DRN-4307462

The complaint

Mr C complains that Brighton Williams & Partners (BW) gave him misleading advice about how a payment from his pension, which was the subject of an Earmarking Order, would be taxed. He complains he's suffered financial loss as a result.

What happened

Mr C had a Self-Invested Personal Pension (SIPP) with a pension provider (who I'll refer to as 'S'). He'd transferred his pension from an occupational pension scheme (OPS) to the SIPP in 2009 – after taking advice from his adviser at that time.

At the time of the transfer he says S was informed there was an Earmarking Order which applied to his pension. The Order stated, among other things, that Mr C was to pay his former spouse (who I'll refer to as W) 50% of the maximum lump sum and then 33% of the retirement pension payable monthly under the terms of his OPS.

He appointed BW as his new independent financial adviser (IFA) in or about 2014. At that time BW contacted S to query whether it was aware of the Earmarking Order. It said it was not aware of the Order but that it would mark its records accordingly.

In 2021, Mr C wanted to bring his pension into payment. He contacted BW for advice. He says he'd been in touch with W about the Earmarking Order and he wanted to "settle things." He says it was only at this stage that BW told him S could not make periodic payments to W. BW told him that S said it could pay W 50% of the maximum tax free cash amount and it would also pay W 33% of the residual pension as a single lump sum.

Mr C says that BW advised him it was still reasonable to proceed in this way and that he'd be responsible for tax on the lump sum payment for 33% of the residual pension. He says that BW told him he could account for the tax that was due through his normal self-assessment returns and that he could take other measures to ensure he didn't "trip" into the 40% tax bracket for the relevant tax year. He says he understood he'd have to pay 20% tax on the taxable lump sum payment to W.

He asked BW to proceed on that basis.

Mr C says that after the payment to W was made he discovered S had grossed up the payment. It had deducted almost 55% of his residual pension which included a significant sum for income tax deducted at source. Even though Mr C has subsequently been able to get a refund of some of this tax from HMRC, he says he's paid over £8,000 of avoidable tax. Mr C says that BW's failure to identify that he would pay higher rate tax precluded him from arranging his affairs differently and in a more tax efficient way. He says he could have purchased an annuity for W or gone to court to challenge how S chose to interpret the Earmarking Order.

He complained to BW. BW investigated his complaint.

BW said Mr C had made clear to it in 2021 he wanted to "draw a line" under matters with W. It told him about the various options open to him regarding the payment of the residual pension after the maximum tax free cash sum had been paid. This included purchasing an annuity in the way set out in the Earmarking Order – which S could have done. BW explained why it had not recommended this option.

BW said it had carried out its own research and had also approached S for guidance about how the Earmarking Order would be implemented.

After carrying out its own research into Earmarking Orders and contacting S for guidance, BW said it advised Mr C to settle the Earmarking Order under drawdown rules. When making that recommendation it had taken a number of factors into account including:

- S said it could only facilitate drawdown by making a single cash sum payment to W in respect of the residual pension;
- BW had considered the tax implications. BW said its adviser's recollection was that S had told him Mr C could account for the tax on the payment to W through his self-assessment tax returns. BW said that there was nothing in the information provided by S which alerted it to the fact that the payment would be grossed up or that an emergency tax code would be used. It had relied on the information provided by S in good faith. S now acknowledged it had not told BW the payment would be grossed up and tax deducted at source – putting Mr C into a higher tax bracket.
- S's failure to provide full details of the logistics of how the Earmarking Order would be implemented meant that BW wasn't able to consider other options.

BW said that it should not be held responsible for making a recommendation based on a reasonable level of research and contact with the pensions technical department of the provider. It did not agree that its adviser had given Mr C unsuitable advice. Mr C did not agree. He referred his complaint to our service.

