DRN-4415359

The complaint

Mr T complains that Butler Toll Ltd (BT) gave him unsuitable advice to transfer his existing pension arrangements, including a Money Purchase Occupational Pension Scheme (MP OPS) with a Guaranteed Minimum Pension (GMP) underpin in 2003. He believes the advice has caused him a loss.

Mr T is represented in his complaint by a claims management company (CMC). But I'll only refer to him in my decision.

What happened

I understand that Mr T was looking to see what his options were in 2003. So he met with a BT adviser to discuss his retirement planning needs in 2003. And signed BT's Terms of Business letter on 12 May 2003.

Mr T met BT on 16 June 2003. BT's meeting notes recorded that the meeting was arranged to discuss current pension arrangements. And that Mr T was considering purchasing a commercial property. And that he'd like to transfer his existing arrangements into a personal pension (PP) with a provider I'll refer to as provider S so that if he did find a suitable property he'd be able to purchase this quickly. The notes also recorded that Mr T was unhappy with the current investment performance of his personal pension with a provider I'll refer to as provider A, and with his MP OPS.

BT took an action to write to Mr T's pension providers to obtain values and policy information. The notes also recorded that it didn't discuss any other elements of Mr T's finances.

At the time of the advice, Mr T had the following pension schemes:

- a personal pension (PP) with provider A with a value of £72,750.84.
- A protected rights (PR) pension with provider A. This had a value of £15,040.
- A Free-Standing Additional Voluntary Contribution plan (FSAVC) with provider A. This had a transfer value of £15,006.39 after provider A had made deductions from the fund value in respect of charges.
- Benefits in an MP OPS. Mr T had left the employer which provided the MP OPS in February 2020. It had a transfer value of £63,507.99. This included Post-97 PR of £2,759.42 and a GMP underpin of £9,840.

Mr T was aged 50 at the time of the advice. He was married and employed.

On 25 June 2003, BT wrote to Mr T's existing providers to ask it for information on his pensions. It noted that his PR with provider A weren't to be transferred, but that charges were to be compared.

Provider A wrote to BT on 2 July 2003 to tell it that the transfer value for Mr T's FSAVC was £13,702.62. The current value was £15,525.52. But the difference reflected the charge provider A would take from the fund to recoup some of its costs, given the plan wouldn't run to its original maturity date. Provider A also sent BT general plan details and information on charges.

On 3 July 2003, Mr T's MP OPS administrator wrote to BT about Mr T's MP OPS transfer request. It provided the unit holding of the existing arrangement. This showed that Mr T was invested in the "Mixed" fund. It didn't note that there was a GMP underpin on Mr T's pension as a result of that scheme having previously contracted out on a GMP basis.

BT said that it met with Mr T on 5 August 2003 to discuss his existing pensions. It said its 7 August 2003 file note recorded that Mr T was happy to proceed with the transfer to the PP with provider S. And that he'd signed the discharge forms.

On 11 August 2003, provider S wrote to BT with a projection of Mr T's benefits at age 60, assuming he transferred £142,612 that day. It also noted that BT would receive commission equating to 3.75% of the transfer.

BT issued a suitability report dated 12 August 2003. It noted that Mr T had the following objectives, which formed the basis of its rationale for the recommendation:

- He was considering purchasing a commercial property.

- He wasn't happy with the investment performance of his schemes.

The report said that in order to achieve his objectives, Mr T would need to transfer his benefits into a SIPP. It also noted that the funds in the PP with provider A could be transferred to provider S with no penalty. And that as the PR pension with provider A couldn't be transferred to a SIPP, BT would compare the charging structures of provider A and provider S to see if it was in Mr T's best interest to transfer.

The report noted the benefits in the MP OPS, including death benefits and the maximum tax-free cash (TFC) Mr T could take. It said that the maximum TFC at Mr T's date of leaving his MP OPS was £16,159.06. And that this would increase in line with inflation each year until he took benefits. It compared this to the reduced amount that Mr T would be able to take as TFC if he transferred to a PP. But the report also stated that if Mr T transferred his MP OPS, he'd have the freedom to choose where to invest his money, including commercial property. It said that his current investment choice was more restricted.

