

## **The complaint**

Mr J has complained that Hugh James Solicitors, trading as Hugh James Independent Financial Advisers, 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 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 Mr 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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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.

The scheme trustees provided Mr J with a cash equivalent transfer value (CETV) on 16 October 2017 of £330,809 in respect of 20 years and 6 months' membership. Mr J met with Hugh James on 2 November 2017 with his circumstances and objectives recorded in a fact find.

According to the document, Mr J was married, 40 years old with an intended retirement age of 58, in good health, and owned his current residence. An attitude to risk questionnaire established that Mr J was categorised as "balanced".

Hugh James completed an analysis of the BPS CETV on 8 November 2017, calculating that Mr J would receive a pension of £23,504 pa from the BPS at age 65 (or £15,577 pa with a lump sum of £103,848) or £17,046 pa (or £11,702 pa with a lump sum of £78,091) at age 60.

In order for the CETV to match these benefits, Hugh James calculated that the following minimum annual growth rates would be needed (the critical yields):

- 6.24% for full pension (or 5.1% with tax-free cash lump sum) at age 65.
- 6.85% for full pension (or 5.46% with tax-free cash lump sum) at age 60.
- 7.27% for full pension (or 5.79% with tax-free cash lump sum) at age 58.

Hugh James also calculated that if the CETV were to achieve a medium rate of return (5%) and benefits taken at the same rate as provided by the occupational scheme increasing by RPI, the fund would last until the following ages:

- Age 103 at full pension from age 65 (or age 119 if tax-free cash was taken).
- Age 106 at full pension from age 60 (or age 120 if tax-free cash was taken).

Hugh James's suitability report was completed on 9 November 2017. The suitability report set out that Mr J's objectives were to have an income of £2,000 pm in retirement, to retire early at age 58/60, to provide benefits to Mr J's daughter in the event of his unexpected death, and to have flexibility and control in the way his benefits are paid. It was also noted that Mr J had serious concerns regarding the scheme's financial stability and no longer wished to have his benefits under the scheme's control.

Hugh James recommended that Mr J should transfer his BPS pension to a PPP with Prudential. The reasons for the recommendation were that the pension would provide tax-free death benefits until age 75, have a wide range of investment funds and provide growth over the long term, and would also provide flexibility to manage the funds depending on Mr J's personal circumstances. The report noted that the critical yields were high, but Hugh James considered them to be achievable.

The ongoing charge, including adviser fees, was 1.5%, with an additional one-off charge of 1% of the transfer value charged by Hugh James for transfer advice.

Mr J brought his complaint to this service in September 2022, saying that the advice meant he had lost valuable guarantees and was paying more in investment charges than he would have previously.

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

- The advice was given during a time of uncertainty, but having reached out for advice, Mr J was more likely than not to have been reliant upon the advice given.
- 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 58 was 7.27% and to match them at age 65 it was 6.24%. The discount rate for 17 years to retirement was 4.4% and, taking into account Mr 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.
- Mr J didn't need to transfer to be able to retire early. He could have done so with the scheme, which, given the critical yields, had the best chance of providing the highest income.
- Mr J may have found the prospect of flexibility appealing, as many perhaps would, but given the choice between a higher guaranteed income and flexibility, the former would have been better for Mr J.
- Mr J's defined contribution accrual could have been used to address any flexibility requirement, or perceived "funding gap" between early retirement and the state pension age.
- In terms of death benefits, the PPP would have paid a lump sum, but Mr J also had death in service benefits of four times' his salary. His family would also have received the benefit of his defined contribution plan. Further, the primary purpose of the retirement benefits was to provide an income to Mr J rather than death benefits for his family.
- Mr J may have had concerns about the prospects for the BSPS, but these concerns should have been managed and addressed by Hugh James.

The investigator recommended that Hugh James undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr J 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 J 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 J's pension plan, but if this wasn't possible, it should be paid directly to Mr J, with a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

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 Hugh James to use the FCA's BSPS-specific calculator to determine any redress due to Mr J.

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

Mr J confirmed that he was happy with this. Hugh James's representative then said that Hugh James had arranged for the calculation to be undertaken in accordance with the updated guidance and using the BSPS-specific calculator. It set out that this had produced a "no loss" position for Mr J.

Mr J said, however, that he would like an ombudsman to consider the case.

Hugh James's representative queried the need for the matter to be considered by an ombudsman, suggesting that it should be dismissed, but if it was referred for review, it wished to make the following submissions in summary:

- The available evidence didn't support the position that Mr J would have done whatever Hugh James recommended.
- The evidence relating to the critical yield if tax free cash was taken at age 58 (5.79%), being only slightly higher than the regulator's mid band growth rate of 5%, didn't support the position that Mr J was likely to receive benefits of a substantially lower overall value.
- Given that the regulator's mid band growth rate was 5% pa, its use of this within the cash flow modelling didn't seem inappropriate.
- The flexibility offered by the PPP would allow Mr J to change his income levels between early retirement and the state pension age.
- The BSPS would have provided Mr J with a maximum income of £15,279 pa at age 58 if he took no tax free cash. The Tata scheme would need to achieve returns of 5.5% pa to provide the additional £9,000 pa which Mr J said he required in retirement. But the investigator wasn't persuaded that this level of growth was achievable.
- Mr J's personal circumstances supported the rationale for the increased lump sum benefits from the PPP for his daughter. If Mr J had needed to rely on his defined contribution plan between age 58 and 65, this would have reduced any lump sum which would be payable from this source, and post retirement he wouldn't have been entitled to the death in service benefits.

