DRN-3391995

The complaint

Mr R complains about the level of service provided by Mercer Limited trading as Mercer Jelf Financial Planning ('Mercer') in relation to his self-invested personal pension (SIPP). He says despite acknowledging some errors, the amount of compensation offered by Mercer is too low.

What happened

Mr R had meetings with his financial adviser in 2015. The adviser recommended that he move his personal pension to a SIPP, with 50% of the funds invested into one fund (which I will call Fund A) and 50% into another fund (Fund B). He's had regular meetings with Mercer since then as part of its ongoing advice service.

At a review in January 2018 Mr R said he wanted a review every six months and Mercer's adviser said she would make '*appropriate diary adjustments to ensure half yearly reviews in September/January/February to their mutual convenience*.'

A suitability report was prepared setting out what was discussed at the meeting. Mercer recommended the following :
"*I recommend your investment continues to be invested 50% in [Fund A] and 50% in [Fund B]. We have previously confirmed to you in our report dated February 2016 why I consider these funds to be suitable for you. I confirm I consider these reasons to still be applicable*."

This report was sent to Mr R a few months after the meeting.

The next review meeting took place in March 2019. At that point Mr R was looking to make a gross contribution of £46,878 into his pension (by paying in a net sum of £37,502). The payment was made and the pension provider confirmed receipt of the funds on 25 March.

There was also a discussion about the returns on his investments. He wanted to consider switching the funds invested in Fund B to a different provider, because the performance of Fund B was relatively poor. It was agreed that the funds should be compared and a recommendation should be made, with fund switch forms provided once completed.

Mr R told Mercer the payment of £37,502 should be made into Fund A if the new fund it had advised should replace Fund B had not been set up in time.

In July 2019 Mercer realised that the pension contribution Mr R had made in March was still sitting in the cash fund and hadn't been invested as agreed. Although Mercer had prepared a report following the meeting (and dated 25 March 2019) Mr R hadn't received this so the forms hadn't been completed or returned.

The report and forms were issued in July 2019. The additional pension contribution of £37,502 was then invested into the new fund on 19 July and the switch from Fund B to the new fund was made on 22 July.

Mr R complained about the delays in carrying out the additional investment and the switch of funds. He said Mercer had agreed to monitor the fund performance and should have advised him to move his funds sooner.

Mercer accepted there had been some failings. It calculated that if the pension contribution had been made on 1 April 2019, and the fund switch had taken place on 2 April (which is what it said would have happened if things had not been delayed), he would have been £6,441.92 better off. So it made an offer of £5,153.54 (for the net payment into his pension) to compensate him for this. Mercer said 20% tax relief would be added to this figure to bring the total to £6,441.92.

Mercer also offered compensation of £200 for the distress and inconvenience caused to Mr R.

Mr R wasn't satisfied with this and brought his complaint to our service but our investigator didn't think the complaint should be upheld. He said:

- Although Mercer did agree to monitor the performance of the fund, it wasn't a straightforward situation of Mr R simply being given information and then switching; Mercer would have looked at various factors and then advised on the best course of action.
- Mercer's terms of business refer to an annual review – it monitors performance in general terms and reviews things at each meeting. That doesn't mean it would be actively monitoring all the time and alerting Mr R to poor performance in between review meetings.
- Switches take place as part of the annual review, which is when this might have happened. If Mercer had agreed to meet more often, that raised Mr R's expectations, but it doesn't necessarily mean the switch would have happened earlier.
- The fund Mr R moved into was a new fund, only available from February 2019. Even if it had been available earlier, the notes from previous meetings show he preferred a passive investment style and this only changed to a more active style in March 2019.
- Mercer shouldn't have agreed to monitor the funds if it couldn't fulfil that promise – but the harm caused is a loss of expectation rather than a financial loss.

Mr R didn't agree and set out some further points, including that:

- The investigator didn't correctly identify the nature of all his complaints, and key facts were overlooked. His complaint stems from the fact Mercer
  - ignored his specific instruction in relation to the investment of £46,887.50 which was left in cash uninvested for four months;
  - failed to do what it had agreed to do – namely, to monitor Fund B – and this caused a significant loss in value when the transfer was eventually made 16 months later.
- At the meeting in January 2018 it was agreed that because he was concerned about the performance of Fund B, Mercer would monitor this fund – and this agreement was later confirmed by Mercer in January 2020.
- It was reasonable for him to conclude from the suitability report sent in July 2018 that Fund B was being monitored.
- When the underperformance was brought to his attention, he immediately instructed a switch of investments. If he'd been told about the poor performance earlier, he would have taken that action earlier – and this should have happened in February or March 2018.
- The whole point of Mercer monitoring the fund was so that he could switch out of it, if it continued to underperform. That's what active management and active advice is all

about and what he was paying for. This didn't need to wait for the next review meeting – an email or letter would have been enough.
- The compensation in respect of the investment in March 2019 should be calculated from 20 March to 19 July 2019 (the date the investment actually took place).

