DRN-3817555

The complaint

Mr C complains about the advice given by Mulberry Wealth Management Limited ('MWM') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was flawed and believes this has caused a significant financial loss.

What happened

In March 2016, Tata Steel UK Ltd announced that it would be examining options to restructure its business including decoupling the British Steel Pension Scheme ('BSPS') (the DB pension scheme) from the company. The consultation with members referred to possible outcomes regarding their preserved pension benefits, one of which was a transfer to the Pension Protection Fund ('PPF') – the PPF is a statutory fund designed to provide compensation to members of defined benefit pension schemes when their employer becomes insolvent. The BSPS was closed to further benefit accrual from 31 March 2017.

In May 2017, the PPF made the announcement that the terms of a Regulated Apportionment Arrangement ('RAA') had been agreed. That announcement said that, if risk-related qualifying conditions relating to funding and size could be satisfied, a new pension scheme sponsored by Mr C's employer would be set up – the BSPS2.

In October 2017, members of the BSPS were sent a 'Time to Choose' letter which gave them the options to either stay in the BSPS and move with it to the PPF, move to the BSPS2 or transfer their BSPS benefits elsewhere. The deadline to make their choices was 11 December (and was later extended to 22 December 2017).

Mr C approached MWM in November 2017 to discuss his pension and retirement needs. He was concerned about the situation with his employer and the BSPS scheme. Both of which were experiencing difficulties at the time.

MWM completed a fact-find to gather information about Mr C's circumstances and objectives. This showed that Mr C was 31 years old, living with his partner and two young dependent children. He was employed earning around £34,000. His partner was also employed full time and was a member of her employers DB scheme. Their residence was valued at £130,000 and was subject to a mortgage of £90,000. They had a modest amount of other credit. They held £5,000 on deposit with no other savings or investments

In respect of Mr C's pension benefits:

Mr C had received a Cash Equivalent Transfer Value Quotation ('CETV') dated 7 November 2017. The CETV was about £92,000. It also showed that Mr C had just over nine years' service in the scheme and the pension at the date of leaving was £4,300 per year.

Mr C was also a member of his employers defined contribution ('DC') scheme and he and his employer were contributing a combined 16% of his salary into this. And he had a modest stakeholder pension, the value of which I understand was around £10,000. Mr C was given advice about this by MWM but this advice hasn't formed part of this complaint.

MWM also carried out an assessment of Mr C's attitude to risk, which it said was '4' on a scale of 1 to 5 or 'moderate to adventurous'.

On 3 December 2017, MWM advised Mr C to transfer his pension benefits into a personal pension and invest the proceeds in line with his attitude to risk. The suitability report said the reasons for this recommendation were that it would help him to retire early, at age 61 if possible. He wanted to control his pension fund and take benefits when and how it suited him. For example, he could take ad hoc tax-free cash or an income, rather than the fixed tax-free cash and income amounts the DB scheme would provide. And he could sever the link between his pension and his employer. He did not trust the scheme, or his employer, to run the scheme efficiently.

Mr C complained in 2021 to MWM about the suitability of the transfer advice because he felt that he would be unable to match the benefits he would have received from the BSPS2 in a personal pension. And so, he shouldn't have been advised to transfer.

MWM didn't uphold Mr C's complaint. It said that it had acted with reasonable skill and care when it advised Mr C. It provided full information to him and explained why it thought the transfer was suitable. Mr C had some antipathy to his employer and the scheme and he wouldn't join the BSPS2. The BSPS2 wasn't guaranteed to go ahead in any event.

Mr C referred his complaint to our service. An Investigator upheld the complaint and recommended that MWM pay compensation. He didn't think that Mr C wanted, or had the capacity, to materially risk his pension provision. And if he had been given the reassurances and information that he should have been, then he would have likely ended up moving to the BSPS2.

MWM disagreed and it's representative at the time provided a detailed response to the Investigators opinion which I have read. I won't summarise all of this letter (as MWM's position has now changed) but in summary it thought that the advice it gave was suitable for Mr C and it complied with the regulations at the time. Mr C was given enough information to enable him to make an informed choice, which he did. And has now more likely than not changed his mind about this.

And Mr C's representative said that the notional 15% reduction to the redress in relation to the tax-free cash wasn't reasonable. It thought this should be calculated after fees and charges had been taken from the fund. And made some further comment on the proposed compensation and the changes the FCA was making to this.

There was some further correspondence, but the Investigator wasn't persuaded to change their opinion. And there were no new issues raised. Both sides were informed at this time that an Ombudsman would consider the complaint in due course.

Moving forward the industry regulator, the Financial Conduct Authority ('FCA') developed a BSPS-specific redress calculator. In its most recent correspondences MWM has confirmed that if a decision specifies that redress is calculated using this, and the consumer accepts it, then it would be prepared to do a loss calculation using this calculator. And pay any compensation that is now due.

That said both parties to the complaint have indicated that an ombudsman should consider this complaint to finalise matters and I've done this below.

What I've decided – and why

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

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of MWM's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

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, MWM should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

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 transfer value analysis ('TVAS') report, that MWM was required to carry out by the regulator, calculated various critical yields. These show how much Mr C's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme. Mr C was 31 at the time of the advice and wanted to retire at 61. The critical yield required to match Mr C's benefits at age 65 was 4.85% if he took a full pension and 4.2% if he took tax-free cash and a reduced pension. The same calculations for his age 61 were 5.15% and 4.46%. And the critical yield to match the benefits available through the PPF at age 65 was 4.52% per year if Mr C took a full pension and 4.33% per year if he took tax-free cash and a reduced pension. Again, the same amounts at his age 61 were 4.91% and 4.72%.

