint to the Financial Ombudsman Service. One of our Investigators looked into the complaint and said it should be upheld. She didn't think Mr O was likely to improve on the guaranteed benefits he was giving up by transferring. And she didn't think transferring for the reasons WCF had said was in Mr O's best interests. She felt he could've still met his objectives without giving up his guaranteed benefits and, if suitable advice not to transfer had been given, felt Mr O would likely have joined the BSPS2. So, she recommended that WCF compensate Mr O for any losses caused by the unsuitable advice and pay him £200 for the distress he'd incurred.

WCF disagreed. It said it wasn't clear that the Investigator had assessed the complaint on the right basis – as the requirements of it were to take reasonable steps to ensure the advice was suitable for Mr O, not guarantee it was in his best interests with the benefit of hindsight. WCF said the Investigator had placed too much weight on the growth rate required to match the benefits from the DB scheme (the critical yield) which was of limited relevance. And it said the discount rate which the Investigator had referenced wasn't something it was required to consider. It said it still believed that the advice was suitable, based on Mr O's circumstances, and said Mr O had made a fully informed decision to proceed with the transfer, which the Investigator hadn't considered, and which it felt was crucial. WCF also said that the BSPS2 was not a confirmed option at the time of the advice.

The investigator wasn't persuaded to change her opinion. She made the point that WCF's role wasn't just to facilitate what Mr O might've thought he wanted but was to provide objective advice. And she felt, although not confirmed, it was clear to the parties at the time of the advice that the BSPS2 was likely to proceed. As agreement could not be reached the complaint was referred to me to make a final decision.

What I've decided – and why

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

I’ve taken into account relevant law and regulations, regulator’s rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses (‘PRIN’) and the Conduct of Business Sourcebook (‘COBS’). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of WCF'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 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

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.

WCF says that its adviser was only required to take reasonable steps to ensure the advice was suitable for Mr O. I agree that under COBS, WCF was required to take reasonable steps to ensure that its personal recommendation to Mr O was suitable for him (COBS 9.2.1). But it was also required, under COBS 2.1.1R to ensure it acted in accordance with his best interests. And, as I’ve mentioned above, additional regulations and guidance apply to advising on transferring out of DB schemes. These say that the starting assumption for a transfer from a DB scheme is that it is unsuitable. And that a business should only have considered a transfer out of the scheme if it could clearly demonstrate that the transfer was in Mr O’s best interests (COBS 19.1.6G). And having looked at all the evidence available, I’m not satisfied it was in his best interests. I’ll explain why.

- WCF was required to obtain a transfer value analysis (‘TVAS’) report by the regulator. This included the calculation of critical yields. The regulator required WCF to calculate this and consider the cost of the guarantees being given up. So, I do think an analysis of the critical yield is a relevant consideration here.

- The TVAS WCF has provided said that the critical yield was 7.66% to match the benefits Mr O would have been entitled to under the BSPS at age 65. Or, to match benefits the PPF would’ve paid from 65 the critical yield was 4.93%. The report also looked at the critical yields required to match the benefits Mr O would’ve been entitled to from age 60, as he had said during the fact-find this was when he hoped to retire. To match the BSPS benefits this was calculated to be 9.12% and to match what the PPF would pay it was 5.72%.

- There was no analysis of the benefits that Mr O could’ve received under the BSPS2 and critical yields were not calculated in reference to this. And I think there should've been, as information about the benefits, not least the revaluation and escalation rates, were made available in the "time to choose" letters. WCF has argued that the BSPS2 may not have gone ahead. But I think it is overstating the chance of this. The restructuring of the BSPS had been ongoing for a significant amount of time by the point WCF gave advice and requested the TVAS. Actions had been agreed with the pension's regulator and carried out as scheduled – not least a lump sum payment into the BSPS which enabled the provision of improved transfer value quotations in September 2017. So, based on what had happened to that point, I think the relevant parties, not least the trustees, were confident the BSPS2 would go ahead.

- Given what we know about the BSPS2, I think the critical yields to match the benefits it would've provided were likely to be between those of the BSPS and the PPF.

- The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. WCF has said it was not required to consider these discount rates. But the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension, using reasonable assumptions. And the discount rates give a useful indication of what growth rates would have been considered reasonably achievable for a typical investor. And so, while WCF was not obliged to use the discount rate, it would, in my view, be a reasonable assumption to consider. And WCF was free to consider it.

- WCF has referred to past performance of the recommended investment. But, as WCF is aware, this is no guarantee for future performance. At the time the regulator's standard projection rates were 2%, 5% and 8% for low, medium and high returns respectively. And I consider those alongside the discount rates to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

- Mr O's attitude to risk was initially referred to as 'cautious'. The suitability report referred to his attitude as actually being 'balanced' but the parties having agreed on 'cautious balanced'. But I note that an internal review of the advice instructed by WCF at the time suggested these references were incorrect given the earlier assessment of Mr O being 'cautious'. Based on the attitude to risk questionnaire I've been provided, I think the initial assessment of Mr O being 'cautious' appears correct.

