

## **The complaint**

Mr B complains about the advice given by JLT Wealth Management Limited (“JLT”) 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 B approached JLT around April 2009, following an introduction from his former employer, to discuss his pension and retirement needs.

JLT completed a fact-find to gather information about Mr B’s circumstances and objectives. JLT also carried out an assessment of Mr B’s attitude to risk, which it deemed to be ‘moderate’.

On 3 June 2009, JLT advised Mr B to transfer his pension benefits into a personal pension and invest the proceeds in a series of funds designed to match his attitude to risk. But JLT said its recommendation was based on Mr B reinvesting the additional cash sum the scheme was offering into the new pension – it said if Mr B wanted to take the additional cash sum it recommended that Mr B didn’t move his pension from the DB scheme. In summary the suitability report said the reason for this recommendation was based exclusively on whether the critical yield was achievable, which it said it was. It also said Mr B had the potential for greater lump sum death benefits and higher tax-free cash at retirement.

On 6 June 2009 Mr B signed the relevant paperwork and indicated on the ‘Member Transfer Agreement Form’ that he wanted to take the additional cash sum rather than invest it into his new personal pension. On 12 June 2009 JLT sent Mr B a confirmation letter in which it said it had received his returned forms and it noted he wanted to transfer his benefits against its advice.

The transfer completed in August 2009.

In 2021, following JLT informing Mr B that it was undertaking a review of the advice it had provided, Mr B complained about the suitability of the advice he received. In summary Mr B said he wasn’t given a choice to remain in his DB scheme – he was advised it was compulsory to transfer out of his DB scheme.

JLT didn’t uphold Mr B’s complaint. In summary it said the advice to transfer his pension benefits from his DB scheme was appropriate at the time. But it said the investment funds his monies were invested in were not in line with his personal circumstances. Despite this, it said having carried out a calculation Mr B hadn’t been financially disadvantaged.

Mr B then referred his complaint to our service. An investigator upheld the complaint and required JLT to pay compensation. In summary they said the advice to transfer wasn’t suitable because it wasn’t financially viable and there were no other compelling reasons to

transfer. They said JLT carried out the transfer on the basis Mr B was an insistent client – but they didn't think he was truly an insistent client because he wasn't in an informed position to fully understand the risks of transferring.

JLT disagreed. In summary it said it could find no basis for Mr B's main complaint that he was under the impression that transferring was compulsory – the advice paperwork was clear that Mr B could remain a member of his DB scheme. It said Mr B told them that, as part of its review into the advice, his preferred retirement age was 65 not 60 – but this wouldn't have impacted its advice at the time or Mr B's decision to transfer out against its recommendation. It said its advice was clear that it did not recommend Mr B transfer out of his DB scheme if he opted to take the additional cash payment, which was repeated in its insistent client letter. It said the investigator's view appears to mis-state the basis of the advice Mr B received.

Referring to several phone calls Mr B had with JLT, it said Mr B made it clear on more than one occasion, including before he received the suitability report, that he wanted to transfer out. Overall it said Mr B was fully engaged in the process, he understood and accepted the risks involved and it was his decision to proceed against advice.

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. My reasons are set out below.

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 B's best interests.

A key aspect in this case is JLT's categorisation of Mr B as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were COBS rules in the regulator's Handbook, which required JLT to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required JLT to provide information that was clear, fair and not misleading. So, JLT's recommendation had to be clear and Mr B had to have understood the consequences of going against the recommendation.

JLT says its advice was clear that it did not recommend Mr B transfer out of his DB scheme if he opted to take the additional cash payment. It says Mr B chose to go against the advice, something he made clear to JLT on several occasions. Mr B says he wasn't given a choice to remain in his DB scheme.

Having considered all of the evidence presented, I think there were weaknesses and failings in the advice process, which meant JLT didn't act in Mr B's best interests. I'll explain why.

JLT's recommendation not to transfer if Mr B took the additional cash was solely based on the critical yield or the growth rate required to match Mr B's DB scheme benefits. JLT gave no other reason. In this situation, and if JLT firmly believed in its advice, I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr B's best interests. But the information here was limited to the growth required to match his existing benefits. Because of this I think Mr B had little information to go off to decide if being an insistent client was truly in his best interests.

I don't think it was in Mr B's best interests to go against JLT's recommendation – yet it appears JLT made it very easy for him to do so. I say this because Mr B simply had to tick a box on the transfer paperwork already enclosed with the recommendation letter to say that he wanted to take the additional cash amount. Mr B didn't need to do or complete anything else. And on the basis of this ticked box, JLT simply sent Mr B what appears to be a templated letter telling him it would process the application and transfer his benefits out of the DB scheme, but that it was against its advice.

