DRN-3822812

The complaint

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

What happened

Mr W approached Reliance in 1993 to discuss his pension and retirement needs. Reliance completed a fact-find to gather information about his circumstances, this showed that:

- He was aged 29 and living with his partner, they had a dependent child aged five.
- He had taken redundancy in late 1992 and was currently unemployed. As far as I can see their only source of income at the time was benefits.
- He and his partner owned their own home which had a value of around £30,000.
- They had a mortgage of £10,000 with 18 years left to run. He had a small amount of other debt.
- Other than an endowment attached to the mortgage, Mr W had no savings or investments.

I can't see that Reliance carried out an assessment of Mr W's attitude to risk.

In July 1993 Reliance advised Mr W to transfer his pension benefits into a personal pension. The reasons why it did this were recorded at the point of sale. These weren't personalised but were indicated by 'ticks in boxes'. The aims selected were:

- Personal control of pension benefits.
- Flexibility of retirement date.
- Flexibility in type of benefits.
- Flexibility of pension escalation.
- Willing to lose the guarantees of his DB scheme in exchange for potentially higher benefits.

The adviser noted Mr W's DB scheme benefits were to be transferred to a personal pension to 'provide potentially better retirement benefits' and that when work and finances permitted Mr W would pay into this pension plan. Mr W hadn't decided when he wanted to retire but later selected age 60.

Mr W had around 12 years of deferred benefits in his DB scheme and it was estimated that it would provide an annual pension of around £18,000 per year ant Mr W's retirement. The DB scheme provided a transfer value of around £19,700. Mr W transferred this amount and invested the proceeds in a personal pension using a managed fund.

Mr W complained in 2020 to Utmost about the suitability of the transfer advice because he said:

- Reliance didn't properly complete a fact find or establish his attitude to risk, so it wasn't fully aware of his situation.
- It didn't properly explain the transfer process or how the funds would be invested. It didn't explain what he would be giving up when he made the transfer.
- Because of these factors, he didn't think the advice was suitable for him.

Utmost didn't uphold Mr W's complaint. It's responses to the complaint have concentrated on whether the complaint was brought in time. In summary it's said that:

- It wrote to Mr W in 1999 about the pension review, but these letters didn't reach Mr W as he had not informed it of his new address.
- It had done all it should have in respect of the personal pension review, so it didn't need to review the sale again.
- It also thought that Mr W had brought his complaint too late. This is because he complained later than six years of when the transfer took place and later than three years of when he ought reasonably to have been aware he could complain.
- Utmost thought Mr W should have been aware he could complain at the completion of the personal pension review in 2003.

Mr W referred his complaint to our service and an investigator looked into it. She firstly considered the jurisdiction of the complaint and she thought that the complaint was brought in time. This is because Mr W wasn't aware that he could complain until very recently. And as he didn't receive the pension review letters, and there were no other reasons that would have made him aware, he wouldn't have been reasonably aware he could complaint earlier.

The investigator went on to say that Utmost did not have to perform a personal pension review. I've noted that Mr W and his representative initially did not agree with this. But they haven't disagreed with the investigator's subsequent opinion about the merits of the complaint.

Our investigator went on to consider the suitability of the sale of the DB transfer. She upheld the complaint and recommended Utmost pay compensation. She said, given what was known about Mr W circumstances, the DB transfer represented a significant risk for him. She didn't think it was suitable that Mr W take this risk. Whilst it was noted that Mr W wanted control or flexibility of his benefits there was no detail as to why this was, it wasn't clear if they were his genuine aims or not.

Utmost hasn't agreed and still thinks that it shouldn't have to look at this sale again given what it did in respect of the pension review. I've clarified to Utmost that the complaint is within our jurisdiction, and that this is my final decision about the merits of the complaint.

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.

The advice was provided by Utmost in 1993. At this time Reliance, as Utmost was then known, was a member of the Life Assurance and Unit Trust Regulatory Organisation ('LAUTRO').

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 Mr W’s best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider ‘the investor’s financial position generally and to all other relevant circumstances’ - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group’s range which was most suited to the investor.

I’ve considered the advice given to Mr W with this in mind.

The Financial Ombudsman Services’ jurisdiction to consider this complaint

As I said above one of our investigators said that the complaint was brought within time and I agree with this. I’ve contacted Utmost to explain why, and it had nothing further to add to what I said.

But for the avoidance of doubt I agree that Utmost doesn’t have to perform a full pension review. This was an exercise that was designed to be performed once and so it’s not the right outcome to revisit this here. But I’ve gone on to consider the suitability of the sale below.

Financial viability

The advice was given during the period of the industry-wide Pensions Review, so the rates the regulator published for Financial Viability Tests are directly relevant here. The investment return (critical yield) required to match the occupational pension at retirement was shown to be 10.37% per year.

This compares with the upper limit the regulator gave for a Financial Viability Test of 11% per year for 30 years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate was 10.75%, and the lower projection rate was 8.5%.

The critical yield is very close to the upper limit for financial viability, and it is around the ‘middle or medium’ of the regulator’s projections. And the managed fund used would usually be considered to have a risk of around ‘medium’.

