DRN-3502669

The complaint

Mrs B complains that Chris Binns Wealth Management Ltd, trading as Model Wealth Management (MWM), gave advice in connection with her employer's pension scheme which led her to opt out and transfer the value of those benefits to a new pension arrangement. Mrs B says she's lost out financially as a result of having opted out and transferred.

What happened

I've considered Mrs B's complaint before. I issued a provisional decision on 18 February 2022 and a second provisional decision on 20 April 2022. I've recapped here what I said in my second provisional decision about the background leading up to Mrs B's complaint; our investigation; my provisional findings (set out in my provisional decision dated 18 February 2022); the responses to that provisional decision; and what I'd further provisionally decided and why.

'*Mrs B had worked for her employer since 1990 and was a member of its final salary occupational pension scheme (OPS). She met with MWM's adviser in early 2018 following a recommendation from colleagues. But things were put on hold due to, amongst other things, Mrs B's ill health. She met with MWM again in September 2018. Mrs B would turn 54 that month. Due to a change in her family circumstances and continued poor health, Mrs B was considering retiring early.*

What was said isn't agreed. According to Mrs B, MWM's adviser recommended that she transfer out of the OPS. There's no written recommendation but Mrs B says MWM's adviser said transferring was a 'no brainer'. MWM's adviser denies saying that or anything else which might be construed as advice to transfer. Mrs B says she understood MWM's adviser would be making a formal recommendation and that a third party would undertake compliance checks. MWM says it introduced Mrs B to a separate business (who I'll call Firm B) for pension transfer advice. But, as referred to below, MWM accepts there was confusion.

Mrs B says MWM's adviser told her she'd need to put in writing her reasons for wanting to transfer. I've seen Mrs B's email of 6 September 2018 to MWM. She set out what she was thinking of writing about why she wanted to transfer out of the OPS. In summary, Mrs B referred to flexibility, being able to retire early and the fact that she wasn't in good health, better death benefits and to the financial qualifications she held for pensions and investments. She asked MWM's adviser to say if she needed to say less or more.

I've also seen MWM's adviser's email in response, saying it was 'exactly the kind of personalised reasons we (and the FCA) like to see and all perfectly rational thoughts too.' He went on to suggest that Mrs B 'beef up' the reasons why she wanted a higher income in the early years – for example, for extra holidays, changing her car, home improvements, and the likely costs. And say why death benefits were important and who'd benefit. Mrs B added in details about her medical condition and how it affected her; her travel plans; her wish to buy a motor home (at a cost of £30,000 to £35,000); who'd benefit from her pension fund on death and her husband's views about the loss of a spouse's pension if Mrs B died first.

Mrs B said she tried, without success, to get a cash equivalent transfer value (CETV) from

the OPS. She emailed MWM's adviser on 9 October 2018. He replied the same day, saying she had to become a deferred member of the OPS to request a CETV. He attached a form which Mrs B needed to complete if she wanted to opt out and explained that it should be returned to the OPS with a request that a CETV be sent. He said the CETV would be guaranteed for three months and all the paperwork could be completed and sent off. He added that there was 'no huge pressure to get this done before the 22nd. If after that meeting you still want to leave the scheme then as long as you are relatively swift in your actions there's no reason to suggest you won't get it back to them before the month is out.' That was a reference to what the adviser had said earlier in his email about becoming a deferred member on the last day of the month in which the opt out form was received by the OPS.

Mrs B met with the adviser on 22 October 2018. I think there'd been earlier meetings too. I've seen that the leavers' form was signed by Mrs B on 22 October 2018. She became a deferred member of the OPS on 30 November 2018. She was given a CETV of £441,441.13, guaranteed for three months, on 18 December 2018.

Mrs B's first contact with Firm B was in early January 2019. Firm B emailed her saying MWM's adviser had asked it to review her OPS. Firm B said it would normally call to discuss why Mrs B had opted out of the OPS but it understood she was undergoing surgery that day (which was the case). Firm B asked Mrs B to confirm that the decision to opt out was hers and she'd not had advice to do so. Firm B quoted what Mrs B had said about why she wanted to transfer – as Mrs B had set out in her email of 6 September 2018 and as amended after MWM's adviser's input. Mrs B emailed Firm B on 5 January 2019. Amongst other things she said: 'This is my decision and I didn't receive any advice in relation to my decision to opt out. I have decided to opt out of my own volition and would now like to seek advice in relation to the transfer of my deferred [OPS].'

Firm B issued a pension transfer report on 11 January 2019. Mrs B then realised the advice to transfer was being provided by Firm B and not, as she'd understood, MWM. Mrs B complained to MWM.

MWM responded to Mrs B's complaint and upheld it. MWM's adviser said:

- *The service you have received throughout the latter part of the advice process has fallen massively short of the high expectations I set myself and there really is no excuse*
- *MWM's ability to introduce clients to [Firm B] was only agreed in late October 2018*
- *After reviewing the information kindly supplied by yourself and looking at back over the timeline and correspondence, we fully uphold your complaint.*

MWM offered Mrs B £1,000 for stress and inconvenience and £5,457 to cover the cost of the advice provided by a new firm to complete the transfer. Mrs B accepted that offer. She then consulted another firm (who I'll call Firm C) and, following advice from Firm C, she completed a transfer of her deferred OPS benefits.