I think it ought to have been clear to JLT that Mr B had very little knowledge or experience of financial matters based on the information available at the time of the advice. I say this because Mr B indicated as much on the Personal Priorities Questionnaire. I'm mindful too that Mr B was unemployed and he had health issues, which meant he couldn't work. So Mr B couldn't add to his pension provision. I also think that in the circumstances Mr B was likely vulnerable. I think these things should've put JLT on notice that it had to be very careful if it was to take Mr B through the insistent client route.

As I said above, Mr B simply ticked a box on the transfer agreement form, which appears to have triggered the insistent client process. While I acknowledge it wasn't a requirement at the time, given Mr B's level of inexperience, I think it would've been important for JLT to ensure he understood what he was getting into.

And a good way to have done this would've been to see in his own words that he understood the recommendation being made and why he wanted to proceed. But JLT didn't do this and

it proceeded to facilitate the transfer. I don't think this was acting in Mr B's best interests.

I can see that JLT has referred to one of a series of phone calls Mr B had with it over the course of the advice process in which it says Mr B was clear that he wanted to transfer and take the additional cash sum. But firstly this phone call was before Mr B received the recommendation, so he hadn't yet had the opportunity to understand and consider JLT's advice, which he was seeking. And secondly from listening to all of the phone calls, I'm concerned that Mr B's actions of wanting to take the additional cash sum in his hands appear to have been driven to a greater extent by emotive feelings he held about his previous employer. I think this was JLT's opportunity to explain to Mr B that the DB scheme wasn't run by the same people he might have held bad feeling towards, and to help him put aside any emotions or feelings about his previous employer in making his decision about what to do. But JLT didn't do this.

Also, during one of the phone calls in which there was a discussion about Mr B's AVC's and his concern about what would happen to them as part of the transfer, JLT told him that his AVC would also transfer shortly after. Later on in the call, Mr B then told JLT that he would take the additional cash lump sum because the transfer of his AVC's would 'make up the difference.' But this wasn't the case because I can see that the transfer value already included Mr B's AVC's – these accounted for just under £6,000 of the total value. So it seems that Mr B was mis-led here.

Overall I don't think Mr B was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer along with taking the additional cash sum as he believed it seemed like a good idea. And also because of negative feelings he had towards his previous employer, coupled with a misbelief that his AVC's would make up for him taking the additional cash sum - neither of which were dispelled or corrected by JLT.

Notwithstanding the above, a key reason why I don't think Mr B was in a position to make an informed decision, is because ultimately I don't think JLT's recommendation that Mr B should transfer the benefits from his DB scheme to a personal pension if he re-invested the entire additional cash sum was suitable. So it follows that, even if Mr B had accepted JLT's advice, I don't think this would've been in his best interests either.

### *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.

Mr B was 51 at the time of the advice and wanted to retire at 60. The critical yield required to match Mr B's benefits at age 60 was 5.8% if he took a tax-free cash sum and a reduced pension.

This compares with the discount rate of 6.3% per year for 8 years to retirement in this case at the time of the advice. 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 B's recorded 'medium or balanced' attitude to risk and also the term to retirement. In my view there would be little point in Mr B giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

On the face of it, because the critical yield of 5.8% is below the discount rate it might appear a transfer was financially viable and, so based on this alone, it was suitable. But firstly I'm not persuaded that Mr B was prepared to accept a medium or balanced level of investment risk. I say this because Mr B had a lack of any real investment experience and when he completed the personal priorities questionnaire, he ticked two boxes to describe his objectives for his pension – he was risk averse and he was prepared to tolerate a small amount of risk. It was during a telephone call in which JLT sought to clarify things that a balanced approach was recorded. But I consider it would be more appropriate for Mr B's attitude to risk to be somewhere between the two answers he initially gave – so a cautious or low attitude to risk. I think this is also supported by Mr B's low capacity for loss – he didn't have any other assets and he wasn't likely to work again and have the opportunity of building up further pension provision. I'm also mindful of the relatively short period to Mr B's intended retirement age of 60.

So in light of this, to have come close to achieving the level of growth required, in my view it would have required Mr B to take a greater level of risk than he was prepared to take.

