The complaint

Mr W complains about the advice given by Utmost Life and Pensions Limited ('Utmost') 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 W met with Utmost in the early part of 1996 to discuss his pension and retirement needs. Mr W says this came about following a seminar he attended.

Utmost said it completed a fact-find to gather information about Mr W's circumstances and objectives – but it hasn't provided this. I also can't see that Utmost carried out an assessment of Mr W's attitude to risk. I'll come back to this later on.

On 20 March 1996 Utmost advised Mr W to transfer his pension benefits into a personal pension. The application form records that the proceeds (were to be invested in a with-profits fund. The letter of 20 March 1996, presumed to be the suitability letter, did not give any reasons for the transfer – it simply said that after discussion of the analysis of Mr W's DB pension, it had decided to transfer his scheme benefits to a personal pension.

Mr W accepted the advice and the transfer duly took place. An amount of around £10,100 was transferred to Mr W's new personal pension.

Using the services of a representative, Mr W complained to Utmost in 2021 about the suitability of the transfer advice.

Utmost didn't uphold Mr W's complaint. In summary it said that Mr W made his decision to transfer following a detailed analysis of the benefits of his DB scheme with that of a personal pension. It said the illustrations and transfer analysis report produced at the time made it clear that there were no guarantees and that the eventual outcome would depend on investment performance. It said Mr W was provided with the necessary information at the time and while Mr W may now regret his decision to transfer, this does not mean the original advice was unsound.

Dissatisfied with its response, Mr W referred his complaint to our service. An investigator upheld the complaint and required Utmost to pay compensation. In summary they firstly highlighted that there was nothing to suggest Mr W's complaint had been brought out of time. And that in considering the merits of the complaint, they thought the advice was unsuitable.

They didn't think it was financially viable - the growth rate required to match Mr W's scheme benefits, taking account of his attitude to risk (deemed by the investigator to likely be cautious) and his capacity for loss, indicated he was unlikely to improve on the benefits available to him under the DB scheme - and there were no other compelling reasons to proceed with a transfer. They said that had Mr W been suitably advised, they thought Mr W would've remained in his DB scheme.

Despite Utmost repeatedly indicating that it would provide a response to the investigator's conclusion, we've not received a response.

On the assumption therefore that Utmost disagrees with the investigator's opinion, 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. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice – but it provides useful context for my assessment of Utmost's actions here.

The advice was provided by Utmost in 1996 (although it was known by another name then). At this time it was regulated by the Personal Investment Authority (PIA). As Utmost was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), the PIA (LAUTRO) adopted rules applied at the time of the advice.

The adopted 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 Mr W's best interest 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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

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 W was 36 was at the time of the advice and wanted to retire at 66 – his scheme's normal retirement age was 65. The critical yield required to match Mr W's benefits at age 65 was 9.5% (I assume this was based on Mr W taking a full pension.) This compares with the discount rate of 10% per year for 28 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 W's attitude to risk and also the term to retirement. In my view there would be little point in Mr W giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

I'm mindful that the critical yield of 9.5% was slightly lower than the discount rate of 10%. But the critical yield was still higher than the regulator's middle projection rate. And 9.5% was the growth required to effectively stand still and provide the same level of benefits as the DB scheme. Importantly I also think this needs to be considered in the context of Mr W's attitude to risk. Nothing in the advice paperwork from the time indicates that Mr W's attitude to risk was assessed by Utmost – if it was, the record of it either hasn't been provided or it's no longer available. But I think there is evidence available to indicate what Mr W's likely attitude to investment risk was at the time. Looking at the personal pension plan application, I can see that the chosen investment fund was a with-profits fund – 100% of Mr W's transfer value was invested this way. In my view this would reasonably be considered a low or cautious investment at the time of the advice. Because I think Utmost would've chosen an investment fund to match Mr W's attitude to risk, I think it's reasonable to assume that Mr W likely had a low or cautious attitude to investment risk.

But I don't think that the transfer was compatible with Mr W's cautious attitude to risk. In my view, to achieve the necessary sustained growth rates, it required Mr W to take investment risk which was above his recorded appetite. It appears that at best he might end up with benefits broadly in line with his existing benefits if he invested in line with a medium attitude to risk. But in my view there was a real possibility that Mr W would receive lower value benefits than his DB scheme at retirement if he invested in line with his cautious attitude to risk, which is what Utmost's advice ought to have been based on.

Overall I think it is clear that Mr W would not be better off and was more likely to be worse off financially if he transferred out of his DB scheme. And for this reason alone, I don't think the advice to transfer out of the DB scheme was suitable for Mr W. But I accept that financial viability isn't the only consideration when giving transfer advice - there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits.

But there are no other considerations recorded as having been taken into account in the advice paperwork – it appears the advice was solely based on Utmost's belief that Mr W would be better off in retirement if he transferred out of the DB scheme. I've already said that I don't think this was the case. And in my view there were no other particular reasons to justify a transfer and outweigh the likelihood of lower retirement benefits.

Mr W was only 36 at the time of the advice and based on what I've seen he didn't have concrete retirement plans. As Mr W had almost 30 years before he said he wanted to 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 Mr W to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr W later had reason to transfer out of their DB scheme he could have done so closer to retirement.

Summary

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free, and increasing income. By transferring, Mr W was at best likely to obtain no more than his existing benefits and in my view he was very likely to obtain lower retirement benefits. I also think there were no other particular reasons, which would justify a transfer and outweigh this.

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

I now need to consider whether, if things had happened as they should have Mr W would've gone ahead anyway, against Utmost's advice.

Having done so, I don't think Mr W would've insisted on transferring out of his DB scheme and gone ahead in any event. I say this because there's nothing to suggest Mr W an experienced investor, who possessed the requisite skill, knowledge of confidence to go against the advice they were given in pension matters. I think Mr W had a cautious attitude to risk and at the time his pension accounted for the majority of his future retirement provision. I think he relied on the advice he was given. So, if Utmost had provided Mr W with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, I think he would've accepted that advice.

In light of the above, I think Utmost should compensate Mr W 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 set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

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 W 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.

Mr W has chosen not to wait for the new rules and 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 W.

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

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 W has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per 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 W's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W'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 W 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 W 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 W.

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

Determination and money award: I uphold this complaint and require Utmost Life and Pensions Limited to pay Mr W 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 W 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 W 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 W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W 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 W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 10 January 2023.
Paul Featherstone
Ombudsman