Our investigation

Mrs B later reflected on what had happened and referred her complaint to us. She said she'd become concerned that transferring her OPS benefits hadn't been a good idea. She said she'd been told by MWM's adviser that transferring was a 'no brainer'. She trusted him. But, without telling her, he outsourced her business to Firm B. She'd seen a new adviser as soon as possible after she'd realised what had happened as the CETV was by then only valid for less than two months. That adviser said he'd have advised her to stay in the OPS. She said she wouldn't have gone ahead with the transfer but for MWM's adviser's input. She was uncertain if she could complain as she'd accepted the offer for outsourcing her to Firm B.

We contacted MWM about Mrs B's complaint. MWM's adviser said at no time had he told Mrs B that it was a 'no brainer to do the transfer'. He didn't use that sort of language and he hadn't advised Mrs B to transfer. Advice had been given by Firm B and Mrs B had then taken advice from another firm. In her email of 5 January 2019 she clearly stated she'd made the decision (to leave the OPS) herself and without advice. If she later decided to transfer out of the OPS that had nothing to do with MWM.

Her original complaint, which it had upheld, centred on the fact that MWM's adviser hadn't provided the pension transfer advice and had introduced her to Firm B. Her new complaint was that MWM had provided advice to her in respect of the pension transfer, which was the exact opposite of what she'd complained about initially. What she was alleging directly contradicted her original complaint and what she'd said in her email to Firm B.

Mrs B made some further comments. She said that when she first contacted MWM she had quite severe health problems and family issues too. The thought of being able to retire early was very appealing. And the adviser mentioned recent changes to the OPS which meant less generous early retirement terms. He said transfers were under scrutiny and he'd introduced a sense check with a third party compliance team. He told her the sort of things to write and then to 'beef it up'. He said the compliance team were happy with the transfer which was his view too. Mrs B said that felt like advice to transfer.

The adviser said she'd need to come out of the OPS. She asked if she could have the transfer recommendation report first but was told she'd need to leave the OPS before any report could be produced. A meeting was arranged for 22 October 2018. She'd messaged the OPS administrators about the process for becoming a deferred member but she hadn't heard back. The adviser then sent her the leavers form himself. At the meeting on 22 October 2018 he reiterated that transferring was the right thing to do. The OPS administrators confirmed on 19 December 2018 that she was a deferred member. When she chased up the recommendation report the following day, the adviser said it would come from the compliance team.

She was then due to have another trial procedure to try to reduce her pain. On the day of the operation (3 January 2019) she received Firm B's email. She was in pain, on medication and replied to confirm it was her decision to opt out. She now doesn't think she was in any fit state to be responding to important emails. If she'd had a conversation with Firm B, she'd have made it clear that her decision was based on what MWM's adviser had said.

When she received the report on 11 January 2019 she realised that Firm B was going to do the transfer and not MWM's adviser. She was unhappy as she hadn't requested advice from Firm B. When she contacted MWM's adviser he told her he'd reached capacity as to the number of clients he could service properly. But she'd only transferred because he'd agreed to look after her as part of his small client list. He said it was two months before the CETV expired which was plenty of time to find another adviser and complete the transfer. By the time he sent his final response letter, the trial procedure hadn't been successful. She was in pain and depressed and just accepted the offer. But, over the next few months she reviewed things and was angry that MWM's adviser had led her to becoming a deferred member with promises about a bespoke service.
Our investigator issued his view on 17 July 2020. He said the issue to determine was if MWM did give advice and, if so, did it persuade Mrs B to transfer her pension. He said that although Mrs B's original complaint centred more on the fact that she was unaware MWM was only acting as an introducer, we could, under our inquisitorial remit, consider the wider complaint about the advice MWM had allegedly provided.

In summary he said MWM hadn't given Mrs B regulated advice to transfer – advice was

given by another firm who Mrs B had approached later to complete the transfer. MWM had referred to Firm B as its 'compliance team'. That was wrong and misleading. MWM hadn't made it clear that Firm B was going to provide the advice. And MWM had told Mrs B it was a good idea to transfer, that she needed to become a deferred member to get a CETV and had then misled her about which business was making the recommendation before she'd then stopped the transfer process and complained to MWM.

But the investigator thought the £1,000 MWM had paid for the trouble and upset Mrs B had been caused plus covering the cost of further advice was a fair and reasonable resolution. Although there'd been failings on MWM's part, after its final response was issued on 14 February 2019 Mrs B still had options. As a deferred member, she was still entitled to receive a final salary pension based on the service she'd already accrued. And she still could've applied for early ill heath retirement. She had no need to transfer out but she chose to do so despite a new adviser confirming all the options available to her. The investigator acknowledged that it had been a stressful time for Mrs B, particularly taking into account her health and other issues. But the resolution MWM had offered, which included paying for new advice, enabled Mrs B to make an informed decision based on independent advice, whether to transfer.

Mrs B didn't accept the investigator's view. She said she wouldn't have become a deferred member had MWM's adviser not advised her that it was the right and sensible thing to do in her circumstances – she was ill and she'd be able to afford to retire early with the life changing sum offered by the OPS. Had she not spoken to MWM's adviser she'd have remained in the OPS. The redress offered wasn't enough as MWM's adviser's impact was far bigger than just misleading her about who was going to do the transfer.

Our investigator wasn't persuaded to change his view. He said MWM's adviser hadn't recommended the transfer. Although Mrs B's conversations with him seemed to confirm he thought she should transfer, he was acting as an introducer to another firm. He'd told Mrs B to become a deferred member and had facilitated a transfer out of the OPS. But Mrs B could've remained a deferred member and kept the benefits she'd accrued, even though she'd lost the option to make further contributions. It was up to the new adviser to look at everything and make an appropriate recommendation. He could've advised Mrs B to remain in the OPS, see if she could rejoin or take early retirement on ill health grounds.

