DRN-4088005

The complaint

Mr A complains about the advice given by Mulberry Independent Financial Advisers Ltd (Mulberry) to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr A approached Mulberry in 2018 to discuss his pension and retirement needs. I understand he had been referred to Mulberry by a friend and the documents from the time of sale show that he wanted to *'set up his own restaurant – needs equity from pensions to set up'.*

Mr A and Mulberry met in July 2018 and Mulberry completed a fact-find to gather information about Mr A's circumstances and objectives. This showed that Mr A was 57 years old and he was married with five children. Three of his children were dependent. It noted that Mr A was employed as a chef, but he wanted to set up his own restaurant business.

Mulberry also carried out an assessment of Mr A's attitude to risk, which it said was 'low to medium'. That said, I think it's pretty clear that Mr A was not comfortable with risk bearing investments at all, given the answers he gave to some of the questions he was asked. For example, he said he would prefer his money to be safe from risk and he indicated he would never make a high-risk investment. It was also documented that he had a low capacity for loss. So, his attitude to risk was nearer low than medium.

On 31 October 2018, Mulberry advised Mr A to transfer his pension benefits into a SIPP and invest the proceeds with a third party in line with this attitude to risk. The suitability report said the reasons for this recommendation were that Mr A wanted:

- To access his tax-free cash whilst not needing to take an income until a future date. This was to help with his future business.
- Flexible benefits in terms of when he could take them, income levels and tax-free cash amount.
- To maximise the lump sum death benefits and to 'leave a financial legacy'.

Mr A proceeded with the transfer in February 2019. The amount transferred was £30,178.59. Mr A took tax-free cash of £7,649 and he also started to withdraw £500 a month at the same time.

Mr A complained in June 2021 to Mulberry about the suitability of the transfer advice. He said that the transfer wasn't justified, and he has suffered a significant loss due to it. He said that Mulberry didn't factor in that he had a low attitude to risk.

Mulberry didn't uphold Mr A's complaint. It said that the recommendation was suitable for him as it allowed him to meet his aim of buying his business. It feels that he was set on doing this and so would have transferred in any event. It went on to say that Mr A was made fully aware of the implications of transferring. In particular, he was made aware of the likelihood that his pension income would be reduced due to the transfer but his desire to release the tax-free cash outweighed this.

Mr A referred his complaint to our service. An Investigator upheld the complaint and recommended that Mulberry pay compensation. She said the transfer wasn't in Mr A's best interests as he was unlikely to be able to improve on the DB scheme benefits. There wasn't a detailed analysis of Mr A's needs and the reasons for transfer seemed to be generic. There was no discussion of any alternative means whereby he could buy a restaurant. And the different death benefits available through a SIPP didn't justify the transfer.

Mulberry didn't respond to the Investigators opinion. And so, as no agreement was reached 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 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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Mulberry should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr A's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Before I look at the transfer in more detail, I'll say now that the overarching problem here seems to be that Mulberry didn't do enough to find out about Mr A's expected situation in retirement, and his wants and needs then. That fact find is very brief and there is very little information recorded in it, other than what I've outlined above. It wasn't recorded, for example, what income Mr A would need in retirement and what other provision he had to achieve this.

But Mulberry was giving DB pension transfer advice and it needed to fully consider how any proposed transfer would affect Mr A's retirement situation. As it didn't find out what provision Mr A had, and what he thought his retirement would look like, it couldn't do this. I accept it did prepare a transfer value analysis report (TVAS). But I don't think Mulberry properly gave advice on Mr A's retirement planning here.

Financial viability

Mulberry carried out a TVAS (as required by the regulator) showing how much Mr A's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). It also calculated the fund value that Mr A would likely need to purchase equivalent benefits to those he would be giving up from the DB scheme.

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. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr A was 57 at the time of the advice and Mulberry assumed he would retire at age 60, which I assume was the DB schemes normal retirement date. The critical yield required to match Mr A's benefits at age 60 was 31.7% if he took a full pension. If Mr A took a pension with no increases, guarantees or a spouse's pension (what it called the hurdle rate) then the critical yield would be 8.3%.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 2.7% per year for two years to retirement. 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 and Mr A's 'lower' attitude to risk. There would be little point in Mr A giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield that fully matched the scheme benefits was 31.7%, I think Mr A was almost certain to receive benefits of a substantially lower overall value than the DB scheme at retirement, because of investing in line with that attitude to risk. This was recognised by Mulberry as it did say that the critical yield was unlikely to be achievable.

And this is further illustrated by the fund value that Mulberry said that Mr A would need to purchase equivalent benefits to those he would receive from the DB scheme at retirement. This was £63,570.38 which was a £33,391.79 more than the transfer value. I think this clearly indicates the value of the benefits Mr A was giving up.

Mulberry has provided cashflow models which it says show Mr A would've been able to meet his needs despite the high critical yields. I've considered these, Mulberry's models show that if the fund grew by 6.64% Mr A could receive similar benefits to the DB scheme. This would last until his age 100.

But, as Mulberry will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. And in any event the return used in the model is well above what was reasonable to assume a lower risk investment would make, as specified in the by the regulators growth rates. Which is what Mr A should have been advised to take.

