DRN-4757349

The complaint

Mr W complains about the advice given by JLT Wealth Management Limited ('JLT') 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 him a financial loss.

What happened

Mr W was a deferred member of his employer's DB pension scheme. In around May 2011, the trustees of the scheme made its members a limited time offer. The trustees offered the scheme members an enhanced cash equivalent transfer value ('CETV') of their scheme benefits together with an additional cash payment. Members had the option of taking all or some of the cash payment immediately (subject to normal income tax and national insurance deductions) or of adding it to their CETV and investing it in another pension scheme. The offer was available until 29 July 2011.

The trustees of the DB scheme engaged the services of JLT to provide DB scheme members with advice on remaining a member of the DB scheme or effecting a transfer to another arrangement. The cost of the advice was met by Mr W's employer. The advice didn't include a full review of Mr W's wider financial planning needs and its recommendations were confined to the suitability of transferring individual DB scheme benefits.

Mr W received a booklet from his DB scheme setting out his options which contained a personal offer statement detailing what it meant for his benefits exactly. The information showed that Mr W's CETV on 30 April 2011 was worth £72,292.53. It also showed that if Mr W chose to transfer his benefits away from the scheme, his CETV would be enhanced to a value of £109,538.97 from which he could choose to take £5,000 as a cash payment.

Mr W took up the scheme's offer of funded transfer advice from JLT.

In late May 2011, JLT sent Mr W a fact-find to complete. The fact find included basic information about Mr W's circumstances and objectives. It showed:

- He was aged 49, married and had one dependent child. Mrs W was aged 43.
- Mr W owned his own home which was valued at £120,000 with an outstanding mortgage of £100,000. He had no other investments or loans save for a £500 overdraft.
- He was employed and a member of his employer's defined contribution ('DC') scheme which had a normal retirement date ('NRD') of age 65 to which both he and his employer were making monthly contributions. Mr W also noted that he had another pension scheme (aside from his DB and DC schemes) but no value was cited.
- He had some health issues which were under control with medication.
- Mr W had an annual income of £21,500 and thought he would need an annual income in retirement of £10,000.
- Mr W thought he would retire at age 65 and he said his DB scheme represented a significant portion of his retirement funding.

- That Mr W wanted to take the cash sum now to help him take a family holiday.
- Mr W didn't consider the death benefits associated with transferring to a personal pension plan to be a priority for him.
- That Mr W preferred to move his pension under his own control and that the ability to take a tax-free cash ('TFC') lump sum at retirement was important to him as were inflationary increases to his pension in retirement.

The fact find also included questions about Mr W's attitude to risk ('ATR'). Mr W ticked the boxes which described both a balanced ATR and a cautious ATR. Mr W said he wanted his personal pension plan to be invested 50/50 between the two risk levels.

In May 2011, JLT provided Mr W with a pension transfer analysis ('TVAS') report which explained the annual investment return (also known as the 'critical yield') required by a personal pension. In Mr W's case, in order to be able to match the DB scheme's benefits at the scheme's NRD of age 64 the critical yield was 5.2%. That was assuming Mr W took the cash incentive payment now and the maximum possible TFC of 25% at retirement.

On 6 June 2011 JLT produced a suitability report in which it advised and recommended that Mr W transfer his DB pension benefits into a personal pension and invest the proceeds with a provider I shall call 'F' in three of its funds as follows;

- 25% in a gilt index fund
- 25% in a UK equity fund
- 50% in a UK equity index tracker fund.

The suitability report said the reasons for this recommendation were:

- so Mr W could immediately access the cash payment he had been offered.
- Because the DB scheme benefits represented a significant portion of his retirement funding.
- That the death benefits were not a priority for him.
- That Mr W preferred to have his pension under his control.
- So Mr W had the ability to take TFC at NRD.
- Because Mr W wanted his pension to have some degree of inflation protection at retirement.
- That the critical yield of 5.2%, taking Mr W's particular risk profile into account, was within JLT's limit of acceptance (cited as being 6.5%).
- That transferring could provide a higher level of TFC than that offered by the DB scheme.

The suitability report also set out the options Mr W currently had before him, namely to remain a deferred member of the DB scheme, or to transfer his DB benefits to his current DC scheme, to a personal pension plan, a stakeholder pension or a Section 32 buy-out policy. The suitability report explained the advantages and disadvantages of each option.

A few days after receiving the report, Mr W rang his advisor at JLT to discuss the report's contents. He said he wanted to transfer to his existing employer's DC scheme and to take the cash incentive immediately. He said he also had another DC scheme that he wanted to consolidate into his employer's DC scheme. JLT advised him to check if his DC scheme would accept transfers in. It also said the annual management charge on the DC scheme could be higher than that charged by F which, in turn, could increase the critical yield required.

