DRN-3407906

## The complaint

Mr P 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 is a defined benefit ('DB') occupational pension scheme. Mr P says the advice was unsuitable for him.

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

## What happened

In March 2016, Mr P'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 October 2017, members of the BSPS were sent a "Time to Choose" letter which gave them the options to either stay in 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).

The trustees of the scheme provided Mr P a summary of the transfer value of his scheme benefits on 24 November 2017. This said his benefits had a cash equivalent transfer value ('CETV') of £93,251.06.

Mr P was concerned about what the announcement meant for the security of his pension. So, he contacted Mulberry on 30 November 2017 for advice, having been referred by a colleague of his.

Mulberry completed a fact-find to gather information about Mr P's circumstances and objectives. It noted that Mr P was 47, married, with two non-dependent children. He was recorded as being in good health and employed full time – having been with his employer (and accrued benefits into the DB scheme) since 2008. He owned his own home, mortgage free, had savings of around £20,000 and had no outstanding liabilities with his combined household income comfortably exceeding outgoings.

Mr P was a member of the new defined contribution pension scheme that had been set up by his employer, with both he and his employer making regular contributions. And it was recorded that Mr P had benefits in another DB pension – the CETV of which was noted as being approximately £148,000 – which as of September 2017 Mr P said was projected to provide him an annual pension of roughly £7,940, from age 60.

Mulberry says Mr P was interested in transferring his pension as there was a general mistrust in his employer's ongoing management of the pension, given what had happened to that point. So, he wanted control of the pension. It also says Mr P wanted to retire at age 60 so wanted flexibility in how he could draw these benefits. And, as he had another DB scheme which provided a guaranteed income, he was willing to take a risk with this pot to try and improve on the benefits he'd receive.

Mulberry also carried out an assessment of Mr P's attitude to risk ('ATR'), which it deemed to be 'moderate' or a three on a scale of one to five.

Mulberry arranged for a transfer value analysis ('TVAS') to be carried out in December 2017. The introduction within the report explains that its purpose was to *"give an indication of the likelihood of being able to match or exceed the benefits provided by your existing scheme with a transfer to an alternative plan."* The report noted it was comparing the existing benefits with those that could be purchased by transferring to a specific provider – which happened to be the provider that Mulberry ultimately recommended to Mr P.

The TVAS included calculations of various critical yield 'CY' figures – the growth rate required of a new pension to allow Mr P to purchase equivalent benefits to those he'd be due under his existing scheme, depending on when he retired and whether he took tax-free cash ('TFC') when the pension began. Remaining in the BSPS as it was, wasn't an option, so the report looked at what Mr P was projected to be entitled to under the BSPS2 and the PPF.

The adviser from Mulberry met with Mr P again on 11 January 2018. The notes provided indicate that, at that meeting, a 'pensions options' document was discussed. Mulberry has provided a copy of that document and the options outlined were remaining in the BSPS and entering the PPF, opting to transfer to the BSPS2 or transferring to an alternative arrangement. The document said there was "*no right or wrong answer*" with respect to what to do with the accrued benefits. It noted the pros and cons of each but that transferring to an alternative arrangement provided the most flexibility. Mr P was then asked to indicate how he wished to proceed. And he signed to say, after discussing this with Mulberry, he would like to transfer to an alternative arrangement.

Some of the application forms to enable the transfer were completed and returned in the days that followed.

On 15 January 2018, Mulberry sent Mr P a written summary of its recommendation – after the completion of a number of the relevant forms. This set out his circumstances and repeated a lot of the information about the pros and cons of the identified options from the 'pensions options' document that Mulberry says was discussed a few days earlier. It went on to say that the reasons Mulberry deemed it acceptable to forego guaranteed benefits and transfer were;

- Mr P categorically stated that he wanted a clean break of this fund from his employer.
- The revaluations of the pension benefits that would be provided by the BSPS2 were considered low by Mr P and he felt he could achieve better growth than this.
- It was felt that greater returns than the maximum rate applicable to the BSPS2 benefits could be achieved on average.
- The projected pension at age 60 and 65 under the BSPS2 or the PPF was not enough to meet Mr P's requirements, so taking a risk to achieve better benefits was acceptable to him.
- Mr P wanted control of his benefits and didn't want his employer to be able to dictate terms.
- Mr P wanted more flexible death benefits.
- There was potential for being able to take greater tax-free cash at retirement.
- Mr P wanted more flexibility in how he could take his benefits.
- Mr P was prepared to take a risk with the fund and manage this himself with the assistance of professional advisers.

