DRN-3362309

The complaint

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

Mr T is being represented by a third party, but for ease I'll refer to all representations as being made by Mr T.

What happened

In March 2016, Mr T'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.

After initially contacting Mulberry in May 2017, concerned about what that announcement meant for the security of his pension, Mr T first met with it in August 2017. Mulberry gathered information about Mr T's circumstances and objectives, carried out an assessment of his attitude to risk and discussed his options. Following this, Mulberry recommended Mr T wait to make a decision until he'd received information that was expected to be sent shortly on funding that had been paid into BSPS.

In September 2017, after receiving an increased transfer value, Mr T met with Mulberry again to review his options and it prepared an updated TVAS and illustrations.

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 BSPS benefits elsewhere. The deadline to make their choice was 11 December 2017 (and was later extended to 22 December 2017).

On 4 October 2017 Mulberry advised Mr T to transfer his BSPS to a PP. It said this would allow him to achieve his objectives of having more control over his pension as he lacked faith in his employers ability to manage the scheme, having flexibility to take tax free cash (TFC) while leaving the rest invested, to choose his income in retirement, as well as having better death benefits.

Mr T had a preserved final salary pension that was projected to pay a pension of £30,504 from age 65. Prior to the transfer it had a Cash Equivalent Transfer Value of £495,178.20 that was reduced to £470,419. And his desired retirement age was noted as being from 58 onwards. Mr T also had a defined contribution pension (DC) through his employer that he started in March 2017, to which he and his employer were each contributing 10% per year, totalling around £9,000 per year.

The suitability report and fact find noted that, at the time of the advice, Mr T was aged 44, married and had three children (two dependent). It said he lived in a property he owned, which was worth around £486,000 and had an outstanding mortgage of £270,000. It said he jointly owned four buy to let properties with his wife, valued at around £587,000 with outstanding mortgages totalling £422,000, which produced a rental income of around £1,400 per month. It said he had savings of around £16,000 and that he was working full time, earning £45,000 per year. It also said that, while he had no specific plans to retire, he'd like to aim to do so between ages 55 and 58 if he could afford to, sell all their properties except one and move abroad, although this wasn't set in stone.

While the suitability report said Mr T's risk profile was 'moderate', it also said it had agreed he should invest on a ;lower moderate; basis following the transfer for 12-18 months, as equity markets especially were a little high and could potentially fall in the short term.

Mr T accepted Mulberry's advice, so his benefits in the BSPS were transferred to his new PP around November 2017.

In 2020, Mr T complained to Mulberry that its advice was unsuitable, as he ought to have been advised to transfer his DB scheme to BSPS2 or the PPF, and that he's been caused a financial loss.

Mulberry didn't agree with Mr T's complaint. It said, in summary, that it couldn't have advised Mr T 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 at the advice if the BSPS2 would go ahead. It said information on BSPS2 was limited, so any comparison with this wouldn't be completely accurate, and that further detail wasn't expected until October 2017. And that if Mr T had opted in, and it didn't go ahead, he would've moved with the scheme to the PPF.

It also said the big driver for Mr T was that he didn't trust the BSPS2 not to fall into the PPF. And Mr T was concerned the BSPS2 benefits would be limited, which he was correct about to the extent that it offered less generated benefits than his existing scheme.

Mulberry said it exercised reasonable care and skill in advising Mr T, who made an informed decision after having time to consider his options without pressure. It said it clearly explained the risks and guarantees Mr T was giving up, his options and why the transfer was suitable. And it wasn't required to guarantee the transfer was suitable for him. It also said that, while Mr T didn't go on to increase the risk level his funds were invested in as planned, he expressed a desire to do so in early 2020 which didn't go ahead due to the impact of Covid-19 on markets and because he then raised his complaint.

One of our Investigator's looked into Mr T's complaint and upheld it. He didn't think Mulberry had demonstrated that transferring Mr T's OPS to a PP was in his best interests, as he thought Mr T was likely to be worse off in retirement. And he wasn't persuaded Mr T had any genuine retirement objectives that needed to be addressed at the time rather than nearer to retirement. Overall, our Investigator thought Mr T should've been advised to wait and then opt into the BSPS2. He recommended that Mulberry compensate Mr T for the losses he incurred by transferring his DB pension, based on him having opted to join the BSPS2. He also said Mulberry should pay Mr T £150 compensation for the distress and inconvenience caused.

While Mr T 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 wasn't required to guarantee the transfer would be in Mr T's best interests. Instead, they were simply required to take reasonable steps to ensure the advice was suitable for him. Mulberry also said the discount rate used by the Investigator wasn't relevant, nor were the critical yields because Mr T didn't want to take an annuity; he wanted flexibility.

