

## The complaint

Mr D complains about the advice given by UTMOST LIFE AND PENSIONS LIMITED ('ULP') 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.

Mr D is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr D.

## What happened

Mr D held deferred benefits in a DB pension which he accrued working for an employer between November 1967 and October 1994.

Mr D says he was approached by ULP about potentially transferring his pension benefits. ULP says that Mr D approached it about a transfer. This disagreement notwithstanding, I've seen evidence that a form was signed in November 1994, by both Mr D and a representative of ULP, indicating Mr D was interested in obtaining a quotation for a personal pension. The form gave ULP authority to request the relevant information from the trustees of his DB scheme.

On 12 December 1994, the DB scheme provided a transfer value quotation ('TVQ'). This noted that the normal retirement age of the DB scheme was 65 and said that the cash equivalent transfer value ('CETV') was £15,959.00.

ULP issued a pension illustration to Mr D on 6 March 1995. This set out examples of what he might receive at retirement from a personal pension depending on different levels of growth.

ULP has provided a copy of a handwritten letter, signed by Mr D, from 12 May 1995. This said *"I am writing this letter to inform you that I wish to change from [DB scheme] fund as quickly as possible to [personal pension provider]. As myself and my wife are not happy at all with the overall performance of the [DB scheme] pension fund and specially the clause where my wife if I die before retirement age, does not receive a pension, only receives my contributions back. And we feel [personal pension provider] representative has explained all the options available. It would be much more beneficial to be with [personal pension provider]."*

I've been provided with a copy of a fact find, signed by Mr D and ULP, on the same day as this handwritten letter, where information was recorded about his circumstances. This recorded that he was 47, married with no other dependents, and not working, due to recent redundancy. It was indicated that Mr D hoped to retire at age 60. The DB pension was recorded though as being Mr D's only retirement provision. The fact find also recorded that Mr D's attitude to investment risk was 'cautious'.

Transfer value analysis ('TVAS') reports were produced by ULP. They included a calculation of the critical yield - the annual growth rate required of a new pension to allow Mr D to purchase, at retirement, equivalent benefits to those the DB scheme guaranteed to provide.

All of the reports I've been provided said, for retiring at age 65 and taking a full pension, the critical yield was 12.6%. The TVAS reports quoted different critical yields for retirement at age 60. These ranged from 12.2 – 14.1%.

An internal memo from ULP dated 24 May 1995 noted that a personal pension would have to perform consistently well to exceed the critical yields (quoting the critical yield for early retirement as being 13.8%). This noted that Mr D' attitude was cautious but a transfer would be quite adventurous. It said the author felt ULP should be saying "stay put". It went on to say *"If the client is 'Insistent' upon transferring, he should be saying that he is going against the advice of the representative. The representative has not given any advice either way."* And closed by saying *"Upon receipt of the clients signed and dated 'Insistence' the transfer will receive further attention."*

Following this memorandum, the fact find was re-signed on 15 June 1995. The declaration to which noted *"Irrespective of the advice given and the representation made by the Representative, we chose to take out the policy(ies) as detailed in 'Type(s) of Policy Sold' and the attached 'Reason Why Letter'."*

A 'pension transfers-in & opt-outs checklist' was also completed on 15 June 1995. This summarised that *"A major reason for Mr D to opt out is that should he die his wife would only get £5,960 from the [DB] scheme and while PPP [personal pension] would be L/S (lump sum) plus pension. This is a very important factor to him. The early retirement penalty is very heavy therefore not being flexible in [DB] scheme. All in all client very unhappy with [DB] scheme, after so many years of service and acting against my advice wishes to go ahead with transfer. See original reason why letter date 12/5/95 plus new letter for full report"*.

