

The complaint

Mr R complains about the advice given by Acumen Independent Financial Planning Limited ('Acumen') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr R'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 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 said that if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr R's employer would be set up – the BSPS2.

In September 2017, the DB scheme administrators sent Mr R information about his entitlement under his current DB scheme including a cash equivalent transfer value ('CETV') illustration. The CETV stated that Mr R had 18 years and 6 months of pensionable service in the DB scheme and that the total transfer value of his benefits was £270,617.02.

In October 2017, members of the BSPS were sent a "Time to Choose" letter which gave them three options; to either stay in BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017).

Following a third-party introduction Acumen contacted Mr R in September 2017. Mr R wasn't sure what to do about his pension so a face-to-face meeting was arranged in early October 2017 so that Mr R's options could be discussed.

Acumen completed a fact-find to gather information about Mr R's circumstances and objectives along with undertaking an assessment of his attitude to risk. At that time Mr R was 36 years old, married with one child under 13. Both he and his wife were working and his wife was an active member of her employer's DB scheme pension as well as a deferred member of her former employer's DB scheme. They owned their own home which was valued at £190,000 but was subject to an outstanding mortgage of £119,000 which was due to be repaid in 2032. It was also noted that they had £2,000 in savings and that Mr R and his employer were contributing 16% of his salary per month to his employer's new defined-contribution ('DC') pension scheme. Acumen assessed Mr R's attitude to risk and his capacity for loss to be 'medium'.

On 15 November 2017 Acumen sent Mr R its suitability report in which it recommended that he transfer his DB scheme pension benefits into a personal pension and invest the proceeds

with a provider I shall call L through which some external discretionary fund managers were to be used so as to diversify the investments and give Mr P the potential for investment growth. The suitability report said the reasons for this recommendation were because Mr R wanted the flexibility to take early retirement at age 60, to have flexibility about how he took his income benefits in retirement and because he wanted to be able leave a legacy for his wife and child.

In the suitability report Acumen also noted said the growth rates required (the critical yields) to match the benefits from the DB scheme were “unlikely to be achievable”. So from an investment perspective a transfer was “likely not feasible”. But Acumen said Mr R’s “desire to live on a lower income”, in order to have flexible access to his funds and greater death benefits were of a higher priority to him.

Mr R signed the forms that day to go ahead with the transfer.

Mr R complained to Acumen through his representative on 25 November 2021. He said the advice he had received to transfer his DB scheme benefits had been unsuitable and that he should have been advised to join the BPS2.

Acumen replied to Mr R’s complaint in January 2022 but didn’t think it had done anything wrong. Acumen said it had fulfilled its regulatory requirements and that it had taken reasonable steps to satisfy itself that its advice to transfer was suitable. It also said it couldn’t recommend that Mr R join the BPS2 as it hadn’t been established at the time and there was no certainty it would be. Finally, It added that the PPF was “widely (and correctly)” considered to be an undesirable outcome.

Unhappy with the outcome of Acumen’s investigation into his complaint, Mr R complained to the Financial Ombudsman Service. One of our Investigators looked into Mr R’s complaint and recommended that it was upheld. She thought that Mr R had been unsuitably advised to transfer and recommended that his complaint was upheld. She said Acumen should establish if Mr R had suffered a financial loss as a result of its unsuitable advice and if so pay him compensation, including compensation of £200 for any distress and inconvenience caused.

Acumen didn’t reply to the Investigator’s findings. So, because things couldn’t be resolved informally, 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

What follows 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 Acumen’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.

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, Acumen should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr R's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

When it gave its advice Acumen said that transferring to a personal pension was unlikely to achieve the relevant critical yields in order to match the benefits of the DB scheme. It also noted that from an investment perspective a transfer was "likely not feasible". In other words Acumen recognised that transferring would most likely mean Mr R would be worse off in retirement by doing so. I agree with Acumen's analysis here. But I don't think it did enough to make it clear to Mr R how much he was likely be worse off by nor did it give him enough information on which to make an informed decision.

Acumen said the critical yields to match the benefits from the BPS at age 65 was 6.3% and 4.5% to match the PPF benefits. But Acumen didn't provide critical yields if Mr R decided to take the maximum tax-free cash ('TFC') lump sum and a reduced pension. Also Acumen compared the benefits from the BPS against the personal pension. But continuing in the BPS in its existing form wasn't an option for Mr R. He needed to allow his funds to move to the PPF to opt to in the BPS2.

By time Acumen issued its suitability report the details of the BPS2 were available. So I think Acumen should have provided a comparison of benefits from the personal pension against those from the BPS2. Had it done so, given what I know about the BPS2, I think the critical yields to match the BPS2 benefits were likely to be between those of the BPS and the PPF at age 65. But more likely than not it would be nearer to the BPS critical yield. But as Acumen didn't set that out I don't think Acumen gave Mr R all the information he needed.

