DRN-3187170

The complaint

Mr C complains that Mulberry Wealth Management Limited (Mulberry) gave him unsuitable advice to transfer the benefits from his defined benefits (DB) scheme with British Steel (BSPS) to a personal pension (PP).

Mr C is being represented by a third party, but for ease I'll refer to all representations as being made by Mr C.

What happened

In March 2016, Mr C's previous employer announced 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 PP arrangement.

In October 2017, members of the BSPS were sent a "time to choose" letter giving them the option to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017).

As Mr C was concerned about what that announcement meant for the security of his pension, he contacted Mulberry for advice and met with its adviser in December 2017. Mulberry gathered information about Mr C's circumstances and objectives and carried out an assessment of his attitude to risk, which it said was 'balanced'.

In January 2018 Mulberry advised Mr C to transfer his BSPS to a PP, as it said this would allow him to achieve his objectives of having more control over his pension as he lacked faith in his employer's ability to manage and fund the scheme and any BSPS2, having more flexibility to choose his income in retirement and better death benefits. It also said the estimated benefits of his DB scheme weren't enough to maintain his standard of living in retirement and that the PP would achieve greater capital growth than the guarantees it offered.

At the time of the advice, Mr C was aged 24 and living with his partner. He lived in a property he owned, which was worth around £144,000 and had an outstanding mortgage of £129,000. And he owned an additional property worth £98,000 with a mortgage of £86,000. The fact find noted that he was expecting to sell his second property shortly, giving him savings of around £16,000. It also said he had a £10,000 car finance loan he was repaying at £165 per month. And that he was working full time, earning £44,633 per year.

Mr C had a preserved final salary pension that was projected to pay a pension of £5,086 from age 65. Prior to the transfer it had a Cash Equivalent Transfer Value of £43,368. And his desired retirement age was noted as being from 58 onwards. Mr C also had a defined contribution pension (DC) through his employer, that he started contributing to in 2017, which had death in service benefits noted as being four times his salary.

Mr C accepted Mulberry's advice, so his benefits in the BSPS were transferred to his new PP.

In 2020, Mr C complained to Mulberry that its advice was unsuitable, as he ought to have been advised to transfer his DB scheme to BSPS2 (which was expected to go ahead) or the PPF, and that he's been caused a financial loss as a result.

In response Mulberry said, in summary, that it couldn't have advised Mr C to opt into the BSPS2 as his transfer value expired before the consultation process for it completed, he wasn't entitled to another for 12 months and, in any case, it wasn't clear at the time of the advice if the BSPS2 would go ahead. It also said the big driver for Mr C was that he didn't trust the BSPS2 not to fall into the PPF. And that he'd already signed the BSPS discharge form before meeting with it, suggesting significant commitment to transfer from this. It said that if Mr C had opted to move to the BSPS2, and it didn't go ahead, he would've moved with his scheme to the PPF. And Mr C was concerned about the lower escalations applicable to his pension in payment under the PPF and the BSPS2.

Mulberry said it exercised reasonable care and skill in advising Mr C, who made an informed decision after having time to consider his options without pressure. It said it clearly explained the risks and guarantees Mr C was giving up, his options and why the transfer was suitable. And that it wasn't required to guarantee the transfer was suitable for him. It said Mr C had potentially 40 years until retirement, which meant he had a strong desire to transfer and take some risks with a view to achieving higher returns. It also said that during the annual review with Mr C in 2019 he again expressed such a desire and a further risk profile questionnaire resulted in amending his risk profile from 'balanced' to 'moderate to adventurous'.

Mulberry also said it used an actuary to conduct a loss assessment in January 2021, which shows Mr C hadn't lost out by transferring his benefits in his DB scheme.

