

The complaint

Mr B complains about the advice given by Tuto Money Limited (Tuto) 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

Our Investigator thought the complaint should be upheld. Tuto disagreed with the Investigator's opinion. The complaint was then passed to me.

I issued my provisional decision saying that Mr B's complaint should be upheld, albeit for slightly different reasons than the Investigator, and with slightly changed compensation. A copy of the background to the complaint and my provisional findings are below in italics and form part of this final decision.

What I said in my provisional decision

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the BSPS (the DB pension scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved pension 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 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 B's employer would be set up – the BSPS2.

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

Mr B approached Tuto in November 2017 to discuss his pension and retirement needs. I understand that Mr B was referred to Tuto by another advising firm that wasn't able to give advice about personal pension transfers. I'll call this other advising business Firm A. Both sides have confirmed that Tuto and Mr B didn't meet, and that the advice process was conducted by written correspondence only.

Tuto sent Mr B a fact-find to gather information about his circumstances and objectives. This was completed by Mr B and the adviser from Firm A. The 'completed by' section of the fact find says that the document was completed by a representative of Firm A.

The fact find shows that Mr B was aged 55 and married. Mr and Mrs B owned their own home which was subject to a mortgage. He had a loan with a value of £11,000 and savings with a value of £12,000. The fact find did contain handwritten notes which explain why Mr B wanted to transfer, and these are written in the first party. But they do use the same handwriting as the rest of the fact find so I've assumed, even if these were Mr B's own words, that this section was also completed by Firm A.

Tuto also carried out an assessment of Mr B's attitude to risk, which said was 'lowest medium or four on a scale of one to ten'.

In respect of Mr B's pension arrangements:

Mr B had received a cash equivalent transfer value ('CETV') from the BSPS on 13 November 2017. This showed that he had around 24 years service. He was entitled to a pension of about £11,400 per year at the date of leaving the scheme. The CETV was about £278,000.

Mr B was already in receipt of a pension of £4,480 per year from another DB scheme.

Mr B had also joined his employer's new defined contribution ('DC') scheme. He was contributing 6% of his salary into this and his employer was contributing 10%. On 16 January 2018, Tuto advised Mr B not to transfer it said that:

- The critical yields, that is the growth rates that the personal pension would need to achieve to match the benefits Mr B was giving up were very high. These were 13.62% to age 60 or 7.29% to age 65.*
- Tuto didn't think these were achievable and so Mr B would likely receive lower pension benefits at retirement. And it stressed that Mr B was giving up guaranteed benefits that he was unlikely to replicate.*
- Mr B did want some tax-free cash to pay his mortgage, but Tuto thought that he could meet this aim using funds from the BSPS2 at retirement.*
- Whilst Mr B wanted his wife to inherit his funds, the BSPS2 would pay her an income for the rest of her life which may be more beneficial than the lump sum. And life assurance was inexpensive.*
- Whilst Mr B wanted a flexible income, he wouldn't be retiring until age 60, so the increased risks of transferring into a personal pension didn't warrant the transfer.*

On 22 January 2018 Mr B wrote to Tuto saying that he thought it was in his best interests to transfer and he wanted to proceed. He said this was because he:

- Didn't trust current BSPS management and felt that his pension entitlement may change in the future.*
- Was worried the BSPS2 would end up in the PPF.*
- Wanted the greater tax-free cash provided by a personal pension.*
- Wanted to retire at age 60 without penalty.*
- Wanted to leave funds for his wife and didn't want to take out a life insurance policy to provide death benefits.*

On 25 January 2018 Tuto issued a second suitability letter. This contained the same information as the earlier report and it reiterated that Mr B shouldn't transfer. But it did now confirm that Mr B wanted to transfer on an insistent customer basis against its advice.

The suitability letter went on to give Mr B advice about which pension product he could transfer to if he decided to go ahead. Consequently, Mr B did transfer his pension benefits into a personal pension and invested the proceeds in funds that met his attitude to risk.

Mr B complained in 2022 to Tuto about the suitability of the transfer advice. He said he had little understanding of the transfer process at the time, but he now thinks the advice he received was poor. He thought he had been put in a position of financial detriment.

Tuto didn't uphold Mr B's complaint. It said that it had advised Mr B not to transfer his BSPS pension but that Mr B had proceeded on an insistent customer basis anyway.

Mr B referred his complaint to the Financial Ombudsman Service. An Investigator upheld the complaint and recommended that Tuto pay compensation. He agreed that Tuto advised Mr B not to transfer his BSPS scheme benefits as it wasn't in his best interests to do so. But he wasn't persuaded that the Insistent customer process that Tuto followed was robust and so it wasn't clear whether or not

Mr B fully understood this. He thought that if Mr B had fully understood the risks of the transfer then he wouldn't have transferred.

