DRN-3134316

The complaint

Mr R complains about the advice given by Mercury Wealth Management Limited (‘MWM’) to transfer the benefits from his defined-benefit (‘DB’) scheme with British Steel (‘BSPS’) to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In March 2016, Mr R’s employer announced that it would be examining options to restructure its business, including decoupling the BSPS from the company. The consultation with members referred to possible outcomes regarding their preserved benefits, which included transferring the scheme to the Pension Protection Fund (‘PPF’), or a new defined-benefit scheme (‘BSPS2’). Alternatively, members were informed they could transfer their benefits to a private pension arrangement.

Mr R was concerned about what the announcement by his employer meant for the security of his DB scheme. So, he contacted MWM for advice. Mr R met with MWM in November 2016; it completed a financial planning questionnaire with him to gather information about his circumstances and objectives. MWM also carried out an assessment of Mr R’s attitude to risk, which it deemed to be ‘balanced’.

On 10 March 2017, MWM advised Mr R to transfer his BSPS benefits into a personal pension and invest the proceeds across an equal split of defensive and growth funds. The suitability report said the reasons for this recommendation were that Mr R wanted to benefit from his pension earlier than his normal retirement age and he wanted to access his benefits flexibly. It said Mr R intended to use his tax-free cash (‘TFC’) to pay off his mortgage and other debts. It also said the personal pension provided additional death benefits which could be passed on to his wife and children, which was important to Mr R.

Mr R accepted the advice. On 5 April 2017 £390,226.63 was transferred to Mr R’s personal pension and he took TFC of £97,556.66 to repay some of his debts. Mr R didn’t take any income from his pension as he intended to keep working until age 65.

Mr R, through his representative, complained in 2019 to MWM about the suitability of the transfer advice.

MWM didn’t uphold Mr R’s complaint. It said Mr R wanted to leave whatever remained of his pension to his family, and he was concerned that he had a shorter life expectancy because of the nature of his work. MWM added that Mr R needed the flexibility to be able to pay off his debts at 55 and leave his remaining funds invested until he retired at 65.

An investigator ultimately upheld the complaint as he thought the advice MWM gave Mr R was unsuitable. The investigator acknowledged Mr R was motivated to transfer away from the BSPS and he was attracted by the higher death benefits a personal pension could provide, but he thought it was clear Mr R would be worse off by transferring out. And he didn't think he should've been advised to do so just to obtain higher death benefits or flexibility that he didn't actually need. The investigator said it should compensate Mr R for the losses he incurred by transferring his DB pension and that compensation should be based on Mr R having opted to join the BSPS2 as he didn't have any plans to retire early.

MWM maintained Mr R's objectives could've only be met by transferring out of the BSPS. It said it wasn't fair to say that it would only be in Mr R's best interest if MWM could demonstrate he would be better off financially – Mr R's other objectives had to be taken into account. It said Mr R was very motivated to transfer out, with his main concern being his fear of dying young, given the nature of his work and his family history. MWM added it was made clear to Mr R what he'd be giving up and he was determined to proceed; he signed a letter to this effect and also gave up the higher transfer value that would've been on offer to him. MWM also maintained that Mr R's debts were not manageable; it said he'd recently taken on a new mortgage which he planned to pay off using his TFC. MWM added that even if it had advised Mr R to remain in the scheme, he would've found another adviser to transfer his pension.

MWM also asked for an oral hearing. It believed Mr R needed to be questioned further on his mortality concerns, his need for additional death benefits and his need to repay debts. Also, it thought Mr R needed to be asked to what extent he understood the transfer and the risks associated with it. MWM thought the evidence Mr R had given in support of his complaint was inconsistent with the information he gave to MWM at the time of the advice.

The investigator didn't change his opinion so the complaint was referred to me to make a final decision and to decide whether to hold an oral hearing.

I turned down MWM's request for an oral hearing because I was satisfied I could make a decision on this case fairly without hearing oral evidence. But I decided to ask Mr R to provide his comments on the issues raised by MWM in writing.