Our investigator looked into Mr C's complaint. She didn't think BW had acted unfairly or unreasonably. She thought BW had considered all of the options available to Mr C and had recommended an action that resulted in the Earmarking Order being settled. She said she was satisfied overall that BW had carried out research about how the Earmarking Order payment would be taxed and had advised Mr C based on the information it had received. She didn't think it had acted unfairly or unreasonably.

Mr C didn't agree. He said he'd relied entirely on what he was being told by BW and even if they'd been misled by S they were still liable to him. He'd only wanted to settle the Earmarking Order and close matters because he was advised that he would not incur anything other than basic rate tax. Had he known that the lump sum from the residual pension would be grossed up, he would have pursued an alternative course of action.

A new investigator was appointed by our service and he looked into everything again. He said that in his view BW had erroneously interpreted the likely tax position. Had it carried out sufficient due diligence on the taxation implications it would have identified the fact that the payment would be grossed up and taxed on a "week one month one basis." Despite this our investigator wasn't persuaded that Mr C would've drawn the benefits by other means. Our investigator said that the fact it hadn't forewarned him about the tax implications had caused upset and inconvenience. He thought BW should pay Mr C £500 by way of compensation for the trouble and upset he'd been caused.

Mr C didn't agree. Our investigator didn't change his view. So, the complaint was passed to me to decide. I issued a provisional decision in which I said:

What I've provisionally 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 crux of Mr C's complaint is that he would've arranged his affairs differently, and avoided approximately £8,000 of income tax, if BW had given him suitable advice about how to settle the Earmarking Order with W.

There is no dispute about the payment to W of 50% of the tax free cash sum. So, in this decision, I'll only be commenting on the advice given to Mr C about how the other part of the Earmarking Order should be settled. In this regard, the Earmarking Order stated:

> *"…direct the Pension Scheme [which was the OPS] to pay or cause to be paid as from the date of the retirement, periodical payments at the rate of 33% of the pension payable under the terms of the Order."*

I've looked at the advice that BW provided to Mr C. That advice was set out in its suitability letter dated 28 June 2021. But before commenting on the information in the suitability letter, it's important to consider the previous conversations that took place between Mr C and BW, specifically in relation to how the payment would be taxed.

I can see that on 21 April 2021 Mr C sent an email to BW. He said:

> *"I was working on the basis that I have to take from the earmarked SIPP enough funds to account for the tax liability on the [amount of the 33% share of the residual pension value] I have to give [W]. If they deducted 20% at source, I would require a withdrawal of [£x], a further [£x] which would put me into 40% tax band.*
> *But it sounds like S won't treat this as "normal income" and tax it at basic rate – is that right? If so, from what you're saying I can take the net amount… Furthermore when would it fall due…"*

BW responded the same day as follows:

> *"I checked this out with S who confirmed that the Order instructs them to pay (on latest values) [amount of the 33% share of the residual pension value] tax-free direct to W. Therefore you are obliged to include the payment in a tax return for…"*

There's no documentary evidence to show that S had given BW the confirmation referred to in its email. And, it became apparent after the payment had been processed that the information provided by BW to Mr C in this email did not align with what actually happened. The payment to W was grossed up and tax was deducted at source.

Following the email exchanges in April 2021, BW issued its suitability letter to Mr C in June 2021. By way of summary the suitability letter stated:

- *Mr C's objective was to settle the earmarked benefits under this SIPP and he sought advice about the appropriate way to fund the withdrawals required to finalise the Earmarking Order;*
- *BW recommended that he access the SIPP via "flexi access drawdown" – drawing the maximum tax free cash sum and then making an initial drawdown of the amount required to pay 33% of the residual pension lump sum to W.*
- *BW said that S had insisted that both elements must be paid to W simultaneously.*

- *The reasons for the recommendation were:*
    - *Mr C could draw 25% of the plan as a tax free lump sum and would also be provided with access to a Flexi access drawdown where the remaining 75% would be held automatically*
    - *He could draw 33% of the remaining value as a taxable lump sum to be paid to W and this would "complete the Earmarking Order"*
    - *Because of S's insistence that both payments were taken simultaneously this was the only option by which benefits could be paid to comply with the Earmarking Order. Benefits could not be paid via an annuity or Uncrystallised Fund Pension Lump Sum (UFPLS)*
    - *Mr C did not require an additional income for himself. His share of the tax free lump sum could be used to alleviate his tax requirements as the lump sum being paid to W "will be taxed on you."*

Having looked at the exchange of emails and the suitability letter, I agree with our investigator when he said that BW had erroneously interpreted the likely tax position.