On 29 June 2011, Mr W completed the option form confirming that he had received independent advice from JLT and had chosen to transfer and to take the cash payment now. Mr W also completed an application form for the personal pension plan with F.

Mr W rang JLT again on 30 June 2011 as he was concerned that the cash incentive payment was taxable and, if it was, that it was less attractive to him as it might not leave him with a sufficient sum to take a holiday. JLT explained the risks of transferring to Mr W again. Mr W said that despite sending back the transfer forms already, he was having second thoughts. JLT suggested Mr W re-read the suitability report and then contact it again. It appears that Mr W didn't do so.

The transfer went ahead in late September 2011.

In August 2023, Mr W complained to JLT about the suitability of the transfer advice it had given him. He said his financial circumstances didn't justify the transfer, that his retirement income needs had not been assessed, that he had no investment experience and that there had been no analysis of his objectives or needs. Mr W went on to say that there was no assessment by JLT of why it was in his best interests to transfer and that any reasonable analysis would have recommended that he remain in his DB scheme.

JLT looked into Mr W's complaint but didn't think it had done anything wrong. It said that:

- it had made Mr W fully aware of the differences between a DB scheme and a personal pension.
- it had provided him with a lengthy suitability report in which it had explained the risks of transferring.
- Mr W had chosen the level of risk he was comfortable with and that he had capacity for loss.
- the transfer provided him with an opportunity to achieve a higher retirement 'pot'.

Unhappy with the outcome of his complaint to JLT, Mr W complained to the Financial Ombudsman Service. One of our Investigators looked into Mr W complaint and recommended that it was upheld. He said that Mr W had no capacity for loss and that the transfer was unsuitable. Our Investigator required JLT to compensate Mr W in line with the regulator's guidance.

JLT disagreed with our Investigator's findings. It said that it was satisfied that Mr W had capacity to deal with any losses. It also referred to the telephone call Mr W made to JLT in June 2011 in which it explained to him the risks associated with both DB and DC schemes. And it reiterated that the critical yield was below the published 'discount rate' and, as such, there was a reasonable chance Mr W could achieve a larger investment fund.

Our Investigator thought about what JLT said but wasn't persuaded to change his mind. He said that explaining the risks and rewards of the DB/DC schemes didn't make unsuitable advice suitable. And he said that whilst there was the potential to achieve a greater retirement fund, he still felt that overall the transfer wasn't in Mr W's best interests.

The complaint was passed to me for 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

What follows 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 our 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, on contemporary evidence, that the transfer was in Mr W's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

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 critical yield required for the personal pension to be able to match the benefits offered by the DB scheme at NRD was 5.2% if Mr W took the TFC (which he had indicated he intended to do). This compares with the discount rate of 6.3% per year for 14 years to retirement in this case. For further comparison the regulator's upper projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's low-medium ATR risk and also the term to retirement. Based on these factors it appears that transferring could have been financially viable in Mr W's case and that there was the potential for the recommended plan to be able to offer increased benefits at retirement. Indeed, I note from the suitability report that financial viability was JLT's main reason for recommending Mr W's transfer.

But I can't ignore the fact that, based on the evidence of his financial circumstances gathered by JLT at the point of advice, Mr W had no real capacity for loss. He had no savings or investments and, by his own admission, the safeguarded benefits of his DB scheme represented a significant portion of his retirement funding. And while he apparently held another DC pension elsewhere JLT gathered no evidence about its value or whether this gave Mr W a greater capacity to absorb any assessment losses. But in any event, Mr W's DB scheme gave him a guaranteed, index linked and increasing pension for life. As such it could have acted as a safeguarded base upon which Mr W could build additional retirement provision through his DC plans, plans through which he was already exposed to investment risk and management charges and costs. So, if Mr W was willing to take some risk – and it appears from the answers he gave on the fact-find that he was – he was already doing so through his other two DC pensions.

Just because the critical yield fell within JLT's limit of tolerance didn't make the advice to transfer suitable. So whilst the transfer itself was potentially financially viable I can't agree that Mr W had any capacity for loss nor do I think it was in his best interests to expose all his retirement saving to investment risk. Of course financial viability isn't the only consideration when giving transfer advice, as JLT has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

The cash incentive

The cash incentive of £5,000 which Mr W said he would use for a family holiday was more of a 'nice to have' rather than a financial need. It did not displace the need for JLT to provide him with suitable advice that was in his best interests, even if that advice challenged any pre-conceived intentions Mr W may have had. The strength of any such intentions must be considered alongside his lack of experience in making serious investment decisions such as to transfer his DB scheme. Mr W couldn't know whether his intentions were in his best interests – he was relying on JLT's expertise to assist him.