Mr R provided a statement, which was passed on to MWM for its comments. Mr R said that the death benefits were emphasised by MWM, not him, and that the adviser showed him statistics about younger deaths associated with shift work. He said he was in good health and he had existing life insurance. Mr R added that he didn't have any unmanageable debts and thought they had been recorded incorrectly by the adviser. For example, it said he had a car loan of £10,000, but it was actually a personal contract purchase ('PCP') – he simply had a monthly repayment until the lease ended and he returned the car. Mr R also asked why he would be granted a new mortgage if there were concerns he couldn't afford the repayments. Mr R said he didn't really understand what he was going into, and didn't think he was taking a risk by transferring out of the BSPS. Mr R said he didn't know how soon his funds could run out.

MWM disputed that the statement had been authored by Mr R and said that it still thought an oral hearing was warranted as there was a clear dispute in the facts. It said it hadn't shared any articles with Mr R about mortality rates associated with shift workers. It also said Mr R's comments about death benefits were totally at odds with what he told the adviser at the time. MWM added that the ombudsman couldn't take information that Mr R hadn't shared with it at the time, such as Mr R's insurance, as its advice had been given based on the information Mr R had provided. MWM made other comments in line with the response it had given to the investigator's view. It also said that it expected the ombudsman to issue a provisional decision as it had made arguments in its letter of 21 January 2022 that hadn't yet been addressed.

Although MWM maintained that the advice it gave Mr R was suitable, it made an offer of £40,000 to him without prejudice and also sought to engage with Mr R's representative about him purchasing an annuity instead. Mr R's representative turned the offer down on his behalf and said Mr R would only accept a settlement based on the regulator's DB pension transfer redress methodology.

MWM thought this demonstrated Mr R's motivation was to "have his cake and eat it too". It also thought it showed Mr R preferred the flexibility of a lump sum held in a personal pension over a guaranteed income that an annuity would provide him with.

The investigator informed MWM that I was satisfied that an oral hearing wasn't required in order for me to decide the case fairly. So, I'm now providing my final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I would first like to address MWM's concerns about my decision not to hold an oral hearing. It says that it is incumbent on me to hold an oral hearing because there is a dispute in the facts which are material to the outcome of the complaint. It says that my request to Mr R to give his comments in writing misses the point of a hearing, which is a means of testing the credibility of the evidence Mr R has provided.

As I have said previously it is clear that Mr R, with the benefit of hindsight, feels differently about his pension transfer. That isn't surprising to me. And I don't think it's really in dispute that at the time of the advice, Mr R felt that transferring out of the BSPS was a good idea. He feels differently now, which is why he has complained. It isn't reasonable to suggest that a customer can't change their mind about things or make a complaint if, on reflection, they think the advice they received was unsuitable.

I can also see that some of the information Mr R has given now is different to the information recorded by MWM at the time of the advice. But that isn't particularly unusual and it does not follow that I must hold a hearing to determine the veracity of Mr R's statements. The events took place around five years ago and so Mr R may remember things differently now. But in any event, where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities. In other words, I determine what I consider is more likely to have happened in the light of the available evidence and the wider circumstances. So, I have borne the factual discrepancies in mind when reviewing the case, and I have attached varying degrees of weight to the evidence as appropriate. And as MWM is aware, evidence from the time of the sale is generally likely to carry more weight.

MWM said it expects me to issue a provisional decision on this case. But I don't think I need to do so. Having considered everything provided by both sides, I'm upholding the complaint for largely the same reasons given by the investigator. I'm not persuaded that any of the arguments raised by MWM in its letter of 21 January 2022 are new and I'm satisfied that the investigator addressed these themes fully in each of his opinion letters. I am also not making my decision based on any new information provided by Mr R. So, it follows that I can issue a final decision.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, MWM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr R's best interest. (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interest. I'll explain why.

Financial viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr R was 55 at the time of the advice and he told the adviser that he wasn't likely to stop working until age 65. The investment return required to match the DB pension at retirement at age 65 (critical yield) was 13% per year if benefits were taken in full. The equivalent critical yield to match the benefits available if the BSPS moved to the PPF was 9.4%.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.7% per year for 9 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken all of this into account, along with the composition of assets in the discount rate, Mr R's 'balanced' attitude to risk and also the term to retirement. And I think Mr R was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement (even if the BSPS moved to the PPF), as a result of investing in line with that attitude to risk.

