DRN-3577590

The complaint

Ms F complains about the advice JLT Wealth Management Limited (JLT) gave her to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a personal pension. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

Ms F was a deferred member of her former employer's DB scheme. The scheme fund was in deficit. In 2010, in an effort to reduce the scheme's size and volatility, its trustees offered an enhanced transfer value to scheme members. Ms F's former employer engaged JLT to offer scheme members advice on the suitability of a transfer from the scheme. JLT's fees were met by the former employer and JLT did not receive any commission for arranging transfers from the scheme.

JLT gathered information about Ms F's entitlements from her DB scheme and received a transfer value analysis report based on Ms F retiring at ages 55 and 60. It asked Ms F to complete a fact find questionnaire. It noted that:

- Ms F was 36 years old, single without dependents.
- She had a mortgage on her home with an outstanding balance of around £113,000.
- She had around £5,000 in savings.
- She hoped to retire at age 65 with an annual income of £40,000.
- She recorded her attitude to risk as balanced.
- The scheme was offering a transfer value of £75,176, which included an enhancement of £6,834. The unenhanced transfer value was £68,341.
- The scheme would pay her a yearly income in retirement of £7,177.
- The critical yield (the investment growth rate required each year to match the benefits of the DB scheme) for retirement at age 60 was 7.3% if Ms F invested the entire enhanced cash value without taking a tax free cash ('TFC') lump sum. The critical yield reduced to 6.4% if she took TFC.

On 8 April 2010 JLT sent Ms F a report outlining its recommendations about the suitability of a transfer away from the DB scheme. It noted that the pension fund was in deficit and as a result the unenhanced transfer value (£68,341) was based on its equivalent pension protection fund ('PPF') benefits. The PPF is a government scheme which protects the retirement income of DB scheme members if their former employer became insolvent or was unable to make up a deficit in scheme funding. It said the DB scheme was offering the opportunity for Ms F to take all or part of the enhancement figure (£6,834) as a lump sum, subject to tax and national insurance, immediately. It set out some of the benefits, risks and disadvantages of staying in or transferring out of the scheme and explained Ms F's options. JLT recommended that Ms F transfer out of the DB scheme and into a personal pension plan for the following reasons:

- The investment returns required, which it quoted as being 6.4% if Ms F invested the enhanced sum, and 6.8% if she didn't, were within the required range.

- It would allow Ms F to “boost” her pension funding.
- It would provide her with flexibility and personal control over the pension fund which it said was “*important*” to her.
- If Ms F died before retirement age the death benefits from a personal pension would be more valuable to her beneficiaries.
- If she was still single when she retired then she might be able to buy a single life annuity giving a higher pension than the DB scheme provided, as the DB scheme automatically provides for a spouse’s pension.
- The cost of the recommended personal pension was competitive at just 0.33% of the fund value.

The report said that if Ms F chose to transfer out of the DB scheme it was important that she reviewed her investments at least once a year. It said that if she wanted JLT to carry out that review there would be a charge for its service.

In terms of investment growth and critical yield the report said:

“*The highest return we can currently accept, as being reasonable for your risk profile and term to retirement is 7.3% per annum*”

And it added:

“*Therefore, we would recommend a transfer to a Stakeholder/Personal Pension Plan based purely on the financial results of Critical Yield calculations*”

The report went on to say that while the critical yield “*may be considered to be the prime factor influencing a potential transfer*”, other factors for Ms F to consider included, amongst other things:

- The maximum lump sum TFC rules from a personal pension on retirement were simpler than those for the DB scheme with 25% of the personal pension fund being available as TFC.
- If Ms F was to fall into ill-health and wished to retire early then she may be able to purchase an enhanced annuity using her personal pension funds.

On an unknown date (the version of the document I've seen is redacted and the date is illegible) JLT’s actuaries provided an updated critical yield calculation which it reported as follows:

“*Our calculations have been completed to assess the impact on the critical yield of assuming that the member retires at age 65 rather than 60 and that the member does not commute their pension for a cash lump sum at retirement.*

The results of the calculations are an increase in the critical yield from 6.4% to 7.0%. This compares to the hurdle rate provided of 7.3%.”

In June 2010 Ms F completed the relevant forms to allow the transfer of her DB funds to a personal pension to go ahead.

In 2019 JLT contacted Ms F. It told her it was reviewing the advice it had given to her. In May and July 2021 JLT told Ms F it had completed the review, which hadn't raised any material issues concerning the suitability of that advice.

In August 2021 Ms F complained to JLT. Amongst other things she said that JLT's advice was neither adequate nor comprehensive enough for her to make an informed decision, at the time, about transferring out of the DB scheme.

