DRN-4989396

The complaint

Mr C complained about advice he was given, in 2011, about transferring the benefits of a deferred defined-benefit (DB) occupational pension scheme to a personal pension plan. 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. I've seen that Mr C himself is represented by a third-party company. So, to keep things simple, I'll refer mainly to "JLT" and "Mr C" respectively when mentioning either party.

What happened

The deferred DB pension originated from Mr C having been employed previously with a company some years before 2011. It seems the trustees of the DB scheme wrote to deferred members, like Mr C, explaining it was looking at ways to manage its long-term pension commitments.

The company decided to offer enhanced terms to deferred members who chose to transfer their defined 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 Mr C's former employer. JLT was contracted to provide that advice. Information gathered about Mr C's circumstances were broadly as follows:

- Mr C was 46 years old, living with his wife and with two financially dependent children. He was in good health.
- By the time of the advice, which was in September 2011, Mr C was employed elsewhere and was earning around £36,000 per year. He hadn't joined his current employer's pension scheme yet, but he did have another personal pension with almost £45,000 in it. (This other pension isn't the subject of any complaint).
- Mr C owned a home the value of which was around £160,000. Around £55,000 of this was mortgaged. He had some modest savings and no significant debts.
- The cash equivalent transfer value (CETV) of Mr C's deferred DB pension at the time was around £44,794 and the normal retirement age (NRA) was 65. A cash enhancement on top of the CETV (around £5,891) was being offered if he transferred away. The normal retirement age of his deferred DB scheme was 65.
- Mr C's options were to keep the 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 a new personal plan or with his new employer's scheme. He could also transfer away but take the enhancement as cash (subject to tax) to be used by Mr C as he saw fit.

JLT set out its advice in a suitability letter and report, on 1 September 2011. It advised Mr C not to transfer out of his DB scheme. It strongly recommended him to remain a member of his existing deferred DB scheme and this was the case whether it was his intention to draw benefits at his normal retirement age of 65, or take early retirement at the age of 60. JLT said if he chose to transfer his benefits against its advice he would almost certainly receive a lower overall pension by comparison in his retirement. However, Mr C transferred from his DB scheme to a personal pension shortly thereafter. He immediately took the enhancement element as cash after tax and national insurance had been applied.

Mr C raised a complaint about JLT's advice in 2023. He said he wasn't correctly advised and he now realised, as he approached nearer to retirement, that he may have lost money as a result. In response, JLT didn't agree it had done anything wrong. It said it had first advised Mr C not to transfer away and that the transfer only happened when Mr C became an 'insistent client' – a term used within the industry when a client wants to go against what was recommended to them by their adviser. JLT says that only when Mr C insisted, did it then go on to proceed with the transfer and make a second recommendation about where the transferred pension funds should be invested. This was with a new personal pension provider and that the monies should be invested in certain funds consistent with Mr C's attitude to risk.

Unhappy with JLT's refusal to uphold his complaint, Mr C then referred his case to the Financial Ombudsman Service in December 2023. One of our investigators looked into the complaint and said it should be upheld. JLT didn't agree with this and it made a number of points in response to what our investigator said.

I issued a provisional decision (PD) about this complaint on 16 October 2024. In this I said I was minded to uphold it in Mr C's favour, but I gave both parties the opportunity to respond with any new information or evidence they wanted me to consider. Mr C agreed in full with the PD. JLT responded with some further commentary and didn't agree the complaint should be upheld.

I am now making 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.

<u>*The applicable rules, regulations and requirements*</u>

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).*

- 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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 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 that the transfer was in Mr C's best interests.

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 C's best interests. I've also considered again what I said in my PD of a few weeks ago.

Overall, I still don't think JLT acted fairly or in Mr C's best interests. I'm therefore now upholding his complaint.

<u>What did JLT do?</u>

I referred in my PD why I would normally begin by assessing whether the transfer of the DB pension to another type of scheme was financially viable. For instance, I'd look at whether there was evidence Mr C's transferred pension could potentially grow outside his deferred DB scheme, to an extent which made transferring worthwhile. I'd also compare these types of projections against the valuable benefits and guarantees Mr C would be giving up by leaving a DB scheme.