The critical yield needed to match Mr R's benefits through the BSPS or the PPF at 65 if Mr R took TFC were not provided. But I don't think they were likely to be substantially lower, and certainly not as low as the discount rate or the regulator's middle growth rate. So, even if Mr R took TFC at age 65, I don't think he was likely to even match the same pension benefits if he transferred out of the BSPS, let alone exceed them.

However, MWM says the critical yield is of limited relevance as Mr R was not planning to take an annuity with his pension funds. Furthermore, it said it didn't tell Mr R that he could achieve a higher pension by transferring out and Mr R understood the critical yield was unlikely to be achieved. But in my opinion, the critical yield does still give a good indication of the value of benefits Mr R was giving up and the regulator deems it an important part of the decision-making process. And while I accept that Mr R signed a letter on 13 December 2016 which stated he understood that a growth rate of 13% couldn't be achieved, it doesn't say whether Mr R understood that the growth rate required to match the PPF benefits (9.4%) was achievable. And that was the more important figure here given that Mr R's DB scheme was moving to the PPF. Nevertheless, making Mr R aware of the risks isn't a substitute for suitable advice.

I've also considered the cash flow forecast produced by MWM, which it says shows Mr R could meet his income needs and he would still have a pension fund worth around £400,000 at age 85. But this is only achieved by Mr R taking much less income than he would be entitled through the BSPS or the PPF from his personal pension from age 65. And in fact, the cash flow forecast shows Mr R withdrawing a negligible sum from age 75, reducing to nothing at all from age 80. So, I'm not necessarily persuaded that Mr R understood that he'd need to take substantially less income from his personal pension, instead relying on his state pension, to make his funds last.

In summary, even if the BSPS had moved to the PPF and Mr R's benefits were reduced, he was very unlikely to match, let alone exceed his benefits by transferring to a personal pension. By transferring his pension it was highly likely Mr R would be financially worse off in retirement. So based on the above alone, a transfer wasn't in Mr R's best interest.

Of course financial viability isn't the only consideration when giving transfer advice, as MWM has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered below whether such other reasons applied here.

Flexibility and income needs

One of MWM's main arguments in support of its recommendation to transfer was that Mr R wanted to take his TFC at 55 to reduce his debts. It says Mr R had already made plans based on this, taking out a mortgage of £37,000 very recently to buy his new house. MWM says that Mr R told the adviser it was always his intention to pay this mortgage off on his 55th birthday in January 2017 by accessing his TFC. MWM says this is the reason Mr R didn't choose a fixed interest rate.

MWM said Mr R therefore needed to take his TFC straight away but as he intended to continue working to age 65, he had no need to take any pension income. As such, he needed to be able to access his pension flexibly as he couldn't take TFC without also taking his pension income through the BSPS. For this reason, MWM said Mr R's objectives could only be met by transferring out of the BSPS. It said if Mr R couldn't access his TFC now, he wouldn't be able to afford his outgoings.

MWM's financial planning questionnaire and meeting notes say at the time of the advice Mr R had two mortgages totalling £105,000 with combined monthly repayments of £974. Both would end by the time Mr R retired at 65. Mr R also had a 'car loan' of £10,000 costing him £175 per month and another loan of £15,000 costing £202 per month ending when he would be 65. Mr R also appears to have had credit card debt of around £9,000.

Mr R says his mortgages and debts were not unaffordable and made the point that the bank wouldn't have loaned him more money if he was struggling financially.

Mr R turned 55 in January 2017, so he was able to access his pension very soon after his first meetings with MWM. And based on the meeting notes, I think Mr R most likely planned to use the TFC available to him to pay down as much of his debt as he could at the time. But an adviser's job isn't simply to facilitate a customer's objectives. Any objectives should be interrogated thoroughly to determine whether or not they are realistic, or achievable through other means. And ultimately, the adviser has to determine whether giving up the secure, guaranteed benefits available through the BSPS or the PPF was in Mr R's best interest.

MWM says it had asked Mr R what Mrs R earned, but he said Mrs R didn't disclose this to him. So, it advised Mr R on the basis that the disclosed monthly outgoings, which included mortgage and loan repayments, utility bills, and other general expenses, were his alone. And that this showed Mr R had a shortfall in income that could only be addressed by him accessing his TFC and reducing his debts.

