

The complaint

Mr W complains about the advice given by Mulberry Wealth Management Limited ('Mulberry') to transfer the benefits he held in the British Steel Pension Scheme ('BSPS') to a personal pension. The BSPS was a defined benefit ('DB') occupational pension scheme. Mr W says the advice was unsuitable for him.

Both Mr W and Mulberry are being represented by third parties. But, for ease of reading this decision, I'll largely refer to representations as just having been made by Mr W and Mulberry.

What happened

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

In June 2017, Mr W received a transfer value quotation ('TVQ') from the trustees of the BSPS. This summarised the benefits Mr W was entitled to under the BSPS at that point. It also gave the cash equivalent transfer value ('CETV') of Mr W's BSPS pension benefits, which was £133,114.81.

I understand Mr W first spoke to Mulberry about his BSPS pension in July 2017. Mulberry completed a fact-find to gather information about Mr W's circumstances and objectives. It noted that he was 34, in good health, employed full time and co-habiting with his partner, to whom he was engaged. They also had one dependent child together.

In addition to the benefits held in the BSPS, Mr W was also a member of his employer's new defined contribution pension scheme. He and his employer were making combined contributions to this pension equivalent to 20% of his salary, as confirmed by Mr W following Mulberry making its recommendation. That pension arrangement had only recently begun though and the BSPS benefits made up the majority of his retirement provisions at the time of the advice.

The fact-find noted that Mr W hoped to retire at age 55. Mulberry also carried out an assessment of Mr W's attitude to risk ('ATR'), which it deemed to be 'moderate to adventurous' or a 4 on a scale of 1 to 5.

In email correspondence shortly following the initial fact-finding meeting, Mr W indicated an income in retirement of around £24,000 per year would be desirable. But he also acknowledged that he'd need his pensions to perform well for the entire period until his retirement to achieve this.

While Mulberry was gathering information and carrying out analysis, on 11 August 2017, Mr W's employer confirmed the terms of an agreement with the pensions regulator about the

next steps for separating the BSPS from the company – which had been broadly agreed in May 2017 and included a lump sum payment into the pension fund – had been signed. This announcement included confirmation that agreement had also been reached about the sponsorship, by Mr W's employer, of the BSPS2.

Then on 25 August 2017, an important update was issued in respect of BPS transfer values. This explained that the expected lump sum payment into the BPS by Mr W's employer was likely to result in an improvement to transfer values. And for those with unexpired transfer values, as in Mr W's case, updated valuations would be issued around October 2017, which would be guaranteed until at least December 2017.

And on 11 September 2017 there was a further announcement, confirming the agreed payment had been made into the BPS by Mr W's employers and the separation of the BPS from the company had been completed. This set out that members would have to make a choice between staying in the BPS or moving to the BSPS2 and explained that personalised information and illustrations would be provided in October 2017 to assist with that choice and that members would have until December 2017 to make a decision.

I understand that also on 11 September 2017, Mulberry met with Mr W again. Another questionnaire regarding the pension transfer appears to have been completed during that meeting (as the version I've seen was signed on that day). As well as asking Mr W to select from a set list of statements to describe his circumstances the questionnaire asked him to rank his priorities, also from a pre-drafted list. To which he said increasing his pension was his top priority. This was followed by providing a pension for his spouse and dependents and the ability to retire early. He placed the security of his pension fourth on the list, with lump sum benefits on death before retirement fifth. And maximising tax-free cash ('TFC') at retirement was the lowest priority.

During the same meeting, Mulberry advised Mr W to transfer his pension benefits and some application forms were completed to enable this. A suitability report, also dated 11 September 2017, was issued confirming Mulberry advised Mr W to transfer his pension benefits into a personal pension and invest the proceeds equally across six different funds which it felt would create a portfolio that matched his attitude to risk. The report said the reasons for this recommendation were that Mr W wanted to transfer his pension away from his employer and have control over his investments. And for this reason, he'd also ruled out joining the BSPS2 because this would mean the ongoing involvement of his employer. It said he didn't intend to work for his employer beyond age 58, or potentially 55. Although he hadn't ruled out finding employment elsewhere rather than retiring at that age. But he wanted flexibility to be able to take benefits when it suited him, at the level he chose.

