

## The complaint

Mr P complains that Brighton Williams & Partners (BWP) failed to consider recommending an enhanced annuity or a drawdown arrangement when advising him on taking pension benefits in 2006. He says that the lifetime annuity he purchased was unsuitable for his needs and circumstances.

Mr P is represented in his complaint by a complaint management company (CMC). But I'll only refer to him in my decision.

## What happened

Mr P had a Free Standing Additional Voluntary Contribution (FSAVC) plan with a provider I'll refer to as provider L. BWP said that this plan started in 1991. And that it wasn't the original selling or advising agents. Mr P also had a stakeholder pension plan with a provider I'll refer to as provider S. He also had a capped drawdown plan - with a provider I'll call provider G – from July 2001, from which he took regular income.

At the point of the 2006 advice this complaint is about, Mr P had been taking advice from BWP about his pension arrangements for a number of years.

Mr P met with a BWP adviser in November 2005. The handwritten meeting notes dated 15 November 2005 showed that his circumstances were as follows:

- Mr P had no income at the time and had been drawing on his limited savings. He did have a mortgage redundancy cover plan which would cover his monthly mortgage payments.
- He was hopeful, but not certain, of becoming employed soon. But needed income from his pension until his job situation was clear, as his funds were running low. He intended to replace his pension monies once the job situation was resolved.
- He was in good health.

BWP suggested Mr P could increase his withdrawal from provider S by approximately £4,000, switch it to provider G, and then take a maximum withdrawal of around £6,400 from provider G. It also said he could take a tax-free cash (TFC) sum of around £7,000 from protected rights in April 2006.

The handwritten note recorded that Mr P felt that: *"this was the most appropriate course of action and would give him some breathing space"*.

In February 2006, provider L wrote to Mr P about his FSAVC plan. It said that as he was now within six weeks of his selected retirement date, it was required to provide an estimated Open Market Option (OMO) value. It said this was £7,941.98 as of 13 February 2006. It also said that Mr P didn't have to buy his annuity with it.

Mr P sent a copy of provider L's February 2006 letter to BWP on 21 February 2006. He also noted his address had changed.

BWP's adviser wrote to Mr P on 18 May 2006. He said that the current transfer value for the pension with provider L was £8,231. And that when this was added to the transfer value of around £4,735 from the pension with provider S, the two would provide a TFC sum of around £3,240.

The letter also said that due to the low nature of the funds, an annuity would have to be purchased, rather than adding the transferred funds to the existing drawdown arrangement with provider G. And asked Mr P how he wanted to proceed.

Mr P replied to BWP on 21 May 2006. He asked it to arrange the TFC sum and to set up annuities for the provider L and the provider S pensions.

Provider L sent BWP a retirement pack for Mr P dated 18 July 2006. This gave a number of annuity options, which included Option 2a - single life annuity with the maximum TFC sum and Option 3a and 3b – options to buy an annuity using the Open Market Option (OMO).

BWP sent Mr P a letter on 19 July 2006 to outline its recommendation about the provider S pension as follows:

- As Mr P wanted to generate cash from his pensions, the letter noted that he'd agreed to take the maximum TFC sum allowed. And to use the remaining fund to buy an annuity.
- Mr P didn't have to buy the annuity from his provider S. But BWP said that in view of the small fund, and having reviewed provider S's illustrations, the OMO wouldn't be considered.
- The total fund value was £4,698.45. Mr P would take £1,174.61 from this as TFC.
- There were various options of how the annuity could be set up. It explained what Mr P had to do when he'd made his choice.
- It said that the annuity couldn't be changed after it was set up. And that on Mr P's death, the benefits would be those he'd chosen at the outset. It also said that if Mr P chose a level annuity, he should be aware that the value of the payments would be eroded by inflation.
- Several other options were available to Mr P. These included a Short-Term Annuity and an Annuity Protection Lump Sum Death Benefit. The letter explained how both worked.
- In view of the small amount, it was decided he'd take an annuity with the provider. Mr P was asked to confirm his choice of annuity
- The drawdown option was considered but due to the small amount and Mr P's circumstances, the option was considered as not applicable.

BWP asked Mr P to sign and return a copy of the letter to confirm his understanding and agreement to the comments made, and receipt of "Keyfacts about our services", the Terms of Business, "Keyfacts about the cost of our services", and product Key Features. It said these had all been provided to him at its November 2005 meeting with him.