I can see from the suitability report that Mr R was considering retiring around age 60 although this was far from certain and nothing was noted on the fact-find about Mr R taking early retirement. However, if taking early retirement had been a key objective for Mr R then it's notable that Acumen didn't give him any figures for what his entitlements would be if he took early retirement. And if it had done so it's reasonable to assume that it was likely the critical yields would have been even higher than for retirement at age 65. That's because the funds would have been invested in a personal pension for a shorter time before Mr R accessed them and so would have had less time to grow. Those funds would also then have

needed to support him for a longer period in retirement. That means the investments would have needed higher returns to match the guaranteed benefits from the DB scheme from an earlier age. But Acumen didn't give Mr R any of that information. So if Acumen believed early retirement was a genuine objective for him then it didn't give him sufficient enough information from which he could make an informed decision.

In any event, whatever age Mr R planned to retire at, I agree with Acumen's assessment that he was likely to be financially worse off by transferring to a personal pension than he was from leaving his benefits in the DB scheme and letting them move into either the PPF or, if he opted to, into the BSPS2. For that reason alone I don't think a transfer was in Mr R's best interests. So I've gone on to consider the other key reasons that Acumen cited for recommending a transfer.

Flexibility and income needs

Acumen said Mr R was prepared to accept a lower income in retirement in order to have flexible access to his benefits in the manner he chose. It's true to say that Mr R couldn't have had the same level of flexible access to his DB funds as he could from a personal pension. While he could have chosen to take his DB pension early, if he had wanted to take TFC, then he would have had to take that at the same time as drawing a regular income from his pension. Whereas the personal pension would allow Mr R to draw down funds as he saw fit. But while I can see why that might have been an attractive prospect for him, I'm not persuaded that Mr R had any concrete need to vary his income throughout retirement. But, if he believed he did there was no requirement for him to give up the safeguarded benefits from his DB scheme in order to have some flexible access to retirement funds.

I say this because I can see that Acumen noted that Mr R and his employer had begun contributing to a recently established defined contribution ('DC') pension scheme. Mr R and his employer were together contributing around 16% of Mr R's salary to that pension. And Mr R could have anticipated continuing to contribute to that pension (or a similar one if he were to change jobs in the future) for the remainder of his working life. And given Mr R was still only 36 years old that could have been for another 31 years until state pension age. The earliest Mr R could take early retirement from the DB scheme or a personal pension in any event would be age 57, around 21 years away; so by the time he reached retirement age, his DC pension should have built a sizeable pot.

The nature of a DC pension means Mr R was already provided with flexibility in how he could take his benefits and meant he could have taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr R retained his DB pension this, combined with his new workplace DC pension, would have likely given him the flexible access to pension funds if that was what he needed.

In addition, if Acumen had advised Mr R to join the BSPS2 and he had later decided he needed greater flexibility than the scheme provided, then he could have chosen to transfer from that scheme nearer to his retirement age. Mr R was only 36 at the time of the advice and based on what I've seen he didn't have any concrete retirement plans. So I think any desire for flexibility in the way he accessed, or when he accessed, his pension benefits was something that Mr R could have explored closer to his intended retirement age; it wasn't a decision he needed to make straightaway. I think it was too soon to make any kind of decision about transferring out of the DB scheme.

In any event, if Mr R had insisted on early retirement then both the BSPS2 and the PPF would allow him to do that. Although his benefits under those schemes would have been subject to actuarial reductions to reflect the fact that the pension would need to sustain him over a longer period. But there's no evidence Acumen made this clear to Mr R. And, as I've

already said, it didn't give him details of his entitlements from the schemes if he took early retirement nor what the critical yields were to match those benefits. So I don't think Acumen gave him all the information he needed in order to make an informed decision.

Death benefits

Acumen also said the death benefits available from the personal pension were of a higher priority to Mr R than his income in retirement. That might have been the case. But Acumen was tasked with advising Mr R about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension and dependents' benefits, that could have been valuable to his family in the event of his death.