Because agreement couldn't be reached, the complaint was referred to me. I issued a provisional decision on 18 February 2022. I've summarised below my provisional findings.

<u>My provisional findings</u>

I acknowledged that what had happened wasn't agreed. In particular whether MWM's adviser had told Mrs B she should transfer out of the OPS so she could access her pension fund and retire early and if he'd told her she needed to opt out of the OPS to get a CETV – the adviser denies telling Mrs B she should transfer and says opting out was Mrs B's own decision. I explained that I have to come to my conclusions on the basis of such evidence as I've seen, including what the parties say about what happened. But, where the evidence is incomplete, inconclusive, or contradictory, I have to reach my decision on the balance of probabilities – in other words, what I think is most likely to have happened in the light of all the available evidence and the wider circumstances.

If, as Mrs B says, MWM's adviser said that transferring out of the OPS was a 'no brainer', I thought that would amount to giving regulated advice (on the conversion or transfer of (safeguarded) pension benefits. The Perimeter Guidance Manual (PERG) in the Financial Conduct Authority's (FCA) Handbook sets out examples (see PERG 12, Annex1) of what is and what is not advising on the conversion or transfer of pension benefits. An initial triage

conversation won't be advice. But a clear statement that Mrs B would be better off by transferring out to a personal pension will be advice. Advice doesn't have to be in writing and can be given orally. So even a somewhat informal expression of opinion will be advice – even if that advice is later confirmed more formally and by a different firm who did have the requisite permissions to advise on final salary pension transfers. Which I didn't think MWM's adviser did. But that's a regulatory matter and doesn't mean that whatever the adviser said couldn't be regulated advice.

I went on to say that, from what I'd seen, MWM's adviser did advise Mrs B that she should transfer out of the OPS. I think the email Mrs B sent to the adviser on 6 September 2018 and the adviser's reply supported what Mrs B had said. I didn't see why there'd have been that sort of exchange unless there'd been a conversation about Mrs B transferring out of the OPS and MWM's adviser had told her that she'd need to give some fairly cogent reasons for wanting to do that. I couldn't see she'd have concluded on her own that's what she wanted to do. The obvious inference was that the MWM's adviser told Mrs B she should transfer and started to put things in place for that to happen.

I also thought what Mrs B had said about MWM's adviser saying she'd need to leave the OPS first and then request a CETV was borne out by the email exchange on 9 October 2018 and the fact that the adviser supplied the form Mrs B needed to complete to opt out of the OPS. That form was signed on 22 October 2018, the date of Mrs B's meeting with MWM's adviser. That would suggest the form had been completed at the meeting and with the adviser's help. I noted that the adviser had said, in his email, that Mrs B didn't need to complete the form before the meeting and if, after the meeting, she still wanted to leave the OPS, she'd be able to get the form in before the end of the month. I thought that indicated that it would be discussed at the meeting. I couldn't see that Mrs B had decided on her own to opt out of the OPS.

I acknowledged that Mrs B did say in her email that she hadn't been advised in connection with opting out and it had been her own decision to do that. But I thought she'd have known she needed to be careful what she said and that she wouldn't have wanted anything to jeopardise the transfer.

I considered Mrs B's financial qualifications but I thought pensions was a specialist area and outside Mrs B's knowledge and experience. I didn't think she'd have made her own decision and that she'd relied on MWM's adviser.

I said I was satisfied MWM's adviser had advised Mrs B to opt out so that she could get a CETV and then transfer out of the OPS into a personal pension arrangement. I went on to explain why I considered that advice was unsuitable. That's still my view for the reasons I gave which I've repeated here.

As a member of a final salary scheme Mrs B's benefits weren't dependent on investment returns but on her pensionable service and salary and were in effect guaranteed. Mrs B wasn't leaving her employment but her future service with her employer, once she'd opted out, wouldn't be pensionable and so she wouldn't accrue any further benefits in the OPS. That meant she lost out on the benefits she'd have accrued between when she opted out and when she left her employment, whether that was on reaching the OPS normal retirement age (which I think was 62 in Mrs B's case) or earlier. I thought Mrs B was still employed although I understand she is currently on long term sick leave. I mentioned that might have impacted on her benefits if she'd have remained in the OPS. Depending on the OPS rules and if Mrs B has continued to be paid, her service might have ceased to be pensionable.

That aside, MWM's adviser was aware of Mrs B's long standing health problems. And that

she wanted to retire early (or that she might be forced to give up work because of poor health). Mrs B had said she's been told, if she'd remained an active member of the OPS, she'd have been able to seek early retirement on ill health grounds. I think MWM's adviser should've been aware that might be a viable option for Mrs B. She she'd said he was aware but told her the terms had changed and were less generous. That might have been true. But that doesn't mean that option could be ruled out.

Early retirement on ill health grounds will be subject to certain criteria and is usually at the trustees' discretion. So it wasn't certain that Mrs B would've been granted ill heath early retirement. And I wasn't sure when she might have retired or what the difference in money terms (if any) would've been between what she'd have got if the trustees did consent to ill health early retirement and what she'd have been entitled to if she'd taken early retirement but not on ill health grounds. But, by opting out, she lost the opportunity to apply for ill health early retirement. I thought that was a reason in itself for MWM's adviser not to advise Mrs B to opt out.

