

The complaint

Ms S is unhappy with the advice she received from what is now Utmost Life and Pensions Limited (Utmost) to transfer benefits from her former employer's defined benefit (DB) scheme to a personal pension. She believes the advice was negligent and has caused her to suffer a financial loss.

Ms S is represented in bringing this complaint. But for ease of reading I will generally refer to all complainant representations as being made by Ms S.

What happened

The history leading up to this complaint is well known to the parties and has been clearly set out in the investigator's assessment, and therefore I have only summarised events below. Ms S received advice from Utmost in November 1994 to transfer the deferred benefits from her DB scheme into an Utmost personal pension plan.

At the time, Ms S's circumstances were as follows:

- 32 years old
- Married
- Working full time but soon going on maternity leave
- Not a member of her employer's pension scheme
- Expected to retire at age 60
- In good health
- Medium attitude to risk (ATR)

The transfer value was around £7,700 and the personal pension began on 25 November 1994, with 100% invested in a managed fund.

Ms S transferred her policy to a new arrangement in May 2018 following advice from an independent financial adviser.

In February 2024 Ms S, through her representative, complained to Utmost about the 1994 advice.

Utmost issued its final response to the complaint on 25 March 2024. It explained why it considered the advice suitable for Ms S at the time. And it said Ms S had been provided with all the relevant information and was made fully aware of the risks of transferring, so it didn't uphold the complaint.

Dissatisfied with this response, Ms S brought her complaint to our Service for an independent assessment. Utmost consented to us investigating this complaint and one of our investigators looked into things.

The investigator thought the complaint should be upheld. He reasoned that the advice wasn't suitable, as Ms S had a low capacity for loss, the DB scheme benefits was her sole pension arrangement, and that it was unlikely that a personal pension plan invested in line with her

ATR would meet the growth rate of 10.26% needed to match the benefits available under the DB scheme. The investigator said Utmost should conduct a loss assessment in line with the Financial Conduct Authority (FCA), the regulator's, 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.

The investigator also thought that Ms S suffered some distress as a result of Utmost's actions and said that Utmost should pay her £100 to make up for this.

Utmost didn't agree. It said Ms S had been made sufficiently aware of the benefits she was giving up by transferring her deferred DB scheme benefits to a personal pension. Utmost also didn't think an award for distress and inconvenience was warranted as Ms S complained through a representative and would have only become aware that she may have been misadvised at that point.

The investigator wasn't persuaded to change their opinion, so the complaint has been referred 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.

When considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The applicable rules, regulations and requirements

The advice was provided by Utmost in November 1994. At this time it was regulated by the Personal Investment Authority ('PIA'). Based on what I know about that time, Utmost would have been a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). When the PIA took responsibility for LAUTRO businesses in 1994, they adopted the LAUTRO rules. And these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

I've considered the advice given to Ms S with this in mind. And having done so, I have reached the same conclusions as the investigator and for broadly the same reasons.

The documentation from the time of advice does show that Ms S's financial circumstances were discussed. A fact find was completed and details of her personal and financial circumstances were recorded.

But there is little information on the file as to why the transfer was recommended given Ms S's objectives and circumstances at the time. The only reasons provided for the transfer at the time were:

- *The projected growth rate under the personal pension to match your ex-employer's scheme benefits is 10.26%. [this is often referred to as the critical yield]*
- *Your attitude to risk is medium which indicated you would be willing to consider the transfer on the projected growth rate expressed.*
- *You are willing to give up the guarantees under your ex-employer's scheme in exchange for the potential of higher benefits under the personal pension.*
- *You do not expect to rejoin your ex-employer.*
- *Your expected retirement age is 60.*
- *The control of your own pension investment is important to you.*

At this time, the industry standard projected growth rates were 6% (lower rate), 9% (mid rate) and 12% (upper rate). Utmost said that Ms S was a medium risk investor and advised her to invest 100% in a managed fund. Given the critical yield was 10.26%, I think Ms S was likely to receive benefits of a lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk. As I've said, the middle rate assumption was only 9% and Utmost said she had a medium ATR.

However, I've not seen enough evidence to suggest Ms S did have a medium ATR. All the evidence points to her having no investments of this nature and no past investment experience to draw upon. She also appeared to have very little capacity for loss. In any event, the middle growth assumption implied growth of below 10.26%. But Ms S would have had to have seen her investments outgrow this amount, year on year, for over 28 years, to make transferring viable from a financial perspective.

