

The complaint

Mr G complains about the advice given by JLT Wealth Management Limited (JLT) to transfer the benefits from his defined-benefit (DB) occupational pension scheme (OPS) to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr G approached JLT in 2010 to discuss his pension and retirement needs. The information from the time of sale shows that this was prompted by Mr G's DB scheme offering an enhanced transfer value. I understand JLT's fees were being paid by Mr G's employer.

The suitability letter said that the DB scheme was paying 92.5% of the cash equivalent transfer value (CETV) due to a deficit in its funding. But in order to facilitate transfers away it would pay 106.5% of the CETV. The enhancement could be taken as cash immediately.

JLT completed a fact-find to gather information about Mr G's circumstances and objectives. This said that he was:

- Aged 35, married, with two dependent children.
- In good health and he was expecting this to continue.
- Employed and earning £29,000.
- He had a planned retirement age of 65, but he was unsure of his preferred retirement date or what his retirement income needs would be.
- Had no savings or investments

JLT also carried out an assessment of Mr G's attitude to risk, the fact find said that Mr G's attitude to risk was 'adventurous'. This was described as being willing to accept a high investment risk which could lead to large gains or losses.

In June 2010, JLT advised Mr G to transfer his pension benefits into a personal pension and invest the proceeds with a well-known provider. The transfer value was £25,019. And an enhancement of £3,356.43 was paid to Mr G directly.

The suitability report said the reasons for this recommendation were:

- Mr G wanted a lump sum straight away and he was prepared to sacrifice his future pension benefits to obtain this. It was noted that he hadn't said why he wanted this money.
- The DB scheme represented an insignificant part of his overall retirement funds.
- He wanted the control, and greater death benefits, a personal pension arrangement could offer. This was because he had very little life assurance.
- He wanted to move to an individual plan under his control.
- He wanted the greater tax-free lump sum a personal pension could offer.

Mr G complained in 2021 to JLT about the suitability of the transfer advice because he thought the transfer was mis-sold. He said that a number of work colleagues had received compensation in similar situations.

JLT didn't uphold Mr G's complaint. It said that the transfer was reasonable given Mr G's high tolerance to risk and the expected returns of the fund it invested in. It also said that Mr G wanted control over his pension fund, and he wanted a greater ability to take tax free cash at retirement.

Mr G referred his complaint to our service. An investigator upheld the complaint and said that JLT should pay compensation. He said the advice to transfer wasn't suitable as Mr G was now likely to receive lower retirement benefits than he would have done in the DB scheme. And even though Mr G did want the cash enhancement there was little insight into his circumstances, or reasons given for the transfer.

JLT disagreed, saying that Mr G required a return of 7.6% to match his scheme benefits. But the 'hurdle rate' was 8.5%. It said this hurdle rate was the highest return it could currently accept as being reasonable for Mr G's risk profile and term to retirement. JLT said it wasn't required to refer to the discount rate and using its own 'hurdle rate' as a comparison was reasonable.

The investigator wasn't persuaded to change their 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.

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'). 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 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.

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.

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 G's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

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.

The investment return (critical yield) required to match the occupational pension at retirement was quoted as 7.7% if Mr G took a full pension and 7.3% if he took tax free cash and a reduced pension. These are based on him taking the enhancement as a cash sum rather than leaving it in the pension, which he did do.

This compares with the discount rate of 6.9% per year for 29 years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%. I've taken this into account, along with the composition of assets in the discount rate, Mr G's attitude to risk and also the term to retirement.

JLT has said that Mr G's tolerance to risk was adventurous, or very high, at the time of sale. I understand this was done solely on the basis that he (or JLT on his behalf) selected this from a number of options. There is no qualification of this at any point, or explanation of why this was.

And the other information from the point of sale is contradictory about this. It was recorded that Mr G didn't have any savings or investments and he was unsure of what investment types or sectors he wanted to invest in. It's not clear to me that Mr G had an understanding or experience of investment risk at this point. So, I'm not persuaded that his attitude to risk was as high as JLT said it was, I think it was likely to be much lower than 'adventurous'.