The report also stated that if Mr T transferred his MP OPS, he'd also have to transfer his FSAVC held with provider A, as it was connected. It said that provider A would apply a penalty to the FSAVC transfer value as Mr T would be transferring it before his selected retirement age.

But the report concluded that despite the reduction in TFC and the penalty on transfer of the FSAVC, there would be greater potential to increase Mr T's pension fund if he transferred his MP OPS and the FSAVC to provider S and then onto a SIPP.

Mr T accepted the recommendation and decided to transfer the benefits with his MP OPS, his FSAVC, and this PP with provider A to provider S.

On 19 August 2003, provider S wrote to BT with a projection of Mr T's PR fund at age 65, assuming he transferred £15,040 that day. It also noted that BT would receive commission equating to 3.75% of the transfer.

Provider S sent BT further information about Mr T's personal pension on 26 August 2003. And on 27 August 2003, it wrote to BT again to state that Mr T's transfer would be invested in the following funds: 40% Property, 30% Sterling, 30% Equity.

Provider S noted that a transfer of £72,750.84 had been applied on 22 August 2003.

On 15 September 2003, BT wrote to Mr T to tell him that provider S had received his PP transfer from provider A. And that the £72,750.84 had been invested 40% in Property (£29,185.20), 30% in UK Equity (£21,928.37) and 30% in Sterling (£21,853.60).

On 19 September 2003, the administrator for Mr T's MP OPS wrote to BT with a transfer quotation. Like the 3 July 2003 statement, this also failed to show the GMP underpin which applied to Mr T's pension.

On 7 October 2003, BT wrote to provider S about the MP OPS transfer. It enclosed relevant completed forms for the transfer. And on 7 November 2003, provider S wrote to BT to tell it that the MP OPS administrator was waiting for the money to be disinvested, but was expecting that the following week.

On 10 November 2003, provider S received a cheque in respect of Mr T's FSAVC for £15,006.39.

On 18 November 2003, BT wrote to Mr T to update him on the transfer of his MP OPS, which it said should be sent that week. It said that in line with the 12 August 2003 report, it would invest those funds in a PP with provider S.

BT also noted it had discussed changing Mr T's PP to a SIPP so that he could invest in Corporate funds. It said that it'd received commission on the transfer to the PP with provider S. But that it was prepared to arrange the transfer to a SIPP without commission. Instead, it would charge an annual 0.5% fund-based fee for reviewing Mr T's SIPP on a regular basis. It also noted that Mr T was still interested in purchasing a commercial property with some or all of his pension fund.

On 2 December 2003, after receiving Mr T's completed discharge forms, the administrator for Mr T's MP OPS wrote to BT to tell it that it had failed to show the GMP underpin on its previous quotation. It apologised. And said that as the MP OPS had previously been contracted out on a GMP basis, the current value if Mr T's GMP underpin was £9,840. This value had been included in the pre-97 part of the transfer value it'd quoted. It also said that Mr T's GMP at his date of leaving the scheme was £641.16 each year, all of which was in respect of Post-88 GMP. And that the GMP would revalue at the fixed rate of 6.25% for each complete tax year between the date of leaving and State Pension Age.

BT said that because of the failure of the MP OPS administrator to previously provide details of the underpin, it now required a letter from Mr T to confirm that he still wanted to proceed with the transfer. And that Mr T had confirmed to the MP OPS administrator on 9 December 2003 that he wanted to proceed with the transfer to a PP with provider S. Later that month provider S received a cheque for £63,507.99.

On 5 January 2004, BT wrote to Mr T with the policy documentation for his recent transfer to the PP with provider S. It asked him to check the documents. These noted that the payment was to be invested in the Sterling fund, with a selected pension age of 60.

