DRN-3330350

The complaint

Mr W complains that Bradbury Hamilton Limited (BHL) didn't provide him with a service despite charging him trail commission through his Self-Invested Personal Pension (SIPP). He'd like to be compensated for the commission and fees he's been charged since February 2018.

What happened

BHL bought the client book, which included Mr W, of an unconnected financial advisory firm in 2014. Mr W's SIPP had a trail commission arrangement in place from an agreement made between Mr W and his previous financial advisor. This arrangement was made before the introduction of the Retail Distribution Review (RDR) in December 2012.

The RDR prohibited commission payments to advisers for arrangements set up after 31 December 2012. But before the RDR, commission could be paid by the SIPP provider to the adviser as a set percentage of the amount investment amount. And advisers could also receive a regular commission known as trail commission. This could be a small percentage of the value of the fund and was designed to pay the adviser for ongoing servicing.

Mr W continued to receive investment support from his previous adviser – who didn't work for BHL – at no additional charge up to 2017. BHL told this service that 75% of the trail commission was paid to the original adviser who set-up the trail commission from the commencement of the acquisition contract in 2014 through to 2017. After the original's adviser's retirement, BHL provided Mr W with a new contact. Mr W felt that the new contact would provide the same support that he'd received from his original adviser. The new contact retired in November 2018.

In August 2019 BHL wrote to Mr W suggesting a review of his SIPP. This prompted a complaint from Mr W, who asked for a refund of commission and fees paid to BHL because he felt it hadn't been looking after his interests by reviewing his plans. He also removed BHL as his servicing agent.

BHL issued its final response letter in October 2019. It said that when it'd bought the client book from Mr W's previous financial adviser, that included buying the right to receive trail commission on his SIPP. BHL said that the commission represented "*delayed remuneration*" to which Mr W's original adviser had been entitled for setting up the SIPP. BHL noted that Mr W's original adviser had never worked for BHL. But that from 2014 onwards, the original adviser had continued to assist Mr W. BHL said it couldn't give Mr W advice as he'd not requested it. And he didn't have a client agreement with it, so it wasn't allowed to give him advice.

Unhappy, Mr W complained to this service. BHL didn't consider that this service had jurisdiction to consider the complaint. But in September 2021 this service concluded that we did have jurisdiction as we didn't agree that:

1. the complaint was out of time

2. trail commission is a service activity and as such isn't a regulated activity

3. Mr W wasn't an eligible complainant because there was no service agreement between him and BHL

After the jurisdiction decision, this service considered the merits of the complaint. We asked BHL if it had any further information for us to consider. But it said it had no additional information to add.

However, BHL said that as the trail commission was set up on a pre-RDR contract and no new fee arrangement for ongoing service had been set up, it had no obligation to provide any specific service level. And it also referred to a Financial Conduct Authority (FCA) document which it felt supported its view. It highlighted the following sentence from that document: *"However, a financial adviser or intermediary can continue to receive trail commission for advice on investments that you bought before 31 December 2012".*

Our investigator considered the merits of the complaint. He felt it should be upheld. He said the complaint centred on BHL's failure to "*undertake all ongoing client servicing requirements..".* He didn't agree that BHL should continue to receive ongoing commission while providing no meaningful service. He felt that BHL should return Mr W to the position he would've been in had the trail commission ceased after February 2018. He also felt that BHL should pay Mr W £500 for the trouble and upset it'd caused.

BHL didn't agree with our investigator. It agreed it hadn't informed Mr W at the time that his contact at BHL had retired in November 2018. But it didn't agree that it hadn't remained available to him. BHL also agreed that the letter it'd sent in August 2019 could've contained more accurate fund values, rather than being generic. BHL said it had done things for Mr W. It said it'd carried out a fact find. It said it had wanted to convert Mr W into a "*proper client, on a proper servicing agreement*". BHL didn't agree that it'd caused Mr W any distress, as he'd always been aware that the commission was being taken from his account. BHL also didn't agree that commission should be refunded from February 2018. It noted that most clients were only on an annual review. Therefore it felt it wasn't fair or reasonable to refund fees starting immediately from the last contact.

Although BHL didn't agree that it'd failed to provide a service it was contracted to provide, it offered to pay Mr W £1,000 as a compromise payment.

Our investigator put this offer to Mr W. But he didn't accept it.