When MWM's adviser told Mrs B that she needed to opt out in order to get a CETV and then transfer, he didn't know what CETV Mrs B would be offered. He couldn't know if it represented good value for money and if it would allow Mrs B to retire earlier than she might have been able to, had she remained a member of the OPS. And, as he wasn't a pension transfer specialist, he couldn't have advised Mrs B about whether she should transfer in any event. I didn't see that she should've been advised to opt out. The documentation she was given by the OPS administrators made it clear that, if she did opt out, reinstatement wouldn't be possible. So there was no going back from a decision to opt out.

I thought Mrs B should've been advised to remain a member of the OPS until she wanted to stop working (or was forced to do so because of her health) and needed to start taking her pension benefits. She could then have considered all her options – early retirement whether on ill health grounds or not or getting a CETV with a view to transferring away to a personal pension arrangement. I thought it would've been possible for an adviser to get an indicative CETV from the OPS so that Mrs B's options could've been considered properly and advice given before she made any final decision.

Mrs B might say that opting out was the root cause of the damage that's been done – she opted out so that she could then transfer – and so MWM is responsible for any and all losses she's sustained in opting out of the OPS and subsequently transferring her deferred benefits to a personal pension arrangement. But I thought opting out of the OPS and then transferring were two separate and distinct events. Opting out meant that Mrs B became a deferred member of the OPS. As she was no longer an active member, she wouldn't accrue further service and benefits. But the benefits she'd accrued up to the date she opted out remained in the OPS and would be revalued in deferment – meaning that increases would apply between when Mrs B opted out and when she took her benefits from the OPS. Mrs B, although she'd become a deferred member, didn't have to go on to take the CETV she'd been given and transfer out of the OPS.

Mrs B had said she took further advice and that adviser said he wouldn't have advised her to opt out of the OPS. It was too late by then to change that – as I've said, reinstatement wasn't possible. So any new adviser wouldn't have been able to 'undo' the fact that she'd already opted out. Advice as to whether Mrs B should transfer out would focus on the benefits and options available to her as a deferred member of the OPS and those the new personal pension arrangement was likely to provide. There's a presumption (see Conduct of Business Sourcebook (COBS) 19.1.6G) that transferring won't be suitable. A firm recommending a transfer needs to show it's in the client's best interests, taking into account, amongst other things, the client's overall financial circumstances and their needs and objectives.

If Mrs B had any concerns about whether she should've been advised to transfer instead of remaining a deferred member, she'd need to take that up with the firm that gave the advice to transfer. My understanding is that wasn't Firm B but a new firm that Mrs B consulted (Firm C). I noted all Mrs B had said about how upset she was and why she wanted everything to be over and done with. But I still didn't think it would be fair to hold MWM responsible for the consequences of advice given by a different firm and assuming that Mrs B acted on that advice – I haven't seen it and it's possible that she transferred against advice. But MWM was responsible for the losses Mrs B has sustained as a result of opting out when she did and which meant Mrs B ceased accruing benefits in the OPS.

I also explained why I thought it was open to Mrs B to bring a further complaint. MWM had already upheld a complaint made by Mrs B and offered redress, which Mrs B accepted. MWM hadn't argued that Mrs B accepted its offer in full and final settlement and so she shouldn't be able to bring a further complaint. But, for completeness, I'd considered that anyway.

Initially Mrs B's concerns centred on the fact that MWM's adviser hadn't made it clear to her that the transfer advice would be given by Firm B. Mrs B accepted MWM's offer to pay for further advice and £1,000 for the distress and inconvenience she'd suffered. I agreed with the investigator that was fair enough, in so far as that complaint went. But Mrs B's current complaint was different. MWM's adviser seems to agree and says it's the opposite of the complaint she first made – that another firm was advising her instead of MWM, whereas she's now complaining about advice she says MWM gave.

So it wasn't the case that Mrs B is revisiting a complaint which has been settled with MWM. She's making a further and different complaint. Part of which is that, on advice from MWM's adviser, she opted out of the OPS. She'd already done that by the time Firm B got involved so there's no suggestion that Firm B gave her any advice about that. Whereas, for the reasons I've explained, I think MWM's adviser was responsible for Mrs B's decision to opt out. But I've taken into account that MWM paid Mrs B £1,000 for distress and inconvenience and I'm not making any further award for that in this complaint.

<u>Responses to my provisional decision</u>

MWM responded to my provisional decision initially on 2 March 2022. It said it fundamentally disagreed with my provisional findings and wanted to appeal to a senior ombudsman. MWM's main points were:

- *It was clear that Mrs B had provided additional information after 7 August 2020. The investigator had emailed MWM then, saying Mrs B disagreed with his findings. He attached some further information from Mrs B. He said she'd be providing some further comments, a copy of which would be provided. He added that he didn't think her response would change his view. We hadn't shared Mrs B's additional comments. MWM hadn't had an opportunity to review or challenge what she'd said. We hadn't been impartial and we'd failed to do what we said we would.*
- *MWM asked for sight of all the additional correspondence we'd received from Mrs B since 17 July 2020 (the date of the investigator's view) plus copies of any additional questions we'd raised or clarification we'd sought. MWM asked us to confirm, based on the additional correspondence we'd received since 17 July 2020, which elements of the extra information had led to the change in outcome.*
- *I'd said in my provisional decision that MWM's adviser had advised Mrs B to transfer out of the OPS. MWM had said that it had always been made it clear that, although when MWM met Mrs B she was an active member of the OPS, she later chose to become a deferred herself. MWM had explained the process and said that her objective for transferring would need to be documented and ideally should be*

verbatim as that would be used in the suitability report. There's nothing in the email exchange to suggest or confirm that the decision to opt out was on MWM's advice.

