The complaint

Mr B has complained about the transfer of his defined benefit occupational pension to a personal pension, following advice he received from Alexander Forbes Financial Services (now JLT Consultants & Actuaries Limited). For ease of reference, I will just refer to JLT.

What happened

In February 2010 Mr B's former employer wrote to him offering to increase the transfer value of his pension if he transferred it elsewhere. The transfer value of the pension was £47,732; but if Mr B transferred it the employer offered to pay an extra £4,773.20 into the new pension or pay an extra £3,698.53 directly to Mr B. The employer also offered to arrange and pay for financial advice to be given by JLT in respect of a transfer.

In a Personal Priorities Questionnaire Mr B outlined his current circumstances, his retirement provisions, his intention to take the £3,698.53 and his intention to use the money for home improvements.

On 25 March 2010 JLT sent Mr B its recommendation report. In summary, it recommended that Mr B not transfer his pension. This was because the Critical Yield (the amount the new pension needed to grow by in order to match the benefits of the defined benefit pension) was unlikely to be achieved and transferring would likely have a detrimental effect on Mr B's retirement income.

On 20 April 2010 Mr B phoned JLT to get an update. He confirmed that he'd received the report and that he understood the recommendation and that he'd be worse off in retirement if he transferred. JLT confirmed that it didn't think Mr B should transfer and recommended that he follow that advice, but Mr B said he still wanted to transfer.

Following the call JLT wrote to Mr B. It re-iterated that it wasn't in Mr B's best interest to transfer as his retirement benefits could be 'dramatically' reduced. It therefore recommended that Mr B get further advice before he proceeded further. It nevertheless noted that Mr B had said he wished to transfer so it enclosed the relevant forms for him to complete.

The forms were completed and JLT arranged the transfer on an 'insistent client' basis – that's essentially where a client wants to take a different course of action from what's been recommended and they want the business to facilitate the transaction against its advice.

Mr B (through his representative) complained to JLT in 2023. The essence of the complaint was that he felt JLT's advice to transfer his pension was unsuitable. JLT felt its advice was suitable and pointed out the times it had told Mr B that transferring wasn't in his best interest. It did however note that the investment funds Mr B's pension had been placed in were a higher risk than he was prepared to accept. It later calculated that Mr B hadn't suffered any loss because of this.

Our investigator thought the complaint should be upheld. In summary, he felt JLT's advice was suitable as Mr B was unlikely to improve on the benefits he was already entitled to from his defined benefit pension. However, he felt JLT treated Mr B unfairly in the way it provided the advice and in how it treated Mr B as an insistent client.

JLT disagreed. It said its advice focused solely on the merits of Mr B remaining in or transferring out of the defined benefit pension. And Mr B was clearly told that he'd be worse off if he transferred. It felt Mr B had made his mind up after receiving the offer and recommendation report, he was driving the transfer as he wanted the cash offer, and he was going to transfer regardless of the consequences to his pension income.

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.

General observations

Mr B's complaint was made on the basis that JLT had advised Mr B to transfer his pension. However, as outlined above, JLT's advice to Mr B was to *not* transfer his pension. Accordingly, most of the arguments presented in the complaint (eg JLT not following the regulator's starting position that transfers of this nature are unsuitable) ignore what actually happened.

The representative also made the complaint without being in receipt of JLT's file. This meant all they knew was what they'd been told by Mr B based on his recollection of events. Mr B told us that he doesn't remember much from the discussions at the time of the advice. And there are some discrepancies in the information he's provided. I've already outlined one example above in respect of what advice JLT gave. Another example is that he said in the complaint that at the time of the advice he was single but the Personal Priorities Questionnaire he completed said he was married and the recommendation report (which Mr B didn't correct) also referred to him being married.

With the above in mind, I'm not persuaded that Mr B's recollection of events is reliable. So I've largely ignored the arguments Mr B and his representative have presented and I've focussed on what I think is relevant. And where there's a discrepancy in the information I've been more persuaded by the documentary evidence from the time of the advice rather than by Mr B's recollection of what happened.