On 20 January 2004, BT met with Mr T. BT's meeting note recorded that the meeting had been arranged to discuss transferring Mr T's funds to a SIPP with provider S. And so that he could discuss and agree his investment choices. The note said that the following investments were agreed:

20% Corporate property, 20% Corporate UK Fixed Interest, 15% Corporate managed, 15% Corporate stock exchange, 10% Corporate UK equity, 10% Fidelity special situation, 10% Newton managed.

The note also confirmed that the set up was to be done on a nil commission basis. But that a 0.5% fund-based charge would be made after that to cover annual reviews.

On 20 January 2004, BT confirmed Mr T's investment choices to the SIPP provider. It included an application form that Mr T had signed on 25 November 2003.

On 28 January 2004, provider S wrote to BT to confirm it'd received the request to transfer Mr T's PP n to a SIPP. It said that £142,205.93 had been paid into the SIPP bank account.

On 23 April 2004, BT met with Mr T. It's meeting note recorded that it'd discussed with Mr T whether it was still appropriate to look at the commercial property market. And said that BT had agreed with Mr T that given the relaxations on residential property going into pension funds the following year, he should remain invested as he was.

Mr T said he saw an online advert about potential pensions mis-selling in July 2022. And that this prompted him to discuss his situation with his CMC. He said that he hadn't been aware that he could raise a complaint about the 2003 advice until he'd had this discussion, as he'd been unaware of the guarantees within his MP OPS until then.

Mr T complained to BT – through his CMC - about the advice on 20 December 2022. He felt it'd been negligent and unsuitable for the following reasons:

- The advice should've only been provided after BT fully understood his circumstances and needs, and after all of the risks involved had been fully explained to Mr T. But he felt that the documents he received in relation to his pension were "*full of financial jargon*" which BT had failed to explain to him, and which he hadn't fully understood.

- He felt that BT hadn't assessed his financial situation in full, in particular his risk profile, capacity for loss and financial situation.

- He felt that there'd been no follow-ups.

- As Mr T had been 50 at the time of the transfers, it may have been possible for him to access his MP OPS, the tax-free cash (TFC) and retain his GMP. But BT didn't appear to have considered his previous scheme. Mr T felt he hadn't been provided with sufficient information to make an informed decision.

- He felt that BT had failed to sufficiently highlight the guarantees held within his former MP OPS.

- He felt that BT had failed to make clear to him that in transferring, his new investment would need to make additional growth to compensate for the fees charged for the transfer.

- And that BT had failed to act in his best interests. As a result, he felt he'd lost out.

Mr T wanted BT to put him back to the position he would've been in but for the negligent advice.

BT issued its final response to the complaint on 15 February 2023. It felt the advice had been suitable. And said that following completion of the transfers in 2003, it remained in regular contact with Mr T. It also said that the advice was explained to Mr T during meetings and in its August 2003 suitability report.

Mr T was unhappy with BT's response. So he brought his complaint to this service, through his CMC, on 15 February 2023. It said BT had said that Mr T's main objective in 2003 was to transfer his pensions to a pension which could enable his commercial property purchase. But Mr T had told it that he'd wanted better returns from his pension. And that BT hadn't provided him with any other alternatives other than transferring his pensions.

The CMC said that BT hadn't done enough to explain the benefits held within Mr T's MP OPS, or how the transfer might impact his retirement income. It also felt that Mr T had enough funds in his personal pensions that he wouldn't have had to transfer his MP OPS benefits, which had led to losing the GMPs within it. It also said that there was no evidence that Mr T had signed a declaration at the time of the advice that he'd understood the risks involved.

The CMC said that BT didn't look at alternatives to meet Mr T's objectives. And that if it had, he would've explored these rather than transferring away from his MP OPS, given the vital guarantees it held.