- Even if though Mr O's attitude to risk was 'cautious balanced', considering this, the discount rates of 4.4% for 18 years to retirement (for retiring at 65) and 4.1% for 13 years to retirement (retiring at 60) and the regulator's middle projection rate, I think Mr O was always likely to receive pension benefits, at either age 65 or 60, of a lower value than those he'd have been entitled to under the BSPS, the BSPS2 or the PPF.

- WCF has said that there were other reasons that meant a transfer was suitable for Mr O. And has referred to what Mr O indicated he was interested in and had a preference for. I'll go on to address these other reasons for transferring. But I'd also add that WCF's role wasn't that of wish fulfilment or to put in place what Mr O might've thought he wanted when seeking advice. It was to give him objective advice about what was in his best interests.

- WCF said that accessing tax-free cash at age 55 to clear his debts appealed to Mr O. But the level of debt he still had at the point he could take tax-free cash was likely to have been significantly less than was recorded at the time of the advice. Mr O's car loan was due to be repaid within four years of the advice – five years before he reached age 55. His mortgage, which was recorded as being on a repayment basis, would still have had roughly three years remaining to run. But the balance would've been significantly reduced by the repayments made in the meantime.

- Mr O also had the option to overpay and reduce his mortgage further – using either the funds freed up when the car loan was repaid or some of his disposable income. So, he may not have had any debts to repay at age 55. Even if though the balance on his mortgage wasn't already cleared in full, Mr O said he planned to continue working until age 60, so would've still received an income. And there was nothing to suggest that Mr O was struggling with or behind on repayments or that these wouldn't have continued to be affordable. So, I don't think he *needed* to clear this debt at age 55 and I don't think giving up his guaranteed pension benefits to reduce a debt that he could afford, was in his best interests.

- WCF said Mr O expected to stop working at age 60 and wanted the flexibility to be able to take his pension benefits at his discretion without incurring reductions.

- Mr O could've taken benefits under the BSPS2 or the PPF from age 60. It is true that these would've been subject to actuarial reductions. But that was to reflect the fact that benefits would've been payable for longer than if he waited to his normal retirement age. This reduction was not a penalty. And, as I've already explained, Mr O was unlikely to be able to improve on the benefits he'd have been guaranteed by the scheme from age 60 by transferring.

- In addition, I'd note that Mr O was only 46 at the time of the advice. Over 13 years from when he thought he would retire. Most people I think would generally aspire to stop working early. As Mr O may well have done. But a lot could've changed in the time between the advice and him actually coming to retire. So, I don't think his plans were finalised.

- I can't see that Mr O needed the ability to vary the income he received from this pension in retirement, even if he did retire from age 60. The expected annual pension the DB scheme would provide from 60 was less than the annual income he thought he'd need in retirement. But Mr O was a member of his new employer's DC scheme, in which he expected to build up additional pension benefits. And it is reasonable to expect he'd have continued to build pension benefits, either through this scheme or with another employer if he moved roles, until he retired. So, he would've had these and his DB scheme benefits in retirement, to meet his needs. The DC scheme benefits would've been accessible flexibly. So, in my view, retaining his guaranteed DB scheme benefits as a solid base for his retirement income while using his DC scheme flexibly if necessary until he later received his state pension, was a more appropriate way to meet his needs than exposing his DB scheme to unnecessary risk.

- And in fact, the suitability report said that Mr O intended to use the proceeds of his new DC pension to meet his income needs entirely between age 60 and him receiving his state pension and expected them to be sufficient to allow him to do so. In which case I can't see that he had a genuine need for flexibility in terms of his DB scheme benefits.

- WCF said Mr O could risk his DB pension, because he had the DC pension to meet his needs, and leave it invested. But by investing in line with his attitude to risk he was unlikely to improve his retirement benefits. And I don't think it was in his interests to put his DB scheme benefits at risk, for flexibility he didn't need.

- WCF said Mr O was interested in the lump sum death benefits of a personal pension, to ensure that a sum was left to his family, particularly his children, in the event of his death. But the priority here was to advise Mr O about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension, that could've been valuable to his wife in the event of his death.

- While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would've also been reduced by any income Mr O drew in his lifetime. And, although it was noted that Mr O had an ongoing health condition, he was referred to in several of the documents as being in good health. So, the pension may not have provided the legacy that Mr O may have thought it would.

- The suitability report referred to WCF having considered life insurance as an alternative. And said that to provide cover equivalent to the CETV the premiums were £197.76 per month. But WCF has provided comparison quotations from the time that indicates whole of life cover was actually potentially available for much less than this. And there was the potential to explore insurance on a term assurance basis – which was likely to be cheaper. And basing a quote on the CETV also effectively assumed Mr O would pass away on day one following the transfer, which isn't realistic.

