DRN-4760564

The complaint

Mr P has complained that JLT Wealth Management Limited gave him unsuitable advice to transfer his defined benefits from his occupational pension scheme (OPS) to a group personal pension plan (GPP).

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

In 2010, Mr P took part in a group advice session about transferring pension benefits he held in his OPS. Mr P's scheme provider was offering a lump sum cash incentive to transfer his benefits and had arranged for JLT to provide transfer advice to the scheme members.

After listening to JLT's presentation, Mr P completed a fact find form, giving it information about his personal circumstances and financial goals. JLT assessed Mr P's answers and provided him with a recommendation to transfer his benefits to a GPP with Friends Provident on 2 June 2010. Mr P agreed to the recommendation.

At the point of advice, Mr P's circumstances were as follows:

- He was 44 years old, married, with one dependent child.
- He was employed full time, with a gross annual income of £33,000 plus overtime.
- He had no life shortening health concerns.
- He had a joint mortgage on the family home with £100,000 outstanding.
- He had credit/store card debt worth £6,000 and a bank overdraft of £500.
- He had a Balanced/Adventurous attitude to risk ("3.5" out of "5", where "5" was the highest risk).
- He had very little knowledge and experience of investing.
- He held pension benefits worth £4,066 pa with a separate OPS, a stakeholder pension plan, and a personal pension worth £50,660.
- He intended to continue working until aged 65.
- He required an annual income of £20,000 pa in retirement.

Mr P was recorded as wishing to consider the benefits and disadvantages of receiving an enhancement to his pension or cash lump sum incentive payment.

The details of the Mr P's OPS membership were as follows:

- His normal retirement age was 65.
- He'd been offered a cash equivalent transfer value (CETV) of £38,499 – increased to £44,326.37 with the enhancement payable in cash or to be invested.
- The OPS would provide a projected guaranteed yearly income of £7,923, or £5,361 and a tax-free cash payment of £35,737.

- The defined benefits had a five-year guarantee period from the date of retirement, after which they would pay a 50% spouse's income in the event of Mr P's death.

JLT recommended the following:

- A transfer of the defined benefits into a Friends Provident New Generation Group Personal Pension Plan (GPP).
- Investment of the £38,499 CETV split 50/50 between the FP Blackrock Consensus Fund and the FP Blackrock (50:50) Global Equity Index Fund.

There would be an annual management charge 0.31%, and the charges associated with the transfer advice would be met by Mr P's employer.

The transfer proceeded as recommended.

In early 2021, Mr P heard from his colleagues that they'd been contacted by JLT and offered compensation for unsuitable advice. Mr P said he hadn't been contacted by JLT regarding the advice he was given but started to wonder about whether he had also been given an unsuitable recommendation.

Mr P said that he was under the impression that JLT would only recommend the transfer if it was in his best interests and proceeded on the assumption he would be better off as a result. Mr P has said he wasn't knowledgeable about pensions at the time, and it was just something he knew he had to contribute to.

Mr P has said that he now finds himself in a considerably worse position than colleagues who remained in the scheme and colleagues who were compensated as part of JLT's review of its advice process. Mr P added that he's lost guaranteed benefits under the OPS and now has a pension whose value is subject to market conditions.

Mr P raised a complaint with JLT, and it concluded that the advice he was given was suitable for his situation and financial goals at the time. It noted Mr P's position that he believed the advice to be unsuitable as he was told the transfer was risk free, but this clearly wasn't the case.

Dissatisfied with the response, Mr P referred the matter to this service.

One of our investigators considered the complaint and thought that it should be upheld, saying the following in summary:

- When considering a transfer of defined benefits, it should be presumed to be unsuitable unless it could be established that it was in an individual's best interests. This was because of the valuable benefits and guarantees within the defined benefits.

- Mr P had said that he had no intention of transferring his defined benefits until he was offered the opportunity of having his pension arrangements reviewed.

- There seemed to have been little consideration of Mr P's objectives as a part of the fact finding and subsequent recommendation. Mr P had said that he wanted £20,000 pa in retirement, but this wasn't mentioned in the suitability report and there was no recorded consideration about whether this might be achievable. There'd also been no recorded exploration of his other pension provision and how this might contribute to the overall income requirement.

