DRN-4399808

The complaint

Mr C complains that JLT Consultants & Actuaries Limited (JLT) gave him unsuitable advice to transfer out of his Occupational Pension Scheme (OPS) and into a personal pension arrangement. He believes this has caused him a loss.

What happened

In July 2010 Mr C was made an offer to transfer his OPS, this offer included an enhancement which could be taken as cash or added to the money invested on transfer.

Mr C's offer included a transfer value of £63,985 and a cash incentive of £4,982.52 if taken as cash or £6,398.50 if paid into the pension.

Mr C's employer had appointed JLT to act as financial advisors for its members and this was paid for by the employer.

Mr C contacted JLT to consider the option of transferring and was required to complete some questionnaires, so that it could gather information about him.

The information recorded at the time showed that:

- Mr C was aged 42, married with dependent children
- Mr C earned £41,100 a year
- Mrs C earned £11,700 a year
- This pension represented his main source of income in retirement.
- Mr C wanted some growth with a limited amount of volatility.
- Mr C's deferred defined benefits pension was projected to provide an income of £13,847 each year at age 65 with the option to take tax free cash of £57,389 and a reduced income of £8,608.

The Transfer Analysis showed a critical yield of 6.3% was required to match the benefits given up if Mr C reinvested the cash incentive. Or 6.7% if he took it as cash.

JLT issued its recommendation on 6 August 2010. It said its recommendation had been based purely on whether the critical yield was achievable considering Mr C's tolerance to risk. The result was that it said Mr C should not transfer.

JLT then became aware that Mr C still wished to transfer. He spoke on the phone to them to say he'd received a letter saying he shouldn't and enquired what that meant and could he still transfer. JLT took him through some risk warnings and a few bits of administration but in terms of discussing the merits of transferring, he was told it was up to him.

Our investigator looked into matters and upheld the complaint. He said that the recommendation hadn't been thorough enough in considering Mr C's requirements and circumstances. Had it been clearly explained to Mr C that the benefits of the cash incentive to him was insignificant compared to the risks to his retirement in the long run, Mr C wouldn't have wished to transfer. And JLT made the insistent client process far to easy without challenging Mr C's reasons for wishing to transfer against its advice. He concluded that JLT had not acted with due care and skill in its advice to Mr C.

JLT disagreed, in summary it said:

- We advised Mr C not to transfer under any circumstances.
- It was clear from a recorded conversation Mr C had decided to transfer, even though the recommendation was to remain in the scheme. Mr C appeared to have made this decision based on the offer letter issued by the employer.
- Mr C was advised he would be significantly worse off in retirement.
- Mr C confirmed he understood our advice was to remain in the scheme and Mr C would be worse off by transferring, however, he wanted to transfer regardless of our advice.
- We read four risk statements as Mr C wanted to proceed against our recommendation to remain in the scheme which Mr C confirmed he understood.
- We provided two insistent client letters explaining Mr C had not followed our advice and Mr C could be worse off in retirement because of this.
- Mr C was fully aware our advice was to remain in the Scheme. Mr C reiterated this point on a call on 20 October 2010, when Mr C stated I know the advice was to remain in the scheme. Mr C was concerned as our advice was to remain in the scheme, the employer wouldn't accept his request to transfer out and therefore Mr C would miss out on the cash offer they had made.
- As our advice was not to transfer, we didn't issue Mr C with any forms to transfer. The transfer forms were only issued after he called JLT on 16 August 2010 and after he had been read the four risk warnings and Mr C acknowledged he'd understood all four of the warnings.

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.

The investigator considered the viability of the transfer. But as JLT advised Mr C not to transfer based on the critical yields, I don't think its necessary for me to discuss this aspect of the advice any further. It's not in dispute that Mr C was advised not to transfer. And I agree with JLT's view at the time that the yields (alongside Mr C's attitude to risk) suggested transferring on that basis shouldn't be recommended.

So given JLT's recommendation was not to transfer but they treated Mr C as an insistent client, the crux of this complaint is whether JLT acted fairly throughout the advice process. Did it make sure Mr C was sufficiently informed to make a decision to transfer? And was it fair in the way it facilitated the transfer for Mr C, against its advice.

At the time of advice there was no specific legislation or rules around the insistent client process. However, JLT was required to act in line with the Conduct of Business Sourcebook (COBS) rules. This 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.