If following the transfer to a personal pension Mr R had died immediately then the CETV sum would have been paid to his wife as a death benefit. I understand that would most likely have appeared attractive as a potential lump sum. But, in reality, the sum remaining on death following a transfer was always likely to be different. How much would remain in the fund on Mr R's death depended on a number of factors. And there may not have been a large sum left in Mr R's personal pension if he lived a long life, the investments performed poorly or if he took large sums from the fund early in his retirement. In any event, Acumen should not have encouraged Mr R to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Further, I'm aware that Mr R had death in service cover from his employer. So that would have paid a considerable lump sum in the event he died while still working for his employer. But, if he wanted to leave a legacy for his family, which didn't depend on his employment, investment returns or how much of his pension fund remained on his death, I think Acumen should have instead explored life insurance. I appreciate life insurance can be expensive. So, the starting point ought to have been for Acumen to ask Mr R how much he would ideally like to leave to his family, and this could have been explored on a whole of life or term assurance basis. But there's no evidence it did so

Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr R. I don't think that insurance was properly explored as an alternative. And ultimately Acumen should not have encouraged Mr R to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

Concerns over financial stability of the DB scheme

I've noted Acumen said in its reply to Mr R's complaint, that at the time of the advice it couldn't recommend a transfer to the BSPS2 because there was no certainty it would come into existence. I accept the BSPS2 wasn't guaranteed to go ahead. But details of the scheme had been provided, the time to choose exercise was ongoing, and all the communications from the scheme trustees were very optimistic that the BSPS2 operating conditions would be met. So, I think Acumen should have factored the benefits available through the BSPS2 into its analysis. But it didn't do so.

I've also noted that, as well as saying that BSPS2 wasn't guaranteed, Acumen said the PPF was considered to be a "poor outcome". I understand that Mr R may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was Acumen's role to objectively address those concerns. As I've already said, at the time, all signs pointed toward the BSPS2 being established. But even if not, the PPF would still provide Mr R with guaranteed income, the possibility of early retirement and the option of accessing TFC. Mr R was unlikely to improve on these benefits by transferring. So, entering the PPF 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.

Use of DFM

Acumen recommended that Mr R use a DFM to manage his pension funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr R, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr R should have been advised to remain in the DB scheme and so the DFM would not have had the opportunity to manage his funds if suitable advice had been given.

Summary

I don't doubt that the flexibility and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr R. But Acumen wasn't there to just transact what Mr R might have thought he wanted. The adviser's role was to really understand what Mr R needed and recommend what was in his best interests.

Ultimately, I think the advice to transfer out of the DB scheme and into a personal pension was unsuitable for Mr R as it was not in his best interests. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr R was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

So, I think Acumen should've advised Mr R to remain in his DB scheme.

Of course, I have to consider whether Mr R would've gone ahead anyway, against Acumen's advice. I've considered this carefully, but I'm not persuaded that Mr R would've insisted on transferring out of the DB scheme, against Acumen's advice. I say this because Mr R was an inexperienced investor with a medium attitude to risk and this pension accounted for the majority of his retirement provision. So, if Acumen had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

In light of the above, I think Acumen should compensate Mr R for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I've thought about Mr R's representative's point regarding the 15% deduction from any redress payable, to take into account the tax Mr R would've paid had this been taken as income. It believes this is unfair as it doesn't account for the charges that would've been deducted from the fund value over that time. While I appreciate the representative feels this may unfairly reduce the redress payable, I'm mindful that it is not possible to provide exact compensation in these circumstances, as the only way to achieve this would be to put Mr R back into the scheme as if the transfer out hadn't happened. So, overall, I remain of the view that the redress proposed fairly compensates Mr R for the impact of the unsuitable advice he received.

Finally, like our Investigator, I agree that Acumen should pay Mr R compensation of £200 for the distress and inconvenience its unsuitable advice about his pension has caused him. Mr R has said that he has suffered stress and anxiety as a consequence of discovering he had received unsuitable advice. Where a financial business, through its words or deeds, causes a consumer trouble or upset, the Financial Ombudsman Service can require it to pay compensation. I've thought about what this means for Mr R and I'm satisfied that an award of £200 is fair and reasonable in the circumstances of his complaint and in line with the Financial Ombudsman Service's approach to awards of this nature in general.

Putting things right

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

Acumen 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>.

Acumen 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 R and our Service upon completion of the calculation together with supporting evidence of what Acumen based the inputs into the calculator on.

For clarity, Mr R 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 PS22/13 and 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 R's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Acumen should:

- calculate and offer Mr R redress as a cash lump sum payment,
- explain to Mr R 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 DC pension
- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr R accepts Acumen's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr R 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 R's end of year tax position.

Redress paid to Mr R as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Acumen 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 R'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.

My final decision

Determination and money award: I uphold this complaint and require Acumen Independent Financial Planning Limited to pay Mr R the compensation amount as set out in the steps above, up to a maximum of £160,000.

Acumen Independent Financial Planning Limited should also pay Mr R compensation of £200 for the distress and inconvenience its unsuitable advice caused him.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Acumen Independent Financial Planning Limited pays Mr R the balance.

If Mr R accepts this decision, the money award becomes binding on Acumen Independent Financial Planning Limited.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 23 November 2023.

Claire Woollerson
Ombudsman