DRN-4047653

The complaint

Mrs T complained about advice she was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan, in 2009. She says the advice was unsuitable for her and believes this has caused her a financial loss.

JLT Wealth Management Limited is responsible for answering this complaint. To keep things simple I'll refer mainly to "JLT".

What happened

At the time, Mrs T was a deferred member of her OPS, having been employed from the mid-1990s until 2007 and she had accrued around 12 years' worth of benefits. The trustees of the DB scheme wrote to members like Mrs T in 2009 explaining that the scheme had become expensive to maintain and so it was looking at ways to manage its long-term pension commitments.

The company decided to offer enhanced terms to members who chose to transfer their benefits to a personal pension scheme. Members of the DB scheme were also being offered regulated financial advice, the cost of which was being met by Mrs T's former employer. JLT was contracted to provide that advice.

Information gathered about Mrs T's circumstances were broadly as follows:

- Mrs T was 45 years old, divorced and with no-one financially dependent on her. She was in good health.
- Mrs T currently earned around £24,000 per year. She didn't own a property and had no savings, investments or significant assets. She had outstanding credit card debt of around £12,550.
- The cash equivalent transfer value (CETV) of the DB pension was around £126,387 and the normal retirement age (NRA) was 60. A cash enhancement of £20,221 was being offered if she transferred away, taking the total amount to £146,608.
- Mrs T's options were to keep the pension where it was and effectively do nothing. Alternatively, she could transfer away to a new personal pension arrangement and invest both the CETV *and* the enhancement in the new personal plan. She could also transfer away, but only invest the CETV in a personal plan. In this case the enhancement would be taken as cash and used by Mrs T as she saw fit.

JLT set out its advice in a suitability letter on 1 December 2009. It advised Mrs T to transfer out of her DB scheme and into a personal plan. JLT said this was based upon the assumption that she could either invest the full transfer value, including the enhancement. Or she could take the enhancement as a cash payment and invest only the remainder amount (£126,387) in funds within a personal pension plan. Mrs T agreed that she wanted to transfer out and she wanted to use the enhancement to pay down her debts. So, she transferred from her DB scheme to a personal pension shortly thereafter. She took the enhancement of £20,221 as cash which became subject to income tax and national insurance.

Mrs T first complained to JLT about its advice in September 2021, saying she shouldn't have been advised to transfer out of her DB scheme. In response, JLT said it hadn't done anything wrong and was acting on the financial objectives Mrs T had at the time.

Mrs T then referred her case to our Service in March 2022. One of our investigators looked into the complaint and said it should be upheld. As JLT hasn't agreed and the complaint couldn't be resolved informally, it's come 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 considered the final response from JLT dated September 2021 and also JLT's response to our investigators view. I've also 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). 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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 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 Mrs T's best interests.

I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension arrangement was in Mrs T's best interests.

I don't think it was so I'm upholding her complaint.

Introduction

I've noted that when responding to our investigator's view, JLT signposted our Service to what it says were a number of previous outcomes reached on very similar complaints in respect of the same pension scheme. JLT says we didn't uphold these complaints and so the implication is that complaints about advice to transfer out of this particular pension scheme are ones we usually don't uphold.

However, I've looked at the four cases JLT refers to and they all have different features which include the consumer's age, their financial circumstances and their points of complaint. Of the four mentioned, only one was ever referred to the ombudsman for a final decision. And the previous final decision I made has many notable differences to Mrs T's complaint.

So, to be clear, JLT is wrong to infer we have an approach to cases like these and I've therefore judged Mrs T's complaint strictly on its own particular merits, as is appropriate.

Financial viability

JLT referred in its transfer recommendation to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a transferred personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

In its suitability report, the JLT adviser said that the critical yield required to match the benefits of the DB scheme she was in at the time, at her NRA of 60, was 5.9%. The critical yield if she retired at 55 was 5.5%. Both these figures assumed Mrs T intended to take a tax-free cash lump sum and a reduced pension when she retired. And they were based on her taking the enhancement offer as cash rather than reinvesting it in a new personal pension together with the existing CETV.

