

The complaint

Mr H has complained that David Stock & Co Limited (David Stock) 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 H'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 The main defined benefit OPS had been replaced by a new defined contribution scheme.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 PPF or into a private arrangement, such as a PPP.

Mr H had obtained a cash equivalent transfer value (CETV) from the BSPS dated 16 October 2017. It showed he had service of 21 years and 9 months and final remuneration of £31,640. The transfer value was just over £247,900, including a deduction to reflect the scheme's funding position.

In January 2018, David Stock completed a fact find analysis to establish Mr H's circumstances and financial objectives. An assessment of Mr H's attitude to risk determined that he had a cautious risk appetite.

Based on the documents completed, Mr H's circumstances were as follows:

- He was 43, separated, with one dependent child.
- He was employed, earning £30,000 pa.
- He owned his home, valued at £90,000, with a mortgage of £70,000.
- He had unsecured debt of around £10,000.
- No details of any savings or investments were recorded.

He was a member of his employer's Group Personal Pension (GPP) but had no other pension arrangements.

No details of Mr H's net income or expenditure were recorded.

David Stock issued an initial advice report dated 5 January 2018. Mr H signed an advice confirmation declaration on 8 January 2018. It confirmed he had been provided with transfer advice and understood he was giving up guarantees.

The initial advice report set out David Stock's advice. It recommended that Mr H transfer the BPS defined benefits to a PPP with LV=, known as a Flexible Transition Account. In terms of investments, it recommended a Discretionary Fund Manager (DFM) portfolio via Brewin Dolphin.

David Stock noted that Mr H had the following objective, which formed the basis of its reasons for recommending the transfer:

- Flexibility regarding how and when to take pension benefits.

Based on the LV= illustration, David Stock levied an initial advice fee of 1%, expected to be £2,479. According to the advice report, it levied a "retainer" fee of 0.1% or £247 per annum – this was also quoted on the LV= illustration. Mr H also signed a "Service Proposition & Engagement" document which referred to 1% ongoing fees, but the investigator's understanding was that only the 0.1% retainer fee was actually applied.

The Brewin Dolphin DFM carried separate charges of 0.8% excluding vat. The estimated annual charge was expected to be £2,379 (inc vat). The illustration provided by Brewin Dolphin was based on a balanced portfolio, but the "welcome letter" dated 24 May 2018 quoted the risk classification as "Diversified Risk (category 3)".

The investigator said that it was unclear as to whether this was aligned to a cautious or balanced ATR.

Mr H accepted David Stock's recommendation and the PPP began in early 2018.

Mr H complained to David Stock on 7 July 2022, requesting that the suitability of the advice he received be assessed. David Stock issued a final response letter dated 31 August 2022, saying that its advice had been suitable. It also said that, in addition to seeking flexibility with his pension fund, Mr H had wanted to protect his pension fund for his dependent child in light of his recent separation.

On 24 November 2022, David Stock told this service that it wished to make an offer for settlement of this complaint (without conceding that the advice had been unsuitable). David Stock undertook a redress calculation on the basis of the regulator's guidance contained within final guidance FG17/9, which it said identified that Mr H had not suffered a financial loss as a result of its advice.

The investigator put this to Mr H on 25 November 2022, but Mr H rejected that outcome and said that he would like this service to continue to review the suitability of the advice he received.

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

- The regulator’s guidance, when considering a transfer of defined benefits, was that it should be presumed to be unsuitable unless it could be clearly demonstrated that it was in an individual’s best interests.
- 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 critical yield to match the scheme benefits at age 65 was 5.68%. The discount rate to age 65 was 4.5%. David Stock had said that the critical yield might be achievable for a younger individual who had a medium attitude to risk, but Mr H had been assessed as having a cautious risk attitude. The comments regarding the critical yield had been unclear in the initial advice report, and it wouldn’t have been clear to Mr H as to whether the transfer represented good value for money.
- In terms of other objectives, David Stock hadn’t been able to demonstrate that it “knew its client” or that Mr H’s needs had been clearly defined and understood.
- In terms of flexibility and control, Mr H’s objective around this hadn’t been clearly set out and it seemed to be a “stock” motive. There didn’t seem to be any clear indication as to when Mr H might retire, but early retirement would in any case have been possible either within the BPS 2 or the PPF. If Mr H required additional flexibility, he could have made the decision to transfer closer to retirement.
- Mr H could also have achieved the required flexibility by accessing his defined contribution plan. Given the size of the contributions to this, this would have amounted to a reasonable sum by retirement.
- Further, the available evidence didn’t support the position that Mr H had either the desire or capacity to exercise personal control over his pension fund.
- As to death benefits, the initial advice report had made mention of death benefits being important to Mr H, with the suggestion being in the final response letter that he wished to protect his young child. But the primary purpose of the retirement benefits was to provide an income to Mr H.
- Mr H also had generous death in service benefits, and his child could have benefited from the dependant’s pension whilst they remained in full time education. Life assurance could also have been explored if an additional lump sum was required in the short term. Mr H’s son could also have benefitted from the value of the defined contribution plan.
- Mr H may have had concerns about the prospects for the BPS, but these concerns should have been managed and addressed by David Stock.

