

The complaint

Ms C complains about the advice Acumen Independent Financial Planning Limited ('Acumen') gave to her to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

In March 2016, Ms C'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'). The PPF acts as a 'lifeboat' for insolvent DB pension schemes, paying compensation to members of eligible schemes for their lifetime. The compensation levels are, generally, around 90% of the level of the original scheme's benefits for deferred pensions. But the PPF's rules and benefits may differ from the original scheme. Alternatively, members of the BSPS 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 included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Ms C's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

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. Members were given until 11 December 2017 (later extended to 22 December) to make their choice between the PPF and BSPS2.

On 16 October 2017 the BSPS administrators provided Ms C with an updated summary of the transfer value of her scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £89,333.

Ms C remained concerned about what the recent announcements by her employer meant for the security of her pension. She contacted Acumen for advice and met with it in early November 2017.

Acumen conducted a fact-find with her and an assessment of her attitude to risk. At that time Ms C was 32, living with her partner, they had two children under six and owned their own home. She was working part time and earning around £11,000 a year.

After obtaining a transfer value analysis report Acumen met with Ms C again the same month. It advised her to transfer her DB funds into a named personal pension. Ms C signed the forms for the transfer to go ahead on 17 November 2017.

On 1 December 2017 Acumen sent Ms C its suitability report setting out the reasons for its recommendation. Amongst other things it said it had assessed her attitude to risk to be “low medium”. She was an inexperienced investor who was “not comfortable” with investing. It 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 it said Ms C’s “desire to live on a lower income”, in order to have flexible access to her funds and greater death benefits were of a higher priority for her.

In 2022 Ms C complained, via the Financial Ombudsman Service, that Acumen’s advice was not suitable for her. Acumen replied to the complaint in June 2022. It didn’t uphold it. Amongst other things Acumen said it had fulfilled its regulatory requirements. It said it had taken reasonable steps to satisfy itself that its advice to transfer was suitable. It couldn’t recommend Ms C join the BPS2 as it had yet to be established at the time of the advice and there was no certainty it would be. It added that the PPF was “widely (and correctly)” considered to be an “undesirable outcome”.

One of our Investigators looked into Ms C’s complaint. He didn’t think Acumen’s advice was suitable for her. He recommended her complaint be upheld. He said Acumen should establish if Ms C had suffered a financial loss as a result of its unsuitable advice and if so pay her compensation, including £300 to address her distress and inconvenience.

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 Business (‘PRIN’) and the Conduct of Business Sourcebook (‘COBS’). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of 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 broadly similar reasons to those our Investigator gave. I've summarised my findings below.

When doing so I've been mindful that the regulator, the Financial Conduct Authority ('FCA'), says 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 recommending a transfer if it could clearly demonstrate it was in Ms C's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

My findings

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 wasn't feasible. In other words Acumen recognised that transferring would most likely mean Ms C 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 Ms C how much she was likely to be worse off by nor did it give her 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 6.7% and 5.1% to match the PPF benefits. But Acumen didn't provide critical yields if Ms C 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 Ms C. She either needed to allow her funds to move to the PPF or to opt to in the BPS2.

By that time 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 it gave her all the information she needed.

In addition I've noted that in Acumen's response to Ms C's complaint it said that transferring would allow Ms C to retire at age 58. It's not clear what informed Acumen to make that comment. That's because there's nothing in the fact-find that says Ms C was looking to retire early, nor does the suitability report refer to her retiring at age 58. However, our Investigator spoke with Ms C. She told him that while early retirement would be preferable, and perhaps at age 60, she didn't have specific plans.

But, if taking early retirement had been a key objective for Ms C then it's notable that Acumen didn't give her any figures for what her entitlements would be from any scheme at any age if she took early retirement. And if it had done so it's likely the critical yields would have been 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 Ms C accessed them and so would have had less time to grow. Those funds would also then have needed to support her 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 Ms C any of that information. So if it believed early retirement was a genuine objective for her then it didn't give her enough information from which she could make an informed decision.

In any event, whatever age Ms C planned to retire at, I agree with Acumen's assessment that she was likely to be worse off by transferring to a personal pension than she was from

leaving her benefits in the DB scheme whether that went into the PPF or if she opted into the BSPS2. For that reason alone I don't think a transfer was in her best interests. So I've gone on to consider the other key reasons that Acumen cited for recommending a transfer.

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

Acumen noted that Ms C and her employer had begun contributing to a recently set up defined contribution ('DC') pension scheme. Ms C and her employer were together contributing around 16% of Ms C's salary to that pension. She could have anticipated continuing to contribute to that pension (or a similar one if she were to change jobs in the future) for the remainder of her working life. And given she was still only 32 years old that could have been for another 35 years until state pension age. The earliest Ms C could take early retirement from the DB scheme or a personal pension would be age 57¹, around 25 years away; so by the time she reached retirement age, her DC pension should have built a sizeable pot.

