complaint

Mr and Mrs B complain, in summary, that Baines & Ernst Limited, ("BEL"), didn't provide them with appropriate information when they entered into a debt management plan ("DMP") with it. The complaint is brought to this service on Mr and Mrs B's behalf by a claims management company ("CMC"). But for ease, I shall refer below to all actions being taken by Mr and Mrs B unless stated otherwise.

background

Mr and Mrs B entered into a DMP with BEL in December 2012. They terminated the DMP in March 2014 when they both entered into an Individual Voluntary Arrangement ("IVA"). The CMC said, in summary, that Mr and Mrs B weren't referred to the not-for-profit advice sector. It also said that a DMP wasn't suitable for Mr and Mrs B, and that they should have been advised to enter into a Debt Relief Order ("DRO") instead, which would've led them to becoming debt free much sooner.

our adjudicator's view

The adjudicator didn't recommend that the complaint should be upheld. She noted that the CMC had said that BEL had failed to consider that this was a joint plan and the formal solution would've been individual. And the CMC also said that by whatever method the disposable income was split between the couple, the disposable income of at least one or most likely both parties would've been under £50, in which case either or both could have been eligible for a DRO. Overall, the adjudicator was satisfied that BEL had given fair consideration to Mr and Mrs B's circumstances and she didn't feel the advice provided to enter into a DMP was unreasonable.

The CMC disagreed and responded to say, in summary, that the Office of Fair Trading's ("OFT") Guidance applied in this case and that Mr and Mrs B should have been referred to fee free advice. It also said that Mr and Mrs B were eligible for a DRO and queried the following:-

- BEL had said that Mr and Mrs B's monthly contractual payments to their debts were £60 before entering into the DMP. But if this was correct, why did they end up on a DMP paying £80 per month?

- The CMC said that BEL included Mrs B's Winter Fuel Allowance ("WFA") in their disposable income. The CMC thought that this showed Mrs B's vulnerability and shouldn't have been included.

- The CMC said that BEL didn't appear to know how Mr and Mrs B's debts should be dealt with. Either the couple should be treated as a household and their disposable income should be split meaning that both were eligible for a DRO. Or, as Mr B had no income, he was eligible for a DRO.

- The CMC referred to Mr and Mrs B's travel costs of £40 - £50 per week. But said that BEL's expenditure form showed these as £20 per month.

my provisional decision

After considering all the evidence, I issued a provisional decision on this complaint to Mr and Mrs B and to BEL on 1 February 2017. I summarise my findings:

I had asked the adjudicator to ask BEL to comment on the points made by the CMC in its response to the adjudicator's view. BEL had said:-

Contractual debt repayments of £60
Mrs B had declared £60 as the amount for her debt repayments in the sales call. But the £80 disposable income was to cover both hers and Mr B's liabilities.

Disposable income below £50
Mrs B had agreed a monthly payment of £80 to be affordable. She had said in the sales call that she could afford this. Mr and Mrs B were also able to increase their payments to £85 as of April 2013 and had continued to make these contributions each month until the final payment in February 2014, when they'd entered into a joint IVA at £89 per month.

Winter Fuel Allowance
According to the Insolvency Service's guidance (Point 46.32 - 'Determination of the Debtor's Monthly Surplus Income'), entering into a DRO application would require that the DRO Intermediary listed all forms of income received at any point of the year. As such, the Winter Fuel Allowance must be listed and, under the calculation tools provided to all Intermediaries, this was automatically distributed across the twelve month period. BEL had also rejected the CMC's claim that the receipt of Winter Fuel Allowance was evidence of fuel poverty. It had said that the allowance wasn't a means tested benefit, and was provided automatically if certain criteria were met. So it wasn't an indication of any financial standing or potential poverty.