I say this despite the fact that it appears BW did carry out some research into Earmarking Orders. But I would've expected it to have taken further steps to have confirmed the position regarding how the payment would be taxed before responding to Mr C's email of 21 April 2021. In that email Mr C was challenging the information BW had provided to him about how the payment would be taxed and he was asking for clarification that what he thought would be the position was infact incorrect. BW should have taken more care before it responded to that email. It did not seek or obtain any written confirmation from S before it responded to Mr C. This would have been important because, as it acknowledges itself, this was not something its adviser had dealt with previously.

I've also noted that BW proceeded to issue the suitability letter without any written confirmation from S that Mr C could account for the tax on the payment on his next tax return.

So, I've provisionally decided that BW made an error when it told Mr C that he could account for the tax through his next tax return.

What needs to be done to put things right

Where, as happened here, a business has provided incorrect information to a consumer I need to consider whether the consumer relied on that information and, if so, whether he changed his position as a result. I then need to consider what (if any) detriment he suffered as a consequence of that change in position. In order to assess that it's important to understand what Mr C says he would've done had BW given him the correct information. I can then compare that to the outcome that happened.

Mr C says that if he had been given the correct information he would have acted differently. He's put forward a number of alternative actions he might have taken which I'll consider further below. But, before doing so, it's important to note that the reason why Mr C had gone to BW in March/April 2021 for advice was because he'd been approached by W and he wanted to "settle" things with her. That objective was confirmed in the suitability letter BW sent to Mr C on 28 June 2021. It said:

> *"You have decided you wish to settle the earmarked benefits… You would like me to recommend the appropriate way of funding the withdrawals required to finalise the Earmarking Order"*

Mr C says he was reliant on BW to advise him how to settle matters and he had no thoughts on how the Order might be settled. Had BW given him the correct information about how a single payment would be taxed he says he would have made alternative arrangements. I'll consider each of the alternatives that he's put forward below.

- *He would have arranged an annuity to make the payments to W*

Mr C says he never had any intention to settle the Earmarking Order by a single transaction. He had no thoughts on how the regular payments might be settled. But he says that BW told him S would not permit periodic payments to be made.

It is the case that in the suitability letter BW told Mr C that "[S] has insisted that both elements {the tax free cash and the 33% share of the residual fund] must be paid to [W] simultaneously."

However, this advice was in the context that BW was recommending that Mr C should access his pension with S by means of a Flexi-Access Drawdown product. There's no evidence to indicate that S could not have facilitated the implementation of the Earmarking Order by means of an annuity. I've noted that the Order stated that S (rather than Mr C himself) should pay W 33% of the annuity payments.

BW did not recommend that Mr C drawdown his benefits by way of an annuity. The reason for this was nothing to do with any issues S might have had administering the terms of the Earmarking Order. But rather it was because BW had established that Mr C did not require an additional income at the time as he already had sufficient income from other sources to meet his needs. So, I think it was fair and reasonable, in these circumstances for BW to consider an alternative product to settle the Earmarking Order.

I've also noted that in October 2021, even after the payment had been made, BW did not change its view about the recommendation it had made. BW told Mr C at that time:

> *"I firmly believe that drawdown rather than the annuity route serves your best interests despite the taxation issues…"*

So, having considered everything, I'm persuaded that BW would not have recommended an annuity even if it had properly understood how the payment would be taxed. And I'm also not persuaded that Mr C would've taken out an annuity product, in the absence of advice from BW recommending that course of action.