As agreement couldn't be reached, the complaint came to me for a review.

I issued a provisional decision on 10 February 2022. It said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I intend to uphold it. But I don't agree with our investigator that BHL should return Mr W to the position he would've been in had the trail commission ceased after February 2018. I do however agree that some compensation for loss of expectation and for distress and inconvenience should be paid in this case. I'll explain why.

Were ongoing services specifically agreed through the trail commission?

Sometimes, it was specifically agreed that trail commission would entitle a consumer to further services, including regular reviews and other types of policy management. So I've

asked BHL if it knew whether this was a service which was agreed by the parties to be paid for by the trail commission. It confirmed that no service agreement was agreed with Mr W at the time his initial policy was set-up.

BHL said that the trail commission had allowed Mr W access to its firm if he needed a policy summary or any generic information about his funds. It said this also allowed the Discretionary Fund Manager (DFM) to request its assistance in completing Mr W's risk profiles when needed. But that, given Mr W hadn't wanted a service agreement, it hadn't been: "instructed or obliged to provide any specific service".

BHL also questioned what service Mr W had received from his original adviser up to 2017. It said that his funds were invested with a DFM. And that the DFM carries out the portfolio reviews. So it felt that although the original adviser may have continued to meet Mr W, it didn't know what those meetings entailed. BHL also said that it'd not seen any evidence of a specific service from the original adviser. And noted that it was in that adviser's interest to keep Mr W happy so that he didn't look for a new adviser. As if he'd changed his adviser, the trail commission would've transferred to the new adviser. It repeated that it was entitled to the ongoing trail commission as the successor business.

I've carefully considered all the evidence. While I acknowledge that no service was agreed to be included as part of the trail commission, I've seen no evidence that BHL ever explained to Mr W exactly what he could expect from them. I'll consider this point further in the "loss of expectation" section below. But before that, I'll look at trail commission more generally.

Pre-RDR commission

Commission is a difficult matter. It was normal with investments in the UK up to 2012. But the rules have changed since then. Although this complaint occurred after 2012, it relates to an investment taken out before then. So the pre-2012 position is relevant in this case.

In broad terms a consumer enters into a relationship with an investment adviser. The adviser agrees to give advice. And the consumer enters into a separate contract with the investment product provider. In the agreement with the adviser the consumer would agree that the adviser would be paid via commission paid by the product provider. And in the agreement with the product provider the consumer would agree to pay the charges for the investment.

Usually the adviser would agree they would give further advice if asked but that they were not obliged to do so. Often the adviser would stay in touch and offer to review matters from time to time. This appears to have been the case here until Mr W's original adviser retired.

The agreement as regards the payment of the commission involved an agreement between the adviser and the product provider. The product provider was paying the adviser for introducing the consumer's business to it. The consumer was not party to that agreement. The terms on which the product provider paid the adviser, how much, when paid, any terms relating to repayment and so on were matters between the product provider and the adviser.

The product provider might pay the commission in one lump sum. Or more normally it would pay part as a lump sum and the rest by instalments for as long as the investment continued to exist. The payment of the commission in instalments in that way is often called trail commission. And despite the fact that payment was paid over a long period, the payment was still for the introduction of the business to the product provider.

It's true that the product provider was able to pay the commission to the adviser as result of the charges it made to the consumer for the investment. But the consumer did not pay the commission, the product provider did.

Whether or not there was any obligation on the adviser to give any kind of ongoing service was a matter between the consumer and the adviser depending on what they had agreed between them. It was not determined by whether or not the product provider agreed to pay trail commission. The product provider paid the adviser for the service the adviser provided to it not for the service provided to the consumer.

In this case Mr W's original adviser had an arrangement with the investment provider and trail commission was paid. That adviser's firm sold the right to receive that trail commission to BHL as part of a bulk transfer to BHL. But BHL continued to return 75% of that commission back to Mr W's original adviser while he carried on supporting Mr W. When Mr W's original adviser retired, BHL introduced him to a new contact at BHL.