- *MWM suggested my independence was questionable as Mrs B had consistently made it seem as though she'd been preyed upon due to her illness and that she had limited knowledge of investment and pensions, despite her qualifications and her job. Her husband also has financial qualifications. He was present at all the meetings and could've guided Mrs B. I'd ignored the email on record which confirmed it was her own decision to opt out. She'd said she hadn't been in any fit state to respond to important emails, but her email didn't read as if that was the case.*
- *MWM sought confirmation that I wasn't holding it responsible for the transfer advice and that my (provisional) decision was only in respect of the loss of active service from the point she chose to opt out of the OPS.*

We provided MWM with the copies of the more recent correspondence from Mrs B and we apologised that we'd omitted to supply it earlier. We also explained about our two stage process and that an ombudsman may come to different conclusions to those reached by the investigator.

MWM responded further. It said it wanted to demonstrate that Mrs B's ability to be considered for an ill heath pension was intact long after any dialogue between MWM and Mrs B had ended. MWM isn't responsible for the fact that isn't now open to her. It was only when she went ahead with the OPS transfer advice that that was no longer an option. MWM also said that Mrs B had made her own decision to opt out of the OPS and without advice from MWM. I've summarised MWM's further comments:

- *Some points can't be contested as they're documented in the investigator's view. The investigator had said Mrs B had employed the services of another adviser to complete the transfer. And that MWM didn't provide regulated advice to transfer – the transfer advice was provided by another regulated firm. The investigator had noted that, as a deferred member, Mrs B was still entitled to a final salary pension based on the service she'd already accrued. And she could still have applied for early retirement on ill health grounds. She had no need to transfer out but she chose to, even though it seemed the new adviser had confirmed all the options open to her.*
- *MWM's offer, to pay for new advice, enabled Mrs B to make an informed decision based on independent advice whether to transfer out or not. That was important as MWM hadn't given Mrs B the advice to transfer out. The central question was at what stage did her options change irrevocably? She'd taken advice from Firm C and decided to transfer out of the OPS at some stage after 5 January 2019. The final decision making was between Mrs B and Firm C. It should've considered the potential for ill health benefits from the OPS. No liability for the loss of a potential ill health pension can rest with MWM and no redress for that can be imposed.*
- *MWM also referred to the investigator's email to Mrs B on 20 July 2020. He'd said that MWM hadn't recommended the transfer and he'd clarified his expectations of the advice Mrs B should've received from the new adviser and who should've investigated the early retirement options. It's entirely possible Mrs B could've obtained an ill health pension. The fact that the new adviser hadn't looked into that wasn't MWM's responsibility.*
- *MWM had fully accepted its shortcomings in providing an introduction to Firm B. And paid Mrs B compensation to cover the cost of the pension transfer advice she'd received from an unrelated firm of her own choosing. MWM had also paid compensation for distress and inconvenience. Mrs B had accepted what MWM had offered. If, as she now suggests, her ill health was severe and she was unable to make rational decisions, she could've remained a deferred member of the OPS and requested a new CETV at some future point.*

- *Mrs B's husband has financial qualifications and he was present during all the meetings. He'd have recognised the importance of the decisions Mrs B was making and could've advised her to take a step back and focus on her health. In any event, MWM can't be held liable for Mrs B's decision to act on pension transfer advice from an unrelated third party business.*
- *Mrs B had confirmed to Firm B that she'd made her own decision to opt out of the OPS and hadn't received advice to do so. Firm B had emailed Mrs B on 3 January 2019 setting out what she'd said about why she wanted to opt out of the OPS. Mrs B had replied two days later confirmed that the information Firm B had quoted was correct. That clear and documented email exchange can't be dismissed. What I'd said about why Mrs B may have said what she did was conjecture. And at odds with the explanation she'd given herself – that she wasn't in any fit state to be replying to important emails. Her email was 'chatty and conversational' and doesn't read like it's from someone who wasn't in a fit state to be making a decision – in fact the opposite.*
- *Mrs B's last meeting and her correspondence with MWM was in late 2018. The allegation, made some three years after Mrs B's dealings with MWM had ended (save in respect of emails in early 2019 about her original complaint) that MWM had said 'no-one ever got ill health retirement and that you would have to be literally on your deathbed to get it' was unfounded. MWM sympathised with Mrs B's health problems but she was still able to pursue ill health options from the OPS long after her communications with MWM had ceased. Firm C had facilitated the transfer from the OPS which had removed the options she'd had under the OPS.*
- *Ultimately MWM thought there were three questions:*
  Did MWM provide pension transfer advice to Mrs B?
  Did Mrs B receive advice to opt out of the OPS?
  Could Mrs B have secured anil heath pension from the OPS?
- *There was documented confirmation from this service that MWM did not give Mrs B the advice to transfer out. And an email exchange between Mrs B and a third party advice business (Firm B) in which Mrs B confirmed, in her own words: 'This is my decision and I didn't receive any advice in relation to my decision to opt out. I have decided to opt out of my own volition and would now like to seek advice in relation to the transfer of my deferred [OPS].' Firm C (not MWM) didn't appear to have considered the ill health pension option from the OPS. Therefore there is no incomplete, inconclusive or contradictory evidence to make a decision upon, only fact in written electronic format (in respect of the opt out) from Mrs B.*
- *MWM reiterated that, despite saying we would, we hadn't shared Mrs B's additional comments before I'd issued my provisional decision on 18 February 2022. And we'd given an extremely short deadline (11 March 2022) for comments. That was compounded because we didn't provide the additional information until 3 March 2022 even though we'd had it for at least three months. We hadn't responded to the request, in view of the change in outcome, to highlight what new evidence had led to that. And from what we'd supplied, no further meaningful evidence had been received. MWM suggested opinion had taken precedence over the facts, there'd been a lack of consistency and I wasn't acting as an independent, unbiased and impartial referee. Instead I'd taken the side of the consumer who, because of her profession, knew exactly what to say to try to reverse the original decision.*

