DRN-3538642

The complaint

Mr R complains about the advice given by Equitable Life Utmost Life and Pensions Limited (Utmost) is now responsible for the pension and complaints about the advice provided. He complains about the advice to transfer the benefits from his 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

Mr R and Equitable Life met in 1995. Mr R's recollections of the sale of the plan are sparse, this isn't surprising given the length of time that has passed. Utmost does have a copy of the point of sale information which largely consists a of a suitability letter, a transfer value analysis report (TVAS), the point of sale illustrations and the sale administration documents.

As far as I can see Utmost didn't complete a fact find or establish what Mr R's attitude to risk was. But the point of sale information does show that:

- Mr R was aged 53.
- He was married and he expected to retire at age 65.
- He wanted to invest in the with profits fund.

As part of the complaint Mr R has said that he had been made redundant from the business where he had accrued the DB scheme benefits a few years earlier. He was employed within the same industry, but possibly not in a permanent position, when the transfer took place.

On 20 September 1995 Equitable Life advised Mr R to transfer his pension benefits into a personal pension and invest the proceeds in it's with profits fund. The suitability report said that, after considering his options, Mr R had concluded that a Personal Pension Plan was the most appropriate choice as, *'with a reasonable growth rate on the With Profits Fund, it would be able to provide you with a higher pension than the revalued* DB Scheme*. In addition, it would also provide you with the flexibility to take certain benefits early.'*

Mr R signed Equitable Life's confirmation of advice form which said he had received advice from one of its representatives and was happy with this advice. He also confirmed that he wasn't an insistent customer.

Mr R proceeded with the transfer. And in 1996 Equitable Life received the transfer proceeds of his DB scheme. The total proceeds were transferred in two parts as I understand the DB scheme did have some funding issues.
I understand the total transfer amount was £34,913.39 and the funds were invested in Equitable Life's with profits fund. Some of the transfer comprised Mr R's guaranteed minimum pension (GMP).

At a later point in time Mr R transferred some additional voluntary contributions (AVC) he had made to Equitable Life. It was documented that Equitable Life didn't advise Mr R to do this.

Mr R complained in 2021 to Utmost about the suitability of the transfer advice. He said that the Equitable Life adviser did not look into his circumstances fully before recommending the transfer. He also says he was told the personal pension would provide greater benefits than the DB scheme and he doesn't think this will now be the case. He thinks he has lost out significantly. He doesn't think the transfer of the DB scheme was suitable for him.

Utmost didn't uphold Mr R's complaint. It said that it thought it had been brought out of time. Unhappy with this, Mr R referred his complaint to our service.

An Investigator first looked into the jurisdiction of the complaint. He thought that Mr R's complaint had been brought in time. Utmost agreed with this, and the Investigator went on to consider the merits of the complaint.

Our Investigator upheld the complaint and recommended that Utmost pay compensation. He said that the transfer of the DB scheme wasn't in Mr R's best interests as he was unlikely to match the benefits he would get from the DB scheme due to the transfer. And there was no compelling evidence that he required flexibility. Our Investigator also didn't think it was likely that Equitable Life had fully discussed Mr R's options with him at the time.

He didn't uphold any complaint that Mr R had made about the AVC. It wasn't certain that Equitable life had advised Mr R to transfer this. It had also taken place a significant time after the main DB transfer advice was given so it wasn't part of this advice.

Utmost disagreed, but it didn't say why this was. It didn't agree to pay compensation.

Mr R, and his representative, agreed with what the Investigator said.

As no agreement has been reached 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.

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.

And where the evidence is incomplete, inconclusive or contradictory, I'll 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 advice was provided by Equitable Life in 1995. At this time it was regulated by the Personal Investment Authority ('PIA'). Equitable Life was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). When the PIA took responsibility for LAUTRO businesses in 1994, they adopted the LAUTRO rules. And these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interests and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

However, none of this went as far as meaning that the adviser could just sell the least unsuitable contract from within the provider's range. Paragraph 13(4) made clear that if a customer required a type of policy that couldn't be satisfied by the provider, they should be referred to an IFA.

I've considered the advice given to Mr R with this in mind.

Our Investigator didn't uphold Mr R's complaint about the transfer of the AVC. And Mr R's representative agreed with the investigator's findings. So, I don't think there is any ongoing disagreement about this part of Mr R's complaint. I won't comment in detail about it this part of it. But for the avoidance of doubt, I'm not persuaded that Equitable Life advised Mr R to transfer this part of his DB scheme benefits and I'm not upholding this part of his complaint.

