DRN-4243278

The complaint

Mr N complains about the advice given by JLT Wealth Management Limited to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr N approached JLT in April 2010 to discuss his pension and retirement needs. He had received an offer from his pension scheme to transfer his pension benefits away. The scheme paid for JLT to provide him with advice about his options.

JLT completed a fact-find to gather information about Mr N's circumstances and objectives. JLT also carried out an assessment of Mr N's attitude to risk, which it deemed to be medium.

On 15 June 2010, JLT advised Mr N to transfer his pension benefits into a personal pension. JLT noted Mr N wanted to accept the incentive to transfer and use the cash. JLT didn't obtain reasons why Mr N wanted to access the incentive cash but he has later explained he used the £15,849 for home improvements and to pay some debts.

JLT's advice was to transfer if he reinvested the cash incentive and Mr N signed to agree on 22 June 2010. He ticked a box confirming he wanted to proceed "*in line with JLT's recommendation".*

On 26 June 2010 JLT then sent Mr N a letter to explain that it had received his Request to take the incentive as cash and was therefore being treated as an insistent client. JLT said in its letter that it didn't recommend Mr N accessing the incentive cash at the time of transfer, and instead recommended he leave it invested for retirement.

The transfer went ahead and Mr N was paid the incentive as cash.

Mr N complained in November 2022 to JLT about the suitability of the transfer advice because he'd had colleagues who had made complaints and they'd been upheld. After listening to them, he now understood that the advice he'd received had been unsuitable and he's worse off in retirement for the advice.

JLT didn't uphold Mr N's complaint. It said it only recommended Mr N transfer if he reinvest the incentive and this was clear. And Mr N went against its advice, but it felt the advice it had given was suitable.

Mr N referred his complaint to the Financial Ombudsman Service. An investigator upheld the complaint and required JLT to pay compensation. Our investigator said JLT failed to demonstrate that there was a compelling need to transfer. She didn't agree Mr N was an insistent client as JLT hadn't made this clear to him and had it advised him not to transfer and retain his DB benefits she believes Mr N would've agreed to this.

JLT disagreed, saying it only recommended transferring if Mr N reinvested the cash lump sum. It was not required to refer to the discount rates. It disagreed that Mr N had a low capacity for loss as he was in a final salary scheme with his employer at the time that could achieve double the service compared to the DB scheme transferred.

JLT says Mr N told it he knew he was going against its advice in its review, but he’s now been given the opportunity to provide a new answer to us and this has changed. Mr N told us he wasn’t aware he was going against its advice.

It was satisfied its advice was suitable and Mr N chose knowingly to go against this advice.

The investigator wasn’t persuaded to change her opinion, so the complaint was referred to me to make a final decision.

What I’ve decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

I’ve taken into account relevant law and regulations, regulator’s rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses (‘PRIN’) and the Conduct of Business Sourcebook (‘COBS’). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of JLT's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I’ve decided to uphold the complaint for largely the same reasons given by the investigator.

As JLT’s advice to Mr N was that he should transfer his DB scheme (provided that he also invested the incentive), I’ve first considered whether that advice was suitable.
The regulator, the Financial Conduct Authority (‘FCA’), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, JLT should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr N’s best interests. And having looked at all the evidence available, I’m not satisfied it was in his best interests.

Financial viability

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

I think it's fair to say that, from a financial comparison perspective, the JLT adviser ought to have recognised that the benefits of transferring away from Mr N's OPS were, at best, very marginal. And given that uncertainty, the advice to transfer away from his OPS was unsuitable regardless of whether the incentive was re-invested.

It said the critical yield was 6.9% if the enhanced value was added and fully invested into a new personal pension (or 7.8% if Mr N took the incentive as cash). So, to make the transfer advice for the enhanced amount suitable from a financial perspective, I'd need to think the critical yield of 6.9% could be exceeded.