At Mrs B's request we shared what MWM had said. She commented further and we'll share what she said with MWM. She strongly disputed that she'd manipulated the situation or that her work meant she'd have known what to say to get the investigator's view reversed. She said she'd only reiterated what she'd said during the initial investigation of her complaint – which boiled down to the fact that MWM's adviser had advised her to opt out of the OPS. In summary, she said:

- *MWM's adviser had continually told her it was a 'no brainer' to transfer given the high CETVs being paid. She referred to his email of 20 December 2018 which included the following: 'We ask for the suitability letter to be sent to you directly from our compliance team to you can clearly see that they have signed this off which hopefully gives you even more* ***comfort that it's not just me saying it's the right thing to do*** *…' (Mrs B's emphasis). And he'd continually stressed he was keeping his client base low so he could look after everyone individually and that he'd use his skill and knowledge to ensure the best possible return. He'd also sent her the opt out form.*
- *The adviser had spoken about the FCA's focus on pension transfer business and that any rationale had to be very strong. He told her the sort of thing to write and to 'beef up' what she'd originally said. She also had to say the decision to transfer was her own. But, as demonstrated by the email, her decision was based on his advice. MWM hadn't given her a suitability letter. Firm B did. But the advice was clearly based on discussions between her and MWM's adviser, not Firm B.*
- *About the email exchange, the email from Firm B was taken from the wording she'd prepared for MWM's adviser after he'd told her to 'beef up' her reasons for wanting to leave the OPS. He'd told her the type of things to say, given the FCA's scrutiny. He'd already told her that she had to tell his compliance firm that it was her decision to opt out of the OPS without advice. But realistically why would she have wanted to opt out of a final salary OPS without advice?*
- *Her job entails the review of mis sold investments such as stocks and shares ISAs. She doesn't deal with pension complaints. She had to do the DipFA qualification for her job. It included pensions but she'd forgotten it as it she didn't use it in her job. And it didn't change the fact that she'd become deferred because of the advice given and promises made by MWM's adviser. When she'd said her job and qualification gave her a greater understanding that most she'd been referring to things like risk and the fact that pension funds and investments can go down as well as up and that falls in value wouldn't have been the adviser's fault.*
- *It was crucial to understand that her decision to opt out was based on the advice she'd been given by MWM's adviser. She'd told his compliance company (Firm B) that she'd made the decision to opt out without advice because MWM's adviser had told her she had to say that so it would go through. The medications she'd been on at the time of her email exchange with Firm B had a negative effect on cognition. And painkillers, can create a sense of calm and happiness.*
- *Her answers to the three questions MWM had posed were as follows: MWM's adviser verbally advised her both to transfer and to opt out of the OPS. If she hadn't left the OPS (that is ceased to be an active member) and been granted ill health early retirement, she'd have got the pension benefits she'd have received if she'd worked until she was 62. As a deferred member she could still have left due to ill health but she'd only have been paid her deferred benefits.*

Mrs B's husband also provided a statement. Again we'll share what he said. But we've redacted part of what he told us as it's personal information about his own health. In summary, he recalled MWM's adviser coming to see Mrs B at home to give her advice about transferring her OPS pension. The adviser did talk through some of the pros and cons of transferring. But Mr B says he 'made a big deal' about how much the OPS was paying to people to come out and said (several times) that it was a 'no brainer' to transfer as those kinds of figures wouldn't be offered forever. Mrs B had brought up the subject of ill health retirement but the adviser had indicated that it was impossible to get. He'd 'strongly' advised Mrs B to become deferred and to do it quickly if she wanted to secure a large pay out.

What I've further provisionally decided – and why

I've considered all the available evidence and arguments again to decide what's fair and

reasonable in the circumstances of this complaint.

I'm sorry we omitted to share, as we'd promised, Mrs B's further comments with MWM. We've done that now. And I note what MWM has said about being given insufficient time to comment fully on my provisional decision and the additional information from Mrs B. To rectify that, I'm issuing this further provisional decision with four weeks for comment.

MWM has asked for confirmation as to which parts of the additional information Mrs B has supplied since the investigator issued his view (not upholding Mrs B's complaint) led to me reaching a different outcome. But that isn't quite how it works. We have a two stage process. If a complaint can't be resolved by the investigator and it's referred to an ombudsman, they will consider the complaint afresh. The ombudsman isn't bound by what the investigator said. We aim for consistency and the ombudsman will often agree with the views expressed by the investigator. But the ombudsman may reach a different outcome based on the same evidence. That may be because the ombudsman attaches different weight to particular evidence. And the ombudsman's findings of fact (except to the extent that the facts aren't in dispute) may be different too.

So, although MWM has pointed to conclusions reached by the investigator, I'm not bound by those. I explained in my provisional decision the views I'd reached and my reasons with reference to the evidence I'd relied on. And I'm issuing this provisional decision to deal with the points MWM has raised and to clarify my findings and exactly what I think MWM is responsible for.