JLT didn't uphold Ms F's complaint. It said, amongst other things, that:

- The hurdle rate (a projected growth rate) of 7.3% was reasonable. Its review had confirmed that such a growth rate at the time was achievable and in fact it had rounded this hurdle rate down from 7.36%.
- The hurdle rate was 0.36% higher than the critical yield of 7%, which reduced the risk of the transfer. JLT referred to the difference between the hurdle rate and the critical yield as a "*positive margin*".
- Its suitability report made it clear that Ms F could remain in the DB scheme.
- The report explained how the PPF cap could apply to the DB scheme.

Ms F referred her complaint to our service. One of our investigators upheld the complaint and required JLT to pay compensation, including £250 to address her distress and inconvenience. Amongst other things our investigator noted that:

- Ms F had a low capacity for loss so the guaranteed benefits offered by the DB scheme would have been important to her.
- The DB scheme offered valuable benefits with virtually no risk.
- The regulator's guidance is that advising firms should start by assuming that a transfer away from a DB scheme is not suitable. That is unless there is contemporary evidence that the transfer is in the client's best interests.
- The critical yield was 7% and the discount rate (a projected growth rate published by this service) was 6.2% a year until Ms F's retirement at age 60. And the regulator's projections were 5%, 7%, and 9% for low, mid and upper projected growth rates respectively. As such, our investigator felt that Ms F was likely to be worse off in retirement by transferring out of the scheme.
- Based on the growth rates required the advice to transfer wasn't suitable.
- While transferring out of the DB scheme gave Ms F more flexibility and control of her pension funds, as she was unlikely to be better off, those weren't worth transferring out of the scheme for.
- The DB scheme had the protection of the PPF. That was lost when she transferred out. Instead her personal pension was covered by a compensation scheme that would only cover up to £85,000 of losses.
- While Ms F had no partner or dependents at the time of the advice, and so didn't require the death benefits from the DB scheme, she also had no pressing need to transfer**.**
- There was no evidence that Ms F was in ill-health so the possibility of enhanced death benefits wasn't worthwhile giving up the guaranteed benefits of her DB scheme for.
- Ms F had said she didn't wish to take TFC at retirement so access to this in a simpler version wasn't a reason to transfer out of the DB scheme.
- Both the DB scheme and the personal pension allowed early retirement so this also wasn't a reason to transfer.

JLT didn't agree with our investigator's assessment of the complaint. Amongst other things it said:

- Ms F's preferred retirement age was 65 and not 60.
- Its actuaries had confirmed that if Ms F retired at 65 then the critical yield was 7%.
- The hurdle rate of 7.3% its suitability report referred to was reasonable.

- The hurdle rate was 0.3% higher than the critical yield.
- Firms weren't required to refer to our published discount rates and as such it's not reasonable to prefer that figure to the hurdle rate. So it said our investigator's primary basis for her conclusion was *"fundamentally incorrect*".
- Ms F did not have a low capacity for loss. She had "*27 years until her preferred retirement age of 65* " and was planning on paying 4.5% of her salary into her new employer's money purchase pension scheme.
- Ms F's attitude to risk was balanced and the advice it gave was suitable as she was in a position to exceed the benefits from her DB scheme.

The investigator wasn't persuaded to change her 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.

In responding to this complaint and replying to our investigator's assessment of it JLT has made a number of detailed points. I've considered carefully everything it's said. But in this decision I don't intend to address each and every point individually and instead will focus on the matters at the heart of Ms F's complaint, JLT's disagreement with our investigator's assessment of it and the reasons for my decision.

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. This includes the regulator's Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). 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 provides useful context for my assessment of Grove'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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for broadly similar reasons to those given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), says 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 recommending a transfer if it could clearly demonstrate that the transfer was in Ms F's best interests.

Financial viability

When thinking about whether or not it's in a client's best interests to transfer out of a DB scheme, often the most pressing consideration is whether or not a client will be better or worse off in retirement by doing so. So that's the first point I intend to consider.

JLT has taken issue with our investigator's reference to our published discount rates especially as these indicated that Ms F's personal pension was unlikely to grow at a required rate to meet the benefits of her DB scheme. However, while I generally find discount rates a useful guide in assessing financial viability, given that firms weren't required to refer to them and it seems JLT didn't consider those, I don't intend to rely on them here.

Instead JLT's said that the hurdle rate is a more useful indicator of likely growth and as that was 0.3% higher than the critical yield then this demonstrated that Ms F could be better off by transferring out of her DB scheme. But as I go on to explain, I'm not persuaded by JLT's analysis.