Financial viability

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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.

Mr R was 53 at the time of the advice and wanted to retire at 65. The investment return (critical yield) required to match the occupational pension at retirement was 10.5% per year. This compares with the discount rate of 10% per year for 12 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6%.

I've taken this into account, along with the composition of assets in the discount rate, Mr R's attitude to risk and also the term to retirement.

From what I can see Mr R wasn't an experienced investor. He wouldn't have gained this kind of knowledge through his employment. And this was his main private pension. Overall, what I know about Mr R's circumstances doesn't lead me to conclude that he wanted to take a large risk, or perhaps very much risk at all, with his pension planning.

In order to provide better benefits than the DB scheme the personal pension fund had to provide a return greater than 10.5%. This is higher than the discount rate and above the regulators middle growth rate. I don't think it was likely that Mr R wanted to take this risk.

Added to this a with profits fund is generally regarded as a lower risk investment (leaving aside the specific circumstances that surround Equitable Life's fund). So, it was likely to provide returns nearer the lower end of the regulators projection rates than anything else. This return would be much lower than Mr R would need to improve on the DB scheme.

So, I think Mr R was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement, as a result of investing in the way he was advised to do.

For this reason alone, a transfer out of the DB scheme wasn't in Mr R's best interests. Of course financial viability isn't the only consideration when giving transfer advice. The point of sale information says that Mr R may have wanted some flexibility. I've considered this below.

Flexibility and income needs

Whilst there was mention of Mr R taking his benefits flexibly there doesn't seem to have been any detailed consideration of this at the time of sale.

Based on the evidence I've seen, I don't think Mr R had a genuine need to access his tax free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I say this because it was recorded that he wanted to take his benefits at age 65. I also can't see evidence that Mr R had a strong need for a variable income throughout his retirement. This doesn't seem to have been discussed.

It wasn't outlined what Mr R's income requirements were exactly, But the evidence from the time of sale indicates that Mr R's primary aim was to maximise his retirement income. The DB scheme's income would have been guaranteed and increasing. And so, I think it offered the best chance of doing this. I'm satisfied Mr R could have bet met his needs in retirement through the DB scheme at 65.

I don't think the DB transfer was suitable because of any increased flexibility it may have provided.

Any concerns over financial stability of the DB scheme

I understand the DB scheme was in deficit at the time. But as far as I know the funding of Mr R's employer's DB scheme wasn't in a position such that he should have genuinely been concerned about the security of his pension. And there is nothing from the time of sale that shows Mr R was concerned about this at the time.

Suitability of investments

Utmost recommended that Mr R invest in Equitable Life's with profits fund. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr R, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr R should have been advised to remain in the DB scheme and so the investments in the with profits fund wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the increased income that Equitable Life said he may receive, and some flexibility through a personal pension, would have sounded like attractive features to Mr R. But Equitable Life wasn't there to just transact what Mr R might have thought he wanted. The adviser's role was to really understand what Mr R needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr R was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr R was very likely to obtain lower retirement benefits, and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr R shouldn't have been advised to transfer out of the scheme on the basis that he would receive a better pension when this was unlikely. This wasn't worth giving up the guarantees associated with his DB scheme.

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

Of course, I have to consider whether Mr R would've gone ahead anyway, against Utmost's advice.

I've considered this carefully, but I'm not persuaded that Mr R would've insisted on transferring out of the DB scheme, against Utmost's advice. I say this because Mr R seems to have been an inexperienced investor. And this pension accounted for the majority of Mr R's personal retirement provision. So, if Utmost had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

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

Putting things right

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

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

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

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 R.

Utmost 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 R retired at 65, so this should 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 R's acceptance of the decision.

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

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

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.

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 Utmost to carry out a calculation in line with the updated rules and/or guidance in any event.

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 Utmost Life and Pensions Limited to pay Mr R 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 Utmost Life and Pensions Limited to pay Mr R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Utmost Life and Pensions Limited to pay Mr R any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Utmost Life and Pensions Limited pays Mr R the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr R.

If Mr R accepts this decision, the money award becomes binding on Utmost Life and Pensions Limited.

My recommendation would not be binding. Further, it's unlikely that Mr R can accept my decision and go to court to ask for the balance. Mr R 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 R to accept or reject my decision before 10 February 2023.

Andy Burlinson
Ombudsman