DRN-4395968

The complaint

Mr A has complained that NTM Financial Services Ltd 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 A'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 Pension Protection Fund (PPF) or into a private arrangement, such as a PPP.

Mr A joined the BSPS in April 1990 and had just under 27 years of pensionable service. His projected benefits at the time of advice were:

- An annual pension of £18,601 at age 65 or a reduced pension of £12,328 and a tax free lump sum of £82,186
- Death benefits including the return of member contributions of £51,272.76 and a 50% spouse's pension. There was also a dependants' pension potentially up to age 23.

When the pensions regulator announced terms for the closure of the BSPS pension, members were provided with personal information and illustrations in October 2017 to help them make their choices.

As the scheme was closing, the funds could be transferred to either:

- The BSPS 2 which was being proposed
- The PPF

- A PPP arrangement (or similar)

At the time of advice, Mr A was 54 and the business file recorded that he was considering retirement at age 57.

A defined benefit transfer value quotation was issued on 28 June 2017 outlining Mr A’s benefits with the now closed scheme. The cash equivalent transfer value (CETV) was £341,820.60. The date of leaving the scheme was recorded as 31 March 2017. The scheme allowed for early retirement at age 55 with actuarial reductions.

The client questionnaire, attitude to risk questionnaire and Pension Transfer Analysis Application were completed on 9 August 2017. These documents noted Mr A’s circumstances at the time of advice as follows:

- He was married
- He was in good health, other than a planned routine operation
- He had two children, one of whom was financially dependent
- His salary was £37,000 pa and his net income was £2,345 per month (£2,000 without bonus)
- His total expenditure was £1,172 pm (£911.30 debt repayments) and he had surplus income of £1,173 pm
- He had a further £200 per month from other income related to land he held (not listed under the income section)
- His main residence was valued at £170,000, with a £120,000 mortgage attached
- He owned land worth £150,000
- He had a loan of £5,000 and a hire purchase amount of £2,500 due to be repaid in April 2019
- He had credit card debt of £8,800
- He had no other investments

The client information form had handwritten notes which said that Mr A had little investment knowledge, but a good understanding of the changes with his employer and the OPS, along with his options. He selected the following statement to reflect his attitude to investment risk:

‘Investors in the High risk group are only prepared to take a medium degree of risk with their financial decisions. When faced with a major financial decision they are usually more concerned about the possible gains than the possible losses. It is somewhat more important that the value of their investments retains its purchasing power than it does not fall. For some, a fall of 20% in the total value of their investments would make them feel uncomfortable but for most it would take a fall of 33%.’

A risk profile questionnaire was also completed on 9 August 2017 and in the first two questions Mr A indicated he was an ‘*average risk taker’* and when things go wrong financially he adapted ‘*Somewhat uneasily’*. The rest of the answers were scored and Mr A was found to be classed as a ‘High Risk’ investor.

In a file note made on 13 September 2017, Mr A confirmed he understood the funding arrangements of the new scheme (as he was a union official).

On 9 August 2017 it was also recorded that, in a meeting held with Mr A, his attitude to risk was discussed, along with his investment knowledge. Mr A felt he had an above average knowledge of investments due to the changes being made to the OPS and the investment needs of the scheme. He needed to understand these as the changes needed to be agreed by the union and its members.

A recommendation report outlining the recommendation to transfer and the Pension Transfer Report was issued to Mr A on 5 September 2017.

The report outlined Mr A's goal and objectives. The investigator summarised them as follows:

- He understood the changes and wanted to transfer to allow him to have control over his affairs and to meet his lifestyle needs, rather than worry about the future of the BSPS.
- He believed life expectancy was lower for people in the steel industry. Mr A wanted to be in control of his destiny as he felt let down by the company, pension trustees, government and regulators.
- He wanted to retire at age 57.
- He wanted an income of approximately £1,800 per month.
- He was attracted to the flexible options provided by taking control of his benefits.
- He was no longer happy to delegate to the trustees and his employer control over his retirement benefits, especially as they were no longer underpinned by his employer.
- He held the strong opinion that the pension should be used to provide him with capital and income to meet his needs. Protection benefits were a secondary consideration.
- He was expecting to earn income from the land he owned and a further separate venture - however it was noted that this might vary.
- He wanted his pension to make up the shortfall as income from business interests would fluctuate.
- He wanted to be able to control the amount of tax he paid.
- He was unhappy about the prospect of being moved into the PPF because of the reduced benefits, the loss of choice and lack of flexibility.