The letter also noted that it would deal with Mr P's pension benefits from provider L at its next meeting with him on 27 July 2006, by which time it hoped to have received information about its benefits.

Mr P completed a retirement options review and questionnaire on 27 July 2006. This stated:

- Mr P was a non-smoker, in good health. There were no possible known future changes to his health.
- He was working part time. And earning £12,000 a year. He needed to supplement his income.
- His wife wasn't in good health and wasn't employed.
- They had a total monthly income of £1,000 and expenditure of £800.
- They needed immediate income at the maximum level.
- Mr P wanted to move to a pension drawdown and was willing to accept a reasonable level of risk.

The handwritten meeting notes for the 27 July 2006 meeting recorded that Mr P had recently moved house. And that this had released some capital. This had been invested in liquid assets. But it was noted that as Mr P's job was only part time, he still had an income shortfall.

The note also said that Mr P wanted to maximise his income and take the maximum TFC available from his pension with provider S, as he needed the money now. And to move the remainder to his existing drawdown policy with provider G. The adviser agreed to investigate whether this was possible.

The note also said that Mr P had again confirmed he wanted to proceed with provider S and provider L annuities. And that the adviser had explained that he wouldn't be considering the OMO due to the small fund size. The note recorded that Mr P was: *"OK with this"*.

BWP made a further note about its call with Mr P on 1 August 2006. This recorded that he'd confirmed he needed the maximum income.

BWP sent Mr P a letter on 7 August 2006, enclosing the illustration in respect of his pension with provider L. The letter stated: *"You have confirmed that as with your [provider S] monies you wish to proceed with the purchase of an annuity with a tax free lump sum"*. It also said that it believed option 2a was the applicable option. This option was for an annual single life pension of £347.28 payable monthly in advance, guaranteed 5 years, with a TFC sum of £1,983.37.

BWP said that if this was the correct option for Mr P, he should complete the payment instruction form accordingly. But that if he wanted to include a spouse's pension, he should choose Option 2b.

The letter also referred to the recommendation the adviser said he'd made in his letter dated 19 July 2006. It said this included the "reasons why" the annuity was going to be set up. And alternative options that were available for the provider L monies. It asked Mr P to sign and return the attached copy of the letter to confirm his understanding and agreement to the comments made. It also noted that a number of product and service documents had been included for Mr P to read and acknowledge.

On 9 August 2006, Mr P told BWP he wanted to take Option 2a with provider L. And on 25 August 2006, Mr P told BWP: *"You have appeared to [have] covered all of my requirements exactly as I have requested"*.

On 20 September 2006, provider L wrote to BWP. It said that Mr P's annuity was now in payment. It noted that the full fund had been £7,977.77. And that an annual single life level annuity of £348.60, payable monthly in advance and guaranteed for five years had been set up. With a TFC sum of £1,994.44 also being paid.

Mr P complained to BWP, through his CMC, on 5 October 2022. He thought the provider L annuity had been mis-sold. And that he should've been advised to take out an enhanced annuity instead as he had a number of medical conditions and was an ex-smoker. He also said that BWP hadn't advised him to consider the OMO, to ensure that he was offered the best annuity rate.

BWP issued its final response to the complaint on 17 October 2022. It didn't think it had done anything wrong. It said that both the OMO and the potential for an enhanced impaired health annuity were considered. But that the relatively low size of the fund available to buy the was well below the minimum accepted. It also said that it had provided Mr P with full details of all the annuity options, including the OMO in its 7 August 2006 letter.

Mr P didn't agree with BWP's response. So he brought his complaint to this service through his CMC in January 2023.

Mr P made an amendment to his initial complaint to BWP, through his CMC, on 8 March 2023. He felt that BWP hadn't advised him that he could've invested his fund in a standard investment while still taking an income under a flexi-access drawdown arrangement. He felt that such an arrangement would've been more suited to his needs compared to the annuity it had advised him to take.

Mr P also felt that BWP's advice should've considered the impact of inflation on his level annuity. And that given how low annuity rates had been at the time of the advice, he shouldn't have been advised to take one out. Mr P also felt that he'd forfeited the potential death benefits available under his existing arrangements. And that BWP hadn't adequately explained this to him.