The report said Mr W was aware his employer had agreed steps with the pension's regulator in relation to the BPS. And this included an imminent lump sum payment into the scheme which was expected to result in increases to CETV's. But it said Mr W didn't want to wait for this to happen before proceeding with a transfer. It also said that Mr W did not want to wait for further details of the BSPS2 to be made available, or for comparisons to the benefits it might provide to be carried out, because he was unwilling to join this scheme.

Mulberry said it felt the growth rate required of the new pension to enable Mr W to purchase equivalent benefits to the guaranteed ones he'd be giving up by transferring, the critical yield, was "acceptable" given his attitude to risk and term to retirement. And it felt a transfer was suitable as this:

- satisfied his objective of ending his employer's involvement in the pension
- gave Mr W control over how the pension was invested
- provided flexibility in how benefits could be taken – including allowing Mr W to take

- tax-free cash when he retired without having to begin taking a pension if he so chose
- provided death benefits that were more appropriate to his circumstances

As part of the recommendation, Mulberry would provide ongoing support and servicing of Mr W's personal pension, at a cost. I understand the transfer went ahead in line with Mulberry's recommendation.

Mr W complained to Mulberry in 2021 about the suitability of the transfer advice. He didn't think it was suitable for him to transfer and give up guaranteed retirement benefits he held, which could've been kept via the BPS2. This was because he felt it was unlikely a personal pension would be able to match those benefits and he was likely to be worse off as a result of the advice. So, he didn't think the recommendation was in his best interests.

Mulberry didn't uphold Mr W's complaint. It said it wasn't required to guarantee that the transfer would be suitable for Mr W when viewed with hindsight. Rather it needed to take reasonable steps to ensure the advice was suitable for Mr W at the time. And it felt it had done this. Mulberry said Mr W had sourced a CETV before contacting it and had been clear he was looking to transfer his pension. It said it thought the evidence available indicated Mr W was an intelligent and sophisticated consumer, who was well researched and confident in how to handle his investments. It said he had ruled out transferring to the BPS2 because of his opinion of his employer – also adding that the BPS2 was not confirmed at the time of the advice so, in Mulberry's view, was not a genuine option. And that he didn't want to move to the PPF. Mulberry said Mr W had been clear that he wanted flexibility in how he could access his pension, the ability to retire early before the normal scheme retirement age, control over his pension and to move it away from his employer whom he did not trust. And Mulberry was satisfied transferring achieved the objectives so was suitable.

Mr W referred his complaint to our service. He's told us that before this transfer he'd never taken financial advice or had any money to really invest – so was an inexperienced investor. He confirmed that he hoped to retire at 55. But he says he didn't suggest the amount of £24,000 per year as a retirement income but rather agreed that this amount would likely be sufficient after Mulberry suggested this would be its target in its initial meeting with him. He also said he didn't, and still doesn't, understand what the lump sum payment into the BPS during the consultation meant for him. He says this wasn't explained to him and, if it had been, says he would've waited for a revised CETV. Mr W states the BPS2 was not discussed or explored and he was given no real advice about this. All he was aware of was that the BPS, PPF and the BPS2 applied penalties for retiring early and, because the personal pension didn't, he assumed he'd been given sound advice. He denies that he'd already decided he would transfer before approaching Mulberry. And he says, during the first meeting, the adviser provided information about past fund performance and what growth he could expect from a personal pension from the provider that they ultimately recommended, before even having discussed his circumstances.

An investigator upheld the complaint and said Mulberry should compensate Mr W for any loss the DB transfer had led to. In summary, while he acknowledged that Mr W may have indicated a willingness to take some risk with his pension, our Investigator didn't think Mr W's circumstances meant that he had much capacity for loss. Which he felt meant a more cautious approach than the 'moderate to adventurous' ATR Mulberry recorded was appropriate. In any event though he didn't think Mr W was likely to be any better off as a result of transferring and was in fact likely to receive benefits of a lower overall value than those he was due under the DB scheme. Given Mr W's circumstances the Investigator didn't think Mr W had genuine need for flexibility or control at the time of the advice. Nor did he think transferring in order to achieve alternative death benefits was appropriate. So, he thought Mulberry should've advised against a transfer and that Mr W would've instead moved to the BSPS2.