And JLT has also said that the DB scheme was an insignificant part of Mr G's pension planning. Mr G ticked a box on the fact find to say this was the case. But there were no other pension arrangements recorded for Mr G on the fact find. And Mr G's age and circumstances make it likely that this was his only non-state pension benefits. So, I don't see how the DB scheme could be an insignificant part of his retirement provision.

It follows from that I don't think the rate that JLT assessed this transfer on was appropriate. The 8.5% return that it used is very high and near the top end of the regulators illustrated growth rates. I think the discount rate is better comparator.

So, I think Mr G was likely to receive benefits of a materially lower overall value than his occupational scheme at retirement, as a result of investing in line with his correct tolerance to risk.

For this reason alone, a transfer out of the DB scheme wasn't in Mr G'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.

Flexibility and income needs

I don't think Mr G required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he 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 this doesn't seem to have been discussed.

I also can't see evidence that Mr G had a strong need for variable income throughout his retirement. This also wasn't identified.

In fact the only need identified was Mr G's statement on the fact find that he needed 'cash'. But there was no recorded evidence of financial difficulty and the transfer provided Mr G with a relatively modest immediate cash sum. So, I don't think this was enough in itself to advise Mr G to transfer.

Furthermore, Mr G was only 35 at the time of the advice and based on what I've seen he didn't have concrete retirement plans. As Mr G had 29 years before he said he wanted to retire and access 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 G to give up his guaranteed benefits, particularly as it was documented that he didn't know what his needs in retirement would be. If Mr G later had reason to transfer out of their DB scheme he could have done so closer to retirement.

Death benefits

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 were likely an attractive feature to Mr G. But whilst I appreciate death benefits are important to consumers, and Mr G 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 G about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think JLT explored to what extent Mr G 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 underplayed. Mr G was married and had dependent children and so the spouses and dependents pensions provided by the DB scheme would've been useful if Mr G predeceased them. I don't think JLT made the value of this benefit clear enough to Mr G. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, JLT should not have encouraged Mr G to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr G genuinely wanted to leave a legacy for his spouse or children, which didn't depend on investment returns or how much of his pension fund remained on his death, I think JLT should've instead explored life insurance.

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 G. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr G's desire for control over his pension benefits was overstated. I'm not persuaded that Mr G was an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr G – it was simply a consequence of transferring away from his DB scheme.

As far as I can see the funding of his employer's DB scheme was not in a position such that Mr G should have genuinely been concerned about the security of his pension.

Summary

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

Ultimately, I don't think the advice given to Mr G was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr G 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 G shouldn't have been advised to transfer out of the scheme just to gain a modest amount of cash, and the potential for higher death benefits and tax-free cash weren't worth giving up the guarantees associated with his DB scheme.

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

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

I've considered this carefully, but I'm not persuaded that Mr G would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because I don't think Mr G was an experienced investor and, as far as I can see, this pension accounted for the majority of Mr G's retirement provision. So, if JLT 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.

I'm not persuaded that Mr G's need for cash and any concerns he may have had about his employer, or the scheme, were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. If JLT had explained that Mr G could meet all of his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr G would have insisted on transferring out of the DB scheme.

In light of the above, I think JLT should compensate Mr G 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 G whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance or 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 G.

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

JLT 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 G has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age, which I understand to be 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 G's acceptance of the decision.

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

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

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 the business 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 JLT 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 JLT Wealth Management Limited to pay Mr G 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 Mr G 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 Mr G 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 Mr G the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

If Mr G accepts this decision, the money award becomes binding on JLT Wealth Management Limited.

My recommendation would not be binding if Mr G accepts this decision. Further, it's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G 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 G to accept or reject my decision before 11 November 2022.

Andy Burlinson
Ombudsman