The suitability letter discussed Mr A's attitude to risk. Capacity for loss was also discussed and it was concluded that Mr A understood there may be fluctuations in the value of any investments to achieve his objectives.

The reduction factors in his expected OPS pension were not available for 57 and so the report explained this and used 55 to provide an indication of the effect on the benefits. The estimated benefits at age 55 were presented in the Pension Transfer Report as an annual pension of £10,004 or an annual pension of £7,075 and tax free lump sum of £47,167.

The suitability report and Pension Transfer Report (containing PPF figures) provided critical yields and hurdle rates which the investigator set out as follows:

<u>*BSPS*</u>

- Critical yield at age 65 with full scheme pension – 9.19% pa
- Critical yield at age 65 with tax fee cash taken – 7.18% pa
- Hurdle rate at age 65 with full scheme pension – 2.79% pa
- Hurdle rate at age 65 with tax free cash taken – 1.47% pa
- Critical yield at age 55 with full scheme pension – in excess of 50%
- Critical yield at age 55 with tax free cash taken – in excess of 50%
- Hurdle rate at age 55 with full scheme pension – 19.52%

- Hurdle rate at age 55 with tax free cash taken – 20%

PPF

- Retirement at age 65 with full scheme pension – 4.91% pa
- Retirement at age 65 with tax fee cash taken – 4.33% pa

The hurdle rates were the levels of growth required to provide a level of income equal to the scheme benefits, but with no spouse's pension, no increases in payment and no guarantee.

The suitability letter noted that the critical yields were too high and it would be difficult to justify recommending a transfer based on these alone. It was recorded that Mr A understood that the transfer would generate lower income than the BSPS.

But it also recorded that he had strong views about being able to tailor his own income. He required £1,800 per month and wanted to have an income to supplement that from other sources.

The growth rates quoted for the hurdle rates were not deemed excessive. The report further recorded that Mr A wanted the ability to vary income in early years of his retirement.

Cash flow modelling was presented to show the effects of using uncrystallised funds pension lump sums (UFPLS) or drawdown to provide income. The modelling was done assuming a 5% growth rate at age 55 and 65. The results were summarised as below:

	Retirement at 55	Retirement at 65
Using UFPLS to fund benefits equal to existing scheme pension only	By age 99 there would be £156,249 remaining	By age 99 there would be £873 remaining
Using Drawdown to fund benefits equal to existing scheme pension only	By 89 fund would be depleted but there would still be the lump sum payment available	By 89 fund would be depleted but there would still be the lump sum payment available
Using UFPLS to fund benefits equal to existing scheme cash and reduced pension	By age 99 there would be £379,499 remaining	By age 99 there would be £320,420 remaining
Using drawdown to fund benefits equal to existing scheme cash and reduced pension	By age 99 there would be £190,276 remaining in addition to lump sum payment available	By age 99 there would be £173,517 remaining in addition to lump sum payment available

Further modelling was undertaken assuming £100,000 was taken as a lump sum to repay the mortgage at age 57 and a withdrawal of £1,800 pm net of tax started at age 57 until age 67.

At age 67 the income dropped by the amount of the state pension Mr A would then receive. This calculation found that the fund would be depleted at age 71 assuming 5% growth and age 74 assuming 7% growth.

The report also said that Mr A's adventurous attitude to risk meant he had the capacity to achieve the higher growth rate to meet his objectives. It was noted that a discussion was required as to how he would repay his mortgage debt at 67.

The report set out that, while past performance '*is categorically no guide to future, based upon back testing of the recommended investment portfolio over a period of 5 years the annualised growth was equivalent to 13.84% and over 10 years is 10.13%.*'

The recommendation was made to give Mr A control over his financial affairs. It was noted that taking scheme benefits would allow him to pay off a significant portion of his mortgage, but a transfer would significantly enhance the amount and allow him to retire debt free, with a cash surplus.