Mulberry didn't agree and asked for an Ombudsman to review the matter. It said it felt the Investigator had assessed the case on the wrong basis. It said it wasn't required to guarantee that the transfer was suitable for Mr W, which it said was subjective anyway particularly with hindsight, which it thought had been unfairly applied. Rather it had to take *reasonable steps* to ensure the advice was suitable. Mulberry also said the Investigator had placed too much weight on the critical yield and discount rate, noting it wasn't under any obligation to refer to the latter. And had not fully considered Mr W's other objectives, which it believed meant the transfer was in his interests. Mulberry said that the BSPS2 was not a confirmed option at the time of the advice and to suggest Mr W should've joined this when there was a risk of this not coming to fruition was unreasonable and not something it felt Mr W would've agreed to. Mulberry also reiterated it felt Mr W had a strong understanding of his options and circumstances and that he had made a fully informed decision to proceed with the transfer, which hadn't been taken into account. And it said even if it had advised against a transfer, it felt Mr W would've proceeded with the transfer anyway.

The investigator wasn't persuaded to change their opinion. He reiterated he was required to look at whether the transfer was in Mr W's best interests. He considered the critical yield to be a valid consideration but explained that this wasn't the only reason he thought a transfer was unsuitable. And he didn't agree with Mulberry's points relating to the BSPS2, noting that further details were released around the time of the advice, which Mulberry should in his view have waited for and incorporated into the advice.

As Mulberry didn't agree with the Investigator's opinion, the complaint has been passed to me to decide.

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.

Both parties have provided a lot of information for me to consider. And I'd like to reassure them that I've carefully considered all the evidence provided. If I don't comment on or refer to everything I've been sent or that either party have said this isn't meant as a discourtesy or because I haven't thought about it. Rather, it is because my decision will address what I consider to be the key issues in deciding what is fair and reasonable.

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 wider 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 W. I agree that under COBS Mulberry was required to take reasonable steps to ensure that its personal recommendation to Mr W was suitable for him (COBS 9.2.1). However, as I've mentioned above, additional regulations apply to advising on transferring out of DB schemes. These additional regulations 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 that the transfer was in the customer's best interests (COBS 19.1.6). So, I'm satisfied, as Mulberry was advising on transferring out of a DB scheme, it was required to clearly demonstrate that doing so was in Mr W's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

Financial viability

Mulberry was gathering information and ultimately advised Mr W at a time when there were some significant updates being issued about what was happening with the BSPS and the BSPS2. This included confirmation that sponsorship of the BSPS2 was planned, that details of the scheme would follow and that members would have until December 2017 to make a choice. It was also explained that the expected payment into the BSPS by Mr W's employer was likely to result in an improvement to transfer values. And that members with unexpired transfer values would be sent updated valuations – again likely improved ones – which would be guaranteed until at least December 2017. And the lump sum payment to the BSPS was confirmed on the day Mulberry gave Mr W advice.

Mulberry though proceeded with the advice without really accounting for any of these developments. There were no comparisons carried out of the benefits the BSPS2 would potentially provide. And the advice was based on the CETV Mr W had received in June 2017, which was due to expire at the end of September 2017.

Mulberry has said that Mr W didn't want to wait for further details or a revised valuation and had ruled out the BSPS2 entirely. And it noted as much in the suitability report. But Mulberry's role wasn't to facilitate what Mr W might've thought he wanted. It was to look at and advise him about what was in his best interests. Given what information the announcements indicated would be forthcoming, in order to give Mr W enough information to make a fully informed decision about what was in his best interests, I think Mulberry should have told Mr W to defer making a decision on the transfer until further details of the BSPS2 were known and revised transfer values received. And I note Mr W doesn't agree that his mind was made up about the BSPS2 – rather he says there was no real discussion about it.

Transferring out of a DB scheme is a one-off event. Once transferred there's no going back, the benefits of the DB scheme are usually lost forever. The announcements indicated that Mr W would be afforded time to think about his options – so the deadline in the original transfer quotation became less relevant. And waiting would've allowed Mulberry to carry out an analysis of the BSPS2 benefits, and properly compare these to the alternatives, and base its advice on this. Because I think without doing this, Mulberry was acting on information which it knew to be limited, so it is difficult to argue that it could properly assess whether a transfer was in Mr W's best interests.