Calculation of Disposable Income
The CMC had said that the monthly disposable income of £80 was incorrectly calculated, with specific reference to the monthly travel costs. It had reviewed the sales call with Mrs B and had noted that Mrs B had said that they often spent £40-50 per month in petrol. It had also noted that in the Financial Statement sent after this call, travel expenses were listed as £20 per month and this had clearly caused confusion. This was due to the fact that the General Household Costs expenditure category totalled £409 per month and included £49 for travel. As such, Mr and Mrs B had a monthly allowance of £69 to cover both petrol and insurance costs. The additional travel allowance of £20 was added when the original disposable income amount was calculated at £159, which had triggered further discussions and resulted in the disposable income being confirmed at £80 per month.

BEL had also said that it wasn't its internal process for Mr and Mrs B to have been assessed separately, but that its procedure was in line with the Insolvency Service and Financial Conduct Authority ("FCA") expectations. It couldn't have considered a formal insolvency application because Mr and Mrs B's disposable income exceeded the £50 limit and Mr B didn't have evidence to show that his disability living allowance ("DLA") had stopped being paid. BEL had also said that a licensed Insolvency Practitioner had excluded a DRO as a suitable solution. So it hadn't believed that a DRO was a viable or eligible option for Mr and Mrs B at the time of their application, and that the DMP provided a suitable solution prior to their entry into an IVA.

I had listened to the five call recordings provided by BEL which had included the main sales call for the DMP with Mrs B. I referred below to information provided by Mrs B in the sales call.

I'd noted above that BEL referred to the FCA's expectations. But I'd noted that the FCA's requirements didn't apply at the time the DMP was sold. I could see that when Mr and Mrs B were sold the DMP, the OFT's Debt management (and credit repair services) guidance from March 2012 ("the 2012 Guidance") had applied. The 2012 Guidance had specifically said that a referral to free debt advice should be made where appropriate to do so (Clauses 2.5d and 3.23g of the 2012 Guidance).

The 2012 Guidance had said that this would be the case if there were priority debts and/or an immediate emergency, or if Mr and Mrs B didn't have enough disposable income to afford the fees and their monthly plan payments. This might be the case if income consisted of pension or benefits. I could see that Mr B had no income and Mrs B's low fixed income included her state pension and pension credit, a subsistence benefit. I noted that they also received housing benefit and council tax benefit. I could also see that Mrs B had said she couldn't afford to pay the £49 per fortnight requested by her gas and electricity provider.

I'd also noted that Mrs B had told BEL in the sales call that she'd been paying £10 per month on each of the debts, but the creditors had wanted more and she couldn't afford more. She had been on a DMP through Citizens Advice previously and she said she couldn't afford to pay the £60 to £65 per month she was paying under that DMP. Taking all these circumstances into account, I thought that at the time of BEL's sales call, that it would have been appropriate for BEL to have referred Mr and Mrs B to the not-for-profit advice sector in line with the 2012 Guidance.

I also thought that it might have been reasonable for BEL to have referred Mr and Mrs B back to Citizens Advice as they had previously had a DMP set up through them for which no fees would have been payable.

I'd also thought about BEL's obligation to exercise due skill and care in providing advice to Mr and Mrs B. I'd noted that Mr B had no income, and that Mrs B received monthly pensions totalling £732 from which she paid the estimated household expenses of £652. This left £80 a month, prompting BEL to propose the DMP.

But I'd noted that in the sales call, Mrs B had said that she never had money left over each month. When the monthly payment amount of £80 was initially quoted by BEL, Mrs B had said that this was *"ridiculous"* and *"high"*. BEL's adviser had said that he was worried that a DMP might not be the best option for them. Despite this, I couldn't see that any other option was discussed during the sales call.

I'd also noted that the 2012 Guidance referred to creditors being transparent about the full range of debt options, including their benefits, disadvantages and risks. BEL's advice needed to be appropriate to individual circumstances. The 2012 Guidance listed as an unfair practice the failure to inform the consumer about other debt management options which may be suitable. But, I couldn't see that any other debt options that might have been more suitable were raised with Mrs B during the sales call. And that led me to conclude that BEL had failed to exercise due skill and care in advising Mr and Mrs B.

