DRN-4832209

The complaint

Mr P complained about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme to a personal pension plan, in 2010. He says the advice was unsuitable for him and believes this has caused him a financial loss.

JLT Wealth Management Limited is responsible for answering this complaint. To keep things simple I'll refer mainly to "JLT".

What happened

In April 2010, the trustees of the DB scheme in question wrote to members like Mr P explaining that the company this pension related to was looking at ways to manage its long-term pension commitments. The company had decided to offer enhanced terms to members who chose to transfer their benefits to a personal pension scheme. Members of the DB scheme were also being offered regulated financial advice, the cost of which was being met by the employer. JLT was contracted to provide that advice.

Mr P was being offered a cash equivalent transfer value (CETV) of £72,267 and the normal retirement age (NRA) of his pension was 65. A cash enhancement of around £9,700 (after minor adjustments) on top of the CETV was being offered if he transferred away.

Information gathered about Mr P's circumstances were broadly as follows:

- Mr P was 42 years old, married and with two financially dependent children. He was in good health. He was earning around £40,000 per year.
- He had no personal loans outstanding and no mortgage. But he had some non-secured credit card debt. Mr P thought he might be able to pay this down by transferring out of his pension and accepting the enhancement offer.
- Mr P had three other small pensions relating to previous and current employments. These aren't being complained of here.
- Mr P's options were to keep the DB pension where it was and effectively do nothing. Alternatively, he could transfer away to a new personal pension arrangement and invest both the CETV *and* the enhancement in the new personal plan. He could also transfer away, but take the enhancement in 'cash', subject to tax and national insurance.

It was a requirement to first get regulated financial advice if seeking to transfer away from a DB scheme. JLT set out its advice in a suitability report on 3 June 2010. It advised Mr P to transfer out of his DB scheme and into a personal plan. JLT said this was based upon the assumption that he could either invest the full transfer value, including the enhancement. Or he could take the enhancement as a cash payment. Mr P followed JLT's advice, transferred out and took the enhancement as cash.

Mr P says he realised he might have been poorly advised to transfer this pension when discussing the matter with similarly affected former work colleagues, in 2023. He first raised a complaint to JLT about its advice, saying he shouldn't have been advised to transfer out of his DB scheme at all. In response, JLT said it was acting on the financial objectives Mr P had at the time. But it said that it had carried out an internal review which concluded that, whilst the advice to actually transfer was correct, the recommended investment funds within the new pension had evidently been poorly recommended by one of the JLT advisers. Agreeing therefore, that Mr P may have lost out on growth as a result of this poor fund selection, it offered to pay Mr P around £4,800 in compensation. JLT says this represents the difference between the fund he ultimately invested his transferred funds into, and the one he ought to have been invested in. Mr P didn't accept the offer.

He then referred his case to the Financial Ombudsman Service in September 2023. One of our investigators looked into the complaint and said it should be upheld. JLT hasn't agreed with this and so it falls to me to make 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 also 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 Business (PRIN) and the Conduct of Business Sourcebook (COBS). 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 guidance, 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).*

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 19.1.2 required the following:

"A firm must:

> *(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*
>
> *(2) ensure that the 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, in good time, and in any case 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 or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion 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, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, 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. And I've used all the information we have to consider whether transferring away from the DB scheme to a personal pension arrangement was in Mr P's best interests.

Overall, I don't think transferring was in his best interests, so I'm upholding Mr P's complaint.

<u>*Financial viability*</u>

JLT referred in its transfer recommendation to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. The critical yield is part of a range of different things which help show how likely it is that a transferred personal pension fund could achieve the necessary investment growth for a transfer-out to become financially viable.

The analysis showed that the critical yield required to match the benefits of Mr P's DB scheme, at the NRA of 65, was 7.3%. This was the critical yield figure if *not* taking a tax-free lump-sum upon his eventual retirement at that age. If retiring and *taking* a 25% tax-free lump sum, the critical yield was 6.9%. To be clear, these figures represented the scenario of Mr P transferring the CETV *plus* the enhancement offer. If taking the enhancement as cash and investing only the original CETV, the relevant critical yields were 8% and 7.6% respectively.

Given the starting stance taken by the regulator, there would seem little point in recommending transferring unless the pension-holder could expect that year-on-year growth rates would exceed these figures; but in my view this simply wasn't likely.

I say this because 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 relevant discount rate here was only 6.7% per year for 22 years to the NRA (age 65), which is below the critical yield figures I've mentioned above. And so, by using only this comparison, one could reasonably say that even matching the critical yield - every year for the next 22 years - was probably unachievable.