That notwithstanding, I also don't think, based on the information that Mulberry has provided and did consider, that the advice wasn't in Mr W's best interests from a financial viability perspective.

Mulberry has provided copies of several transfer value analysis ('TVAS') reports which it instructed – as obtaining a TVAS was required by the regulator. These included, amongst other things, the calculation of critical yields - how much Mr W's pension fund would need to grow by each year if invested in a personal pension so that he could purchase the same benefits as his DB scheme at retirement. Critical yields were calculated based on various different scenarios – largely distinguished by the age at which Mr W might retire. But the suitability report only referenced critical yields based on him retiring at age 65. Given analysis was clearly run and Mr W's noted goal of potentially retiring early, I'd have expected to see the critical yield for some of the other scenarios referenced in the suitability report. And without these having been discussed, I again think it's difficult to say that Mr W was in a fully informed position at the time of the advice or that the critical yields were "acceptable" as Mulberry stated.

The critical yield figures calculated were based on matching Mr W's existing scheme, the BSPS, based on the revaluation assumptions noted. But Mr W didn't have the option to remain in the BSPS – he either needed to opt into the BSPS2 or move with the scheme to the PPF. Again, I think Mulberry ought to have waited until further details of the BSPS2 were made available, in order to run the relevant analysis and include this in its advice.

Critical yields were calculated in respect of the PPF. And of the figures in the reports Mulberry instructed, these would appear to be the more useful comparisons. But I think even these indicate that Mr W was unlikely to be better off as a result of transferring.

The suitability report says that the critical yield required to match the benefits Mr W was estimated to be entitled to under the PPF if he retired at 65 and took a full pension, rather than exchanging some of his entitlement for tax-free cash, was 4.89%. And to match the benefits the existing BSPS was due to provide, the critical yield was said to be 6.35%. These were the only figures quoted in the advice to Mr W.

The critical yield applicable to the BSPS2 benefits wasn't calculated – although again I think Mulberry ought to have waited and analysed this before providing its advice. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat in comparison to the BSPS. But I still think they would've likely been higher than those reflecting the PPF benefits and are likely to have been closer to those of the BSPS benefits, particularly at age 65.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. The relevant discount rate at the time the advice was given was 4.7% per year for 30 full years to retirement, as would be the case had Mr W retired at age 65. 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%.

Mulberry has said that Mr W had a 'moderate to adventurous' attitude to risk. The description of his risk profile given by Mulberry said *"You are prepared to take a medium degree of risk with your investments in return for the prospect of improving longer term performance."* Suggesting he might hope to receive returns around the middle projection rate. But I can also see that the analysis of his attitude to risk from the time of the advice said *"There is 21% chance that your attitude to risk is in the Moderate category and <1% chance that your attitude to risk is Adventurous"* suggesting he tended more towards moderate. This pension also accounted for the vast majority of his retirement provisions at the time of the advice and so at that point, he had very little capacity for loss – again suggesting his appetite for risk may've been more towards moderate.

I've taken into account the critical yields, discount rate and its composition of assets, Mr W's attitude to risk and also the term to retirement. There would be little point in Mr W giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, that appears to have been the likely outcome – that at best he might match the benefits he'd have been entitled to under the PPF at age 65 by investing in line with his attitude to risk. And given what I've said about the likely critical yield for the BSPS2 benefits, it seems likely he'd have received benefits of a lower overall value than the BSPS2 would've provided at age 65.

As I've mentioned though, the recommendation was based on Mr W likely retiring before 65 anyway. Again, Mulberry didn't include any of the relevant critical yields for early retirement in the suitability report. But I can see that it calculated, for example, the critical yield required to match the benefits the PPF would've provided at age 55 was 6.44% if Mr W took a full pension at that time. Or, if he took a full pension under the PPF at age 58, the critical yield required to match that pension would be 5.89%.

The discount rates for equivalent times to retirement were 4.5% and 4.6% respectively. And the regulators standard projections rates were as previously quoted. So, if he retired early, it seems he was even more likely to receive benefits of a significantly lower overall value than he'd have been due through the PPF at that point. And I think it's also likely to have been the same case in respect of any benefits he'd have been due under the BSPS2.

