

## **The complaint**

Mr C complains via a CMC, about the advice he received to transfer his pension by EB Associates Group Limited (EBAGL).

## **What happened**

I set out the background in an earlier provisional decision. For clarity, I repeat it here.

Mr C is represented in his complaint by a third-party CMC but for ease I will refer to Mr C throughout my decision.

On 25 April 2019, Mr C complained to EBAGL about advice he received to transfer his pension. His complaint raised the following points:

- Mr C was vulnerable, and no third person was present at the meeting
- Fees were excessive and unnecessary with ongoing fees being charged moving forward.
- The past performance of the ceding fund was not comparable to that of the recommended fund, as it was a different asset class. This was misleading as it exceeded the sector average over the one-year term. (It was compared to sector average)
- The new fund was recommended as being an actively managed portfolio. This is misleading as 80% of the fund is aligned to a model portfolio.
- The model portfolio's asset allocation appears not to mirror a low risk approach containing higher risk offshore equities subject to exchange rate and macroeconomic risks.

On 20 June 2019, EBAGL issued its final response. It didn't uphold Mr C's complaint, it said:

- It was aware very early on Mr C was classed as a vulnerable client and had recommended Mr C had a third party with him when the advice was given but Mr C declined as he "had no-one to be with him" and he said "it's ok, I'll be fine honestly"
- The fees and charges were clearly explained in the telephone advice given and Mr C was told the ongoing service was also optional. This was further set out clearly in the suitability letter.
- The recommended fund had a higher annual management charge than the ceding fund, because it is a multi-manager blended fund, offering an element of active management. The ceding fund was a passive tracker fund invested in high risk equities which was no longer suitable for Mr C's assessed attitude towards risk.
- The suitability report shows the ceding fund was compared to its subscribed benchmark to give context to the figures.
- The model portfolio is a blended portfolio, investing in a selection of active and passive funds. It is managed by a discretionary fund manager who monitors

the covariant volatility and ensures consistency. The illustration shows a breakdown of the funds held within the model portfolio. With the exception of one fund, all are actively managed.

- The model portfolio subscribes to Distribution Technology risk rating and has been officially approved as suitable for a Dynamic Planner risk rating of 3. On this basis EBAGL assessed it met Mr C's attitude to risk profile and the advice was suitable.

Mr C was dissatisfied with the outcome and brought his complaint to this service.

An investigator looked into things. In his first view, he listened to the telephone calls and looked at all the documentation. He found EBAGL had given Mr C time to consider the advice. He found the suitability letter to be clear, explaining the recommendation and charges fully. He found EBAGL had recognised Mr C's vulnerability and had asked him to have a third-party present, but he declined to do so, as was his right. He felt Mr C had indicated he understood the advice during the telephone calls and so he didn't uphold his complaint.

Mr C disagreed and after requesting a copy of the calls, his CMC pointed out a number of inconsistencies that it believed affected the suitability of the advice. It said:

Mr C said in the telephone call he didn't believe he would reach the age of 65. It felt this was something that should have caused a discussion of Mr C's health and wellbeing, as well as the reasons why he believed this to be the case, but this doesn't appear to have taken place during this call. It also runs counter to the retirement age that is quoted on the suitability report, which is shown as 67.

There was also no recorded discussion of any alternatives to the SIPP recommended including switching funds within his existing pension, which may have been more suitable.

Our investigator considered the additional submissions from Mr C and issued a second view. In it he said that the inconsistencies brought to light and shed doubt on the suitability of the advice Mr C had been given by EBAGL. He found that Mr C had been placed in a pension that carried significantly higher charges than appeared necessary. He also questioned whether it truly met Mr C's risk profile of being a low risk investor as per the suitability report. He thought the fees and the potential performance concerns meant there is a significant chance that Mr C is in a worse position than he would have been in an internal transfer had been considered. He found that the advice to transfer was potentially unsuitable and as such he asked EBAGL to put things right.