But notwithstanding this, even if I thought Mr B was prepared to accept his recorded attitude to risk of medium or balanced, at the time of the transfer a couple of months later - shortly after Mr B's birthday – the discount rate was 5.6% for 7 years to retirement. So given the critical yield was marginally above this rate, I think Mr B was likely to receive benefits of a lower overall value than the DB scheme at retirement – or at best broadly the same benefits – as a result of investing in line with that attitude to risk. It would appear the term to retirement was a limiting factor here.

Overall, I think JLT ought to have told Mr B that it wasn't in his best interests to transfer out of the DB scheme even if he reinvested the additional cash sum because I think it's clear that the returns needed to improve on his scheme benefits weren't compatible with his attitude to risk. And for this reason alone, I don't think the advice to transfer out was suitable. That said, I accept there might be other considerations which mean the transfer was nevertheless suitable, and I've considered these below.

#### *Maximum tax-free cash lump sum*

It's recorded that Mr B wanted the maximum possible tax-free lump sum at retirement to repay debts including his mortgage. But JLT didn't gather any information about Mr B's debts to understand for example how much was outstanding and what the remaining term or terms were on any debts. So JLT didn't know whether Mr B's debts, including his mortgage would still be running at his normal retirement age. Because JLT didn't understand this, it didn't know that Mr B's DB scheme tax-free cash entitlement of around £20,000 wasn't going to be enough. It's possible that Mr B could have achieved his objective by staying in the DB scheme.

So I'm not persuaded that Mr B's objective of wanting the maximum cash lump sum possible at retirement was a suitable reason for the transfer.

#### *Income needs*

JLT also didn't know Mr B's income need at retirement. And crucially it didn't know whether Mr B had other provision or whether he'd be solely reliant on his DB scheme for his income in retirement.

I can see that JLT noted this in its recommendation letter saying that it might be "*more attractive to keep your pension with [X]... as you will retain the guarantees that are provided*

*by the scheme.*” So it appears JLT wasn’t confident in its advice because it didn’t have everything that it reasonably needed to know to decide whether a transfer was in Mr B’s best interests – yet it proceeded to recommend the transfer anyway. JLB’s role here was to really understand what Mr B needed and recommend what was in his best interests. Because JLB didn’t do that I’m not persuaded the recommendation was suitable.

Overall I’ve found no compelling reasons for Mr B to transfer out of his DB scheme.

### *Summary*

Overall, I don’t think the advice given to Mr B was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr B was very likely to obtain lower retirement benefits – or at best broadly the same - and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

So, I think JLT should’ve advised Mr B to remain in his DB scheme regardless of any additional cash lump sum on offer.

Of course, I have to consider if things had happened as they should have whether Mr B would’ve gone ahead anyway, against JLT’s advice. As I said earlier on, JLT says this would’ve been the case because Mr B said so during a phone call.

Having done so, I don’t think Mr B would’ve gone ahead in any event and insisted on transferring out of his DB scheme. I say this because, as I referred to earlier on Mr B was an inexperienced investor and it seems likely that this pension accounted for the majority of his retirement provision. I’m not persuaded Mr B needed the additional cash lump sum to repay debts immediately – JLT didn’t know what debts Mr B had and there’s no evidence he was in arrears or they were otherwise unaffordable. As I also said above, I think Mr B’s actions were driven by negative feelings he had towards his previous employer and a misbelief that his AVC’s would make up for him taking the additional cash sum - neither of which were dispelled by JLT.

So if JLT had provided Mr B with clear advice against transferring out of the DB scheme regardless of any additional cash on offer, explaining why it wasn’t suitable for him and why it was in his best interests given his circumstances to remain in the DB scheme, including addressing his concerns about his previous employer, I think that would’ve carried significant weight. I think Mr B would’ve accepted that advice – I don’t think Mr B would’ve insisted on transferring out of the DB scheme.

In light of the above, I think JLT should compensate Mr B 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) 17/9 (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 Mr B whether he preferred any redress to be calculated now in line with current guidance or wait for any new guidance / rules to be published.

Mr B has said that he cannot make a choice. In the circumstances, I'm going to treat this as if Mr B didn't make a choice. So as set out previously, I've assumed in this case Mr B doesn't want to wait for any new guidance.

I'm satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr B.

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

JLT Wealth Management Limited 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 B has not yet retired, and he told JLT that his intended retirement age is 65. 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 B's acceptance of the decision.

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

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

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 Wealth Management Limited 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 Financial Management Limited to pay Mr B 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 Financial Management Limited to pay any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require JLT Financial Management Limited to pay Mr B 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 Financial Management Limited pays Mr B the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr B.

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

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 17 November 2022.

Paul Featherstone

**Ombudsman**