The applicable rules and regulations

In 2010 there was no specific regulatory guidance for businesses to follow in respect of insistent clients. But there were Conduct of Business Sourcebook ("COBS") rules which required JLT to *"act honestly, fairly and professionally in accordance with the best interests of its client"* and to provide information that was clear, fair and not misleading.

The advice itself

In its recommendation report JLT said the growth needed on the new pension to make the transfer financially viable wouldn't be achieved by investing the funds in a personal pension. And it said for this reason it didn't recommend that Mr B transfer out of his defined benefit pension. I agree with JLT's analysis ie it was more likely than not that Mr B would be worse off in retirement if he transferred.

I'm not going to dwell on this point further though because (a) it's not disputed by either party and (b) I don't think the outcome of the complaint turns on whether or not the advice was suitable. The important issue in my opinion is whether or not JLT treated Mr B fairly in facilitating the transfer of the pension having previously advised him to not transfer.

The advice process

An important consideration in this type of complaint is whether JLT's recommendation was sufficiently clear enough to allow Mr B to make an informed decision on whether to transfer.

I think there are issues in this case that go in JLT's favour in this respect. These are:

- this wasn't a rushed transaction – it was roughly three months between Mr B completing the Personal Priorities Questionnaire and him completing the transfer documents; and I don't think JLT applied any pressure to Mr B to make a decision
- the recommendation report didn't outline what Mr B needed to do if he wanted to transfer – so the message wasn't blurred by JLT saying something along the lines of "we recommend that you don't transfer but if you want to here's what you need to do"
- it was Mr B who called JLT after the recommendation report was sent (rather than the other way round) to chase what was happening, and JLT only sent the relevant transfer forms to Mr B after this call
- JLT told Mr B on at least four separate occasions that its recommendation was that he shouldn't transfer and doing so wouldn't be in his best interests and would mean he'd be worse off in retirement.

But I think there are other issues that go against JLT. As I've said above, JLT had to act honestly, fairly and professionally in accordance with Mr B's best interests and it had to provide Mr B with information that was clear, fair and not misleading. This meant its recommendation needed to be clear and Mr B would have needed to have understood the consequences of going against the recommendation.

I'm not persuaded that JLT provided Mr B with sufficiently clear, fair and not misleading information so that he could make an informed decision on whether to transfer or so that he fully understood the consequences of going against the recommendation. I say that because although JLT recommended against transferring, it only focussed on whether the growth needed to match the original pension was achievable. There was no proper consideration of or investigation into:

- Mr B's objectives and reasons for transferring
    - JLT's role was to establish Mr B's wants and needs and why he wanted to transfer his pension and take the cash being offered
    - but the only reference to this was in the phone conversation on 20 April when JLT asked Mr B why he wanted to transfer and Mr B simply said he wanted to transfer
    - this in my view was wholly insufficient; as Mr B had previously indicated an interest in receiving the lump sum payment JLT should have interrogated Mr B more on this point to establish exactly what he wished to do with it and why
    - if Mr B just wanted the money being offered – this wasn't an objective and JLT should have made this clear
    - if Mr B wanted the money for home improvements – JLT should have considered whether this was a pressing need and, if it was, whether there were alternative ways of meeting this objective
- Mr B's capacity to absorb the loss of this pension
    - aside from the state pension this was Mr B's only source of retirement income
    - I can't see that any analysis was done on whether Mr B could afford to lose the guaranteed benefits of the defined benefit pension he was giving up
- the difference in costs between the existing and new pensions

    - no comparison was done between the cost of the existing pension and the cost of the personal pension
- the difference in benefits between the existing and new pensions
    - JLT used words like 'significantly' and 'dramatically' to describe how worse off Mr B might be if he transferred
    - but it didn't do any comparison between the retirement benefits Mr B would receive from the defined benefit pension and the likely benefits he would receive from the personal pension
    - the recommendation report outlined the annual pension Mr B was projected to receive from the defined benefit pension
    - but it gave no information on the annual pension he might receive if he transferred – the only information given was in respect of death benefits and the tax-free cash he might receive
    - so there was no real way for Mr B to see in numerical terms how worse off he might be or of what 'significantly' or 'dramatically' worse off meant eg there was no explanation along the lines of "you might receive £3,700 (approximately) now but in retirement you'll likely lose £x".