Mr R may not have known what Mrs R earned, but I don't think that means it was reasonable for MWM to not have factored in her earnings into its analysis of their income needs in retirement. MWM knew Mrs R was working at the time, and it is reasonable to assume she was contributing to the household expenses. At no point did Mr R ever suggest he was in financial difficulty – in fact in the meeting note of 12 December 2016 Mr R said the debts were not giving him a problem. Mr R simply approached MWM with a plan to pay off some of his debts, not because he couldn't afford them but because he thought it was a good idea to do so in light of the rules allowing him to access his pension at 55. So, I think MWM needed to do more to understand Mr R's total household income given its advice was going to be having a substantial impact on his retirement funds, which were intended to provide for both him and Mrs R.

Based on what I've seen in the financial planning questionnaire, financial plan and meeting notes, I don't think Mr R's outgoings were unaffordable. After tax, national insurance contributions and the money Mr R was putting into his new workplace defined-contribution scheme ('DCS'), his take home pay was around £2,500 per month. Mr R's monthly mortgage and loan repayments amounted to around £1,350, and utilities, council tax and insurance added another £300 per month. I don't know what Mr R was repaying towards his credit card debt each month. However, I think it's fair to assume he'd be paying at least £250 towards this each month to meet the minimum repayments. This left around £600 per month for essential spending, plus whatever Mrs R earned. Mr R's mortgages and loans would've been repaid by the time he wanted to retire at 65. So, I don't think there was any actual immediate need for Mr R to access his pension funds to repay his debts. And his monthly expenses were affordable until then even without factoring in Mrs R's income.

I can see that in the meeting note of 11 April 2017, Mr R disclosed that Mrs R's income was about £11,500 per year (gross), so around £900 per month (net). Although this was a month after the advice was given, I don't see why MWM couldn't have insisted that Mr R provide this information to MWM before it gave the advice. I think MWM needed to know this information in order to understand the full picture and give suitable advice, particularly as it affected Mrs R's retirement too. And if MWM had known what Mrs R earned, it would've been even clearer that Mr R didn't need to access his pension to pay off his debts – between them, their income covered their outgoings comfortably.

MWM's financial plan included basic expenses and leisure expenses of £2,000 per month, which seems to be the main reason why its analysis of Mr R's income versus expenditure showed an income shortfall. But I don't know how MWM came up with these figures – there is no further breakdown or analysis of them. I accept that Mr R stated that he wanted to be able to take his family away on holiday in the near future. He said by freeing up £1,000 per month from servicing the mortgage debt, this would go some way to being able to do that. So, it may have come from this, but I don't think this could reasonably be factored in as a long-term income requirement. And I don't think that MWM should've encouraged Mr R to transfer out of the BSPS just to be able to take his family on holiday in any event.

MWM also says that Mr R said he wanted to be able to benefit from his pension now, rather than at 65 when he might not be well enough to enjoy it. It says freeing up income that was otherwise being used to service debts would allow him to do this. But as I've said above, Mr R's income was already sufficient to meet his essential household expenditure, and together with Mrs R's earnings they had significant disposable income. And I still don't think that Mr R's security in retirement should've been risked to free up some extra income, particularly whilst he was still working and intended to do so for another decade.

MWM also recorded that Mr R was due to receive an inheritance of £100,000 on his father's death. Mr R's father was noted to be 88 at the time of the advice, so I don't think it is unreasonable to say that he could've expected this inheritance within the next 10 years. It's also reasonable to assume Mr R's income would increase over the next 10 years, providing additional funds to supplement his lifestyle. In addition, Mr R was paying into his DCS, and MWM has shown that this would've been worth over £25,000 by 2022. Mr R could've accessed these funds to supplement his lifestyle or use it for luxuries like holidays if he wanted to before he retired. So, I think it's fair to say that Mr R had other means of meeting this objective.

