DRN-4074542

The complaint

Mr W complains about the advice JLT Wealth Management Limited (JLT) gave to him concerning transferring 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 him a financial loss.

The firm that gave Mr W advice was operating under a different name to JLT. But as JLT has confirmed it is responsible for responding to the complaint, for ease of reading, I will only refer to it in this decision.

What happened

Mr W was a deferred member of his employer's DB pension scheme. In February 2010, his employer wrote to him and explained that it was looking at ways to control its pension costs, including reducing the number of deferred members of the scheme. It said Mr W's pension had a transfer value of £80,404, which it would enhance by £8,040 if he transferred to a personal pension. Alternatively it said he could take a reduced enhancement as a cash lump sum, which net of tax and National Insurance was £6,279. The employer said that if Mr W was considering accepting its offer, he would need to take professional advice, which the employer would pay for. It also said that if Mr W wanted to stay in the DB scheme then he need not take any further action.

Mr W expressed an interest in the offer and the employer sent him a password so he could log onto JLT's website and complete a fact-find questionnaire to begin the advice process.

Mr W completed the fact-find. Amongst other things he said he was 42 years old, married with dependent children. He said he was "risk averse*"*, but could tolerate "moderate" volatility in the value of his pension fund. He said he intended to take all of the enhancement offer as a cash lump sum to buy a car.

In March 2010 JLT produced a suitability report setting out its analysis and recommendations. It recommended that Mr W should not transfer out of his DB scheme. In brief it said it didn't believe a personal pension would meet the growth rate required (the critical yield) to match the benefits from the DB scheme. It said Mr W's benefits in retirement could be significantly reduced by transferring.

In April 2010 Mr W rang JLT. He said he'd already returned forms to transfer out of the DB scheme. JLT said his employer had sent the transfer forms to everyone who'd completed a fact-find questionnaire. But that, as its analysis was that Mr W would likely be "significantly worse off*"* by transferring and its recommendation was that he shouldn't transfer, the forms weren't applicable to his situation. Mr W asked what he should do if he still wanted to transfer out of the DB scheme. JLT said it *"strongly recommended"* he remain in the DB scheme. It repeated that he would be significantly worse off in retirement by transferring. And as such doing so wasn't in his best interests. It asked Mr W why he wanted to go ahead with a transfer against its advice. He said that basically he *"could do with the money".* JLT told Mr W that by taking the money then, he would have a potential income shortfall in retirement.

JLT read out some statements and asked Mr W if he agreed with them. Those included:

- He'd read and understood JLT's suitability report. And he was satisfied he'd been given enough information and understood the risks involved.
- By transferring it was highly likely his retirement benefits would be less than he would receive from the DB scheme.
- That once transferred the process would be irreversible.

Mr W agreed to each of the statements individually. JLT then said it could arrange the transfer for him but it would do so on an 'insistent client'[1] basis.

JLT then wrote to Mr W enclosing an illustration of what a personal pension might be worth to him in retirement. JLT repeated that its recommendation was he should not transfer out of the scheme. It said that by doing so his retirement benefits could be dramatically reduced. It said it strongly recommended he seek further advice before deciding to transfer. It repeated its earlier warning that Mr W could be worse off in retirement and he needed to understand the risks he was taking.

Mr W completed the relevant forms for the transfer to go ahead. JLT replied. While noting receipt of the forms for the transfer it repeated its earlier warning that Mr W's retirement income could be "dramatically reduced" by transferring. It said it couldn't accept responsibility for Mr W's decision not to follow its advice. And it asked him to contact it if he wanted to cancel the transfer. Mr W didn't do so and the transfer went ahead.

In 2022 Mr W complained to JLT about the suitability of its transfer advice. JLT didn't uphold his complaint. In short it said its advice was that he shouldn't transfer.

Mr W brought his complaint to us. One of our investigators looked into it. She recommended Mr W's complaint be upheld. In brief she said that she didn't believe Mr W had fully understood the implications of transferring. He didn't provide adequate reasons for going against JLT's advice but it didn't do enough to challenge that and instead went ahead with the transfer on an insistent client basis.

JLT didn't agree with our Investigator's assessment of the complaint so it's been passed to me to determine.

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.