Finally a 'Reasons Why Letter' was completed and signed by ULP and Mr D on the same day. This was a printed form with the ULP's advisers handwritten comments inserted. It said:

*"I have advised Mr D not to proceed with the transfer on the grounds that the [DB] pension shows better projection benefits at retirement at age 65 on all but the higher growth rate. Despite his relatively cautious attitude he still insists on proceeding with the transfer for the following reasons.*

- 1) The [DB] scheme provides no spouses pension in the event of death before retirement.*
- 2) He feels the LPI mid rate projection of 4 – 5% pa is unlikely to be achieved in the near future. Economists estimate 1995 and 1996 RPI to be less than 3%.*
- 3) There are severe penalties of 8% pa for early retirement from [DB] scheme.*
- 4) He has discussed 3&4 above with [DB] scheme trustees.*
- 5) He has little confidence in the [DB] scheme as a whole.*
- 6) The personal pension option can provide added retirement flexibility.*
- 7) The [DB] scheme is also a 100<sup>th</sup> scheme.*

*See attached clients letter."*

The attached clients letter seems to be the earlier handwritten letter from 12 May 1995, from before any advice was provided.

There was a further internal memorandum on 26 June 1995, noting that, although it had been noted Mr D didn't have adequate life cover, that no recommendation had been made in this regard.

Also on 26 June 1995, ULP sent Mr D another letter. This said it was in reference to his request to transfer his benefits and said it was essential that Mr D fully understood the

implications of this. It explained, once payment had been made from the DB scheme, the scheme was under no obligation to accept the money back in the event Mr D wished to cancel. So, ULP enclosed copies of 'draft cancellation notices' for Mr D to read and consider the matter again. Copies of the 'draft cancellation notices' haven't been provided.

There was though a declaration to confirm these had been read. This said "...*having read and fully understood the contents and implications of the draft cancellation notices issued to me, hereby declare that I wish/do not wish \* to proceed with the transfer of deferred pension benefits from [DB scheme] to [personal pension provider]. I understand that once payment of the transfer value is received from [DB scheme] they will be under no obligation whatsoever to accept payment back into their scheme should I later change my mind.*" The note said in respect of the section marker \* to delete as appropriate. Mr D signed this declaration on 7 July 1995, although I note neither option was deleted.

The transfer completed in August 1995.

I understand Mr D moved his personal pension to a different provider around the year 2000.

Mr D complained to ULP in May 2022. He said he thought the transfer was unsuitable as he'd lost all accrued and future guaranteed benefits as a result. He said he was an inexperienced investor who didn't understand the implications of the transfer and if these had been properly explained to him, he wouldn't have gone ahead.

ULP said it had advised Mr D against transferring, but he had chosen to proceed despite this advice. And Mr D had indicated at the time the transfer had been fully explained. So ULP didn't think it had done anything wrong.

Mr D asked our service to consider the complaint. He said he didn't know he'd been treated as an insistent client in 1995 and had just signed the documentation that the adviser had presented to him. His representative added that in their experience, letters like the handwritten one Mr D signed were often dictated by advisers and argued Mr D didn't have the knowledge to make the statements in the letter without encouragement.

ULP confirmed separately that it consented to our service considering the complaint.

One of our Investigator's considered the complaint. She thought it should be upheld and that ULP should compensate Mr D for any loss the DB transfer had led to. She didn't think a transfer was in Mr D's best interests and thought he was always unlikely to improve on the guaranteed benefits the DB scheme provided. She noted Mr D had signed a handwritten letter indicating he wished to proceed. But she noted this was before any advice had been given. So, she didn't think he was in a position to decide at that point. And she didn't think ULP had done enough to ensure that he was in an informed position after that. So, she didn't think Mr D was an insistent client, and if he'd been provided clearer advice, didn't think he'd have gone ahead.

ULP disagreed. It said that the information from the time documented that Mr D had clear reasons for wanting to proceed. And it felt it demonstrated that he was insistent.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time the advice was given. 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 advice was provided in 1995. At that time the adviser was regulated by the Personal Investment Authority ('PIA'). Based on the information I've seen I understand the adviser was previously a member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). And it was tied to or could only sell products from a certain provider. When the PIA took responsibility for LAUTRO businesses in 1994, they adopted the LAUTRO rules. These adopted rules applied at the time of the advice in this case.