Mulberry says the critical yield is of limited relevance. And it says Mr W didn't intend to take an annuity, making them even less relevant. But Mr W was only 34 at the time of the advice so it was approximately 20 years until he'd likely be able to take benefits in any form from the pension. In that time his circumstances or plans could very well have changed. And it was entirely possible that, when he did retire, he may have wanted greater guarantees for his income. In any event though, the regulator required Mulberry to consider the rate of investment growth that would have to be achieved to replicate the benefits being given up. So, I do think an analysis of the critical yield is a relevant consideration here.

Mulberry has also said that referring to the discount rate was not required by the regulator when giving advice. So, has suggested our Service is wrong to take this into account. But I think it is 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 personal pension by using reasonable assumptions. The discount rate would be considered a reasonable assumption of likely returns. And businesses were free to refer to it. So, whilst I agree businesses weren't required to refer to these rates when giving advice on pension transfers, they are able to do so and I consider they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The TVAS reports also included estimates at what age the pension fund would run out if Mr W transferred to a personal pension, took an income equivalent to that the BSPS would provide and the medium rate of growth assumed in the analysis was achieved. These estimated that for retiring at age 65 the fund would run out by age 77, for retiring at age 58 the fund would run out by age 71 and if Mr W retired at 55 and took this course of action, the fund would run out by age 69. All significantly before Mr W would reach his average life expectancy. Whereas under the DB scheme the income would be guaranteed for the entire of Mr W's life. While again I acknowledge that Mr W couldn't have remained in the BSPS, so the guaranteed benefits from either the PPF or the BSPS2 were likely to be slightly different, I don't think the time the fund would last for would be significantly greater in these scenarios. And this, in my view, further illustrates it was likely that he'd receive benefits of a significantly lower overall value in his retirement by transferring compared to remaining in the DB scheme.

Mulberry highlighted the past performance of the portfolio it recommended to Mr W in the suitability report and noted that the average returns over the previous five years were enough to match the critical yields it quoted. But as Mulberry will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

So, based on the information that is available, from a financial viability perspective, I don't think a transfer was in Mr W's best interests. Mulberry said in the suitability report that Mr W was *"prepared to accept a potentially lower income compared to the BSPS2 or PPF"*. Suggesting that it was aware that the transfer might not result in Mr W being better off but it felt there were other reasons that made the transfer suitable. And it says Mr W was aware of and accepted this risk. But I'm not sure the potential for lower overall retirement benefits was made as clear as it should've been. And making Mr W aware of risk doesn't mean it was suitable advice to recommend that he take that risk. In any event though, as I'll explain, I don't think the other reasons for transferring meant it was in his best interests to do so.

Flexibility

The fact find noted that Mr W's objective was to retire at age 55. A desire for early retirement was also reflected in the suitability report, although it was noted that Mr W may in fact leave his current employer but find a different job while he phased into retirement. And Mr W agrees that the goal he was most interested in at the time was the ability to retire early. But while I'm satisfied that this was on balance an objective that was likely discussed, Mr W was only 34 at the time of the advice. It was over 20 years until he could think about accessing his pension benefits at all. I don't doubt he was interested in retiring early if possible – I think most consumers would be when asked. But I don't think those plans were finalised – which is supported by the mention of potentially moving to a different job at age 55 or 58, rather than retiring fully. His plans could well have been subject to change, just as his circumstances and needs may have altered.

Mr W was also able to take benefits early under either the PPF or the BSPS2. So, I don't think he needed to transfer in order to access his pension early.

It is true that if Mr W drew his benefits before age 65 under either the PPF or the BSPS2 the amount he could take would be subject to an actuarial reduction. And Mr W has said he was concerned he'd incur 'penalties' for retiring early through the DB scheme. But an actuarial reduction is to reflect the pension benefits being paid for longer. The starting monetary amount when compared with the full pension payable from age 65 – the normal scheme retirement age – would've been less. But by taking benefits at say age 55 Mr W would've been receiving his pension for ten years longer. It was a trade-off, rather than a 'penalty'.