JLT said the advice only focused on the merits of whether Mr B should remain in or transfer out of the defined benefit pension and that the fee Mr B's former employer paid didn't take account of any wider aspects of financial planning. I don't think the agreement JLT had with Mr B's former employer has any relevance here. That's because irrespective of the fee it received it provided financial advice to Mr B and it therefore had to act within the bounds of the regulator's rules. If that meant JLT was 'underpaid' for the work it needed to do that was an issue between JLT and the employer.

This is a finely balanced case because as I've outlined above there are issues that go both for and against JLT. However, overall, I think the flaws in the advice process outweigh the things that go in JLT's favour. JLT's role was to establish what Mr B's needs and wants were and why he wanted to transfer his pension. It wasn't to simply do what Mr B wanted without appropriate analysis and challenge of his motives. As I've outlined above, I'm not persuaded that JLT fulfilled its role in this respect.

In my view, JLT just telling Mr B that he'd be worse off in retirement if he transferred wasn't enough to fulfil its requirement to act in his best interests or to provide information that was clear, fair and not misleading. The advice and information given to Mr B should have covered the overall picture. JLT only concentrating on the critical yield meant Mr B had little other information to consider in order to decide whether to go against its advice. And I don't think Mr B could reasonably be expected to make an informed decision about going against the recommendation when he wasn't in receipt of all the relevant information.

Overall, I don't think JLT can fairly rely on its recommendation and the warnings given as Mr B decided to proceed against the recommendation without having all the facts available.

Would Mr B have transferred regardless?

In 2016 the regulator issued guidance on its website and said it's unlikely to be common for consumers seeking advice to disregard that advice. In other words, if a consumer seeks advice from a professional advisor it's most likely that they will follow the advice they're given. With that in mind, I think the fair starting point in answering this question is that Mr B most likely would have followed JLT's recommendation and not transferred if JLT had done a full analysis of his circumstances, recommended that he not transfer, and given him clearer and fairer information on why transferring wasn't in his best interest (as I've discussed above).

However, there are obviously occasions where consumers have a pre-conceived idea of what they want to do and will proceed against advice irrespective of the consequences. I think JLT's argument that Mr B had made his mind up and would have transferred regardless isn't entirely without merit. Given the nature of the phone calls I think there's a possibility that Mr B was keen to get his hands on the cash windfall of nearly £3,700. And, in a sense, that's not surprising as it's exactly what the employer's incentive was designed to do ie incentivise Mr B to transfer away from the defined benefit pension. But I don't think this possibility is enough to move from the starting position outlined above.

I say that because Mr B was an inexperienced investor with a cautious attitude to risk. But by transferring he was taking a significant risk of losing the guarantees from his defined benefit pension. There was also no clear reason identified for why Mr B needed either the cash incentive (the money was actually spent on day-to-day expenses and on his children) or to transfer of his pension (eg for an investment opportunity). So if JLT's advice had been suitably robust I think it's more likely than not that Mr B would have remained in the defined benefit scheme.

Putting things right

A fair and reasonable outcome would be for JLT to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. As above, I conclude that Mr B would have most likely remained in the defined benefit pension 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 B plans to retire at age 60. So, compensation should be based on him taking benefits at this age.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B'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 B redress as a cash lump sum payment
- explain to Mr B before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment his defined contribution pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum
- if Mr B accepts JLT's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr B 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 B's end of year tax position.

Redress paid to Mr B 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 B'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 Consultants & Actuaries Limited to pay Mr B 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 Consultants & Actuaries Limited pays Mr B the balance.

If Mr B accepts this decision, the money award becomes binding on JLT Consultants & Actuaries Limited. My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 17 November 2023.

Paul Daniel
Ombudsman