- *He would have arranged monthly drawdowns from his pension to make the periodic payments to W.*

BW did consider this option. It asked S whether it could arrange for monthly drawdowns to be paid to W. S was not obliged under the terms of the Earmarking Order to facilitate this request. It told BW Mr C could defer taking his benefits for as long as he wanted (although W could challenge him). But, if he wanted to take income drawdown it would pay W 33% of the residual fund as a lump sum rather than by deducting 33% from each income drawdown. S said it couldn't administer splitting monthly drawdown payments.

For the same reasons as BW had not recommended that Mr C take out an annuity, it didn't recommend the monthly drawdown option. Because even if S had been able to

facilitate monthly drawdown, part of each monthly drawdown payment would've been added to Mr C's own income – which was something he didn't need or want. So, I'm not persuaded that Mr C would or could've opted for monthly drawdown payments.

- *He would have settled the Earmarking Order by making a cash payment, from his other resources, for W's 33% share in the residual pension rather than taking out the flexi income product*

BW recommended the flexi income product. This meant that Mr C could drawdown the amount he needed to "settle things" with W but leave the rest of his fund invested until he needed to access it himself. The suitability letter indicated that by taking this course Mr C would be able to "complete the Earmarking Order."

Mr C says he approached W on the basis of BW's recommendation and she agreed that this would settle matters as far as she was concerned. There's no evidence that Mr C sought legal advice or approached the court to seek a variation of the Earmarking Order which had stated that periodical payments were to be made to W. Nevertheless, I'm satisfied on balance that both Mr C and BW reasonably believed that the proposal would meet his objective which was to settle things with W.

Mr C says that he wouldn't have taken this option had he known about the tax implications. Instead he says he may have decided to make a cash payment to W. Mr C has provided evidence that he could have funded such a cash payment from his other resources.

But I'm not persuaded, taking everything into account, that such a payment would have "settled" the Earmarking Order without him also having to go back to court to ask for the Earmarking Order to be varied and/or discharged. And, I cannot be certain, if he'd done that, whether his application would've been successful or what a court may have decided. So, I'm not persuaded, on balance, it's fair or reasonable to say that he could've made a cash payment to settle the Earmarking Order or that BW should've recommended that course of action to him.

- *He would have gone to court to challenge S's interpretation of the Order*

Mr C says that had he known S would gross up the payment and then deduct income tax at source using an emergency tax coding he would've gone to court to challenge its interpretation of the Earmarking Order. If he had chosen to do that I cannot be certain what the outcome would have been.

When thinking about whether it's likely he would have taken this course, I've also considered what he himself believed when he wrote to BW on 21 April 2021. It appears from reading that email (set out above) that he was "working on the basis" that the payment would be grossed up and tax would be deducted at source – albeit he undercalculated the grossed up amount and the amount of tax he would have to pay. BW's response to this email was that he could include the payment in his next tax return – that advice was incorrect.

But nevertheless this email exchange shows that even though Mr C thought the payment would be grossed up and that would put him into a higher tax bracket he was still content to proceed to "settle" the Earmarking Order by making the single payment to W. So, although tax was a factor in his overall decision making, it was not the overriding factor. If it had been, he could've pursued the other options BW had told him about, such as deferment, which wouldn't have resulted in any tax having to be paid at the time.

So, I'm not persuaded, on balance, that had BW given him the correct interpretation of the taxation position, it would've changed what he decided to do - given that his overarching objective was to settle the matter with W.

Having considered everything here, I'm persuaded on balance that even if BW had correctly explained the taxation position to Mr C he would still have proceeded in the same way. For that reason, I've provisionally decided that despite BW's erroneous interpretation of the tax position, it's not fair or reasonable to say that Mr C's suffered any financial loss as a result of relying on its advice.