Our investigator felt that the complaint should be upheld. She felt that BT shouldn't have recommended that Mr T switched his MP OPS and FSAVC, as it wasn't in his best interests. While she didn't think the personal pension switch in itself was unsuitable, she felt that BT hadn't acted fairly as it hadn't considered or recommended any investments at the time of advice. Therefore she proposed redress which would establish whether Mr T had suffered a loss as a result of the advice. And if it had, to put him back to the position he would've otherwise most likely have been in but for the unsuitable advice.

BT didn't agree with our investigator. It said that Mr T's main reason for transferring his existing pensions was so he could place the funds in a Self-Invested Pension Plan (SIPP) that could be used for the purpose of purchasing a commercial property, possibly with other investors. It said Mr T had been looking to operate a business from the property. Therefore it didn't agree that the reason for the transfer of the existing pensions was simply to achieve a greater return. It said that none of Mr T's existing arrangements could've been used in a commercial property purchase through a SIPP.

BT also said that both property purchases and pension transfers could be long and protracted processes. So Mr T had wanted to have a plan in place that he could use as soon as he'd found a property. It also said the decision to proceed with the pension transfers wasn't taken lightly by either it or Mr T.

BT said that Mr T hadn't been able to find a suitable property. And that enabled it to engage with Mr T on an ongoing basis to provide investment advice on a regular basis. It said Mr T was also able to take advantage of the drawdown facility in his pension. And said that his final withdrawal had been used to fund a buy-to-let property purchase.

As agreement couldn't be reached, the complaint has come to me for review.

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 first considered whether Mr T had brought his complaint in time. Mr T said he first became aware he might have a cause for complaint about the 2003 advice in July 2022. He complained to BT in December 2022.

As I've seen no evidence that Mr T was aware, or ought reasonably to have been aware that he might have cause for complaint before July 2022, I'm satisfied that Mr T has complained in time. And that his complaint about the 2003 advice is one that I can consider the merits of.

Having done so, I'm going to uphold it. I agree with our investigator that the advice BT gave Mr T to transfer his MP OPS and FSAVC wasn't in his best interests. And that although the advice to transfer the personal pension wasn't in itself unsuitable, BT should've recommended investments at the time of the advice. I'll explain the reasons for my decision.

I first considered the transfer of Mr T's PP from provider A to provider S.

As the advice took place in 2003, I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider good industry practice in 2003. This includes the Principles for Businesses (PRIN) and the Conduct of Business (COB) rules. In particular COB 5.3.5R meant that BT had to take reasonable steps to ensure that its advice was suitable for Mr T.

The transfer of Mr T's PP with provider A

BT said that provider A had been closed to new business at the time of the advice. And that the existing contracts were subject to higher charges. It felt this was eroding the accrued fund value of Mr T's PP. So it felt that the lower charging structure applicable to the PP with provider S would be better for Mr T.

In order to assess whether the advice to transfer Mr T's PP with provider A to a PP with provider S was suitable, I've considered the relative charges. I also note that BT would charge a 3.75% commission for arranging the transfer. But as Mr T was aged 50 at the time of the advice, with a selected retirement age of 60, he had a ten-year investment period over which to make up for the commission that would be charged.

The PP with provider S had an annual management charge (AMC) of 1%, although this would be discounted to 0.8% for fund values over £50,000.

The PP with provider A had the following charges:

- A bid/offer spread which meant that Mr T's contributions were worth about 5% less immediately after they were paid into the plan.
- AMC of 0.75% a year.
- An indexed policy charge of £4.74 each month.

If Mr T followed BT's recommendation, he would also be paying it 0.5% of his fund value each year as a fee for ongoing reviews. Despite that, I'm satisfied that the combined charges under the PP with provider S – even when the commission was taken into account - were significantly lower than the fees that applied to his PP with provider A. And Mr T would also receive ongoing reviews of his investments.

From what I've seen, the advice BT gave Mr T to switch his PP with provider A to the PP with provider S wasn't unsuitable. I say this because the charging structure was better, he would receive ongoing reviews, and I'm satisfied that he had enough time left to invest his funds to more than make up for the commission paid. There would also be no penalties or lost guarantees on such a transfer.

