DRN-4597557

The complaint

Mr D complains about the advice JLT Wealth Management Limited ('JLT') gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr D was a deferred member of his employer's DB scheme. The scheme was in deficit. His employer was offering enhanced cash equivalent transfer values ('CETV') if members transferred out of the scheme. His employer hired JLT to give scheme members who wanted it independent financial advice, at no cost to the member, on the merits or otherwise of transferring out of the scheme.

Mr D attended a presentation given by JLT. He then completed a fact-find form giving some details of his circumstances. Amongst other things JLT recorded that:

- Mr D was 28 years old, single with no dependents.
- He had £40,000 equity in property.
- He had no savings or investments.
- He had unsecured debts of around £9,500.
- He had two other defined contribution ('DC') pensions which he was contributing to and which were then valued at around £5,800.
- Mr D said his attitude to risk was 80% adventurous and 20% speculative.
- He wanted to take the enhancement as a cash lump sum immediately to pay off debts.

In June 2010 JLT sent Mr D a suitability report setting out its analysis and recommendations. It recommended that Mr D should transfer his DB scheme funds to a named personal pension. It said his CETV was £7,432 and his employer would enhance this to £8,557.28. It said he could either transfer the full sum to a personal pension or take the enhancement sum as an immediate cash payment – net of tax and national insurance – of £997.58. JLT recommended Mr D transfer out of the DB scheme because, amongst other things:

- The growth rates required (the critical yields) to match the scheme benefits, which were 6.9% if Mr D transferred the full enhanced sum and 7.3% if he took he enhancement as a cash lump sum, were reasonable.
- It had calculated that based on Mr D's attitude to risk a critical yield of anything up to 8.6% was acceptable.
- He could receive a higher starting level of pension.
- It would give him control and flexibility over his pension.

Mr D accepted JLT's recommendation to transfer. He said he wanted to take the enhancement as an immediate cash lump sum. He also said that he wanted to transfer the funds to one of his existing DC pensions rather than JLT's recommended pension.

JLT wrote to Mr D. It said its recommended pension had an annual management charge or 0.32%. It added that it had no knowledge of the charge for Mr D's chosen DC fund and, if the charge was higher, could affect the critical yield on which its advice was based. It said that as Mr D wanted to proceed with the transfer but to a product it hadn't recommended it would treat him as an insistent client[1].

The transfer went ahead. Mr D took the enhancement sum in cash and transferred £7,432 to his existing DC personal pension.

In 2023 Mr D complained to JLT that its advice to transfer might not have been suitable for him. JLT didn't uphold his complaint. Amongst other things it said that it had calculated a hurdle rate[2] of 8.3% [sic - the figure in the suitability report was 8.6%] which indicated that the critical yields were achievable reducing the risk of a transfer. It pointed out that Mr D had gone against its recommendation for the chosen receiving scheme for the product.

Mr D brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He didn't think JLT had treated Mr D fairly. In short the Investigator thought Mr D's attitude to risk had been overstated and said the critical yields were too high and Mr D would most likely be worse off in retirement as a result of transferring. He said none of the other reasons for transferring justified the loss of guaranteed benefits from the DB scheme.

JLT didn't agree with our Investigator's complaint assessment. It said Mr D had selected the risk profiles himself after reading a description of those. He'd chosen an 80/20 split which indicated he'd spent time considering it. It added that if Mr D had followed its advice he would have invested in funds in line with his declared level of risk. It had no influence over the actual funds he invested in. It said its own actuaries had calculated the hurdle rate and were satisfied that it was reasonable. And its insistent client letter was clear.

As the matter wasn't resolved the complaint's been passed to me to issue 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 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 businesses ('PRIN') and the Conduct of JLT Sourcebook ('COBS'). And 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 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.

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[1] Where a client chooses to go against a financial adviser's recommendation, they are often referred to as an insistent client.
[2] The hurdle rate is another measure of calculating future investment returns.