I don't agree with our investigator that the trail commission in itself created any obligation on BHL to provide a service to Mr W. I acknowledge that BHL did try to convert Mr W into a "proper client, on a proper servicing agreement". But note that Mr W was reluctant to sign a terms of business arrangement with BHL and to accept advice from it. But I do consider that, as I said in my jurisdiction decision, Mr W's refusal to sign didn't imply that he accepted that BHL should continue to receive ongoing commission without providing any meaningful service. I say this because, as far as Mr W was concerned, he'd had a meaningful service via BHL until February 2018. And from what I've seen, BHL didn't clearly communicate either the original post-transfer of business relationship, or how that relationship would change following the retirement of both Mr W's original adviser and the new contact.

Based on the above, in principle I don't consider that BHL did anything wrong when it continued to take the trail commission after its acquisition of the client book which included Mr W. But in practice, I'm persuaded that BHL's failure to clearly communicate with Mr W about the services he should expect to get from it led to a loss of expectation for him. I'll explain why.

Loss of expectation

I accept BHL's position that liability for the ongoing provision of advice hadn't been passed on as part of the takeover of the original advising business. But I don't consider that BHL made clear to Mr W exactly what he could expect from it immediately after the transfer of business, or after the retirement of his original adviser. Or after the retirement of the new contact. BHL has confirmed that it didn't tell Mr W about his new contact's retirement at the time. From what I've seen, Mr W saw very little change to the service he'd been receiving before the transfer until the new contact retired. It was only when he received the August 2019 letter that he felt he hadn't been getting the service he expected and complained.

So I've gone on to look at how the changes in contact were communicated to Mr W.

When BHL took over the book of business it wrote a letter, dated 29 March 2014, to the previous business. I've included an extract from this letter below:

"Bradbury Hamilton Ltd is now entitled to all commission payments and will undertake all ongoing client servicing requirements in respect of the above agency from this date onwards".

The investment platform provider also confirmed that on 19 May 2014, the adviser linked to Mr W's account changed to a named adviser at BHL. And that this continued until Mr W removed BHL from his account in August 2019.

Moving on to the letter BHL sent to Mr W in August 2019, this said:

"it appears that the fund mix in which the plan has been invested has not been looked at for some time. With this in mind there is a real concern that if this investment is not looked at soon you may find that the value of the investment could be adversely affected".

I can understand why Mr W would've been shocked to receive this letter. He considered that his investment had been subject to regular reviews through his fund managers and his "BHL adviser". I think this was a reasonable assumption based on what the March 2014 letter said and the investment support Mr W had continued to receive up to the retirement of the new contact in November 2018.

I acknowledge that BHL don't agree that it caused Mr W any distress. Its position is that he'd always been aware that the commission was being taken from his account. But I think that misses the point here. I understand that Mr W was shocked to find out that he hadn't received the service that he thought was being provided by BHL. It may be BHL's position that Mr W should've known that it wasn't providing the service he thought it was providing. But I consider that the 29 March 2014 letter reasonably led to quite different expectations about the service BHL was actually providing.

From what I've seen, Mr W felt that BHL was still providing an ongoing service to him. I've seen no evidence that he was explicitly told that he'd only get this service if he signed an ongoing service agreement with it. So I consider that it was reasonable for Mr W to believe that BHL was providing a service, despite the fact that he wasn't paying any fees other than the trail commission.

It would clearly have been better for Mr W if he'd been properly informed of any changes when they occurred. But even if that had happened, from 2012 onwards, all new advice was required to be paid for in the form of an up-front fee rather than through commission. So had Mr W wanted or needed advice any time after 2012 he would've had to pay for it regardless of who provided it.

It seems clear that Mr W was comfortable with how his investments had been operating up to February 2018. From what I've seen, that was the last time he had contact with his new contact at BHL before that contact's retirement. BHL has told this service that most clients are only on an annual review cycle. So disagree that it would be appropriate to take the last contact date as the point at which things went wrong.

From what I've seen, Mr W removed BHL as his servicing agent after receiving the August 2019 letter. I'm satisfied that he would've removed BHL earlier – most likely at the point his new contact retired in November 2018 – if BHL had clearly communicated at the time that there was no free ongoing servicing or advice provision connected with the trail commission. However, this wouldn't have meant that Mr W would've instead received the trail commission. So I don't consider that it should be returned to him for the nine-month period between November 2018 and August 2019. This is because he didn't pay the commission, the product provider did.