- The discount rate was 4.7% for 34 and 39 years to retirement. Looking at the critical yields they seem to be around, but slightly above, the discount rate. So, it may be the case that Mr C could replicate the benefits he gave up from the DB scheme. But there would be little point in Mr C giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And this seems to be the case here. And in the personal pension there would be a significant risk that he'd get lower benefits. And I'm not fully persuaded that Mr C wanted to take this risk, his attitude to risk was fairly high but there is little to support that he wanted to take a significant risk with his pension planning.

- And the suitability report noted that if Mr C transferred to a personal pension and invested in line with his attitude to risk then he may receive benefits similar in value to those he was giving up. But it also said that *'Returns, however, are not linear and at some point, were you to transfer your fund out now and invest until age 65 then take withdrawals, if growth is then not sufficient or charges erode the value of those returns, then it is possible that your transferred fund could run out of money.'*

- Overall, I don't think the transfer was suitable for Mr C because of the risk that he would receive lower pension benefits.

- MWM said the transfer was suitable for Mr C as it allowed him to potentially retire early and to access his pension flexibly. And he was prepared to receive a lower income to do this. It is true to say the personal pension could be more flexible, as from the DB scheme Mr C would have to take any tax-free cash he wanted at the same time as he took an income. He wouldn't have had to do this in the personal pension.

- But the first problem with this is that Mr C was only 31 at the time of the advice, and based on what I've seen he, understandably, didn't have any defined retirement plans. Other than a want to retire early, if possible, which I would think most people would express a preference for. So, I don't think it was a suitable recommendation for Mr C to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. I think it was too soon to make any kind of decision about transferring out of the DB scheme.

- And if MWM had advised Mr C to stay in the BSPS2 and he decided he needed greater flexibility than the scheme provided later on, then he could have chosen to transfer from that scheme nearer to his retirement age.

- Secondly, I understand that Mr C and his employer had begun contributing to a recently set up DC pension scheme. Mr C and his employer were together contributing around 16% of Mr C's salary to that pension. Given the amounts that were being invested, that his salary and contributions would likely increase over time and investment returns would increase all of this, Mr C would likely build up a significant amount of money in the DC scheme.

- This would provide Mr C with flexibility – he wasn't committed to take the benefits in a set way. Mr C could have taken lump sums as and when required and adjusted the income he took from it according to his needs. So, I think if Mr C retained his DB pension, this combined with his new workplace pension, would have likely given him the flexibility to retire early - if that was what he ultimately decided to do.

- Overall, I'm not persuaded that Mr C needed to transfer to increase the flexibility in how he took his pension benefits at this time.

- It was documented at the time of sale that the spouse's pension the DB scheme had would not pass to his partner, as they were not married. And Mr C said he liked the idea that he could pass the fund on to his partner and maybe his children. But the priority here was to advise Mr C about what was best for his retirement.

- While the CETV figure would no doubt have appeared attractive as a potential lump sum, the sum remaining on death following a transfer was always likely to be different. As well as being dependent on investment performance, it would've also been reduced by any income Mr C drew in his lifetime. And so may not have provided the legacy that Mr C may have thought it would.

- If Mr C had wanted to leave a legacy for his family, MWM could've explored life insurance as an alternative. It recorded that he had disposable income through which he could've met the associated premiums. And this could've been considered on a whole of life or term assurance basis – which was likely to be cheaper. But there's little evidence MWM did so.

- And in any event, it would seem that Mr C and his partner had already significant provision in place. The point of sale documentation shows that they both had death in service benefits with their employer of around four times their salaries. And they had started life cover in respect of their mortgage.

- Overall, I don't think different death benefits available through a transfer justified the likely decrease of retirement benefits for Mr C. I don't think that insurance was properly explored as an alternative. And ultimately MWM should not have encouraged Mr C to prioritise the potential for alternative death benefits through a personal pension over his security in retirement.

- I think Mr C's desire for control over how his pension was invested was overstated. I can't see that he had an interest in or the knowledge to be able to manage his pension funds on his own. And the recommendation seems to have been given on the basis he'd receive, and pay for, ongoing support with his pension. So, I don't think that this was a genuine objective for Mr C – it was simply a consequence of transferring away from his DB scheme.

- Mr C may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. But it was MWM's role to objectively address those concerns. At the time of the advice, all signs pointed toward the BSPS2 being established. But even if not, the PPF still provided Mr C with guaranteed income and the option of accessing tax-free cash. Mr C was unlikely to improve on these benefits by transferring. So, entering the PPF was not as concerning as he might've thought, and I don't think any concerns he held about this meant that transferring was in his best interests.

Overall, I can't see persuasive reasons why it was clearly in Mr C's best interests to give up his DB benefits and transfer them to a personal pension. And I also haven't seen anything to persuade me that Mr C would've insisted on transferring, against advice to remain in the DB scheme. So, I'm upholding the complaint as I think the advice Mr C received from MWM was unsuitable for him.

Our Investigator recommended that MWM also pay Mr C £300 for the distress caused by the unsuitable advice. Mr C said that finding out that he may be worse off in retirement has cause him stress and anxiety. I don't doubt that Mr C has been caused concern in relation to his retirement planning, in what was already a difficult time for employees of the company he worked for. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr C would most likely have opted to join the BSPS2 if suitable advice had been given.

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

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

For clarity, Mr C 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 of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with 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 C'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, MWM should:

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

Redress paid to Mr C as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, MWM may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr C'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.

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

MWM should pay also Mr C £300 for the distress and inconvenience the poor advice has caused him.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Mulberry Wealth Management Limited to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £160,000.

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

If Mr C accepts this decision, the money award becomes binding on Mulberry Wealth Management Limited.

My recommendation would not be binding. Further, it’s unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 23 November 2023.

Andy Burlinson
Ombudsman