Mulberry went on to say that transferring best satisfied these objectives. So, it recommended a transfer to a personal pension. It also recommended a specific pension provider and an investment strategy that it felt was in line with Mr P's ATR.

The transfer went ahead in line with Mulberry's recommendations, and the funds were received by the new pension provider in May 2018.

Mr P complained to Mulberry in January 2021 about the suitability of the transfer advice. He said Mulberry had been wrong to say that better returns were likely achievable, he was not an experienced investor so his desire for control had been overstated, he was a long way from retirement and so his plans were not decided, and his needs could have been met through a combination of the benefits available under the BSPS2 and his other provisions. So, he felt the advice given was not suitable.

Mulberry didn't uphold Mr P's complaint. It said Mr P had obtained a CETV before contacting it and had already begun considering the option of transferring before advice was given. It felt the advice was suitable based on Mr P's circumstances and objectives, adding that the BSPS2 had not been confirmed at the time so recommending Mr P move to that was not an option. It also suggested that Mr P would've still looked to transfer his benefits had it advised against doing so as he was unhappy with his employer and the issues with the BSPS and didn't trust their ability to manage the pension moving forward.

Mr P referred his complaint to our service. An Investigator upheld the complaint and thought Mulberry should pay compensation in line with the regulator's redress methodology for unsuitable DB transfer advice as well as £250 for the distress caused. In summary, he felt Mr P was always likely to be worse off as a result of transferring as the growth required to match the benefits available under the BSPS2 or the PPF was unlikely to be achieved based on his circumstances and attitude to risk. He also felt Mr P could've met his income needs without transferring, through a combination of these benefits and his other provisions, so didn't have a genuine need to transfer. And he felt Mulberry should've done more to address any concerns Mr P had relating to his pension benefits – in particular regarding the PPF and the proposed BSPS2. As a result, the Investigator felt that the advice wasn't in Mr P's best interests and if suitable advice had been provided thought he'd have ultimately moved his benefits to the BSPS2.

Mulberry didn't agree, saying the investigator had assessed the case on the wrong basis. It said it wasn't required to guarantee that the transfer would be in Mr P's best interests. Instead, the adviser was simply required to take reasonable steps to ensure the advice was suitable for him. And it said the Investigator had used a significant degree of hindsight, which it thought was unreasonable.

Mulberry said the Investigator had placed too much weight on the critical yields and discount rate and that these were unreliable and largely irrelevant as Mr P didn't intend to take an annuity. Mulberry also said Mr P had made a fully informed decision to proceed with the transfer, which the Investigator hadn't considered, and which it felt was crucial. It also maintained that the BSPS2 was not a confirmed option at the time of the advice. And it didn't agree that Mr P would've acted differently, as he wanted to break ties with his employer, nor did it agree he'd have accepted the possibility of the benefits transferring to the PPF.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

**What I've decided – and why**

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

Both parties have provided detailed arguments and a lot of documentation to consider. And I'd like to reassure both parties 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 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.

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

Mulberry says that its adviser was only required to take reasonable steps to ensure the advice was suitable for Mr P. I agree that under COBS Mulberry was required to take reasonable steps to ensure that its personal recommendation to Mr P 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 Mr P's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

*Financial viability*

Some of the reasons given in the recommendation letter for supporting the transfer were that Mr P thought the revaluation rate under the BSPS2 was unappealing, he could achieve a better return than this and he was willing to take a risk to obtain better pension benefits than he was due. But exceeding the revaluation rate under the BSPS2 didn't mean Mr P would receive greater pension benefits by transferring elsewhere. Because the CETV didn't represent the cost of purchasing equivalent benefits. The CETV, when invested, would need to grow by significantly more than the BSPS2 revaluation rate just to allow Mr P to purchase the same benefits that he would've been guaranteed under the BSPS2. With the same applicable for the PPF. The rate it would need to grow by was the critical yield.

