DRN-4307464

The complaint

Miss F complains about the advice given by JLT Wealth Management Limited to transfer the benefits from her defined-benefit ('DB') occupational pension scheme to a Group Personal Pension. She says the advice was unsuitable for her and believes this has caused a financial loss.

What happened

JLT in 2010 attended Miss F's workplace to advise on her employer's offer to transfer her DB benefits. Her employer was offering an incentive to transfer.

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

On 31 March 2010, JLT advised Miss F to transfer her pension benefits into a Group Personal Pension. The suitability report said its recommendation was '*based exclusively on whether your Critical Yield is achievable on a year-by-year basis*, *considering your tolerance to risk'* but it did also say there were other reasons Miss F might consider transferring:

- Miss F wasn't married so she wouldn't benefit from the spouses pension payable from the scheme.
- Miss F had been offered an additional cash sum to transfer. Re-investing this cash sum in the pension would increase the chances of Miss F receiving higher benefits at retirement.
- The lump sum death benefit payable under a personal pension may be higher than under the DB scheme.
- At retirement, the tax-free lump sum payable may also be higher in a personal pension.

Miss F accepted JLT's recommendation and the amount transferred was £31,984.

Miss F complained in 2023 to JLT about the suitability of the transfer advice because:

- She wasn't made fully aware of the benefits she would lose out on by transfer. Had she been told, she says she would've stayed in the scheme.
- Although the cash incentive was appealing to Miss F at the time, she didn't need this.
- Miss F wasn't looking to take any risk with her pension, and she wasn't aware that it was unlikely her pension would achieve the returns required.
- The DB scheme was Miss F's only pension provision at the time, and she had no previous investment experience. Therefore, she doesn't believe the transfer was in her best interests.

JLT didn't uphold Miss F's complaint. It said it made its recommendation based on the information available to it at the time on the fact-find. Miss F had stated she had significant other assets at retirement and so wouldn't be relying on the DB scheme for income. And that it felt the transfer was financially viable at the time so it didn't agree the advice had been unsuitable.

However, it did reflect that the attitude to risk of Medium/High recorded at the time was incorrect based on the answers Miss F had given. It said the answers were in line with someone who had a medium attitude to risk at the time. It also said Miss F has since indicated her wishes at the time was to retire at 55 – and this hadn't been recorded but it confirmed this wouldn't have made a difference to the recommendation at the time.

It ran loss calculations based on assumptions (it said it didn't have all the information available to use real figures) on the basis of retirement at age 55. And another on the basis of the incorrect recording of her attitude to risk. Both calculations came out as no loss.

Miss F was unhappy with this answer and referred the case to our service.

One of our investigators looked into matters and she recommended the complaint be upheld. She said she agreed the attitude to risk had been inaccurately recorded at the time. And that Miss F's attitude to risk should've been recorded as medium or low medium.

The investigator explained that she didn't think the transfer was financially viable, nor that there were other compelling reasons to transfer.

She explained that whilst it is ticked on the fact-find that Miss F had significant other assets, this appears to be a mistake. As it does not tally with other answers she gave (she ticked she anticipated repaying loans and debts) – and JLT ought to have investigated this statement more. But the evidence suggests it didn't and it didn't record what these assets were either. There was no supporting evidence on file to suggest Miss F wouldn't need a pension in later life. And what Miss F has told JLT and us since (at the time she had debts and was living with her parents and her two children) doesn't support the answer that she had significant other assets that meant she wouldn't require a pension in retirement.

JLT responded to say that it believed the yield at the time demonstrated that Miss F might be better off in retirement transferring. It disagreed with the investigators' view that Miss F had a low capacity for loss just because this pension was her only DB scheme.

They felt the points about other reasons for transferring such as death benefits were irrelevant as it didn't agree the figures from the time demonstrated Miss F would likely be worse off in retirement. It also explained the advice was part of a focused exercise purely about whether it should be considered transferring out of the DB scheme. And so it wouldn't have considered whether objectives could be met by other financial products such as life insurance for death benefits.

