DRN-3214836

The complaint

Mr B complains about advice given by Andrew Colyer-Worsell trading as FixMyPension.com to transfer his executive pension plans (EPP) to a self-invested personal pension (SIPP).

Mr B has been helped in the complaint by his wife Mrs B, but the complaint is just about his pension. So for simplicity I've referred to any comments or submissions as if they were made by Mr B himself.

What happened

Mr B held two EPPs with provider S, valued at the time of the advice at just over £65,093 in total. In 2016 Mr B took advice from Mr Colyer-Worsell ("the advisor") trading as FixMyPension.com ("FMP") about taking advantage of "pension freedoms" legislation to cash in these plans. Mr B lives in France and at the time he and his wife were in the process of selling their business. They intended to purchase a buy-to-let property in the UK or Spain to boost their retirement income.

The fact-find completed by the advisor records Mr B's circumstances at the time as:

- Aged 64 and married, no dependent children
- Wishing to retire at 67
- Self-employed, living and running a business in France since 1998
- Intending to sell the business which he thought was worth £100,000
- Owned a property in France outright
- No UK income and no other savings or investments
- Attitude to risk (ATR) 2 out of 7

FMP advised Mr B to consolidate and transfer his policies to a SIPP with provider "A" in a flexi-access drawdown plan. For tax reasons FMP recommended Mr B take income spread across three tax years, taking 25% tax-free cash and then an annual income payment of £11,500 to utilise his personal allowance under UK tax rules.

Mr B accepted the advice and the transfer to A took place in June 2017, leaving Mr B with around £62,800 once the advisor's fee of 3.5% had been deducted. He was 65 by then and became eligible for a UK state pension, which gave him additional annual income of about £6,000.

In August 2017 Mr B took 25% tax-free cash (around £15,700) as his pension commencement lump sum (PCLS), and the remainder of his drawdown plan was invested in a mix of equities, property, bonds and some cash. In September 2017 Mr B withdrew £11,500 from the plan on which he paid some tax expecting to reclaim it back from HMRC. But for this and subsequent withdrawals Mr B found himself liable for both UK and French tax.

In 2019 Mr B complained the advice he'd been given wasn't suitable for someone living outside the UK. He discovered that French rules would've allowed him to take his whole pension as a lump sum taxed at a flat rate of 7.5%. This option hadn't been suggested by the FMP advisor.

FMP maintained the advice had been suitable. If Mr B's funds had remained with S he'd still have paid UK emergency tax - his UK state pension had caused the extra tax. FMP didn't think he'd be better off paying French tax at 7.5%. The advisor said Mr B should sort out the overpaid tax with provider A. But A said the application form had shown Mr B to be a UK resident, so it hadn't done anything wrong.

Mr B complained to this service saying he wanted to be put back in the position as if his pensions had never been transferred from S to A, all withheld tax repaid, FMP's fees refunded and compensation for the stress the situation caused and for the additional fees he'll have to pay to a new advisor to sort things out. An investigator at this service looked into the complaint and upheld it, as he said the advice wasn't suitable for Mr B as a non-UK taxpayer and he proposed two ways to put things right. FMP didn't agree saying the advice was suitable as Mr B had "maintained" a UK address as evidenced by the plan with S and his UK driving licence. They still thought Mr B could reclaim any overpaid tax from HMRC, A's charges were lower than he'd been paying with S and those he'd incur with an overseas plan. And Mr B had wanted the funds invested for growth and the investments recommended were appropriate for Mr B's ATR of 2 out of 7.

I issued a provisional decision on this case in November 2021.

my provisional findings (in summary)

I didn't think the advisor should have recommended Mr B transfer his benefits to a SIPP with A as it was clear from the application form and declaration which Mr B signed it's only for UK residents. The advisor was aware Mr B was resident in France (his French address is recorded in the letter of authority and fact-find) he'd lived there for over 20 years, was a French taxpayer and in receipt of a French state pension. Even if the advisor understood Mr B had "*maintained*" a UK address, (his UK correspondence address was reflected on his UK driving licence) I felt it was clear he wasn't actually a UK resident or taxpayer at the time the pension plan started.

A explained its customers can access their pensions from overseas by advising them in advance, and completion of Form R43 enables a citizen of the EEA to claim the same personal tax allowance as a UK resident. FMP thought Mr B would be able to reclaim all the UK tax he paid from HMRC, but Mr B believes he's been left with a shortfall giving rise to his complaint.