The file recorded that providing life cover was considered but discounted on the basis of cost.

The report noted that the recommendation was not made to achieve early retirement as transferring to achieve better guaranteed benefits was not possible. The rationale for transferring was to access higher levels of tax free cash to repay debts and to access the pension benefits flexibly.

The recommendation set out the funds appropriate for Mr A's recorded high risk rating.

An illustration was provided which set out the charges below and provided projections for the funds selected at the assumed lower band growth rate of -0.71% pa, mid band 2.29% pa and a higher growth rate of 5.29% pa. These were calculated after the effects of inflation.

The charges applied were as follows:

Type of charge	Amount
Product charge	0.30% pa
Fund Charges	0.43% pa
Initial Adviser charge	£6,836
Ongoing adviser charge	0.65% pa

Notes were made from a meeting on 13 September 2017, which was just after the recommendation report was issued. The adviser confirmed that the actual critical yields would be lower as they'd been based on BSPS rather than BSPS 2. It was discussed that it was not confirmed that the BSPS 2 would go ahead and was dependent upon meeting funding and member number targets. It was also explained that the PPF may be a better option for Mr A than BSPS 2. Mr A had been unaware that the PPF offered better TFC and income earlier.

Mr A confirmed that he now intended to take his tax free cash at age 55. He confirmed at this meeting that he had no intention to pay off his debt immediately, although the investigator noted that NTM had said that Mr A took £42,668 on 1 May 2018 and, by 14 October 2019, Mr A had taken £65,000.

Capacity for loss was discussed and how Mr A would feel if he lost a significant amount or all of his pension funds. He said he would be unhappy but felt that was not realistic. He said he would accept the falls as outlined in the report and would be prepared to wait for funds to recover after a fall.

Mr A accepted NTM's recommendation and transferred his defined benefits.

He complained to NTM in December 2021, but NTM declined to uphold the complaint. Dissatisfied with the response, Mr A referred the matter to this service.

As part of the investigator's assessment, he noted Mr A's comments that he didn't understand why being a union official gave him a better than average understanding of investments, as this related more to human resources issues. He further said that he didn't have much experience of investing but had taken part in the share save scheme before Tata took over.

Mr A also said that he hadn't planned to retire at age 57 before seeing the adviser and only started thinking about this when it was suggested that this was a viable option. His plan was to remain in the scheme until 65 as he was aware there were reductions for retiring early. He is still working at the same employer.

He further confirmed that the lump sum payment he took at age 55 was used to buy a gift for his daughter and go on holiday as he believed he would be able to retire at age 57.

Having considered the complaint, the 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.
- Mr A was 54 at the time of the advice and was considering retiring in just over two years' time. It was reasonable for Mr A to be considering early retirement, but financial advisers have a duty to ensure that clients' objectives are viable and realistic.
- There were plans to develop income streams from the land Mr A owned, and one other venture, but these couldn't be relied upon at the time of the advice.
- As such plans were at a very fledgling, and unpredictable, stage, and the recommendation was based upon Mr A having the need for flexibility of income, and the ability to vary this as income from other sources fluctuated, Mr A was likely to be predominantly reliant upon his pension income.
- Mr A had benefits which would produce a guaranteed income for life of £18,601 pa at age 65, but the report produced modelling which showed that, based upon a target growth rate of 5% pa, and with a retirement age of 57, income of £1,800 pa and a £100,000 lump sum, Mr A's funds would be depleted at age 71 (or age 74 with a 7% growth rate). This wasn't in Mr A's best interests.
- Mr A had sizeable debts at age 54, including £7,500 in loans which were due to be repaid in April 2019, £8,800 of credit card debt, and an outstanding mortgage of £120,000 - although the client information form said he had £1,173 pm surplus income.
- Although Mr A was recorded as considering himself to have above average knowledge of investments, seemingly due to his role with his trade union, he didn't present as such an individual. Mr A's only experience of investments seemed to be his employer's share save scheme, but this was organised as part of his employment package. And although Mr A said that was intending to take the tax free cash, he had no immediate plans to repay his debt.
- Mr A would have needed a relatively secure income with which to service the outstanding debts and eventually repay them. The transfer therefore didn't represent a credible strategy and it should have been made clear that it wasn't in Mr A's best interests to proceed with it and retire at age 57.