Mr R also commented that Mercer should be asked to produce calculations of his loss so that, if he considers it necessary, he can take independent advice about the calculations.

The investigator considered Mr R's points but didn't change his view. So the complaint was passed to me to decide. I issued a provisional decision on the complaint saying I intended to uphold it in part. I set out my reasons as follows:

The starting point for considering the complaint is Mercer's terms of business, which form the basis of the relationship between the parties. These confirm that Mr R would be given advice after an assessment of needs; set out the basis for Mercer's charges; and say there will be an annual review, following which it will confirm any recommendations or changes that might be needed.

As well as the terms of business, Mercer has a general duty to treat its customers fairly; to deal with things in a reasonable time; and when giving advice, to provide enough information to allow Mr R to make an informed choice, and ensure the advice given was suitable for his needs.

I've taken into account these duties, as well Mercer's terms of business, when considering the complaint.

There are two aspects to the complaint and I will deal with each separately.

Mercer failed to act on Mr R's instructions in March 2019

When Mr R made the one-off contribution into his SIPP, Mercer should have invested those funds. This didn't happen until July because, due to an oversight, the letter of instruction wasn't sent to Mr R. It was only dealt with when Mercer realised the funds hadn't been invested as they should have been. There's no dispute about what went wrong here – the issue is how to put things right for Mr R.

Mercer has calculated the loss due to the delay between March and July 2019. The value if the additional sum had been added in March would have been £286,343.85. The actual value was £279,697.55. Taking into account the sums held in cash it calculated the loss to be £5,924.85. The calculations were based on the assumption the additional investment should have been made on 8 April and the switch of funds from Fund B should have happened on 10 April. After Mr R questioned those dates, Mercer agreed the appropriate dates to use were 1 and 2 April respectively and re-calculated the loss, reaching a sum of £6,441.92. From the information I've seen I'm satisfied the calculations were reasonable. So I don't think Mercer needs to take any further action.

Mr R has mentioned whether the payment should have been made gross or net. Where a business has offered to pay compensation into a pension fund, it may be treated as a personal contribution and qualify for tax relief. So I think it was reasonable for Mercer to pay the net amount. If it had made the payment gross, tax relief would be added, meaning he would be overcompensated.

Monitoring the performance of Fund B

There's a fundamental disagreement between Mr R and Mercer about what was supposed to happen.

Mr R says he raised concerns about the fund performance in January 2018 and Mercer agreed to monitor this and have reviews every six months instead of yearly reviews, but that didn't happen. He understood Mercer would be actively monitoring the performance regularly and would advise him if it was not performing well.

Mercer says that although it did say it would monitor the funds, that didn't mean it would be monitoring them closely on a day to day basis – all it meant was that it would review performance and advise him at the annual review meetings as to whether the investments were still suitable for him, or if he should move to different investments. And it says if Mr R wanted close monitoring, that was a higher level of service which would have been charged for.

I've considered this carefully and weighed up the comments from both Mr R and Mercer. It's clear Mr R was expecting the performance of his investments to be monitored. But looking at what was said at the time, I don't think it would be reasonable to expect Mercer to have monitored things that closely and alerted him as soon as there were any signs of poor performance. If Mr R wanted active monitoring in that way, he could have agreed a different level of service with Mercer – and would have been charged more for it. That wasn't, however agreed. In my view, what Mercer promised was to review the funds before each review meeting and then recommend whether Mr R should leave them as they were or make any changes. So I don't think it should have notified Mr R of any performance issues as early as February or March 2018 as he's suggested.

Having said that, Mercer gave a clear commitment to Mr R to have a review every six months rather than every 12 months – Mr R was told it would make dairy adjustments "to ensure half yearly reviews in September/January/February to their mutual convenience." I appreciate the terms of business refer to a 12 month review, but I agree with Mr R that Mercer varied those terms when it gave this specific commitment to him. In the circumstances, it wouldn't be fair for Mercer not to honour this agreement.

This was a specific commitment to have a review every six months. But Mr R didn't have a review meeting from January 2018 until March 2019 – over a year later. If Mercer had done what it agreed to do and there had been a review meeting in September 2018 as promised, the poor performance of Fund B would have been highlighted at that point. And if he'd been told about the poor performance of Fund B then, it's more likely than not that he would have switched at that point – since he did decide to make the change as soon as he found out the following March. He clearly had some concerns and I'm satisfied he would have made the change as soon as his concerns were confirmed.

For these reasons, I'm satisfied Mercer was in breach of the agreement it had reached with Mr R and he would have acted differently if that breach hadn't happened.

Putting things right

To put things right, the aim is to put Mr R in the position he would have been in, if the review had taken place as agreed in September.