BWP issued a further final response letter to the amended complaint on 22 March 2023. It still didn't think it had done anything wrong. It said that a flexi-access drawdown wasn't available until 2015. It also said that it did consider adding the funds to Mr P's existing drawdown plan with provider G. But that this wasn't an option due to the low fund value. It said Mr P was aware of this. BWP also said that given the low fund value, the only real option had been to take an annuity with provider L. And that Mr P had decided to go for this as it provided the highest income from the start.

In April 2023, our investigator considered whether the complaint had been brought to this service in time. Mr P said he wasn't previously aware he could complain. But that he saw something on the internet which prompted him to instruct someone to look into the annuity.

BWP said Mr P had signed a Letter of Authority (LOA) relating to pension advice for a different CMC from the one who was representing him now on 20 March 2020. It felt that this showed that Mr P had considered the suitability of his pension annuity before his complaint in 2022.

Our investigator felt that Mr P's complaint had come to this service on 29 September 2022, which was within three years of him becoming aware of any issues in March 2020. BWP agreed with our investigator. And said it understood that she would now investigate the merits of Mr P's complaint.

Our investigator felt that BWP hadn't addressed the forfeited death benefits aspect of the

updated complaint. She said that Mr P felt that he'd forfeited any death benefits that were available under his existing arrangements and such benefits would've been likely to reduce his annuity rate, but this BWP hadn't adequately explained this. She asked BWP to comment on this point.

BWP said that at the time of the advice, Mr P's objective had been to take income from his pension to top up his part time earnings. He'd reached retirement age under the provider L plan. It said that while he did have the option to defer taking his benefits, this wouldn't have achieved his objective. And that the only other option offered by the provider L plan was to purchase an annuity. It said that all of Mr P's other pension benefits were in capped drawdown with the associated death benefits available. BWP also said that most annuity providers hadn't offered terms on such a low purchase price at the time.

Mr P's CMC said that Mr P would've had access to capped drawdown if he hadn't opted to take an annuity. And this would've provided his beneficiaries access to death benefits on any residual funds. It said that BWP had assessed whether this pension could've been transferred to Mr P's existing capped drawdown arrangement with provider G, but that the transfer value was too low. But it said that the adviser could've assessed other providers who would accept the funds.

Our investigator didn't think the complaint should be upheld. She wasn't persuaded that BWP hadn't considered Mr P's health at the time of the advice. She said the adviser had a responsibility to ensure that his recommendation was suitable for Mr P's circumstances. And she felt that BWP's advice had been suitable.

Mr P didn't agree with our investigator. He made the following points through his CMC:

- He didn't consider the fact that he'd completed an Enhanced Annuity Medical Questionnaire in 2001 to be relevant to this complaint. He didn't feel he should be expected to have remembered completing this. Mr P felt that BWP hadn't adequately assessed his circumstances and therefore its advice had been negligent.
- Mr P felt that BWP's comments that an enhanced annuity hadn't been an option because the majority of providers wouldn't have offered it due to the low fund value showed that it hadn't looked into whether he could've obtained an enhanced annuity from somewhere given his health conditions. He said he'd had a health issue at the time of the advice that would've meant he was eligible for an enhanced annuity.
- He also felt that BWP hadn't reviewed the whole market to see whether or not a new capped drawdown with a different provider could've been set up.

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

Having done so, I'm not going to uphold it for largely the same reasons as our investigator. I know my decision will be disappointing. I'll explain the reasons for it.

I first considered the regulation that BWP needed to follow when it advised Mr P in late 2005/2006.

#### *Regulation at the time of the advice*

The regulator set out its Conduct of Business (COB) rules in its handbook. COB 5.3.5(1) said that the advice had to be suitable. But didn't define suitability. But it was generally understood that suitability meant ensuring that the advice met the consumer's demands and needs, based on an analysis of their circumstances at the time.

COB 5.3.5(3) explicitly referred to the need to base advice on the facts disclosed by the client and other relevant facts of which the business reasonably should be aware. And COB 5.3.14 and 16 said that the suitability letter should take into account the consumer's personal and financial circumstances.

So BWP had a responsibility to ensure its recommendation was suitable for Mr P's objectives and circumstances at the time of the advice.

In Mr P's original complaint, he felt that the provider L annuity had been mis-sold. And that he should've been advised to take out an enhanced annuity instead. He had a number of medical conditions and was an ex-smoker. He also doesn't think that BWP advised him to consider the OMO.

