DRN-3904523

## The complaint

Mr S complains about the advice given by Hearts of Oak Insurance Group (Hearts) 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.

Utmost Life and Pension Limited (Utmost) is now responsible for the advice Hearts gave to Mr S.

## What happened

Mr S approached Hearts in April 1990 to discuss his pension and retirement needs. I understand Hearts had offered Mr S the opportunity to have his pension planning reviewed.

Hearts completed a fact-find to gather information about Mr S' circumstances and objectives. This showed that he was 31 years old and married. He'd recently started new employment. He owned his own home which was subject to a mortgage.

Mr S had built up twelve years service in his previous employer's DB scheme. He wasn't currently a member of his new employer's scheme, and it wasn't recorded that he had any other pension arrangements. At the time of leaving his previous employer, it was estimated the DB scheme would provide pension of just over £2,000 a year.

Utmost has confirmed that there isn't anything to show that Hearts assessed Mr S' attitude to risk. And there isn't a suitability letter, or any other documentation from the time of sale, that shows why Hearts thought that the pension transfer was suitable for Mr S.

In early 1990 Mr S transferred his DB pension benefits into a personal pension with Hearts. He transferred £11,587.85 and invested the proceeds in, as I understand it, one of Hearts' managed funds.

Mr S transferred his pension away from Hearts in 1992.

Mr S complained in 2021 to Utmost about the suitability of the transfer advice. He says that Hearts didn't fully consider his circumstances. He says he lost the guaranteed benefits in the DB scheme and the risk of the personal pension was too high for him. He went on to say that he had to pay fees that he wouldn't have had to in the DB scheme and he wasn't provided with full information about the transfer.

Utmost considered Mr S' complaint. It thought that that Mr S had brought his complaint too late. This was because it had written to him as part of the industry wide personal pension review and he had had not responded. He should have been made aware he had reason to complain at this time, but he hadn't done this.

Mr S referred his complaint to our service. We have considered the jurisdiction of this complaint and an Ombudsman has decided that it was brought in time and that the Financial

Ombudsman Service can consider it. Because of this, I'll just look at the merits of the complaint.

An Investigator upheld the complaint and recommended that Utmost pay compensation. She said that the transfer had more risk that it was likely that Mr S wanted to take, and so it probably wasn't financially viable. And there was no reason given why the transfer was suitable for Mr S in the point of sale documentation. So, she didn't think that it was likely the transfer was in Mr S' best interests.

Utmost hadn't commented on what the Investigator said. As no agreement has been reached the complaint has been passed to me for 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.

The advice was provided by Hearts in 1990. At this time it 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 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 S with this in mind.

*Financial viability*

There isn't a lot of information from the time of the transfer. This is perhaps understandable given that it took place a long time ago. I do have a fact find but this is only one page of factual information. And I do have some of the illustrations and the transfer values. Utmost has been able to provide information about the pension Mr S gave up which was around £2,000 at the time of transfer. Mr S, the business and the DB scheme don't have any more than this. I don't have the expected DB scheme benefits at his retirement. So, it's not clear what rate of return would be needed from the new personal pension to match the DB scheme benefits (the critical yields) that were calculated, and relied on, at the time. If they were.

The advice was given during the period of the industry-wide Pensions Review, so the rates the regulator published for Financial Viability Tests are relevant here. The upper limit the regulator gave for a Financial Viability Test is 11.9% per year for 33 years to retirement – which assumed that Mr S took his pension benefits at age 65. For further comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate 10.75%, and the lower projection rate 8%.

As I said, it's not clear what the personal pension would need to grow by to replicate the DB scheme benefits. But given that investment returns were generally high, I would have expected a correspondingly high critical yield. And given the pension Mr S gave up and what it may have grown to, I don't think it's unlikely that the transfer may have been made on the basis that a reasonable growth rate would have showed that the personal pension could provide better benefits than the DB scheme. It may have been financially viable for Mr S to transfer.

But this doesn't mean the transfer was risk free. Mr S was giving up 12 years service in a DB scheme. This would have provided an increasing and guaranteed income at his retirement. And so far, this was the majority of his retirement provision. It's likely that he would have made further provision in the future, but this isn't certain. And any further pension provision may also have been in risk bearing investments. So, the DB scheme pension could have been important to him and he may have relied on it to meet, at least in part, his retirement needs.

Given the likely higher investment returns likely needed to match the DB scheme, and that this was an important part of his retirement provision, I think it's reasonable to say that this transfer represented a significant risk to Mr S.

Utmost has said that it isn't aware if Mr S' attitude to risk was assessed. It is reasonable to assume that Mr S would be willing to take some risk with his pension planning over the time he had to retirement. But it doesn't look like Mr S had invested before and he had no means to replace this income if his personal pension didn't perform well. So, I'm not persuaded that he wanted to take, or had the capacity to take, a significant risk with this pension at the time.

For this reason alone, I don't think a transfer out of the DB scheme was in Mr 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 S 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 also can't see evidence that Mr S had a strong need for a variable income throughout his retirement. There is nothing to say that either of these were discussed at the time of sale.

So, I'm satisfied Mr S could have best met his income needs in retirement through the DB scheme at 65. This is largely because the income from the DB scheme was guaranteed and increasing. And was likely to form a significant part of his retirement provision,

Furthermore, Mr S was only 31 at the time of the advice and based on what I've seen he didn't have concrete retirement plans. He had around 33 years before he was thinking about accessing his pension, so I think it was too soon to make any kind of decision about transferring out of the DB scheme. I don't think it was a suitable recommendation for Mr S to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr S later had reason to transfer out of his DB scheme, he could have done so closer to retirement.

*Suitability of investments*

Hearts recommended that Mr S invest in a risk based fund. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr S, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr S should have been advised to remain in the DB scheme and so the investments in these funds wouldn't have arisen if suitable advice had been given.

*Summary*

I don't doubt that the potential for a higher pension and increased flexibility would have sounded like attractive features to Mr S. But Hearts wasn't there to just transact what Mr S might have thought he wanted. The adviser's role was to really understand what Mr S needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr S was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr S could possibly have obtained lower retirement benefits and in my view, there were no other reasons which would justify a transfer and outweigh this.

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

Of course, I have to consider whether Mr S would've gone ahead anyway, against Hearts' advice. I've considered this carefully, but I'm not persuaded that Mr S would've insisted on transferring out of the DB scheme, against Hearts' advice. I say this because Mr S was an inexperienced investor and this pension accounted for the majority of Mr S' retirement provision so far. So, if Hearts 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.

In light of the above, I think Utmost should compensate Mr S 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 set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

In this consultation, the FCA 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 S 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 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 S.

A fair and reasonable outcome would be for the business to put Mr S, as far as possible, into the position he would now be in but for Hearts' unsuitable advice. I consider Mr S 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 S has not yet retired, and he has no plans to do so at present. 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 S' acceptance of the decision.

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

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

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.

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 Limited to pay Mr S 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 S 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 S 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 S the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S 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 S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 4 April 2023.

Andy Burlinson
**Ombudsman**