DRN-3591936

The complaint

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

What happened

Mr J approached Utmost around February 1999 to discuss his pension and retirement needs.

Utmost completed a fact-find to gather information about Mr J's circumstances and objectives. Utmost also carried out an assessment of Mr J's attitude to risk, which it deemed to be 'medium'.

On 25 February 1999 Utmost advised Mr J to transfer his pension benefits into a personal pension and invest the proceeds in a managed fund. In summary the suitability report said the reasons for this recommendation were:

- because of the projected growth rate required of 7.01% to match Mr J's DB scheme benefits.
- because Mr J's medium attitude to risk indicated was willing to consider the transfer based on the projected growth rate.
- to provide the potential for higher benefits in exchange for the loss of guarantees.
- to enable Mr J to control his pension.
- because the death benefits provided by Mr J's DB scheme weren't important given he didn't have any dependants and he didn't expect this to change.
- To provide for a retirement age of 60.

Mr J accepted the recommendation and the transfer took place. Mr J also started a monthly contribution to his new pension of around £40 a month.

In 2021 Mr J complained To Utmost about the suitability of the transfer advice because he doesn't think it was in his best interests to transfer out of his DB scheme given his low appetite for risk and because his pension represented his only provision for retirement.

Utmost didn't uphold Mr J's complaint. In summary it said that it explained to Mr J the benefits he would be giving up by transferring and that his eventual benefits payable would be dependent on investment growth.
Overall it said that Mr J was provided with enough information to make an informed decision and to what to do and the transfer was reasonable in the circumstances.

Mr J referred his complaint to our service. An investigator upheld the complaint and required Utmost to pay compensation. In summary they said that taking into account the critical yield required to match Mr J's DB scheme benefits, his attitude to risk, the discount rate and the regulator's growth projection rates, they thought it likely at best Mr J would end up with broadly the same level of benefits to his DB scheme as a result of transferring out. And in considering whether there were any other compelling reasons to transfer they didn't think flexibility or control were real or important reasons to transfer – they thought they were stock or generic motives recorded by Utmost. So overall they didn't think the advice to transfer was suitable and that Utmost had failed to demonstrate that transferring was in Mr J's best interests. The concluded by saying that they thought Mr J would've likely remained in his DB scheme had he been given suitable advice.

Despite us sending reminders, Utmost didn't respond to the investigator's assessment.

Because it is assumed Utmost disagrees, 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 advice was provided by a business now known as Utmost in 1999. At this time it was regulated by the Personal Investment Authority ('PIA'). Utmost 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 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.

I've considered the advice given to Mr J with this in mind. And having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator – I don't think the advice Mr J received to transfer out of his DB pension scheme was suitable. My reasons are set out below.

Financial viability

Utmost said that one of the reasons Mr J wanted to transfer out of his DB scheme was because of the potential for better benefits through a personal pension.

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.

The investment return (critical yield) required to match the occupational pension at retirement was quoted as 7.01% per year. This compares with the discount rate of just under 7% for 26 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 J’s attitude to risk and also the term to retirement.

In my view there would be little point in Mr J giving up the guarantees available to him through his DB scheme only to achieve, at best, the same or broadly the same level of benefits outside the scheme. And here, while the critical yield was lower than the regulator’s middle projection rate, it was higher than the lower projection rate. And it was also around the same as the discount rate. So it appears at best, only the same level of benefits might be achieved by transferring.

I’ve also thought about this in the context of Mr J’s capacity for loss – his DB scheme was the only real source of his future retirement income, which was guaranteed and would increase. He wasn’t an active member of an occupational pension scheme because he was self-employed. He’d only recently started contributing a relatively small monthly amount towards a personal pension. And other than a few hundred pounds in the bank as an emergency fund, Mr J didn’t have any other assets or investments to his name. So I think Mr J’s capacity for loss was low.

I can also see that the adviser originally recorded on the advice paperwork that they considered the growth rate required from the personal pension to match Mr J’s DB scheme benefits was *“low”.* And while the adviser was instructed to correct the description by sending Mr J a follow-up letter, if the adviser no longer believed this to be the case, then I would’ve expected them to have taken the opportunity to reconsider the advice overall – not simply clarify that it wasn’t the correct description.

