DRN-3866615

The complaint

Mr M 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 self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a 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 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 M's employer would be set up – the BSPS2.

Mr M met with MWM in August and September 2017 to discuss his pension and retirement needs. He was also concerned about the situation with his DB scheme.

MWM completed a fact-find to gather information about Mr M's circumstances and objectives. This showed that he was 51 years old and in good health. He was married with three children one of which was still financially dependent. They owned their home which was valued at £285,000, it had an outstanding mortgage that had 14 years left to run. The property also had a second charge loan that had ten years left to run. Mr and Mrs M had no savings or investments.

MWM also carried out an assessment of Mr M's attitude to risk, which it said was two on a scale of one to five or 'cautious to moderate'.

In respect of Mr M's pension arrangements Mr M had received a cash equivalent transfer value ('CETV') from the BSPS in September 2017. This showed that he had just under 30 years service in the BSPS. He was entitled to a pension of about £18,000 at the date of leaving the scheme. The CETV was about £446,300. Mr M had also joined his employers new defined contribution ('DC') scheme. He was contributing 6% of his salary into this and his employer was contributing 10%. This had a current value of about £6,800.

On 20 September 2017, MWM advised Mr M to transfer his pension benefits into a SIPP and invest the proceeds in funds that it said matched his attitude to risk. The suitability report said the reasons for this recommendation were that Mr M wanted some flexibility in how he took his benefits so he could potentially retire at age 60. Although he would continue to work if he needed to or downsize their property to repay any outstanding debt. He was concerned about the future viability of the DB scheme.

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 choice was 11 December (and was later extended to 22 December 2017).

Mr M complained in 2022 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 SIPP. And so, he shouldn’t have been advised to transfer.

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

Mr M referred his complaint to the Financial Ombudsman Service. An Investigator upheld the complaint and recommended that MWM pay compensation. He thought that Mr M didn’t need to transfer at the time. This was largely because he wasn’t clear about what he needed at retirement and he had some flexibility about how and when he would take his pension benefits. So, it wasn’t right to advise him to make a transfer that would mean he was financially worse off due to the advice.

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 M and it complied with the regulations at the time. Mr M 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.

Mr M’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 they made some further comment on the proposed compensation and the changes the FCA was making to this. And that Mr M would have retired at age 65.

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. I understand it is in the process of starting to do this calculation.

That said both parties to the complaint, at some points, 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.

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 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 M's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests. I'll explain why.

- MWM was required to carry out a transfer value analysis ('TVAS') report by the regulator. This calculated the critical yield which was how much Mr M's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme. It showed this was 9.14% to match the full pension he'd have been entitled to under the scheme at age 65. The same calculation at his age 60 was 14.61%.

- To match the full pension the PPF would've paid from 65 the critical yield was 5.55% and to match the tax-free cash and reduced pension the PPF would've offered, it was 5.15%. The same calculations at his age 60 were 6.99% and 6.46%.

- MWM has provided evidence that it produced a number of TVAS' based on various scenarios and investment links. Some are based on the BSPS but MWM has provided a TVAS from after the date of the suitability letter which is based on the BSPS2. And it's not entirely clear which figures Mr M actually saw. But there isn't a great deal of difference in the calculations anyway and the percentages above (some of which were in the suitability letter) look to be broadly representative of the situation for both the BSPS, BSPS2 and PPF.

- The discount rate, which represents a reasonable assumption about future growth, was 4.1% for 13 years to retirement, and 3.5% for eight years in this case. And given this, and Mr M's recorded attitude to risk, and the regulator's lower and middle projection rates of 2% and 5%, I think Mr M was always likely to receive pension benefits, from age 60 and 65 of a lower value that those he'd have been entitled to under the BSPS2 or the PPF by transferring and investing in line with that attitude to risk.

- And this was recognised at the time of sale when the suitability report said that *'This, in our opinion, is a higher critical yield than we would like given your attitude to risk and may mean that your fund, after transfer, may not reach the levels required to match your scheme benefits.'* And the report gave warnings that Mr M may not be able to secure the same, or same type of income, as the DB scheme would have provided.