Mulberry said that Mr T had made a fully informed decision to proceed with the transfer. And it maintained that the BSPS2 was not a sure thing and so was not an option at the time of the advice. Mulberry thought Mr T would've gone on to transfer in any event. And it said there's no evidence he's in a worse position now than if he'd opted for BSPS2.

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

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 T. I agree that under the COBS Mulberry was required to take reasonable steps to ensure that its personal recommendation to Mr T was suitable for him (COBS 9.2.1). However, 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). And having looked at all the evidence available, I'm not satisfied it was in Mr T's best interests. So, I've decided to uphold his complaint for largely the same reasons given by the Investigator.

Financial viability

As required by the regulator, Mulberry carried out a transfer value analysis report (TVAS) showing how much Mr T's pension fund would need to grow by each year to provide the same benefits as his DB scheme (the critical yield). However, this was based on his existing scheme benefits and Mr T 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.

Mulberry said in the suitability report that, while Mr T had the option of transferring to BSPS2, which sounds like it would offer greater benefits than the PPF, Mr T wasn't willing to wait for this. And that it couldn't run a comparison, as it didn't have the details or timescales in which those would be available, so the only comparison it could provide was with the benefits available to Mr T through the PPF. But I think Mulberry overestimated the chance of this not happening given the BSPS2 was formally announced as progressing on 11 August 2017. And it was announced on 21 September 2017 that members would have the choice of moving to this or the PPF and that it would send out details of this 'time to choose' packs in early October 2017.

In which case, I think Mulberry should have waited until Mr T had received his pack before making its recommendation. Especially when considering the existing scheme was no longer an option, so its analysis of it wasn't helpful to Mr T. BSPS2 would've offered the same income benefits but the annual increases would've been lower. I appreciate the suitability report says Mr T didn't want to wait, but I think this was due to his distrust in the schemes available, which I've addressed below. And, in any case, Mulberry had an obligation to act in Mr T's best interest, despite what perception he had of his employer or the proposed scheme. So, I still think the benefits available to Mr T through the BSPS2 should've been factored in with this advice so that he could make an informed decision.

The TVAS said the critical yield required to match Mr T's benefits from the OPS at age 65 was 6.7% per year if he took a full pension or 9.77% at age 55. The critical yield required to match the benefits available through the PPF at age 65 was quoted as 4.3% per year if Mr T took a full pension and 3.94% if he took TFC and a reduced pension. Alternatively it was 6.77% at 55 if he took the full benefits and 6.21% if he took TFC and a reduced pension. The lower annual increases under the BSPS2 would've likely decreased the critical yields somewhat. But, I still think they would've likely been higher than those reflecting the PPF benefits, particularly at age 65.

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 4.5% per year for 20 years to Mr T'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 the fund it was recommending had a 8.96% annual average return over 3 years, which it also said would have been sufficient to match the required critical yields of BSPS and the PPF. But I think projecting that level of growth over such a long period of time was very optimistic, it doesn't appear to take account of charges or that the illustration for the PP it was recommended assumed the middle growth rate to be 1.6% per annum after taking account of future inflation of 2.5% per year and charges. The impact of this meant that the value of Mr T's fund at age 65, after taking account of all charges and inflation, was projected to be £489,000 in today's terms. This was substantially less than the value of the fund the TVAS said Mr T would need in order to purchase an annuity providing comparable benefits to his existing scheme, which was £1,075,948.25 at age 55 and £1,335,252.62 at age 65.

I appreciate it was anticipated that Mr T's risk profile would increase to 'moderate', rather than 'lower moderate', and that he'd later invest funds to reflect that in the hope of achieving greater returns. But, as set out above, Mulberry needed to clearly demonstrate on the evidence available *at the time* that the DB transfer was in Mr T's best interests, rather than on the basis that it might later turn out to be if he switched funds in future. And I can see it recognised in the suitability report that the critical yield could mean that Mr T's fund, after transfer, may not reach the levels required to match his existing scheme benefits.