The LAUTRO rules required ULP to make Mr D aware up front it could only sell products from the range the specific provider offered. It had to exercise due skill, care and diligence, deal fairly with Mr D, take into account his financial position generally and all other relevant circumstances and to give best advice. This included that it couldn't make inaccurate or unfair criticisms of other products. Nor could it advise someone to cancel an existing product unless it genuinely believed doing so to be in the consumers best interests and it had clearly disclosed the relevant consequences and disadvantages. However, none of this went as far as meaning that the adviser could just sell the least unsuitable contract from within the provider's range.

*Was transferring I Mr D's best interests?*

Having looked at all the evidence available, I don't think a transfer was in Mr D's best interests.

ULP recorded that Mr D was unhappy with the performance of the DB pension fund. And that he didn't expect the LPI, which revaluation of the DB scheme was linked to, to be particularly high. ULP also recorded a comment in relation to economists' predictions at the time.

From the information I've seen, Mr D appears to have been an inexperienced investor. And I'm not sure he'd have necessarily been in a position to speculate about the future growth rate of the DB scheme. In any event though, a personal pension growing at a rate in excess of the rate at which the DB scheme benefits revalued wouldn't have meant Mr D would be better off in retirement. The personal pension would have to grow by in excess of the critical yield for that to happen. So, if this was a genuine statement by Mr D, I'd have expected to see some evidence that ULP had addressed this objection and provided an explanation – in order to show that it had dealt fairly with Mr D and made him fully aware of the relevant disadvantages. But I can't see that this was addressed, from the information that I've seen.

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

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. 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.

The investment return (critical yield) required to match the guaranteed pension at the normal retirement age of the DB scheme, 65, was quoted as 12.6% per year. This compares with the discount rate of 10.3% per year for 17 full years to retirement.

The critical yield to match the benefits available at early retirement at age 60 was quoted as being between 12.2 – 14.1%. Which compares with a discount rate of 10.0% for 12 full years to retirement.

For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6%.

I've taken this into account, along with the composition of assets in the discount rate, Mr D's cautious attitude to risk and also the term to retirement. There would be little point in Mr D giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, I think Mr D was always likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his recorded attitude to risk.

So, from a financial viability perspective, I don't think a transfer was in Mr D's best interests. And the information from the time indicates that ULP agreed with this.

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.

The fact find recorded that Mr D was interested in potentially retiring at age 60. And the 'Reasons Why Letter' added that a personal pension would provide additional flexibility, noting the "severe penalties" for early retirement.

It is true that if Mr D drew his benefits before the normal retirement age of the DB scheme, the pension he'd receive would be subject to actuarial reduction. But an actuarial reduction is intended to reflect the pension benefits being paid for longer. The starting monetary amount when compared with the full pension payable from age 65 – the normal scheme retirement age – would've been less. But by retiring early Mr D would've been receiving his pension for longer. It was a trade-off, rather than a 'penalty'.

In addition, based on the critical yield ULP calculated for early retirement, it again appeared unlikely that he'd improve on the guaranteed benefits the DB scheme would've provided in the event he retired early, even after the actuarial reduction.

Despite this ULP made references to this being a penalty in its handwritten notes. And I can't see that it gave an appropriately balanced explanation.

In any event though, at the time of the advice, Mr D was 47 and was over 12 years from when he thought he might retire. And so, while Mr D might've had a plan in mind, given the time until he was intending to retire, I don't think those plans were finalised and could've been subject to change, just as his circumstances and needs may have altered. On top of this, I can't see that ULP recorded anything about his expected retirement income needs.

Taking all of this into account, I don't think a transfer in order to achieve greater flexibility was in Mr D's best interests at the time.