- Mr A had been assessed as having an adventurous investment strategy, but the responsibility for this assessment seemed to have been placed on Mr A. But his comment that it wasn't realistic for him to prospectively lose a significant proportion of his pension fund wasn't consistent with a high risk profile.
- He was also recorded as being prepared to accept falls in the value of his pension fund and then wait for it to recover, but the recommendation was for him to make withdrawals of £1,800 pm in just over two years' time – and his other source of income was only producing £200pm at the time of the advice.
- Mr A didn't have the capacity to lose his secure income. If Mr A wished to retire early, he would need to pay down his debt and reduce his income requirement. And if this wasn't possible, then he needed to defer taking his benefits.
- Mr A had in fact said that he didn't intend on retiring at age 57, and it was only when this was presented as a viable option that it became an "objective". It wasn't therefore a true objective and he should have been advised that it wasn't a realistic option.
- Mr A may have scored highly in the risk questionnaire, but he had effectively transitioned from someone who had never invested before to someone who was reliant upon his investment to provide for his retirement needs. And his comment in the risk profile questionnaire that he adapted to things going wrong financially "somewhat uneasily" wasn't representative of someone who was comfortable with risk.
- Given Mr A's lack of previous investment experience, his age and overall circumstances, the adventurous risk rating wasn't suitable for him.
- Although Mr A may have considered himself to be familiar with investments on the basis of his involvement with the union, he hadn't for example been aware that the PPF offered better tax free cash, even after this had been included in the "time to choose" documentation. He was therefore heavily reliant upon the advice given.
- According to the financial report, Mr A had expressed concerns about the potential loss of flexibility if the pension benefits were transferred into the PPF, but if that was the case, then NTM should have explained that the PPF would continue to provide valuable benefits. This may have reassured Mr A.
- In terms of the BSPS 2, the adviser told Mr A that there was no confirmation that it would be established as it was contingent upon meeting requirements relating to funding and member numbers. But costed plans were being put in place in conjunction with the regulators.
- The meeting notes explained why the PFF would offer preferential terms if Mr A was planning to retire at age 57. But this wasn't in any case realistic and early retirement shouldn't have been recommended.
- The advice had been given during the period in which this service was publishing information with which businesses could calculate future "discount" rates for complaints about transfers which were being upheld.
- 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 investigator said that the investment return required to match the OPS benefits at age 65 was 9.19% pa, and that to match the PPF benefits at the same retirement age it was 4.91% pa. But this compared to a discount rate of 3.1% pa for the ten years to retirement in this case. and for retirement at age 57, this dropped to 2.7% pa.

- For additional context, the growth rates in the personalised illustration were -0.71% for the lower band growth rate, 2.29% for the mid band, and 5.29% for the higher rate band.
- Although the high performance figures quoted for the last five and ten years for the recommended recipient fund were caveated with warnings that they were no guide to the future, given Mr A's lack of investment experience, it was likely that these would have set his expectations.
- Given the composition of assets used in the discount rate, Mr A's attitude to risk and term to retirement, he was likely to receive benefits that were of a materially lower value than the occupational pension scheme.
- The recommendation report said that Mr A understood that the transfer would generate a lower level of income than the BSPS, but it was nevertheless justified on the basis that the pension income would be used to supplement the income from other sources. But this was at the time generating a very low monthly income and the plans weren't sufficiently well formed to justify relinquishing such a valuable source of future income.
- It was clear that the pension income was likely to be that which Mr A would rely upon for the rest of his life, and it was therefore too valuable to lose.
- The recommendation was made on the basis of the flexibility of income and that he'd be able to retire in just over two years. But in contrast to the OPS, where the investment risks were borne by the employer and the costs pooled with other members, Mr A was recommended a strategy where he bore the high risks and he incurred the costs. These were unnecessary.

The investigator recommended that NTM undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that, as there was no credible plan for Mr A to retire early, that he would have opted to join the BSPS 2 and retire at 65.

