DRN-3355786

The complaint

Mr F complains about the advice given by JLT Wealth Management Limited ('JLT') to transfer the benefits from his deferred defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In April 2010 Mr F met with JLT via an introduction from his ex-employer to discuss his pension and retirement needs.

JLT completed a fact-find to gather information about Mr F's circumstances and objectives. JLT also carried out an assessment of Mr F's attitude to risk, which it deemed to be 'balanced' overall – but for this transaction it was recorded that Mr F wanted to invest in a 70/30 split between balanced and adventurous investment profiles.

On 9 June 2010 JLT advised Mr F to transfer his pension benefits into a personal pension and invest the proceeds in funds JLT deemed matched the investment risk profile split I referred to above. The suitability report said the reasons for this recommendation were:

- The investment returns required to both Mr F's normal retirement age of 65 and his assumed early retirement age of 60 were within the range it deemed appropriate to recommend a transfer given Mr F's attitude to risk.
- To enable the enhanced transfer value to boost Mr F's pension funding.
- To provide the possibility of a higher amount of tax-free cash at retirement.

Mr F duly accepted the recommendation to transfer and the transfer took place in September 2010.

In 2020 JLT carried out a proactive review of the advice it provided Mr F in 2010. In summary it deemed the advice was suitable. But it determined that it had incorrectly recorded Mr F's target retirement date of 55 when it should have been 60. Because JLT acknowledged that this might have had an impact on Mr F's retirement fund and the way it had been invested, JLT carried out a loss assessment. But this showed Mr F had not lost out.

Mr F complained to JLT following the outcome of its review because he said he believed the advice wasn't suitable and he should not have transferred out of his DB pension scheme.

JLT didn't uphold Mr F's complaint. In summary it said that it had gathered information about Mr F's circumstances, including his attitude to risk, which had been taken into account in providing the recommendation to transfer as set out in its report. It said that assuming a retirement age of 60, the critical yield was 7.2%, which was lower than the 7.65% return or growth rate it believed was achievable - so the transfer was suitable. It said the report made it clear that Mr F could have remained in his DB scheme. Finally it confirmed that it had addressed the issue identified in its review of the advice about Mr F's incorrect preferred retirement age.

In 2021 Mr F referred his complaint to our service. An investigator upheld the complaint and required JLT to pay compensation. In summary they said it didn't appear that Mr F had any particular retirement planning need to suggest why he needed to transfer out of his DB scheme. They said the recommendation to transfer was solely based on the potential to produce greater benefits than Mr F's DB scheme. But given the critical yield required to match Mr F's DB scheme benefits was 7.2%, taking account of the discount rate at the time which was 6.2%, they said they didn't think the return was achievable. They went on to explain that they didn't think the rate of return required took account of the 'lifestyling' option built into the investment strategy (this is where around 10 years from retirement the investment strategy changes by moving some of the investments into lower risk assets) further reducing the potential for the required growth to be achieved. They said they believed Mr F was exposed to too high a level of risk to try and meet the return required - so they didn't think the advice to transfer was appropriate.

JLT disagreed. In summary it said what it described as the 'Hurdle Rate' referred to in its suitability report was a reasonable reflection of an achievable investment return based on the term to retirement and Mr F's attitude to risk. It clarified that this rate had taken into account the 'lifestyling' profile contrary to what the investigator concluded. It said it didn't have to refer to the discount rate as the investigator said and considered it inappropriate for them to have disregarded the hurdle rate and deferred to the discount rate as the reason why the advice was unsuitable. It concluded by saying that Mr F's attitude to risk had been correctly assessed and that overall it was satisfied the advice was suitable.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, JLT should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr F's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return, or critical yield required to match Mr F’s benefits at age 60 – his preferred retirement age - was 7.9% if he took a full pension and 7.2% if he took his tax-free cash entitlement and a reduced pension. This compares with the discount rate of 6.2% per year for 12 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr F’s attitude to risk as mainly balanced with a smaller exposure to adventurous risk, and also the term to retirement.

In my view there would be little point in Mr F giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, taking the most likely option of Mr F taking tax-free cash and a reduced pension, the critical yield was 7.2%. And while marginally, this is still above the regulator’s middle projection rate. But it is also 1% higher than the discount rate. Based on this, I think Mr F was likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

I can see JLT has said it doesn’t think it is right to rely on the discount rate in concluding the advice was unsuitable and disregard the growth rate it calculated at the time of the advice, which it considered was reasonably achievable. Firstly, as I said above I think the published discount rates are a useful indication of reasonably achievable growth rates at the time JLT provided its advice to Mr F. So I think is it fair and reasonable for me to take them into account in assessing the financial viability of the transfer. Secondly, I think it is important to highlight that this is not the only factor in my consideration of whether the advice to Mr F to transfer out of his DB scheme was suitable. I’ve also referred to the regulator’s projection rates and I also think Mr F’s wider circumstances are important here. And this includes his capacity for loss, which I consider was low. I say this because Mr F’s DB scheme, as the adviser recorded, represented a major proportion of his retirement funding at the time of the advice – a guaranteed and increasing income. He’d only recently joined his current employer’s defined contribution scheme and it was worth not much more than £1,000.

But if I accept JLT’s argument that the growth rate it calculated at the time – a rate of 7.65% - was achievable and so greater than the critical yield figure of 7.2%, it is only higher by what I consider to be a small margin. As I’ve already said, I consider there would be little point in Mr F giving up the guarantees available to him through his DB scheme only to achieve at best the same level of benefits outside the scheme. And here, because the difference between the two rates was so small, I think it’s likely that, at best, Mr F would end up receiving benefits of broadly the same overall value as a result of investing in line with his recorded attitude to risk. Importantly, there of course still remained the risk that Mr F *might* end up with benefits of a lower overall value than his DB scheme at retirement.