Tuto initially didn't agree with this and said it would appeal, but at this point it didn't provide its reasons why it disagreed.

However, at a later point in time, Tuto said that it had performed a loss assessment on the same basis that the Investigator had recommended. And this had shown that Mr B hadn't suffered a loss. The Financial Ombudsman Service hasn't been provided a copy of the calculation and, as far as I can see, neither has Mr B.

And after this the regulator has since developed, and now provides access to, a BPS- specific redress calculator. I've seen no indication that Tuto has performed a loss assessment using this calculator. And Mr B still would like his complaint considered by an ombudsman. As this is the case, I'm now issuing a provisional decision.

What I've provisionally 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.

Although Tuto has in the past carried out a loss assessment, I understand it is still disputing that it didn't act incorrectly in respect of Mr B. This is because it acknowledged at the time of sale that the advice wasn't in his best interests and that he shouldn't transfer.

Because it's agreed that transfer wasn't right for Mr B I don't see the need to address the suitability of its advice to Mr B in detail. However, I would like to note that I agree that transferring his DB scheme away was unsuitable for Mr B for largely the same reasons given by Tuto at the time of sale. These are, briefly:

- *Given the returns needed to match the DB scheme benefits he was giving up Mr B was very likely to receive lower benefits at retirement.*
- *Whilst he did have some debt (his mortgage mainly) he didn't have a pressing need for the tax-free cash and in any event the cash the scheme provided would have likely met this need.*
- *Mr B didn't really need flexibility in his pension planning at this stage.*
- *The death benefits could have been better in some circumstances from the personal pension, but his priority should have been his retirement income.*
- *Mr B was concerned about his employer and the BPS, but these concerns shouldn't have outweighed the guaranteed benefits he was giving up from the DB scheme.*

Overall, I can't see any persuasive reasons why it was in Mr B's best interests to give up his DB benefits. And I don't think there is any disagreement about this.

So, I've gone on to consider if it was fair for Tuto to treat Mr B as an insistent customer.

Since 3 January 2018, COBS 9.5A includes additional guidance on insistent clients. It defines who is an insistent client and it sets out three key steps for advisers to take. So, at the time the advice was provided to Mr B, this guidance was in force. However, the FCA had put out guidance in 2016 setting out what it expected firms to do if facilitating a transaction for a customer against their advice. And this had also been good industry practice for some time. So, I think Tuto would've been aware of the steps it should take if it was processing a pension transfer on an insistent client basis.

COBS 9.5A.3 says:

- (1) *Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2)*

- (2) The information which the firm should communicate to the insistent client is:
- a) that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;
 - b) the reasons why the transaction will not be in accordance with the firm's personal recommendation;
 - c) the risks of the transaction proposed by the insistent client; and
 - d) the reasons why the firm did not recommend that transaction to the client.

And COBS 9.5A.4 says:

- (1) The firm should obtain from the insistent client an acknowledgement that:

- (i) the transaction is not in accordance with the firm's personal recommendation; and
- (ii) the transaction is being carried out at the request of the client.

- (2) Where possible, the acknowledgment should be in the client's own words.

Tuto's role was to find out what Mr B's wants and needs were and why Mr B wanted to transfer his pension. Its role wasn't simply to facilitate what Mr B wanted. And overall, it had to act in his best interests. And the guidance above sets out that it should be clearly communicated to the consumer why the advice is against their best interests. And it should also be clear that the customer has understood and acknowledged this, but wants to proceed anyway.

Mr B has essentially said that this didn't happen. He doesn't recall that he was proceeding on an insistent customer basis and he feels that he was advised to leave the DB scheme. He said the notes on the fact find that explained he wanted to proceed on an insistent customer basis were written by the adviser (presumably Firm A) and not him. I've thought about if this was likely to be the case.

I think it ought to have been clear to Tuto that Mr B had little knowledge or experience of financial matters based on the information available at the time of the advice. I say this because he had a low attitude to risk and he doesn't seem to have invested before. Other than his mortgage and some cash savings he doesn't seem familiar with financial products at all. And I think this should've put Tuto on notice that it had to be careful if it was to take matters through the insistent client route, particularly as another advisory firm was involved, meaning it was dealing with Mr B indirectly. And overall, I don't think Tuto took a reasonable amount of care here.