Distress and Inconvenience
As our investigator said, it did come as an unpleasant surprise to Mr C when he realised that the payment would be grossed up and he would be taxed on the "week one month one" basis. And although, for the reasons set out above, I'm currently not persuaded he suffered any financial loss as a result, I agree it's fair and reasonable that BW should pay Mr C £500 by way of compensation for the distress and inconvenience he's experienced as a result of what happened here. BW has indicated, without acceptance of liability, it is willing to make that payment.

My provisional decision
For the reasons given above my provisional decision is that I intend to uphold this complaint about Brighton Williams & Partners. I intend to require it to take the following action:

- *Pay Mr C £500 for the distress and inconvenience he experienced as a result of what happened.*

BW did not respond to my provisional decision.

Mr C responded to my provisional decision. He did not agree that he would have proceeded in the same way had BW given him correct advice about the tax implications. By way of summary he said:

- Most people would try to avoid paying tax if it was legally possible. Avoiding avoidable tax was his overriding factor. His overarching objective was not settlement with W. It made sense to settle the Earmarking Order only because he believed he could do so without incurring higher rate tax.
- He was not and had never been a higher rate tax-payer and always sought to avoid being a higher rate tax-payer.
- His email of 21 April 2021 was part of an ongoing discussion and did not reflect a decision he'd made.
- He said there was no good reason for BW not to have recommended an annuity. He did not agree that he had sufficient income from other sources to meet his needs. Income from other sources was from drawdown pensions, which could be stopped at any time.
- BW could have pressed S harder to get it to provide drawdown payments.
- He would have approached W and used funding from other sources to settle the Earmarking Order. He said this would've been acceptable to her. Although he might've had to pay court costs and possibly also had to negotiate an additional payment to W, he was confident he would still have saved a significant sum.

- BW had made a without prejudice offer to settle matters at an earlier stage. He had not accepted or declined the offer but had advised that the proposed amount had not been calculated correctly.
- S hadn't proceeded in accordance with its instruction.

So, I now have 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 considered what Mr C has said in response to my provisional decision. Although I know that Mr C feels strongly about this matter, I'm not persuaded to change my view as set out in my provisional decision. I'll explain why:

I'd just comment firstly that although Mr C remains of the view that S didn't act in accordance with his instruction, that issue was the subject of a separate complaint about S. So, I won't be dealing with that issue here.

Mr C has also referred to correspondence from BW which included an offer to "assist in mitigating the effect of the situation." The offer was made expressly without acceptance of liability on the part of BW. Although Mr C says he didn't accept or decline the offer, he did ask BW to issue its final response letter so that he could refer his complaint to our service. So, I don't think it's fair or reasonable for me to comment further on the offer that was made.

Mr C says his overarching objective was not to settle the Earmarking Order but rather to avoid paying avoidable tax. I've carefully considered everything which provides details about the circumstances which existed at the time when Mr C approached BW for advice.

Mr C said in his complaint letter to BW that he'd been approached by W when he'd reached his retirement date under the original pension plan. So, I'm satisfied that responding to the approach that W had made was an important consideration for Mr C at the time when he sought advice from BW.

It is also the case that S was on notice of the Earmarking Order. So, if Mr C wanted to access the SIPP he had to take account of the provisions of the Earmarking Order.

I've then noted that in the Suitability Letter issued to Mr C in June 2021 BW set out, at the start of that letter, its understanding of his objectives and the reason why it had been asked to give him advice. The letter stated:

> *"Summary of your objectives*
> *We have agreed the following:*
> 1. *You have now decided that you wish to settle the earmarked benefits under your [S] SIPP to [W]. Following your decision, you would like me to recommend the appropriate way of funding the withdrawals required to finalise the earmarking order."*

No other objectives were summarised in the letter. There's no evidence that Mr C challenged the information in the letter or said, as he now argues, that his overriding objective was to avoid tax and that settling the Earmarking Order was a secondary consideration.

