The complaint

Mr J has complained that Estate Capital Financial Management Limited (ECFM) gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) – the British Steel Pension Scheme (BSPS) – to a Personal Pension Policy (PPP).

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business, including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, one of which was a transfer to the Pension Protection Fund ("PPF") – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

In May 2017, the Pension Protection Fund (PPF) made the announcement that the terms of a Regulated Apportionment Arrangement (RAA) had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr J's employer would be set up – the BSPS 2.

This was, however, intended to receive deferred benefits only. The main defined benefit OPS had been replaced by a new defined contribution scheme. The existing scheme was due to be closed in the near future, with the options being set out in a subsequent letter in October 2017 for deferred members to either transfer their benefits to the successor scheme, BSPS 2, the Pension Protection Fund (PPF) or into a private arrangement, such as a PPP.

Mr J received a letter from BSPS dated 18 September 2017, which showed a cash equivalent transfer value (CETV) of £66,138.82 was offered in return for his deferred benefits, reduced by 5% to reflect underfunding of the BSPS, guaranteed until 11 December 2017.

Mr J had also received a 'Time to Choose' pack from BSPS, and he had until mid-December 2017 to choose between one of the following options:

- Switch to the new British Steel Pension Scheme (BSPS 2), providing similar benefits as BSPS but with lower future increases; or
- Remain with the current BSPS and move into the Pension Protection Fund (PPF); or
- Transfer his pension benefits away from the BSPS.

An initial meeting took place between Mr J and an adviser from ECFM on 19 October 2017, during which a fact find was completed - this shows his circumstances at the time were as follows:

- He was 29 years old, single (living with his partner) with no dependants.
- He was in good health, a non-smoker, and had no reason to believe he would not reach normal life expectancy.
- He was employed, with gross annual income of £43,000 and net monthly income of £2,200.
- His total expenditure of £663 pm provided surplus income of £1,537 pm, although this figure didn’t include discretionary expenditure.
- He held £4,798 in a current account and £4,140 in savings accounts, and £1,989 in shares.
- He owned a property valued at £162,000, subject to a repayment mortgage of £78,000 over a remaining term of 21 years, at £463 pm.
- He had been a member of the Tata Steel group personal pension scheme since April 2017, into which he was making contributions of 6% a year and his employer was making contributions of 10% a year – no value was provided.
- His attitude to investment risk was recorded as “balanced” – “6” on a scale from “1 to 10”, where “1” was lowest risk and “10” was highest.

Mr J’s retirement objectives were recorded as follows:

- Retire early at age 60, although his income needs weren’t known.
- He wanted to break all ties with his employer and move funds to an individual plan under his control – he had concerns over their financial stability.
- He did not consider the BSPS funds represented a significant proportion of his potential pension at retirement.
- He wanted flexibility at retirement to control the way benefits were paid, depending on his circumstances at the time.
- He was prepared to risk his benefits in the hope of good returns and the prospect of retiring early - he was happy to accept a larger degree of risk in exchange for the possibility of a higher pension in retirement.

In terms of Mr J’s deferred benefit entitlement within the BSPS, he had a normal retirement age of 65, with a total annual pension of £3,306.58 at his date of leaving the scheme on 31 March 2017. This figure would increase from his date of leaving to his normal retirement age, in line with specified increases, and was estimated to be a starting income of £7,808 pa at age 65 or £6,403 a year at age 60, increasing for life.

A transfer value analysis report (TVAS) was completed on 25 October 2017, indicating the amount of growth required by the transferred funds to match those being given up in the BSPS. This concluded that the transferred pension funds would need to grow by 6.18% pa to match Mr J’s full scheme income at his normal retirement age of 65, or 7.05% pa to match his full scheme income at age 60. Further, the report concludes the investment would need to grow by 4.79% pa to match benefits provided by the PPF at age 65, or 5.41% pa to match the benefits provided by the PPF at age 60, in the event of the BSPS moving to the PPF.

ECFM recommended that Mr J transfer his benefits from the BSPS to a personal pension plan with Nucleus, initially invested in the “ECFM Balanced Alpha Edition 27” portfolio. A suitability letter was produced by ECFM on 17 November 2017, confirming the reasons for the recommendation made and the risks associated with the transfer of Mr J’s benefits from the BSPS to the personal pension plan.