I've taken this into account, along with the composition of assets in the discount rate, Mr T's attitude to risk – which he doesn't dispute was lower moderate at the time – and the term to retirement. There would be little point in Mr T giving up the guarantees available to him through a DB scheme only to achieve the same level of benefits outside the scheme. But here, the critical yields relating to the BSPS benefits were all higher than the discount rate, the regulator's middle projection rate and the middle growth rate on the PP illustration. Only the critical yields relating to the PPF benefits at age 65 were lower than these. I don't know what the critical yields would've been for the BSPS2 benefits, but I think they were likely to have been in between those applying to the BSPS and the PPF benefits. So, on balance, I think Mr T would've been worse off if he transferred out of the scheme compared with the benefits he could likely achieve by opting into the BSPS2. And if Mr T retired early, which was what he expected to do, then I think he was likely to receive benefits of a lower overall value than from the BSPS2 and the PPF.

Mulberry says it's unreasonable to base any findings on the discount rate because taking this into account was not 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 T'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 T 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 is a relevant consideration here, particularly as I don't think Mr T 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 another 14 years. So, I think it's entirely possible that Mr T would want at least some guaranteed income in retirement (which he could achieve by taking benefits from the DB scheme).

Given Mr T was unlikely to exceed the retirement benefits he would've been entitled to under the BSPS2 (or the PPF if he retired early) by transferring to a PP, 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 T's best interests, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

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

But I don't think Mr T had any concrete retirement plans to really know whether he required flexibility in it or not. While Mr T said he'd like to retire early (around age 58) and move abroad, he also said this was only if they could afford to, this wasn't set in stone and that he had no specific retirement plans. His retirement was likely to be at least 14 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 to leave his funds invested until a later date. There's no *pressing* need recorded in any of the documents Mulberry has provided, just a vague wish for flexibility in case he later wanted it. And I think if asked, most people would say flexibility is desirable, but that doesn't mean it was a genuine objective for Mr T at the time.

I also can't see evidence that Mr T 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 T could retire. I don't know what income Mr T was entitled to through the BSPS2 or the PPF at age 58 because Mulberry failed to do that analysis. But according to the TVAS, Mr T could've taken an annual pension of £17,481 through the PPF at age 55, so under the BSPS2 his income was likely to be at least this amount, and likely closer to £20,000 per year. I haven't seen anything to persuade me that this sum wouldn't have met Mr T's needs in retirement, particularly when considered alongside his DC scheme funds and Mrs T's own pension income. So, I think Mr T could've met his income needs in retirement by opting into the BSPS2.

Furthermore, I don't think Mr T needed to transfer his DB scheme to a PP to have flexibility in retirement. I say this because Mr T expressed a desire to sell most of his properties, which would pay off any outstanding mortgages. And Mr T had retirement funds that would be building up over the next 14+ years, through his DC scheme. The fact-find says Mr T and his employer were each contributing 10% of his annual salary to this, which is around £750 per month. This means that, even without taking investment growth into account, his DC pension would be worth in the region of £120,000 at age 58. So I think Mr T would have likely had a significant DC pension to draw on flexibly, as and when he needed, to top up his income or to 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 T had around 14 years before he thought he would access 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 T had the option of joining the BSPS2. So, I don't think it was a suitable recommendation for Mr T to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr T 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 T's best interests for him to transfer his pension just to have flexibility that he didn't actually need.

Control and concerns over financial stability of the DB scheme

The suitability report said one of Mr T's objectives was taking control of his pension savings. And it's clear that Mr T, 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. And I appreciate the fact find says that despite Mr T being made aware the critical yield was quite high he was prepared to take a lower income in order to control his fund and break links with his employer.

So I recognise it's possible Mr T 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 it seemed likely BSPS2 was going to be going ahead if the funding criteria was met and it was known that more details of it were due to be released shortly. So I think this should've alleviated Mr T's concerns about the scheme moving to the PPF. I appreciate that Mr T had a general distrust of his employer, and that this meant he was sceptical about the BSPS2. But while Mulberry says Mr T was keen for a 'clean break', he still worked for the same employer and he intended to continue doing so. He was also a member of the new DC pension scheme via his employer. So, he wasn't going to achieve a 'clean break' by transferring, as he would remain tied to the employer in other respects. I think it also should've been mentioned that his employer and the pension scheme trustees were not entirely one and the same. This would've, in my view, allayed his concerns about the BSPS2.

Even if there was a chance the BSPS2 wouldn't go ahead, I think that Mulberry should've reassured Mr T that the scheme moving to the PPF wasn't as concerning as he thought. Mr T was unlikely to be able to exceed the income available to him through the PPF at age 58 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. And it seems to me the pension on offer through the PPF would've been sufficient to meet Mr T's needs in retirement when considered alongside his other income sources. So, I don't think that these concerns should've led to Mulberry recommending Mr T transfer out of the DB scheme altogether.