I also commented in my provisional decision about the other options that were open to Mr C had he wanted to avoid tax. Mr C acknowledged in his complaint letter to BW that it had told him he could defer taking any of the benefits under the SIPP. If he'd chosen that option he could have avoided, or at least deferred paying tax – but he didn't choose that option.

Mr C says that his email dated 21 April 2021 needs to be considered in the context that it was part of an ongoing discussion. It was written prior to him making a decision about how to proceed. Nevertheless, I remain of the view that it was indicative of Mr C's thinking at the time. As he said in the email he was "working on the basis" that the payment would be grossed up and tax would be deducted at source – albeit he undercalculated the grossed up amount and the amount of tax he would have to pay. So, his email indicated the basis he was working on at the time – it did not say anything to the effect that he was not prepared to proceed if his understanding that the payment would be grossed up and tax deducted at source was correct.

So, although as I stated in my provisional decision, tax was a consideration, I remain of the view that Mr C's overarching objective when he sought advice was to settle matters with W.

Mr C has reiterated in his response to the provisional decision that he had always wanted to take the benefits from the SIPP as an annuity. He doesn't agree that BW's reasoning for not recommending an annuity was valid. He disputes that he had sufficient income from other sources. He says that the other sources were drawdown pensions which could've stopped at any time.

When thinking about what Mr C says, I have to take into account the circumstances which existed at the time when the advice was given to him. The suitability letter explained that BW was recommending that Mr C take out a flexi access drawdown product. And the suitability letter stated that one of the reasons for this recommendation was that Mr C did not require an additional income at the time. So, I'm satisfied that, at the time, Mr C was aware BW was not recommending that he take out an annuity and that BW believed he did not require an additional income.

If, as he says, he'd always wanted to take out an annuity and he didn't have sufficient income from other sources, I think he would have challenged the information in the suitability letter. But, there's no evidence that he challenged the information in the suitability letter at the time.

Mr C also thinks that BW should have pressed S harder to get it to agree to implement monthly drawdowns to W. But, as I said in my provisional decision, S said it couldn't accommodate this request and it wasn't obligated under the terms of the Earmarking Order to agree to this request either.

In my provisional decision, I had commented on Mr C's view that he could've approached W and asked her to agree to discharge the Earmarking Order on the basis that he paid her the required amount from other resources. He acknowledges there would've been costs associated with this and also possibly an additional payment would've had to be paid to W. He estimates the additional costs at no more than £1,000 with possibly a further payment of no more than £1,000 to W. But, he says that would be a lot less than the £8,000 of avoidable tax he's had to pay.

I said I could not be certain, if he'd asked the court to discharge the Earmarking Order, whether his application would've been successful or what a court may have decided. I remain of that view.

Although Mr C feels confident that a court would've agreed to discharge the Order and W would've consented, perhaps subject to certain conditions, I cannot say what a court might have decided. The court would've taken into consideration all legal and factual matters before reaching its determination. Although Mr C says he's no doubt that W would've consented, he does acknowledge that if he had gone back to court he may have had to enter into negotiations with W and may have had to pay her an additional sum which he estimates at around £1,000. But, despite what Mr C says, it's not possible to say what the outcome would've been or whether he would've been advised to go back to court to ask for the Order to be discharged.

So, having considered everything again, I haven't received any new or further information that persuades me to change my view, as set out in my provisional decision about how this complaint should be resolved. I remain of the view that even if BW had correctly explained the tax position to Mr C, it's likely, on balance, he would've proceeded in the same way. I also remain of the view that although I'm not persuaded it's fair or reasonable to say that Mr C suffered any financial loss as a result of relying on BW's advice, I think it is fair and reasonable to require BW to pay him £500 for the distress and inconvenience he experienced as a result of what happened.

My final decision

For the reasons given above I uphold this complaint about Brighton Williams & Partners. I require it to take the following action:

- Pay Mr C £500 for the distress and inconvenience he experienced as a result of what happened.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 11 October 2023.

Irene Martin
Ombudsman