

The complaint

Mr M complains about the advice JLT Wealth Management Limited ('JLT') gave to transfer the benefits from his former employer's 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 was a deferred member of his employer's DB scheme. The scheme was in deficit and in 2011 Mr M's former employer offered scheme members enhanced cash equivalent transfer values ('CETV') to consider transferring out of it. The employer engaged JLT to offer scheme members advice on the suitability of a transfer. The employer paid JLT's fees and it did not receive any commission for arranging transfers.

JLT gathered information about Mr M's DB scheme entitlements. It asked him to complete a fact find questionnaire including information about his attitude to risk. Amongst other things JLT established that Mr M was 40, employed, married with two dependent children. He was in good health. His retirement age was 65. He was paying into his new employer's pension scheme. He assessed his own attitude to risk as balanced.

JLT obtained a transfer value analysis report (TVAS) which compared Mr M's entitlement under his DB scheme with what he might receive if he reinvested the funds in a personal pension. Amongst other things the TVAS said that Mr M's unenhanced CETV was £25,637, but after adding the employer's enhancement of £11,593, that rose to £37,230. It set out the growth rates required to match the benefits from the DB scheme (the critical yield) if Mr M transferred his CETV into a personal pension at age 65. Those were 6.6% if Mr M took a full pension or 6.3% if he took tax free cash ('TFC') and a reduced pension.

On 5 December 2011 JLT sent Mr M its suitability report setting out its advice and recommendations. Amongst other things it said the enhanced CETV was only on offer until 6 January 2012. Under a heading of "Your Objectives", it listed the following as being important to Mr M:

- The fund benefits were a significant proportion of his retirement funding.
- On death before retirement his dependants would receive significant sums from other sources so higher death benefits were not an absolute priority.
- He would prefer not to move his pension to an individual plan under his control.
- The ability to take TFC at retirement.
- He wanted his pension to increase to provide some protection against inflation.

JLT said the critical yield of 6.3% was within an achievable range for someone with Mr M's balanced attitude to risk. It said the highest return it felt was acceptable was 7.4%. It added that transferring to a personal pension could result in higher TFC. But it noted that transferring conflicted with Mr M's preference not to have the pension under his control. It also warned him that moving out of the DB scheme would involve taking risks which he wouldn't have to bear under the DB scheme, most notably the risks of market volatilities.

However, based on the critical yield and Mr M's balanced attitude to risk, it recommended Mr M should transfer out of the DB scheme and into a named personal pension.

JLT's adviser followed up the suitability report with a phone call to Mr M which lasted around 40 minutes. During that call, the adviser ran through some of the advantages and disadvantages of transferring. He said that Mr M had to balance the possibility of a better income in retirement against the risks that he would be taking on by transferring. In particular that there were no guarantees the investments would do as well as expected and could leave Mr M worse off. The adviser said JLT believed the investments should be able to grow at an average of around 7.4% a year but acknowledged that over the previous five years the average growth rate was around 5%.

Mr M later confirmed he wished to transfer his DB scheme funds. When he completed the application for the personal pension he put on it that his preferred retirement age was 62.

In 2021 Mr M complained to JLT as he felt its advice wasn't suitable for him. JLT didn't uphold his complaint. In brief, amongst other things, it said the difference between its estimated growth rate of 7.4% and the critical yield of 6.3% generated a *positive margin* of 1.1% which provided some protection against poor investment performance. But it had warned Mr M about the risks inherent with such a transfer. It added that Mr M was under no obligation to go ahead with it.

Mr M brought his complaint to us. One of our investigators looked into it. She upheld it and recommended that JLT should pay compensation.

JLT didn't agree with our investigator's assessment of the complaint so it's been 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 broadly similar reasons to those our investigator gave.

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 it was in Mr M's best interests overall. And having looked at all the evidence available, I'm not satisfied that JLT has been able to demonstrate it was in his best interests.

Was JLT's advice suitable?

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 the DB scheme (the critical yield).

JLT gave its advice during the period when this 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 at the time JLT gave its advice.

The investment return (critical yield) required to match the occupational pension at retirement was 6.6% if Mr M took a full pension and 6.3% if he took a reduced pension and TFC. This compares with the discount rate of 6.5% per year for 25 years to retirement.

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 M's balanced attitude to risk and also the term to retirement. I appreciate that the critical yield figures and discount rate are broadly comparable – although the discount rate would exceed the critical yield if Mr M took TFC. But that margin was relatively small. And there would be little point in Mr M giving up the guarantees available to him through his DB scheme only to achieve similar benefits outside the scheme.