That said, I think there was perhaps more agreement between me and the investigator than MWM suggests. It seems the investigator accepted that MWM had told Mrs B it was a good idea to transfer and that she needed to become a deferred member of the OPS (and which the adviser facilitated). The investigator thought what MWM's adviser had said didn't amount to regulated advice. But I think, for the reasons I've explained, that it did. Formal documented advice to transfer may have been given later by another business (Firm C). But, if MWM's adviser had said that transferring out of the OPS was a 'no brainer' so that Mrs B could transfer to a personal pension arrangement, I think that would amount to regulated advice.

I also agree with the investigator that, as a deferred member, Mrs B retained her entitlement to preserved benefits in the OPS, based on the service she'd accrued up to when she'd opted out. And that, after she'd opted out and had become a deferred member, she could've applied for ill health early retirement or (once she reached age 55) early payment of her benefits from the OPS. I don't know if she'd have qualified for ill health early retirement and, if so, what she'd have been entitled to or what she'd have been paid if she'd taken her benefits at age 55. That would depend on the OPS rules. They would set out the qualifying criteria for ill health early retirement (and which might be subject to consent from the OPS trustees) and the early retirement factors which would apply if Mrs B took her benefits before the OPS normal retirement age (which I said I thought was 62). Mrs B lost those options because she transferred out of the OPS, following advice from Firm C.

But I also thought that Mrs B's position had changed (and been prejudiced) as a result of her dealings with MWM – she'd opted out of the OPS so that she could get a CETV and then transfer out into a personal pension. I thought MWM's adviser had advised Mrs B to opt out of the OPS. I didn't think, for the reasons I gave, that the advice to opt out was suitable for Mrs B. That remains my view.

As I said, I didn't think MWM was responsible for all the losses Mrs B had sustained in opting out and then subsequently transferring. I saw opting out and transferring as two separate and distinct events. I also said, if Mrs B had any concerns about the advice to transfer out,

she'd need to take that up with Firm C. But, by the time Mrs B sought advice from Firm C, the fact that she'd opted out couldn't be undone – reinstatement wasn't possible. So, in my view, Mrs B's position had been altered to her detriment as a result of MWM's adviser's involvement and the unsuitable advice he'd given Mrs B – to opt out of the OPS. The redress I suggested was aimed at redressing the losses relating to the opting out and that Mrs B lost the opportunity to accrue further benefits in the OPS. I said the calculation should assume that just the opted out period of service remained in place and compare that with a nil value for any replacement personal pension.

My understanding is that the 17/9 guidance includes standard assumptions as to how long an OPS member's service would've continued but for the opting out. Those assumptions may or may not be appropriate, hence I indicated that considerations as to when Mrs B's service would end due to her health and/or unreduced early retirement might need to be taken into account when the calculation is actually undertaken. We'd expect a professional firm of actuaries experienced in carrying out this type of calculation to be instructed and who would be familiar with the assumptions that apply.

MWM also says that it fully accepted its shortcomings in providing an introduction to Firm B and paid redress to Mrs B – the initial advice fee she was to be charged by a third party advice firm of her own choosing. I don't disagree that MWM paid for Mrs B to take new independent advice – and she instructed Firm C. MWM also paid a generous sum for distress and inconvenience. As I've explained, I'm not saying that MWM is responsible for Mrs B's decision to transfer her deferred benefits and for any losses she's suffered in consequence of doing that. But MWM is responsible for Mrs B opting out so she could get a CETV and then transfer to a personal pension arrangement. So MWM is responsible for losses flowing from the opting out.

I also note all MWM says about why Mrs B could've remained a deferred member of the OPS, especially if, at the time, her heath was too poor to enable her to make proper decisions. And that Mrs B's husband (who also has financial qualifications) should've recognised the importance of the decisions Mrs B was making and, if he'd seen Mrs B wasn't in a fit state to be dealing with such matters, ensured she stepped back. MWM says it can't be held liable for Mrs B's decision to act on advice from a totally unrelated third party advice firm. Or liable for redress arising from the same transfer advice. But, as I've explained, I'm not saying MWM is responsible for that. But I think MWM is liable for losses arising because Mrs B opted out when she did and which was long before she'd had any contact with Firm C (or indeed Firm B).

I say that because, and despite all MWM has said, I maintain that MWM's adviser was instrumental in Mrs B's decision to opt out. On the one hand we have Mrs B's email to Firm B on 3 January 2019 which contains an apparently clear statement that she hadn't had any advice to opt out and the decision had been hers. But, on the other hand, there's the email exchange on 6 September 2018. That was before any involvement by any other firm and before Mrs B, at a meeting with MWM's adviser, signed the leavers' form (provided by MWM's adviser) and which was then submitted to the OPS.

I think the email exchange is contemporaneous evidence which demonstrates MWM's adviser was involved in Mrs B's decision making and in particular her decision to opt out of the OPS. Regardless of what Mrs B later told Firm B (and whether that was due to her being unwell, in pain and/or on medication or for some other reason) I think the email exchange provides clear evidence in support of what Mrs B has said (and which has been corroborated by her husband) about having been advised by MWM's adviser to opt out so she could get a CETV and then transfer out of the OPS. Despite what Mrs B later told Firm B, I accept that she didn't decide, on her own, to opt out on her own. I think she opted out, based on what MWM's adviser told her she should do. In my view, but for MWM's adviser's input, Mrs B

wouldn't have opted out of the OPS.

I think what Mrs B says about her understanding that MWM's adviser would be formalising his advice, and how she reacted when she found out that Firm B would be advising her instead, is also consistent with what Mrs B says happened. If she was expecting MWM's adviser to put in writing what he'd already told her she should do, I can see that she'd have been confused and upset when she realised that another firm, and not MWM, had become involved and would in fact be advising her.