Overall, I don't think Mr R's desire to pay down some of his debts was a good enough reason for him to give up a secure, guaranteed, escalating pension income in retirement. And I think MWM recognised this – in the meeting notes from 15 November 2016 MWM states that it told Mr R, *"…he shouldn't be considering moving out from his DB scheme just to pay off his debts as he may not have anything to live off in retirement…"*

The advantages of staying in the scheme and disadvantages of transferring out are referred to in the recommendation letter, and Mr R also signed a letter confirming he was aware his pension could be lower in retirement if he transferred out. But the transfer was justified by MWM by suggesting Mr R's objectives couldn't be achieved by staying in the scheme. However, as explained above, I don't think this is true – Mr R was able to meet his outgoings without touching his pension and all of his debts were due to be repaid by the time he retired. So, I don't think MWM should've advised Mr R to transfer out of the BSPS to repay affordable debts or to have flexibility that he didn't really need. And Mr R's desire to access his pension doesn't outweigh MWM's responsibility to provide him with suitable advice and act in his best interest.

Concerns about life expectancy and death benefits

MWM says Mr R wanted to ensure he could pass on whatever was remaining of his pension to his wife and children upon his death. And it said Mr R was convinced that he was likely to die young, citing the nature of his work and his family history. MWM says this was a key reason for his decision to transfer out of the BSPS.

Mr R disputes this. He says it was MWM who emphasised that he could have a lower life expectancy and that it encouraged him to transfer out for this reason. Mr R says he was in good health then and still is now, and his father (whose health is mentioned in the paperwork) is also still alive.

Clearly there is discrepancy here. But I think the evidence from the time of the advice shows that Mr R was genuinely concerned about his mortality and thought he could have a shorter life expectancy because he did shift work. The meeting note from 12 December 2016 says that the adviser mentioned to Mr R that he (the adviser) had read a couple of articles about this, and that the adviser told Mr R the evidence suggested this could lead to a shorter life expectancy. So, it does appear that Mr R's concerns were affirmed by MWM to some extent.

I've seen the articles that MWM has provided as part of its file here, and whilst they do link the shift work and a number of health conditions, I think some context needed to be provided to Mr R. The focus of the articles is on long-term night working, rather than general shift work. And they also pointed to lifestyle factors that were more prevalent amongst those workers, which might not have necessarily applied to Mr R. So, I don't think the articles ought to have played an important consideration in the advice process, and I think they could have an influence on Mr R – more so than they should have.

I accept that MWM wasn't qualified to challenge Mr R's concerns on a medical basis. But it still needed to assess whether these concerns warranted taking the risks involved in transferring out of the BSPS. Mr R had told the adviser he was in good health, so I think that ought to have been the starting point here. And even though it was possible Mr R might not reach his life expectancy, I think the adviser ought to have emphasised to Mr R that it was also a possibility that he could exceed his life expectancy, and if he did so, he'd need his pension to last for longer. If Mr R transferred out of the BSPS he'd be relying on investment returns to meet his needs over the long-term. As demonstrated above, the investment returns required to provide the same benefits as Mr R's existing scheme were not achievable, and Mr R would need to take substantially less income from his personal pension (and barely anything at all) from age 75 to make his funds last and still provide for a legacy.

Whether Mr R genuinely had a shorter life expectancy or not, MWM also still had to give Mr R an objective picture of the death benefits he already had and decide whether it was in Mr R's best interest to give up his guaranteed pension in favour of the potential for greater death benefits through a personal pension.

Death benefits are an emotive subject and of course most people would like their loved ones to be taken care of when they die. And I'm sure that the idea of leaving a large sum to his family in the event of his death sounded attractive to Mr R, particularly in view of his concerns about his life expectancy. But whilst I appreciate death benefits are important to consumers, and Mr R might have thought it was a good idea to transfer his BSPS benefits because of this, the priority here was to advise Mr R about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. So I don't think the potential for greater death benefits should have been prioritised over this. And I say potential, because the sum left on Mr R's death was dependent on investment returns and if he lived a long life, there may not have been a large sum to pass on.

I also think the existing death benefits with the BSPS were underplayed. Mrs R would have received a guaranteed, escalating spouse's pension for life, which would have been valuable if Mr R predeceased her. Furthermore, MWM would've known that Mr R had generous death in service cover through his employer if he died before retirement. He was also paying into his DCS and he would've been able to nominate his children as beneficiaries of this plan.