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

He also said that NTM should pay Mr A £400 in respect of the distress and inconvenience the matter would have caused him due to the realisation that he's lost out on valuable guaranteed benefits.

Mr A made no further comment upon investigator's findings. NTM said that it would respond as soon as possible, but that it had a large volume of cases to deal with.

As no further response from the business was received, the (new) investigator informed both parties that the matter would be referred to an ombudsman for review.

NTM then said that it considered that it would be appropriate to undertake a loss calculation for this case, with no admission of liability. And so it requested that information be sought from Mr A so that it could do so.

The investigator acknowledged this request but then informed NTM that she'd enquired of Mr A 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.

Mr A confirmed that he'd like any redress calculation to be conducted on the basis of the existing guidance.

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, she 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 NTM to use the FCA's BSPS-specific calculator to determine any redress due to Mr A.

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 A's complaint, they should let her know by 5 June 2023.

Neither party has submitted further comments in respect of this.

The complaint has now been referred 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.

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.

The applicable guidance, rules, regulations and requirements

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 NTM advised Mr A were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like NTM, 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, NTM needed to gather the necessary information for it to be confident that its advice met Mr A'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) 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 NTM's advice to Mr A in the context of the above requirements and guidance.

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

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

In accordance with COBS 9.2.2R, fact finding was undertaken for Mr A 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 A'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 A would be better off financially as a result of the transfer.

The financial case to transfer

NTM obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr A'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 3.1% pa. And the growth rates used in the TVAS to illustrate the benefits which might be payable from a PPP were -0.71% (low), 2.29% (mid) and 5.29% (high).

The critical yields to age 65, at 9.19% for full pension income benefits with no tax free cash, and 7.18% with tax free cash being taken, and then over 50% respectively at age 55 (and likely somewhere approaching this for age 57), therefore comfortably exceeded both the discount (or growth) rate deemed achievable over the same period, and the higher growth rate used by the pension provider – which might perhaps be a reasonable assumption for a "high" risk investor (even if I accept that this was realistically the case – see further below).

As noted by NTM, the above critical yields were calculated on the basis of the BSPS benefits, rather than the BSPS 2 benefits. The critical yields to match those which would be produced by the PPF at age 65 were 4.91% pa with full pension income, and 4.33% pa with tax free cash and a reduced income.

Given what was known about the proposed BSPS 2 and Mr A's own projected benefits, I think it ought to have been possible to produce critical yields for that proposed successor scheme as well. But in the absence of those, I think that assuming critical yields somewhere between those for the BSPS and the PPF wouldn't be unreasonable in estimating those which might be required for the BSPS 2. But these would still have been higher than the growth rate which would reasonably have been projected for an investor such as Mr A (even if he was a high risk investor, which I address further below).

NTM itself said 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 in fact unachievable, year on year, for the number of years that Mr A 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 A'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 A 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 NTM did provide warnings on the guarantees which would be relinquished, but as NTM will be aware, and as noted by the investigator, 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. NTM 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 A.

As I've said above, NTM'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 A required flexibility of income due to his particular circumstances, objectives, and concerns about his employer and the pension scheme. 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 A 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 I have similar concerns to those expressed by the investigator regarding the reliability of the risk rating attributed to Mr A, given his lack of investment experience and other assets beyond pension savings. The tool it used to determine Mr A's risk attitude can only provide a general guide to a likely risk rating, and some of the answers given by Mr A, for example, his comment that he would adapt to things going wrong financially "somewhat uneasily", would reasonably in my view have cast doubt on whether Mr A should be attributed anything greater than a "medium" risk attitude.

But I think there's also the wider issue about Mr A's capacity to take financial risks with his pension funds which is pertinent to the overall suitability of what was recommended here. The investigator concluded that Mr A had an overall low capacity for loss, given his paucity of other assets and outstanding debts. And I'm inclined to agree. Mr A had joined the replacement defined contribution scheme, and so would likely have accrued a reasonable amount of money purchase benefits given the overall contribution rate (if he remained with the same employer).

But other than the state pension which wouldn't be payable until age 67, the defined benefits accrued through the BSPS were likely to have been his main source of guaranteed income. Through transferring, Mr A was effectively putting a lot of his eggs in one "money purchase basket". Any reduction in the benefits payable from them would therefore have had an impact on his financial security in retirement.