Mrs B has some financial qualifications. As does her husband. I've taken that into account. But final salary OPS transfers require specialist advice. Mrs B was an ordinary retail client. It was up to MWM to give her suitable advice. I don't think Mrs B should've opted out of the OPS when she did. I think she received advice about that from MWM. That advice was unsuitable.

MWM says there are three questions which need to be answered and based on the facts:

Did MWM provide pension transfer advice to Mrs B?
Did Mrs B receive advice to opt out of the OPS?
Could Mrs B have secured an ill heath pension from the OPS?

In my view, the answers to the first two questions are in the affirmative. I think MWM did provide pension transfer advice to Mrs B. Although that advice may have been somewhat informal I think, for the reasons set out in my provisional decision, it did amount to advice to transfer. I've taken into account that formal advice was later given by another business, Firm C. But by then Mrs B had already been advised, by MWM, to opt out of the OPS. The issue of whether Mrs B could have secured an ill health pension from the OPS isn't straightforward and may be material in the redress calculation.'

Responses to my further provisional decision

MWM said it was disappointed with my findings which it continued to refute. MWM said there'd been inconsistencies in the handling of the case and what was deemed by us to be a fair outcome. It said that the original finding was that the case should be upheld but the financial redress paid was adequate. Whereas my conclusions gave a very different outcome with no material difference in the information provided by either party. MWM didn't feel any explanation as to why that was the case had been provided. MWM also sought confirmation that the maximum amount of redress was capped at £160,000. And it raised a query about the evidence required to confirm that early retirement from the OPS would've been granted. The investigator responded to MWM about those matters.

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'm sorry that MWM feels there have been inconsistencies in our handling of the case. It is of course disappointing for MWM, having received the investigator's view and which didn't recommend that MWM should pay any further compensation, to then receive a provisional decision from me taking a different view and awarding more compensation than MWM had offered. But, and as I've explained before, ours is a two stage process. If either party doesn't accept the investigator's view (and sometimes both parties may be unhappy), then the complaint is considered afresh by an ombudsman who may or may not agree with what the investigator has recommended. We do aim for consistency but it is sometimes the case that an ombudsman will consider that a different approach should prevail and even if no new

material evidence has been provided since the investigator's view was issued.

MWM says the reason why my approach is different to that of the investigator hasn't been explained. But I've issued two provisional decisions setting out what happened and why I consider MWM didn't act as it should've done and the impact on Mrs B. In my second provisional decision I dealt with the points MWM had raised in response to my first provisional decision. And, although MWM has said, in response to my second provisional decision, that it continues to disagree with what I've said, it hasn't put forward any further arguments or set out why it still considers what I've said was wrong.

All in all my views remain as previously set out. I've recapped in full my earlier provisional findings and what I've said forms part of this final decision.

As mentioned above, the maximum I can award in a case such as this is £160,000. I've included below a recommendation that if the calculation shows Mrs B's loss is more then MWM should pay the loss in full. But, as I've said, MWM isn't obliged to comply with my recommendation. And the award I've made is formulaic. We don't undertake this sort of redress calculation ourselves and I don't know how much the redress will be. The redress calculation may show that the loss isn't above our award limit anyway.

Putting things right

I've set out again the redress I proposed in my provisional decisions.

A fair and reasonable outcome would be for Chris Binns Wealth Management Limited trading as Model Wealth Management to put Mrs B, as far as possible, into the position she'd be in now but for the unsuitable advice. I consider she'd have remained in the OPS.

Chris Binns Wealth Management Limited trading as Model Wealth Management must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers. Paragraph 2 of the introduction to the guidance says that it may also be relevant to complaints about opt outs. And paragraph 10 says that in respect of a complaint about opting out, the guidance may be used as a basis for calculating appropriate redress, to the extent that it is appropriate to do so and subject to the particular circumstances of the case.

The calculation should assume that just the extra opted out period of service remained in place and compare that with a nil value for any replacement personal pension (there may still be a SERPS (State Earnings Related Pension Scheme) or S2P adjustment). The calculation should take into account the standard assumptions in the guidance as to how long Mrs B would've remained in service unless there is evidence that confirms her service will end at an earlier date due to her health condition. It should also take into account any evidence that Mrs B has that she would've been granted an unreduced pension on ill health early retirement from the OPS

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs B's acceptance of the decision.

Chris Binns Wealth Management Limited trading as Model Wealth Management may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs B's contribution history to SERPS or S2P.

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the OPS on Mrs B's SERPS/S2P entitlement. If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs B's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs B as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mrs B'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.

The compensation amount must where possible be paid to Mrs B within 90 days of the date Chris Binns Wealth Management Limited trading as Model Wealth Management receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Chris Binns Wealth Management Limited trading as Model Wealth Management to pay Mrs B.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Chris Binns Wealth Management Limited trading as Model Wealth Management should pay Mrs B the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Chris Binns Wealth Management Limited trading as Model Wealth Management pays Mrs B the balance.

This recommendation is not part of my determination or award. Chris Binns Wealth Management Limited trading as Model Wealth Management doesn't have to do what I recommend. It's unlikely that Mrs B can accept my decision and go to court to ask for the balance. Mrs B may want to get independent legal advice before deciding whether to accept this decision.

My final decision

I uphold the complaint. Chris Binns Wealth Management Limited trading as Model Wealth Management must redress Mrs B as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 4 July 2022.

Lesley Stead
Ombudsman