DRN-3671222

The complaint

Mr P complains about the advice given by Mulberry Wealth Management Limited ('MWM') to transfer the benefits from a defined-benefit ('DB') occupational pension scheme, the British Steel Pension Scheme ('BSPS'), to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr P is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr P.

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 of the BSPS were informed they could transfer their benefits to a private pension arrangement.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed. That announcement included that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr P's employer would be set up – the BSPS2. The RAA was signed and confirmed in August 2017 and the agreed steps were carried out shortly after.

In October 2017, members of the BSPS were sent a "time to choose" letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere.

On 7 November 2017, the BSPS provided Mr P with an updated summary of the transfer value of his scheme benefits, following the RAA taking effect. These benefits had a cash equivalent transfer value ('CETV') of £85,211.31.

Mr P approached MWM to discuss his pension in November 2017. MWM's notes said Mr P had already opted into the BSPS2 under the "time to choose" exercise. But he wanted to get advice about a transfer, so he could fully consider his options.

MWM says its first meeting with Mr P was on 21 November 2017. During that meeting, it completed a fact-find to gather information about Mr P's circumstances and objectives. Mr P was 27, in good health, married with one financially dependent child and he and Mrs P were both employed. In addition to the benefits held in the BSPS, Mr P was also a member of his employer's new defined contribution ('DC') pension scheme.

MWM recorded that Mr P was potentially interested in retiring at age 58 but no other information about his plans or objectives for retirement were noted.

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

Application forms to transfer Mr P's pension benefits from the BSPS to a personal pension were completed and signed on 30 November 2017.

On 3 December 2017, MWM sent Mr P a written summary of its recommendation (also known as a suitability report). MWM said it recommended that Mr P transfer his benefits away from the BSPS to a personal pension. It said the reasons for this were that it would give Mr P a clean break from his employer in respect of this pension and provide him with control over it. MWM also said a transfer provided Mr P with flexibility and lump sum death benefits to provide for his family. And it said that the guaranteed pension the existing scheme offered was unlikely to be enough to meet Mr P's income needs in retirement and a transfer gave him the opportunity to potentially improve his benefits. MWM recommended that Mr P invest in one of the provider's managed portfolios as it said this was in line with his attitude to risk. And MWM would provide ongoing servicing and advice, for a cost.

Mr P complained in 2021 to MWM as he thought the advice he'd been given was unsuitable. MWM did not uphold Mr P's complaint. As a result, Mr P referred the matter to the Financial Ombudsman Service.

One of our Investigators looked into the complaint and said it should be upheld. He thought the chances of Mr P improving his benefits by transferring were limited. And he didn't think any of the other reasons given for a transfer were in Mr P's best interests – not least because of how far from retirement he was and his needs in retirement being unknown. The Investigator thought, if suitable advice not to transfer had been given, Mr P would likely have joined the BSPS2. So, he recommended that MWM compensate Mr P for any losses caused by the unsuitable advice and pay him £200 for the distress he'd incurred.

MWM disagreed. It said it didn't think the Investigator had assessed the complaint on the right basis – as the requirements of it were to take reasonable steps to ensure the advice was suitable for Mr P, not guarantee it was in his best interests with the benefit of hindsight. MWM said the Investigator had placed too much weight on an analysis of the critical yield – the rate of return required of a new pension to allow Mr P to obtain benefits equivalent to the guaranteed benefits he would've received under the DB scheme at retirement. And it said the discount rate which the Investigator had referenced wasn't something it was required to consider. MWM said it still believed 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. And MWM also said that the BSPS2 was not a confirmed option at the time of the advice.

Mr P's representatives largely accepted the Investigator's findings. But they said they didn't think making an overall 15% notional deduction from the compensation amount to account for income tax was fair as this didn't allow for ongoing charges that Mr P may incur.

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.

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 Businesses ('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 MWM'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.

MWM 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, MWM was required to take reasonable steps to ensure that its personal recommendation to Mr P was suitable for him (COBS 9.2.1). But it was also required, under COBS 2.1.1R to ensure it acted in accordance with his best interests. And, as I've mentioned above, additional regulations and guidance apply to advising on transferring out of DB schemes. These say that the starting assumption for a transfer from a DB scheme is that it is unsuitable. And that MWM 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 19.1.6G). And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

- MWM was required to instruct a transfer value analysis ('TVAS') report by the regulator. This included the calculation of critical yields. The regulator required MWM to calculate this and consider the cost of the guarantees being given up. So, contrary to what MWM has argued, I do think an analysis of the critical yield is a relevant consideration here.