What JLT didn't set out on the suitability report was the critical yields in relation to retiring without taking a tax-free lump sum; these were actually 6.5% and 6.4% respectively (for retirement at ages 60 and 55). Mrs T was only 45 at the time, so it's not possible to be sure what she would have most likely done at retirement as this was still a long way off for her. Also, given her financial circumstances, I think a retirement at 55 looked very unlikely.

I've noted that the critical yields for reinvesting the whole offer – both the CETV and the enhancement – in a personal pension, were generally lower. The yields were 4.8% (retiring aged 60) and 3.9% (aged 55). But JLT's recommendation was that she transfer away whether reinvesting the enhancement offer or not. And in any event, I think the evidence shows she was definitely leaning to taking the enhancement as cash, without reinvesting it in a pension.

So, in my view, the first critical yield figure I mentioned above was closest to Mrs T's circumstances – this was 5.9%. Next came the potential for her most likely retiring at 60 and taking a full pension – this was 6.5%. There would therefore need to be solid evidence showing these types of growth rates could be exceeded for a transfer to be financially viable.

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.

The relevant discount rate published by the Financial Ombudsman Service for the period was 6.4% per year for 14 years to the NRA (age 60), which is broadly within the critical yield bands I've mentioned above. I've also kept in mind that the regulator's upper projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate was 5%.

I do accept that all these figures might be difficult to follow. But essentially what they are demonstrating is that the discount rate is showing us that, as of December 2009, it was likely that Mrs T at best could hope to *match* the benefits her DB scheme provided her with at age 60. But exceeding those benefits was less certain. And as such, there wasn't a clear case for saying that transferring her DB pension would be worthwhile from a purely financial perspective.

Looking at other indicators, I think the financial case for transferring was even weaker. The guidance from the regulator at the time assumed a 'mid-rate' annual growth, of around 7% and a 'low' assumed growth rate of 5%. JLT said Mrs T's attitude to risk (ATR) was "medium". However, I've noted Mrs T's circumstances meant she had no capacity for loss because this was her only meaningful pension at that point in her life. While she had other pensions, they were not significant in value. She also owned no property and had no savings, assets or investments. She also had no investment experience to call upon so I think saying she had a "medium" ATR was stretching credibility here, based as it was on her simply answering a few generalised questions on a form. Her reality was obviously quite different and I think her actual ATR should have been moderated down because of the obvious financial vulnerabilities she faced. Overall, I think a fair assessment of her ATR would have been 'low'.

This means, that in all likelihood, the reasonable rate of assumed growth from the regulator was also below the critical yield rate because the 'low' assumption of 5% per year should have been used. This is below the 5.9% and 6.4% per year growth assumed by the critical yields.

There also would most likely have been charges and fees associated with the recommended personal plan which could have acted as a drag on growth, and of course, there was always a risk that if Mrs T transferred her funds to a personal pension arrangement, the growth could have been even lower. Mrs T didn't face either these costs or risk with her DB pension. In any event, I've seen the adviser also went beyond its own assessment of Mrs T's ATR by recommending that a part of her pension fund be allocated to a money market fund with a risk level that was "adventurous". This was clearly much higher than I think Mrs T would have been comfortable with and I don't think she had the necessary capacity for loss to take such a risk with her pension funds.

Overall, I don't think there was sufficient opportunity for Mrs T's transferred funds to grow enough outside her DB scheme to make transferring worthwhile, particularly given her low ATR. And in my view, there would be little point in her transferring away from this type of guaranteed pension scheme to get lower overall benefits in the longer term.

JLT has asked why we refer to the critical yield rate and not a 'hurdle rate'. However, the regulator required firms to consider the critical yield at the time of the advice and as I've said, use of the critical yield is only a part of how I've assessed Mrs T's situation.

Of course, according to JLT, its recommendation that she should transfer out to a personal pension was not based on the financial comparisons with her current scheme alone. Rather, JLT said Mrs T had different reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer was suitable for her.

I've considered these below.

Other reasons given for the transfer advice

I've used the documentation from JLT at the time to help list some of the themes the recommended transfer-away was based on. Our investigator also highlighted some themes when he issued his view. These were:

- Transferring away from the DB scheme was going to provide an immediate cash sum of £20,221.92 (less income tax and national insurance). Mrs T indicated she wanted this because she was experiencing financial challenges and wanted to pay off debts.