EBAGL disagreed. It didn't agree that Mr C's health condition would have changed the advice it gave and didn't accept the risk profile of the recommended plan to be unsuitable. But it did concede that there was little evidence that a full discussion had taken place regarding alternative options within the existing providers funds. It seems to suggest that had an internal fund switch been carried out there would have been an internal charge of 1%. It has carried out a calculation and has determined the redress amount of £189.81, including interest for the last 3.5 years. It also offered Mr C an additional £100 for the trouble and upset this matter has caused.

The CMC, on behalf of Mr C did not accept that the offer reflected the actual losses occurred and so it asked for an ombudsman review.

In my provisional decision, I considered COBS 2.1.1R requiring a business to "act honestly, fairly and professionally in accordance with the best interests of its client". I explained that in order to ensure this was the case, and in line with the requirements in COBS 9.2.2R, the

advisor needed to gather the necessary information for it to be confident that its advice met Mr B's objectives. It also needed to ensure that Mr B had the necessary experience and knowledge to understand the risks he was taking. Broadly speaking, that section sets out the requirement for a regulated advisory business to undertake a "fact find" process. Once the fact finding was complete, COBS 9.4.7R required a business to "explain why the firm has concluded that the recommended transaction is suitable for the client" - in other words, it needed to provide its client with a suitability report outlining its advice and the reasons for it.

I explained, in 2009 the regulator published a checklist for pension switching. It highlighted four key issues it thought should be focussed on – Charges (has the consumer been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?); Existing benefits (has the consumer lost benefits in the switch without good reason?); Risk – (has the consumer switched into a pension that doesn't match their recorded ATR and personal circumstances?); Ongoing fund management (has the consumer switched into a pension with a need for ongoing investment reviews, but this was not explained, offered or put in place?)

There is no recording of the initial fact find available, only a recording to confirm Mr C wanted to proceed with his appointment and a recording of the recommendation call. But in the absence of any further recordings or minutes of any subsequent discussions I think there are some anomalies between the detail in the suitability letter and its accuracy in reflecting what was actually said in the telephone calls available.

*So, was Mr C a vulnerable client and was he treated fairly by EBAGL?*

I said I didn't think there was any doubt that Mr C was a vulnerable client at the point EBAGL gave him advice and they have confirmed this was acknowledged by their representative in the call confirming his appointment. I listened to this call and the representative did ask Mr C to have someone else present and explained this was due to him being then unemployed and suffering from health difficulties. Mr C disclosed his health conditions on the application form, so I do think this was acknowledged by EBAGL.

The suitability letter also confirmed the adviser assessed Mr C as a vulnerable customer and that, as such, a third party should be present at all future meetings. I said I couldn't see from the evidence that there were any subsequent meetings. But, treating vulnerable customers fairly doesn't just end after an offer of the presence of a third party had been made. It was also incumbent on EBAGL to check Mr C's understanding throughout the advice process and with particular reference to key areas such as charges, his risk profile, how the investment worked and the funds he would be investing in.

*Was Mr C's current pension suitable for his assessed attitude to risk?*

I could see, EBAGL carried out a risk questionnaire and from Mr C's responses issued a risk profile report on 9 April 2018.

In summary, EBAGL found Mr C to score 3/10, indicated a low attitude towards risk-based investments and so this identified that Mr C's current pension investments didn't correctly match the risk profile that it had measured for him. Given, Mr C's pension plan was predominantly invested in international equities, I said I didn't find this an unreasonable assessment. So, I thought it reasonable to conclude that Mr C might want to consider changing the funds into which his pension savings were invested.

So, I went on to consider the recommendation call between the adviser and Mr C and compared this to the information in the suitability letter.

*Did the suitability letter accurately reflect the recommendation and advice in the telephone call?*

I said the first thing that struck me was that the recommendation call duration lasted just short of 17 minutes. Given that Mr C is an inexperienced investor and has been classed as vulnerable by EBAGL, that seems to be a very limited time in which to explain the details of the recommended pension transfer.

The suitability letter is dated 9<sup>th</sup> May 2018 and runs to 15 pages but refers to a discussion that has taken place on 29<sup>th</sup> May 2018. If the suitability letter had been issued prior to the recommendation telephone call, I would have expected the adviser to run through it with Mr C. There was no reference to the suitability letter in the call, so if this was issued after the recommendation call, I would expect it to accurately reflect the discussion.