Nevertheless, the JLT adviser told Mr P that the highest return he could *"currently accept, as being reasonable, for your risk profile …. is 8.25% per annum … provided by our own in-house actuaries"*. In my view this advice was substantially misleading. There's nothing I can see evidenced in the analysis from that time that would justify such a high projected growth rate. The then Bank of England base rate had been 0.5% since March 2009.

JLT accepted that Mr P had an "adventurous" approach to risk (ATR). But I think this was far too high and the adviser simply didn't record any supporting context or evidence to justify such a category. In fact, there's no suggestion Mr P had any stock market investments at the time or indeed any investment experience at all to draw upon in his entire lifetime. The evidence is strongly suggestive that Mr P didn't understand these things and so in this situation, there's no indication that Mr P really had an ATR at the "adventurous" level. I've kept in mind that the regulator's upper growth projection rate at the time was 9%, the middle projection rate was 7%, and the lower projection rate was 5%. In my view, he should have been listed as a "cautious" investor (or similar) which would mean the regulator's lower growth projection of around 5% as a maximum was appropriate in his case.

The correct critical yield to use here would have been the 8% figure. This is because, as I'll explain more about later, Mr P was still so far from retirement that JLT couldn't possibly say what his financial needs would be or what future retirement income would seem accurate for him. However, with the discount rate and the regulator's projection being well below the critical yield figure, the adviser should have been telling Mr P that he'd be likely to receive lower overall retirement benefits as a result of transferring away.

So, to be clear, advising Mr P to transfer on this basis was wrong.

JLT said Mr P had additional reasons to transfer away, so I've thought about all the other considerations which might have meant a transfer *was* suitable for him. I've considered these below.

Other reasons given for the transfer advice

I've used the documentation from JLT at the time to help list some of the themes the recommended transfer-away was based on. The suitability report was, in my view, a very poor document and wholly generic in nature rather than being fully cognisant of Mr P's personal circumstances. However, it seems the broader supporting reasons that JLT recommended the transfer out to a personal pension was for the flexibility and control it offered to Mr P.

- *Overview*

I think it's important to focus for a moment here on Mr P's comparatively young age by pension standards. As I've mentioned above, he was still only 42 years old and in good health. In this context, the evidence I've seen here is that Mr P – understandably - had no concrete plans whatsoever for his retirement. With over 22 years still left to when he'd be actually contemplating retiring if using his NRA, there's simply no way he should have been advised to irreversibly move away from a DB scheme. Doing so involved an investment risk which I've shown above could mean lower overall financial benefits at retirement.

- *The cash enhancement*

From the documentary evidence I've seen, I think a rationale used by JLT for Mr P transferring away and accepting the enhancement offer as cash, was that he supposedly wanted to pay down some credit card debt he had outstanding at the time. The debt amount was said to be £9,000 although I've seen nothing showing the adviser went through this in any detail with Mr P to ascertain all the necessary facts and options.

However, I think the JLT adviser should have been stepping in at this point and comprehensively investigating what the possibilities were for dealing with this apparent debt in a way that didn't involve irrevocably leaving his pension scheme. If Mr P was saying that he'd like to accept the enhancement solely to pay this amount down, then this clearly came with certain disadvantages. The first is that this payment was subject to income tax and national insurance (NI) so it wouldn't have even paid off the whole £9,000 which he owed. I do acknowledge that Mr P was probably told about the tax, but if he'd either not transferred – or indeed reinvested the extra money in his new pension – he'd not pay either tax or NI.

There's also no suggestion he desperately needed this money and, as I've referred to above, we know that in 2010 interest rates were very low. So, I've seen nothing showing this apparent debt couldn't be refinanced more cheaply by converting to a loan. So again, using this reasoning for transferring away was wrong.

- *flexibility and personal control*

I think the implication that by transferring Mr P could have more flexibility and control over his pension funds was no more than a 'stock' objective used to help justify JLT's transfer recommendation. Indeed 'flexibility' was ill-defined here and I've seen no evidence Mr P had either the desire or capacity to manage his own pension fund.

As regards flexibility, I start from the premise that Mr P was so long away from retirement as to make a case for flexible income no more than pure speculation. In the documents from the time, Mr P picked a 'round figure' of £30,000 annually as being his required income in retirement. But in my view this couldn't be anything more than guesswork. For him, the age of 65 was still over two decades away and so neither he, nor JLT, could have any idea what his circumstances might be upon retiring. So, there was no transferring case made out based on flexibility.

Even if I were to consider that flexibility emerged in the intervening years, then Mr P could have reassessed this when he was much nearer retirement age. It's also wrong to assume these types of pension have no flexibility at all. Early retirement is often possible under DB schemes and there is an ability to either take – or not take - a tax-free lump sum. In his specific case Mr P's DB scheme contained the possibility, as allowed under the rules, to retire early from the age of 55. Essentially though, no substantive case was made out for the need for flexibility and if the adviser thought there was one, then they should have properly explained why.