I'm satisfied that Mr W suffered a loss of expectation, rather than financial loss, when he found out in August 2019 that BHL hadn't been reviewing his plans. I acknowledge he must have been disappointed when he discovered that BHL weren't providing the support he'd expected. I believe that Mr W could reasonably consider that he hadn't received the service expected for a nine-month period between November 2018 and August 2019. I also acknowledge that it would've been a shock for Mr W to realise this service had not been provided.

I've also considered what BHL has said. And what it's offered to put things right.

BHL said that it should've told Mr W that his new contact had retired in November 2018. It noted that it had written to him in August 2019. And that it was still available to him. BHL agreed that the August 2019 letter should probably have contained more accurate fund values, as the generic nature of that letter had been one of the reasons for Mr W's concern. BHL said that it had done things for Mr W – for example a fact find. BHL also said that it had always wanted to have a proper service agreement with Mr W, which would've provided a defined service. But he had declined that. BHL felt it was unfair to say that it had tried to collect money for nothing from Mr W.

BHL offered £1,000 as a compromise payment to Mr W. I acknowledge that Mr W has rejected this offer. But from what I've seen, I consider that is a fair and reasonable offer under the circumstances. I consider that it would be fair compensation overall for both the loss of expectation and the distress the unclear communication has caused Mr W.

Response to my provisional decision

BHL didn't agree with my decision. It felt that I had mis-represented its offer to pay Mr W £1,000 to settle the matter. I can confirm that before I wrote my provisional decision, I did listen carefully and in full to the telephone conversation in which the offer was made.

BHL said that it had offered to settle the matter for £1,000 under the following circumstances:

1. It felt that our investigator was extremely biased against it. And that crucial evidence had been ignored. It also felt that accusations had been made that it wasn't providing the service it was obliged to. BHL felt that my provisional decision had since established that this was not the case.

2. Under the circumstances noted in 1., BHL felt that the complaint against it may be unfairly upheld, so made the offer to avoid that scenario.

3. BHL also made the offer to try to avoid further time-consuming investigations being necessary.

4. BHL said it was reluctant to spend additional time and resource dealing with this complaint as it'd been going on since 2019. It made the offer in the hope of concluding the matter more quickly.

BHL acknowledged that Mr W rejected its offer to settle. And this led to the investigation continuing. It had to spend further time and resources handling the queries. It felt strongly that my decision under the circumstances was unfair.

BHL explained why it felt my provisional decision to ask it to pay Mr W £1,000 was unfair:

1. It felt Mr W was always aware of the adviser charges that were being deducted.

2. It said it was entitled to collect the commission, as I had explained in my provisional decision.

3. It said that it wasn't reviewing Mr W's funds, and never had. It said that Mr W's previous advisers didn't review his funds either. And that his funds were reviewed by the DFM.

4. It said that Mr W regularly attended the DFM office. And that it now understood that his original adviser had also met him there. But it said that whilst that adviser might

have had an informal chat with Mr W about his investments, he wasn't carrying out a fund-related review.

5. It said it'd introduced Mr W to a new contact at BHL because it was assisting his DFM in carrying out the risk assessment when requested.

6. It said it wasn't obliged to introduce Mr W to any new adviser when that new contact retired. But that it had contacted Mr W in a reasonable timeframe and in good faith with a proposal to review his investments.

7. It acknowledged that the wording of its letter could've been different, but it didn't see why the letter had caused Mr W distress.

8. It didn't consider it'd done any wrong. It said it was always available to Mr W. And it was available to his DFM when they needed its support.

9. It didn't think it'd done anything to impact Mr W in any negative way.

10. It felt it unfair to award Mr W £1,000 compensation for the letter it'd written to him to invite him for a review of his funds. It felt that if it hadn't written to him, he wouldn't have had a reason to complain.

Mr W accepted my provisional decision. But made the following points:

- He felt that the resolution had taken too long and that my response was complex and difficult for the layman to understand

- He noted that his complaint had three parts and asked me to confirm that my decision covered all three aspects of his complaint

- Mr W said he remained unclear about what the trail commission had paid for after his original adviser retired

- He didn't agree that the trail commission was paid by the SIPP company. He said it came out of his SIPP funds. And therefore he did suffer financially.

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.

Although I've listed every point BHL made in response to my provisional decision, I consider that several of them aren't new points, so have already been addressed. However, I have carefully considered all of the new points BHL made.

