DRN-3907861

The complaint

Mr M complains about the advice given by JLT Wealth Management Limited (JLT) 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 M met with JLT in 2009 to discuss his pension and retirement needs. Mr M did this after he received information from his employer that the DB scheme had funding problems. One of the options given to Mr M was to transfer away, it offered a financial incentive if Mr M did this.

JLT completed a fact-find to gather information about Mr M's circumstances and objectives. This shows that he was 48 years old, recently divorced and had children. Mr M was employed full time and owned his own home which was subject to an outstanding mortgage. He had savings of around £10,000 and investments of £2,000.

In respect of his pension arrangements, he had been a member of his employers DB scheme for 21 years. The scheme had ceased to accrue further benefits in 2009 and Mr M was now a deferred member. The transfer value would normally be £91,006. Due to the funding situation with the scheme this was currently reduced to £88,890. Mr M's employer said that Mr M could take £10,116 as cash incentive and a transfer value of £81,890. This is the option Mr M took.

The DB scheme would pay Mr M a guaranteed income of £6,200 a year at the time of advice. The suitability letter says this would be revalued to around £9,500 at Mr M's age 65.

Mr M also had a personal pension with a fund value of around £20,000. And he was a member of his employers new Group Personal Pension scheme into which he and his employer contributed 18% of his salary each month.

JLT also carried out an assessment of Mr M's attitude to risk, which it said was 'balanced to adventurous'. It was noted that he had some investment knowledge and experience, but that he wasn't an experienced investor.

In June 2009, JLT advised Mr M to transfer his pension benefits into a personal pension and invest the proceeds half in the new providers Global Equity fund and half in its Managed fund.

The suitability report said the reasons for this recommendation were to:

- Remove the uncertainty that the DB scheme faced due to its funding issues.
- Take advantage of the financial incentive to help pay for his daughter's wedding.
- Provide overall flexibility and control over his pension fund.
- Improve on the death benefits that his estate would receive.

Mr M complained in 2021 to JLT about the suitability of the transfer advice. He said that he had noticed that colleagues who had not transferred had better retirement benefits. And having looked at the transfer documentation he now thought he had lost out due to the transfer.

JLT didn't uphold Mr M's complaint. It said it was established, and agreed, that Mr M had a higher attitude to risk. It also looked into his circumstances in detail at the time of sale, and it thought the advice it gave was suitable for him.

Mr M referred his complaint to our service. An Investigator upheld the complaint and recommended that JLT pay compensation. She said that whilst the transfer looked like it could have been financially viable, she wasn't persuaded that Mr M had the capacity to risk what was his main pension provision so far. It also looked like the funding situation with the scheme would be resolved soon and Mr M didn't seem to have a pressing need for cash. So, he didn't need to transfer for these reasons. Overall, she didn't think the transfer was suitable.

JLT disagreed, saying that the required critical yield was higher than the discount rate (assuming he took tax free cash) and so it was likely that Mr M would receive higher benefits from the transfer. It said the Investigator had ignored that Mr M was a member of his employers defined contribution (DC) scheme. It projected that Mr M would build up a fund of around £131,000 in this, so, he had the capacity to risk his DB scheme benefits.

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 19.1.6G 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 M's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

JLT carried out a transfer value analysis report (as required by the regulator) showing how much Mr M's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

Mr M was 48 at the time of the advice and, whilst he wanted to retire early, he realistically thought he would retire at age 65. The critical yield required to match Mr M's benefits at age 65 was 6.3% if he took a full pension and 5.4% if he took tax free cash and a reduced pension. The same calculations for Mr M's age 60 were 7% and 5.8%. These were all based on Mr M taking the cash incentive and transferring to a personal pension which is what he did.

The critical yield to match the benefits available through the Pension Protection Fund (PPF) at age 65 was quoted as 4% per year if Mr M took a full pension and 3.8% per year if he took tax free cash and a reduced pension.

There were other calculations that showed the situation if Mr M didn't take the cash incentive (and transferred the full amount) or transferred to a Section 32 policy. I've not reproduced all of these, partly as they are similar, and also, they don't reflect the choice Mr M made.

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.

This was 7% per year for 16 years to retirement (his age 65) and 6.7% for the nine years to his age 60. I've kept in mind that the regulator's projection rate 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 M's attitude to risk and the term to retirement.

Mr M's attitude to risk was recorded as being adventurous. But he indicated that he wanted to invest half in adventurous investments and half in balanced funds, for this pension. Both attitudes to risk were broadly described as being suitable for someone wanting to take a significant risk with their money in order to provide a better return. Albeit to a lower degree for the balanced investor.

When someone has a high attitude to risk, I would expect them to have, or have had, significant investment experience. But this doesn't seem to be the case here. Mr M had a small investment at the time and there is no indication he had invested before in higher risk areas. There's nothing else that shows he was comfortable with higher risk investments. So, I'm not persuaded that his attitude to risk was as high as JLT recorded, I think it was likely to be much lower than this.

And even if Mr M ordinarily did have a higher attitude to risk, with some knowledge and experience of investments, JLT needed to ensure he wanted to take this risk with his pension planning. This is because the DB scheme would provide a significant amount of guaranteed and increasing income. Mr M would have no means of replacing this income if it was lost, or very much reduced.

So, Mr M's capacity to risk this pension should reasonably be thought to be lower. I'm not persuaded he had the capacity to take a significant risk with this part of his pension planning. His circumstances lead me to think it wasn't appropriate for JLT to advise him to do this.