The representative further said that, if the matter was referred to an ombudsman and upheld, it would simply be replicating the same loss calculation which had already determined that Mr J hadn't incurred a loss through transferring.

The investigator acknowledged the representative's submissions, but confirmed that, as Mr J had requested that the matter be referred to an ombudsman, it would duly be referred for that consideration.

More recently, the investigator invited Hugh James to recalculate on the basis of the BSPS-specific calculator, and to do so (and submit the results to this service) by 24 November 2023. The investigator suggested that they would then engage with Mr J to try to resolve the matter without the need for an ombudsman's decision.

But as no further calculation has yet been forthcoming from Hugh James or its representative, the matter has been passed to me for 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.

I've noted the comments from both parties in response to the investigator's assessment. In particular, I understand the point made by Hughes James's representative about the loss calculation has already undertaken, but Mr J has expressed his preference to have the investigator's findings reviewed by an ombudsman, which is open to either party. I also acknowledge that a previous calculation may have determined a "no loss" position for Mr J, and that this may well also be the case with a revised calculation.

As Hugh James has offered to undertake the redress calculation, 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 DB 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 Mr 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 Mr J's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 5.79% to match the post-tax free cash pension he'd have been entitled to under the scheme at age 58. Hugh James's representative has said that this was only slightly higher than the regulator's mid band growth rate, and lower than the higher rate. But I don't think the latter would be relevant here given Mr J's "balanced" attitude to risk.
- As for the critical yield being only slightly higher than the mid band growth rate, the critical yield was the return needed to *simply match* the scheme benefits. For them to be bettered, it would need to be higher still. And the fact in any case remains that the critical yield was higher than both the mid band growth rate and the discount rate to that same age. And so I think the conclusion that the benefits produced by the PPP were more likely than not to be lower than those provided by the scheme is fair and reasonable.
- Early retirement may well have been appealing to Mr J, as it might reasonably be appealing to a great many people, but he had no clear or pressing plans to do so, which I think is understandable for a 40 year old. Mr J's circumstances may in any case have changed significantly between then and retirement. And if flexibility was required in terms of the "funding gap" between early retirement and the state pension age, Mr J would have accrued around 18 years' defined contributions by age 58 (or 20 by age 60), which he wouldn't have needed to take as an annuity – he could have accessed as much or as little of this as he required – flexibly - including tax free cash, until he needed to begin accessing his BPS benefits.
- In terms of the alternative lump sum benefits a transfer offered to his family, the priority here was to advise Mr J about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's (and dependants') pension, that could have been valuable to his family 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 have also been reduced by any income Mr J drew in his lifetime. And so it may not have provided the legacy that Mr J may have thought it would. Further, Mr and Mrs J had no clearly identifiable need for the lump sum benefits – they owned their home outright and their daughter was envisaged to be financially independent by the time Mr J retired.
- Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr J. And ultimately Hugh James shouldn't have encouraged Mr J to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.
- Mr J may have held concerns about the BPS the prospect of entering the PPP. But it was Hugh James's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BPS 2 being established. But even if not, the PPP still provided Mr J with guaranteed income and the option of accessing tax-free cash. Mr J was unlikely to improve on his scheme benefits by transferring. So, entering the PPP was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons as to why it was clearly in Mr J's best interest to relinquish his defined benefits and transfer them to a PPP. And I also haven't seen anything to persuade me that Mr 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 Mr J received from Hugh James was unsuitable.

### **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 J, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr J would more likely than not have remained in the occupational pension scheme and opted to join the BPS 2 if suitable advice had been given.

Hugh James Solicitors, trading as Hugh James Independent Financial Advisers, 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, trading as Hugh James Independent Financial Advisers, should use the FCA's BPS-specific redress calculator to calculate the redress. A copy of the BPS calculator output should be sent to Mr J and our service upon completion of the calculation.

Mr J hasn't yet retired, and cannot do so for many 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 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, trading as Hugh James Independent Financial Advisers, should:

- calculate and offer Mr J redress as a cash lump sum payment,
- explain to Mr 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 Mr J receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr J accepts the offer of Hugh James Solicitors, trading as Hugh James Independent Financial Advisers, to calculate how much of its redress could be augmented, request the necessary information and not charge Mr 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 Mr J's end of year tax position.

Redress paid to Mr 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 Mr 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, trading as Hugh James Independent Financial Advisers, to pay Mr 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, trading as Hugh James Independent Financial Advisers, pays Mr J the balance.

If Mr J accepts this final decision, the award will be binding on Hugh James Solicitors, trading as Hugh James Independent Financial Advisers.

My recommendation wouldn't be binding on Hugh James Solicitors, trading as Hugh James Independent Financial Advisers. Further, it's unlikely that Mr J could accept my decision and go to court to ask for the balance. Mr 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, trading as Hugh James Independent Financial Advisers, to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 27 December 2023.

Philip Miller  
**Ombudsman**