Mr R says he also had life assurance, which he told MWM about. But I can't see any reference to this in the paperwork from the time of the advice. So, I don't think it is fair for me to take this into account now. But even without taking this into account, Mr R had significant death benefits already available to him and his family. Again, this is something I think MWM recognised at the time – in the meeting notes from November 2016 I can see that it *"stressed how good the scheme was and its benefits".* Given this, is difficult to see why MWM still advised Mr R to transfer out of it.

The recommendation letter notes that Mr R was concerned that by staying in the BSPS, if he died, a pension would be payable to Mrs R, but when she died, nothing would be payable to his children. But if Mr R genuinely wanted to leave a legacy for his children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think MWM should've instead advised him to take out extra life insurance. I appreciate Mr R already had some life insurance, but based on the information he's provided, this would've ended by the time he was 66. And if it was intended to provide for a legacy if he died after retirement, then whole of life cover would've been most appropriate.

The meeting note of 12 December 2016 mentioned a whole of life policy with a sum assured of £390,000 – this was discounted by Mr R because of the cost (£552 per month). But I don't think that this was a balanced way of presenting this option to Mr R. Basing the quote on the transfer value of Mr R's BSPS benefits essentially assumed that he would pass away on day one following the transfer, and that isn't realistic. Ultimately, Mr R wanted to leave whatever remained of his pension to his children, which would be a lot less than this if he lived a long life and/or if investment returns were poor. So, the starting point ought to have been to ask Mr R how much he would ideally like to leave to his children, and how much he could afford to contribute. Insurance on this basis was likely to be a lot cheaper to provide and would've met his objective of leaving a legacy without risking his retirement income.

I also note that when it was pointed out to Mr R what level of pension he'd be giving up if he transferred out of the BSPS (over £30,000 per year), he said this was "too much" income. If that was the case then there were other options available to Mr R which I think the adviser ought to have emphasised instead of accepting that this extra income wasn't needed. For example, Mr R could've gifted the excess funds to his children, he could've also saved them or reinvested them in a tax-efficient manner for the benefit of his children, for example, through a trust.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr R. And I don't think MWM did enough to explore the alternatives available to Mr R to meet this objective. Instead MWM appears to have used Mr R's mortality concerns to justify the transfer.

Concerns about financial stability of BSPS

Mr R was concerned about his pension. Lots of his colleagues at the time were transferring out of the scheme and he was worried his pension would end up in the PPF. He'd heard negative things about the PPF and he preferred to have control over his pension fund.

So it's quite possible that Mr R was also leaning towards the decision to transfer because of the concerns he had about his employer. However, it was MWM's obligation to give Mr R an objective picture and recommend what was in his best interest.

Mr R was concerned about BSPS moving to the PPF. But from what I've seen, Mr R's income needs would've still been met through the PPF, despite the 10% reduction in the starting benefits. So, I think MWM ought to have reassured Mr R that his scheme moving to the PPF wasn't as concerning as he thought.

Summary

I accept that Mr R was motivated to transfer out of the BSPS when he met with MWM. And I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to him. But MWM wasn't there to just transact what Mr R might have thought he wanted. The adviser's role was to really understand what Mr R needed and recommend what was in his best interest.

According to the meeting notes from the time, MWM recognised that Mr R had no real knowledge or experience of investments, and that by transferring out, he'd be going into a world completely unknown to him and taking on a lot of risk. It also acknowledged how good the scheme's existing benefits were, and recognised that Mr R shouldn't transfer out just to clear some debts. Despite this, MWM recommended that Mr R should transfer out of the BSPS, knowing he would be worse off financially as a result.

Ultimately, I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, he was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr R shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme. So, I think MWM should've advised Mr R to remain in the BSPS.

Of course, I have to consider whether Mr R would've gone ahead anyway, against MWM's advice. MWM argues that this is the case; it says Mr R was determined to transfer out of the BSPS regardless of the advice he received. It says this is supported by the fact he turned down a higher transfer value soon after the advice was given to him, and that he wanted to sign transfer paperwork and take his TFC before the advice had been given.

As I’ve said above, I accept that Mr R was motivated to transfer out of the BSPS when he approached MWM. But on balance I still think Mr R would have listened to MWM and followed its advice if it had recommended that he stay in the scheme.