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

But the investigator also noted the regulator's consultation on a revised methodology and enquired of Mr H as to whether 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.

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

Mr H accepted the investigator's conclusions and indicated that he'd like the calculation to be undertaken in line with the existing methodology.

A representative of David Stock then said that the calculation had been undertaken and that it had produced a "no loss" outcome. But it offered Mr H £50 to settle the matter.

Mr H didn't accept the outcome of the calculation undertaken, however, or the offer made to him, and requested that the matter be referred to an ombudsman for review.

The (new) 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 David Stock to use the FCA's BSPS-specific calculator to determine any redress due to Mr H.

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 H's complaint, they should let him know by 4 December 2023.

Mr H confirmed that he was prepared for the calculation to be undertaken on this basis, but wished his reasons for the referral to also be taken into account.

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 noted the comment from Mr H in response to the investigator's most recent contact about the BSPS specific calculator. And I'd like to reassure him that I've carefully considered the merits of the case on a fair and reasonable outcome.

But as David Stock has previously indicated its preparedness to undertake the redress calculation, and hasn't submitted further comments on the merits of the case in response to the investigator's assessment, I'll keep my observations on the matter of suitability relatively brief.

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 David Stock'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 deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 specifically relate to a defined benefit pension transfer.

The regulator, the FCA, states in COBS 19.1.6G that the starting assumption for a transfer from a defined benefit scheme is that it is unsuitable. So, David Stock should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr H's best interests.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

- The TVAS report which David Stock was required to carry out by the regulator said that the critical yield - how much Mr H's pension fund would need to grow by each year in order to provide the same benefits as his defined benefit scheme – was 5.68% to match the pension he'd have been entitled to under the scheme at age 65.
- Given this, along with the discount rate of 4.5% to 65 (and 4.3% to age 60), and the regulator's middle projection rate for growth (5% pa), I think Mr H was more likely than not to receive pension benefits, from age 60 or 65, of a lower value than those he'd have been entitled to under the BPS 2 by transferring and investing in line with his cautious attitude to risk.
- Early retirement may well have been appealing to Mr H, as it might reasonably be appealing to a great many people, but he had no clear or pressing plans to do so, which I think is understandable for a 43 year old. Mr H's circumstances may in any case have changed significantly between then and retirement. And if flexibility was required in terms of any "funding gap" between early retirement and his normal retirement date (or the state pension age), Mr H would have accrued around 17 years' defined contributions by age 60. He could have accessed as much or as little of this as he required – flexibly - including tax free cash, until he needed to begin accessing his BPS benefits.
- As set out by the investigator, I also don't think the objective of control over Mr H's pension funds was well supported by his other circumstances, investment history or experience.
- In terms of the alternative lump sum death benefits a transfer offered to his family, as noted by the investigator, the priority here was to advise Mr H about what was best for his retirement. And the existing scheme offered death benefits, by way of a dependant's pension, that could have been valuable to his family (and in particular

his child) in the event of his death. The defined contribution plan, and, in the event of death before retirement, the death in service benefits, would also have provided further lump sums.

- While the CETV figure may no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would have also been reduced by any income Mr H drew in his lifetime. And so it may not have provided the legacy that Mr H may have thought it would. Further, I think it would be reasonably envisaged that Mr H's child would be financially independent by the time he retired.
- Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr H.
- Mr H may have held concerns about the prospect of the BPS entering the PPF. But it was David Stock's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BPS 2 being established. But even if not, the PPF still provided Mr H with guaranteed income and the option of accessing tax-free cash. Mr H was unlikely to improve on his scheme benefits by transferring. So, entering the PPF was not as concerning as he might have thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons as to why it was clearly in Mr H's best interest to relinquish his defined benefits and transfer them to a PPP. And I also haven't seen anything to persuade me that Mr H would have insisted on transferring, against advice to remain in the defined benefit scheme.

So, as with the investigator, I'm upholding the complaint as I think the advice Mr H received from David Stock was unsuitable.

Putting things right

As set out in the investigator's further comments relating to the BPS-specific redress calculator, I consider that it would be appropriate to use that calculator here, given the BPS-specific circumstances.

A fair and reasonable outcome would be for the business to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would more likely than not have remained in the occupational pension scheme and opted to join the BPS 2 if suitable advice had been given.

David Stock & Co 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>.

David Stock & Co Limited should use the FCA's BPS-specific redress calculator to calculate the redress. A copy of the BPS calculator output should be sent to Mr H and our service upon completion of the calculation.

Mr H hasn't yet retired, and cannot do so for many years. 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 H'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, David Stock & Co Limited should:

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

Redress paid to Mr H 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 H'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.

Determination and money award: I require David Stock & Co Limited to pay Mr H the compensation amount as set out above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I would also recommend that David Stock & Co Limited pays Mr H the balance.

If Mr H accepts this final decision, the award will be binding on David Stock & Co Limited.

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

I've noted that David Stock & Co Limited's representative has offered Mr H an additional £50, irrespective of its prior "no loss" outcome. I think Mr H will have been caused some concern by this matter, and so I think it's reasonable that it should therefore also pay this to Mr H.

My final decision

My final decision is that I uphold the complaint and direct David Stock & Co Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 8 January 2024.

Philip Miller
Ombudsman