

The complaint

Mr C complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan, in 2007. Mr C says the advice was unsuitable for him and believes this has caused him a financial loss.

Norrix Financial Services Limited is responsible for answering this complaint. To keep things simple I'll refer mainly to "Norrix".

What happened

At the time of the advice, Mr C was a deferred member of an OPS, having previously been employed from the late 1980's until 2006 and had accrued around 17 years' worth of benefits. The OPS had signalled an intention to offer members an enhanced cash equivalent transfer value (CETV) if they decided to transfer out of the scheme.

As a consequence of this offer, members of the DB scheme were also being offered regulated financial advice, the cost of which was being met for them, but Mr C opted to use an independent financial adviser (IFA) instead. The IFA in this case did not have the regulatory authority required to advise on these types of pension transfers, but it had an ongoing relationship with Norrix, which did. The recommendation to transfer out was therefore made by Norrix, although Mr C also had a number of personal dealings with the IFA.

Information gathered about Mr C in 2007 was broadly as follows:

- He was 43 years old, married with a young dependent child.
- Mr C was a homeowner with a mortgage of £640 per month plus endowment policy costs of £130. He had since become self-employed, earning £1,700 (net) per month. There's no indication of Mr C having any major debts or other liabilities.
- Mr C's OPS had a cash equivalent transfer value (CETV) in 2007 of around £39,000 with a normal retirement age of 65. In addition to this sum, an enhancement of around £40,000 was being offered to members of the OPS who transferred out.
- Mr C had no other pension.

In October 2007, Mr C signed the forms enabling the transfer to take place. He complained in 2020 about the transfer out of his OPS being unsuitable for him and says he's worse off as a result. Mr C complained to Norrix saying he only realised much later what had happened after talking to former colleagues in the scheme. He says he hadn't really understood the transfer process back in 2007.

Norrix responded to Mr C's complaint by saying it didn't agree the recommendation to transfer out was wrong. It says Mr C understood the differences between his OPS and a personal pension because this was explained to him. It also said that analysis at the time showed his pension could grow in a way that would make the transferring out suitable.

The complaint was referred to our Service and one of our investigator's looked into it and said we should uphold it. They said Norrix shouldn't have recommended the transfer out of Mr C's OPS. The investigator also noted Norrix hadn't been able to provide much evidence or documentation of the transfer process, such as a recommendation letter or a suitability report. They came to the view that the transfer out was not in Mr C's best interests.

As the complaint can't be resolved informally, it's come to me for an ombudsman's 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.

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 Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). 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 JLT'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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.16 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 S's best interests.

Having considered everything, I am upholding Mr C's complaint, along the same lines as our investigator.

Introduction

A particular feature of this case is that we don't have very much information available from the time of the advice. Norrix concedes that the files it has are unsatisfactory and it explained this is basically because it regarded Mr C as a client of the IFA, with whom Norrix had an ongoing professional relationship. Norrix has therefore been unable to provide important documents from the transfer that I'd normally expect to see. It acknowledged it never provided Mr C with a transfer recommendation letter or suitability report, even though it was responsible for the advice. It has also been unable to provide any evidence of Mr C's

attitude to risk (ATR) or capacity for loss being assessed during the advice process. Norrix was, however, able to provide copies of a transfer analysis report which was generated as part of the process. Norrix says this helps to demonstrate that the transfer out was in Mr C's best interests.

As a consequence of Norrix's close relationship with the IFA therefore, it seems to me that Norrix took the IFA's judgement on this matter as 'read' and it failed to carry out the advice to transfer as diligently as I would expect. Norrix now admits this was a failing and a serious error, but mentioned it had a high regard for the IFA; it said the IFA in question was the only financial adviser for whose clients it ever provided this type of service.

Nevertheless, I should point out clearly, that as the firm that held the relevant regulatory credentials to advise on a defined benefit transfer, Norrix was responsible for the suitability of the advice provided to Mr C. Although a third-party IFA was involved, it was Norrix's responsibility to gather enough information to ensure the recommendation was suitable for Mr C, as per the regulator's requirements.

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.

Norrix said the critical yield required to match Mr C's benefits, assuming the full transfer value was invested at his normal retirement age of 65, was 6.7% if he took a full pension and 5.7% if he took tax-free cash and a reduced pension.

The relevant discount rate was 6.6% per year for 21 years to retirement. For further comparison, the regulator's upper growth projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5% per year.

I've considered all these figures with care and Norrix has made the point they show that if transferring out of his DB scheme, Mr C's pension funds would have been able to grow by enough to make the transfer in his best interests. However, I disagree.