Moreover, there would be little point in Ms S giving up the guarantees available to her through her DB scheme only to achieve, at best, the same level of benefits outside the scheme. And from what I can tell, Utmost presented the growth rate needed as achievable, but it provided no explanation or context as to why reaching a sustained growth rate close to 10.26% was likely at that time.

Furthermore, the transfer exposed the benefits accrued by Ms S to investment risk and charges that had not previously applied. Ancillary benefits such as spouses' and dependents' pensions were also subject to change as a result of the advice. From what I've been provided, there isn't sufficient evidence for me to conclude that these wider implications of the advice were considered or explained to Ms S.

Therefore, I am not persuaded that all of the relevant consequences and disadvantages of the transfer were explained sufficiently to Ms S before she accepted the advice. As such, I do not believe that Ms S was put into a fully informed position before agreeing to the transfer of her deferred DB pension.

And even if I'm wrong about this, Utmost wasn't there to just transact what Ms S might have thought she wanted. The adviser's role was to really understand what Ms S needed and recommend what was in her best interests.

Although it was recorded that Ms S wanted control over her pension, I've seen no evidence to support this from the time of advice. As explained, Ms S was an inexperienced investor, with no previous investment experience. I've seen nothing to explain why she wanted this control and given that she followed the advice to invest 100% into managed funds, I don't consider this a likely objective or a compelling enough reason for Ms S to forgo the guarantees associated with the DB scheme.

Ultimately, I don't think the advice given to Ms S was in her best interests. She was giving up a guaranteed, risk-free and increasing income. By transferring, Ms S was very likely to obtain lower retirement benefits and in my view, there were no particular reasons which would justify a transfer and outweigh this. So, I don't think Utmost should've advised Ms S to transfer her deferred DB scheme benefits.

Of course, I have to consider whether Ms S would've gone ahead anyway, against Utmost's advice.

I've considered this carefully, but I'm not persuaded that Ms S would've insisted on transferring out of the DB scheme, against Utmost's advice. I say this because Ms S was an inexperienced investor, she had, at most, a medium attitude to risk, little capacity for loss and this pension accounted for the majority of Ms S's retirement provision. So, if Utmost had provided her with clear advice against transferring her DB scheme benefits explaining why it wasn't in her best interests, I think she would've accepted that advice.

In light of the above, I think Utmost should compensate Ms S for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice.

In addition, although Ms S is represented in bringing this complaint, and was more likely than not alerted of the issues with the 1994 advice by her representative shortly before bringing the complaint, I think that Ms S has suffered some distress upon learning, as she approached retirement, that she may have received unsuitable advice to transfer a significant portion of her retirement savings. Therefore, I agree with the investigator that £100 compensation for this distress is warranted in the circumstances of this complaint.

Putting things right

A fair and reasonable outcome would be for the business to put Ms S, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Ms S would have most likely remained in the occupational pension scheme if suitable advice had been given.

Utmost 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, Ms S has not yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 60 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 Ms S'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, Utmost should:

- calculate and offer Ms S redress as a cash lump sum payment,
- explain to Ms S 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 Ms S receives could be augmented rather than receiving it all as a cash lump sum,
- if Ms S accepts Utmost's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Ms S for the calculation, even if she 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 Ms S's end of year tax position.

Redress paid directly to Ms S as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), Utmost may make a notional deduction to allow for income tax that would otherwise have been paid. Ms S's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

Utmost should also pay Ms S £100 for the distress she has experienced as a result of the advice.

My final decision

Where I uphold a complaint, I can award fair compensation of up to £190,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £190,000, I may recommend that the business pays the balance.

Determination and money award: I uphold this complaint and require Utmost Life and Pensions Limited to pay Ms S 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 Utmost Life and Pensions Limited pays Ms S the balance.

Utmost Life and Pensions Limited must also pay Ms S £100 compensation for her distress. If Ms S accepts this decision, the money award becomes binding on Utmost Life and Pensions Limited.

My recommendation would not be binding. Further, it's unlikely that Ms S can accept my decision and go to court to ask for the balance. Ms S 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 Ms S to accept or reject my decision before 3 February 2025.

Jennifer Wood
Ombudsman