And NTM was, or ought to have been, aware of the importance Mr A would have attached to these pension benefits. As set out by the investigator, although Mr A may have had a small alternative income stream, this wasn't producing, and couldn't be relied upon to produce, the kind of income Mr A wanted in retirement.

But I also don't think Mr A 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 A 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 other than concerns around the employer and associated scheme, which I'll address further below, it's unclear as to why Mr A would have wanted or needed such flexibility at the cost of such valuable guaranteed benefits, given the investment risk associated with the transfer, and bearing in mind his likely actual risk rating and apparent lack of any similar historical investment which might otherwise indicate a preparedness to take risks with his pension income.

NTM has suggested that Mr A was willing to accept the trade-off between a secure income and risk to achieve his objectives. As I've said above, although there were answers he gave which would suggest that he wasn't suited to a high or adventurous risk rating, I think Mr A may have understood the principle of risk/reward, and risk warnings were provided by NTM.

Mr A was accruing further benefits in his defined contribution scheme, and given the contribution rates to that scheme (my understanding is that this was 10% and 6% employer and employee contributions respectively) and the number of years left to retirement, compared against the benefits accrued in the final salary scheme, at the normal scheme retirement age, around 11 years of his pension accrual would likely be derived of the defined contribution scheme. As such, Mr A would already by necessity have been taking investment risk through the replacement scheme.

In light of this, and given that in the 27 years up to that point Mr A had been accruing defined benefits, I think the guarantees attached to those defined benefits would have been of considerable value and shouldn't have been relinquished lightly in favour of a flexibility which was loosely defined around the apparent desire for early retirement and concerns around the employer/scheme.

As with others in his position, I think it's fair to say that Mr A would have been concerned about the future of the BSPS and his associated benefits. But Mr A's concerns around this should have been managed appropriately. 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 as the professional party, the IFA is tasked with rationally addressing those concerns and providing an appropriately balanced view of the available options.

I don't think this happened here. There was no prospect of the BSPS funds being lost to the employer, even if Mr A distrusted it. Further, 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 time of the "Time to Choose" exercise) the BSPS 2 seemed more likely than not to be a viable alternative. I've noted what NTM said about the 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.

I also have concerns around the way in which the situation at that time was portrayed to Mr A. At several points in the recommendation report, the lack of employer underpinning was mentioned, but this wouldn't by the point of advice have meant that Mr A's pension benefits were in peril, with the fallback position being that, even if the BSPS 2 couldn't be formed, they would be transferred into the PPF.

And again, the loss of the guarantee from the employer was mentioned, but the benefits (albeit in a slightly reduced form) would have been guaranteed even in the PPF.

Although the benefits of the PPF were mentioned in a later part of the report, I think Mr A's concerns would have been reinforced by much of the language used, rather than mitigated. And as I've said above, I think by the time of the advice, the formation of the BSPS 2 was the more likely of the possible outcomes.

The prospect of Mr A'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.

And so I think that, had Mr A's concerns been better managed, the seeming key driver for having control over his pension benefits would also have diminished.

And on the specific matter of early retirement, I agree with the investigator that financial advice should be more than simple "wish fulfilment". And if such a plan isn't credible, then the client should be advised of this. In this case, Mr A did have both secured and unsecured loans, and if he began to take benefits from the transferred sum in the way which had been described, his funds would have run out by his early 70s. Notwithstanding the point which I've noted about perhaps more limited life expectancy for a steel worker (which I in any case think would depend heavily on the role undertaken) this was some way short of even average life expectancy for a 54 year old, let alone the possibility of him living longer than this.

But I've also noted that NTM itself said that it wouldn't recommend the transfer on the basis of early retirement, as this could in any case have been achieved through the guaranteed scheme benefits.

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

Death benefits

NTM has confirmed that the restructuring of the death benefits wasn't recorded as being important for Mr A, and I note that Mrs A had her own pension income, and so this didn't form part of the rationale for transferring. But I would comment that accrued pension provision is intended to provide for an individual's retirement rather than a desire to leave a legacy for extended family members. The recommendation needed to be given in the context of Mr A's best interests, and Mr A himself identified this.