For this reason alone a transfer out of the DB scheme wasn’t in Mr F’s best interests. Nevertheless, even if I accept that the transfer had the potential to be financially viable, crucially in my view I think the adviser disregarded a key need of Mr F’s recorded in the fact-find, which ought to have reasonably prompted them to conclude the advice to transfer wasn’t in Mr F’s best interests. I say this because Mr F was asked to tick a series of boxes in response to some key questions, which the fact-find said would help to advise on the most appropriate option for Mr F’s circumstances. One of those questions was about *‘Control and flexibility of pension funds’.* This asked Mr F to answer either Yes or No to the following: *‘Company pension schemes often have strict rules that state exactly how pension benefits* *are to be paid. These rules do not usually provide flexibility to take account of your individual circumstances. In addition, you will have little or no control over the way your pension fund is invested. I would prefer to move my pension to an individual plan which is under my control'* And Mr F answered *'No'.*

I think this was an important answer. Not only does it in my view bring into question the level of risk Mr F was truly willing to take with his DB pension benefits, it suggests to me that he had no real need to transfer out of his DB scheme and had a preference to remain in the DB scheme – otherwise he would've answered differently. Indeed I can see that immediately underneath the reasons why the adviser recommended Mr F should transfer in their suitability letter they said: '*However, this does not accord with your preference to remain in the Plan and if transferring you must be comfortable with taking on the investment risk...'*

But if the adviser didn't think it was a suitable recommendation or in Mr F's best interests taking account of his circumstances, needs and preferences, then they shouldn't have recommended Mr F go ahead with the transfer.

Furthermore there were no other compelling reasons in my view to support the transfer or objectives which couldn't have been met by Mr F remaining in his DB scheme. For example Mr F didn't need access to the cash lump sum on offer representing the enhancement to the transfer value; he could've taken early retirement at 60 from his DB scheme; he didn't want to take control of his pension or need flexibility in how he accessed his benefits; and his scheme offered a tax-free lump sum at retirement.

Summary

I don't doubt that the potential for higher benefits and the enhancement to the transfer value to boost his pension funding through a personal pension would have sounded attractive to Mr F. But JLT wasn't there to just transact what Mr F might have thought was a good idea or what he thought he wanted. The adviser's role was to really understand what Mr F needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr F was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr F was very likely to obtain at best broadly the same retirement benefits, with the risk that they might be lower. In my view, there were no other compelling reasons which would justify a transfer – indeed I think Mr F's needs indicated a good reason not to.

So, I think JLT should've advised Mr F to remain in his DB scheme.

I now need to consider whether Mr F would've gone ahead anyway, against JLT's advice.

Having done so, I don't think Mr F would've insisted on transferring out of his DB scheme and gone head in any event. I say this because Mr F was not in my view an experienced investor who possessed the requisite knowledge, skill or confidence to go against the professional advice they received.
So I think Mr F relied solely on the advice he was given. At the time this pension was the primary source of Mr F's guaranteed future retirement provision. So, if JLT had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, because he wasn't likely to be any better off in retirement and his preference was to remain in the scheme given he didn't want or need control or flexibility, I think that would've carried significant weight. I think Mr F would've accepted that advice.

In light of the above, I think JLT should compensate Mr F for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I can see the investigator also recommended an award of £250 for the distress and inconvenience the matter has caused Mr F. So I've also thought about whether it's fair to award compensation for distress and inconvenience. This isn't intended to fine or punish JLT – that's the job of the regulator. But I think it's fair to recognise the emotional and practical impact this had on Mr F. Taking everything into account, including that I consider Mr F is now at the age when his retirement provision is of greater importance to him, I think the unsuitable advice has caused him distress. So I think an award of £250 is fair in all the circumstances.

Putting things right

A fair and reasonable outcome would be for the business to put Mr F, as far as possible, into the position he would now be in but for JLT's unsuitable advice. I consider Mr F would have most likely remained in his DB scheme if suitable advice had been given.

JLT 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.

My understanding is that Mr F's normal scheme retirement age was 65. But Mr F indicated at the time of the advice that he intended to retire at 60 and he's told us that he's about to start drawing benefits now that he's turned 60. So I think it's likely Mr F would've accessed his benefits from age 60 had he remained in his DB scheme. A retirement age of 60 should therefore be the basis for the calculations.

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 Mr F's acceptance of the decision.

JLT may wish to contact the Department for Work and Pensions (DWP) to obtain Mr F's contribution history to the State Earnings Related Pension Scheme (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 occupational scheme on Mr F's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr F'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 Mr F 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 his 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr F within 90 days of the date JLT receives notification of his 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 JLT to pay Mr F.

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

My final decision

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

JLT Wealth Management Limited should also pay Mr F £250 for the distress and inconvenience the unsuitable advice caused.

Where the compensation amount does not exceed £160,000, I would additionally require JLT Wealth Management Limited to pay Mr F any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require JLT Wealth Management Limited to pay Mr F any interest as set out above on the sum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that JLT Wealth Management Limited pays Mr F the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr F.

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

My recommendation would not be binding. Further, it's unlikely that Mr F can accept my decision and go to court to ask for the balance. Mr F 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 F to accept or reject my decision before 29 August 2022.
Paul Featherstone
Ombudsman