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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator at the time, the Financial Services Authority ('FSA'), said in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, JLT should have only considered recommending a transfer if it could clearly demonstrate, on contemporary evidence, that it was in Mr D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Attitude to risk

I've seen the fact-find form that Mr D completed, which offered him the choice of five risk categories to self-define his attitude to risk. Mr D said he fell into the adventurous/speculative categories on an 80/20 split basis. Those risk categories were the two highest of the five offered on the form. The form explained that those risk levels are high or very high and investing with that level of risk could lead to large gains or losses.

I have little doubt that Mr D read the explanations of those risk levels when choosing them. But it's fairly unusual for an individual with little experience of investing in the financial markets to rate their own risk tolerance so highly. And I note that there was no figures given by way of examples which could have shown him what, in real terms he stood to gain or lose by investing with those categories of risk. For example, when describing risk categories it's common for advisers to show consumers what might happen to a hypothetical sum invested in various risk levels, which would show in monetary terms just how much could, potentially, be lost or gained. Further, there was no documented attempt by JLT to probe with Mr D why he felt able to tolerate such high risks, especially as it was his only guaranteed source of pension income outside of his state pension.

Mr D didn't have any savings or investments, other than small DC pensions And. It's not clear to me that Mr D had an understanding or experience of exactly what investment risk he would be taking on at this point. So, I'm not persuaded that his attitude to risk was as high as JLT believed it was. Mr D has given us details of the DC investments he chose to transfer the DB funds to, and those are lower risk than he gave to JLT. The information he's provided shows his risk tolerance in his chosen DC pension as being the fourth highest risk of a choice of seven. I appreciate that JLT wouldn't have been aware of that at the time it gave its initial advice. But I think that, when Mr D told it that he wanted to transfer the funds into that DC pension, it should have at least probed with him whether the risk level was in line with its recommendation in its suitability report. However, as far as I can tell it didn't do that. It gave a warning about fees reducing his investment returns and then said it was treating him as an insistent client without pointing out to him that a change in risk could alter the outcome of its advice. So I think JLT should have done more to ensure Mr D was aware of the importance of risk levels before going ahead with the transfer. And had it done so, I think it's likely JLT would have established that Mr D had a lower risk appetite than he'd given on his fact-find form.

Financial viability

JLT carried out a transfer value analysis report (as required by the regulator) showing how much Mr D's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

JLT advised Mr D 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. I'll explain that a discount rate is a measure of what an investment is likely to grow at in the future. We find it a useful tool to establish whether an investment is likely to match or exceed the required growth rates to make a DB transfer financially viable. I acknowledge that JLT was under no obligation to refer to discount rates when giving advice. But it was free to do so. And instead JLT calculated its own "hurdle rate" of 8.6%. That is an extremely high growth rate and almost at the 9% that was the regulator's upper projection rate at the time. So I think the discount rate would, in my view, be a more reasonable assumption by which to compare the benefits likely to be paid under a personal pension with

Mr D was 28 years old at the time of the advice and wanted to retire at 65. The critical yield required to match Mr D's benefits at age 65 was between 7.3% and 7.6% if he took his employer's enhancement as a cash lump sum. This compares with the discount rate of 7% per year for 36 full years to retirement. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%. I've taken this into account, along with the composition of assets in the discount rate, Mr D's attitude to risk and also the term to retirement.

In this instance the relevant discount rate is below the critical yield if Mr D took the enhancement as a cash lump sum, which he did. So I think Mr D was likely to receive benefits of a lower overall value than the DB scheme at retirement. But even if I accept that with a higher risk appetite Mr D could have matched or improved slightly on the DB scheme benefits there would be little point in Mr D giving up the guaranteed benefits from his DB scheme only to achieve a level of benefits outside the scheme that was broadly comparable to what he would receive from remaining in it. That's because, in order for the potential to improve slightly on the DB scheme benefits, he would need to put those funds at risk. And, if his investments didn't regularly perform at a high level, there was an extended period of poor performance or his investments suffered losses, that would most likely result in him being worse off in retirement.

Further Mr D would be required to pay the fees of his personal pension provider and those fees would reduce any gains made. But in the DB scheme those fees were met by his employer.