Mr R was an inexperienced investor, as MWM acknowledged, and this pension accounted for the majority of his and Mrs R’s retirement provision. So, if MWM had provided him with clear advice against transferring out of the BSPS, explaining why it wasn’t in his best interest, I think he would’ve accepted that advice. I’m not persuaded that Mr R’s concerns about his life expectancy were so great that he would’ve insisted on the transfer knowing that a professional adviser, whose expertise he’d sought out and was paying for, didn’t think it was suitable for him or in his best interest. If the adviser had explained that Mr R could meet all of his objectives, that he could still provide for his family and enjoy the next 10 years of his life, without risking his guaranteed pension, I think that would’ve carried significant weight.

I appreciate that Mr R was given the option to delay his transfer and wait for a new revised transfer value (which was likely to be higher) following a review of the calculations used previously by the trustees. Mr R, however, rejected this and confirmed he wanted to proceed with the original transfer value. But I don’t think that means Mr R would have acted against any advice he was given not to transfer out. I say this because I think Mr R’s insistence on proceeding was because MWM had already provided him with a positive recommendation to transfer out of the BSPS by this point. MWM had determined Mr R was likely to receive a lower pension in retirement but had still recommended he transfer out – it essentially gave a ‘green light’ to Mr R to go ahead with his plans. So I’m not really surprised that Mr R was keen to move forward there and then.

I also don’t think the fact that Mr R intended to repay his new mortgage using his TFC would’ve led him to act against the advice he ought to have been given. MWM says Mr R didn’t take a fixed rate mortgage for this reason, but I still think he was able to afford the mortgage repayments if he didn’t access his pension. And if MWM had given suitable advice and told Mr R that it did not recommend that he transfer his pension just to be able to repay this mortgage, Mr R could’ve addressed this by re-mortgaging and taking a fixed rate if he wanted to ensure the repayments remained affordable. Overall, I don’t think that Mr R would’ve pressed on with his plans if clear, suitable advice had been given and all of the options available to him had been set out in a balanced way.

In any event, if MWM had given Mr R suitable advice, that is, that he should remain in the BSPS and Mr R didn’t accept this, it could’ve treated him as an insistent client. But MWM didn’t give Mr R suitable advice, so that point is ultimately moot. And as above, I don’t think Mr R would’ve acted against the professional advice he’d sought out.

If Mr R had stayed in BSPS, he would have shortly after had the choice to move to the PPF or transfer to a new scheme, the BSPS2. Mr R had no plans to retire early – he expected to continue working to his normal retirement age. So, I don't think that it would've been in his interest to accept the reduction in benefits he would've faced by the scheme entering the PPF, as it wouldn't be offset by the more favourable reduction for early retirement. Also, Mr R was married, and his wife’s pension would be set at 50% of his pension at the date of death, and this would be calculated as if no lump sum was taken at retirement (if Mr R chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2.

So, overall, I think MWM should compensate Mr R for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. And as per the above, it is the benefits available to him through the BSPS2 at age 65 that should be used for comparison purposes.

MWM argues that Mr R should be compelled to purchase an annuity – it believes he would turn this down, thereby demonstrating his desire for flexibility. It is evident that Mr R will benefit from flexibility by virtue of the position he's in now, but that has only arisen because of the unsuitable advice. And ultimately the regulator has set out what it deems to be appropriate redress to put right instances of unsuitable defined benefit pension transfer advice. And I see no reason to depart from this in the circumstances of this complaint.

Putting things right

A fair and reasonable outcome would be for the business to put Mr R, as far as possible, into the position he would now be in but for MWM's unsuitable advice. I consider Mr R would have most likely transferred into BSPS2, rather than to the personal pension if he'd been given suitable advice. So, MWM should use the benefits offered by BSPS2 for comparison purposes.

MWM must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

MWM may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr R's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr R's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr R within 90 days of the date MWM receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes MWM to pay Mr R.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

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

Where the compensation amount does not exceed £160,000, I would additionally require Mercury Wealth Management Limited to pay Mr R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Mercury Wealth Management Limited to pay Mr R any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Mercury Wealth Management Limited pays Mr R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr R.

If Mr R accepts this decision, the money award becomes binding on Mercury Wealth Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R may want to consider getting independent legal advice before deciding whether to accept any final decision.

Mercury Wealth Management Limited should provide details of its calculations to Mr R and his representative in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 April 2022.

Hannah Wise
Ombudsman