

The complaint

Mr P complains that AFH Independent Financial Services Limited (“AFH”) provided him with unsuitable advice about the transfer of some pension benefits to a new self-invested personal pension (“SIPP”) in May 2014.

What happened

Mr P has been assisted in making his complaint by a firm of solicitors. But, for ease, in this decision I will generally refer to all communication as having been with, and from, Mr P himself.

Mr P met with AFH in May 2014. The records from the time suggest that the meeting was intended to review Mr P’s provision for his retirement. At that time Mr P was aged 48 and living with his partner and their teenage daughter. He had what appears to be a deferred occupational pension from a previous employer, and further pension savings held within a stakeholder scheme. The advice he received from AFH only related to his pension savings held in the stakeholder plan.

AFH recommended that Mr P move his pension savings from the stakeholder plan into a new SIPP. It said that the stakeholder plan didn’t offer a sufficient range of investment funds to allow a suitably diverse portfolio to be constructed. And it noted that it didn’t offer the flexible retirement benefits Mr P would expect to need at retirement.

AFH did note in its suitability report that the costs of using the SIPP arrangement, including its ongoing advice fee, would be greater than Mr P was already paying. But it says that those additional charges could have been recouped by better investment performance. AFH measured Mr P’s attitude to risk as being 3, on a scale of 1 to 5. Mr P accepted AFH’s recommendation and moved his pension savings to the new SIPP. I understand that around two years later Mr P decided to transfer his pension savings once again – but AFH was not involved in that transfer.

Mr P’s complaint has been assessed by one of our investigators. He didn’t think the recommendation AFH had given to Mr P had been suitable. He didn’t see any reasoning to suggest why the investment funds offered by the stakeholder plan were insufficient for Mr P. And given the extended period left until Mr P’s retirement he thought any decisions about flexibility would have been better taken nearer the time. So he thought that, had AFH provided Mr P with suitable advice, he’d have left his pension savings within the stakeholder plan. So our investigator asked AFH to pay Mr P some compensation.

AFH didn’t agree with that assessment. It said that its fact find identified that Mr P was prepared to take on extra charges for the potential of a greater return. It said that he had a detailed understanding of the risks involved in the transfer as a result of his job. It said that its financial planning report clearly set out the costs involved in the transfer and the additional investment returns that would be required. And AFH concluded that any losses Mr P now faces are as a direct result of his decision to further transfer his pension savings without the advice of AFH.

So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr P accepts my decision it is legally binding on both parties.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr P and by AFH. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority ("FCA"). Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

The applicable rules, regulations, and requirements

Within the FCA's handbook, COBS 2.1.1R required a regulated business to *"act honestly, fairly and professionally in accordance with the best interests of its client"*.

The FCA's suitability rules and guidance that applied at the time AFH advised Mr P were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like AFH, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements of COBS 9.2.2R, AFH needed to gather the necessary information for it to be confident that its advice met Mr P's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

Mr P has said that the information that AFH gathered showed a significant inaccuracy. AFH recorded that Mr P was self-employed as a currency trader. And in its responses to our investigator's assessment it has used that information to support a conclusion that Mr P would have been well aware of the risks he was taking by agreeing to transfer in order to potentially achieve greater investment returns.

But Mr P says that the information about his employment was incorrect. He says that whilst he had previously undertaken some currency trading activity, his main employment was as the owner of a gift and sweet shop. And he says that later, after suffering from ill-health, he took a role as a caretaker, that he still holds today.

In some circumstances the difference between those two accounts might be significant and warrant greater investigation. However here, for the reasons I will now go on to set out, I don't think I need to explore in greater detail what Mr P's employment circumstances were at the time the advice was given.

Mr P was seeking advice, and a recommendation, from AFH. It was AFH that was the expert when looking at the pros and cons of the transfer, and how Mr P could best use his pension savings to provide for him when he retired. Whilst it needed to ensure that it gave full and detailed information to Mr P to support its recommendation, it was primarily responsible for ensuring that the advice it gave was suitable for Mr P's circumstances. So whilst Mr P may, or may not, have had some financial experience he was entitled to rely on the advice that AFH gave to him when deciding how to proceed.

AFH advised Mr P to move his pension savings into a new SIPP. It said that his existing stakeholder plan could not provide the range of investments that would be needed to construct a suitable diverse portfolio. But I haven't seen anything that sets out in any level of detail why AFH thought that was the case. Its notes from the time suggest that the stakeholder plan offered up to 23 different investment funds that Mr P could use – and that at the time of the advice he was using ten of them. It doesn't seem to me that there was anything unusual about Mr P's circumstances that he might have needed more bespoke investment funds, or significant additional diversity.

