DRN-3153789

The complaint

Mr M complains about the advice given by Utmost Life and Pensions Limited to transfer the benefits from his preserved defined-benefit ('DB') occupational pension scheme to a personal pension. Mr M says the advice was unsuitable for him and believes he's lost out as a result.

What happened

In 1996 Mr M discussed his pension and retirement needs with Utmost Life and Pensions – Mr M says this came about as part of an existing client review.

Utmost Life and Pensions completed a fact-find to gather information about Mr M's circumstances and objectives. It also carried out an assessment of Mr M's attitude to risk, which it deemed to be 'moderately speculative.'

In November 1996 Utmost Life and Pensions advised Mr M to transfer his preserved pension benefits in the DB scheme into a personal pension and to invest the proceeds in two separate plans a managed fund. The "reason why" letter said the reasons for this recommendation were:

- The potential for greater fund growth;
- The option to take a tax-free lump sum, which wasn't available in the current scheme;
- A greater spouse's pension and tax-free sum; and
- In order to sever connections with Mr M's previous employer.

Utmost Life and Pensions followed this up with a second "reason why" letter in January 1997 to address some inaccuracies in the previous letter and to confirm Mr M's understanding of the risks of transferring out of the DB scheme.

In 2020 Mr M complained to Utmost Life and Pensions about the suitability of the transfer advice because he says his pension has been devalued. He says that based on a recent pension statement value, he now believes he would have been better off remaining in his employers pension scheme.

Utmost Life and Pensions didn't uphold Mr M's complaint. In summary it said Mr M was visited on more than one occasion and it was explained to him – and documented – what he was giving up if he left his employer's scheme, but that he wanted potential for greater benefits and the availability of earlier retirement. It said it had provided Mr M with the necessary information and that Mr M had signed a declaration to say the relevant points had been fully discussed and considered.
Mr M subsequently referred his complaint to our service. An investigator upheld the complaint and required Utmost Life and Pensions to pay compensation. In summary they said they didn't think the advice Mr M was given to transfer was suitable based on his circumstances at the time, and because the critical yield required to match the benefits Mr M would receive from his employer's scheme wasn't reasonably achievable – something Utmost Life and Pensions acknowledged itself at the time. They said Mr M didn't have the

capacity for loss and the reasons for recommending the transfer didn't constitute appropriate advice and wasn't in Mr M's best interests.

Utmost Life and Pensions disagreed. In summary it said that Mr M was made sufficiently aware of the benefits he was giving up and that he was provided with all the relevant information to make an informed decision as to what to do with his pension. It said Mr M's decision to transfer to a personal pension plan was reasonable in the circumstances at the time.

The investigator wasn't persuaded to change their opinion, so the complaint was 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 am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator – I don't think the advice Mr M received to transfer out of his employer's pension scheme was suitable. My reasoning is set out below.

The advice was provided by Utmost Life & Pensions in late 1996 and early 1997 (although it was known by another name then). At this time it was regulated by the Personal Investment Authority (PIA). As Utmost Life & Pensions was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), the PIA (LAUTRO) adopted rules applied at the time of the advice.

The adopted 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 Mr M with this in mind.

Financial viability

Utmost Life & Pensions says that Mr M wanted to transfer out of his DB scheme because of the potential for greater fund growth through a personal pension.

The advice was given during the period when the then regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pension Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I think they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor when the advice was given in this case.

The critical yield required to match Mr M's benefits at age 65 was 10.9% if they took a full pension. The relevant discount rate closest to when the advice was given, which I can refer to was 9.9% for 34 years to retirement. However, the rate was 8.5% for 33 years to retirement at the point the transfer was made (there was delay between the advice being given and the transfer being finalised.) For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection rate 9%, and the lower projection rate 6% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr M's attitude to risk and also the term to retirement.

On the point of Mr M's attitude to risk, I can see the adviser has recorded this as being *"moderately speculative"* in the pension transfer questionnaire. Although this isn't defined, it seems to me that this would translate to a 'medium-high' attitude to risk. It's not clear to me from the available evidence how this assessment of Mr M's risk appetite was arrived at – in my view Mr M was not an experienced investor. It was recorded at the time that Mr M held a few thousand pounds in cash savings and had a couple of small endowment savings plans – but neither of these things reasonably lead me to believe Mr M had sufficient knowledge or experience to be able to take a "*moderately speculative"* approach to investing his pension. However, Mr M was relatively young and he expected to work for around another 30 years, so he had time to accumulate additional pension funds and could afford to take some risk. With this in mind, a 'medium' or 'balanced' attitude to risk would appear to be more appropriate.