- Transferring away to a personal pension plan would provide scheme death benefits which were more appropriate to her circumstances.

- Transferring provided more overall flexibility and personal control over her pension fund.

So, as well as being the only way to access the cash enhancement there and then, it seems the supporting reasons that JLT recommended the transfer out to a personal pension was for the flexibility and control it offered to Mrs T. I have therefore considered all these issues in turn.

- *The cash enhancement*

It was recorded on documents from the time that Mrs T faced some difficult circumstances in 2009. She was divorced and had no significant assets, savings or investments. She didn't own a property. It's evident that Mrs T had some debts that she was interested in clearing. But I've seen no evidence to demonstrate Mrs T had fallen behind with her repayment of these such that she needed to repay them in full immediately.

In any event, our investigator quite rightly pointed out that irrevocably transferring away from a DB pension scheme wasn't the only way of potentially addressing these issues. For example, Mrs T might have been able to seek a type of debt management arrangement and she may have been able to borrow money from elsewhere; she herself has said that her family was an option. I accept some of these options may have seemed unpalatable in her difficult financial situation of the time, but the adviser doesn't seem to have considered – or at least recorded – other debt management or lending alternatives.

I think that recommending Mrs T seek debt consolidation advice ought to have been JLT's first consideration before recommending Mrs T transfer her pension away from her DB scheme.

- *Death benefits in her pension*

A key theme in the advice JLT gave to Mrs T was that she wasn't currently married and had no-one financially dependent on her, so the death related pension benefits associated with her existing scheme were of no use to Mrs T.

I do understand the point being made. In addition to spousal benefits, there were likely wider child-related benefits whilst children remained within full-time education. For many consumers, these things are of great reassurance, and therefore great value, in a pension. I accept Mrs T didn't need them at the time.

Although Mrs T has told our Service recently that she had a partner there's no indication she told the adviser at the time she intended to marry again. It's possible to view this as a failing on the adviser's part as they didn't elicit such details. But I've got no evidence Mrs T disclosed this at the time; she may have felt this was a personal matter or one which didn't relate to her existing financial circumstances. So, I think it's likely the adviser didn't know of her existing partner in 2009. The absence of a partner was mentioned several times in the suitability report. So, I think if the adviser had mis-understood this, then Mrs T would have been likely to put them right and correct what was set out in the death benefits section of the report.

What JLT told Mrs T is that if she transferred away, then any value in a personal pension plan could be passed on, most likely tax-free, to a nominee. This may have sounded good, but it needed careful explanation, particularly as Mrs T was still only 45 years old and in good health. And whilst the entire value of a pension in a personal scheme could be passed on upon death, the whole point of a pension is to pay for one's ongoing retirement. Therefore, if Mrs T had lived a long life, it's highly likely there would be very little left in the personal pension fund to pass on. The amount in a personal scheme was also at risk to market volatility and it wasn't index linked so had no built-in protection against inflation.

So, although JLT implied that the death benefits were discussed at the time and the personal pension arrangement would better enable the retention of the value of the funds if Mrs T died, this isn't strictly the full picture. JLT should not have encouraged Mrs T to prioritise the potential for higher death benefits through a personal pension over her security in retirement.

I'm also not clear the extent to which life insurance was discussed. However, at 45 years of age, a term cover policy may have been a reasonably affordable product if Mrs T really did want to leave a legacy for a partner, relative, or anyone else, if she passed away.

Overall in this case, I don't think different death benefits on their own justified transferring from the DB scheme.

- *Flexibility, ownership and control*

I can't see that Mrs T required flexibility in retirement in the way JLT implied. I think JLT did a poor job at identifying what Mrs T's retirement income requirements might be and there were already limited degrees of flexibility still available to her around retiring early in her existing scheme.

In my view, there was no evidence to support that Mrs T needed flexibility at all and the concept of flexibility wasn't really defined by the adviser.