JLT says that Mr M would have built up a significant fund in his employers DC scheme so he could afford to take some risk with his DB scheme benefits. But if he was building up a fund that was subject to investment risk then he would be gaining many of the advantages that this type of arrangement can have. Which would mean he would have no need to subject his DB scheme benefits to the same risk.

That said, it is reasonable to assume Mr M could take some risk, and he did have around 16 years till he would take his pension benefits. The discount rate here was 7%, and this matched the rate that JLT said it also used as a 'benchmark' to see if a transfer was appropriate. Here, the highest critical yield was 7%, but I can see that in much of the circumstances they are lower than this. Which does indicate that Mr M may have been able to replicate the benefits from the DB scheme.

There would be little point in Mr M giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And I think the situation is less clear cut if Mr M wanted to significantly improve on the benefits he was giving up, given his lower attitude and capacity for risk. I don't think it was in Mr M's best interest to transfer just on the basis that the transfer may produce better benefits, as this wasn't certain, or even likely in some circumstances.

Of course, financial viability isn't the only consideration when giving transfer advice. And I think in this case there needed to be another genuine reason for the transfer to make it suitable. I've considered if this was the case below.

Flexibility and income needs

JLT has said that one of the main reasons it recommended the transfer was for the increased flexibility it could provide. Mr M could decide when he took his DB scheme benefits but he couldn't, for example, take some tax free cash and take an income at a later date. He had to take a pension, and any tax free cash he wanted, at the same time.

Mr M has said that he didn't really envisage having a need for cash at retirement given his mortgage would be paid off and he already had some savings. It was recorded that he would use the incentive to perhaps pay for his daughter's wedding. But he's said wanting to do this was more of a 'passing comment' than a genuine need.

It wasn't recorded what income Mr M would need in retirement. This isn't unreasonable given how far away this was, but it does make it difficult to now say if the advice Mr M received met his needs.

Under the DB scheme, Mr M was entitled to an annual income of around £9,500 a year from age 65. He would also have his state pension a few years later which would typically provide around £9,000 a year.

And Mr M was a member of his employers new DC scheme. As JLT has said he would possibly have a fund of around £130,000 at Mr M's retirement. And this would add to his own personal pension of £20,000.

So, whilst I can't say with certainty that Mr M's income needs would be met by the DB scheme, as it wasn't established what they were, Mr M would have an income from the DB scheme and his state pension which was guaranteed and increasing. This could form the core of his retirement income to cover his expenditure when he had stopped working. He'd have the DC scheme benefits to increase this income, or to use flexibly if required. So, I'm satisfied Mr M was likely to have met his income needs in retirement through his existing arrangements.

Overall, I don't think Mr M 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. He's said he didn't want to do this. I also can't see evidence that Mr M had a strong need for variable income throughout his retirement. This doesn't seem to have been discussed.

And I don't think the incentive, and Mr M's plans for it were a good enough reason to transfer on their own. JLT should have looked at other ways Mr M could fund his daughter's wedding, if this is really what he wanted to do.

Lastly, Mr M was only 48 at the time of the advice and based on what I've seen he didn't have concrete retirement plans. As Mr M had around 16 years before he would 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 M to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr M later had a reason to transfer out of their DB scheme, he could have done so closer to retirement.

Death benefits

Mr M indicated on the fact find that his dependents would already receive significant amounts on his death. And so, providing a further lump sum wasn't a priority for him.

That said, 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 was likely an attractive feature to Mr M. But whilst I appreciate death benefits are important to consumers, and Mr M 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 M 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 M 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 M wasn't married and the financial situation around how he and his ex wife supported their children wasn't explored at all. But the dependent's pension provided by the DB scheme may have been useful to his dependents if Mr M predeceased them. I don't think JLT made the value of this benefit clear enough to Mr M. 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 M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr M genuinely wanted to leave a legacy for his family, 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 M. 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 M's desire for control over his pension benefits was overstated. Mr M 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 M – it was simply a consequence of transferring away from his DB scheme.

Mr M did have some concerns about the stability of the DB scheme. However, the scheme had recently told Mr M that whilst it was underfunded by a few percent, it did believe that this would be rectified a very short time after the advice.

So, I think it's reasonable to say that the funding of his employer's DB scheme was not in a position such that Mr M should have genuinely been concerned about the security of his pension.

Suitability of investments

JLT recommended that Mr M invest in two higher risk funds. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr M 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 flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr M. But JLT wasn't there to just transact what Mr M might have thought he wanted. The adviser's role was to really understand what Mr M needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, it was possible that Mr M could obtain lower retirement benefits, and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr M shouldn't have been advised to transfer out of the scheme just to gain the financial incentive, even if he had a use for this. And the potential for flexibility and higher death benefits wasn't worth giving up the guarantees associated with his DB scheme.

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

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

I've considered this carefully, but I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because Mr M was an inexperienced investor and this pension accounted for the majority of Mr M'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 M's concerns about the scheme, or the existence of the incentive, would have led to him insisting 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 M 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 M would have insisted on transferring out of the DB scheme.

In light of the above, I think JLT should compensate Mr M 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 M 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 didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

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 M.

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for JLT's unsuitable advice. I consider Mr M 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 M 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 M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 M 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 M.

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

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

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 21 March 2023.

Andy Burlinson
Ombudsman