There would be little point in Mr M giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield was 10.9%, which was higher than the regulator's middle projection rate and the discount rate, I think Mr M was likely to receive benefits of a substantially lower overall value than his DB scheme at retirement, as a result of investing in line with a medium attitude to risk.

I'm mindful too that internal paperwork from the time of the sale suggests that Utmost life and Pensions itself questioned the financial viability of the transfer. One document records:

"*...critical yield is on the high side and could take some achieving."*

It was partly for this reason that the adviser was instructed to produce a second "reason why" letter for Mr M. I note this second letter says:

"*Finally, you are aware that it may be difficult to achieve the critical yield figure over the period of 10.9%."*

Utmost Life & Pensions adds that Mr M was told in the illustrations and key features document that the projected value of his personal pension wasn't guaranteed.

So, overall, it believes Mr M understood that he might not get a higher pension by transferring out of his DB scheme.

But Utmost Life and Pensions was under a duty to provide suitable advice – so if it didn't think the transfer was suitable for Mr M because of the difficulty in achieving the critical yield, the adviser should not have recommended he go ahead with it. It wasn't sufficient for Utmost Life & Pensions to simply ask Mr M to acknowledge that the critical yield wasn't achievable, or give him warnings that the projections weren't guaranteed, particularly when it had told him in the first "reason why" letter that it was recommending the transfer because the personal pension had greater fund growth potential. But it was very unlikely that Mr M would be able to match, let alone exceed the benefits he was entitled to under the DB scheme through a personal pension. So, I think Utmost Life & Pensions ought to have told Mr M it wasn't in his best interests to transfer out.

Overall, I think it's clear that Mr M would be worse off financially if he transferred out of his DB scheme. For this reason alone, I don't think the advice to transfer out was suitable. Of course financial viability isn't the only consideration when giving transfer advice. I accept there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility – access to tax-free cash and early retirement

The first "reasons why" letter said that taking a tax-free lump sum was important to Mr M. It said the option to take a tax-free lump sum was available through a personal pension but it wasn't available to Mr M through the DB scheme. But another reason why the adviser was instructed to produce a second suitability letter was because Utmost Life and Pensions believed it was in fact highly likely that this would be available from the DB scheme. Internal records show they believed to be the case given that the guaranteed minimum pension should easily be covered.

So it appears that one of Mr M's objectives, taking a tax-free lump sum, would in any case be met by remaining in the DB scheme - he did not need to transfer his benefits to a personal pension to achieve this.

But importantly in this case, Mr M was only 31 at the time of the advice, and based on what I've seen, he didn't have any concrete retirement plans. The pension transfer questionnaire notes that Mr M wanted to work to age 60 at the latest. But Mr M didn't know at this stage what his income requirements might be and what, if any, need he had to access a lump sum. So, he couldn't have known whether he would be able to afford to retire early. As Mr M had around 30 years before he thought he might retire, I think it was too soon to make any kind of irreversible decision about transferring out of his DB scheme.

So I don't think it was a suitable recommendation for Mr M to give up his guaranteed benefits when he didn't know what his needs in retirement would be. If Mr M later had reason to transfer out of his deferred scheme – for example, to access to a tax-free lump sum because his deferred scheme didn't offer that, or because he needed to access a higher income than the scheme provided – he could have done so closer to retirement.

Death benefits

Utmost Life & Pensions says that Mr M's other main objective, which justified the transfer, was to have access to a greater spouse's pension through a personal pension – this was set out in the first "reason why" letter.

I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer his deferred DB scheme to a personal pension because of this. But the priority here was to advise Mr M about what was best for his retirement provisions, and a pension is primarily designed to provide income in retirement.

In the second "reason why" letter Utmost Life & Pensions qualified that a 50% spouse's pension was available through the DB scheme, and if Mr M wanted to provide for a spouse's pension through the personal pension, it would reduce the benefits available to him.

So, it would appear that in fact, Utmost Life & Pensions recognised that Mr M probably wouldn't be able to achieve a higher spouse's pension if he transferred out of the DB scheme. This is because it knew the critical yield was unlikely to be achieved, and the critical yield represented the investment growth required to purchase an annuity that provided Mr M with the same benefits available through the DB scheme, including a 50% spouse's pension. So, I think that ought to have prompted the adviser to reconsider their recommendation – one of Mr M's main objectives wasn't likely to be met by transferring out.