Mulberry says the critical yield is of limited relevance and can be unreliable. And it is based on the growth required to produce a fund large enough to purchase an annuity on the same basis as the benefits provided by the DB scheme – but Mulberry says Mr P didn't want to purchase an annuity. Given though Mr P was 47 and had a number of years until he could take his pension benefits – in which time his circumstances or plans could change – it was entirely possible that when he did retire he may have wanted greater guarantees for his income. And in any event, 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.

The TVAS report listed several different critical yields based on different scenarios. It said, for retiring at 60 – which Mulberry says was when Mr P indicated he intended to retire – to match the benefits Mr P would be due if he moved to the BSPS2 the critical yield was 8.84% if he took a full pension or 7.25% if he took the maximum allowable tax-free cash ('TFC') initially and a reduced pension. To match the benefits that would be due at age 60 under the PPF, the critical yield was 8.28% if taking a full pension or 7.89% if taking TFC and a reduced pension.

For retiring at age 65, the normal retirement age for the DB scheme, the critical yield to match the BSPS2 benefits was 7.34% if taking a full pension or 6.12% for a reduced pension and TFC. And to match the benefits Mr P would've been entitled to under the PPF at age 65 the CY was 6.64% for a full pension and 6.31% for a reduced pension and TFC.

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.

Mulberry says 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 discount rates are a reasonable additional consideration when seeking to determine what level of growth was reasonably achievable at the time of the advice for a typical investor. And 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. So, businesses were free to use the discount rate as this would be considered a reasonable assumption of the likely returns achievable for a typical investor.

The relevant discount rates closest to when the advice was given which I can refer to were published by the Financial Ombudsman Service for the period before 1 October 2017. These were 4.0% for 12 full years to retirement – as would've been the case if Mr P retired at age 60 – and 4.4% for 17 full years to retirement – relevant if he retired at age 65. 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%.

I've taken this into account, along with the composition of assets in the discount rate, Mr P's 'moderate' attitude to risk and also the term to retirement. There would be little point in Mr P giving up the guarantees available to him through a DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the discount rates and the regulator's middle projection rate were all below the lowest critical yield figure, I think Mr P was most likely to receive benefits of a substantially lower overall value than those provided by the PPF and the BSPS2 if he transferred to a personal pension, as a result of investing in line with that attitude to risk.

Mulberry has provided our service with copies of cashflow simulations carried out at the time of the advice. These simulations were based on Mr P drawing a pension equivalent to the full pension he'd have been entitled to under the BSPS2 (without taking TFC) at ages 60 and 65. And these simulation indicate that, if he did this, while keeping his remaining fund invested, his fund would last into his late nineties, significantly beyond his life expectancy. But the lowest 'pessimistic' growth rates used in these simulations were 6.85% for taking benefits at age 60 and 6.41% for taking benefits at age 65. Which based on Mr P's ATR, the discount rate and regulators standard projections, don't appear likely to have been obtainable without taking more risk that Mr P was comfortable with. The TVAS included a section called 'drawdown income' which indicated that, if Mr P drew an equivalent pension to that he'd be entitled to under the BSPS2 at age 60, his fund would likely run out before he reached his life expectancy if the fund achieved the medium rate of return used in the report. And again, these models were based on simply replicating what he was already guaranteed – while introducing additional risk.

So overall, I think Mr P was always likely to receive lower retirement benefits by transferring to a personal pension. And for this reason alone, a transfer out of the DB scheme wasn't in Mr P's best interests. Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered this below.

*Flexibility and income needs*

The 'pension options' document Mulberry says it discussed with Mr P suggested that transferring provided greater flexibility. And the recommendation letter Mulberry subsequently sent said Mr P wanted greater flexibility in terms of how he could access his benefits. With the indication being this was because he intended to retire at age 60 and had indicated he'd likely require an income of £18,000 - £20,000. But I don't think Mr P required flexibility in retirement as I think he could've met his objectives by staying in the DB scheme.