JLT's said that it wasn't required to refer to the discount rate when it gave its advice. And it told Mr M that it estimated his funds would grow at 7.4% a year. I don't know how JLT calculated that figure. But, given Mr M's balanced attitude to risk, he could reasonably anticipate his funds growing at the regulator's projected middle level rate of 7% at the time, which I find more reliable than JLT's own figures. And while that figure remains higher than the critical yields, in order to achieve that growth Mr M would still need to put his otherwise safeguarded benefits at risk.

Further it's notable that Mr M's pension pot would be reduced by fees. In this case the personal pension JLT recommended had fees which were 0.23% of the fund value each year. Those charges are at the cheaper end of the scale compared to some other personal pension plans. But when compared to a DB scheme, where a member like Mr M pays no fees at all, it is a fee that reduces any positive margin that investing in a personal pension gives. And that margin would narrow even further if Mr M did eventually decide to retire early, as the funds would have less time to grow.

Also, JLT's recommendation was dependent on Mr M's fund attaining average growth above

the critical yield level over a 25 year time-span. But if there was a sustained period of poor performance or crashes in the markets, then there was a very real chance that Mr M's fund would grow at a much slower rate or could suffer losses. And that could see Mr M considerably worse off in retirement.

I acknowledge that there was a possibility Mr M's personal pension might outperform the required critical yield. But once that growth was reduced by the effect of charges, I think the margin was far too narrow to positively recommend that transferring was in Mr M's best interests.

Further, Mr M was 40 years old at the time of the advice. He was still 25 years away from the scheme's normal retirement age, and 22 years away from the date he said he wanted to retire at when he applied for the personal pension. So, he had no urgent need to make a decision about transferring out of the DB scheme. That was something he could make a decision about nearer to his retirement age, if it was still something he was considering. I appreciate that the former employer's offer of an enhanced CETV was time limited. So, it was something Mr M may not have been offered again. But, in order to realise tangible benefits from that enhancement, he had to put guaranteed benefits at risk. I don't think it was in his best interests to do so.

Also, as far as I can see Mr M didn't have any other objectives that would make transferring out of the DB scheme suitable for him. He did say that TFC was important to him. And it is often the case that TFC can be more generous from personal pensions. That's because consumers can take 25% of the full pot as TFC, whereas DB scheme rules tend to be stricter about how much TFC their members can take. So TFC sums are often lower from a DB scheme. But, the amount available as TFC from a personal pension would be dependent on investment returns. And, if the fund grew at a lower rate or suffered losses, as set out above, then the overall fund would be smaller and the TFC sum lower. So transferring to a personal pension didn't guarantee Mr M a larger TFC sum. In any event he still had entitlement to TFC under the DB scheme. So, he didn't need to transfer his DB funds to a personal pension in order to receive TFC.

It's also notable that Mr M specifically said he didn't want to have control over his funds. That is he didn't wish to be responsible for the investment decisions. But, in transferring to a personal pension that was essentially a role he was taking on. While the named personal pension provider would undoubtedly offer Mr M a range of managed funds to invest in - in line with his attitude to risk - it was a choice Mr M hadn't expressed any desire for. And at that time, had no experience of. So, recommending a transfer to a personal pension wasn't in line with that objective.

I think it's worth repeating that the regulator's guidance is that an advising firm like JLT shouldn't recommend a transfer from a DB scheme unless it can clearly show it was in the customers best interests overall. But in this case I don't think it managed that. As I've said above there was a chance that Mr M could be better off in retirement by transferring to a personal pension. But – as its adviser recognised several times during his call with Mr M – it was anything but guaranteed.

Ultimately, I don't think JLT's advice was suitable. By accepting that advice Mr M was giving up a guaranteed, risk-free and increasing income for a relatively slim prospect of an improved income in retirement against the possibility he would be worse off. And in my view, there was no clear evidence that a transfer would be in Mr M's best interests. So JLT should not have recommended that Mr M transfer out of 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 he would have insisted on

transferring out of the DB scheme, against JLT's advice. I say this because Mr M was an inexperienced investor with a balanced attitude to risk and this pension accounted for a significant proportion of his 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 have accepted that advice.

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 I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

I'm satisfied that a calculation in line with FG 17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr M.

For clarity, while Mr M expressed a preference to retire at age 62, he 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, JLT should pay the compensation if possible 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, JLT should pay it 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 JLT must add interest 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. In those circumstances, 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 £170,000, 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 £170,000, 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 £170,000.

Where the compensation amount does not exceed £170,000, 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 £170,000, 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 £170,000, I also recommend that JLT 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 24 March 2023.

Joe Scott
Ombudsman