When Mr R made the additional investment in March 2019, his instructions were that it should be invested in Fund A if the new fund wasn't available. And the new fund wasn't available until February 2019. So he wouldn't have been able to invest in that fund in September 2018. I think if he'd made the switch in September 2018, he would most likely have moved the funds to Fund A.

Mercer has already compensated Mr R for the loss between March and July 2019. So the additional calculation should cover the period up to 2 April. I don't know the exact date when a review might have taken place in September 2018. I think it would be reasonable to do the calculation using the period from 30 September 2018 to 1 April 2019.

Any loss Mr R has suffered should be determined by obtaining the notional value of the pension from Fund B on the basis that it had been in Fund A between those dates, and subtracting the value of the pension in Fund B at 1 April 2019 from this notional value. If the answer is negative, there's a gain and no redress is payable.

The compensation amount should if possible be paid into Mr R'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 R as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.

If Mr R hasn't yet taken any tax-free cash from their plan, 25% of the loss would be tax-free and 75% would have been taxed according to their likely income tax rate in retirement – presumed to be 20%. So making a notional reduction of 15% overall from the loss adequately reflects this.

Replies to the provisional decision

Mercer has accepted the provisional decision and has said if Mr R also accepts the findings it will finalise matters on the basis of the calculation set out above.

Mr R has provided further comments. He says:

- Although the provisional decision records that compensation has been paid to him by Mercer, that hasn't happened as he was required to sign a document in full and final settlement, which he hasn't done.
- In correspondence in January 2020, Mercer acknowledged that at the meeting in January 2018 it was verbally agreed it would monitor the performance of Fund B, which was under-performing compared to Fund A. So his expectation was that the two funds would be monitored against each other. This requirement wasn't recorded correctly at the time.
- In further correspondence in March 2020 Mercer again acknowledged that it had agreed to monitor the performance of Fund B.
- The performance of the two funds could have been monitored easily and should have been reported to him in a letter Mercer sent in June 2018, which discussed the two funds. If this had been done, he would have required the fund switch in June 2018.
- If Mercer had simply agreed to continue monitoring both funds as required by the terms of business it would have said so.

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.

Mr R maintains that Mercer should have been monitoring the performance of the two funds more closely and this had been agreed. And he says he should have been told about the underperformance in June 2018, in which case he would have requested the switch then. So I need to decide whether he's right about this, and the compensation should be calculated from that date rather than September 2018, as I proposed in the provisional decision.

I've considered what Mr R says but I'm not persuaded by his comments that there was an agreement in place for Mercer to monitor the two funds closely in the way he says. This would have been a change in the way it was conducting business with him. As Mercer says, if he wanted that type of active monitoring, that would have been charged at a higher rate. If Mercer had agreed to vary things it this way it's likely that would have been confirmed, together with the additional charges. The agreement to have more regular review meetings was confirmed in writing, but there was no such confirmation of any change to the monitoring itself. On balance, I'm not satisfied Mercer did agree to this.

So my view remains that what Mercer should have done was to honour the commitment it did make – to have a review in September. And if that had happened, then the funds would likely have been switched at that point. So Mercer needs to calculate whether any loss was caused by the failure to do this.

Mr R says the compensation Mercer agreed hasn't in fact been paid to him. I explained in my provisional decision why I thought the compensation was appropriate and that's still my view. So I don't think Mercer needs to do anything differently in relation to this part of the complaint. But if Mr R hasn't received that compensation, it should now be paid. In addition, Mercer should calculate whether there is a loss in respect of the delayed fund switch and if so, pay the additional compensation.

Putting things right

To put things right, the aim is to put Mr R in the position he would have been in, if the review had taken place as agreed in September.

When Mr R made the additional investment in March 2019, his instructions were that it should be invested in Fund A if the new fund wasn't available. And the new fund wasn't available until February 2019. So he wouldn't have been able to invest in that fund in September 2018. I think if he'd made the switch in September 2018, he would most likely have moved the funds to Fund A.

Mercer has already calculated the compensation for Mr R for the loss between March and July 2019 and offered compensation of £200 for distress and inconvenience. If these payments haven't been made, they should now be paid.

The additional calculation should cover the period up to 2 April 2019. I don't know the exact date when a review might have taken place in September 2018. I think it would be reasonable to do the calculation using the period from 30 September 2018 to 1 April 2019.

Any loss Mr R has suffered should be determined by obtaining the notional value of the pension from Fund B on the basis that it had been in Fund A between those dates, and subtracting the value of the pension in Fund B at 1 April 2019 from this notional value. If the answer is negative, there's a gain and no redress is payable.

The compensation amount should if possible be paid into Mr R'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 R as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.

If Mr R hasn't yet taken any tax-free cash from his plan, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional reduction of 15% overall from the loss adequately reflects this.

My final decision

My final decision is that I uphold the complaint in part and direct Mercer Limited trading as Mercer Jelf Financial Planning to take the steps set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 April 2022.

Peter Whiteley
Ombudsman