

## The complaint

Mr C says the advice given and the arrangements made by Attanta Limited to switch his personal pension with Prudential into the Pointon York (PY) Self-invested Personal Pension (SIPP), with a discretionary fund management (DFM) arrangement through Reyker Securities (RS) and the resulting portfolio of investments, was unsuitable.

Mr C is represented by Mendelsons Solicitors (MS)

## What happened

Mr C was approached by a firm called IPS Invest Ltd to undertake a review of his pension arrangements. It then referred him to Attanta (trading as Harrison Charles Wealth Management) for financial advice. In October 2016 it held a telephone conversation with Mr C. It recorded that he wanted to switch his Prudential pension as he was disappointed with its performance.

Mr C's objectives were recorded in the following terms:

*"You have confirmed that your main objective is to ensure that your pensions are working as hard as they can for you. You want to maximise the growth potential of your pensions whilst maintaining investments...in line with your balanced attitude to risk. You are aiming to retire once you reach age 65 and expect that with the retirement provisions you currently have, you should be able to live in the same comfort you currently enjoy."*

*"You have accrued benefits over your working life from various occupational pension schemes, you currently have 3 pensions and would like to be able to eventually consolidate these into the one plan. All 3 of these plans are paid up (frozen) and you don't intend to make any future contributions."*

*"Your employer has recently introduced a workplace pension scheme which you will be enrolling into, you have stated that you wouldn't want to transfer any of your current plans into this due to the restrictive investment choice."*

*"...we have agreed to...immediately look at the Prudential plan. The Guinness Mahon pension plan is invested in investments that don't mature for another 3-4 years and as such this is to remain as is."*

Attanta produced a suitability report for Mr C dated December 2016. In summary it recommended he should:

- Switch his existing Prudential personal pension into a PY SIPP.
- Invest the funds in line with his assessed balanced attitude to risk through a DFM arrangement with RS and its Real Assets Balanced Portfolio.

Attanta's recommendations were implemented. The suitability report indicates a transfer value for Mr C's Prudential pension of around £97,200. After initial fees and charges around £94,700 was said to have been invested in his new SIPP.

In July 2020, on behalf of Mr C, MS raised several concerns with Attanta about what had happened to his pension arrangements in 2016. It cited a failure to meet its regulatory obligations. It said the advice to move from his existing pension had been unsuitable. He had a low tolerance for risk. It said the investments made with his pension funds had been inappropriate. It said Mr C had suffered significant financial detriment as a result of its actions.

Attanta responded to Mr C's complaint in September 2020, refuting all the points raised. It said its advice had been suitable for him.

The Investigator reviewed Mr C's complaint and upheld it. He had concerns about the advice Attanta provided, in particular in relation to matters such as costs of the new arrangement; the prospects for him to have been better off as a result of the transaction and aspects of his exposure to risk.

Attanta disagreed with the Investigator's findings and conclusions. It maintained its advice had been suitable, appropriate for Mr C's objectives, circumstances and risk outlook. It had performed proper due diligence on the DFM and SIPP provider and that he should direct any claim via the Financial Services Compensation Scheme (FSCS)

As both parties couldn't agree with the Investigator's view, Mr C's complaint was passed to me to review afresh and to provide a decision. This is the final stage of this Service's involvement.

### **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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr C's complaint. I'll explain why.

#### *How does the regulatory framework inform the consideration of Mr C's case?*

The first thing I've considered is the extensive regulation around transactions like those performed by Attanta for Mr C. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2 - which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3 - which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6 - which requires a firm to pay due regard to the interests of its customers.

- Principle 7 - which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like Attanta. As such, I need to have regard to them in deciding Mr C's complaint.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of "designated investment business" includes "arranging (bringing about) deals in investments".

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

When I consider a case where someone has switched their pension funds, I look at their circumstances at the time. Why were they interested in switching? Were those wants or needs reasonable? And so, should the adviser have recommended the switch?

Each case is different, but I'd expect the switch to be in Mr C's best interests to make the advice suitable. And in this regard, I'd expect to see a comparison was made between his former pensions and the recommended new arrangement.

In 2009 the Financial Conduct Authority (FCA), then the Financial Services Authority, published a checklist for pension switching that I think is still helpful today. 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? This could include the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits early.
- *Risk* - has the consumer switched into a pension that doesn't match their recorded attitude to risk (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.

It's also important to review the FCA's specific stance on advice provided about SIPP's. For example, in April 2014 it issued an industry alert which said:

*"Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable."*

*"If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole."*

Further, when considering the use of a DFM, the regulator has made clear that amongst other matters, firms need to take into account issues such as:

- Likely cost: do the overall costs justify the potential for improved performance?
- Size of funds under management: once a consumer has a moderately-sized fund, they may benefit from a model portfolio which is rebalanced automatically by a DFM ranging all the way up to bespoke arrangements for clients with larger funds.
- Investor's knowledge and experience: FCA has said the adviser needed a reasonable belief that the investor could understand the nature of the risks of the underlying investments the DFM might make.
- Level of disclosure: whether the benefits vs cost of the arrangement were explained to the investor in terms they were likely to (or appeared to) understand.