The suitability report didn't refer to penalties. Rather it said the pension would be reduced because it would be paid for longer, which is correct. But it didn't give monetary examples – just the percentage by which the pension could be reduced. And more importantly, as I've already mentioned, it didn't explain what the critical yields were for retiring early. And that Mr W was always likely to receive benefits of a lower overall value than those he'd be due under the DB scheme for early retirement. And while taking benefits flexibly under a personal pension would allow Mr W to decide the level of his income 'without penalty' the amount he could take was entirely dependent on the sum available under the pension plan. The income he took would deplete the plan – and as I've already mentioned, if he attempted to match the benefits the DB scheme would provide, appear likely to have been unsustainable. Whereas the DB scheme benefits, regardless of which point they started, were guaranteed for life. And I think if all of this information had been provided in a more clear and balanced way, Mr W would have been in a more informed position about the 'penalties' for early retirement, and he might've been more willing to accept the reductions the DB scheme would apply.

Mulberry says Mr W wanted an income of £24,000 per year in retirement and that the flexibility offered by a personal pension was important to make that possible. Mr W though says he didn't have an income figure in mind when he contacted Mulberry and the mention of this only came about, in emails following the initial meeting, after Mulberry suggested at the initial meeting this was the income he should target.

Again, Mr W was over 20 years from potential retirement. So, I don't think his needs in retirement were entirely known. I also note when this level of income was first mentioned, Mr W even noted that to achieve this he realised his pension would have to perform particularly well – so it might be unlikely. This coupled with the fact that in the suitability report, Mulberry said Mr W was "*prepared to accept a potentially lower income compared to the BSPS2 or PPF*" I think indicates that this wasn't a need but a 'nice to have' and that Mr W was realistic this might not be achievable.

The information from the time also doesn't support that this level of income was likely to be sustainable as a result of transferring. The income modellers I've been provided show that if 5% growth was achieved – which was by no means guaranteed – and Mr W began drawing an income of £22,000 per year (less than Mulberry says he wanted) from the pension from age 58, with this income increasing in line with inflation, the fund would be entirely depleted by age 70. Or that if he did the same from age 60, the fund would run out by age 73. And as I've already explained, the projections in the TVAS reports suggested that trying to match the starting income that the BSPS would've provided on early retirement (which was a lot less than £22,000 or indeed the £24,000 which Mr W apparently wanted) would likewise result in the fund being depleted before Mr W reached his average life expectancy.

The suitability report acknowledges that Mulberry had not taken into account the potential income from Mr W's new pension with his employer or his partners income when looking at future income. But if Mulberry believed the transfer to be in his best interests in order to achieve his goals, I'd have expected some calculation that showed this was achievable. But the information I've seen does not support that it was. So, I can't see that transferring would've enabled him to meet this goal anyway, even if I thought it was a genuine need.

And once again, the information I've seen indicates Mr W was unlikely to improve his pension benefits as a result of transferring. So, it seems he'd have likely had a better chance of achieving his retirement objectives through a combination of the guaranteed pension his DB scheme provided, flexible benefits from his new defined contribution pension and his state pension.

Ultimately, I don't think it was a suitable recommendation, or in his best interests, for Mr W to give up his guaranteed benefits when he did – particularly bearing in mind it appears he was always unlikely to be able to match the benefits he'd be due under the DB scheme.

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension might have been an attractive feature to Mr W – although I note when he was asked to rank his priorities, he placed an ongoing pension for his spouse and dependents ahead of lump sum death benefits. But in any event, whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr W about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Mulberry explored to what extent Mr W was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr W and his partner had a child, so the dependent's pension provided by the DB scheme would've been useful. He and his partner were also engaged to be married. So, it appears likely that the spouse's pension provided by the DB scheme would also have become useful to Mr W and his dependents, if he predeceased them. I don't think Mulberry made the value of this benefit clear enough to Mr W. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. The sum remaining on death following a transfer, as well as being dependent on investment performance, would've also been reduced by any income Mr W drew in his lifetime. And again, as the cashflow analysis shows, there may not have been a large sum left and in fact the fund may have been depleted entirely, particularly if Mr W lived a long life. And given he was recorded as being in good health, there wasn't anything to suggest he was unlikely to live until his average life expectancy at least. In any event, Mulberry should not have encouraged Mr W to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

The new pension scheme Mr W was a member of through his employer also provided alternative death benefits to that of the DB scheme. And if Mr W genuinely wanted to leave a further legacy for family, which didn't depend on investment returns or how much of his pension fund remained on his death, life insurance would appear to have been an option. Given his age and apparent good health it appears likely this could've been obtainable at a reasonable price. But I can't see that Mulberry explored this.