Mr P couldn't take his DB scheme benefits flexibly. He could take a full pension on retirement, which he'd then receive for the rest of his life, and which would continue to escalate. Or he could choose to take TFC and a reduced, escalating pension but would have to do so together. I haven't seen anything to indicate that Mr P had a need for TFC – particularly given he had no recorded debts at all. But in any event, I also haven't seen anything to suggest Mr P intended to take his benefits in a different way than the DB scheme would allow – as it appears he intended to take his benefits continually from the time he retired, whether drawing TFC or not. So, the DB scheme could've met his needs in this respect. And my understanding is he could've taken benefits under the BSPS2 or the PPF at age 60 – which he apparently intended to do.

The TVAS report indicated that if Mr P's benefits moved into the PPF, at age 60 he'd be entitled to an estimated annual full pension of £5,124.95 or a reduced annual pension of £4,250.16 and TFC of £28,334.41. Under the BSPS2 it was estimated that Mr P would be entitled to a full annual pension of £5,466 or a reduced pension of £3,932 and £26,219 TFC. All of these annual pension amounts would've continued to escalate in retirement. But clearly on their own wouldn't have met Mr P's stated annual income need.

However, Mr P had another DB scheme – which had a normal retirement age of 60. And Mr P told Mulberry during the fact finding that a recent revaluation of this had indicated he'd be entitled to a pension of £7,940 from age 60. And the information I've seen indicates Mr P's income entitlement under this scheme is actually more than he understood at the time.

Mr P also had savings of around £20,000 at the point of the advice. And his household income comfortably exceeded his outgoings. So, over the approximately 13 years until his intended retirement, he was in a position to increase his savings to help provide for his retirement.

Mr P also confirmed he was a member of the new defined contribution pension scheme his employer had put in place after the BSPS had closed. And he and his employer's combined contributions to this were equivalent to 16% of his salary. He also said he intended to remain with his employer until his retirement during which time contributions would continue. And – before even accounting for increases in salary, investment growth or Mr P increasing his contributions – by age 60 this fund would've been worth in excess of £70,000. And this fund could've been used flexibly from age 60, to support the guaranteed escalating incomes from both of his DB schemes, to meet his retirement needs until he began receiving the state pension at age 67.

Once he was in receipt of state pension, based on the amount it was estimated he would be due, this, plus the guaranteed benefits under Mr P's DB schemes, would've met his income requirements. And that was before even accounting for any income Mrs P could contribute.

So, I don't think at the time of the advice, Mr P needed flexibility in his pension arrangements in order to meet his objectives.

Mulberry has said that BSPS2 wasn't confirmed at the point of the advice and was just a possibility so it couldn't have recommended that Mr P join that scheme and that this wasn't a genuine option. And if it hadn't gone ahead and Mr P hadn't transferred to a personal pension, he would've ended up in the PPF.

I think Mulberry overestimated and has overstated the chance of the BSPS2 not happening. The restructuring of the BSPS had been ongoing for a significant amount of time by the time Mr P took advice. I understand Mr P had also received his "time to choose" pack by the time the advice was given – BSPS2 being one of the choices set out. And details of the scheme had been provided setting out that the BSPS2 would've offered the same income benefits, but the annual increases would've been lower. I think the trustees were confident at that point that it would go ahead. But in any event, as the figures I've set out above indicate, even if Mr P's pension had ended up in the PPF, I still think he could've achieved his objectives.

Overall, I'm satisfied Mr P could have met his income needs in retirement through the BSPS2 or the PPF and his other provisions at age 60. So, I don't think it was in Mr P's best interests to make an irreversible decision to transfer his pension at the point he did just to have flexibility that he didn't need. Particularly given Mr P was 47 at the time of the advice. So, it was 8 years until he could take any benefits under the BSPS (whether he moved to the BSPS2 or the PPF) and 13 years before he apparently intended to retire. And so, while Mr P might've had a plan in mind, given the time until he was intending to retire, I don't think those plans were finalised and could've been subject to change, just as his circumstances and needs may have altered.