One of our Investigator's looked into Mr C's complaint and upheld it. He didn't think Mulberry had demonstrated that transferring Mr C's OPS to a PP was in his best interests, as he thought Mr C was likely to be worse off in retirement. And he wasn't persuaded Mr C had any genuine retirement objectives that needed to be addressed at the time rather than nearer to retirement. Overall, our Investigator thought Mr C should've been advised to opt into the BSPS2, the details of which were known at the time of the advice. He recommended that Mulberry compensate Mr C for the losses he incurred by transferring his DB scheme, based on him opting to join the BSPS2. And he said that while Mulberry said Mr C hasn't lost out, it should undertake a redress calculation in line with the regulator's updated pension review guidance. He also said Mulberry should pay Mr C £350 compensation for the distress and inconvenience caused to him.

While Mr C accepted our Investigator's opinion, Mulberry didn't agree. It added, in summary, that the Investigator had assessed the case on the wrong basis. It said its adviser was simply required to take reasonable steps to ensure the advice was suitable for Mr C, rather than guaranteeing the transfer would be in his best interests. Mulberry also said the discount rate our Investigator used wasn't relevant and neither were the critical yields, because Mr C didn't want to take an annuity; he wanted flexibility.

Mulberry said Mr C made a fully informed decision to proceed with the transfer. And it maintained that as the BSPS2 wasn't a sure thing it wasn't an option at the time of the advice. Mulberry also thought Mr C would've gone on to transfer in any event. And it said that, in any case, its loss assessment shows Mr C's better off as a result of its advice.

As no agreement could be reached, the complaint has been referred to me for a decision.

I let Mr C know I don't intend to tell Mulberry pay him compensation for distress and inconvenience, as I think that any impact on him will have been limited given he's a significant number of years away from retirement. In response, Mr C said he checks his pension most days and the poor performance is causing him stress and anxiety, impacting his sleep, as he's worrying about the stability of his finances in retirement.

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.

The parties have made detailed submissions and, while I've carefully considered these, I only intend to address what I think is key to reaching my decision.

In doing so, 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 Mulberry'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.

Mulberry says that its adviser was only required to take reasonable steps to ensure the advice was suitable for Mr C. I agree that under the COBS Mulberry was required to take reasonable steps to ensure that its personal recommendation to Mr C was suitable for him (COBS 9.2.1). However, additional regulations apply to advising on transferring out of DB schemes. These say that the starting assumption for a transfer from a DB scheme is that it is unsuitable. And that a business should only have considered a transfer out of the scheme if it could clearly demonstrate the transfer was in the customer's best interests (COBS 19.1.6) And having looked at all the evidence available, I'm not satisfied it was. So, I've decided to uphold the complaint for largely the same reasons as the Investigator.

Financial viability

As required by the regulator, Mulberry carried out a transfer value analysis report (TVAS) showing how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

Although Mulberry based its analysis on the pension available to Mr C through the BSPS2, it has argued that as the BSPS2 may not have gone ahead the only real comparison it could provide was with the benefits available to Mr C through the PPF. But I think Mulberry overestimated the chance of this not happening; Mr C had received his “time to choose” pack by the time the advice was given. And details of the scheme had been provided; indeed, Mulberry provided these figures in the recommendation letter. Of course, it’s possible this may not have gone ahead, but I still think it was important that Mr C was made aware of the benefits available to him through the BSPS2 so that he was able to make an informed decision.

In the information from the time Mr C’s desired retirement age was noted as being from 58 onwards. And the TVAS said the critical yield required to match Mr C’s benefits from the OPS at age 65 was 5% per year if he took a full pension and 4.44% if he took tax free cash (TFC) and a reduced pension. At age 58 it was 5.46% if he took the full benefits and 4.85% if he took TFC and a reduced pension. However, I note that Mulberry quoted lower critical yield figures at age 58 in the recommendation letter – it appears to have mistakenly used the hurdle rates at age 65, based on what I’ve seen in the TVAS.

The critical yield required to match the benefits available through the PPF at age 65 was quoted as 4.74% per year if Mr C took a full pension and 4.57% if he took TFC and a reduced pension. Alternatively it was 5.38% at 58 if he took the full benefits and 5.22% if he took TFC and a reduced pension.

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. While I recognise businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given.