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 W.

Control and concerns over financial stability of the DB scheme

Mulberry says that Mr W wanted control over his pension and a clean break from his employer as there was significant mistrust based on how the pension had been handled. It also says he had ruled out a move to the BSPS2. Mr W disputes that he had ruled out moving to the BSPS2 and says there was no significant discussion around this.

I don't doubt Mr W, like many of his colleagues, was concerned about his pension. His employer had been consulting on its plans for the scheme for some time. And the announcements in the run up to Mulberry providing him advice indicated he was going to need to make a choice about this – which I doubt is something he'd done or contemplated before.

Mr W had likely heard negative things about what could happen, including entry into the PPF. And he may've expressed a preference for more direct control because of this. It's also quite possible that Mr W was leaning towards the decision to transfer because of his concerns. I agree that Mr W was likely unhappy with how things had turned out and that he may've been sceptical of how his employer would handle things moving forward. And indeed, I've seen an email from after the advice was given discussing the transfer of funds, supporting this. But that was why it was even more important for Mulberry to give Mr W an objective picture and recommend what was in his best interests.

Mulberry has argued that Mr W was an intelligent and sophisticated customer, with a good understanding of his options. Mr W, like his colleagues, had been given a lot of information about the BPS in the months before taking advice. I don't doubt he'd taken the time to take all of that information on board, discussed it with colleagues or used other avenues of support his employer had provided in order to form an understanding of the situation. And he may well have had a firm understanding of the position and his options. But the information I've seen indicates that otherwise, he was an inexperienced investor.

Although Mulberry disagrees, I don't see that Mr W had an interest in or the knowledge to be able to manage his pension funds on his own. Indeed, as part of the recommendation Mulberry was to provide ongoing servicing and advice to Mr W.

I'm also conscious that while Mulberry says Mr W was keen for a 'clean break', he still worked for the same employer. And hadn't suggested he intended to find alternative employment until significantly later in his life. He was also a member of the new defined contribution pension scheme his employer provided. So, he wasn't going to achieve a 'clean break' by transferring, as he would remain tied to the employer in other respects. And I think it also should've been talked about with more clarity that his employer and the pension scheme trustees were not one and the same.

So, I think Mr W's desire for control over his pension benefits was overstated – and it was simply a consequence of transferring away from the DB scheme.

And on the subject of financial stability, I think Mulberry could've done a lot more to allay any concerns. As I've explained, I think Mulberry should have waited before confirming its advice so that the option of the BPS2 could've been fully considered and explained. Prior to the advice being given there were several important updates regarding the BPS2 that indicated it was progressing and appeared likely to be an option for customers in Mr W's position. So, the advice should've properly taken the benefits available to Mr W through the BPS2 into account. Which, as I've said, it appears he was unlikely to improve upon by transferring. And I think this should've alleviated some of the concerns Mr W might've had about the scheme moving to the PPF.

Mulberry argued this had already been ruled out by Mr W. But given a great deal of the updates relating to the BPS2 came about while the advice process was ongoing, I don't think it's likely that Mr W had entirely discounted this option – as he was unlikely to have had sufficient detail to do so. And even if he did have a negative perception of the BPS2 before speaking to Mulberry, again its role wasn't just to put in place what Mr W might've thought he wanted.

In any event, even if there was a chance the BSPS2 wouldn't go ahead, I think that Mulberry should've reassured Mr W that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr W through the PPF, while a reduction on what he'd have been due under the BSPS, was still guaranteed and not subject to investment risk. And he was unlikely to improve on the pension benefits the PPF would've provided by transferring out. And this guaranteed income would've given him a solid foundation for retirement, which he could build on through contributions to his employer's new pension arrangements. So, I don't think that any concerns Mr W might've had about the PPF should've led to Mulberry recommending he transfer out of the DB scheme altogether.