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[1] Where a client chooses to go against a financial adviser's recommendation, they are often referred to as an insistent client.

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.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But the client’s best interests rule (COBS 2.1.1R) and PRIN 7 are particularly important when considering treating a client as insistent. So, JLT’s recommendation had to be clear and Mr W had to have understood the consequences of going against the recommendation.

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.

Financial viability

In its suitability report JLT set out that the critical yields were too high to be achieved by reinvesting the DB funds in a personal pension. It said for that reason it didn't recommend that Mr W should transfer out of his DB scheme. I agree with JLT’s analysis. That is, it was more likely than not that Mr W would be worse off in retirement by transferring. And as this isn't disputed by either party to the complaint, I see no reason to further analyse the viability of the transfer when it clearly wasn’t viable.

Did JLT fairly treat Mr W as an insistent client?

JLT’s said that, on more than one occasion, it gave Mr W clear advice not to transfer out of the DB scheme. But, because he chose to go against that advice it treated him as an insistent client.

There’s no doubt JLT’s suitability report said its advice was that Mr W should not transfer out of his DB scheme. But I think there were flaws in JLT’s process which mean it wouldn’t have been fair for Mr W to rely on its recommendation not to transfer.

It’s notable that JLT’s suitability report didn’t include specific details of an alternative personal pension for comparison purposes. I find this undermines the advice process. That's because the information JLT provided in its suitability report was limited and essentially relied on a comparison of the critical yield against the level that JLT thought Mr W’s personal pension might reasonably grow at. And while JLT said what the relevant critical yields were, it didn’t show what growth rate Mr W could expect from a personal pension or what that would mean to him in monetary terms in retirement. I think it would therefore have been very difficult, if not impossible, for Mr W to make a direct comparison between what he would be giving up by transferring and what he was likely to receive if he did. So I think Mr W had insufficient information to go off in order to decide if going against JLT’s advice was truly in his best interests. And I don’t see how JLT could expect Mr W to make an informed decision about going against its recommendation when it hadn't given him all the information he needed in order to make that decision.

A clearer process would have been for JLT to provide its advice and recommendations as a whole, taking into account Mr W's objectives and attitude to risk. That advice should have considered the overall picture – both of transferring out of the DB scheme together with the choice of alternative pension and Mr W's desire to take the additional enhancement payment as a lump sum immediately. Only then should JLT have clearly set out in one document why transferring out of the scheme wasn't in Mr W's best interests.

JLT's recommendation was that it wasn't in Mr W's best interests to transfer. But it made it easy for him to do so anyway. I say this because when Mr W spoke with it and asked what the process would be if he wanted to transfer anyway JLT did very little to challenge why he would want to do that. It did ask him what his reasons for going ahead with the transfer were and Mr W replied that he could do with the money. But JLT didn't find out what he wanted the money for or whether he could raise it by another means without giving up the guaranteed benefits from his DB scheme. This is something I'd have expected to see as part of a robust advice process.

Further, Mr W had said in the fact-find questionnaire that he intended to take the enhancement as cash immediately. Although on that occasion Mr W had said he wanted the money for a car. So he'd made it clear from an early stage he was already leaning towards transferring so he could have access to some instant cash, but, again, I've seen no evidence JLT probed why Mr W wanted to do that. Mr W did say he could do with the money, but JLT didn't ask him what he wanted to achieve by taking the enhancement as cash. And, as I've said above, I can't see that it explored whether he could raise the cash by some other means.

Also, JLT didn't capture any detail about whether Mr W had debts or savings. Nor did it gather any information about what Mr W's regular outgoings were. But, from the information he's given us, it appears he was managing his finances effectively. So, while I don't doubt that the opportunity to receive some ready cash was a mouth-watering prospect, there's no evidence he had any actual need for it. But, while JLT did warn him he'd likely be worse off in retirement by transferring, I can't see that it made a concerted attempt to explain to Mr W that giving up guaranteed pension benefits for a cash lump sum that wasn't obviously needed was not in his best interests.

Similarly, JLT didn't gather any information about what Mr W's likely income needs would be once he retired. Mr W had said his DB scheme would make up the majority of his pension. But I can't see that JLT established how Mr W intended to fund his retirement, if he transferred to a personal pension in line with his attitude to risk, neither did it make it clear to him in terms of actual figures how much worse off he could potentially be.