ULP noted that death benefits were one of the reasons that Mr D was keen to transfer as,

under the DB scheme, if he died before retirement, his wife would only receive a lump sum return of premiums. Whereas a personal pension would potentially provide a lump sum and a pension income.

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. But whilst I appreciate death benefits are important to consumers, and Mr D 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 D about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

The fact find ULP has provided recorded the DB scheme was Mr D's only retirement provision and suggested he already lacked adequate provisions for retirement. So, giving up his guaranteed benefits for the purpose of alternative death benefits doesn't seem to have been in his best interests. And I can't see from the information that has been provided that ULP challenged this as a reason for proceeding – rather it just recorded this as something Mr D had said. I'd have expected to see some analysis and explanation to explain why this wasn't in his interests – in order to demonstrate that it had taken account of his circumstances and addressed the relevant disadvantages and risks.

Furthermore, if Mr D genuinely wanted to leave a legacy for his spouse in the event of his death, life insurance could've been explored. Indeed, ULP's internal memo on 26 June 1995 noted a recommendation about this was appropriate and indicated surprise it hadn't yet been given. ULP however recorded that this would instead be looked at "soon" once Mr D returned to work. But I think without exploring this alternative at the time, ULP failed to deal clearly with Mr D or put him in a position to fully understand the alternatives when considering the potential disadvantages of a transfer.

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 D.

ULP says Mr D was dissatisfied in general with the DB scheme and did not want his pension to remain with it. The reason for this dissatisfaction seems in part to be related to performance and death benefits, which as I've already explained, I don't think meant transferring was in Mr D's best interests. But I also think this dissatisfaction is likely to have partly been because Mr D had been recently made redundant by the business which sponsored the DB scheme.

While though I understand Mr D might've felt he wanted a clean break from his former employer, that wasn't in my view, a valid reason to transfer – particularly as it seems likely he'd have been worse off in retirement. I've also seen nothing to suggest that the funding position of the DB scheme was in a position such that Mr D should have genuinely been concerned about the security of his pension. But again, I can't see that ULP substantially addressed this, which I think it ought to have done if it was acting in his best interests.

Taking all of this into account, I don't think a transfer was in Mr D's best interests.

#### *The advice given by ULP and whether Mr D was an insistent client*

ULP says it advised Mr D against transferring. And I can see that in its internal memo on 24 May 1995 it was recorded that it was felt the advice should be to "stay put". But, based on everything I've seen, I don't think that advice was made clear to Mr D here. Certainly not to the extent I would've expected it to have been.

The main section of the 'Reasons Why Letter' is titled 'Representatives Report' and says it is

for the adviser to summarise the advantages and disadvantages as well as the reasons the client wishes to proceed. But very little of the information recorded is about the reasons for ULP's advice. It says, *"I have advised Mr D not to proceed with the transfer on the grounds that the [DB] pension shows better projection benefits at retirement at age 65 on all but the higher growth rate."* But there is no further reasoning provided beyond that. There is no commentary addressing the issues I've covered above about why the reasons Mr D apparently wished to transfer did not make doing so in his best interests.

It is true that Mr D signed a copy of this form, indicating the contents were accurate. But given the majority of the comments related to why he was looking to proceed, with no rationale why that wasn't in his interests, the reasoning was, in my view, not complete. And I don't think this is enough to say that ULP had communicated with him clearly or fairly, or that he understood its advice.

And I can't see that there was any further reference in the documentation provided by ULP advising against a transfer. None of the written notes in the fact-find, which was returned to Mr D for a further signature, refer to ULP advising for or against a transfer. The 'Pension transfer in & opt-outs checklist' also makes no reference to any reasons for ULP's recommendation. The letter ULP sent to Mr D in June 1995, where it provided 'draft cancellation notices' also makes no reference to what ULP's advice was. It talks about Mr D needing to understand the implications and likely not being able to go back once a transfer was made, but there were no further warnings that ULP didn't think a transfer was in his interests. And the accompanying declaration didn't include an acknowledgement that Mr D was acting against advice.