The investigator responded to say she had considered these points but was not minded to change her view. She said she recognised the yields, discount rate applicable and expected return for a medium risk investor were marginal but she said this didn't make the advice suitable. She didn't think Miss F had the capacity to absorb the potential losses that transferring put her at risk of.

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.

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 Miss F's best interests. And having looked at all the evidence available, I'm not satisfied it was in her best interests.

Financial viability

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

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.

Miss F was 38 at the time of the advice – it wasn't recorded what age she wished to retire. But she's since said she would've wished to retire at 55 – the scheme retirement age was 65. The critical yield required to match Miss F's benefits at age 65 was 6.3% if she took the enhancement as cash (if she didn't the yield was 5.9%).

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 6.9% per year for 26 years to retirement. I've kept in mind the regulator's upper projection rate at the time was 9%, the middle projection 7%, and the lower projection rate 5% per year.

I've taken this into account, along with the composition of assets in the discount rate, Miss F's 'medium' attitude to risk and also the term to retirement. There would be little point in Miss F giving up the guarantees available to them through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. As JLT has argued, the yield is slightly less than the discount rate applicable at the time. And the projection rate applicable for a medium risk investor is slightly in excess of the yield required. However, I agree with the investigator that this doesn't make the transfer suitable. There is little point in giving up guaranteed benefits for what amounts to quite a small chance of being slightly better off.

The starting point should've been that a transfer was not in Miss F's best interests. And only if JLT had a clearly demonstrable or compelling reason to transfer should it deviate from this. This is largely because the benefits within the DB pension are guaranteed. Transferring puts these benefits at risk of market fluctuations, so with the estimates of potential performance showing that any benefits in transferring were likely to be minimal, I don't think transferring was suitable for Miss F's circumstances at the time.

So again I agree with the investigator that it's important to consider Miss F's capacity for loss. Could she have reasonably afforded to risk her guaranteed benefits in retirement for the opportunity that she might be a bit better off?

Miss F was 38 at the time of advice, this was her only pension at the time. She's since told us she was living with her parents and had two children, she also ticked a box at the time to say she expected in retirement she would use any tax-free cash to repay debts or loans.

JLT has argued that it doesn't agree that Miss F had a low capacity for loss but it's not clear what it is basing this on. The little information we do have from the time suggests her capacity for loss was low, and what she has told us since corroborates this.

So based on this information, I think it's most likely Miss F couldn't afford to risk her guaranteed benefits in retirement for the small opportunity to improve her benefits. She had 26 years left until retirement and would've needed returns consistently at and in some years above the critical yield just to be a bit better off. To be substantially better off she would've needed consistent returns above the critical yield. The chances of her being substantially better off were slim and given her situation I don't think the risk was supportable.

JLT argues that Miss F had ticked a box on the fact-find that she had significant other assets and so wouldn't be relying on her pension in retirement. Miss F's said that must have been a mistake as her situation was such that at the time she was living with her parents and two children. She's also confirmed she had debts at the time. And as the investigator pointed out, and as I've said above, on that same form Miss F had ticked to say she anticipated paying off debts with any tax-free cash she would receive in retirement. This doesn't seem like the thought process of someone with significant other assets – and this tallies with what she has told us since. An adviser giving expert advice, ought to have recognised this disparity. And JLT did not record or seemingly ask about Miss F's wider financial situation, it didn't record what these significant other assets were for example. It seems it relied purely on its fact-find which was fairly limited in the information it recorded. This brings into question the robustness of JLT's process in giving advice to Miss F. I don't think it gathered enough information to act in Miss F's best interests. It didn't record what date Miss F wished to retire either – which should've formed quite an important part of its advice process. I don't think it treated Miss F fairly here.

In summary of this point, I don't think the transfer was suitable on the basis of financial viability. For this reason alone a transfer out of the DB scheme wasn't in Miss F'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. I've considered this below.