An illustration was produced and provided to Mr J, which provided projected values of what the PPP could be worth in the future, assuming different growth rates. Based upon a mid-growth rate of -0.40%, after allowing for inflation at 2.5% pa and all charges, the transferred funds would be worth £57,000 at age 65.

The illustration also set out the charges applicable to the PPP, including an annual platform charge of 0.35% pa and an annual charge for the recommended investment portfolio funds of 0.61% pa. In addition, it showed an initial adviser charge of 2% of the CETV would be deducted from the personal pension plan at outset and paid to ECFM, with an ongoing adviser charge of 0.75% also payable to it.

Mr J signed relevant forms on 21 November 2017 to proceed with the transfer of his benefits from the BSPS, which were sent to Nucleus by the adviser from ECFM the following day to process the application.

The transfer of Mr J’s BSPS benefits took place, with the funds of £66,138 being received by Nucleus on 7 March 2018, although these were not invested immediately and remained in cash.

A meeting took place between Mr J and the adviser from ECFM on 19 March 2018, during which it was determined that his approach to the investment of his BSPS funds had changed in view of market volatility, and the assessment showed his attitude to investment risk had reduced to “3” on the same scale of “1 to 10”, indicating a cautious risk attitude – he was then advised to invest in the “ECFM Conservative Growth” portfolio.

Subsequent review meetings have been held between Mr J and the adviser from ECFM since the inception of the PPP, and he has since been advised to switch into the “ECFM Balanced Alpha Edition 35” portfolio, in line with his previously stated attitude to investment risk of “balanced”.

Mr J then raised a complaint about the advice he’d received to transfer.

ECFM responded to Mr J with its reasons for disagreeing with him and why it was satisfied that the advice he had received was suitable.

Dissatisfied with the response, Mr J referred his complaint to this service.

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

- COBS 2.1.1R within the regulator’s handbook required a business *“to act honestly, fairly and professionally in accordance with the best interests of its client”*.

- Further, 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.

- COBS 19.1.7 also said that “*When a firm advises a retail client on a pension transfer, pension conversion or pension optout, 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".*

- The advice had been after the regulator had given instructions in final guidance FG17/9 as to how businesses could calculate future "discount rates" for complaints about transfers which were being upheld. Prior to that, this service was publishing information with which businesses could calculate future "discount" rates.

- Whilst businesses weren't required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.

- The discount rate was 4.7% pa for the more than 30 years up to Mr J's normal retirement date (65). This compared to respective required critical yields to match the BSPS benefits at 65 of 6.18%, and to match them at 60 of 7.05%. But this didn't include the initial advice charge of 2% or the ongoing advice charge of 0.75% pa. Had they been included, the critical yields would have been higher.

- The pension provider illustration also gave projected rates of growth, with the mid band growth rate being 2.10% pa after charges and ignoring the effects of inflation.

- Taking these figures into account, the critical yields weren't reasonably achievable, certainly with Mr J's recorded risk attitude. Mr J's primary objective, as recorded in the pension transfer questionnaire, was to increase his pension provision, but there was no reasonable prospect of Mr J improving upon the scheme benefits. ECFM should have explained to Mr J that the transfer didn't represent good financial value.

- Mr J had limited investment experience, owning a relatively small value of shares, and he'd only been a member of the defined contribution scheme for a few months. Mr J wouldn't therefore have had the required risk profile to consider giving up the guaranteed BSPS benefits.

- Although ECFM had indicated in its final response letter to Mr J that his pension fund was on track to meet the target return to match the scheme benefits, the figures had been misleading as they didn't include a number of factors such as the adviser charges.

- The apparent motives for Mr J transferring, such as "control" seemed to be generic rather than specific to him, as required by the regulator. Mr J may have had concerns about the BSPS, but these should have been managed, and given the high risks associated with the transfer, he should have been advised to remain in it - and then transfer into the BSPS 2.

- Risk warnings may have been given, but these wouldn't mean that the advice was suitable.

- Any flexibility of income needs could have been met by Mr J accessing his accrued defined contributions when he came to retire in a tax efficient manner – and would have meant that he could defer taking the BSPS benefit until the normal retirement age. But the BSPS benefits, if retained, would have formed the bedrock of a guaranteed income.