- There was also no recorded discussion about why Mr P might have needed the cash enhancement, which was a key consideration when thinking about whether he should relinquish the defined benefits. Although higher tax free cash was cited, this was a generic benefit which might reasonably apply to most clients who were considering transferring. Further, Mr P was already entitled to tax free cash within the OPS and it was unclear as to why this needed to be higher.

- JLT had said in the recommendation that it hadn't commented on issues such as debts, liabilities, non-pension assets and any other possible requirements Mr P may have had. But whilst it wasn't uncommon for an advising business to limit the scope of its advice, it couldn't ignore key facts relating to the provision of suitable advice. JLT had a responsibility to cover all of the wider issues which might inform the decision to transfer.

- There weren't compelling or specific enough reasons related to Mr P's circumstances to demonstrate that the transfer was in his best interest at the time of the advice. The advice was for Mr P to take the incentive payment on the basis of financial viability alone without considering his wider needs, circumstances or objectives.

- The advice had been given during the period when this service was publishing information with which businesses could calculate future "discount" rates.

- Whilst businesses weren't required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.

- The critical yield – the return required to match the scheme benefits - produced by the TVAS was 7.7%. This compared to the discount rate of 6.7% pa for the nearly 21 years until Mr P's prospective retirement. The regulator's low, mid and upper band projected annual growth rates were 5%, 7% and 9% respectively.

- Talking this into account, in addition to the composition of assets used to determine the discount rate, Mr P's attitude to risk, and his term to retirement, it was likely that he would receive benefits of a materially lower overall value by transferring. The transfer wasn't therefore financially viable.

- Mr P was, at the time, an inexperienced investor and the OPS benefits in question would have represented a significant proportion of his retirement funding. Mr P had mentioned that he had a similar, but slightly lower, level of pension which he could expect from a separate defined benefit OPS. But overall, although the OPS benefits to be transferred were the largest individual source of pension, they made up less than half of his total provision.

- Taking all of his likely pension provision into account, he was in a position to meet his objective of £20,000 pa without needing to risk the OPS benefits for the sake of a small cash enhancement, for which he had no immediate need. And had JLT considered his retirement income needs, as required, then this would have been apparent.

- In support of the recommendation JLT had pointed to Mr P's recorded balanced/adventurous attitude to risk, but whilst Mr P may have indicated this risk rating, the form was filled out in isolation and without any follow up questions. An assessment of a client's attitude to risk required a conversation with the adviser, in which the latter would encourage them to think carefully about their situation and how it might be affected by a transfer. But as there was no evidence of a conversation with Mr P about the transfer, the self-reported risk appetite was in some doubt.

Overall, the investigator said, the transfer wasn't financially viable, nor could it be justified by any other reason. There was no good reason for Mr P to risk his previously guaranteed benefits for the small chance of greater gain.

Further, he was more than 20 years away from his normal retirement date and much could have changed in the intervening years. Mr P could have transferred at any point up to his retirement if a genuine need to do so arose. Mr P didn't need the cash incentive and it wasn't significant enough to justify putting his OPS benefits at risk, the investigator added.

As Mr P would have been able to meet his £20,000 pa income requirement through his various pension accrual, there was no need for him to transfer these defined benefits.

If Mr P had been suitably advised to retain his defined benefits, it was likely that he would have accepted that recommendation and done so.

The investigator recommended that JLT undertake a loss calculation in accordance with regulator's policy statement PS22/13, and as set out in the regulator's handbook in DISP App 4. Mr P had no plans to retire at present and so the investigator said that the calculation should be based upon an assumed retirement age of 65, as per the regulator's usual assumptions in its guidance.

If the redress was paid directly to Mr P, JLT could make a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

He also said that JLT should pay Mr P £300 in respect of the trouble and upset that the matter would have caused him.

JLT didn't accept the investigator's conclusions, however, saying the following in summary:

- As noted by the investigator, businesses weren't required to refer to the discount rate. It was satisfied that the "hurdle rate" calculated by its in house actuaries was reasonable. The margin between the hurdle rate and the critical yield made the transfer viable and there was a reasonable prospect of Mr P receiving a higher pension pot at his retirement.

- There was no evidence to support the position that Mr P was an inexperienced investor. He didn't disclose his assets in the fact find and he had a reasonably significant personal pension plan valued at around £50,000.

- It was satisfied that Mr P's attitude to risk and split of investment was appropriate. Although the investigator hadn't agreed, he hadn't indicated what level of risk he thought Mr P would in fact have been prepared to accept.