Death benefits

At the time of the advice, Mulberry mentioned different death benefits as a benefit of transferring. The suitability report said his existing scheme might not be as beneficial or provide as flexible death benefits for his wife and children as those if he transferred.

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 PP was likely an attractive feature to Mr T. But whilst I appreciate death benefits are important to consumers, and Mr T might have thought it was a good idea to transfer his existing scheme to a PP because of this, the priority here was to advise Mr T about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think Mulberry explored to what extent Mr T 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 T was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr T predeceased her. I don't think Mulberry made the value of this benefit clear enough to Mr T. This was guaranteed and it escalated – it wasn't dependent on investment performance, whereas the sum remaining on death in a PP was. And as the TVAS showed, if Mr T took an income of equal value to the estimated benefits provided by the existing scheme, increasing by RPI per year, the fund (at the medium rate of return) would run out at age 81. So, there may not have been a large sum, if any left at all, to pass on when Mr T died. In any event, Mulberry should not have encouraged Mr T to prioritise the potential for higher death benefits through a PP over his security in retirement.

Furthermore, if Mr T genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Mulberry should've instead explored life insurance. While I can see from the fact find that Mr T said he had decreasing and level term assurance, he also said he thought there was a gap in cover of around £120,000 in light of his outstanding mortgages, but Mulberry doesn't seem to have discussed bridging this gap with him. And I think this would've been a cheaper way of Mr T leaving a legacy without him risking his retirement income.

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 T. But Mulberry wasn't there to just transact what Mr T might have thought he wanted. The adviser's role was to really understand what Mr T needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr T was suitable. He was giving up a guaranteed, risk-free and increasing income through either the BSPS2 or the PPF. By transferring, Mr T 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 T was so far away from his intended retirement age. So, I don't think it was in Mr T's best interests for him to transfer his DB scheme to a PP now when he had the opportunity of opting into the BSPS2.

I appreciate that 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 T had over 14 years before he expected to retire, and he didn't know 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, as it wouldn't be offset by the more favourable reduction for very early retirement. And by opting into the BSPS2, Mr T would've retained the ability to transfer out of the scheme nearer to his retirement age if he needed to. Also, Mr T 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 T 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 T to opt into the BSPS2.

I've considered Mulberry's point about the CETV expiring before the scheme trustees could confirm the funding requirements of the BSPS2 had been met. But I don't think this point is relevant – Mr T had to opt into the BSPS2 before the deadline of 22 December 2017, which was also before the scheme would be confirmed as proceeding. So, he would've always needed to choose to join the BSPS2 knowing that it might not go ahead.

Mulberry says that regardless of the advice given, Mr T made an informed choice to proceed with the transfer. And it believes Mr T would've transferred in any event.

I accept Mulberry disclosed the risks of transferring to Mr T, and provided him with a significant amount of information in the suitability report. But ultimately it advised Mr T to transfer out, and I think Mr T relied on that advice.

I'm not persuaded that Mr T would've insisted on transferring out of the DB scheme, against Mulberry's advice. I say this because Mr T 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 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 T's fear about the PPF or his concerns about his employer 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. And if Mulberry had explained Mr T was unlikely to exceed the benefits available to him through the BSPS2 or the PPF if he transferred out, and that he could meet his income needs in retirement without risking his guaranteed pension, I think that would've carried significant weight.

I'm aware that in some communications with Mulberry Mr T appeared motivated and anxious to get the transfer out completed. But Mr T had received advice from Mulberry that he should transfer out of the DB scheme. So, I think his words have to be considered in that context. It isn't reasonable to assume that he'd have behaved the same way if he'd been advised to opt into the BSPS2. So, I don't think demonstrates he'd have gone against the advice.

In light of the above, I think Mulberry should compensate Mr T for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Mulberry should also pay Mr T £150 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.

Putting things right

A fair and reasonable outcome would be for the Mulberry to put Mr T, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr T would have most likely opted to join the BSPS2 if suitable advice had been given. So, Mulberry should use the benefits offered by the BSPS2 for comparison purposes.

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) 17/9 (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.

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 T 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. He didn't make a choice, so I've assumed in this case that he doesn't want to wait for any new guidance. 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 T.

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 T has no plans at present to retire. 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 T's acceptance of the decision.

Mulberry may wish to contact the Department for Work and Pensions (DWP) to obtain Mr T'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 T's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr T'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 T 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 T 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 T.

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 T £150 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 T 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 T 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 T 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 T the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr T.

If Mr T 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 T can accept my decision and go to court to ask for the balance. Mr T 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 T to accept or reject my decision before 20 December 2022.

Holly Jackson
Ombudsman