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 closest to when the advice was given was 6.5% per year for 17 years to retirement. Which is below the critical yield figure. It's also important to remember that even parts of a percentage point, year-on-year, can make substantial differences to growth prospects in the longer-term.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection 7%, and the lower projection rate 5% per year. So, I think this shows the transfer was unlikely to be in Mr N's best interests.

JLT's transfer analysis at the time thought a growth rate of 7.5% was achievable. It's not entirely clear what this was based on, but past performance is no guarantee of future performance and with a discount rate of 6.5% and the regulator's middle projection of 7%, I don't think it could be said that a transfer out was clearly in Mr N's best interests. I think these figures, at best, show the future potential growth achieving the critical yield of 6.9% was highly uncertain – and more likely below that figure. And when comparing features such as ongoing charges outside the scheme, the benefits Mr N was giving up by leaving his scheme, and the guarantees he had around a reliable future pension income, I think a transfer out of the OPS wasn't in Mr N's best interests.

There would be little point in Mr N giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 6.9%, I think Mr N was unlikely to improve on the benefits available in the DB scheme at retirement, as a result of investing in line with that attitude to risk.

JLT has argued that Mr N had capacity for loss. As at the time of the advice he was part of a final salary scheme and he could have double the length of service at retirement compared to the DB pension subject to the advice. I think it's important to note that the adviser at the time recorded that the plan benefits represented a significant proportion of his retirement funding. And JLT's point about double the length of service was reliant on Mr N remaining with this employer for a long time and the DB scheme continuing in that format, which was not a given. I appreciate if he changed employer, he may have access to another pension plan but again this isn't a given. And Mr N's circumstances could've changed, such as not being able to work, in which case the importance of Mr N's DB pension would be paramount.

Whilst generally I do take JLT's point Mr N may have had some capacity for loss given he had 17 more years to save for his retirement, this doesn't change the fact that Mr N was giving up guaranteed benefits – and to do so, in my view, requires a compelling reason. And the financial viability of the transfer wasn't in Mr N's favour, if Mr N reinvested the cash incentive, he needed growth at 6.9% for 17 years just to stay still. The chances of meaningfully improving his benefits in retirement was slim.

For this reason alone, a transfer out of the DB scheme wasn't in Mr N's best interests. 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. I've considered this below.

<u>*Other considerations*</u>

the cash incentive

As JLT recorded at the time Mr N was keen to take the cash incentive. Although JLT didn't record what Mr N intended to do with it. In reality Mr N says he used the money for home improvements, but he's said he didn't require the cash incentive to do this – it's just what he chose to spend it on.

JLT said that Mr N shouldn't take the incentive as cash – so it cannot rely on this as a compelling reason to transfer. However, it has relied on the information and reasoning provided in its recommendation report to say it gave suitable advice. And that it was clear and not misleading in the information it presented that Mr N should only transfer if the cash incentive is reinvested.

However, as this was seemingly the key reason Mr N wished to transfer, I think JLT needed to do a lot more to discuss his reasons and challenge his thinking to give suitable advice and act in his best interests.

JLT didn't ask for any information about Mr N's income and expenditure, or discuss his wider financial position, to see if there were other means to obtain this sum. And without having done so, I don't think JLT could realistically assess whether accessing this sum was needed or if transferring to enable this was in Mr N's interest.

And without all of these things being explored in the suitability report, with JLT explaining how they impacted its recommendation, I think the advice given to Mr N was incomplete. JLT says it made Mr N aware of the risks involved with a transfer. But disclosing risks isn't a substitute for suitable advice.

By recommending Mr N transfer if he used the incentive to invest without a thorough investigation of his circumstances and requirements, I think it failed to properly appraise Mr N of the risks of transfer and the likelihood of improving on his benefits in the scheme.

The real issue here was Mr N likely receiving less benefits at retirement and losing the valuable features of his DB scheme in transferring. Not whether the cash incentive was re-invested or taken as cash – which was much of the focus in JLT's recommendation.