JLT remained of the view that the advice to transfer was suitable and that Mr P had a reasonable prospect of enhancing his retirement benefits.

It also said that the £300 award in respect of distress and inconvenience was at odds with other similar cases (involving the same OPS) which had been referred to this service. There was nothing which distinguished it, in JLT's view, from any other referral.

As agreement couldn't be reached on the matter, it's been referred to me for review.

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.

And having done so, I've reached similar conclusions to those set out by the investigator, and for broadly the same reasons.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The applicable guidance, rules, regulations and requirements

This isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

Within the FCA's handbook, COBS 2.1.1R required a regulated business *to "act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time JLT advised Mr P were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like JLT, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, JLT needed to gather the necessary information for it to be confident that its advice met Mr P's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2R required the following:

"A firm must:

1. *compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension scheme;*
2. *ensure that that comparison includes enough information for the client to be able to make an informed decision;*
3. *give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, no later than when the key features document is provided; and*
4. *take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading *"Suitability"*, COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

I've therefore considered the suitability of JLT's advice to Mr P in the context of the above requirements and guidance.

JLT's rationale for transferring

Mr P wasn't categorised as an "execution only" or insistent client, and JLT was taking him through the advice process. Therefore, JLT could be confident that he would be acting upon its advice.

In accordance with COBS 9.2.2R, fact finding was undertaken for Mr P and his circumstances and objectives were recorded – as I've noted above.

As with the investigator, I've noted above that the FCA's guidance was that the starting assumption for an assessment of Mr P's options was that a transfer would be unsuitable, unless it could clearly be demonstrated that it was in his best interests in order to meet specific objectives.

The financial case to transfer

JLT obtained a transfer report for comparison purposes to determine the viability of the transfer to meet Mr P's objectives from a financial perspective.

The suitability report was issued before the FCA's revised guidance which was released in late October 2017, and which provided "discount rates" for levels of growth which were deemed achievable for particular time periods until prospective retirement. But before that, similar rates were published by this service. I've noted that JLT has said that it wasn't required to refer the discount rate, and this was also noted by the investigator. But I do think that, as one of several metrics, they would nevertheless have been a useful indicator of the type of investment return deemed feasible at the time.

The discount rate deemed achievable for the number of years left to the scheme retirement age of 65 was 6.7% pa. And the low, mid and high band growth rates set out by the regulator were 5%, 7% and 9% respectively.

The critical yield to age 65, at 7.7%, if the enhancement was taken as a cash sum, therefore exceeded both the discount (or growth) rate deemed achievable, and both the low and mid growth rates used by the regulator.

JLT has said that it was the hurdle rate which should be used for comparison purposes. But I'm unclear as to what's meant by this as I can find no specific reference to a hurdle rate within the suitability report. If it's referring to the rate which assumed that the optional cash payment wasn't taken and invested instead, then the required rate of return was 6.9% pa. This was still higher than the discount rate to age 65. It was similar to the mid band growth rate used by the regulator for growth projections, but as a reminder, 6.9% was the growth rate required to just match the scheme benefits. There needed to be a compelling rationale as to why Mr P should transfer, and just about matching the scheme benefits, whilst relinquishing all of the guarantees associated with scheme, wouldn't in my view satisfy this.

I've noted that JLT considered 8.25% pa to be achievable in terms of growth, according to its in house actuaries. But I haven't seen any justification for this being higher than the regulator's assumed mid band growth rate, which might reasonably have been the growth rate to bear in mind given Mr P's recorded balanced attitude to risk. Therefore, given the regulator's growth assumptions and the discount rate, I think it's more likely than not that the critical yield was unachievable, year on year, for the number of years that Mr P had until he reached normal retirement age.

I've also noted JLT's further point about Mr P's attitude to risk. This was recorded as being 50/50 balanced/adventurous within the fact find. But as noted by the investigator, this was Mr P self-identifying as such, and given the lack of other declared assets and investment experience, other than separate pension plans, I agree that this above average risk rating would have merited further discussion. I also note that, whilst Mr P may have ticked both the balanced and adventurous boxes when indicating if he'd like his fund to be split between two or more risk levels, he only ticked the "balanced" box when asked to signify the option which was most appropriate to him. Again, I think this inconsistency would have justified further discussion as to what would have been an appropriate risk rating for him.