*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 was likely an attractive feature to Mr P. But whilst I appreciate death benefits are important to consumers, and Mr P might have thought it was a good idea to transfer to a personal pension because of this, the priority here was to advise Mr P 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 P 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 P was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr P predeceased her. I don't think Mulberry made the value of this benefit clear enough to Mr P. 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 as a potential legacy would've also been reduced by any income Mr P drew in his lifetime. Mr P was in good health, so there wasn't anything to suggest he was unlikely to reach at least his average life expectancy. And as I've mentioned, the TVAS suggested that if he did so and drew a pension equivalent to what he'd have been due under the BSPS2, the fund would've been depleted by that point. So, the pension was unlikely to provide the legacy Mr P may have thought when he first considered the CETV. In any event, Mulberry should not have encouraged Mr P to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

The fact find also recorded that Mr P had death in service benefits from his current employer, which appear to have been a more appropriate method by which to leave a legacy. The new defined contribution pension he was contributing to also provided alternative forms of death benefit to his DB schemes. And, if Mr P didn't think these were enough and genuinely wanted to leave a further legacy for his family, 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. Which I can't see that it did.

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 P.

*Control and concerns over financial stability of the DB scheme*

Mulberry says that Mr P wanted a clean break from his employer and wanted control over his pension, based on a general mistrust of how things had been handled to that point.

Firstly, I think Mr P's desire for control over his pension benefits was overstated. Mr P was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on their own. Indeed, the recommendation letter suggested he would remain reliant on professional advisers. So, I don't think that having control was a genuine objective for Mr P – it was simply a consequence of transferring away from his DB scheme.

I'm also conscious that while Mulberry says Mr P was keen for a 'clean break', he still worked for the same employer. And hadn't suggested he intended to find alternative employment. And he was a member of the new defined contribution 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.

It's clear that Mr P, like many of his colleagues, was concerned about his pension. His employer had made the announcement about its plans for the scheme, the consultation had been ongoing for over a year and he'd been recently told he needed to make a choice. And I don't doubt he was worried his pension would end up in the PPF or that he'd heard negative things about the PPF and so thought this was something to be avoided and he was drawn to having more control over his pension fund. It's also quite possible that Mr P was also 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 Mr P an objective picture and recommend what was in his best interests.

As I've explained, by this point details of BSPS2 were known and it seemed likely it was going ahead. And I think this should've alleviated some of Mr P's concerns about the scheme moving to the PPF. Mulberry has said that Mr P didn't think the revaluation rates of the BSPS2 were that attractive. I'm not sure as an inexperienced investor Mr P would necessarily have been able to make this assessment. But as I've already explained, matching or exceeding the revaluation rate didn't mean that Mr P would've been better off. So, I think a fuller discussion around the BSPS2 should've taken place.

But even if there was a chance the BSPS2 wouldn't go ahead, I think that Mulberry should've reassured Mr P that the scheme moving to the PPF wasn't as concerning as he thought. The income available to Mr P through the PPF would've still been guaranteed and escalated. It combined with his other provisions would still have met his goals. And he was unlikely to be able to exceed this by transferring out. And while the increases in payment in the PPF were lower, again the income was guaranteed and was not subject to any investment risk. So, I don't think that these concerns should've meant Mulberry recommending Mr P transfer out of the DB scheme altogether.

*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 P. And, as I've said, he may've gone into discussions with Mulberry thinking that transferring was a good idea. But Mulberry wasn't there to just transact what Mr P might have thought he wanted. The adviser's role was to really understand what Mr P needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr P to transfer was suitable or in his best interests. He was giving up a guaranteed, risk-free and increasing income through either the BSPS2 or the PPF. By transferring to a personal pension arrangement, in my opinion, Mr P was always very likely to obtain lower retirement benefits – either at age 65 or if he retired earlier at age 60 as he suggested – compared to either the BSPS2 or the PPF. In my view, there were no other particular reasons which would justify a transfer and outweigh this. And overall, I don't think it was in Mr P's best interests to transfer his DB scheme to a personal pension at the time, 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, as I've said, I think it was clear to all parties that it was likely to be going ahead. Mr P had over 12 years before he expected to retire, and he didn't know for sure what his needs in retirement would 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 P would've retained the ability to transfer out of the scheme nearer to his retirement age if his circumstances changed and he had the need to. Also, Mr P was married, and his wife's pension would be set at 50% of his pension at the date of death. The annual indexation of his pension when in payment was also more advantageous under the BSPS2. So, I think Mulberry should've advised Mr P to opt into the BSPS2.