Suitability of investments

Mulberry recommended that Mr W invest in a set of funds through the personal pension which it said meant that the portfolio would be appropriate for his attitude to risk. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr W, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr W should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for alternative death benefits on offer through a personal pension would have sounded like attractive features to Mr W. But Mulberry wasn't there to just transact what Mr W might have thought he wanted. The adviser's role was to understand Mr W's circumstances, separate his potential concerns stemming from the ongoing uncertainty and unconfirmed potential plans from his genuine needs and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr W was suitable. His needs in retirement were largely unknown. By transferring, he was giving up a guaranteed, risk-free and increasing income. And this action was irreversible. Mr W was also, in my view, always likely to obtain lower retirement benefits as a result of transferring. And I don't think there were any other reasons which justified the transfer and outweighed this – particularly given how far away from making any real decisions about retirement Mr W was. So, I don't think it was in Mr W's best interests for him to transfer his DB scheme to a personal pension. And I think Mulberry should've first recommended that he defer making a decision until further details of the BSPS2 were available and ultimately advised him against transferring.

Mr W had over 20 years before he expected to retire. So, while he indicated he was interested in retiring early I don't think he could say with any certainty what his needs in retirement would likely be. 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. I say this because while it is true the PPF would've provided a more favourable reduction for very early retirement, because his plans were not confirmed, there was no guarantee the reduction he accepted would end up being offset by this more favourable reduction. And by opting into the BSPS2, Mr W would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think if Mulberry had correctly advised him against transferring Mr W would've opted into the BSPS2.

Of course, I have to consider whether Mr W would've gone ahead anyway, against Mulberry's advice. Mulberry argues that this is the case, saying he was made aware of the risks and made an informed choice. It also noted he had obtained a CETV before taking advice and was motivated to move his pension away from his employer's control.

I've considered this carefully. But I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against Mulberry's advice.

Mr W had obtained a CETV from the trustees of the BSPS before speaking to Mulberry. But he'd also been told by that point about significant potential changes to the BSPS and that he'd likely have to make a choice at some point. Obtaining a CETV allowed him to make an informed choice. But I don't think this means his mind was already made up.

I don't doubt that Mr W likely had a negative opinion of his employer at that time in respect of the pension arrangements, given what had happened to that point. And I think he had likely put a lot of thought to the information he'd been given and may even have gone into the discussion leaning towards transferring. But Mr W still worked for the employer and hadn't indicated an intention to stop. So, I don't think the relationship and trust was as irretrievably broken down as Mulberry has suggested. Again, he wasn't obtaining a 'clean break' through a transfer, as Mulberry has again suggested. And his employer and the pension scheme trustees were not one and the same.

And while I accept that Mulberry disclosed risks associated with transferring to Mr W and provided him with information about this in the suitability report, that isn't a substitute for suitable advice. And ultimately Mulberry advised Mr W to transfer his benefits, and I think Mr W relied on that advice.

While I don't doubt Mr W had done his research, he was an inexperienced investor and this pension accounted for the majority of his retirement provision at the time. So, if Mulberry had provided him with clear advice against transferring, explaining why it wasn't in his best interests, I think he would've accepted that advice. I'm not persuaded that Mr W's concerns about the consultation or the PPF, or the potential appeal of control, alternative death benefits and flexibility were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. And if Mulberry had explained Mr W had no real reason to take on additional risk or give up the guarantees he was entitled to and that he was unlikely to exceed the benefits available to him through the BSPS2 or PPF if he transferred out, I think that would've carried significant weight. So, I don't think he'd have gone against the advice.

In light of the above, I think Mulberry should compensate Mr W for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

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

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document -

<https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr W whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance / rules to come into effect. He didn't make a choice, so as set out previously I've assumed in this case Mr W doesn't want to wait for the new guidance to come into effect.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr W.

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 W has not yet retired, and he 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 W's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W'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 W 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 W within 90 days of the date Mulberry receives notification of his 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 W.

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.

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 Mulberry Wealth Management Limited to pay Mr W 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 W 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 W 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 W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W 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 W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 22 February 2023.

Ben Stoker
Ombudsman