Although I'm satisfied the recommendation to transfer his PP with provider A was suitable for Mr T, I also need to decide whether BT gave him suitable investment recommendations.

BT's August 2003 suitability report doesn't recommend any investments. And I haven't been provided with a fact find from the time of the advice.

BT told this service that it couldn't locate the fact find that it would've completed at the time of the advice. It said that after a series of face-to-face meetings with Mr T around the time of the advice, it had discussed different asset classes available and their related risk profiles. And that through these discussions, it had deemed Mr T to be a non-average retail investor – "*an entrepreneur*" - who wanted to purchase a commercial property utilising a SIPP.

BT also said that it had discussed with Mr T the choice of funds available both for his PP with provider S and his SIPP. It said the email of 15 September 2003 showed an asset split. And the file note dated 20 January 2004 showed a further asset split. BT also said that the file note dated 23 April 2004 showed that the performance of the SIPP was discussed.

BT also provided the following documentary evidence which it felt demonstrated that it'd regularly considered Mr T's attitude to risk (ATR):

- a Knowledge and Experience Assessment form dated 27 January 2010 which indicated that Mr T was an individual who purchased direct equities without using professional investment advice and on an execution only basis.

- a fact find dated 1 February 2010. At this time, Mr T's ATR had been assessed as Adventurous.

- Further emails from Mr T over the years which it felt showed that he had an interest in self-investment and had the ability to manage his own portfolio.

BT also said that from 2007 to 2011, Mr T's PP was invested in an adventurous investment model. And that from 2011 to 2023, a moderate investment model. And that it constantly addressed his investments with him.

Mr T said his ATR at the time of the advice was medium. I'm persuaded that this was reasonable given he was invested in the mixed fund within his MP OPS. And because BT sent him a report in 2006 which stated that it: "*established that your attitude to risk could realistically be described as balanced*".

Overall, while I've noted that BT has provided evidence that Mr T's ATR changed over time, I'm satisfied that it's reasonable to conclude that at the time of the advice Mr T was a balanced, medium risk investor.

The suitability report stated the following about fund choice:

"Choosing suitable investments is essentially a matter of balancing risk with reward. In general terms, the higher the potential for returns, the higher the downside risk. It is therefore important that you choose investments with which you feel comfortable.

We agreed to discuss your investment strategy once all monies have been received".

I can see that after the initial advice, BT discussed investments with Mr T. It also had to choose investments on the application form for the PP with provider S on 27 August 2003. But I've not seen any evidence of BT providing any investment recommendations at the time of the advice. Nor have I seen evidence of any consideration of his future investment strategy, other than a vague plan that he might buy a commercial property.

At the time of the advice, BT was required to ensure the suitability of its advice for Mr T. It had to know relevant facts about Mr T so that it could ensure that any recommended investments were and remained suitable for him.

I've not seen enough evidence that BT understood how Mr T wanted to invest at the time of the advice. I appreciate that it felt he wanted to invest in a commercial property, but his plans for doing so were in their early stages, and his pension funds had to be invested immediately after the transfer. I've also seen no evidence that BT conducted any analysis of what sort of return Mr T might achieve from any investment he might make.

I agree with our investigator that although BT intended that Mr T would eventually transfer to a SIPP so that he could invest in a commercial property, this wasn't his immediate plan. And in any event, BT initially recommended that Mr T transferred his PP with provider A to the PP with provider S. I consider that BT should've investigated where Mr T would invest his funds and whether these were suitable for his circumstances. As this wasn't done at the time of advice, I'm not satisfied that BT acted in Mr T's best interests. And I further agree with our investigator that, although the transfer itself wasn't unsuitable, BT should've carried out analysis to assess where Mr T would invest his funds once the transfer had taken place.

I'll cover the redress I consider is necessary later on in my decision.

I next considered the recommendation to transfer Mr T's MP OPS and his FSAVC to provider S.