I've considered these complaints within the regulatory framework at the time. I've first considered whether Mr P should've been advised to take out an enhanced annuity instead of the provider L annuity.

*Should BWP have recommended an enhanced annuity?*

BWP said it had considered the possibility of an enhanced annuity at the time of the advice. But that it hadn't completed a medical questionnaire to assess Mr P's eligibility for an enhanced annuity as it considered the funds available were well below the minimum accepted.

BWP said that majority of annuity providers wouldn't have offered terms on such a low purchase price. And that it had discussed this with Mr P, who'd then decided to take the annuity offered by provider L. It also said that Mr P was aware of the enhanced annuity option, as he'd completed an enhanced annuity questionnaire in 2001.

Mr P didn't feel he should be expected to have remembered completing an enhanced annuity questionnaire five years before the 2006 advice. And that BWP hadn't adequately assessed his circumstances. Therefore he felt its advice had been negligent.

I can understand why Mr P doesn't think his completion of a form in 2001 is directly relevant to the advice in 2006. I agree that I wouldn't necessarily expect him to remember having done so five years later.

But from what I've seen, BWP did consider Mr P's personal and financial circumstances at the time of the advice, including his health. I say this because the evidence shows that Mr P's health was discussed in both 2005 and 2006. Both the meeting note from November 2005, and the retirement options review and questionnaire from July 2006 recorded that Mr P was in good health. And the July 2006 questionnaire recorded that he was a non-smoker, with no possible known future changes to his health. I've seen no evidence that Mr P told BWP at the time of the advice that he had health conditions, or was a former smoker.

Therefore I consider that BWP did consider Mr P's health at the time of the advice. And nothing Mr P told it at the time indicated that he might've been eligible for an enhanced annuity. And while BWP didn't complete a medical questionnaire at the time of the advice, I'm satisfied that it did enough to establish Mr P's state of health and therefore his possible eligibility for an enhanced annuity. I'm also not persuaded, given the lack of enhanced

annuity providers in the market for small funds at the time, that Mr P would've been able to secure an enhanced annuity with such a small fund, even if a his health had been assessed through a medical questionnaire.

I next considered whether BWP advised him to consider the OMO.

*Did BWP advise Mr P to consider the OMO?*

Mr P doesn't consider that BWP advised him to consider the OMO.

The February 2006 letter from provider L provided an estimated OMO value. And said that Mr P didn't have to buy his annuity with it.

The 18 July 2006 retirement pack for Mr P from provider L included a number of annuity options. Option 3a and 3b were options to buy an annuity using the OMO.

Page 10 of this pack explain what the OMO was. It said the following:

*"You do not have to buy your pension with [provider L], and you are free to choose to buy your benefits with another pension provider. This is called the Open Market Option. We will, at your request, pay the Open Market Option to any approved UK pension provider. This value is shown on your illustration and is the same whoever you decide to buy your benefits with."*

*Different pension providers can offer different types of annuity to suit individual circumstances. Not all pension providers offer the best rates in all instances, and by choosing a different provider you may be able to buy a bigger income".*

The handwritten meeting notes from 27 July 2006 stated that the adviser had explained that he wouldn't be considering the OMO due to the small fund size. And said that Mr P had been: "OK with this".

From what I've seen, I'm satisfied that BWP provided Mr P with sufficient information for him to have considered the OMO. So I don't agree that BWP had failed to advise him on this point.

I next considered whether the annuity with provider L had been mis-sold.

*Was the annuity with provider L mis-sold?*

Mr P thinks that his annuity with provider L was mis-sold. In his follow-up complaint to BWP, he also said that it should've considered, and adequately explained to him, the impact of inflation on the level annuity he purchased. And that given how low annuity rates had been at the time of the advice, he shouldn't have been advised to take one out.

From what I've seen, BWP had carried out periodic reviews with Mr P about the level of income he needed and the possibility of varying this to suit his needs from at least 2001. And when Mr P met with BWP in November 2005, it noted that Mr P had no income at the time. So it suggested steps he could take to increase his income to match his needs.

Mr P considered BWP's recommendation, and his response to it was recorded in a note at the time as: *"this was the most appropriate course of action and would give him some breathing space"*.

The July 2006 meeting note also recorded that Mr P wanted to maximise his income. And

that he: *“needed the money now”*. BWP also spoke to Mr P on 1 August 2006. The phone note recorded that he’d confirmed he needed the maximum income.