I also think the existing death benefits attached to the deferred scheme were underplayed. Mr M was married and had a child - so the spouse's/dependent's pension provided by the deferred scheme would've been useful to his spouse/dependents if Mr M predeceased them. I don't think Utmost Life and Pension made the value of this benefit clear enough to him. This was guaranteed and it escalated – it was not dependent on investment performance. In any event, Utmost Life and Pensions should not have encouraged Mr M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

It isn't clear whether Mr M was interested in being able to leave a lump sum to his family in the event of his death, which was an option if he took out a personal pension. But if Mr M genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Utmost Life and Pensions should've instead explored life insurance – particularly given Mr M's relatively young age.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr M. And I think Utmost Life & Pensions recognised that Mr M probably wouldn't be able to achieve a higher spouse's pension by transferring to a personal pension. Again, asking Mr M to acknowledge that he understood this doesn't make the advice to transfer out suitable.

Control and wanting to sever links with employer

While not a key objective recorded on the suitability letters, other paperwork from the time of the advice records that Mr M was attracted to the *"concept of controlling this part of his pension arrangements."* But I'm not persuaded by this – Mr M was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own (and I can see the fund choice was a managed fund.) So, I don't think that this was a genuine objective for Mr M – it was simply a consequence of transferring away from his deferred defined benefit scheme.

In any event, I don't think severing links with his previous employer was an objective reason for recommending the transfer to Mr M. I consider it was for the adviser to distance themselves from any emotion or feelings Mr M might have had about his previous employer - albeit I note Mr M says he parted with his previous employer on good terms) – and base their recommendation on Mr M's broader retirement objectives and circumstances at the time. I don't think severing ties with an employer was an appropriate reason to recommend a transfer.

Summary

I don’t doubt that higher growth potential, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr M. But Utmost Life and Pensions wasn’t there to just transact what Mr M might have thought he wanted. The adviser’s role was to really understand what Mr M needed and recommend what was suitable.

Ultimately, I don’t think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr M was very likely to obtain lower retirement benefits. And in my view there were no other particular reasons which would justify a transfer and outweigh this.

So, I think Utmost Life and Pensions should’ve advised Mr M to remain in his DB scheme.

I now need to consider whether Mr M would've gone ahead anyway, against Utmost Life and Pension’s advice. Utmost Life and Pensions appears to argue that this is the case because it says that Mr M was provided with all of the relevant information to make an informed decision – including that the critical yield may be difficult to achieve and that he was giving up certain guaranteed benefits.

I’ve considered this carefully - but I’m not persuaded by what Utmost Life and Pension’s says. Utmost Life and Pension’s wasn’t just providing Mr M with information – it was advising him. So simply telling Mr M what he was giving up didn’t make the recommendation to transfer suitable.

And if things had happened as they should have, I don’t think Mr M would’ve insisted on transferring out of his DB scheme and gone ahead in any event. I say this because Mr was not in my view an inexperienced investor and I think he relied on the advice he was given. At the time this pension was the primary source of Mr M’s retirement provision. So, if Utmost Life and Pensions had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn’t suitable for him, I think he would’ve accepted that advice.

In light of the above, I think Utmost Life and Pensions should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

I can see the investigator also recommended an award of £250 for the distress and inconvenience the matter has caused Mr M. Utmost Life and Pensions argues Mr M has not suffered given he’s used a representative to bring his complaint. But compensation isn’t awarded to recognise the inconvenience of making a complaint - instead it is to compensate the customer for the impact of any wrongdoing. And taking everything into account, including that Mr M is now at the age when his retirement provision is of greater importance, I think the unsuitable advice has caused him distress. And overall, I think an award of £250 is fair in all the circumstances.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Utmost Life and Pension’s unsuitable advice. I consider Mr M would have most likely remained in his deferred defined benefit scheme if suitable advice had been given.

Utmost Life and Pensions must therefore undertake a redress calculation in line with the regulator’s pension review guidance as updated by the Financial Conduct Authority in its

Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers.

My understanding is that Mr M has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of the decision.

Utmost Life and Pensions may wish to contact the Department for Work and Pensions (DWP) to obtain Mr M's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr M's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr M within 90 days of the date Utmost Life and Pensions receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Utmost Life and Pensions to pay Mr M.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

My final decision

<u>Determination and money award</u>: I uphold this complaint and require Utmost Life and Pensions Limited to pay Mr M the compensation amount as set out in the steps above, up to

a maximum of £160,000. I also award an amount of £250 for the distress and inconvenience this matter has caused Mr M.

Where the compensation amount does not exceed £160,000, I would additionally require Utmost Life and Pensions Limited to pay Mr M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Utmost Life and Pensions Limited to pay Mr M any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Utmost Life and Pensions Limited pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M 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 Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 25 May 2022.
Paul Featherstone
Ombudsman