- There was no justification for Mr J transferring with such a long time to go until retirement. It wasn't possible to know what he needs might be at retirement so far in advance.

- In terms of death benefits, the TVAS showed that the capital value of the death benefits before retirement were significantly higher than those which would be provided by the PPP for at least the first 20 years after transferring. And the reduction in that capital value was particularly relevant as Mr J married in 2021 and his spouse would have been entitled to valuable scheme benefits in the event of his death.

- Had the scheme benefits moved into the PPF, Mr J wouldn't have been entitled to a CETV, but he would have been under the BSPS 2, and could then have made any decision about whether to transfer as and when he needed to closer to retirement.

- Had Mr J's concerns about the BSPS been appropriately managed, he would have viewed things differently – and had he been advised to retain his scheme benefits rather than transfer, he would have done so.

The investigator recommended that ECFM undertake a loss calculation in accordance with the regulator's guidance (FG 17/9) for such complaints – and on the basis that Mr J would have opted to join the BSPS 2.

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

Mr J agreed with the investigator's findings. ECFM didn't, however, saying the following in summary:

- A consistent approach should be taken, and comparing the PPP with the benefits of the old scheme wasn't viable, and so wasn't indicative of the guaranteed income Mr J would receive. If it was to be assumed that the BSPS 2 would have been Mr J's choice, then this should be the comparator scheme. But if doing nothing would have been more likely to lead to the fund moving into the PPF, then this was the relevant benchmark.

- The hurdle rates (relevant given that Mr J was single at the time) to match the PPF benefits at 65 and 60 were below the discount rate in every scenario.

- It had undertaken further financial modelling, which demonstrated that Mr J hadn't been financially disadvantaged and has the potential to improve upon his scheme benefits.

- If Mr J was more likely to access his benefits by drawdown, and that he would take maximum tax free cash (as most people do) then the critical yields at age 65 (4.21% for the BSPS 2 and 4.25% for the PPF) and 60 were viable.

- The illustrations were inflation adjusted, so the fund values quoted were in "today's terms". The annuity capital value to replicate the annual income from the scheme was not in a "today's terms" figure – it was simply the sum which would be required to buy an annuity.

- The actual likelihood of whether the fund would be sufficient to match the scheme benefits depended largely on the level of investment risk Mr J was prepared to take, and his capacity for loss.

- Mr J's attitude to risk was assessed as being high, and as he was young and making substantial defined contributions, he also had a high capacity for loss. Mr J acknowledged this at the time.

- Mr J also said that he had some investment experience – he was an educated man with a good degree of understanding. It had to rely on the response given in the questionnaire and any inconsistencies weren't so great as to cause concern.

- Mr J had largely maintained his "balanced" risk approach and investment strategy. ECFM had written to Mr J since the complaint was made with three options as to how he wished to conduct his investment strategy and he'd elected to remain in the Estate Capital portfolio and pay the ongoing advice charge, so as to benefit from regular rebalancing. This demonstrated a willingness to continue to invest and pay for the service, despite lower than normal investment returns over the previous six years, when he could just transfer the fund to his GPP and pay lower charges.

- In terms of the death benefits, it took issue with the comment about the benefits which would be payable to Mrs J, as Mr J wasn't married at the time of the advice, and so this was with the benefit of hindsight.

- Further, Mrs J wouldn't be entitled to the capital value of his CETV, but a 50% spouse's pension and a return of Mr J's contributions (£13,750). But through the PPP, she and any children would receive the full fund value as a lump sum, free of tax.

- As to the investigator's comment that, had Mr J not transferred, he wouldn't need to rely upon uncertain future returns to meet his income requirements, he didn't have an income requirement at the time of the advice. Further, the critical yield which the investigator said demonstrated the lack of financial viability was against the BSPS rather than the PPF or BSPS 2.

- There was no clear methodology in the investigator's assessment, but the critical yields weren't in any case high or unachievable – and Mr J would have the opportunity to greatly improve on the eventual pension fund.

- ECFM provided cashflow modelling figures which it said demonstrated the financial viability of the transfer. Even though the CETV may have been high, and it acknowledged that this wouldn't of itself be a reason to transfer, this still had a bearing on viability as the critical yields were achievable given Mr J's risk tolerance – and were well below the quoted discount rate.