JLT has said that the investigator hasn't indicated what level of risk he thought Mr P would have been prepared to accept. And I'd agree that this isn't straightforward to determine. So I need to draw conclusions as to what, on balance, is more likely than not to have been the case, given Mr P's circumstances at the time.

In thinking about this, Mr P had no assets other than his pension plans, and as Mr P has said, he simply thought that investment in pensions was the "done thing". I'm inclined to agree - contributing to a pension (both before and after auto enrolment) is a common feature of an individual's overall savings, and wouldn't in my view indicate a particular interest in, or experience of, investing. And I think this is lent further credence by the relatively modest fund sizes within Mr P's plans.

Other than the pension plans, there's nothing within Mr P's investment history or experience, for example investment into stocks and shares, or other assets held (and so capacity for loss) which might reasonably account for his apparent balanced/adventurous risk rating. Had a further conversation around this taken place with Mr P, including an explanation of the principles of risk/reward and what JLT ought in any case to pointed him to in terms of a risk rating which would have been appropriate for him and his circumstances, I think it's more likely than not that he would have been attributed a balanced risk rating.

From a financial perspective, there needed to be a realistic chance that the benefits of the scheme could be bettered through transferring. As set out by the investigator, the guidance was that it needed to be clearly demonstrated that the transfer would be in Mr P's best interests.

With a balanced risk rating, I don't think that a realistic chance of improving on the scheme benefits existed. As such, my view is that the transfer couldn't be justified from a financial perspective, especially given the valuable guarantees which Mr P would be relinquishing.

Other reasons to transfer

I note from the suitability report that, other than the potential to improve upon the scheme benefits, there weren't any other particular recorded reasons as to why Mr P wished to consider transferring.

What should JLT have done – and would it have made a difference to Mr P's decision?

There was no need for Mr P to make any decision about transferring his OPS benefits at this point in time. My understanding is that Mr P had no immediate need for the cash enhancement, which would have increased the critical yield required to match the scheme benefits – and even if he invested the cash enhancement, the critical yield and Mr P's likely attitude to risk meant that it was unlikely that the scheme benefits could be bettered in any meaningful sense which might justify the transfer.

Tax free cash for whatever purpose would have been available both from his accrued defined contribution and defined benefit pension funds. Death benefits pre and post retirement were also payable from the defined benefit scheme, albeit in a different format from those available from the PPP.

Further, as noted by the investigator, it seemed likely that Mr P would have been able to meet his income requirement of £20,000 pa using the existing expected future pension provision. And so there was simply no reason to take the investment risk with his previously guaranteed scheme benefits.

Taking account of Mr P's circumstances, including his likely (and appropriately ascertained) attitude to risk, his objectives and the guarantees which the OPS offered, my view is that JLT should have advised against the transfer.

And I think that, had this happened, Mr P would have followed that advice and not transferred his benefits to the PPP.

Summary

For the reasons given, my view is that a fair and reasonable assessment of this case leads to the conclusion that the recommendation to transfer wasn't suitable for Mr P, nor was it in his best interests.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for the unsuitable advice.

I consider that Mr P would most likely have remained in the OPS if suitable advice had been given.

JLT Wealth Management Limited 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.

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 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 P's acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, JLT Wealth Management Limited should:

- calculate and offer Mr P redress as a cash lump sum payment,

- explain to Mr P before starting the redress calculation that:

- its 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 his defined contribution pension

- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr P accepts JLT Wealth Management Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr P for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr P's end of year tax position.

Redress paid to Mr P as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses 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 P'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.

If Mr P accepts this final decision, the award will be binding on JLT Wealth Management Limited.

I've noted JLT's objection to paying Mr P the £300 as recommended by the investigator. It says that this is contrary to other similar cases, but I'm aware of at least one other in which the same amount was deemed appropriate.

Such awards are in any case considered on an individual basis, and I think it's quite plausible that this matter will have caused Mr P a not inconsiderable amount of concern about his security in retirement. Further, I think this will have been exacerbated by his awareness of other colleagues being contacted about possible errors in the advice provision, whilst he had no such contact, and then needed to initially contact JLT himself and, following its rejection of his complaint, pursue the matter with this service.

As such, I agree that JLT Wealth Management Limited should also pay Mr P £300 in respect of this.

My final decision

My final decision is that I uphold the complaint and direct JLT Wealth Management Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 8 July 2024.

Philip Miller
Ombudsman