The closest discount rate to the time of this transfer which I'm able to refer to was published for the period before 1 October 2017, and is 4.7% per year for 39 years to Mr C’s scheme retirement age. I’ve kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

In the suitability report Mulberry said there was a 5.87% average rolling rate of return based on Mr C’s ‘balanced’ risk profile. But I think that level of growth over such a long period of time was very optimistic. And it doesn’t appear to take account of charges or be specific to the PP it was recommending Mr C transfer his DB benefits to. Instead, I can see that the illustration for his PP assumed the middle growth rate to be 2.2% per annum after taking account of future inflation of 2.5% per year, and 1.1% after deduction of all charges. The impact of this meant that the value of Mr C’s fund at age 60 after taking account of all charges and inflation was projected to be £64,300. This was substantially less than the value of the fund the TVAS said Mr C would need in order to purchase an annuity providing comparable benefits to the BSPS2, which was £146,960.01 at age 58 and £163,591.40 at age 65.

I've taken this into account, along with the composition of assets in the discount rate, Mr C’s attitude to risk – which he doesn’t dispute was ‘balanced’ at the time – and the term to retirement.

There would be little point in Mr C giving up the guarantees available to him through a DB scheme only to achieve the same level of benefits outside the scheme. The critical yields were all either close to, or higher than, the discount rate, the regulator's middle projection rate and the middle growth rate on the PP illustration. So, I think the opportunity for Mr C to improve on the benefits provided by the PPF and the BSPS2 at age 65 was limited if he transferred to a PP, as a result of investing in line with that attitude to risk. And if Mr C retired early, as per his wish at age 58, I think he was likely to receive benefits of a lower overall value.

Mulberry says it's unreasonable to base any findings on the discount rate because taking this into account wasn't required by the regulator when giving advice. While I haven't based my findings on this, I think it a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice. Under COBS 19.1.2 the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a PP by using reasonable assumptions. So, businesses were free to use the discount rate as this would be considered a reasonable assumption of the likely returns. And in any event, this has been considered in tandem with the regulator's published projection rates, which providers were required to refer to. And it is this combination, along with Mr C's attitude to risk, which leads me to be believe he'd unlikely be better off in retirement if he transferred to a PP.

I've considered Mulberry's comments about reliance on the critical yield and that it has said this assumes Mr C would be acquiring an annuity, which wasn't contemplated here. But the regulator required it to consider the rate of investment growth that would have to be achieved to replicate the benefits being given up. So it needed to provide an analysis based on the critical yield. And I do think it's a relevant consideration here, particularly as I don't think Mr C could realistically say with any certainty whether he would want to take a regular income at retirement or not. He wasn't expecting to retire for at least 30 years. It's entirely possible that Mr C would want at least some guaranteed income in retirement (which he could achieve by taking benefits from the DB scheme).

Mulberry has provided financial plans which show cashflow models, and I've considered these along with the other documents it has provided. The two models I've seen are based on Mr C taking the same income the BSPS2 would've provided him with at age 58 and age 65. While each model demonstrates that Mr C would be left with a sum in excess of £89,000 at age 99, I'm mindful that all of the models are based on an assumed growth rate in excess of 5.4% after accounting for inflation. And I don't think that level of sustained growth can reasonably be expected over such a long time. Furthermore, Mulberry hasn't provided any 'stress test' models showing the impact of poor returns or market instability over time and how that might impact Mr C's income or remaining fund. So, I'm not necessarily persuaded that the cashflow models demonstrate Mr C would be better off by transferring out.

Given Mr C was unlikely to exceed the retirement benefits he would've been entitled to under the BSPS2 by transferring to a personal pension, for this reason alone I don't think a transfer out of the DB scheme was in his best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Mulberry has argued in this case. There might be other considerations which mean a transfer is suitable and in Mr C's best interests, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

The suitability report said one of Mr C's objectives was having the option to withdraw his pension funds as and when needed. It's evident Mr C couldn't take his DB scheme benefits flexibly. Although he could choose to take TFC and a reduced annual pension, he had to take those benefits at the same time.