Because of the significant failures in the advice process, I can't say for sure what Mr C's intentions were and what his objectives in transferring out might have been. I can't say, for example, whether Mr C had indicated back in 2007 whether he would take a lump sum when his pension was eventually accessible or whether he would have been more likely to take the pension in full. In all likelihood, this would have probably been something he hadn't yet considered given he had some 20 years before he expected to retire.

In my view, Norrix's own figures demonstrate that the financial viability of the transfer out was more marginal than it implies now. The critical yield in the case of the former scenario was 6.7% and so in determining whether the transfer was in Mr C's best interest, I'd have to consider the likelihood of this growth rate being exceeded, particularly as the regulator says that transfers out should at first be assumed to be unsuitable. But here, the discount rate was slightly below the critical yield figure of 6.7%, and the regulator's middle projection rate was only marginally higher at 7%. So, in my view, whilst there was a possibility of matching the level of benefits in the DB scheme, I think there was much less chance of improving on them, particularly considering Mr C's personal pension would have to experience a

sustained level of growth over 20 years. Given the ups and downs the market experiences over time, I don't think this was likely.

To make the transfer 'more viable' in terms of the projected growth, I'd have to assume that the 5.7% critical yield figure (only) ought to be used. But even then, given the regulator's lower projected growth rate was only 5%, Mr C would have to be willing to take more risk with his pension to achieve this level of growth and crucially, Norrix failed to make any assessment of Mr C's ATR, investment experience or capacity for loss.

I've seen no evidence that Mr C was anything other than a 'blue-collar worker' with no experience of investing in money market funds. He's since told us he wasn't an experienced investor. And as he had a mortgage, a family and a moderate salary, and no other pension, I think his ATR and capacity for loss at the time would both have been low. In that context, it's reasonable for me to assume the likely expected growth would be at the lowest end of the regulator's projections, or around 5% and Norrix has shown me nothing that conflicts with this.

As both critical yields were above this, I don't think advising him to transfer out of this pension was suitable advice.

Norrix asked me, in its response to our investigator's view, to consider that Mr C's pension scheme was in deficit and that the critical yield figures pertaining to the Pension Protection Fund (PPF) would have been lower than 5%. However, I've been presented with no related evidence about this. My understanding is that members were being offered extra money to consider leaving the scheme and there's nothing showing the scheme was so much in deficit as to be in danger of collapse. And even if this were the case, I would have expected this aspect to have been covered comprehensively in the advice process in 2007 and been referred to in terms of recommending a suitable way forward. There is no evidence of this being the case here.

I've noted that the transfer analysis included some retirement modelling showing how Mr C's transferred pension might grow and sustain him into retirement. However, I've also seen this data was not for Mr C's consumption as the associated notes explain these are for financial advisers only and not to be distributed to clients. So Mr C probably wouldn't have seen these, and even if he did, I think he'd have found the data difficult to understand. There were a large number of different scenarios set out here; but these were not like-for-like comparisons with the wider guarantees and benefits in the pension scheme Mr C left. Certain assumptions were also made about fund performance going forward, and I note that the critical yield figures for retirement at 60, for example, were much higher than those I've quoted above, making transferring out much less viable.

So, having considered this analysis, it doesn't change my view. Past performance is no guarantee of future performance. I also consider the discount rates and the regulator's lower standard projections to be much more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

As I've explained above, the critical yield and growth figures show, at very best, a highly uncertain and very limited chance of Mr C's pension growing outside the scheme in a way that made transferring viable, even when retiring at the normal retirement age of 65. These things, together with the regulator's presumption that such transfers are unlikely to be suitable, show there is solid and reliable evidence that the advice to transfer out wasn't suitable or in Mr C's best interests. In considering other scenarios, such as taking a 'full' pension or retiring early at 60 for example, the case becomes even weaker; these very clearly demonstrate the transfer out was unsuitable.

Having been clear that the transfer was unsuitable in this context, I've considered whether there might be other reasons which could change this.

Flexibility and income needs

Because Norrix failed to provide a recommendation letter or suitability report I've been unable to fully understand what Mr C's objectives and needs at the time were or what the advice was based on. However, Mr C was only 43 years old and based on what I've seen he didn't have concrete retirement plans. As Mr C probably had around 20 years before he could realistically think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme.

So, I don't think it was a suitable recommendation for him to give up his guaranteed benefits now when he didn't know what his needs in retirement would be, even though an incentive was being offered. If Mr C later had reason to transfer out of his DB scheme he could have done so closer to retirement. In the meantime he'd have retained many of the benefits I think were of relevance to him.

Also based on the information I have, there's no evidence Mr C needed a flexible income in retirement and there's nothing showing he had a desire or the capacity to manage his own pension affairs, as of 2007. So, I'm satisfied Mr C could have met his income needs in retirement by using the pension in the way it was intended, through the DB scheme at 65.