However, in this case, JLT itself has said its initial advice was *not* to transfer. The critical yield analysis carried out by JLT implied his pension funds, if transferred, wouldn't be able to grow enough to make transferring away from his DB scheme worthwhile. So, having said in 2011 – and again in 2023, following the complaint - that transferring wasn't suitable, it would obviously be very hard for JLT now to argue that it *was*.

For the record, I agree that transferring probably wasn't suitable on financial viability grounds. But there were also other significant reasons why transferring wasn't suitable which in the main related to the benefits and guarantees within the current scheme Mr C would be giving up by transferring away. However, as there's no dispute that transferring wasn't suitable for Mr C, I don't need to spend any more time explaining why. The issue in dispute here relates to something else.

JLT says Mr C ultimately went against its advice. It says that he was advised that he ought to stay in the DB scheme, and it was Mr C himself that insisted he wanted to transfer out. JLT says this meant he became an 'insistent client' and that accordingly, it merely followed a process to transfer Mr C's deferred DB scheme to a personal pension plan, as per his wishes.

At the time when Mr C met with JLT which was advising him, there was no specific regulatory advice or guidance in place in respect of insistent clients. However, as I've pointed out above, there were a number of important general rules in the regulator's Handbook. These included but were not limited to a requirement upon JLT to *'act honestly, fairly and professionally in accordance with the best interests of its client'*. In addition to this, COBS required JLT to provide information that was clear, fair and not misleading. So, JLT's recommendation had to be clear and Mr C had to have understood the consequences of going against the recommendation.

JLT first went through a 'fact-find' exercise which took place on or around 24 July 2011. In this Mr C described his circumstances of that time which included issues such as his family situation and employment details.

I've noted this showed that he was with a new employer but he hadn't yet joined that employer's pension scheme. However, Mr C recorded that he had an existing personal pension with a value of around £45,000. I've also noted that the 'fact-find' form already catered - at this early stage in the proceedings - for the possibility that Mr C could just disregard any advice and access the cash sum which was on offer even though this was dependent on him leaving his deferred DB scheme. I say this because at this point he hadn't yet even received the financial advice from JLT but he was being asked at this 'fact-find' stage if he would like to access this sum. Mr C ticked a pre-determined option on the form which said, *"I would like a cash sum now at the cost of sacrificing future pension benefits because…..* and he went on to explain his intentions for this money by saying… *I would like to invest* [it] *in other savings."*

In my view, this substantially undermined the whole process of obtaining independent advice. Here was someone yet to be formally advised on whether or not to transfer away from a DB scheme – and there was already an option placing transferring at the forefront of Mr C's mind. I think it's fair to say that Mr C himself was a relative amateur in these matters with little financial experience and no expertise in pension matters. In this context, JLT needed to be sure that Mr C wasn't just choosing to do what he thought might be a good idea by accessing some instant cash. JLT was the regulated party here, so its job was to provide clear and independent advice which was in Mr C's best interests.

I don't think JLT did this.

In my view, there were significant issues from the 'fact-find' exercise which still needed to be clarified. These included, for instance, the apparent comfort Mr C was drawing from his deferred DB scheme apparently *"not representing a substantial proportion of* [his] *overall retirement benefits"*. However, I think the 'fact-find' appeared to show otherwise because at that time, his DB scheme and the benefits contained therein was probably more valuable to him than his other existing pension scheme which was a personal plan. So, although this defined contribution[1] scheme contained around £45,000, it had far less guarantees and benefits that were contained in his DB scheme. As I've also said, it appears Mr C had failed to sign up to his current employer's pension offering.

Further uncertainties which I don't think JLT clarified were that Mr C had implied his dependents would receive other assets upon his death, but it was unclear where this was from, who could benefit and by how much. Also, Mr C's apparent assumption that he could live in retirement on £15,000 per annum also seemed at least worthy of investigation as this was both a modest amount, even in 2011, and it was also unclear what his anticipated outgoings might still be at the point of retirement. The 'fact-find' also hadn't captured Mrs C's income (if she had any) and Mr C was still only 46 years of age with apparently only moderate savings. So, I think it's unlikely that Mr C would have been able to say with any certainty that he'd be able to live on £15,000 per year in a retirement which for him was still many years away. His current income was over double this amount.