BWP then reconfirmed with Mr P what option he wanted to take. And sent him a number of documents to confirm his understanding and agreement to the option he’d chosen. Mr P confirmed the option he wanted to take on 9 August 2006. And told BWP on 25 August 2006: *“You have appeared to [have] covered all of my requirements exactly as I have requested”*.

Regarding Mr P’s complaint about the impact of inflation, BWP’s 19 July 2006 letter to Mr P stated that the annuity couldn’t be changed after it was set up. And that if Mr P chose a level annuity, he should be aware that the value of the payments would be eroded by inflation. It also noted that Mr P wouldn’t be able to change his income once the annuity was set up.

Given this, I’m satisfied that BWP did adequately explain the impact of buying a level annuity at the time of the advice. I also consider that, as Mr P needed to maximise his income at the time, it was reasonable for him to opt for a level annuity. This would provide a higher starting pension than an increasing pension. So was better suited to meet his stated objectives at the time.

Regarding Mr P’s complaint about the low annuity rates at the time of the advice, I’m not persuaded that BWP could’ve known that rates would improve. And I’m satisfied that buying an annuity after taking the maximum TFC sum was a suitable option for Mr P given his circumstances at the time.

Therefore I’m satisfied that the annuity with provider L wasn’t mis-sold.

I next considered Mr P’s other additional complaint. He felt that he’d forfeited the potential death benefits available under his existing arrangements. And that BWP hadn’t adequately explained this to him.

*Did BWP adequately explain the impact on death benefits?*

Mr P felt that he might’ve had access to capped drawdown at the time of the advice, which would’ve provided his beneficiaries with access to death benefits on any residual funds. BWP said it hadn’t been possible to transfer funds to Mr P’s existing capped drawdown arrangement as the transfer value was too low.

BWP’s 19 July 2006 letter to Mr P stated that on his death, the benefits would be those he’d chosen at the outset. This letter also explained that there were several other options available to Mr P. These included a Short-Term Annuity and an Annuity Protection Lump Sum Death Benefit.

The letter said that a Short-Term annuity would allow Mr P to use all or part of his pension fund to buy a fixed term annuity lasting up to five years, with the rest of his fund remaining invested until another short-term annuity or lifetime annuity would be purchased. It also explained that the Annuity Protection Lump Sum Death Benefit was a way of ensuring that if Mr P died before age 75, his fund would be protected.

I’ve also not seen any documentary evidence which shows that it was important to Mr P that he preserve his existing death benefits. And I’m satisfied that the 19 July 2006 letter explained options which would’ve better preserved Mr P’s death benefits than the annuity he chose. So I’m satisfied that BWP did make Mr P aware what death benefits he would be getting.



In any event, I agree with our investigator that, given the relatively low size of fund used to purchase the annuity, Mr P's income needs during his retirement, and the 17 years that have passed since he purchased the annuity, there may've been very little left to pass on to his family on his death if he'd instead set up a second capped drawdown arrangement if that had been possible.

Therefore I'm satisfied that BWP did adequately explain the impact on death benefits of the annuity purchase.

I finally considered whether BWP should've reviewed the whole market to see whether a new capped drawdown with a different provider could've been set up.

*Could a new capped drawdown with a different provider have been set up?*

Mr P said that BWP hadn't reviewed the whole market to see whether or not a new capped drawdown could be set up.

BWP said that at the time of the advice, Mr P had around £85,000 in his existing capped drawdown. It said the existing plan was fit for purpose but wouldn't accept a low value transfer. And that as Mr P had no other guaranteed income in place, his objective for income had been met by the annuity.

As I noted above, even if it had been possible to invest the relatively small sum in a new drawdown arrangement, I'm satisfied that Mr P would've largely spent the funds over the time that's passed since 2006. And I'm also satisfied that Mr P was happy that the recommendation to take the maximum TFC and then to buy an annuity best met his income needs at the time. So I'm satisfied that BWP acted reasonably when it didn't assess whether there were any providers who could've been used to set up a new capped drawdown for Mr P at the time of the advice.

Overall, I consider that BWP's advice was suitable. And that the annuity wasn't mis-sold. Therefore I don't uphold the complaint.

### **My final decision**

For the reasons set out above, I don't uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 28 August 2023.

Jo Occleshaw  
**Ombudsman**