- MWM said the transfer was suitable for Mr M as it allowed him to potentially retire early and to access his pension flexibly. It is true to say the personal arrangement could be more flexible, as from the DB scheme he 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 SIPP.

- Mr M said that he wanted to retire between ages 60 and 65. And he wanted between £18,000 and £20,000 a year, or £1,500 a month net, as income. Mr M said that he was considering partially retiring and taking on some part time work in the future. Even with a different employer or in a different industry. And he needed to think about making sure his mortgage debts were repaid.

- The documentation I've seen shows that Mr M would receive about £25,700 from the BSPS2 at age 65, or £22,600 at age 60. So, his current provision met his income needs at both of these ages. But this was complicated by the amounts that he owed on his property as if he took tax-free cash from his DB scheme to repay this, then the income he received would be lower. And this meant that he wasn't yet certain when he would retire.

- Mr M was 51 at the time of the advice. And, because of the factors I've mentioned above, it looks like his full retirement would be at least ten years in the future. I think it's reasonable to say, based on what I've seen, that he didn't have a properly defined retirement plan. This is understandable given his circumstances, he needed to be closer to stopping work to fully consider how, and when, he wanted to retire and ensure his mortgages were repaid. So, this really wasn't the right time to be advising Mr M to make an irrevocable decision to alter his retirement plans at potentially a significant cost to him

- And if MWM had advised Mr M 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.

- And Mr M would also have his DC scheme benefits which were estimated to be around £60,000 at 65. This would provide Mr M with flexibility – he wasn't committed to taking the benefits in a set way. Mr M 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 M retained his DB pension, this combined with his new workplace pension, would have likely given him some of the flexibility he needed, if that was what he ultimately decided to do.

- So, I don't think it was a suitable recommendation for Mr M 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. Overall, I'm not persuaded that Mr M needed to transfer to increase the flexibility in how he took his pension benefits at this time.

- MWM said Mr M was interested in the improved death benefits a transfer offered to his family by way of alternative death benefits. But the priority here was to advise Mr M about what was best for his retirement. And the existing scheme offered death benefits, by way of a spouse's pension, that could've been valuable to his family in the event of his death.

- 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 M drew in his lifetime. And so may not have provided the legacy that Mr M may have thought it would.

- If Mr M had wanted to leave a legacy for his family, MWM could've explored life insurance as an alternative. 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.

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

- I think Mr M's desire for control over how his pension was invested was overstated. I can't see that he 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 M – it was simply a consequence of transferring away from his DB scheme.

- Mr M may have legitimately held concerns about how his employer had handled his pension and the prospect of entering the PPF. And it was documented at the time of sale that he was 'adamant' that he wanted to transfer his benefits away from his employer. 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 M with guaranteed income and the option of accessing tax-free cash. Mr M 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 interest.

Overall, I can't see persuasive reasons why it was clearly in Mr M's best interest to give up his DB benefits and transfer them to a SIPP. And I also haven't seen anything to persuade me that Mr M 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 M received from MWM was unsuitable for him.

Our Investigator recommended that MWM also pay Mr M £300 for the distress caused by the unsuitable advice. Mr M said that finding out that he may be worse off in retirement has caused him understandable stress and anxiety. I don't doubt that Mr M 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 MWM to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr M would most likely have remained in the occupational pension scheme and 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 M and the Financial Ombudsman Service upon completion of the calculation together with supporting evidence of what MWM based the inputs into the calculator on.

For clarity, Mr M 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, 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 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 M's acceptance of my final 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 M redress as a cash lump sum payment,
- explain to Mr M 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 M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts MWM's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr M 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 M's end of year tax position.

Redress paid to Mr M as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, MWM may make a notional deduction to cash lump sum payments to take account of tax that Mr Ms 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 M'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 M's representative's point regarding the 15% deduction from any redress payable, to take into account the tax Mr M 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 M 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 M for the impact of the unsuitable advice he received.

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

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, I may recommend that the Mulberry Wealth Management Limited pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Mulberry Wealth Management Limited to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that MWM pays Mr M the balance.

If Mr M 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 M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 5 January 2024.

Andy Burlinson
Ombudsman