I had also given consideration as to whether BEL should have specifically raised the option of a DRO for Mr B with regard to his debts. I noted that BEL had previously told the adjudicator that if an application had been made for a DRO for Mr B, it might have been rejected as his DLA was under appeal.

Yet in the sales call, I'd noted that Mrs B had told BEL's adviser that they'd been advised by Citizens Advice not to appeal the withdrawal of DLA. So, I couldn't see that a DRO shouldn't have been raised for this reason alone. BEL had also said that Mr B didn't have evidence to show that his DLA had stopped. But if a DRO was otherwise appropriate, I thought that Mr B could have obtained a letter to show that the DLA had stopped relatively easily. And when Mr B had received the evidence to show this, a DRO could have been considered.

BEL had also said that there was another debt referred to after the sales call and this might have caused a DRO to fail. But, I said that this wouldn't have affected a consideration of a DRO as an option at the time of the sales call. I'd also noted that BEL had said that a DRO was excluded as a suitable solution by the Insolvency Practitioner. I had read the IVA documents but I could only see that bankruptcy (and not a DRO) was excluded as a suitable solution.

So, having carefully considered the specific circumstances of this complaint, I thought there were shortcomings in BEL's advice to Mr and Mrs B. So, I thought that it would be reasonable for BEL to refund the fees paid to it by Mr and Mrs B. I didn't think that the rest of the repayments should be refunded as these did reduce Mr and Mrs B's debt balances and had reduced the amounts repayable under their IVAs.

Subject to any further representations by Mr and Mrs B or BEL, my provisional decision was that I intended to uphold this complaint in part. I intended to order Baines & Ernst Limited to refund the fees paid to it by Mr and Mrs B. I also said that BEL must pay the compensation within 28 days of the date on which we told it Mr and Mrs B accepted my final decision. If it paid later than this, I said it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple. I also noted that Mr and Mrs B should be aware that their Insolvency Practitioner had asked that any award they received be paid to it, in line with their IVA.

BEL responded to say that it agreed my provisional decision. It said that Mr and Mrs B had paid £620 to it during their time on the DMP and this was what it would like to offer them in compensation.

The CMC disagreed with my proposed award. It said that it understood that I believed that it would have been appropriate for Mr and Mrs B to have been referred to the free sector. And it also assumed that I thought that Mr and Mrs B would have entered into DROs had they been offered. It also said that the proposal that Mr and Mrs B receive a refund of the fees paid to BEL was of no benefit to them whatsoever given that they are now on IVAs. It said that Mr and Mrs B should be debt free today and would be were it not for gross errors made by BEL. And the only way that they could be put in the position they should be in was by the repayment of all funds made to the DMP and the extinguishing of their outstanding debt.

my findings

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

With regard to the referral to fee free advice, I note that Mr and Mrs B had previously had a relationship with Citizens Advice so they already knew about fee free advice before consulting with BEL. And I hadn't said in my provisional decision that Mr and Mrs B would have entered into a DRO, as they very obviously didn't two years after entering into the

DMP. In reality, Mr and Mrs B went on to apply for IVAs and dismissed bankruptcy as an option. And I'd previously noted that the payments Mr and Mrs B made on their DMP reduced the amount payable under the IVAs. So, having considered the parties further comments, overall, I wasn't persuaded to change the proposed outcome in my provisional decision.

my final decision

My decision is that I uphold this complaint in part. In full and final settlement of this complaint, I order Baines & Ernst Limited to refund the fees paid to it by Mr and Mrs B.

BEL must pay the compensation within 28 days of the date on which we tell it Mr and Mrs B accept my final decision. If it pays later than this, it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

Mr and Mrs B should be aware that their Insolvency Practitioner had asked that any award they receive be paid to it, in line with their IVA.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 10 April 2017.

Roslyn Rawson
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