Firstly, I've taken into account that:

- JLT stated on a number of occasions in writing that Mr C could be worse off and it used phrases such as significantly worse off as well.

- JLT didn't signpost or promote to Mr C how he could transfer against its advice in its recommendation or supporting documents.

- The message was consistent, and the alternative wasn't promoted. It was made clear Mr C was going against its advice to transfer.

- It was Mr C who called JLT after the recommendation report was sent and requested to move forward to transfer. JLT didn't initiate the insistent client process.

So Mr C acted knowing that he was going against JLT's advice and the evidence supports that JLT did not influence this decision by providing this option within its recommendation. However, I don't think that alone is enough to say Mr C was fully informed or that JLT acted in his best interests. I'll explain why.

Looking at Mr C's responses to the questionnaires and listening to the calls at the time of advice it is clear that Mr C was a risk adverse individual. He described himself as cautious and in the risk analysis carried out over the phone he said of the various choices in terms of risk and reward he was at the lowest end.

JLT also categorised Mr C as a low risk individual and it knew that not only was Mr C giving up guaranteed benefits in retirement that were very important as he had no other provision, that he was also likely to be worse off in retirement on transfer (it had said both the 6.3% and 6.7% critical yields were likely unachievable).

So transferring out of his defined benefit pension against advice and losing his only guaranteed pension and main source of income in retirement, doesn't really correlate with Mr C's attitude to risk and the picture he presented to JLT. This suggests to me that he didn't fully understand the implications of what he was doing. And having listened to the calls with JLT I think that is apparent and should've been apparent to JLT as well. Mr C was very keen to transfer to get the cash incentive, despite this being recorded as a low priority of his – and value wise it being fairly insignificant compared to the benefits he was giving up on transfer. But JLT didn't challenge Mr C's decision.

So acting in Mr C's best interests I would've expected JLT to question Mr C's motives and understanding when he wished to transfer against its advice.

And I also agree with the investigator that JLT failed to provide Mr C with sufficiently clear, fair and not misleading information so that he could make an informed decision on whether to transfer. And so that he fully understood the consequences of going against the recommendation.

I say that because although JLT recommended against transferring, it's advice process only looked into whether the critical yields were achievable. And I don't think the comparisons gave enough information for Mr C to fully understand what he was giving up compared to what he could get in a personal pension.

COBS 19.1.2 says that a firm must ensure its comparisons include enough information for a client to be able to make an informed decision to transfer out of a defined benefits pension scheme. It should draw the client's attention to the key factors that do and do not support the advice and take reasonable steps to make sure a client understood the firms comparison.

JLT did compare the benefits but in what I consider a rather basic way, it only provided a comparison in terms of critical yields. To a lay person this may not be easy to understand. It did however say Mr C could be *'significantly'* and *'dramatically'* worse off on transfer. But I think these warnings were rather hollow when there was no monetary comparison between the retirement benefits Mr C was giving up and the likely benefits, he would receive from the personal pension. There was very little information in the report about the personal pension arrangement Mr C would be transferring into. It gave no information about the potential pension Mr C might receive if he transferred. The only figures or direct comparisons were in relation to the death benefits and the tax-free cash.

There were no figures given for the estimated worse case scenario at low growth performance, so Mr C couldn't see in real terms how much worse off he might be. And related to this there was no commentary, due to this omission, setting out the risks in real terms. I understand that Mr C was subsequently sent illustrations from the new provider once he had given his intention to transfer. Although the illustration was based on an incorrect retirement date. It also appears that JLT took Mr C's instruction that this was ok without knowing whether he was in possession of the illustrations that would've matched his scheme retirement date, which I think is rather indicative of the insistent client process that followed the recommendation. It was made too easy for Mr C to simply transfer against its advice.

I think this was a failure of COBS 19.1.2. During the recommendation Mr C ought to have been presented with information that showed the estimated benefits in real terms with commentary and risk warnings set out in line with those figures. Mr C was clearly a cautious and low risk individual, had it been explained in terms of something like *'you could end up receiving a pension as low as X amount per year and compare this with the guaranteed scheme pension of X per year – you may not have enough money to meet your needs in retirement'* – I think that would've carried weight with Mr C and put him in an informed position to decide whether the risk involved was worth it. I think this would've made a difference to Mr C, especially bearing in mind Mr C said the reasons for taking the cash incentive weren't important to him.