- It also provided two reports which it said demonstrated that the pension fund could sustain and improve upon the income levels projected by both the PPF and BSPS 2. That Mr J's funds had grown in value by more than the rate of CPI demonstrated the potential to increase his pension, particularly over the 35 years left to retirement.

- On the basis of its modelling, even replicating the full PPF or BSPS 2 income from 65 and indexation of 2%, the fund would last until age 90 and leave a healthy residual fund value.

- It acknowledged that there was question over whether it could ever be sufficiently clearly demonstrated that a transfer was in a client's best interests when reliance needed to be placed upon future growth assumptions over decades. But its approach had been conservative and the past performance had been roughly equivalent to the reduced critical yields, despite significant market downturns.

- There was also a corollary to this, which was that those with long term investment horizons had the advantage of time in the market when considering financial viability. Returns couldn't be guaranteed, as it set out in the suitability report, but it considered the critical yields were low enough that there was a reasonable chance of improving on the scheme benefits.

- It considered that it had demonstrated how likely it was that the scheme guarantees would be able to be replicated, or even improved upon, in the event of Mr J needing to access his BSPS-derived pension funds.

ECFM also challenged the basis of the proposed redress calculation, saying that the comparator should be the PPF rather than the BSPS 2. In support of this, it said the following:

- The BSPS 2 didn't exist at the time of the advice and its structure wasn't known under the "Time to Choose" exercise. There were conditions which needed to be met for the BSPS 2 to be implemented.

- If a member didn't make a decision, then they would default into the PPF. This was the only option open to members.

- Although the BSPS 2 did then go ahead, any conclusion that Mr J would have opted to join that scheme was based on hindsight.

- Members were provided with amended CETVs from 11 September 2017, and were told that the trustees would only consider a new transfer post 11 December 2017 if the member had opted to remain in the BSPS, rather than join the BSPS 2.

- The trustees also said that those who opted to join the BSPS 2 wouldn't be able to then transfer out until after the BSPS 2 had potentially been created – and that transfer values would be lower due to lower escalation rates and increases to pensions in deferments in the new scheme.

As agreement couldn't be reached on the matter, the investigator said that it would be referred to an ombudsman for review.

The investigator then enquired of Mr J as to whether, if the complaint was upheld, his preference would be to have a loss calculation undertaken on the existing basis, or to await the new methodology for defined benefit transfer redress calculations.

Mr J confirmed that he'd like any redress calculation to be conducted on the basis of the existing guidance, until the new guidance came into force.

The investigator then wrote to both parties to confirm that the FCA had developed a BSPS-specific redress calculator to calculate redress for cases which were included in the BSPS consumer redress scheme. But, he said, the FCA was also encouraging businesses to use the calculator for non-scheme cases.

The investigator further said that, when issuing my decision, I may require ECFM to use the FCA's BSPS-specific calculator to determine any redress due to Mr J.

The investigator said that, if either party didn't think it was appropriate to use the BSPS-specific redress calculator in the circumstances of Mr J's complaint, they should let him know by 5 June 2023. Neither party has raised an objection to the use of that calculator.

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

ECFM's rationale for transferring

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

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

The financial case to transfer

I think it's fair to say that this represents the mainstay of ECFM's argument for the suitability of the advice – that there was a reasonable prospect of Mr J not only matching, but improving upon, the pension benefits Mr J would otherwise have received from the scheme.

ECFM obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr J's objectives from a financial perspective.

The suitability report was issued after the FCA's revised guidance which was released in 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 4.7% pa. And the mid band growth rate used to illustrate the benefits which might be payable from a PPP was 2.10% pa.

The critical yields to age 65, at 6.18% (or 5.34% for tax free cash and a reduced pension) and then 7.05% (or 6.1% for tax free cash and a reduced pension) to age 60 therefore comfortably exceeded both the discount (or growth) rate deemed achievable over the same period, and the mid growth rate used by the pension provider.

The critical yields to match those which would be produced by the PPF at age 65 were 4.79% pa (or 4.55% for tax free cash and a reduced pension), and 5.41% pa (or 5.17% for tax free cash and a reduced pension) to age 60.