I can't see that JLT explored with Mr W whether there was any other way of him affording a family holiday without the need to make an irreversible decision that involved him giving up the guarantees associated with his DB scheme. I think that if JLT had had more regard to the FCA's starting premise that the transfer of a DB scheme is unsuitable it should have advised Mr W that transferring to obtain £5,000 (before tax and NI deductions) wasn't in his best interests. Mr W was being advised to transfer to obtain a very short-term benefit whilst simultaneously putting its long term needs at un-necessary risk.

And I can't ignore the note of the phone call between Mr W and JLT from 30 June 2011 where Mr W expressed that he now understood the cash incentive of £5,000 was subject to income tax and NI deductions which made it less attractive to him. I accept that the file note records that JLT advised Mr W during the call of the risks associated with both DB and DC schemes, but JLT was there to advise Mr W about what was in his best interests. And I can't agree that, whilst the offer of instant money was no doubt attractive to Mr W, it was not in his best interests to have transferred his DB scheme in order to obtain it.

So I don't think that the cash incentive was a sufficiently strong enough reason on which to base a transfer recommendation. It wasn't suitable to advise Mr W to transfer his DB scheme in order to access such a relatively small sum of money for which there existed other means, unexplored by JLT, to raise it. That's especially the case given the guarantees he would be giving up in order to access it.

Flexibility and income needs

Mr W was only 49 at the time of the advice and based on what I've seen he had no concrete retirement plans other than he expected to work until he was age 65.

As Mr W had 16 years before he thought he would retire, 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 Mr W to give up his guaranteed benefits in 2011 when he didn't know what his needs in retirement would be. If Mr W later had reason to transfer out of his DB scheme that could have been done closer to retirement.

Another of the objectives identified by JLT was that it was important to Mr W that the transfer could potentially provide him with more TFC at retirement than the DB scheme. But in transferring from the DB scheme, Mr W was giving up guaranteed TFC at retirement for TFC that was dependent on investment performance. And I don't think that JLT fully explained this to Mr W. I can see that JLT advised that it was easier to calculate the TFC due under a personal pension but I don't consider any simplicity of calculation justifies the suitability of the transfer.

Control over the pension

Similarly I think Mr W's desire for control over his pension benefits was overstated. Mr W was not an experienced investor and I've not seen any evidence that he had an interest in, or the knowledge to be able to manage his pension funds on his own. From the fact find I can see that Mr W had one other pension plan and was a member of his employer's DC scheme but I can't see that he was actively involved in running these pensions. And he had no savings, no investments and his only asset was the family home valued at £120,000. So, I don't think that control over his pension benefits was a genuine objective for Mr W – it was simply a consequence of transferring away from his DB scheme.

Inflation protection

On the fact find, Mr W said that he wanted his pension to increase in retirement to provide some protection against inflation. JLT cites this as one of Mr W's objectives for transferring his DB scheme benefits. But the DB scheme already provided Mr W with this benefit, a benefit he lost on transferring. So I don't think it was in Mr W's best interests to transfer for this reason.

Suitability of investments

As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr W, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr W should have been advised to remain in the DB scheme and so the funds he invested in wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the ability to receive a small amount of cash immediately, the potential to increase his pension benefits and to take control of his pension would have sounded like attractive features to Mr W in 2011. But JLT wasn't there to just transact what Mr W might have thought he wanted. The adviser's role was to really understand what Mr W needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr W was suitable. Despite the potential to obtain increased benefits at retirement, doing so meant Mr W was giving up a guaranteed, risk-free, and increasing income and exposing all his pensions to investment risk and management charges. Mr W had no capacity to sustain a loss should his transferred pension not perform as well as anticipated, so Mr W was at risk of obtaining lower retirement benefits. In my view, for the reasons I've given above, there were no other compelling reasons which would justify the transfer and outweigh the risk Mr W was un-necessarily exposing himself to. Mr W shouldn't have been advised to transfer out of the scheme just to access the small amount of enhancement cash for a holiday, which I think could've been funded by other means.

So, I think JLT should've advised Mr W to remain in his DB scheme.

Of course, I have to consider whether Mr W would've gone ahead anyway, against JLT's advice. I've considered this carefully, but I'm not persuaded that Mr W would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because Mr W was already doubting the wisdom of his decision shortly after he made it. He was an inexperienced investor with a low-medium attitude to risk and, as far as I can see, this pension accounted for the majority of Mr W's retirement provision. So, if JLT had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice. And I don't think the small amount of cash on offer to transfer out would've been enough of an incentive for him to go against that advice.

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 the business 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 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 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 64, 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 DC 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 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 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 £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 JLT Wealth Management Limited 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 £190,000.

Recommendation: If the compensation amount exceeds £190,000, 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.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 5 July 2024.
Claire Woollerson
Ombudsman