The nature of a DC pension means this already provided Ms C with flexibility – she wasn't committed to take its benefits in a set way. Ms C could have taken lump sums as and when required and adjusted the income she took from it according to her needs. So, I think if Ms C retained her DB pension, this combined with her new workplace pension, would have likely given her the flexible access to pension funds if that was what she needed.

In addition, if Acumen had advised Ms C to join the BSPS2 and she had later decided she needed greater flexibility than the scheme provided, then she could have chosen to transfer from that scheme nearer to her retirement age. And I think this was something that she could have explored closer to her intended retirement age; it wasn't a decision she needed to make straightaway.

I've noted Acumen said in its reply to Ms C'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.

Acumen also said a transfer was suitable because the lump sum death benefits were better from a personal pension than from the DB scheme. It said the death benefits available from the personal pension were of a higher priority to Ms C than her income in retirement. That might have been the case. But Acumen was tasked with advising Ms C about what was best for her retirement not what would provide the greatest legacy for her beneficiaries if she died.

¹ That statutory age for early retirement will rise to age 57 from 2028, it is currently at age 55.

I'm aware Ms C wasn't married at the time of the advice, so her partner couldn't have benefited from the spouse's benefits the DB schemes offered. But Ms C was only 32 years old, and she's confirmed that she does have plans to marry in the future. So, the spouse's benefits would become payable at that time. And, even if wedding plans were only a distant consideration, I think this is something that Acumen should have made clear to her.

Further, the DB scheme would pay a dependents' benefit for Ms C's children if she was unfortunate enough to die while they were still in education – up to age 23. So the death benefits the DB schemes offered could have been valuable to Ms C's family in the event of her premature death.

In addition while Acumen said that the lump sum death benefits would be better under a personal pension that wasn't guaranteed. If Ms C had died immediately following the transfer then the CETV sum would have been paid to her beneficiaries 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 Ms C's death depended on a number of factors. And there may not have been much left in Ms C's personal pension if she lived a long life, the investments performed poorly, or if she took large sums from the fund early in her retirement. But I don't think Acumen was clear about this.

Further, I'm aware that Ms C had death in service cover from her employer. So that would have paid a lump sum in the event she died while still working for her employer. But, if she wanted to leave a legacy for her family, which didn't depend on her employment, investment returns or how much of her pension fund remained on her 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 Ms C how much she would ideally like to leave to her family, and it could have explored cover on a whole of life or term assurance basis. But there's little evidence it suggested this.

Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Ms C. Also I don't think Acumen properly explored the option of life insurance as an alternative with her. And ultimately Acumen should not have encouraged Ms C to prioritise the potential for alternative death benefits through a personal pension over her security in retirement.

I've also noted that, as well as saying that the BSPS2 wasn't guaranteed, Acumen said the PPF was considered to be an "undesirable outcome". I understand that Ms C may have legitimately held concerns about how her employer had handled her 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 Ms C with a guaranteed income, the possibility of early retirement and the option of accessing TFC. Ms C was unlikely to improve on these benefits by transferring. So, entering the PPF was most likely not as troubling as she might have thought, and I don't think any concerns she held about this meant that transferring was in her best interests.

Overall, I can't see persuasive reasons why it was clearly in Ms C's best interests to give up her DB benefits and transfer them to a personal pension. And I haven't seen anything to persuade me that Ms C would have insisted on transferring, against advice to remain in the DB scheme.

For the above reasons I think Acumen's advice to Ms C to transfer out of the DB scheme and into a personal pension was unsuitable for her as it was not in her best interests. So, I

think Acumen should compensate her for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Ms C, as far as possible, into the position She would now be in but for the unsuitable advice. I consider Ms C would most likely have remained in the DB scheme and opted to join the BSPS2 if Acumen had given suitable advice.

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 Ms C and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what Acumen based the inputs into the calculator on.

For clarity, Ms C has not yet retired, and she 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 Ms C 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, Acumen should:

- calculate and offer Ms C redress as a cash lump sum payment,
- explain to Ms C before starting the redress calculation that:
 - her 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 her redress prudently is to use it to augment her personal pension
- offer to calculate how much of any redress Ms C receives could be augmented rather than receiving it all as a cash lump sum,
- if Ms C accepts Acumen's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Ms C for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Ms C's end of year tax position.

Redress paid to Ms C as a cash lump sum will be treated as income for tax purposes. 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 Ms C's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Acumen Independent Financial Planning Limited to pay Ms C 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 Acumen Independent Financial Planning Limited pays Ms C the balance.

If Ms C 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 Ms C can accept my decision and go to court to ask for the balance. Ms C 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 Ms C to accept or reject my decision before 10 November 2023.

Joe Scott
Ombudsman