Mr T's MP OPS and his FSAVC

In addition to the transfer of Mr T's PP with provider A, BT also recommended that he transfer his MP OPS and his FSAVC.

As I noted earlier, Mr T's benefits in the MP OPS included both a GMP underpin and PR. He was invested in a mixed fund, which I consider suitable for a medium ATR investor. Mr T also had a FSAVC connected to his MP OPS.

The charges for Mr T's FSAVC were:

- A bid/offer spread which meant that Mr T's contributions were worth about 5% less immediately after they were paid into the plan.
- A capital unit charge of 3.5% of their value when purchased
- An AMC of 0.75% a year.
- An indexed policy charge of £4.74 each month.

As noted above, provider A would also impose a penalty equivalent to the charges that it would've taken in future on transfer.

It seems that the only cost in Mr T's MP OPS was a bid/offer spread. For the mixed fund he was invested in, this was approximately 5% at the outset. There doesn't appear to have been any ongoing charge.

Based on what I consider was Mr T's ATR at the time of the advice, which I covered earlier in this decision, I've looked at the funds available in Mr T's MP OPS. I can see that there were a variety of funds which he could've used to match his current and future investment needs. As our investigator noted, there were 20 funds listed on his benefit statement notes. So, if Mr T had been unhappy with the performance of his MP OPS and had decided to change his investments, he could've completed a fund switch within that scheme to match his ATR.

I can see that the recommendation to switch Mr T's MP OPS to the PP, and then to a SIPP, led to a more expensive pension. For the PP with provider S, there was an AMC of 1%, which was reduced to 0.8% for balances over £50,000, as well as the ongoing charge Mr T would pay BT for an ongoing service. The combined charge under the PP with provider S would therefore be higher than the existing charge on Mr T's MP OPS scheme. And then the 3.75% commission paid to BT on the transfer would also need to be considered.

I acknowledge that BT said that at the time of the advice, Mr T was an entrepreneur looking to establish a business. And that at that time, there'd been a lot of discussion in the press about commercial property purchase being possible through a SIPP. It said that although Mr T didn't have a specific property in mind, he'd wanted to establish a PP that could be used for a commercial property purchase when he'd found one. And as it'd confirmed that Mr T's current arrangements couldn't facilitate such a purchase, he'd needed to set up a different pension plan to meet this need.

I appreciate that BT also felt that if Mr T transferred to a PP with provider S, and then on to a SIPP, he'd have more freedom to choose where to invest his money. And I also note that BT waived any further commission on the eventual SIPP transfer.

BT also said, as I noted earlier, that provider A's closure to new business had led to higher charges. So this meant that although there was a transfer penalty for the FSAVC, this was mitigated by the lower charging structure available with provider S.

But I'm not satisfied that this justifies the transfer of Mr T's MP OPS or his FSAVC. I say this because the new arrangement BT felt Mr T needed to be set up, could've been set up simply with a transfer from his PP with provider A. Then, if Mr T had found a suitable commercial property, it would've been relatively easy to arrange the MP OPS and FSAVC transfer if that was the best way for Mr T to complete the purchase at that time.

I'm also not persuaded that the potential benefits of the recommendation justified the charges in the new arrangement, the commission BT charged, the potentially lower TFC, the penalty charged against the FSAVC or the loss of the GMP benefit in the MP OPS. As our investigator said, it was unlikely that the investment performance in the new arrangement would be so much better than that in the old arrangements that it would more than compensate Mr T for all of the additional costs and lost benefits.

I also note that BT made its recommendation to transfer without having discussed any other elements of Mr T's finances with him. So it didn't even consider any other options Mr T might have to potentially achieve the commercial property purchase he might want to make.

Before I consider the redress, I'd also like to acknowledge a further point BT has made. It said that the advice it set out in its August 2003 suitability report was prepared on the basis of the information provided by provider A and by the administrator of the MP OPS. But that the administrator of the MP OPS had written to it on 3 December 2003 to explain it'd made an error when it hadn't previously provided the GMP underpin in its quotations.