The evidence showed FMP had discounted an overseas plan because the charges would be higher. And that A's charges at 0.4% were far lower than Mr B had been paying to S. But I didn't think the lower charges themselves made the recommendation suitable.
So having established FMP's advice wasn't suitable I considered what Mr B would have done. I thought it most likely if he'd known he could Mr B would have taken an UFPLS of just over £62,800 (allowing for the advisor's fee) and accepted the relevant French tax. Taking into account the 10% tax-free allowance, the remaining £56,520 would be subject to tax at 7.5% (£4,239). So I calculated in the 2017/18 tax year Mr B would've had access to approximately £58,561. In addition he'd have his UK state pension of £6,760 per year, which it looked like he could've received without the deduction of UK tax by completing the relevant form.

So I then looked at what actually happened and from the available evidence Mr B has received the following cash amounts:

PCLS	£15,700

Net withdrawal (£11,500)	£7,842	(tax year 2017/18)
Net withdrawal (£5,610)	£5,160	(tax year 2018/19)
Tax rebates (total)	£2,330	
	£31,032	

Plus he still has £31,646 being the balance of his SIPP with A (as at Sept 2019) which remains invested, making a total £62,678. So based on this very basic calculation it didn't appear Mr B was financially worse off by not taking the UFPLS and paying French tax so I asked Mr B for evidence of the additional tax he'd paid. And if Mr B was worse off FMP I said FMP should pay interest to reflect that he didn't have access to his whole pension in the 2017/18 which prevented him using the funds.

So my provisional decision was that FMP should:

- On the production of suitable evidence reimburse Mr B the amount of additional tax he's been charged by the French authorities but not received a rebate for.
- Pay Mr B simple interest at 8% on £58,561 from 30 August 2017 to the date of my final decision to reflect the loss of use of the funds;
- Pay Mr B £500 for the trouble and upset caused by the unsuitable advice and its impact on his retirement plans

Responses to the provisional decision

Mr B accepted the findings and said the following (in summary)

- He provided evidence that he's registered for the French healthcare system (so wouldn't be subject to the 9.1% social charge in addition to the 7.5% tax charge);
- He couldn't confirm if he'd overpaid French tax but it's now too late to amend his 2017 French tax return. His new accountant provided an estimate of the tax he'd pay (€20,872) if he cashed in his entire policy with A this year, (but this calculation appears to be based on Mr and Mrs B's joint finances);
- He'd received tax rebates from HMRC of £1,223.02 in respect of 2017 and £334.59 for 2020;
- In 2021 he'd withdrawn the final £2,638.27 from the pre-retirement (cash) element of his plan with A;
- Mr and Mrs B had a mortgage offer in place and had embarked on the search for a Spanish property in 2019. They were interested in one for €169,000 but this didn't progress due to a family bereavement. A mortgage wouldn't now be necessary, but prices have risen prohibitively and changes in their circumstances, Mr B's age and poor health mean they are no longer pursuing this, although they regret not going ahead in 2019;
- The business (which had been marketed at €300,000) has not sold and now Mr B's son is going to run it, but they didn't need the sale proceeds for the buy to let purchase;
- Had things gone according to plan he'd have purchased a buy to let property in 2017 and received five years of rental income. While the pandemic might have prevented overseas visitors, income would've come from Spanish "*staycationers*";
- Mr B's wife mentioned their finances and tax position have been affected by inheritances following the death of her mother in 2019. But as this couldn't have been foreseen at the time of the advice it's not relevant for this decision.

FMP disagreed with my findings, making the following points:

- The advisor didn't know Mr B was intending to claim his UK state pension as soon as he became eligible, and if Mr B had asked he would've told him to delay so that the drawdowns fell within his UK personal allowance;

- Mr B's pension plan with A has benefitted from investment growth of approximately 7% so he's better off than if he'd transferred to an UFPLS in the 2017/18 tax year;
- They agreed to the £500 but nothing more as Mr B doesn't appear to have suffered a financial loss.

Having considered the responses from both parties I still thought the advice from FMP had been unsuitable.

But without evidence of additional French tax paid I'd seen nothing to dispute the calculations in the provisional decision which showed Mr B hadn't actually made a financial loss. As it appeared he'd received a total of £66,596 rather than the £58,561 he would've had, (plus the ongoing investment growth of his plan with A). And if he made no loss I have no basis to award redress. So I also compared the tax he should have paid (in France) of £4,239 and the tax he'd actually paid (£4,108) less the rebates he's received (£4,120) and this appeared to show he'd paid close to zero tax, which also meant no evidence of financial loss from the tax perspective.