I said in my view, there are a number of anomalies between what was said in the recommendation call and the information in the suitability letter.

The recommendation refers to Mr C's paid up Aviva personal pension plan and goes onto say the adviser has considered a number of factors including:

*"...your requirement to remain in a multi manager fund."* and

*"...your requirement to retire at age 67..."* and

*"you estimated you would need £6,000 per annum as a realistic income to aim for"*

I said from listening to the call, I didn't get the impression that Mr C had any idea of what a multi-manager fund is. Indeed, he said several times, he didn't understand pensions. There was no discussion about prospective income and Mr C said he didn't think he would live to 65 and wanted to be able to retire early and get his hands on his pension from age 55.

Aside from the explanation that the recommended portfolio split was 80/20 into the Model Portfolio 3 and Corporate Bonds. Mr C was provided with very limited information as to how the investment worked. There was no mention of different asset classes, how the fund could go up and down, rebalancing or the Discretionary Investment Manager (DIM).

The suitability letter indicates the ceding scheme charges are lower than the recommended scheme and it goes onto say:

*"I have considered the whether your investment requirements could be met by funds available in your existing scheme and there are no funds that would be suitable"*

I said I hadn't seen any evidence of a comparison of any funds available. Mr C's ceding scheme was with Aviva, who have a significant number of funds available and so I'm not persuaded a comparison to ascertain whether a suitable internal fund switch was carried out.

The suitability letter also references a discussion regarding stakeholder pensions but again this wasn't discussed in the recommendation telephone call I have listened to.

The adviser also didn't discuss the Key Features of the recommended plan or discuss the illustrations but rather arranges for them to be delivered to Mr C at a later date, so I said I couldn't see that the adviser checked his understanding of them.

Given Mr C's vulnerabilities and health issues I'm said I wasn't persuaded Mr C understood what the transfer involved, and I didn't find EBAGL had demonstrated that the advice to transfer his existing pension was suitable.

Given that the charges were a little higher in the recommended scheme and the recommended fund had only been in existence since 2013 and as yet didn't have a 5 year past performance, I'm not entirely sure how EBAGL expected a transfer to a new provider to significantly outperform a change in investment with Mr C's existing provider. And of course, I think being better off would be the basic expectation of Mr C in accepting EBAGL's advice. But by Mr C accepting the transfer EBAGL would be entitled to a significant fee equal to 5% of the transferred pension savings. That would put a long term drag on the value of Mr C's pension savings and he would need to see significantly improved investment returns over an extended period in order for the transfer to be beneficial.

I also said I hadn't seen any evidence that EBAGL provided Mr C with the ongoing advice it says he requested and for which it charged him.

So, on balance I said I didn't think the advice that EBAGL gave to Mr C, to transfer his pension savings to a new provider, was suitable. I also said I thought EBAGL should pay Mr C some compensation in relation to the advice fee he paid to the firm.

In order to put things right, I said had EBAGL provided more suitable advice, I think Mr C would have left his pension savings with his existing provider. I think that Mr C would have been suitably advised to reduce his overall risk exposure to be more consistent with his attitude to investment risk and proximity to retirement. And it's very likely that there would have been a range of funds within Aviva which would have been suited to this.

But rather than pick specific funds into which I think Mr C would or should have switched, and to also avoid the perception of doing so with the benefit of hindsight, I think it would be appropriate to use one of our benchmark indices to determine the return which Mr C would otherwise have received.

Mr C should then review his current pension arrangements and, if necessary, transfer into a plan, for example a low-cost stakeholder policy, and funds of his choosing, or which a further financial professional might deem suitable for him. As such, Mr C will likely need to seek further financial advice, and so, if the initial advice fee was paid separately from the reinvested pension funds, I think the EBAGL should return this to Mr C.

And, as I haven't seen any evidence on any ongoing reviews, I think it should also refund the ongoing service charges that it has received – if these were also paid separately from the pension funds.

If the fees were paid from Mr C's pension funds, then this will be reflected in the below comparison, and no further repayment to Mr C would be necessary.

So, to put things right EBAGL should compare the transfer value of Mr C's current pension plan at the date of any final decision along these lines, with the notional value, at the same date, of Mr C's (pre-fee deduction) pension funds had they been invested in line with one of our benchmarks.