- The TVAS said that the critical yield was 4.65% to match the full pension Mr P would have been entitled to under the BSPS2 at age 65. Or to match the benefits the PPF would've paid from 65 the critical yield was 4.35%. The report also looked at the critical yields required to match the benefits Mr P would've been entitled to from age 58, as MWM says he indicated a preference to potentially retire at that age. To match the full pension estimated to be payable under the BSPS2 at age 58 the critical yield was 5.09%. And to match the full pension payable under the PPF was 4.97%.

- 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. MWM has said it was not required to consider these discount rates. But the regulator required businesses to compare the benefits likely to be paid under a DB scheme with those payable under a personal pension, using reasonable assumptions. And the discount rates give a useful indication of what growth rates would have been considered reasonably achievable for a typical investor. And so, while MWM was not obliged to use the discount rate, it would, in my view, be a reasonable assumption to consider. And MWM was free to consider it. The relevant discount rate at the time was 4.7%. This was for both 30 and 37 years to retirement – so relevant whether Mr P retired at 58 or 65.

- There would be little point in Mr P giving up the guarantees available to him through his DB scheme only to achieve a level of benefits outside the scheme that was broadly comparable to what he would receive from remaining in it, given the additional risk this involved. And by transferring Mr P would have to pay annual fees and charges for the personal pension, which would reduce any gains the funds made. And those are not charges he would have had to pay if he didn't transfer.

- Given Mr P's recorded 'moderate' attitude to risk, the discount rate of 4.7%, how long Mr P had to retire and the regulator's middle projection rate, I think there was little scope for Mr P to improve on the benefits the BSPS2 or PPF would've guaranteed him, at his normal retirement age of 65, by transferring. And, if his fund had an extended period of poor performance or suffered losses then he would likely find himself worse off in retirement.

- Also, if he had genuinely sought to retire early at age 58, I think he was likely to receive pension benefits of a lower value than those he'd have been entitled to under the BSPS2 or the PPF by transferring and investing in line with his attitude to risk. So, I don't think transferring for the purpose of seeking to improve his pension benefits was in Mr P's best interests.

- MWM said there were other reasons that Mr P was interested in transferring. I'll go on to address these other reasons. But I'd also add that MWM's role wasn't that of wish fulfilment or to put in place what Mr P might've thought he wanted when seeking advice. It was to give him objective advice about what was in his best interests.

- MWM said Mr P was interested in retiring at age 58 and in the flexibility a personal pension provided, in respect of how pension benefits could be taken. But Mr P was only 27 at the time of the advice. He was unlikely to have had any realistic set plans for retirement and everything discussed at that time was likely to be an aspiration at best. Which is supported by the fact that, beyond potentially retiring at age 58, MWM recorded no other information about what Mr P's retirement might look like – how much income he might need etc. – as this was unknown.

- MWM said the benefits from the DB scheme would not have been enough to meet Mr P's income needs. Notwithstanding the fact that his income needs in retirement were not recorded, probably unknown and he was unlikely to improve his pension benefits by transferring, he would also have had other income streams beyond his DB scheme benefits at retirement. He was a member of his employer's new DC pension through which he expected to build up additional pension benefits. And it is reasonable to expect he'd have continued to build pension benefits, either through this scheme or with another employer if he moved roles, until he retired. So, he would've had these and his DB scheme benefits in retirement, to meet his needs. The DC scheme benefits would've been accessible flexibly – already providing him with flexibility he was apparently interested in. And so, in my view, retaining his guaranteed DB scheme benefits as a solid base for his retirement income while using his DC scheme flexibly, if necessary, was a more appropriate way to meet his needs than exposing his DB scheme to unnecessary risk.

- Overall, I think it was too soon for Mr P to make an irreversible decision to transfer out of his DB scheme. Particularly when he could have joined the BSPS2 which would've meant he would retain the option to transfer out at a later date if his circumstances required it.

- MWM said Mr P was interested in the lump sum death benefits of a personal pension. But Mr P was relatively young and in good health, so there was no reason to believe he wouldn't be reliant on his pension to meet his own needs in retirement into his old age. While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different – so may not have provided the legacy Mr P might've thought it would. And the existing scheme offered death benefits, by way of a spouse's pension, that could've been valuable to his family in the event of his death.

- If Mr P was concerned about leaving a legacy for his family, MWM ought to have explored insurance instead, which was likely to be cheap to provide given his age and wouldn't risk his own security in retirement.