With all these uncertain issues in mind, I think the advice which followed the 'fact-find' exercise lacked depth and was likely based on facts that still needed clarifying. And although the suitability report ultimately said he shouldn't transfer away, and was probably correct, all

[1] With a defined contribution pension you build up a pot of money that you can use to provide an income in retirement. Unlike defined benefit schemes, which promise a specific income, the income you might get from a defined contribution scheme depends on factors including the amount you pay in, the fund's investment performance and the choices you make at retirement.

this was poorly explained in the suitability document itself. In my view, this would have made it difficult for Mr C to understand the key issues he faced.

The suitability report itself was dated 1 September 2011 and this contained JLT's recommendation. It's true that this did set out that Mr C shouldn't transfer from his deferred DB scheme and it also explained that the critical yields were high and that in the long-term, he could end up with a lower retirement income by transferring to a type of personal scheme.

However, in the same correspondence substantial commentary was given to Mr C simply ignoring JLT's recommendation and I think this is where the undermining of the advice gained more ground. For example, an acknowledgement slip accompanied the recommendation. This slip provided an 'option box' for him to accept JLT's advice. But directly next to this it also provided the opportunity for him to easily choose an alternative option, which was to access the cash enhancement he was being offered by his former employer to transfer away from the DB scheme. There was a printed option on this slip which said, *"having read the report and JLT's recommendation to remain in the* [company] *Pension Fund … I nevertheless wish to transfer my benefits away from the scheme against this advice"*.

I agree with our investigator who said that this process fundamentally diluted the suitability report and the advice's overall importance. It made it very easy and straightforward for Mr C to simply opt for the transfer and an acceptance of the cash without fully understanding the wider implications. I say this with the above issues in mind which essentially show the suitability report to be a generally weak document. It failed to challenge assumptions about a retirement in up to 19 years' time that were clearly not being fully explained by JLT or fully thought through by Mr C. I think the documents Mr C received indicate that up until this point this had been mainly a 'paper exercise' with Mr C merely being asked to fill out some forms rather than comprehensively being engaged by an adviser. Consequently, important issues that required clarification or challenge went unnoticed.

After the completion of the suitability report and Mr C returning the slip to JLT to say he wanted to choose the option of transferring away, it seems there was a 'phone call between JLT and Mr C. We don't know when this call was, but I've listened carefully to the recording and I agree it probably took place after he'd had the report presented to him and he'd sent back his slip disregarding JLT's advice. JLT said our investigator didn't include this in their written 'View' when recommending that we should uphold Mr C's complaint and therefore hadn't considered the important issues contained within the call. JLT says the call was significant because it thinks Mr C was given enough information about the dangers of rejecting JLT's advice not to transfer and the serious consequences of him doing so. In short, JLT says Mr C was warned about the dangers of transferring during that call, but that he chose to go ahead anyway.

However, whilst I understand the point being made, I don't agree this call changes anything. The call was brief given the subject matter and its premise was certainly not to robustly reiterate that the advice JLT was giving to Mr C was *not* to transfer his pension. Rather, in my view, the call followed the general laissez faire approach of the suitability report – it failed to address obvious inconsistencies about Mr C's financial circumstances and it failed to really drill into the reasons as to why Mr C ought not to transfer. Here would have been a good opportunity to really reiterate the advice JLT says it wanted to convey: to comprehensively explain all the guarantees and benefits Mr C would be giving up in the DB scheme; to ask him about how he was intending to fund his retirement; and to enquire as to what his actual spending plans were for the £5,891 after deductions for income tax and national insurance.

In my view, the call did not address these crucial issues and it failed to genuinely convey the importance of the original 'do not transfer'' recommendation. In fact, the call handler began by saying Mr C was *"more than welcome"* to transfer and also said he *"wanted to just run a few points past"* Mr C. The implication here therefore was that after just a few formalities, the money would be transferred from his DB scheme and Mr C could access the cash incentive.

I've noted carefully all the points made in JLT's response to our investigator's View. And of course, I accept that some individual pieces of information given to Mr C during the telephone call could be viewed, in isolation, as being of some use to him in arriving at a decision about what to do. But there had already been failures in the processes of fact-finding and the poorly worded suitability report.