However, I note that at the time JLT said '*Our recommendation is based exclusively on whether your Critical Yield is achievable on a year-by-year basis'.* So at the time it wasn't relying on reasons other than the viability of transfer in its recommendation. But I've considered whether in any event other reasons may have meant that the advice was in Miss F's best interests.

Flexibility and income needs

Miss F was only 38 at the time of the advice, and based on what I've seen she didn't have concrete retirement plans. As Miss F had many years before she could think about accessing her pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Miss F to give up her guaranteed benefits then when she didn't know what her needs in retirement would be. If Miss F later had reason to transfer out of their DB scheme they could have done so closer to retirement.

I recognise Miss F was offered an incentive to transfer and she likely wouldn't have this available again in the future. But Miss F was still reliant on expert advice and based on the little information gathered at the time it doesn't look like this was a driving force in her decision to transfer. She had ticked to say she hadn't decided what she would do with the enhancement. And the value of the enhancement was relatively small, around 10% of the full transfer value if re-invested. If taken as cash it would be less as it would've been subject to tax.

Miss F has also indicated since the advice that at the time she would've wanted to retire at 55. But as she was only 38 at the time, I don't think this plan would've been in any way concrete. And given her circumstances at the time it doesn't seem like it would've been a realistic option either. So I've not considered this further.

Death benefits

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. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Miss F, especially as she didn't have a spouse at the time – so the schemes spousal death benefit once in payment may not have been as valuable to her. But whilst I appreciate death benefits are important to consumers, and Miss F might have thought it was a good idea to transfer her DB scheme to a personal pension because of this, the priority here was to advise Miss F about what was best for her retirement provisions. A pension is primarily designed to provide income in retirement. And JLT didn't explore to what extent Miss F was prepared to accept a lower retirement income in exchange for the potential for higher death benefits. Furthermore, I don't think death benefits were a driving force in Miss F's decision to transfer. JLT's recommendation said it was made purely on the critical yields – and as Miss F has said she wasn't fully aware of what she was giving up – and the risk involved with taking the course of action that she did.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the risk involved with transferring her guaranteed benefits.

Summary

I don't doubt that the potential for increasing her benefits and the incentive offered on transfer would have sounded attractive to Miss F. But the adviser's role was to really understand what Miss F needed and recommend what was in her best interests. And I think the potential for higher benefits compared to the risk of giving up of guaranteed benefits wasn't presented in a balanced way. The adviser ought to have recognised the yields were so marginal that it wasn't a risk worth taking given Miss F's circumstances and capacity for loss.

Ultimately, I don't think the advice given to Miss F was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Miss F wasn't very likely to obtain higher retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

So, I think JLT should've advised Miss F to remain in her DB scheme.

Of course, I have to consider whether Miss F would've gone ahead anyway, against JLT's advice.

I've considered this carefully, but I'm not persuaded that Miss F would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because Miss F was an inexperienced investor with a medium attitude to risk and this pension accounted for the majority of Miss F's retirement provision. So, if JLT had provided her with clear advice against transferring out of the DB scheme, explaining why it wasn't in her best interests, I think she would've accepted that advice.

In light of the above, I think JLT should compensate Miss F 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 Miss F, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Miss F 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, Miss F has not yet retired, and she 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 Miss F'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 Miss F redress as a cash lump sum payment,
- explain to Miss F 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 Miss F receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss F accepts JLT's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Miss F 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 Miss F's end of year tax position.

Redress paid to Miss F 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 Miss F'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 £190,000, 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 £190,000, 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 Miss F the compensation amount as set out in the steps above, up to a maximum of £190,000.

Recommendation: If the compensation amount exceeds £190,000, I also recommend that JLT Wealth Management Limited pays Miss F the balance.

If Miss F accepts this decision, the money award becomes binding on JLT Wealth Management Limited.

My recommendation would not be binding. Further, it's unlikely that Miss F can accept my decision and go to court to ask for the balance. Miss F 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 Miss F to accept or reject my decision before 18 December 2023.

Simon Hollingshead
Ombudsman