- So, I don't think different death benefits available through a transfer meant it was in Mr P's best interests. And ultimately MWM should not have encouraged Mr P to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

- I think Mr P's desire for control over his pension was overstated. I can't see that he had an interest in or the knowledge to be able to manage his pension funds on his own. And the recommendation seems to have been on the understanding he was going to take ongoing advice about how his pension was invested, at additional cost. So, I don't think that this was a genuine objective for Mr P – it was simply a consequence of transferring away from his DB scheme.

- I've noted that MWM said, in terms of this pension, Mr P wanted a clean break from his employer. I don't doubt that Mr P was likely to have been upset by what had happened with his pension to that point. Or that he had negative feelings about his employer and might've thought moving his pension away from it was appropriate. I think that would have been a very natural emotional response to what had happened. But again, MWM's role was to give impartial, objective advice. Mr P's employer and pension scheme were not one and the same. And Mr P intended to continue in his job and was paying into a new DC scheme with his employer. So, the relationship may not have been as irretrievably broken down as suggested.

- Mr P may have held concerns about the prospect of his deferred benefits entering the PPF. But there had been a number of key announcements that all pointed toward the BSPS2 being established as an alternative. Which was expected to provide better benefits than the PPF and still provide Mr P the option to transfer closer to retirement. But even if this hadn't happened, the PPF still provided Mr P with guaranteed income and the option of accessing his benefits early. Mr P was unlikely to substantially improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've thought, and I don't think any concerns he held about this meant that transferring was in his best interest.

Overall, I can't see persuasive reasons why it was clearly in Mr P's best interest to give up his DB benefits and transfer them to a personal pension.

MWM says that Mr P made an informed decision to transfer. So, I've thought carefully about whether Mr P would always have looked to proceed with it. I can see that MWM did give information about some of the risks involved in a transfer, when it made its recommendation.

But ultimately, it advised Mr P to transfer. And I think he relied on that advice. If MWM, a professional adviser whose expertise he had sought out, had explained why it wasn't in his best interests to transfer I think he'd have accepted that advice.

As a result, I'm upholding this complaint as I think the advice Mr P received from MWM was unsuitable.

MWM has said that the BSPS2 was not confirmed at the time of the advice so was not a genuine option for Mr P. But I think it is overstating the chance of this. The restructuring of the BSPS had been ongoing for a significant amount of time by the point it gave advice. Actions had been agreed with the pension's regulator and carried out as scheduled – not least a lump sum payment into the BSPS which enabled the provision of improved transfer value quotations. And members had been sent "time to choose" letters, with opting into the BSPS2 one of the options offered to them. So, based on what had happened to that point, I think the relevant parties, not least the trustees, were confident the BSPS2 would go ahead.

And MWM's own notes indicate that Mr P told it he had already opted into the BSPS2 before taking advice. So, I'm satisfied, on balance, that if he'd been given suitable advice not to transfer, Mr P would've remained in the DB scheme and gone on to join the BSPS2.

I've thought about Mr P's representative's point regarding the 15% deduction from any redress payable, to take into account the tax Mr P would've paid had this been taken as income. It believes this is unfair as it doesn't account for the charges that would've been deducted from the fund value over that time. While I appreciate the representative feels this may unfairly reduce the redress payable, I'm mindful that it is not possible to provide exact compensation in these circumstances, as the only way to achieve this would be to put Mr P back into the scheme as if the transfer out hadn't happened. And a deduction such as this is referred to in DISP App 4. So, overall, I remain of the view that the redress proposed fairly compensates Mr P for the impact of the unsuitable advice he received.

Our Investigator recommended that MWM make a payment for the distress caused to Mr P. I accept that Mr P has likely been worried to find, when he discussed matters with his representative, that the advice might not have been suitable for him. And given the circumstances and uncertainty under which he first asked for this advice, I don't doubt he has been concerned. This wouldn't have occurred but for the advice that is the subject of this complaint. So, in the circumstances, I think the recommended award of £200 is fair and reasonable.

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 the unsuitable advice. I consider Mr P would most likely have remained in the occupational pension scheme and joined the BSPS2 if suitable advice had been given.

MWM must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

MWM should use the FCA's BSPS-specific redress calculator to calculate the redress. A copy of the BSPS calculator output should be sent to Mr P and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what MWM based the inputs into the calculator on.

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

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. 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 acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, MWM should:

- calculate and offer Mr P redress as a cash lump sum payment,
- explain to Mr P before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr P accepts MWM's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr P for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr P's end of year tax position.

Redress paid to Mr P as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, MWM may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr P's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

In addition, MWM should pay Mr P £200 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.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Mulberry Wealth Management Limited pays Mr P the balance.

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 16 November 2023.

Ben Stoker
Ombudsman