I acknowledge the point made by ECFM that the above critical yields were calculated on the basis of the BSPS benefits, rather than the BSPS 2 benefits. And it has asserted that the relevant comparator would be the benefits Mr J would have received from the PPF. But I don't accept that the more likely course of action for Mr J here would be that he would have done nothing, and accepted that his BSPS benefits would move into the PPF. Put simply, he didn't do "nothing" – he sought advice from ECFM and, for the reasons which I set out in this decision, my view is that the advice should have been to move into the BSPS 2.

Given what was known about the proposed BSPS 2 and Mr J'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 slightly lower than those for the BSPS – and likely somewhere in between those and the critical yields for 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 discount and mid band growth rates set out above.

ECFM has said that it was the hurdle rates which were more relevant here, but these stripped out not only the spouse's benefit, which I accept wouldn't have been unreasonable given Mr J's single status at the time (although I think it needed to be taken into account that this might very well change, given his age and the number of years to retirement – and indeed as did then happen soon after), but also the effect of the escalation in the scheme pension and the guarantee period. So I don't agree that it was a realistic comparison for the scheme benefits which Mr J would be relinquishing.

And 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 J 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. I've noted the financial modelling that ECFM has done to try to demonstrate that Mr J has the potential to improve on the BSPS (or BSPS 2) benefits, but for the reasons given above, I don't agree with the premise on which this has been based – that Mr J would have moved into the PPF, or that the hurdle rate is a suitable comparator.

I've also noted the comments that the growth in the PPP funds since the advice has outstripped the CPI revaluation rate applicable within the scheme. I don't think I need to labour this point, given what is known about inflation since the investigator's view and ECFM's response to that view, and even though the revaluation rates within the BSPS 2 for two years of Mr J's service would have been CPI capped at 4%, with a further four being CPI capped at 3%, and the remainder CPI capped at 2.5%, I doubt that this remains the case.

And this is rather the point. Notwithstanding the fact that it is the critical yields upon which more focus needs to be placed, Mr J had over 35 years until his prospective retirement, and whilst looking at fund performance and CPI over a few years might suggest that, if that trend continued, the funds would perform well, that trend needed to be sustained for a very long time. And the reasonable likelihood of that kind of stable environment for that length of time was, in my view, low.

I've also noted what ECFM has said about Mr J's risk rating, and this being consistent with the types of return required to improve on the scheme benefits. But in the suitability report, ECFM said that Mr J could "best be summarised as a balanced investor". Or, as in the following sentence, a "balanced to speculative" investor. On the basis of a "6 out of 10" rating, however, where "1" was lowest risk and "10" was the highest, I think it's reasonable to conclude that Mr J was probably more "balanced" than "speculative". As such, I think his level of risk was likely consistent with the mid band growth and discount rate assumptions as set out above – both of which were lower than the critical yields required to match the scheme benefits.

And I think it's also worth noting that it was ECFM's own stated opinion in the suitability report that the critically yields would more likely than not be unachievable over the long term given the average growth of a portfolio which would be suitable for Mr J's attitude to risk.

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 J's best interests. And in line with my comments above, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Mr J would be relinquishing.

But I think it's also worth pointing out that, even if the critical yields were reasonably achievable, the feasibility of achieving them 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 ECFM did provide warnings on the guarantees which would be relinquished, but as ECFM 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. ECFM 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 J.

As I've said above, ECFM's reasoning for the recommended transfer, alongside the potential for Mr J to improve upon those which would have been produced by the scheme if he took a higher level of risk, was that Mr J 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 J 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.

And as commented above, I also think it's quite possible that Mr J had a "balanced" risk rating, given his age and number of years to retirement. I also agree with ECFM that the more significant part of his overall pension benefits would be represented by the defined contribution scheme accrual. Mr J would likely have accrued a significant amount of money purchase benefits given the overall contribution rate (if he remained with the same employer) by retirement. But other than BSPS membership and the state pension which wouldn't be payable until age 67, Mr J had no other guaranteed benefits. Through transferring, Mr J 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.

But I also don't think Mr J 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 J 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 J 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 "balanced" attitude to risk and apparent lack of any similar historical investment (other than just under £2,000 in shares) which might otherwise indicate a preparedness to take risks with his pension income.

I've also thought about whether Mr J could meet an objective of retiring early whilst also retaining the valuable guarantees offered by either the BSPS 2 or the PPF. And in my consideration of this, I acknowledge that there was no facility for Mr J to take tax free cash from the BSPS 2 or PPF without also starting to take an income.