But based on what I've seen, I don't think Mr C had any concrete retirement plans to really know whether he required flexibility in retirement or not. As I've said above, Mr C's retirement was likely to be at least 30 years away, so he didn't know whether he'd want or need access to a lump sum before his normal scheme retirement age and leave his funds invested until a later date. I say this because there's no pressing need recorded in any of the documents Mulberry has provided, just a vague wish for flexibility in case he later wants it. I think if asked, most people would say flexibility is desirable, but that doesn't mean it was a genuine objective for Mr C at the time.

I also can't see evidence that Mr C had a strong need for variable income throughout his retirement. That's because there's no calculation of his retirement income needs, more likely than not because, as I say, it was still many years until Mr C could retire. And I note that Mulberry's cashflow models were based on Mr C taking a steady income in line with what he was entitled to through the BSPS2.

Furthermore, at age 65, if Mr C opted into the BSPS2, he could take a pension of around £5,086 per year. And his state pension of around £9,000 per year would become payable at age 68. There wasn't any known need for the TFC, as Mr C's mortgage and loan would most likely be repaid by this point. And Mr C had retirement funds that would be building up over the next 30 years, through his DC scheme. The fact-find says Mr C and his employer were contributing 16% of his monthly salary to this, which is around £453 per month. This means that, even without taking investment growth into account, his DC pension would be worth in the region of £160,000 at age 65. So I think Mr C would have likely had a significant DC pension to draw on flexibly, as and when he needed, to top up his income or take additional lump sums. So, I don't think he would have had to sacrifice flexibility in retirement by opting into the BSPS2.

Overall, as Mr C had around 30 years before he could think about accessing his pension, I think it was too soon for him to make any kind of decision about transferring out of the DB scheme completely, particularly as Mr C had the option of joining the BSPS2. So, I don't think it was a suitable recommendation for Mr C to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr C later had reason to transfer out of the BSPS2 he could have done so closer to retirement. So, I don't think it was in Mr C's best interests for him to transfer his pension just to have flexibility that he didn't actually need.

Death benefits

At the time of the advice, Mulberry mentioned different death benefits as a benefit of transferring. But this doesn't seem to have been a concern or genuine objective of Mr C's. This is because, while he had a partner, it was noted that he had sufficient cover in place should death occur due to his death in service benefit through his DC pension.

While the death benefits in Mr C's existing scheme were potentially of use to him in future, the priority here was to advise Mr C about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. So Mulberry should not have encouraged Mr C to prioritise the potential for higher death benefits through a PP over his security in retirement. And in any event, if investment returns were poor or Mr C lived a long life there may not have been a large sum to pass on when he died.

Control and concerns over financial stability of the DB scheme

The suitability report said one of Mr C's objectives was taking control of his pension savings. And it's clear that Mr C, like many employees of his company, was concerned about his pension. He was worried his pension would end up in the PPF, which he'd heard negative things about, and said he preferred to have control over his pension fund. So I recognise it's possible Mr C was leaning towards the decision to transfer because of the concerns he had about his employer and his negative perception of the PPF. However, it was Mulberry's obligation to give him an objective picture and recommend what was in his best interests.

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going to be going ahead if the funding criteria was met. And given the advice took the benefits available to Mr C through the BSPS2 into account, I think this should've alleviated Mr C's concerns about the scheme moving to the PPF.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that Mulberry should've reassured Mr C that the scheme moving to the PPF wasn't as concerning as he thought. Mr C was unlikely to be able to exceed the income available to him through the PPF by transferring out. And although the increases in payment in the PPF were lower, the income was still guaranteed and wasn't subject to any investment risk. So, I don't think that these concerns should've led to Mulberry recommending Mr C transfer out of the DB scheme altogether.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a PP would have sounded like attractive features to Mr C. But Mulberry wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income through either the BSPS2 or the PPF. By transferring, Mr C was likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this, particularly when Mr C was so far away from his intended retirement age. So, I don't think it was in Mr C's best interests for him to transfer his DB scheme to a PP now when he had the opportunity of opting into the BSPS2.

Mr C couldn't remain in his existing scheme; he had until 22 December 2017 to choose to whether to opt into the BSPS2. Mulberry didn't give Mr C its advice until the suitability report dated 13 January 2018. And by this time, Mr C had lost the chance to opt into the BSPS2.