What should NTM have done – and would it have made a difference to Mr A'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 A. But this only serves to emphasise the need for a balanced assessment of the options available and, ultimately, suitable advice.

But there was no imminent prospect of Mr A's scheme benefits needing to enter the PPF. 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 A was a balanced appraisal of the options available to him, coupled with a robust and candid discussion about his own concerns relating to the BSPS. Mr A, amongst many others in a similar position, may have been concerned by developments relating to his employment and the BSPS, which clearly fed into his views on having control over his own pension funds, but he was nevertheless entitled to an impartial review of his options.

And looking at those options, one of the key recorded objectives - possible early retirement – (although Mr A disputes that this was the case, and he only became interested in it when it was portrayed as being viable) was in any case achievable within the BSPS 2, and would have remained so even in the scenario of entry into the PPF.

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. The available evidence simply doesn't support the position as to why control or flexibility would have been sufficiently compelling reasons for Mr A to relinquish valuable benefit guarantees.

My further view is that, if properly discussed, Mr A's concerns 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, 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 would have been available both from his accrued defined contribution and defined benefit pension funds. Death benefits were also payable from the defined benefit scheme, 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 both the mid and higher 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, given Mr A's likely risk attitude.

Taking account of Mr A's circumstances, including his recorded (if not likely lower) 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 NTM should have advised against the transfer.

And I think that, had this happened, Mr A 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 a clear conclusion – that the recommendation to transfer wasn't suitable for Mr A, nor was it in his best interests. The key contributing factors here are: Mr A's likely lower risk rating and its incompatibility with the type of investment risk which would have been required to match the scheme benefits – a failing under COBS 19.1.7; and the lack of a comprehensive and balanced portrayal of Mr A's options and the future benefits available from the BSPS defined benefits – a failure to adhere to COBS 19.1.2 (2) and 19.1.8.

Furthermore, at least one of the key benefits sought by Mr A were available without needing to transfer – possible early retirement, although I'd refer to my comments, aligned as they are to the investigator's, about the actual viability of this. I also note that Mr A remains employed to date.

My view is that, taking account of the critical yields, Mr A's likely lower attitude to risk with regard to his pension funds than was recorded and matching that with the likely corresponding investment returns, it was unlikely (as also indicated by NTM), 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 COBS 19.1.6, NTM would - or should - then have drawn, and conveyed, the conclusion that transferring wasn't in Mr A'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 A, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr A would most likely have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given. I acknowledge that the PPF may have provided enhanced early retirement benefits, but had Mr A been suitable advised, I don't think he would have opted to take early retirement, certainly at 57, and the benefits he apparently sought, with the prospect of running out of money in his early 70s.

NTM Financial Services Ltd 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.

NTM Financial Services Ltd 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 A and our Service upon completion of the calculation.

For clarity, Mr A hasn't yet retired, and my understanding is that 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. It may, however, factor in the tax free cash withdrawals Mr A has taken (which he did on the basis that he thought at the time that retirement at age 57 was feasible).

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 A'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, NTM Financial Services Ltd should:

- calculate and offer Mr A redress as a cash lump sum payment,

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

- if Mr A accepts NTM Financial Services Ltd's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr 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 A's end of year tax position.

Redress paid to Mr A 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 A's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I require NTM Financial Services Ltd to pay Mr A the compensation amount as set out above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I would also recommend that NTM Financial Services Ltd pays Mr A the balance.

If Mr A accepts this final decision, the award will be binding on NTM Financial Services Ltd.

My recommendation wouldn't be binding on NTM Financial Services Ltd. Further, it's unlikely that Mr A could accept my decision and go to court to ask for the balance. Mr A 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 A a not inconsiderable amount of concern about his security in retirement, especially given his proximity to what he thought at the time might be possible retirement age of 57. As such, I agree that NTM Financial Services Ltd should also pay Mr A £400 in respect of this.

My final decision

My final decision is that I uphold the complaint and direct NTM Financial Services Ltd to undertake the above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr A to accept or reject my decision before 9 November 2023.

Philip Miller
Ombudsman