I agree that Mr W was always aware of the adviser charges that were being deducted. I don't consider I ever said he wasn't aware of the charges. But I'm satisfied that he wasn't clear about the service he could expect to get for those charges. And while I agree that no service was guaranteed under the terms of the trail commission, one had been provided up to the retirements of first the original adviser, and then the new contact. Hence I concluded Mr W had suffered a loss of expectation at the point that he received the letter offering him a fund review.

I acknowledge that BHL said it wasn't reviewing Mr W's funds, and never had. And that his previous advisers didn't review his funds either as they were reviewed by the DFM. But Mr

W valued the service he received from his previous advisers. And was surprised when he found out he'd not been getting the service he thought he'd been getting. This is – in my opinion – because his expectations were never properly set after the transfer of the client book. On the contrary, the letter Mr W received after that transfer suggested that BHL would *"undertake all ongoing client servicing requirements in respect of the above agency from this date onwards".*

I can't comment in any detail on the services provided by Mr W's original adviser. All I can say is that Mr W wasn't unhappy with that service, or the one provided by the new contact at BHL.

Regarding BHL's point that it'd introduced Mr W to a new contact to assist his DFM when requested, I haven't seen evidence that this was ever explained to Mr W. Therefore I still consider that it was reasonable for Mr W to expect that new contact to provide the same support his previous adviser had done. I'm not saying that is what BHL was obliged to do. Simply that it never explained to Mr W what service the new contact was there to provide.

I agree that BHL wasn't obliged to introduce Mr W to any new adviser when his new contact retired. And that it contacted Mr W in good faith with a proposal to review his investments. But I've seen no evidence that this was ever made clear to Mr W. And previous communications from BHL, and the service its new contact had provided to Mr W, had led him to have a different expectation.

I acknowledge that BHL don't see why its letter offering Mr W a fund review had caused him such distress that I intended them to pay him £1,000 compensation. But that's not the case. The £1,000 compensation represents compensation for both Mr W's loss of expectation and the distress and inconvenience the lack of clarity around the service he could expect has caused. I consider that Mr W would've removed BHL as servicing agent before August 2019 if he'd known the extent of the actual service it was providing him with. I consider that the letter simply caused Mr W to realise that he hadn't been getting the level of service he thought he'd been getting. And therefore gave him a cause for complaint that he hadn't previously realised he had.

I accept that BHL was available to Mr W. And that it was available to his DFM when needed. But I disagree that BHL has done nothing to impact Mr W in a negative way. I consider that if it'd been clear to Mr W about the service he could expect, it could've prevented the complaint.

I acknowledge that BHL considers that the compensation I've proposed is simply for the letter it'd written to Mr W about a fund review. And that it considers that he would've had no reason to complain if it hadn't written to him. But I don't agree. I'm satisfied that Mr W would have complained at the point in time in the future when he found out what service he was entitled to. The reason I say this is that this was less than the service he thought he was getting. Mr W's expectations about the service had been set by previous communications and by previous advisers' actions. But the service he was entitled to under the arrangement he actually had with BHL was less than the one he thought he was getting. I'm satisfied that Mr W would've removed BHL as his servicing agent as soon as he found out the extent of the service BHL was obliged to provide. And it is for this reason that I still consider £1,000 compensation to fairly reflect the circumstances of this complaint.

I'll now consider the points Mr W has made. I'm sorry he feels that his complaint has taken too long to resolve. And that my response was complex.

Regarding Mr W's complaint having three parts: I can confirm that while my decision has focussed on the crux of Mr W's complaint, which was the money taken by BHL and the lack

of service provided, I've considered the other aspects of Mr W's complaint as part of that.

I acknowledge that Mr W has said he remains unclear about what the trail commission had paid for after his original adviser retired. And that Mr W feels that he did suffer financially due to the trail commission still being paid. However, I covered these points in my provisional decision. I apologise if I wasn't clear. But I don't feel I can usefully add anything further at this stage.

Having considered all of the points both BHL and Mr W have made, I remain of the view I set out in my provisional decision.

Putting things right

I require Bradbury Hamilton Limited to pay Mr W £1,000 to compensate him for the loss of expectation and distress its unclear communication has caused.

My final decision

For the reasons given above, I uphold this complaint. I require Bradbury Hamilton Limited to take the action detailed in the "Putting things right" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 23 March 2022.

Jo Occleshaw
Ombudsman