But as noted above, by age 65, Mr J would have accrued around 35 years' worth of defined contributions in the replacement scheme, or 30 years by age 60. Given the likely value of this separate pot of money on the basis of the employer and employee contribution rates, this could be used to plug any gaps between him starting to take flexible benefits and his OPS/state pension beginning. It's possible that he could have relied on the proceeds of his defined contributions plan for flexible access to pension benefits, from whatever age after 60, and then taken guaranteed benefits from either the BSPS 2 or the PPF as and when needed.

Alternatively if, on the basis of an income requirement which outstripped this over the years left to age 65 – although I would say that I don't think the actual income requirement was demonstrably known at the time of advice, or could in any case reasonably have been known with any certainty given his distance from retirement - Mr J could then have begun to take the scheme benefits early if needed.

Mr J would also have been able to choose a tax efficient level of income (or lump sum withdrawals if he later decided he wanted them) through the defined contribution accrual, until the point that he either needed, or chose, to begin taking benefits from either the BSPS 2 or the PPF. And so any need for flexibility of income could have been addressed in this way.

Mr J may then have been in the fortunate position of receiving an income which was higher than his actual needs, especially when the state pension began, but he could have simply reinvested any excess as he saw fit, or, to provide a legacy for his child or extended family, immediately gift it away to avoid it being subject to inheritance tax.

The suitability report suggested that Mr J was willing to accept the trade-off between a secure income and risk to achieve his objectives. As I've said above, although Mr J didn't have any particular financial experience, I think he may have understood the principle of risk/reward, and risk warnings were provided by ECFM.

But as I've noted above, Mr J was accruing further benefits in his defined contribution scheme, and given the likely accumulation of funds in that scheme, compared against the benefits accrued in the final salary scheme, at the normal scheme retirement age, around 35 years of his pension accrual at age 65 (or 30 at age 60) would likely be derived of the defined contribution scheme. As such, Mr J would already by necessity have been taking investment risk through the replacement scheme.

In light of this, and given that in the 7 or so years up to that point Mr J had been accruing defined benefits, I think the guarantees attached to those defined benefits would have been of some value, as commented by the investigator a "bedrock" of guaranteed benefits, 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.

And on that particular note, as with others in his position, I think it's fair to say that Mr J would have been concerned about the future of the BSPS and his associated benefits. But Mr J'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 J distrusted it. Further, although I've noted ECFM's comments relating to the BSPS not yet being in place, 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 point of the "Time to Choose" exercise) the BSPS 2 seemed more likely than not to be a viable alternative.

As I've said above, the prospect of Mr J'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 J's concerns been better managed, the seeming key driver for having control over his pension benefits would also have diminished.

Mr J simply didn't need to make any decisions about transferring out his defined benefits at that point. The prospect of Mr J'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.

Mr J's plans, including retirement, may in any case have changed significantly in the 30 or so intervening years between then and him reaching age 60. Any flexibility requirements could have been addressed nearer to, or at, the point of Mr J's retirement – and Mr J would have been able to transfer out of the BSPS 2 if needed.

There may have been lower CETVs offered in the future if gilt yields and other market factors changed, but for the reasons given, I think that Mr J could have achieved a degree of flexibility with his pension benefits without needing to transfer at all. And even if he did ultimately decide that flexi access drawdown was his preferred option – and again, this could have been established closer to his actual retirement age – Mr J or his adviser could then assess at that point whether the transfer represented good value.

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

Death benefits

ECFM confirmed that the restructuring of the death benefits wasn't recorded as being a priority for Mr J. 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 J's best interests, and I think Mr J himself identified this.

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

Furthermore, as I've also said above, there was no need for Mr J to make any decision about his BSPS benefits at this point in time and it was the responsibility of ECFM to explain to Mr J why he didn't need to make any irreversible decision on relinquishing valuable scheme pension guarantees at that time. As I've also said above, there was no imminent prospect of Mr J's scheme benefits needing to enter the PPF, which would have ruled out a later transfer. 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 J 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 J, amongst many others in a similar position, may have been concerned by developments relating to his employment and the BSPS, 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 – 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, and I'm satisfied that Mr J's income needs could likely have been met by well-planned access to his different types of accrued benefits by the time he came to retirement. The available evidence simply doesn't support the position as to why control or flexibility would have been sufficiently compelling reasons for Mr J to relinquish valuable benefit guarantees – especially at the age of 29.