It's notable that JLT's suitability report doesn't actually use the term *hurdle* rate at any point. What it does say is:

"*The highest return we can currently accept, as being reasonable for your risk profile and term to retirement is 7.3% per annum*"

I'm satisfied that the "*highest return*" JLT was referring to was in fact the hurdle rate. In other words JLT projected that Ms F's personal pension would grow at 7.3% a year. But, typically the calculation of hurdle rates don't factor-in the costs of fund charges or spousal benefits, and they also might not factor-in pension increases over time, which is a guarantee of the DB scheme. And the personal pension JLT recommended cost 0.33% of the fund value a year. So that charge alone, if not factored into the hurdle rate, would cancel out most of the *positive margin* between the hurdle rate and the critical yield. However, even if JLT did factor-in scheme and adviser charges when calculating the hurdle rate (and there's no evidence that it did), I still don't think this supports an analysis that Ms F would most likely be better off in retirement by transferring out of her DB scheme.

JLT pointed out that Ms F had said she wanted to retire at 65 and not 60. But its own suitability report and transfer value analysis reports don't ever mention her retiring at 65. The calculations in the transfer value report are all either for early retirement at age 55 or otherwise at 60. And given that Ms F gave no indication she wished to retire at 55 I think it's fair to discount those figures. So, all the information JLT provided to Ms F was based on an incorrect assumption that she would retire at age 60. There isn't a single mention that I can find of her retiring at age 65 until it responded to her complaint. So, as far as I can see, the information that JLT gave to Ms F to inform her decision was all based on the wrong preferred retirement date. It follows that I don't think it gave her all the facts with which to make an informed decision about whether or not she wanted to transfer out of the DB scheme.

It's evident that at some point JLT realised it should have run a transfer value analysis for Ms F's chosen retirement age of 65. And at that point it asked its actuaries to recalculate the critical yield for that retirement age. The actuaries response was as follows:

"*Our calculations have been completed to assess the impact on the critical yield of assuming that the member retires at age 65 rather than 60 and that the member does not commute their pension for a cash lump sum at retirement.*

The results of the calculations are an increase in the critical yield from 6.4% to 7.0%. This compares to the hurdle rate provided of 7.3%."

But I think those calculations are almost certainly wrong. Its actuaries said above that the critical yield at age 60 was 6.4% – without Ms F taking TFC at retirement. However, both JLT's transfer value analysis and suitability report say that the critical yield at age 60, without taking TFC is 7.3%. The figure only reduced to 6.4% if Ms F *did* take TFC. So the starting critical yield above should have been 7.3% and not 6.4%. And it seems likely that the actuaries have mistakenly recalculated the critical yield figure at age 65 with Ms F taking TFC. I don't have the actuarial tools to recalculate the correct critical yield myself, but given that it increased by 0.6% in the mistaken calculation above, I think it's likely to have increased by a similar margin and as such would have gone above 7.3% and eroded any positive margin. And in those circumstances Ms F was more likely than not to be worse off by transferring out of the DB scheme.

However, even if my analysis above is wrong and the correct critical yield was 7% at age 65 with a positive margin of 0.36%, I still don't think a recommendation for Ms F to transfer out of the scheme was suitable.

The DB scheme would provide Ms F with a guaranteed income at retirement for the rest of her life. That income was index linked and would increase each year. But the benefits from a personal pension are dependent on investment returns. That is they carry with them the risk that investments can go down as well as up. And Ms F's personal pension plan would have to grow each year, at the critical yield of – at least – 7% in order simply to match the benefits available to her from her DB scheme. And any period of poor or lower investment return performance could see her personal pension funds falling below the value of the DB scheme.

Further there would be little point in Ms F giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, the critical yield was at least 7% and JLT felt that the "highest" return was likely to be 7.3%. So I think Ms F was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with a balanced attitude to risk and regardless of her capacity for loss.

For this reason alone a transfer out of the DB scheme wasn't in Ms F's best interests. Of course 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. I've considered these below.

Annuity

JLT said that one of the benefits of Ms F transferring out of the scheme was that, as a single person, she might be able to buy a more valuable annuity at retirement. It might help if I explain that Ms F's DB scheme had guaranteed benefits for her spouse should she have one at the time of her death. But, if she were to remain single, then – at retirement – she could buy an annuity on what's known as a single life basis. That is a product that did not provide any benefits for a spouse and could therefore be more valuable in terms of her own income as a single person.

But, at the time of JLT's advice, Ms F was still over 28 years from retirement age and so was unlikely to have known for certain if she would remain single until retirement. And even if she was planning to be single in retirement, given the length of time until that happened she had no reason to make any sort of decision about transferring out of her DB scheme at that time. If she decided she wanted to buy a single life annuity closer to retirement then that would be a decision she could make at that time. That is she could decide to transfer out of the DB scheme at a time when she could make an informed decision about what retirement income a single life annuity – if that's what she wanted – would pay to her compared against the benefits from her DB scheme. She had no good reason to make such a decision in 2010. So I don't think the prospects of a more valuable single life annuity in many years to come was a good enough reason to give up the benefits of her DB scheme for.