During the call, the handler focussed the rationale for the recommendation as being the likely inability of a personal pension growing enough to match the benefits in his DB scheme. Mr C was told the critical yield for a retirement at 65 was 7.2% per year whereas JLT's assumptions were that he might only get 6.35% per year if investing on the open market with a personal pension plan. However, I've seen Mr C's aspiration was for an earlier retirement which I think could have pushed the critical yield higher than explained in the call. These were only some of the relevant issues at play in Mr C's situation and he wasn't a financial expert, so I think the focus simply on annual percentage growth would have been difficult for him to put into context.

What the call handler failed to set out clearly during the call was that there were also other very important factors Mr C ought to be thinking about, such as those I've mentioned above. I think further confusion was brought about by the JLT handler mentioning a specific default personal pension it was "recommending" if Mr C wanted to transfer after all. It was also unhelpfully mentioned that personal pensions were more flexible and could be beneficial at times when the market was signalling a good time to buy. Again, these issues substantially confused the situation because they added credence to transferring away, which was the direct opposite of the message JLT apparently wanted to convey.

Would better practice have changed anything?

I therefore considered whether, if JLT had acted in Mr C's best interests, he would have taken a different course of action. I think he would.

JLT was being paid to provide independent financial advice to Mr C. I think if JLT had clarified his financial situation, his retirement objectives, and why he wanted to access a relatively modest cash enhancement at the expense of giving up a DB scheme, it could have based its advice on these things. It could then have demonstrated to Mr C, the powerful arguments of keeping his pension where it was.

I think if it had clearly set out its recommendation in this way, both in the written materials and during the call, the advice not to transfer would have appeared understandable and genuine. Instead, JLT gave Mr C the opportunity – and indeed tools – to simply ignore its advice and move to the next stage which was to disregard it and transfer away. But if explained in proper terms, without the prompts for him to simply disregard its advice, I think Mr C would have decided not to transfer away.

Response to my PD

I have looked in detail at JLT's response to my PD. However, I'm afraid no new information or evidence has been provided, only a re-emphasis of points already made (and addressed). These consisted of the recommendation report being clear about remaining in the DB scheme, that Mr C himself had clearly considered the pros and cons, and that the follow-up telephone call from JLT had shown Mr C was insisting on transferring.

However, I had already dealt with these points comprehensively in my PD. As I explained, both the 'fact-find' and suitability report were set up in a way that allowed Mr C to easily disregard any advice, and they substantially undermined the recommendation. And overall I don't think JLT's processes were clear or independent enough. Finally, as regards the call, this was brief and it did a very poor job at reiterating that the advice JLT was giving to Mr C was not to transfer his pension

Summary

Given the failings I've set out above, I don't think it would be reasonable for me to conclude that Mr C can truly be regarded as an insistent client. I think JLT made it altogether too easy for him to disregard the advice. JLT's overall communication with Mr C wasn't clear or fair. It didn't act in Mr C's best interests and it failed to act with due care and skill.

JLT should have provided a genuine, clear and well-evidenced recommendation on the merits of *not* transferring. It should not have immediately offered him the alternative to just disregard its recommendation by presenting alternative courses of action he could very easily take. The written process JLT engaged in undermined its recommendation, and during the telephone call this was further weakened by the approach the call-handler took.

I am therefore upholding Mr C's complaint.

Putting things right

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

JLT must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

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 C's acceptance of the decision.

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

- calculate and offer Mr C redress as a cash lump sum payment,
- explain to Mr C before starting the redress calculation that:
    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension

- offer to calculate how much of any redress Mr C receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr C accepts JLT's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr C for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr C's end of year tax position.

Redress paid to Mr C as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, JLT may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr C's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that JLT pays the balance.

Our investigator recommended that JLT should pay Mr C for the distress and inconvenience caused by its actions. I have considered the impact this would likely have had on Mr C in his particular circumstances. This pension at the time represented a relevant and sizeable part of his retirement provision. In his situation I think the thought of losing material benefits would have negatively impacted upon Mr C and caused him anxiety about his future. So I agree the recommended payment of £250 for distress and inconvenience. JLT should additionally pay Mr C this money.

My final decision

Determination and money award: I am upholding this complaint and I direct JLT Wealth Management Limited to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that JLT Wealth Management Limited pays Mr C the balance.

If Mr C 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 C can accept my decision and go to court to ask for the balance. Mr C may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 29 November 2024.

Michael Campbell
Ombudsman