Given JLT was well aware there was very little prospect of a personal pension matching the DB scheme benefits in monetary terms, then other reasons for transferring needed to be sufficiently compelling. But JLT didn't explore this with Mr W in any detail. Saying he could "do with" the money isn't a financial objective. And I don't see how JLT could give Mr W suitable advice in respect of his objectives without knowing the basic facts about what he wanted the cash for. Neither have I seen evidence that JLT effectively advised Mr W about the long-term nature of pension planning – such as the need for a pot of funds to provide an income for many years ahead.

JLT's role was to discern what Mr W's wants and needs were and why he wanted to transfer his pension. It wasn't simply to do what he wanted without appropriate analysis and challenge of his motives for doing so whilst discussing the implications of those actions with him. While it did give him risk warnings, I've seen little evidence of such a challenge even though that would have been in Mr W's best interests. Indeed, as I've said above, I've seen no evidence JLT explored with him exactly what he wished to do with the enhanced payment and why. So, I don't think JLT met its obligations to challenge Mr W's objectives in light of what he would be giving up. That also meant it didn't appropriately consider whether Mr W's aims could be met through other means without giving up the benefits from his DB scheme at all.

JLT did give Mr W advice not to transfer out of his DB scheme and did warn him that he could be worse off in retirement by doing so. But I don't think it can fairly rely on its recommendation for Mr W not to transfer. That's because he apparently made his initial decision to go against its advice without having all the facts available to him.

Also, after he said he wanted to go ahead JLT then made a recommendation to transfer to a personal pension. But I can't see that it gave him a side-by-side comparison of what he was likely to receive in retirement from his DB scheme against what he'd likely receive from the personal pension. That would have been particularly helpful as, by taking the enhancement as cash, it would be reduced to £6,279 net. And, I think that JLT should have given Mr W an indication of what he could likely receive from the personal pension (based on reasonable assumptions) compared to what the DB scheme would pay him. It should then have asked him to think about whether it was worthwhile giving up that guaranteed income in retirement for a sum of £6,279. Had it done that I think it's likely Mr W would have thought again about whether transferring was in his best interests.

JLT was in a good position to have analysed, tested, challenged and advised Mr W about what was in his best interests for retirement planning. It knows valuable pension pots like Mr W's DB scheme were paid into with the intention of providing a guaranteed income for retirement. But Mr W's chosen path was to give up that income in retirement for the chance of getting hold of a lump sum of cash, for which he had no obvious need, rather than long-term retirement planning. And I don't think that applying an insistent client label to someone when they express that their preference is not to follow advice, is the same as applying the rigorous process of arriving at a fair determination of who an insistent client really is. So, given the flaws described above in JLT's advice process, I don't think it fully and accurately informed Mr W about his position.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process JLT followed meant it was fair to truly regard Mr W as an insistent client. So, I don't think JLT acted in his best interests. Neither do I think it treated him fairly.

I've thought about whether Mr W would have transferred out of the DB scheme had he been given all the information essential to him making an informed decision. But I'm not persuaded he would have insisted on transferring out of the DB scheme, against JLT's advice if it had brought all of the important points to his attention. I say this because Mr W was an inexperienced investor and described himself as "risk averse". But he was taking a significant risk of losing the guarantees from his DB scheme by transferring out of it. So, I think if JLT's advice had been suitably robust Mr W would have remained in the DB scheme.

In light of the above, I think JLT should compensate Mr W 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 JLT to put Mr W, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr W would have most likely remained in the DB scheme if JLT had given suitable advice.

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.

For clarity, Mr W has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, 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 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 W'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:

- calculate and offer Mr W redress as a cash lump sum payment,
- explain to Mr W before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr W receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr W accepts JLT's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr W 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 W's end of year tax position.

Redress paid to Mr W as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, JLT may make a notional deduction to cash lump sum payments to take account of tax that Mr W would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr W'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 JLT Wealth Management Limited to pay Mr W 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 JLT Wealth Management Limited pays Mr W the balance.

If Mr W 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 W can accept my decision and go to court to ask for the balance. Mr W 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 W to accept or reject my decision before 18 July 2023.

Joe Scott
Ombudsman