Death benefits

I can't say whether, or to what extent, death benefits were discussed in this case. Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension may have been an attractive feature to Mr C. But whilst I appreciate death benefits are important, and Mr C might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr C about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement and this was Mr C's primary retirement savings by some way at the time, other than his state pension. I've seen no evidence Norrix explored to what extent Mr C was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were probably underplayed. These were good benefits in this case, and Mr C was married and had children. So the spouse's / dependent's pension provided by the DB scheme would have been useful if Mr C predeceased them. I think it's unlikely that Norrix made the value of this benefit clear enough to Mr C. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

I've noted Mr C took out a short and decreasing value life policy around this time. I've seen no explanation about this but its term and value seem very unlikely to me to impact on my decision in any way. Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr C.

Other issues

I've considered the points made by Norrix about Mr C having the differences between DB and personal pensions explained to him at the time. But while it was important for Norrix to explain this to Mr C, its job was much wider than this. Its role here was to really understand Mr C's needs and make recommendations that were suitable for him. And if the transfer out couldn't be clearly shown to be in his interests, Norrix shouldn't have advised him to do it.

Norrix also added that the other IFA involved had discussed the transfer with Mr C at length and Norrix trusted the adviser. But as I've said above, Norrix was responsible for giving the advice as the only pension transfer specialist involved. So, while it could take into account what information Mr C had been given by the IFA, it still needed to gather sufficient information and carry out a full advice process.

Norrix also mentioned in response to our investigator's view, in May 2022, that the tax-free element available to Mr C from his pension would have been higher in a personal pension than available through his OPS. This is often the case, because the values and benefits of these pensions are calculated differently. But this doesn't change anything either. Norrix ought to have explained this came with certain consequences. Having more in tax-free cash would lower his ongoing pension and I can't see this was either pointed out, or was something that Mr C was interested in or needed. So this doesn't change what I think. The potential for higher tax-free cash is therefore just a generic statement and not applicable to Mr C being advised to transfer out of his pension in 2007.

Suitability of investments

Norrix recommended that Mr C invest in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr C, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr C should have been advised to remain in the DB scheme and so the investments in the personal pension wouldn't have been made if suitable advice had been given.

Summary

I don't doubt that during the advice process, a number of features about personal pensions, were most likely explained to Mr C. I accept his considerations would have also included the enhancement to leave his existing scheme. However, in my view, Norrix failed in its duty here. Norrix wasn't there to merely transact what Mr C might have thought he wanted at the time, or to only obtain the enhancement without other considerations, the adviser's role was to act in his best interests.

This was Mr C's sole pension and ultimately I don't think the advice given to him was suitable. He was giving up a guaranteed, risk-free and increasing future income and as I've shown, by transferring, the opportunity to improve on these benefits was limited and if he decided to retire early, he was likely to be worse off. In my view, there were no other particular reasons or objectives which would justify a transfer and outweigh this.

Of course, I have to consider whether Mr C would have gone ahead anyway, against Norrix's advice. As I've explained, in this case Mr C specifically went outside the 'paid for' advice being offered to members of the scheme, to seek his own IFA. He paid for that advice

and so I think that demonstrates he was keen to get what he considered to be an independent view on whether he should transfer out of the scheme. And if he'd been advised to remain in the DB scheme, I think Mr C would have followed that advice.

I say this because there doesn't appear to have been any real motivation for Mr C to want to transfer out at the time. He couldn't access his pension for a number of years and he didn't intend to use the cash incentive for anything – he invested it in his pension. So, I think if Norrix had set out clearly why it wasn't in his best interests to transfer and that even with the enhanced CETV he had a limited opportunity to improve on his DB scheme, which was guaranteed, I think he'd have accepted that advice.

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

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#). The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/19](#) (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr C whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published.

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr C.

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

Norrix 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.

For clarity, Mr C has not yet retired, and he has no plans to do so at present. So, compensation should be based on the usual assumptions in the FCA's guidance.

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 C's acceptance of the decision.

Norrix may wish to contact the Department for Work and Pensions (DWP) to obtain Mr C'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 C's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr C'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 C 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 C within 90 days of the date Norrix 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 Norrix to pay Mr C.

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 Norrix pays the balance.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Norrix to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

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

Where the compensation amount does not exceed £160,000, I would additionally require Norrix Financial Services Limited to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Norrix Financial Services Limited to pay Mr C any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Norrix Financial Services Limited pays Mr C the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr C.

If Mr C accepts this decision, the money award becomes binding on Norrix Financial Services Limited.

My recommendation would not be binding if he doesn't accept. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 10 November 2022.

Michael Campbell
Ombudsman