Further to this, there was no consideration of the wider picture in terms of Mr C's wants and needs in retirement. Considering this was Mr C's main source of income in retirement, further conversation and investigation was required so that Mr C could understand the downsides of transferring. Nowhere was it considered what Mr C may need in retirement. So he wasn't informed of the potential consequences on his retirement that losing the guaranteed benefits could have. So I don't think his decision to transfer was a fully informed one.

JLT said the advice only focused on the merits of whether Mr C should remain in or transfer out of the defined benefit pension and that the fee Mr C's former employer paid didn't take account of any wider aspects of financial planning. Whilst this may be the case, this was an agreement between JLT and the employer. It doesn't change the obligations it had to the individuals it advised through this agreement. It still had to comply with the rules set out by the regulator when advising individuals about transferring their DB pensions.

By only considering a very basic picture of Mr C's transfer and only giving him information on this basis, it failed to put Mr C in a fully informed position. The advice was based purely on figures and these weren't put into a personal context. I also note that there was no comparison of the costs involved and the only mention of costs in the personal pension was based on an example figure and not specific to a particular product. This is a failure under COBS.

Given what I've said about what JLT knew about Mr C, his attitude to risk, his reasons for transfer and that he was going against its advice – I don't think it acted fairly either, after Mr C told it of his intention to transfer.

In the calls following the recommendation, where it facilitated his transfer it didn't once challenge or question his decision. It did very quickly go through some risk warnings and required him to agree that he understood these. But Mr C told them that he wished to transfer to get the cash enhancement, this was rather contradictory when you consider Mr C's attitude to risk, the importance he placed on these benefits and the importance he placed on what he needed the cash for and its value. It also told Mr C in these calls that transferring was *'up to you'* with no advice or challenges to his thinking. Aside from the letters warning him that he could be worse off and a few risk warnings repeated to him, it was very easy for Mr C to go against JLT's advice. Nothing personal to his circumstances was discussed, and given the transfer analysis and recommendation was basic and lacking the full picture, I don't think JLT acted with due care and skill and in Mr C's best interests it its advice and transfer process.

As the investigator said, JLT had to establish Mr C's objectives and the reasons he was considering transferring. JLT's role wasn't simply to facilitate what Mr C wanted. But having considered the evidence, I think it failed in its obligations here.

In my view JLT advising Mr C that he'd be worse off in retirement based only on critical yields and an analysis of his attitude to risk wasn't enough to fulfil its requirement to act in his best interests or to provide information that was clear, fair and not misleading. And I don't think due to this failing and the ease at which Mr C was able to transfer, JLT has demonstrated that Mr C was truly an insistent client.

Would Mr C have transferred regardless?

The regulators position is that its unlikely that customers seeking advice would then disregard this advice. However, obviously here Mr C did go against JLT's advice. But JLT didn't put Mr C in a fully informed position and I think this would've made a difference. Had JLT met its obligations to provide clear, fair and not misleading information, I think Mr C would've remained in the scheme.

At the time Mr C did respond to the questionnaire to say he had an average/fair amount of experience and understanding of the risks involved. This was based on only one question, and I wouldn't say it represented a robust process to really comprehend his understanding. But having looked at all the evidence and listened to the calls, I think its clear Mr C was an inexperienced investor. His understanding of the transfer risks and the process was limited. It appears he agreed to the transfer without even having received the correct illustrations and JLT seemed comfortable with that and didn't challenge this. I don't think it should've been, given what it knew about Mr C and the importance of this decision to his future retirement plans.

I think it was clear Mr C hadn't fully considered the downsides of transferring and I think this was due to the insufficient advice process he'd been through. Had all the information been set out to Mr C in real terms and he'd understood the impact this could have on his needs in retirement, I think Mr C as a cautious, inexperienced investor wouldn't have gone against this advice. So had JLT's advice process been sufficiently robust, I think it's more likely than not that Mr C would have remained in the defined benefit scheme.

Putting things right

A fair and reasonable outcome would be for the business to put Mr C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr C 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 C 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 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 C'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 C redress as a cash lump sum payment,
- explain to Mr C 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 C receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr C accepts JLT's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr C 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 C's end of year tax position.

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

If Mr C 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 C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 6 February 2024.

Simon Hollingshead
Ombudsman