There's also no evidence showing that Mrs T had either the desire or capacity to manage these funds. Mrs T had no such investments at the time and there's nothing to suggest she was knowledgeable enough in these pension related matters or that she had any past investment experience to call upon.

I therefore think the issue of flexibility was used to merely help justify the transfer-away recommendation. And at around £126,000 in total value, I think Mrs T would have needed significant help and advice to manage the scale and complexity of the funds. Given their value, this would have come at an ongoing cost which she didn't have with the scheme she was already in.

<u>Summary</u>

I do accept the enhancement offer and Mrs T's financial circumstances meant that her situation was a somewhat mixed picture. I also accept JLT provided Mrs T with quite a lot of information.

But ultimately, as per the regulator's stance, JLT should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs T's best interests. I don't think the advice given to her was suitable. She was advised to give up a guaranteed, risk-free and increasing income. By transferring away from her DB scheme, she was more likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

JLT also cited the death benefits in a personal plan as being better than in Mrs T's existing scheme, particularly as she was divorced and had no financial dependents. However, I described above how this wasn't a viable enough reason to recommend the transfer on its own.

Similarly, for the reasons of flexibility, control and personal ownership of her pension funds, I think the adviser used this as no more than a 'stock' objective. Flexibility wasn't really defined and she already had some with her current scheme. More so, Mrs T didn't have the capacity or desire to manage her pension funds if she transferred and so listing this as a positive rationale for transferring was unreasonable. All the evidence I've seen shows Mrs T, an inexperienced investor, would have needed ongoing and significant support to manage her funds. The adviser also recommended a part of her pension fund be transferred and allocated to a fund with a risk level that was much higher than I think Mrs T was comfortable with.

On the other hand, Mrs T knew she was being offered an incentive to leave the DB scheme and she knew that offer was basically £20,221 in cash (less tax and national insurance). In her difficult financial position of the time she thought the best option might be to reduce the burden of debt she'd been enduring. But JLT wasn't just there to transact what Mrs T thought she wanted. After all, it was still being paid to provide advice. And as a regulated adviser, its job was to understand her needs and recommend what was in her best interests. In the event JLT encouraged Mrs T to accept a short-term gain without fully considering workable alternatives that would have been much better for her in the longer term. In my view, she now faces a more uncertain retirement as a result.

I've considered whether Mrs T would have still gone ahead anyway, against JLT's advice. I accept the cash was most likely quite tempting. But I'm not persuaded that she would have insisted on transferring out of the DB scheme, against JLT's advice. I say this because she was an inexperienced investor with no capacity for loss. As I've said, this pension also accounted for the vast majority of her retirement provision. So, if JLT had provided her with some alternatives to address her outstanding debts, and very clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would have accepted that advice.

In light of the above, I think JLT should compensate Mrs T for the unsuitable advice, 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 Mrs T**,** as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs T would have most likely remained in the occupational pension scheme if suitable advice had been given.

JLT 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.

Compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with 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 Mrs T'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, JLT should:

- always calculate and offer Mrs T redress as a cash lump sum payment,
- explain to Mrs T before starting the redress calculation that:
    - the 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 Mrs T receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs T accepts JLT's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mrs T for the calculation, even if she ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs T's end of year tax position.

Redress paid to Mrs T as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, JLT 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 Mrs T'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 £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.

I have also considered the impact on Mrs T of the unsuitable advice and transfer. Our investigator recommended that a sum of £250 should be paid to Mrs T by JLT for what they referred to as the inconvenience of bringing this complaint. Whilst I understand this was inconvenient, I've considered the wider circumstances of this case. And as I'm directing that things should be put right if there has been a loss, I consider this to be sufficient and fair in all the circumstances of the case. I therefore make no additional award for distress and inconvenience.

My final decision

Determination and money award: I uphold this complaint and I direct JLT Wealth Management Limited to pay Mrs T the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that JLT Wealth Management Limited pays Mrs T the balance. If Mrs T accepts this decision, the money award becomes binding on JLT Wealth Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mrs T can accept my decision and go to court to ask for the balance. Mrs T 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 Mrs T to accept or reject my decision before 15 June 2023.

Michael Campbell
Ombudsman