Tax-free cash at retirement

Although I've seen a comment in the recommendation letter saying Mr N would have found a tax-free lump sum important, I think this is no more than a generic comment and not directly related to his situation. I've seen nothing in JLT's advice that shows why this was important or what he needed a lump-sum for. Nor that transferring to receive his tax-free cash from the personal pension rules was a compelling reason to transfer.

The ability to take a tax-free cash lump sum was available with the scheme as well. As noted in the recommendation report – there was no guarantee the tax-free cash available in the personal pension would be higher than that available in the scheme. The scheme's tax-free cash element was seemingly dependant on the cost of the GMP and so wasn't known at the time.

Death benefits

This issue was only briefly mentioned in the recommendation letter and did not form a prominent part of the advice. But I think the existing death benefits attached to the OPS in this case were underplayed. Mr N was married and so I think the spouse's pension provided by the DB scheme would have been useful to Mr N's wife if he predeceased her. I don't think JLT made the value of this benefit clear enough. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was.

So, overall, I think the advice JLT gave to Mr N to transfer his DB scheme wasn't suitable for him. I don't think he was likely to be any better off by doing so, even if he invested the cash incentive being offered by his employer, and there were no other compelling reasons which demonstrated the transfer to clearly be in Mr N's best interests. Mr N was 47 and so he was a long way off from retiring, so I don't think he should've been advised to give up the security offered by his DB scheme when he didn't yet know what his needs in retirement would be.

In light of this, I have to consider whether Mr N still would've insisted on transferring away from his DB scheme if JLT had given him clear and detailed advice that he should remain in his DB scheme.

<u>Would Mr N have transferred out of his DB scheme if JLT had advised him to remain in it?</u>

JLT says that Mr N was an insistent client as it recommended Mr N transfer but only if he reinvested the incentive. And Mr N chose to transfer but take the incentive as cash. But as I've said above, I don't think the recommendation was suitable in any event. And so I am not persuaded that Mr N was truly an insistent client as he was not presented with all the information required to make an informed choice. And I don't think the insistent client process was strong enough to be assured that Mr N would've insisted regardless of JLT's clear advice not to transfer.

At no stage during the suitability report was it stated, in clear monetary terms, how much Mr N might receive from a personal pension by transferring – particularly if the critical yields were not achieved – so that he could make a comparison. I think this was important information that JLT should've made sure Mr N understood and this could be the consequences of transferring out. The TVAS showed what benefits Mr N may receive if the rate of return was at the lower band and this showed Mr N would be worse off in retirement and potentially by a few thousand a year. But the suitability report only highlighted the critical yields with mostly positive commentary about how they could be met. I think the potential downsides ought also to have been given more prominence in the suitability report.

It is true that JLT said there was a risk that the benefits available at retirement could be less than would've been available under the scheme. But Mr N wasn't, in my view, given sufficient context to make a decision. The advantage of having guaranteed benefits in retirement against the uncertainty of performance in a personal pension was not given sufficient prominence in the recommendation. And I think this was even more important considering the only objective that Mr N seems to have thought about was releasing the enhancement as a cash sum – which was relatively unimportant and insignificant when compared to the potential value of his DB scheme to him in retirement.

Had Mr N been given suitable advice, i.e not to transfer even with re-investment of the cash incentive, I think such a recommendation would have been much clearer to Mr N and he'd have realised that the benefits of the scheme just weren't worth giving up. I think Mr N as an inexperienced individual in terms of pensions and financial matters was keen to get his hands on the cash enhancement, whereas JLT should have been properly appraising him of what he was giving up. And it should've looked at Mr N's circumstances to see if he could've found other ways of financing the cash sum if it was desperately required. Which he says it was not.