Flexibility and control

One of the reasons for JLT's recommendation to Ms F to transfer out of her DB scheme was because it would allow her the flexibility and control of her pension which it said was "*important*" to her. But it's difficult to see how it weighed up just how important that was to her or whether it was worth giving up the benefits of her DB scheme for.

I've noted that when completing JLT's fact find questionnaire Ms F ticked a box which said that she would prefer to move her pension to an individual plan that was under her control. But while she's given that as a preference there's no indication that this was of great importance to her. And that question wasn't put into the context of what she would be giving up in order to gain that flexibility and control.

I've noted that Ms F said she would prefer to invest in "*ethical sectors*". But I can't see that JLT explored this with her or indeed referred to it in its suitability report. I've seen no evidence in the available papers that flexible access to her DB pension fund was something that Ms F had any actual need for at the time of the advice. That's because JLT hasn't recorded any reason why Ms F might need access to her DB funds before retirement age, or why accessing those funds flexibly would be worth giving up the guaranteed benefits her DB scheme offered her.

I also can't see evidence that Ms F had a strong need for variable income throughout her retirement or before. And while I can understand that the ability to take control of investments and access funds flexibly might have been a preference for Ms F when she answered a question about it, that doesn't mean that meeting that preference was in her best interests. That's because having that flexibility and control meant giving up guaranteed income at retirement age. And on top of that, Ms F would be taking on investment risk alongside charges for the personal pension and for any investment advice she decided to take. Those are charges that would potentially continue to reduce the size of Ms F's pension fund but which wouldn't have been deducted from her DB scheme benefits had she remained in that. So I don't think the potential benefits of flexibility and control of her pension funds outweighed the benefits she would have to give up from her DB scheme.

Death benefits

JLT also said that if Ms F died before retirement age the death benefits from a personal pension would be more valuable for her beneficiaries than those provided by the DB scheme. That might be the case. But at the time of the advice Ms F wasn't suffering from any ill-health; and there was no indication she was likely to die before retirement age. So I can't see that this would have been a sufficient reason to give up a guaranteed income at retirement. The priority here was for JLT to advise Ms F about what was best for her retirement provision. A pension is primarily designed to provide income in retirement. And I don't think JLT explored to what extent Ms F was prepared to accept a lower retirement income in exchange for higher death benefits. I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Ms F.

Summary

Ultimately, I don't think the advice JLT gave to Ms F was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Ms F 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. So JLT's advice to transfer out of the scheme wasn't in her best interests. And I think JLT should've advised Ms F to remain in their DB scheme.

Of course, I have to consider whether Ms F would've gone ahead anyway, against JLT's advice. I've considered this carefully, but I'm not persuaded that Ms F would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because Ms F was an inexperienced investor with a balanced attitude to risk. So, if JLT had given her clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would have accepted that advice.

Further, Ms F's explained that the poor advice to transfer out of the scheme has been a source of distress and inconvenience for her, to address that I think JLT should pay her £250 compensation.

Putting things right

A fair and reasonable outcome would be for JLT to put Ms F, as far as possible, into the position she would now be in but for its unsuitable advice. I consider Ms F would have most likely remained in her DB scheme if JLT had given suitable advice.

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) 17/9 (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.

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 Ms F whether she preferred any redress to be calculated now in line with current guidance or wait for any new guidance /rules to be published. She has chosen not to wait for any new guidance to come into effect to settle her complaint.

I’m satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Ms F**.**

JLT must therefore undertake a redress calculation in line with the regulator’s pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, Ms F has not yet retired, and has no plans to do so at present. And while she could have accessed her DB scheme at age 60 she has said that she only intended to do so from age 65. So, compensation should be based on her 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 Ms F’s acceptance of the decision.

JLT may wish to contact the Department for Work and Pensions (DWP) to obtain Ms 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 Ms F’s SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Ms 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 Ms 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 her 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 Ms F within 90 days of the date JLT receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% a 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 Ms 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.

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 JLT 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 JLT pays the balance.

My final decision

Determination and money award: I uphold this complaint and require JLT Wealth Management Limited to pay Ms F 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 JLT Wealth Management Limited to pay Ms 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 Ms F any interest as set out above on the sum of £160,000.

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

If Ms 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 Ms F can accept my decision and go to court to ask for the balance. Ms 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 Ms F to accept or reject my decision before 15 November 2022.

Joe Scott
Ombudsman