In response to Mr J’s complaint, Utmost said that it told him about the risks involved, the guarantees he would be giving up and that his future benefits would be dependent on investment growth. So overall Utmost believes Mr J was given enough information to make an informed decision about things.

But Utmost was under a duty to provide suitable advice. Merely disclosing information doesn’t make an unsuitable recommendation suitable .Utmost told Mr J that it was recommending the transfer because the personal pension had greater benefit potential. But I think it was unlikely that Mr J would be able to exceed the benefits he was entitled to under the DB scheme through a personal pension – at best I think they would be broadly the same.

So given this together with Mr J's circumstances at the time including his capacity for loss, I think Utmost ought to have told Mr J it wasn't in his best interests to transfer out.

Overall, because I think it is likely Mr J would not be better off financially if he transferred out of his DB scheme, for this reason alone, I don't think the advice to transfer out of the DB scheme was suitable for Mr J. 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 broadly the same overall benefits. I've considered these below.

Flexibility

The fact-find recorded that Mr J wanted flexibility of retirement date. And while it wasn't specifically referred to as a reason why Utmost recommended Mr J transfer out of his DB scheme, it seems reasonable that it considered this in giving its advice. But I don't think Mr J required flexibility in retirement. I say this because Mr J's normal retirement age of his DB scheme was 60. And this was the same age as Mr J's target retirement date. It was also the same age the adviser recorded as being the most likely age Mr J would retire, despite indicating that flexibility was important.

Furthermore, Mr J was only in his early thirties at the time of the advice and based on what I've seen he didn't have concrete retirement plans and I don't think he would've known his future income need had Utmost asked him. As Mr J had in excess of 20 years before he could 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 J to make any kind of irreversible decision to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr J later had reason to transfer out of his DB scheme – for example because he needed to access a higher level of income than his scheme provided - he could have done so closer to retirement.

I'm also mindful that Mr J didn't need to transfer out of his DB scheme to achieve flexibility if that's what he required – he already had a degree of flexibility in how and when he took some of his future retirement benefits because he had an existing personal pension plan. And while it was of low value at the time of the advice, Utmost's overall recommendation for Mr J's retirement planning was that he contribute a monthly amount to the new personal pension. But he could've been advised to direct this to his existing personal pension while at the same time remaining in his DB scheme. In my view this would've been a suitable recommendation – it would've given Mr J a guaranteed future retirement income foundation which he could then build upon using his existing personal pension.

Control

I think Mr J's desire for control over his pension benefits was overstated. Mr J was not an experienced investor – in fact he was completely inexperienced as the advice paperwork records - and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own.
Indeed the fund choice was a managed fund, which I think supports my view. So, I don't think that this was a genuine objective for Mr J – it was simply a consequence of transferring away from his DB scheme.

Summary

I don't doubt that the potential for higher benefits, flexibility, and control on offer through a personal pension would have sounded like attractive features to Mr J. But Utmost wasn't there to just transact what Mr J might have thought he wanted. The adviser's role was to really understand what Mr J needed and recommend what was in his best interests.

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

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

I now need to consider whether Mr J would've gone ahead anyway, against Utmost's advice. Having done so, if things had happened as they should have, I don't think Mr J would've insisted on transferring out of his DB scheme and gone ahead in any event. I say this because Mr J was not in my view an experienced investor who possessed the requisite knowledge, skill or confidence to go against the professional advice he sought and was given. And at the time his pension accounted for the majority of his retirement provision – so I think he relied on the advice he was given. Therefore, if Utmost had provided Mr J 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.

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 J 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.

Mr J didn't make a choice by the deadline provided, so as set out previously I've assumed in this case he doesn't want to wait for any new guidance.

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 J.

A fair and reasonable outcome would be for the business to put Mr J, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr J 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 J’s DB scheme normal retirement age was 60. Because I think this is when Mr J would most likely have taken his benefits had he remained in his DB scheme, compensation should be based on a normal retirement age of 60.

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 J’s acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr J’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 J 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 J within 90 days of the date Utmost receives notification of his/her 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 J.

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.

My final decision

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

If Mr J 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 J can accept my decision and go to court to ask for the balance. Mr J 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 J to accept or reject my decision before 10 November 2022.
Paul Featherstone
Ombudsman