

The complaint

Mr H complains about the advice given by Utmost Life and Pensions Limited (Utmost) 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 H met with Utmost in October 1991 to discuss his pension and retirement needs.

Utmost completed a fact-find to gather information about Mr H's circumstances. Fairly limited information was recorded and nothing about his objectives nor the reasons for recommending a transfer.

Utmost advised Mr H to transfer his pension benefits into a personal pension and invest the proceeds in a managed fund.

Mr H complained in July 2022 to Utmost about the suitability of the transfer advice because he believed the advice hadn't been in his best interests. Mr H's representatives also said Utmost hadn't completed its regulatory duties during the Pension Review.

Utmost didn't uphold Mr H's complaint. It said the complaint was time-barred. It explained it had attempted to contact Mr H as part of the pension review in 1999 but its letters had been returned as gone away. And it had been unable to trace Mr H. It said had Mr H kept it updated with his address as he should've done so, he would've then become aware of his cause for complaint and so he is out of time. It also said it thought Mr H would've been aware of the publicity around the review and should've contacted it to ask for a review.

Mr H referred his complaint to the Financial Ombudsman Service. An investigator upheld the complaint and required Utmost to pay compensation. Firstly, the investigator explained he felt the complaint had been made in time. He said there was nothing to suggest Mr H had been aware of his complaint before he came into contact with the representative. Mr H hadn't received any of the correspondence regarding the pension review in 1999 and he'd seen nothing to say Mr H would've been aware of any media coverage regarding the review.

The investigator then issued his merits recommendation where he upheld the complaint on the basis Mr H ought to have been advised to remain in his DB pension. He said Utmost had failed to demonstrate the advice was in Mr H's best interests and it hadn't disclosed at the time all the relevant information to Mr H.

Utmost disagreed but hasn't provided any reasons regarding the merits as to why it felt the advice was suitable. Nor why it disagreed with the investigator's view.

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.

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. 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 advice was provided by Utmost in 1991. At this time it was part of the Life Assurance and Unit Trust Regulatory Organisation ('LAUTRO').

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.

Around six months after the transfer, LAUTRO produced an Enforcement Bulletin (16) which said that they anticipated that many consumers would be best advised to remain in their Defined Benefit Scheme. LAUTRO also said that its guidance should be applied to investigations of past complaints, which shows it was of the view that this was something its members should've already been taking into account before this bulletin was issued.

I've considered the advice given to Mr H with all of this in mind.

Before I discuss the merits of the transfer, for clarity I agree with the findings of our investigator regarding our jurisdiction to consider this complaint. Utmost has argued that Mr H has made his complaint too late as he ought to have been part of the pension review – but wasn't as he'd not kept his address up to date with Utmost. However, in considering when Mr H was aware or ought reasonably to have been aware of his cause for complaint, I've seen no evidence to suggest he ought to have been aware more than three years before he did complain. As part of the pension review process it was expected that firms would attempt to trace customers who were no longer at the held address. I can see Utmost did do this but in not being able to trace him – it's clear Utmost wasn't able to provide him with the information that could've made him aware of his cause for complaint at that stage. And as I've said I've seen no evidence to suggest there was another event at a date prior to him raising his complaint that ought reasonably to have made him aware of his cause for complaint. So I am satisfied he has complained within our time limits.

Mr H was 26 at the time of the advice and wanted to retire at 65. No reasoning for the recommendation from the time was recorded. There was a box on the form the adviser completed to show the reasons for the recommendation but it just said '*pension transfer*'.

The documents from the time of sale show that Mr H had a preserved DB pension, but the adviser didn't compare the benefits Mr H was giving up to the benefits the personal pension was projected to provide. The documents from the point of sale show what Mr H's preserved pension benefits were at the time of the advice but they don't show what they would be worth in retirement. I cannot see from the paperwork from the time which includes illustrations, that Mr H's existing benefits were ever set out or considered (other than the transfer value received from the DB scheme).

The new personal pension contract returns will no doubt have looked attractive especially at the then LAUTRO approved higher rate of return of 13% but Mr H was giving up valuable guaranteed benefits at retirement which weren't set out or compared with the potential returns applicable to the personal pension. Utmost ought to have set out a comparison between the two to give best advice. As the benefits given up on transfer are clearly an extremely relevant disclosure when considering the new personal pension contract. This is a failure of the LAUTRO rules.

As I've said above the documentation from the point of sale does show that limited information about the preserved pension benefits Mr H had was gathered but not what they would be worth in retirement, which I think gives an inaccurate view of Mr H's benefits in the DB scheme – if this information was relayed to him.

LAUTRO required advisers to deal fairly with their customers, but I don't think the advice given to Mr H met this standard as the adviser didn't take any care in checking whether what he was advising would likely provide better returns. Mr H was giving up a guaranteed, risk-free and increasing income. By transferring, Mr H was putting his guaranteed pension at risk in the hope of increasing its value in retirement through investment returns. But the evidence suggests this wasn't set out by the adviser, who only provided part of the picture to Mr H. This didn't meet the standards of advice required at the time and prevented Mr H from being able to make an informed decision.

Due to the lack of information gathered at the time and the lack of due care, skill and diligence applied by Utmost, it's now very difficult to say what Mr H ought to have been advised to do. However, it was generally considered the starting point was that it would be better to remain in a DB scheme, the adviser didn't meet even the basic expectations of the time and Mr H wasn't given enough information to make an informed decision – so I am upholding the complaint on the basis that Mr H would've been better advised to remain in his DB scheme. I've seen nothing by way of a counter argument or evidence to suggest the advice to transfer was suitable advice, nor that Mr H wouldn't have accepted advice to remain part of the DB scheme.

Putting things right

A fair and reasonable outcome would be for the business to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H 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, Mr H has not yet retired. So, compensation should be based on the scheme's normal retirement age, age 60 as this is when Mr H's preserved pension would've become payable, 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 H'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 Mr H redress as a cash lump sum payment,
- explain to Mr H 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 H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts Utmost's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr H 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 H's end of year tax position.

Redress paid to Mr H 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, Utmost 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 H'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

For the reasons explained I uphold this complaint and direct Utmost Life And Pensions Limited to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 6 August 2024.

Simon Hollingshead
Ombudsman