As for wanting more control of his pension, I'm afraid I can see no evidence of this. The reality here is that we can't say what Mr P's retirement strategy was – although when providing regulated retirement advice would seem a good time to have recorded it. And as I mentioned earlier, there's no evidence Mr P was experienced in investment matters to the extent that transferring this DB scheme to a type of market-based fund was justified. His current scheme was already managed for him by trustees: by moving away from this he would be required to manage and monitor his investments and the new charges and fees involved in a personal scheme incurred substantially more cost for him.

So, I haven't seen any evidence why a 42-year-old with no stock picking experience and no interest in investing would need to gain the flexibility or control over their pension when retirement was so far off. Our investigator also pointed out, quite rightly, that future growth couldn't be guaranteed whilst Mr P's DB pension was.

- *tax-free cash at retirement*

It was implied on the suitability report that transferring may eventually provide a higher level of tax-free cash at retirement. In my view, this was a generic and again, a 'stock' objective with no real relevance to Mr P's situation. No-one could realistically know what his plans yet were. It was true that Mr P would likely be able to access 25% of his pension as a lump-sum at some point (at the time this had been recently changed to the age of 55). And it's usually the case that more tax-free cash can be often accessed from a personal pension when compared against a DB scheme; this is because the values and benefits of the two schemes are calculated differently. But JLT should have been telling Mr P at the time that any extra tax-free lump sums being removed from a personal pension, potentially from his late fifties in his case, also came with consequences in that the amount left for his later retirement years would obviously decrease.

- *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. In this case it's not entirely clear how much the death benefits found in the DB scheme were a prominent feature in the advice. JLT did include this issue, however, in the suitability report.

I can't say whether, or to what extent, the death benefits issue influenced Mr P's decision to transfer away. But he was still only in his forties and in good health. I think this advice pre-dated when the entire value of a pension in a personal scheme could be passed on, upon death, tax-free. But I think it's important to be clear that Mr P's existing DB scheme death benefits were still of considerable value to him. For example, he was married at the time and had dependent children all of whom could have received some benefits from the DB scheme if he died. It wasn't made clear why he'd want to give these up.

Summary

I think the adviser in this case did a poor job at identifying what was in Mr P's best interests.

The suitability report wasn't personalised to Mr P. Although it first dealt with financial comparisons between his existing DB scheme and the growth he could reasonably expect if he transferred away to a personal pension, the justification used was substantially flawed. It led Mr P to believe that transferring was financially viable, when quite clearly the opposite was true.

The report then moved to focus on what was a series of 'stock' objectives which didn't really relate to Mr P. Mr P didn't appear to need any flexible features in his pension, nor was there any coherent case made out for him specifically wanting to take personal control of the funds. Also, the loss of death benefits in the DB pension were relevant because by leaving the scheme Mr P's wife and two children could potentially lose something if he died.

But the bigger risk here was transferring away from a guaranteed, indexed-linked pension at the age of just 42. Neither Mr P nor JLT could possibly say what his retirement would look like at that point in time. The much more suitable option was therefore to remain in the scheme until nearer retirement age.

I accept that JLT disclosed some of the risks of transferring to Mr P and provided him with a certain amount of information. But ultimately it advised Mr P to transfer out, and I think Mr P relied on that advice. I'm also not persuaded that Mr P would have insisted on transferring out of the DB scheme, against JLT's advice. I say this because Mr P was an inexperienced investor and this pension accounted for much of his retirement provision at the time. 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 have accepted that advice.

For these reasons, I'm upholding his complaint.

Putting things right

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

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 Mr P'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 P redress as a cash lump sum payment,
- explain to Mr P before starting the redress calculation that:
  - the 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 the DC 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's offer to calculate how much of the 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 the 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.

Our investigator recommended that JLT should pay Mr P for the distress and inconvenience caused by the unsuitable advice. I have considered the impact this would likely have had on Mr P in his particular circumstances. This pension at the time represented most of his retirement provision. In his situation I think the thought of losing material benefits would have impacted upon Mr P. So, I agree the recommended payment of £300 for distress and inconvenience. **JLT should pay Mr P this amount in addition to the redress I've set out above.**

Redress paid to Mr P 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 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.

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 JLT pays the balance.

My final decision

Determination and money award: I uphold this complaint and I direct JLT Wealth Management Limited to pay Mr P 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 P the balance.

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

My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P 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 P to accept or reject my decision before 1 January 2025.

Michael Campbell
Ombudsman