I'm mindful that by the time Mulberry provided Mr P with its recommendation, the deadline for opting into the BSPS2 had passed. However, I'm satisfied that in giving Mr P advice on his options, Mulberry ought to have been aware of the deadline and ensured that it delivered its initial recommendation to Mr P before the deadline expired. And I think Mulberry had everything it needed to make that recommendation before 22 December 2017; it had completed the fact-find and attitude to risk assessment and had also completed the TVAS. So, I think Mulberry should've been able to advise Mr P to opt into the BSPS2 in time.

Of course, I have to consider whether Mr P would've gone ahead and transferred anyway, against Mulberry's advice. Mulberry says it thinks Mr P would've always transferred. It has said he had obtained a CETV before contacting it and that he was adamant he wanted to transfer due to a mistrust of his employer. It has also argued that Mr P made an informed choice to proceed with the transfer.

I've considered this carefully. It's true that Mr P does appear to have received a CETV before he was in touch with Mulberry. But, as I've said, I understand by that time he'd also been sent literature by the trustees of the BSPS saying that he needed to make a choice about his pension. Obtaining a CETV allowed him to make an informed choice. But I don't think this means his mind was already made up. Mr P had to take advice before he could transfer out and crucially, Mulberry would've always required the CETV to give him advice. So, I don't think the fact Mr P had obtained a CETV shows an intention on his part to transfer out of the DB scheme regardless of any advice he received.

Mr P was no doubt unhappy with the situation regarding the BSPS and his employers and could've had a negative impression of them. Again, though the BSPS scheme trustees were not the same as his day to day employer contacts. And again, he still worked for the employer and hadn't indicated an intention to stop. He wasn't obtaining a 'clean break' through a transfer, as Mulberry has suggested. And Mr P was an inexperienced investor who sought independent advice and guidance.

I accept that Mulberry disclosed the risks of transferring to Mr P - albeit the transfer seems to have been begun before the final written recommendation was issued. And Mulberry provided him with a significant amount of information. But ultimately it advised Mr P to transfer out, and I think Mr P relied on that advice.

I'm not persuaded that Mr P's concerns about his employer or the PPF 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 that Mr P was always unlikely to exceed the benefits available to him through the PPF if he transferred but could still meet his income needs, without incurring additional risk I think that would've carried significant weight. So, I don't think Mr P would have insisted on transferring out of the DB scheme.

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

Our Investigator recommended that Mulberry also pay Mr P £250 for the distress caused by the unsuitable advice. I don't doubt that Mr P has been caused distress and concern by finding out the advice may not have been suitable – particularly given the circumstances and uncertainty under which he first asked for this advice. And I'm conscious this upset wouldn't have happened but for the unsuitable advice. So, in the circumstances, I think the award the Investigator recommended is fair.

**Putting things right**

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for Mulberry's unsuitable advice. I consider Mr P 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 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've previously asked Mr P whether he preferred any redress to be calculated now in line with current guidance or wait for any new guidance / rules to be published.

Mr P has chosen not to wait for any new guidance to come into effect to settle his complaint.

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 P.

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, I understand Mr P has not retired yet, and is not due to do so for some time. So, in the circumstances, I think 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 P's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr P'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 P 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 P 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 P.

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.

In addition, Mulberry should pay Mr P £250 for the distress caused by the disruption to his retirement planning.

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

If Mr P 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 P can accept my decision and go to court to ask for the balance. Mr P 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 P to accept or reject my decision before 2 December 2022.

Ben Stoker
**Ombudsman**