- WCF said Mr O declined the option of life insurance as an alternative to transferring as he felt moving his pension to provide this benefit was better than paying money for insurance. But I think the way information was presented about insurance was misleading. And if it had been explained that insurance was potentially obtainable for a much lower cost, and that the pension was unlikely to provide death benefits equivalent to the CETV, Mr O might've been more inclined to consider this. And again, in any event, WCF's role wasn't that of an order taker. It was required to advise Mr O about what was in his best interests. And I don't think it can reasonably be said that giving up his guaranteed retirement benefits for alternative death benefits was in his interests.

- WCF also said that transferring gave Mr O the control of his pension funds that he wanted. But I think Mr O's desire for control over his pension was overstated. I can't see that he had an interest in or the knowledge to be able to manage his pension funds on his own. And the recommendation seems to have been on the understanding he was going to take ongoing advice about how his pension was invested, at additional cost. So, I don't think that this was a genuine objective for Mr O – it was simply a consequence of transferring away from his DB scheme.

- I don't doubt that Mr O was likely to have been upset by what had happened with his pension to that point. Or that he had negative feelings about his employer and might've thought moving his pension away from it was appropriate. I think that would have been a very natural emotional response to what had happened. But again, WCF's role was to give impartial, objective advice. Mr O's employer and pension scheme were not one and the same. And Mr O intended to continue in his job and was paying into a new DC scheme with his employer. So, the relationship may not have been as irretrievably broken down as suggested.

- Mr O may have held concerns about the prospect of his deferred benefits entering the PPF. But there had been a number of key announcements that all pointed toward the BSPS2 being established as an alternative. Which was expected to provide better benefits than the PPF and still provide Mr O the option to transfer closer to retirement. But even if the BSPS2 hadn't happened, the PPF still provided Mr O with guaranteed income and the option of accessing his benefits early. Mr O was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've thought, and I don't think any concerns he held about this meant that transferring was in his best interests.

Overall, I can't see persuasive reasons why it was clearly in Mr O's best interest to give up his DB benefits and transfer them to a personal pension.

WCF says that Mr O made an informed decision to transfer and that the Investigator did not have enough regard for this. So, I've thought carefully about whether Mr O would always have looked to proceed with the transfer. I can see that WCF did give information about some of the risks involved in a transfer, when it made its recommendation. But ultimately, it advised Mr O to transfer. And, while he might've entered the discussions thinking about transferring, I think he relied on that advice. I believe that if WCF, a professional adviser whose expertise he had been recommended, had explained why it wasn't in his best interests to transfer I think he'd have accepted that advice.

As a result, I'm upholding this complaint as I think the advice Mr O received from WCF was unsuitable.

Mr O had over 13 years before he reached the age at which he'd indicated he might like to retire. But his plans were in any event unconfirmed. I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for very early retirement. And by opting into the BSPS2, Mr O would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think, had he received suitable advice not to transfer, Mr O would've opted into the BSPS2. And I think WCF should compensate him on this basis.

WCF has said that it wasn't the firm that provided ongoing advice, so it isn't responsible for what has happened since the transfer. But if WCF hadn't advised Mr O to transfer, none of the subsequent investments would've happened. WCF's role was pivotal, since the eventual investments were fully reliant on the funds being transferred first. So, in my view, the entirety of any loss Mr O might've incurred stems from WCF's unsuitable advice. So, I think holding WCF responsible for the whole of any loss represents fair compensation in this case.

Our Investigator recommended that WCF make a payment for the distress caused to Mr O. I accept that Mr O has likely been worried to find, when he discussed matters with his representative, that the advice might not have been suitable for him. And given the circumstances and uncertainty under which he first asked for this advice, I don't doubt he has been concerned. This wouldn't have occurred but for the advice that is the subject of this complaint. So, in the circumstances, I think the recommended award of £200 is fair and reasonable.

Putting things right

A fair and reasonable outcome would be for WCF to put Mr O, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr O would most likely have remained in the DB scheme and opted to join the BSPS2 if suitable advice had been given.

WCF 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.

WCF 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 O and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what WCF based the inputs into the calculator on.

For clarity, Mr O has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, 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 O'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, WCF should:

- calculate and offer Mr O redress as a cash lump sum payment,
- explain to Mr O before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr O receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr O accepts WCF's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr O for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr O's end of year tax position.

Redress paid to Mr O as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, WCF 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 O'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.

In addition, WCF should pay Mr O £200 for the distress caused by the disruption to his retirement planning.

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 pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Michael James, trading as West Country Financial to pay Mr O the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Michael James, trading as West Country Financial pays Mr O the balance.

If Mr O accepts this decision, the money award becomes binding on Michael James, trading as West Country Financial.

My recommendation would not be binding. Further, it's unlikely that Mr O can accept my decision and go to court to ask for the balance. Mr O may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 10 November 2023.

Ben Stoker
Ombudsman