My further view is that, if properly discussed, Mr J'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 or could in any case access in other ways, 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, should Mr J's relationship circumstances change in the future (as it did), 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 the mid band growth rate 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 J's recorded risk attitude.

Taking account of Mr J's circumstances, including his recorded 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 ECFM should have advised against the transfer.

And I think that, had this happened, Mr J 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 the conclusion that the recommendation to transfer wasn't suitable for Mr J, nor was it in his best interests. The key contributing factors here are: Mr J's recorded attitude to risk and its incompatibility with the type of investment risk which would have likely 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 J's options and the future benefits available (which could have incorporated an element of both guaranteed and non-guaranteed benefits) from both the BSPS defined benefits and defined contributions – a failure to take account of COBS 19.1.2 (2) and 19.1.8.

Furthermore, at least two of the key benefits sought by Mr J were available without needing to transfer – possible early retirement and flexibility through utilising the different types of scheme benefits which would have been available to him.

My view is that, taking account of the critical yields, Mr J's recorded attitude to risk with regard to his pension funds and matching that with the likely corresponding investment returns, it was unlikely (as also indicated by ECFM at the time), 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 by COBS 2.1.1R and COBS 19.1.6, ECFM would - or should - then have drawn, and conveyed, the conclusion that transferring wasn't in Mr J'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 J, as far as possible, into the position he would now be in but for the unsuitable advice.

In terms of the option Mr J would have chosen, had he been suitably advised, I've noted that there would be a 10% reduction in the starting pension entitlement within the PPF, whereas the BSPS 2 wouldn't cut the starting entitlement for deferred members.

Regarding death benefits, under the BPSP 2 the spouse's pension would be set at 50% of Mr J's pension at the date of death, and this would be calculated as if no lump sum was taken at retirement. But as Mr J was single at the time I don't think this particular enhancement over the PPF benefits would have had much resonance for him.

The reduction for early retirement under the PPF was lower and the commutation factors for the tax free cash entitlement were also slightly more favourable. And so, on the basis of prospective early retirement, both the starting income and the tax free cash would likely have been higher with the PPF.

One of Mr J's recorded objectives was the ability to retire early. And so this would have been a point which required careful consideration when weighing up whether he should opt for the BSPS 2 or remain in the BSPS with a likely subsequent move into the PPF.

But for the reasons set out above, even if Mr J envisaged retiring early, I think it's likely that, properly advised, he could have accessed his defined contribution scheme benefits to make up any income shortfall in the period between retirement and starting to take his defined benefits, which could then have been deferred until normal scheme retirement age. The advantages of early retirement through the PPF wouldn't therefore have applied.

And so, for the reasons given, my view is that it's the benefits offered by the BSPS 2 which should be used for comparison purposes.

I therefore consider that Mr J would most likely have remained in the occupational pension scheme and opted to join the BSPS 2 if suitable advice had been given. And as I've set out above, given the amount of time left to retirement, I don't think it could be assumed that Mr J would take his defined benefits before age 65, especially with the possibility, as outlined above, of accessing his accrued defined contributions flexibly if required.

Estate Capital Financial Management Limited 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.

Estate Capital Financial Management Limited 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 J and our service upon completion of the calculation.

The compensation calculation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

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

- explain to Mr J before starting the redress calculation that:

  - its redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation),

  and

  - a straightforward way to invest their redress prudently is to use it to augment their defined contribution pension

- offer to calculate how much of any redress Mr J receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr J accepts Estate Capital Financial Management Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr J for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr J's end of year tax position.

Redress paid to Mr J as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr J's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £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 Estate Capital Financial Management Limited to pay Mr J 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 Estate Capital Financial Management Limited pays Mr J the balance.

If Mr J accepts this final decision, the award will be binding on Estate Capital Financial Management Limited.

My recommendation wouldn't be binding on Estate Capital Financial Management Limited. Further, it's unlikely that Mr J could accept my decision and go to court to ask for the balance. Mr J may want to consider getting independent legal advice before deciding whether to accept my final decision.

My final decision

My final decision is that I uphold the complaint and direct Estate Capital Financial Management Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 21 November 2023.

Philip Miller
Ombudsman