It was clear that Mr B was receiving significant assistance from Firm A in the advice process. And this was clear right from the start, and before Tuto gave any advice. The fact find was completed by this firm including a section where Mr B indicated why he wanted to transfer. This was written in the first person, indicating that Mr B may have been involved in this, and it included details of Mr B's want for tax free cash and his concerns about the BSPS. But this section is really based on what I think are generic reasons as to why a DB transfer can be appropriate for a consumer. So, I'm not persuaded that these were Mr B's own words, or that he was really engaged in this process.

After Tuto issued its first suitability letter Mr B responded and said he wanted to transfer. But the letter was typed and it's not clear if Mr B wrote it himself. He did sign it but he has said that he doesn't recall reading or signing it and that the Firm A adviser wrote it. Which to me indicates that this letter wasn't brought to Mr B's attention. But in any event this letter was essentially a repetition of the reasons why Mr B wanted to transfer. There isn't any acknowledgement that this wasn't in his best interests or anything to show that Mr B had understood the risks and disadvantages of the transfer that were given in the first suitability letter.

I think there was a significant risk that Mr B's decision to proceed could've been influenced by Firm A, which wasn't a pension transfer specialist. And I think that Tuto ought to have recognised that by transacting the business in the way it did, through correspondence only and without any direct contact with Mr B, that there was a risk Mr B may not have fully understood the consequences of his decision to proceed. That's particularly the case given Mr B's level of experience. So, I think it would've been important for Tuto to ensure Mr B understood what he was getting into, and a good way to have done this would've been to see in his own words that he understood the recommendation being made and

why he wanted to proceed. Alternatively, it could have done this by arranging a telephone call with Mr B, and discussing his reasons for wanting to proceed in more detail. In the absence of this, I'm not persuaded Mr B made an informed choice here.

While Tuto acknowledged the transfer of Mr B's benefits wasn't suitable, I think there were failings in the advice process which meant he probably wasn't fully aware about how this would have affected him. And I think it's more likely than not if Tuto had taken more steps to ensure that Mr B did have a full understanding of the advice, this would've influenced his decision making.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process Tuto followed meant that Mr B can truly be regarded as an insistent customer. Overall, I don't think it acted in Mr B's best interests. And it failed to act with due care and skill.

I think if Tuto had been acting in Mr B's best interests and taken an extra step to ensure he fully understood the recommendation not to transfer, and why he still wanted to do so, I don't think Mr B would've insisted on going ahead with the transfer. And Mr B says this is the case.

I want to make it clear that I'm not making a finding about Firm A here. Clearly Mr B wanted some assistance with the transfer process and it wasn't unreasonable that he received this. What I'm saying is that because of the way Tuto dealt with Mr B, through Firm A, it wasn't clear that Mr B truly understood the disadvantages of the transfer or why his reasons for wanting to go ahead wouldn't be considered to be compelling reasons to transfer. And Tuto had a responsibility to ensure that he had understood this. But I don't think it did this.

Our Investigator thought that Mr B should be paid £500 for the distress and inconvenience the advice has caused him. But I think this is too high an amount.

Using financial services won't always be straightforward and sometimes things do go wrong. It's not really fair to make an award just because something has happened that causes frustration. And Mr B hasn't indicated that he felt a significant level of distress due to the advice.

That said it clearly would have caused him some concern when he realised that his retirement benefits may have been reduced due to the advice that Tuto gave. And this would have been at a time when he was concerned about the situation with his employer and the scheme in any event. Because of this I think £300 compensation is reasonable to compensate him for this.

Developments

Tuto, and Mr B, were provided with a copy of my provisional decision. But neither party to the complaint had anything to add after they'd seen it. As this is the case, I've now gone on to issue my 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.

Tuto and Mr B didn't raise any new points after receiving my provisional decision or provide any further evidence for me to consider. So, I've reached the same conclusions I reached before, for the same reasons. As there is nothing further to consider I won't add to the conclusions that I reached earlier. Tuto should now put things right as below.

Putting things right

A fair and reasonable outcome would be for Tuto to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would most likely have remained in the occupational pension and opted to join the BPS2 if suitable advice had been given and his reasons for wanting to proceed against the advice had been robustly

challenged by Tuto. Whilst the suitability letters were produced after the time to choose deadline, Mr B was in contact with Tuto before this. And I think it would have been reasonable for it to have advised him to join the BSPS2 pending any advice it gave.

Tuto 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>.

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

For clarity, Mr B has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B'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, Tuto should:

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

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

Tuto should also pay Mr B £300 for the distress and inconvenience that the poor advice has caused him.

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.

My final decision

Determination and money award: I uphold this complaint and require Tuto Money Limited to pay Mr B the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Tuto Money Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on Tuto Money Limited. My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 21 December 2023.

Andy Burlinson
Ombudsman