The benchmark that I consider to be suitable is the 50/50 bonds/Income Total Return index benchmark. It's a fair measure for someone who wanted lower risk investments and the index is close enough to allow me to use it as a reasonable measure of comparison given Mr C's circumstances and risk attitude.

The compensation should be paid into Mr C's pension plan. 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 EBAGL is unable to pay the compensation into Mr C'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 compensation 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 C won't be able to reclaim any of the reduction after compensation is paid.

The notional allowance should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age. I think it's reasonable to assume that Mr C is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, as Mr C would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%. If either EBAGL or Mr C dispute that this is a reasonable assumption, they must let me know as soon as possible so that the assumption can be clarified, and Mr C receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

I said for the reasons I had given, I was currently minded to uphold this complaint and I intended to direct EB Associates Group Limited to comply with redress as detailed above.

I gave both parties the opportunity to make any further submissions they wished me to consider before issuing my final decision.

The CMC, on behalf of Mr C responded. It believed the transfer was from a final salary scheme and wanted to ensure the redress set out in my provisional decision reflected any losses from a final salary pension scheme.

EBAGL responded requiring clarification regarding the redress. It said it was already in the process of calculating an offer and hadn't requested a decision from an ombudsman. It was surprised to receive my provisional decision and asked for clarity on the approach it should take.

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### **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 thank both parties for their submissions.

In deciding this complaint I've considered 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 C and by EBAGL. 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.

Firstly, in response to EBAGL's request for clarification regarding the redress. I appreciate an offer had been made to Mr C, but the CMC on his behalf had rejected that offer and asked for an ombudsman decision. For this reason, Mr C's complaint was passed to me. Any redress or award should therefore be in line with that contained within my final decision.

I have then considered the assertion that this transfer was in fact from a final pension scheme. I have received no evidence from the CMC on Mr C's behalf, save for details of where Mr C's occupational schemes are or were held. I have received the transfer forms from Aviva. This was a unit linked scheme with no Guaranteed Annuity Rates (GAR's) or a GMP attached to this plan.

There were no challenges to the decision the advice given to Mr C was unsuitable and I'm satisfied the redress I set out in my provisional decision is fair and reasonable.

It follows that I have reached the same outcome as that of my earlier provisional decision.

### **Putting things right**

Had EBAGL provided more suitable advice, I think Mr C would have left his pension savings with his existing provider. I think that Mr C would have been suitably advised to reduce his overall risk exposure to be more consistent with his attitude to investment risk and proximity to retirement. And it's very likely that there would have been a range of funds within Aviva which would have been suited to this.

But rather than pick specific funds into which I think Mr C would or should have switched, and to also avoid the perception of doing so with the benefit of hindsight, I think it would be appropriate to use one of our benchmark indices to determine the return which Mr C would otherwise have received.

Mr C should then review his current pension arrangements and, if necessary, transfer into a plan, for example a low-cost stakeholder policy, and funds of his choosing, or which a further financial professional might deem suitable for him. As such, Mr C will likely need to seek further financial advice, and so, if the initial advice fee was paid separately from the reinvested pension funds, I think the EBAGL should return this to Mr C.

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The benchmark that I consider to be suitable is the 50/50 bonds/Income Total Return index benchmark. It's a fair measure for someone who wanted lower risk investments and the index is close enough to allow me to use it as a reasonable measure of comparison given Mr C's circumstances and risk attitude.

The compensation should be paid into Mr C's pension plan. 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.

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taxable income. Therefore, the compensation 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 C won't be able to reclaim any of the reduction after compensation is paid.

The notional allowance should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age. I think it's reasonable to assume that Mr C is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, as Mr C would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

I had asked If either EBAGL or Mr C dispute that this is a reasonable assumption, they must let me know as soon as possible so that the assumption can be clarified, and Mr C receives appropriate compensation.

I have received no further response with regard to the assumptions used within this calculation and so it stands as set out above.

### **My final decision**

For the reasons I have given, I uphold this complaint and I direct EB Associates Group Limited to comply with redress as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 28 June 2022.

Wendy Steele  
**Ombudsman**