Whilst the advice did make it clear in places with bold type that the recommendation was to transfer only if the cash incentive was reinvested. It also included paragraphs such as this:

'If you decide to take the cash then you should plan to make increased pension contributions in the future to make up this shortfall. However, in some circumstances you may feel that it is more important to have the cash now rather than in the future.'

JLT knowing that Mr N was keen to take the enhancement as cash ought to have endeavoured to deter him especially as it said it wouldn't be suitable to do so. But I think this paragraph when read by Mr N, would've made it easier for him to decide to proceed on that basis. And I think it somewhat undermined the warnings elsewhere in the recommendation letter.

As I've already explained, I don't think Mr N was provided with all of the information he needed in order to make an informed decision about the advice. And without that information I also don't think he was in an informed position to decide whether he wanted to proceed with the transfer against the advice he was given as I don't think he truly understood the consequences of this. And I don't think the influence of the fact that JLT advised him to transfer out of his DB scheme can be ignored. Mr N believed that JLT thought transferring out of the DB scheme was in his best interests – albeit if he invested the cash incentive too – so I think that Mr N likely considered that taking the incentive as cash made much of a difference to the overall recommendation.

I also think the process JLT used made it altogether too easy for Mr N to proceed and for it to treat him as an insistent client.

Mr N was not told he was an insistent client until after he'd already signed to agree to JLT's recommendation to transfer. And the letter explaining this didn't require any further signature or contact to continue with the transfer. The process ought to have been to challenge Mr N's thinking as he was going against its advice, but Mr N simply had to tick a box.

And on the basis of this ticked box, JLT sent Mr N what appears to be a templated letter telling him it would process the application and transfer his benefits out of the DB scheme, but that it was against its advice. It then proceeded to facilitate the transfer without any further contact with Mr N. So Mr N would've had to initiate contact to change anything – there was no timescale given to respond by nor any explanation about if and how he could change his mind. The letter only said contact us if you have any questions.

Overall, I think JLT made it altogether too easy for Mr N to agree to being an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer if he intended to take the enhancement as cash.

It's clear that the ability to access the enhancement as a cash sum played a part in Mr N's decision to proceed with the transfer. However, had JLT's recommendation been to remain in the DB scheme regardless of whether investing the enhancement, I think his view would have been quite different. And I haven't seen evidence to persuade me that Mr N needed the cash such that he would've gone against clear advice to remain in his DB scheme. It seems to me this was a 'nice to have', not something he needed or couldn't achieve through other means.

I think such a recommendation would have been much clearer to Mr N and he'd have realised that the benefits of the scheme just weren't worth giving up. I think he was unduly influenced by the enhancement offer, which expert advice ought to have discussed and challenged and alternatives considered. But JLT failed to do so. Had JLT explored other ways of raising the cash required and the reasons for needing it and/or explained in real terms why the cash incentive shouldn't be prioritised over guaranteed benefits in retirement I think Mr N as an inexperienced investor would've listened to clear, well thought out expert advice. And he would've chosen to remain in the scheme.

Summary

Ultimately, I don't think the advice given to Mr N was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr N was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr N shouldn't have been advised to transfer out of the scheme even with the cash incentive re-invested and I think his leaning towards taking the incentive as cash wasn't properly challenged and he wasn't properly informed by JLT. Had JLT acted in line with legislation and acted in Mr N's best interests, I don't think Mr N would've transferred.

So, I think JLT should've advised Mr N to remain in the DB scheme and Mr N would've accepted that advice.

In light of the above, I think JLT should compensate Mr N 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 Mr N, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr N 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.

For clarity, Mr N 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 N'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 N redress as a cash lump sum payment,
- explain to Mr N 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 N receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr N accepts JLT's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr N for the calculation, even if he 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 Mr N's end of year tax position.

Redress paid to Mr N 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 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 N'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 N 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 N the balance.

If Mr N 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 N can accept my decision and go to court to ask for the balance. Mr N 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 N to accept or reject my decision before 1 December 2023.

Simon Hollingshead
Ombudsman