So given all of this, it seems reasonable to say that Mr W would need to take a ‘medium’ risk to match his DB scheme benefits. But there was no point if Mr W transferring to receive the same benefits as he could receive this without taking a risk. So he really needed, to make this worthwhile, to be investing at a higher risk than this. I’ve looked to see if it was clear that he wanted to do this at the point of sale.

The evidence that Utmost has provided doesn’t show that it assessed Mr W’s attitude and capacity for risk at all. So, as a starting point, it couldn’t make a suitable recommendation as it wasn’t aware of how much risk Mr W could take with his pension planning. It certainly isn’t clear that he wanted to take the above average risk that he needed to here.

And looking at his circumstances I can't see that is likely that he wanted to take a significant degree of risk at all. He didn't have any investment experience other than his mortgage endowment. He was currently unemployed and had been for a reasonable length of time. This was Mr W's only private pension so far and so it was significant for him. All of this points to a lower tolerance and capacity to risk in respect of his pension planning than he needed to take here.

Whilst Mr W invested in a managed fund, which is usually regarded to have a risk of around 'medium' there was no explanation of the risk of the fund and how it fitted Mr W's circumstances.

I've taken all of this into account and having done so I think Mr was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement, as a result of investing in line with a lower attitude to risk.

For this reason alone, a transfer out of the DB scheme wasn't in Mr W'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 it's demonstrated that Mr W required flexibility in retirement. This is because based on the evidence I've seen; I don't think 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. This doesn't seem to have been discussed.

And I also can't see any evidence that Mr W had a strong need for variable income throughout his retirement. Again, this doesn't seem to have been looked at.

Mr W was giving up a guaranteed and increasing income. This could have formed a strong income foundation for him in retirement and be a useful addition to his state retirement provision. It could have helped him meet his income needs when he retired.

In fact, whilst Mr W ticked a box to say that he wanted flexibility of various forms in retirement there is no indication that this was anything other than a generic 'nice to have'. There is no consideration of what income he wanted in retirement or how this flexibility would fit his circumstances.

This is perhaps not surprising given that, Mr W was only 29 at the time of the advice, and based on what I've seen he didn't have concrete retirement plans. He was 'undecided as yet' about the date he wanted to retire at. As Mr W had around 30 to 35 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 W to give up his guaranteed benefits now when he didn't know what his needs in retirement would be.

If Mr W later had reason to transfer out of his DB scheme he could have done so closer to retirement.

Control of pension benefits

I think Mr W's stated want for control over his pension benefits was overstated. Mr W was not 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 W – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

Utmost recommended that Mr W invest in a managed fund. I've said above that I'm not persuaded that his attitude to risk was 'medium' so this may not have been the best fit for him. But leaving this aside as I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr W, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr W should have been advised to remain in the DB scheme and so the investments in the personal pension wouldn't have arisen if suitable advice had been given.

Summary

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

Ultimately, I don't think the advice given to Mr W was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr W was 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, I think Utmost should've advised Mr W to remain in the DB scheme. Of course, I have to consider whether Mr W would've gone ahead anyway, against Utmost's advice.

I've considered this carefully, but I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against Utmost's advice. I say this because Mr W was an inexperienced investor and this pension accounted for the majority of his retirement provision so far. So, if Utmost 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 any concerns or needs that Mr W may have had were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests. If Utmost had explained that Mr W could meet his objectives without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr W would have insisted on transferring out of the DB scheme.

Our Investigator recommended that Utmost also pay Mr W £300 for the distress caused by the unsuitable advice. I don't doubt that Mr W has been caused distress and concern in relation to his retirement planning. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

In light of the above, I think Utmost should compensate Mr W for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

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Putting things right

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

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.

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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr W whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect.

He would like his complaint to be settled in line with new guidance or rules. I consider it's fair that Utmost calculates Mr W's redress in line with new guidance and rules when they come into effect.

The basic objective of the amendments to the redress methodology still remains to put a Mr W, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme. Having reviewed the FCA's consultation and policy statement, I'm satisfied that the changes still reflect a fair way to compensate Mr W.

Utmost must undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

For clarity, Mr W plans to retire at age 65. So, compensation should be based on him taking benefits at this age.

In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.
If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr W within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Utmost has received notification of Mr W's acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to

DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes Utmost to pay Mr W.

Income tax may be payable on any interest paid. If Mr W deducts income tax from the interest, it should tell Mr W how much has been taken off. Utmost should give Mr W a tax deduction certificate in respect of interest if Mr W asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Utmost should also pay Mr W £300. Utmost doesn't have to wait for the new guidance to come into force to pay this.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Utmost Life and Pensions to pay Mr W the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Utmost Life and Pensions to pay Mr W any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Utmost Life and Pensions to pay Mr W any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Utmost Life and Pensions pays Mr W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr W.

If Mr W accepts this decision, the money award becomes binding on Utmost Life and Pensions.

My recommendation would not be binding. Further, it's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W may want to consider getting independent legal advice before deciding whether to accept any final decision.
Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 25 January 2023.

Andy Burlinson
Ombudsman