For this reason alone, a transfer out of the DB scheme wasn't in Mr A's best interests. Of course financial viability isn't the only consideration when giving transfer advice. Mulberry has said that Mr A proceeded with the transfer as he wanted a lump sum to fund his new business. And there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

On the face of it, Mr A went to Mulberry to receive advice about his pension planning. And whether it was suitable for him to take his benefits flexibly.

As I've said above, I don't think that Mulberry looked into what Mr A's retirement needs were at all. There is no information about what Mr A's existing retirement provision was and what he thought he would need at retirement. So, it's difficult to now say the advice he was given, which was essentially to transfer his DB scheme benefits and use them flexibly was suitable for him. Mulberry needed to do a lot more here. This was to allow Mr A to make a meaningful decision about changing his pension arrangements. None of this seems to have been done.

What I do know is that Mr A wanted to take some benefits from his pension and start his own business. But I don't think it's unreasonable to say that Mulberry took what Mr A said very much at face value about his new business. And it seemed that Mr A's suggestion (if it was his suggestion) that he use his pension fund to do this went unchallenged.

But this seems to be a want rather than a need. Mr A now says it wasn't a real aim at all. And there is no detail about this which I would have expected to see if Mr A had a realistic plan for doing it. And the amount he received from the DB scheme was relatively modest, in relation to starting a business. I don't know enough about Mr A's circumstances to say that he would have been able to raise this by more conventional means, such as a loan, but this course of action really should have been looked at in detail and discounted before any thought was given to changing his pension arrangements.

Mr A's DB scheme was shown to provide a yearly income of £1,325 at Mr A's age 60, and a tax-free lump sum of just over £4,000. So, he could potentially receive this in just under three years' time. This would probably not have met all of Mr A's retirement needs. But I still think it's likely he could have best met his retirement income needs by remaining in the DB scheme as it provided the highest income.

Overall, I don't think Mr A required flexibility in retirement. This is because based on the evidence I've seen; I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I don't think this was established. And I can't see evidence that Mr A had a strong need for variable income throughout his retirement. This also doesn't seem to have been discussed.

Essentially, I'm not persuaded that Mr A's want to use his pension to start a business was a good enough reason to make this transfer. So, he shouldn't have been advised to transfer away for this reason.

Death benefits

In the recommendation report Mulberry state one of Mr A's main objectives was *"To maximise the lump sum death benefits…to leave a financial legacy."*

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 SIPP was likely an attractive feature to Mr A. But whilst I appreciate death benefits are important to consumers, and Mr A might have thought it was a good idea to transfer his DB scheme to a SIPP because of this, the priority here was to advise Mr A 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 A 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 A was married and had children and so the spouse's and dependent's pensions provided by the DB scheme would've been useful to his spouse and dependents if Mr A predeceased them. I don't think Mulberry made the value of this benefit clear enough to Mr A. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a SIPP was. And as the cashflow analysis indicated, there may not have been a large sum left particularly if Mr A lived a long life. In any event, Mulberry should not have encouraged Mr A to prioritise the potential for higher death benefits through a SIPP over his security in retirement.

Furthermore, if Mr A genuinely wanted to leave a legacy for his spouse or children, 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. I can't see that it did this.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr A. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr A's desire for control over his pension benefits was overstated. Mr A 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 his own. So, I don't think that this was a genuine objective for Mr A – it was simply a consequence of transferring away from his DB scheme.

And the funding of his employer's DB scheme was not in a position such that Mr A should have genuinely been concerned about the security of his pension.

Suitability of investments

Mulberry recommended that Mr A invest in funds that may not have been suitable for his lower attitude to risk. And this is one of the complaint points that he has made. But as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr A, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr A should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

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

Ultimately, I don't think the advice given to Mr A was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr A was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr A shouldn't have been advised to transfer out of the scheme just to fund a new business venture (if he did want to do this), and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

So, I think Mulberry should've advised Mr A to remain in his DB scheme.

Of course, I have to consider whether Mr A would've gone ahead anyway, against Mulberry's advice.

I've considered this carefully, but I'm not persuaded that Mr A would've insisted on transferring out of the DB scheme, against Mulberry's advice. I say this because Mr A was an inexperienced investor with a lower attitude to risk and this pension accounted for the majority of Mr A's retirement provision that I know about. 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 A's want to start a business was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think transferring his pension was suitable for him or in his best interests. If Mulberry had explained that Mr A shouldn't risk his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr A would have insisted on transferring out of the DB scheme.

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

Putting things right

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

Mulberry 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.

For clarity, Mr A 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 using the most recent financial assumptions in line with PS22/13 and 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 A's acceptance of the decision.

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

- always calculate and offer Mr A redress as a cash lump sum payment,
- explain to Mr A before starting the redress calculation that:
  - their 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 their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr A receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr A accepts Mulberry's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr A for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr A's end of year tax position.

Redress paid to Mr A as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Mulberry 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 A'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.

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 Independent Financial Advisers Ltd to pay Mr A 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 Independent Financial Advisers Ltd pays Mr A the balance.

If Mr A accepts this decision, the money award becomes binding on Mulberry Independent Financial Advisers Ltd.

My recommendation would not be binding. Further, it's unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A 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 A to accept or reject my decision before 13 June 2023.

Andy Burlinson
Ombudsman