Mulberry hasn't said that it couldn't have given Mr C advice before the deadline for him to choose to opt into the BSPS2, despite having the opportunity to comment on this given our Investigator said it ought to have recommended BSPS2 to Mr C. And I think it had everything it needed to do so given it had his completed fact find, risk profile information and TVAS by 13 December 2022. Mulberry was aware, or ought reasonably to have been, of the deadline of 22 December 2017 for opting into the BSPS2. And I think it was incumbent on Mulberry to ensure it was able to provide the advice to Mr C before the deadline for doing to had passed. In which case, I think Mulberry should've been in a position to give its recommendation to Mr C in time to meet the deadline.

And, overall, I think Mulberry should've advised Mr C to join the BSPS2. I appreciate the BSPS2 hadn't been confirmed when the advice was given, but I think it was clear to all parties that it was likely to be going ahead. Mr C most likely had over 30 years before he expected to retire, and he didn't know what his needs in retirement would likely be. So, I don't think 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, if Mr C were to get married in future, the 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 C chose to do so). The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think Mulberry should've advised Mr C to opt into the BSPS2. And by opting into the BSPS2, Mr C would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to.

Mulberry says that regardless of the advice given, Mr C made an informed choice to proceed with the transfer. And it believes Mr C would've transferred in any event.

I accept that Mulberry disclosed the risks of transferring to Mr C, and provided him with a significant amount of information in the suitability report. But ultimately Mulberry advised Mr C to transfer out, and I think he relied on that advice. And I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme against its advice. I say this because he was an inexperienced investor with a 'balanced' attitude to risk and this pension accounted for all of his retirement provision at that time, albeit he still had time to invest and grow other pension funds. So, if Mulberry had provided Mr C with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr C's concerns about the PPF were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Mulberry had explained that Mr C could opt into the BSPS2 and that he was still unlikely to exceed his PPF benefits through a PP, I think that would've carried significant weight. So, I don't think Mr C would have insisted on transferring out of the DB scheme against Mulberry's advice.

In light of the above, I think Mulberry should compensate Mr C for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. While Mulberry's said it has already done a loss calculation, which it says shows Mr C is better off, it didn't uphold Mr C's complaint. Mr C was entitled to bring his complaint to our service, and given I'm upholding it for the above reasons, I think it's fair and reasonable for Mulberry to undertake an up to date redress calculation in the way I've set out below.

Having taken into account Mr C's comments, I think Mulberry should also pay him £200 compensation to make up for the distress and inconvenience caused to him by this matter. I think this is a fair and reasonable amount in the circumstances. I say this because I think it takes into account the stress and anxiety he's been caused by this matter, while also bearing in mind it hasn't impacted his immediate plans as he's a significant number of years from retirement.

Putting things right

A fair and reasonable outcome would be for the Mulberry to put Mr C, as far as possible, into the position he would now be in but for Mulberry's unsuitable advice. I consider Mr C would have most likely remained in his DB scheme if suitable advice had been given.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.** The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/19 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We previously asked Mr C whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance/rules to be published. Mr C has chosen not to wait for any new guidance to come into effect to settle his complaint. And I'm satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr C.

Mulberry 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.

For clarity, Mr C has not yet retired, and has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 C's acceptance of the decision.

Mulberry may wish to contact the Department for Work and Pensions (DWP) to obtain Mr C'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 C's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr C'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 C 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 C within 90 days of the date Mulberry 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 Mulberry to pay Mr C.

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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Mulberry to carry out a calculation in line with the updated rules and/or guidance in any event.

Mulberry should also pay Mr C £200 for distress and convenience caused by the unsuitable advice.

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 Mulberry pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Mulberry Wealth Management Limited to pay Mr C 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 Mulberry Wealth Management Limited to pay Mr C any interest on that amount in full, as set out above.

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

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

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

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr 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 Mr C to accept or reject my decision before 9 December 2022.

Holly Jackson
Ombudsman