Also I don't think Mr D needed to make a decision to transfer when he did. I note that his employer was offering an enhancement but, in terms of his retirement provision, it was fairly small. And if he'd remained in the scheme he would have kept the potential option of transferring out of it nearer to his retirement age. Mr D was only 28 years old at the time of the advice. He was still around 36 years away from retirement. A lot could happen in that time. And if he'd remained in the DB scheme, he would have kept the secured benefits the scheme offered and wouldn't have to put his pension funds at investment risk. So, I don't think a recommendation that he transfer his DB funds when he was that far from retirement was in his best interests.

Paying off debts

Mr D said he wanted to take the enhancement as a cash lump sum in order to pay off debts. But there's no evidence that JLT challenged his motives for doing this or established if there were options, other than giving up his secure benefits from the DB scheme, for doing so.

I'll explain that JLT's role was to discern what Mr D's wants and needs were and why he wanted to transfer his pension. Its role wasn't simply to do what Mr D wanted without appropriate analysis and challenge of his motives for doing so whilst discussing the implications of those actions with him. But I've seen little evidence of such a challenge even though that would have been in Mr D's best interests. And the enhancement figure being offered wouldn't have cleared any of Mr D's individual debts. So I don't think JLT met its obligations to challenge Mr D's objectives in light of what he would be giving up. That also meant it didn't appropriately consider whether Mr D's aims could be met through other means without giving up the benefits from his DB scheme at all.

Flexibility and control

I don't think Mr D required flexibility in retirement. This is because, based on the evidence I've seen, I don't think he had a genuine need to access his tax-free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. Indeed there's no evidence this was discussed. And as I've said above, Mr D was only 28 at the time. So I doubt he had any concrete plans for retirement or would know if indeed he wanted or needed higher tax free cash lump sum or more flexibility in retirement.

Further, I accept that transferring would give him more control over where his pension funds were invested. The scheme trustees made those decision in the DB scheme. But Mr D wasn't an experienced investor. He did tick a box to say he would *prefer* to have control of his pension; but the question about that preference only had two options to answer, yes or no. And the question wasn't put into the context of giving up guaranteed benefits in order to obtain that control. So, I don't think ticking a box to express a preference of one choice over another is indicative of that preference being a financial objective. And, as I've said above, the question didn't ask Mr D if he was willing to give up safeguarded benefits in order to gain that control. I don't think that having control of his investments was worthwhile giving up the guarantees of his DB scheme for.

Also, as I've said above, as JLT chose to treat Mr D as an insistent client it didn't examine the fund Mr D chose to transfer to. However, for the reasons given above, JLT should not have recommended that Mr D transfer out of his DB scheme. And it was only as a result of JLT's involvement that Mr D transferred the DB funds to his personal pension. JLT's role was pivotal, since the eventual investments were fully reliant on the funds being transferred first. If that hadn't happened, Mr D couldn't have invested as he did. So, in my view, the entirety of any loss Mr D suffered stems from JLT's unsuitable advice to transfer away from his DB scheme.

Summary

I don't doubt that the potential for investment returns, flexibility and control on offer through a personal pension would have sounded like attractive features to Mr D. But JLT wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what Mr D needed and recommend what was in his best interests.

Ultimately, I don't think the advice JLT gave to Mr D was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr D 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 JLT should've advised Mr D to remain in his DB scheme.

Of course, I have to consider whether Mr D would've gone ahead anyway, against JLT's advice. I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the DB scheme, against JLT's advice. I say this because Mr D wasn't a particularly experienced investor and his DB pension was his only guaranteed source of income in retirement outside of his state pension. 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.

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

Putting things right

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

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.

For clarity, Mr D has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, as per the usual assumptions in the regulator'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 D'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 D redress as a cash lump sum payment,
- explain to Mr D 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 his DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts JLT's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr D 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 D's end of year tax position.

Redress paid to Mr D 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 Mr D would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr D'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.

My final decision

I uphold this complaint and require JLT Wealth Management Limited to establish if Mr D has suffered a loss and if so pay him the compensation amount as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 2 April 2024.

Joe Scott
Ombudsman