By agreeing to transfer his pension savings, Mr P needed to pay a fee of 2% of their value to AFH. I understand that fee was only due if he agreed to the transfer, so there was a clear conflict of interest in the advice that AFH gave. Without recommending the transfer took place, AFH would not receive a fee for its advice.

AFH's analysis showed that the charges Mr P would need to pay following the transfer would be much higher than those he was paying on his stakeholder plan. On his current plan AFH identified that Mr P was paying an annual management charge of 1%. If he agreed to the transfer to the SIPP Mr P would need to pay an average fund management charge of 0.84% plus a charge of 0.4% to the SIPP administrator. And AFH would add its own on-going management charge (in addition to the 2% initial advice charge) of 0.75% per annum. Overall AFH calculated that Mr P's pension investments would need to return an additional 1.37% per annum to recoup the additional charges.

I think it is reasonable to conclude that the information AFH provided did make these charges differences clear. But I don't think that is the end of the matter. AFH was providing Mr P with advice, and needed to ensure the approach it recommended would be in his best interests. I haven't seen anything that persuades me AFH had any evidence-based expectation that the transfer to the SIPP would result in Mr P being better off. It is clear that the charges would be higher. I don't think there were any reasonable grounds to conclude that the alternative investment approach it was recommending would produce sufficient excess returns to justify those additional charges.

AFH also noted that the stakeholder pension didn't offer the flexible retirement benefits Mr P would expect to need at retirement. Again, I haven't seen any contemporaneous evidence to support that conclusion. Mr P was aged 48 at the time. I doubt that he had a clear understanding of when he would retire, let alone what form he might want his retirement benefits to take. I agree with our investigator that any decisions intended to provide the basis on which Mr P might take his retirement benefits would have been better taken nearer to the time of his retirement. At that point Mr P would be able to better articulate his needs in retirement, and the regulatory landscape would be set. I don't think that there was any need to transfer Mr P's pension savings, for this reason, from the stakeholder scheme at that time.

Overall I don't think it was appropriate for AFH to advise Mr P to transfer his pension savings into the SIPP. I haven't seen anything to persuade me that he needed the additional flexibility and investment funds that the SIPP would offer to him. And I'm not persuaded that any investment performance improvements would have been sufficient to outweigh the

significant additional charges Mr P would need to pay. So I think that Mr P's complaint should be upheld and AFH needs to put things right.

As part of its submissions to us AFH has said that Mr P's losses have arisen from his decision to make a further transfer of his pension savings from the SIPP it recommended. I don't agree with that conclusion – it was AFH's advice that led to Mr P moving his pension savings to the SIPP and it is at that point that his losses arose. But I accept that AFH shouldn't continue to carry responsibility for Mr P's pension savings once he had made a further decision on their investment without the involvement of AFH. So my redress below will only cover the period between the transfer into the SIPP in June 2014, and the transfer out of the pension savings in March 2016.

Putting things right

My aim is that Mr P should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr P would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr P's circumstances and objectives when he was advised to make the transfer.

What must AFH do?

To compensate Mr P fairly, AFH must:

- Compare the performance of Mr P's investment with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- AFH should add interest if necessary as set out below:
- AFH should pay into Mr P's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If AFH is unable to pay the total amount into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr P won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age.
- For example, if Mr P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Should this compensation not be paid with 28 days of AFH being informed of Mr P's acceptance of my final decision, simple interest at a rate of 8% per annum should be added to the compensation due from the date of my final decision to the date of settlement.

Income tax may be payable on any interest paid. If AFH deducts income tax from the interest it should tell Mr P how much has been taken off. AFH should give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional investment returns
Transact SIPP	Transferred out	Notional value from previous provider	Date of investment	Date of transfer out	In line with the growth on the consumer's current pension from 3 March 2016 to the date of this final decision

Actual value

This means the actual amount paid from the investment at the end date.

Notional Value

This is the value of Mr P's investment had it remained with the previous provider until the end date. AFH should request that the previous provider calculate this value.

Any withdrawal from the Transact SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if AFH totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, AFH will need to determine a fair value for Mr P's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr P wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr P's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that AFH Independent Financial Services Limited should pay the amount calculated as set out above. AFH Independent Financial Services Limited should provide details of its calculation to Mr P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 15 August 2022.

Paul Reilly
Ombudsman