I can see that the administrator of the MP OPS did fail to issue transfer quotations showing the GMP underpin on at least two occasions. But it explained its mistake and provided the correct information before Mr T had transferred his MP OPS to his PP with provider S. And although Mr T had to confirm he still wanted to go ahead with the transfer, I've seen no evidence that BT explained what this new information meant. Or that it suggested to Mr T that it reconsider its advice in light of the new information. So the failure of the administrator to provide full and correct information at the start of the advice period doesn't change my mind about BT's responsibility to Mr T in this complaint.

I'm satisfied that BT shouldn't have advised Mr T to transfer his MP OPS and FSAVC. It clearly wasn't in his best interests at that time. I consider that if the adviser had advised Mr T to stay in the MP OPS, he would've done so. BT should therefore carry out a loss calculation to establish whether there has been a loss as a result of the unsuitable advice.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr T as close as possible to the position he would probably now be in if he had been given suitable advice.

Transfer from PP with provider A to PP with provider S

Although I believe Mr T would've transferred his PP with provider A to provider S, I think he would've invested differently. It isn't possible to say precisely what he would've done, but I'm satisfied that what I've set out below is fair and reasonable given Mr T's circumstances and objectives when he invested.

What must Butler Toll Ltd do?

To compensate Mr T fairly Butler Toll L

- Compare the performance of his funds within his PP with provider S that derive from his transfer from his PP with provider A with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

- Butler Toll Ltd should add interest as set out below.

- If there is a loss, Butler Toll Ltd should pay into Mr T's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Butler Toll Ltd shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Butler Toll Ltd is unable to pay the compensation into Mr T's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would've provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr T won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr T's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr T would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Income tax may be payable on any interest paid. If Butler Toll Ltd deducts income tax from the interest, it should tell Mr T how much has been taken off. Butler Toll Ltd should give Mr T a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists and liquid	FTSE Private Investors Income Total Return Index	Date of investment	My final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving Mr T's acceptance

Actual value

This means the actual amount payable from the investment at the end date.

Fair value

This is what the investment would've been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if all those payments are totalled and then deducted at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr T wanted Capital growth and was willing to accept some investment risk.

- The FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr T's circumstances and risk attitude.

MP OPS and FSAVC transfer

I think Mr T would've remained with his MP OPS and FSAVC provider, however I can't be certain that a value will be obtainable for what the previous policy would've been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr T's circumstances and objectives when he invested.

What must Butler Toll Ltd do?

To compensate Mr T fairly Butler Toll Ltd must:

- Compare the performance of Mr T's investment with the notional value if it'd remained with the previous providers (for the MP OPS and FSAVC). If the actual value is greater than the combined notional value of these, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Butler Toll Ltd should add interest as set out below.

- If there is a loss, Butler Toll Ltd must pay into Mr T's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. It shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Butler Toll Ltd is unable to pay the compensation into Mr T's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would've provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr T won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr T's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr T would've been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Income tax may be payable on any interest paid. If Butler Toll Ltd deducts income tax from the interest, it should tell Mr T how much has been taken off. Butler Toll Ltd should give Mr T a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists	Notional value from	Date of	My final	8% simple per year

	and liquid	previous providers	investment	decision	from final decision to settlement (if not settled within 28 days of the business receiving Mr T's acceptance

Actual value

This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Mr T's investment had it remained with the previous provider until the end date. Butler Toll Ltd must request that the previous providers calculate this value.

Any additional sum paid into the SIPP should be added to the notional value calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if those payments are totalled and deducted at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, Butler Toll Ltd will need to determine a fair value for Mr T's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

My final decision

I uphold the complaint. My decision is that Butler Toll Ltd must pay the amount calculated as set out above.

Butler Toll Ltd should provide details of its calculation to Mr T in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 4 December 2023.

Jo Occleshaw
Ombudsman