There may have been discussions between the adviser and Mr D. But no records have been provided to show what was discussed, or to confirm and corroborate any information or rationale that was shared verbally. So, based on what I've seen, I don't think I can fairly say ULP made its advice as clear as it should have, or that it explained its rationale, in reference to the consequences of transferring, in the level of detail I'd have expected.

As a result, although Mr D signed forms at the time, I don't think ULP put him in a position to make an informed decision in relation to the advice given.

In addition, I share the Investigator's concerns about whether Mr D was truly an insistent client.

The handwritten letter from 12 May 1995 does indicate that Mr D wanted to proceed with a transfer and the reasons for this. But the letter also indicated that this was on the basis that ULP had explained his options to him. ULP however acknowledged, in its memo of 24 May 1995 that this letter was drafted before it had provided Mr D with advice. So, when that letter was written, ULP hadn't told Mr D it advised against a transfer (and indeed as I've explained I don't think it was subsequently clear about this). Moreover, the letter indicates that him wanting to proceed was on the basis of information the adviser had discussed. Which suggests firstly that Mr D understood at that point that the adviser was potentially endorsing a transfer as being suitable. And that Mr D may have been led by these discussions rather than having already decided to transfer.

I acknowledge that Mr D subsequently signed several forms saying he did want to transfer. But, from what I've seen, none of these explained the risks involved in any great detail. Which, given Mr D was an inexperienced investor, I think would've been fair. And the forms simply repeated the reasons for transferring first listed in the handwritten letter, which as I've explained I don't think necessarily reflect Mr D's starting position and don't appear to have been suitably robustly challenged by ULP. They didn't provide any further reason for wanting to proceed or why Mr D was ignoring ULP's, after it says this was explained to him. This is

something I'd have expected to see if Mr D was an insistent client and is something that ULP said Mr D should document.

Taking all of this into account, I don't think Mr D was in a position to make an informed decision about whether to proceed as an insistent client – something he says he was unaware ULP had treated him as.

*Would Mr D have acted differently?*

While I think there were failings in the advice process by ULP, I have to consider whether Mr D would've gone ahead anyway as an insistent client, if clearer advice had been provided.

As I've noted, Mr D did sign a handwritten letter indicating that he wanted to proceed with a transfer, primarily because of unhappiness about death benefits and the scheme in general. But, as I've said, I haven't seen evidence to support that ULP did enough to address these things or explain why a transfer wasn't in his best interests for these reasons. And if this had been properly addressed, I'm not persuaded that Mr D would've insisted on transferring out of the DB scheme, against ULP's advice. I say this because Mr D was an inexperienced investor with a cautious attitude to risk and this pension accounted for the majority of his retirement provision. So, if ULP 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 D's concerns about the death benefits or his potential animosity towards his former employer were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he was paying for, didn't think it was suitable for him or in his best interests. I think a properly reasoned explanation by ULP would've carried significant weight. So, I don't think Mr D would have insisted on transferring out of the DB scheme.

As a result, I think Mr D's complaint should be upheld and that ULP should compensate him using the regulator's defined benefits pension transfer redress methodology.

## **Putting things right**

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

ULP must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:  
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, I understand Mr D retired at age 58. So, compensation should be based on him taking benefits at this age.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr D's acceptance of the decision.



If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, ULP should:

- always calculate and offer Mr D redress as a cash lump sum payment,
- explain to Mr D before starting the redress calculation that:
  - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
  - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts ULP's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr D for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr D's end of year tax position.

Redress paid to Mr D as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, ULP may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr D's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

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 UTMOST LIFE AND PENSIONS LIMITED to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that UTMOST LIFE AND PENSIONS LIMITED pays Mr D the balance.

If Mr D 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 D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 14 June 2023.

Ben Stoker  
**Ombudsman**