So it seemed despite the unsuitable advice, Mr B was actually no worse off than he would've been. But I acknowledged he'd effectively put his retirement plans on hold so I still felt FMP should pay £500 for the inconvenience caused.

To avoid issuing another provisional decision I put these thoughts to both parties.

FMP agreed to pay £500.

Mr B was very disappointed and reiterated the following points:

- He'd always hoped to cash in his EPPs but the option of an UFPLS paying French tax was never put forward by the advisor;
- In 2017 the proceeds of the policies converted to Euros plus some savings would have been sufficient to purchase a buy to let property, but prices have risen prohibitively since;
- They'd started an online property search as soon as they found out the value of the policies but put it on hold while the complaint was ongoing. They didn't really want a mortgage at their age;
- The policies were a "*windfall bonus*" which they'd hoped to use to provide additional retirement income, but this freedom of choice has now been denied to them;
- Mr B didn't write the UK address on the application form, it must have been added later by the advisor;
- The transfer from "S" to "A" had been pointless;
- The advice hadn't been suitable for someone living outsider the UK and he's suffered financially from it;
- He wasn't happy with compensation of £500 and asked that I revisit the compensation originally awarded in the provisional decision;

So the case has been passed back to me for 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 considered the responses from both parties and read through the whole file afresh. Having done so I still think FMP gave Mr B unsuitable advice as the advisor (and Mr B himself) knew Mr B was not a UK resident for tax purposes at the time the pension plan with A started. Even if Mr B had been a UK taxpayer (which he wasn't) the additional income from his UK state pension reduced the amount he could withdraw annually from his pension plan and remain within the personal allowance.

Confusion was caused by Mr B's UK address which he'd provided to "S" as his "*new address*" and which showed on his driving licence. It transpired to be that of the friend who introduced him to the FMP advisor to be used as a temporary correspondence address if Mr B visited the UK once his business sold. It was never his residential address so shouldn't have been quoted on A's application form. The form details may have been completed by the advisor but the declaration at section 7 of the application form which Mr B signed on 30 May 2017 included nine short bullet points. One of which read "*I declare the information given in this application is correct to the best of my knowledge and belief*" and another one read "*I confirm that I am resident in the UK for tax purposes*". The sentence just above Mr B's signature read in bold "*I confirm that I have read and agree to the above Application Declaration".*

So Mr B had some responsibility for the accuracy of what he was agreeing to. But while both parties were aware Mr B wasn't a UK resident, it was FMP's responsibility to base their recommendations on Mr B's actual circumstances as a French resident and non-UK taxpayer. So I'm satisfied the advice wasn't suitable, even if the advisor wasn't aware of the possibility Mr B could take an UFPLS and pay 7.5% French tax.

On balance think if that option had been presented Mr B is likely to have taken it, assuming he met the eligibility criteria. Had he done so he would have had access to the funds in the 2017/18 tax year to use as he saw fit. Mr B has said these funds were never intended as his main retirement income but were a "*windfall bonus*" to be used to generate supplementary income, perhaps through the purchase or a buy-to-let property.

But while Mr B wasn't able to cash in his pensions as a lump sum as he hoped, I'm not persuaded the advice caused him a financial loss. While Mr B hasn't purchased a buy-to-let property so feels he's lost out on rental income, I don't think this was solely the responsibility of FMP. Mr B says they started a property search as soon as he had the valuation of his plan with S but put it on hold while the complaint was ongoing. He provided evidence of property searches in 2019 and says they had a mortgage offer at the time, but the purchase didn't progress for personal reasons, and they didn't really want to take on a mortgage. So it seems Mr B could've purchased a rental property if he'd wished to and repaid the mortgage with withdrawals from his pension or other monies, pending the outcome of the complaint, which I recognise has taken a long time to resolve. And in the meantime his plan with A has benefitted from investment growth. But some compensation is appropriate to recognise the impact of the unsuitable advice on Mr B's retirement plans.

Putting things right

I think £500 is fair to reflect the impact of the advice on Mr B's retirement plans.

My final decision

I uphold this complaint.

Andrew Colyer-Worsell trading as Fix My Pension should pay Mr B £500.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 10 March 2022.

Sarah Milne
Ombudsman