The regulator was clear there was a positive obligation on the adviser to carry out research, rather than supplying the DFM with a risk rating and hoping 'all will be right in the end'. They were recommending a DFM as a solution to their client's needs and that meant 'looking under the bonnet'.

*Did Attanta meet the regulatory obligations it was bound by when advising Mr C?*

I don't think Attanta met the requirements placed on it in this case. I'll explain why.

There are several documents relating to Attanta's transaction with Mr C that are important to my consideration, these include the fact-find, risk appetite questionnaire, pension replacement analysis form and the suitability report.

Attanta recorded that Mr C was 53 at the time of the advice. He was in good health and a non-smoker. He was married with two children. One child was at university while the other was in employment and soon to be married.

Mr C was employed as an IT manager with total annual income of around £79,000 per annum and had been in the same employment for 20 years. His household had total monthly net income of about £4,100 with monthly commitments of around £3,800. Mr C and his wife had total assets of £227,000 and investments of £30,000. Their home was subject to a small outstanding mortgage of approximately £32,000, with five years remaining.

In terms of pension provision, Mr C had a money purchase occupational pension through his employer with a current value of about £57,000 into which his employer was paying 4% of salary. He had a SIPP with Guinness Mahon valued at £190,000. And he had a personal pension with Prudential, which was recorded as being worth £85,000.

Mr C's main objective was recorded in the following terms (bolding is my emphasis):

*"During our meeting we discussed the importance of addressing specific objectives, **giving thought to specific target amounts required and the time in which you have to meet these targets.***

*"You have confirmed that **your main objective is to ensure that your pensions are working as hard as they can for you.** You want to maximise the growth potential of your pensions whilst maintaining investments in line with your balanced attitude to risk. **You are aiming to retire once you reach age 65 and expect that with the retirement provisions you currently have, you should be able to live in the same comfort you currently enjoy.**"*

There are some basic problems with the information Attanta has provided. For example, I can't see evidence of modelling carried out which shows how the advice it gave Mr C in 2016, came together to deliver his income requirements in retirement.

I can't see Attanta conducted a full comparison between his existing Prudential plan and the arrangement it was putting in place. And how this contributed to achieving his retirement objectives. I think such analysis would've been important to his being able to take an informed decision about what to do with his personal pension.

Attanta's role wasn't simply to facilitate what Mr C was said to have wanted. Its role was to have analysed, tested, challenged and advised him about what was in *his* best interest for retirement planning. It knew pension pots built up over many years are to provide for a retirement income.

So, these fundamental problems with Attanta's approach undermined the rationale for the switch of Mr C's personal pension. It recommended he switched into an PY SIPP, with a DFM arrangement though RS and to invest in a balanced portfolio of assets. There are a number of serious specific weaknesses with its advice.

### *Charges*

The charges for the new plan were disclosed as an annual fund charge of 0.9% equating to £848.65 and annual platform charge of £150 + VAT. Costs and charges between the new SIPP and the existing Prudential plan were compared. This showed the new arrangement would be slightly cheaper.

There are a couple of problems here. Firstly, I note that the RS portfolio Mr C was investing in also carried a dealing charge of 0.2%, this was omitted from the suitability report. But more significantly, on top of product charges, there would be adviser charges.

Attanta's charges were set out clearly in the suitability report. There was an initial fee of 3% of Mr C's fund value which equated to around £2,900. And an ongoing annual adviser charge of 1% of his fund, equating to about £970. These charges were to be taken directly from the new SIPP.

So, in reality the charges Mr C faced flowing from Attanta's recommendations were actually around 1% higher than he incurred under his previous arrangements. That meant in order for the proposed switch to be in his best interest, his new RS portfolio needed a realistic prospect of outperforming his Prudential personal pension – firstly to recoup the higher level of charges and then to deliver better returns to him.

Mr C wanted his pension to work hard and to maximise potential growth, while maintaining investments in line with his balanced attitude to risk. It was recorded he'd been very disappointed with the performance of his Prudential pension. Obviously, it wasn't for him to be the judge in terms of the prospects for improved investment returns under RS's management nor how this compared with his existing plan. Attanta needed to provide its assessment.

I can't see that Mr C was informed by Attanta about the performance of his former personal pension. In order to exceed the drag of increased costs and then provide an improved return on investment, there needed to be a reasonable prospect of significant performance improvement under the new arrangements. Further, I've not seen that he was provided with a comparison against the yield being targeted by RL's balanced portfolio.

On reviewing the factsheet for the Real Assets Balanced Portfolio recommended by Attanta, it shows a target return of 5 to 5.5% per annum. Analytic data summarised by Harrison Charles Wealth Management on 11 November 2016 shows that Mr C's existing Prudential pension plan delivered the following discrete annual performance: 2011 – 0.82%; 2012 – 11.02%; 2013 – 19.33%; 2014 – 8.81%; and 2015 – 6.09%.

As the Investigator noted in his view, this showed that in four of the preceding five years Mr C's existing pension investments had outperformed the return being targeted by his new SIPP investment. Further, his existing investments over that period had significantly outperformed the benchmark – FTSE All Share – Dec 85, whilst also being marginally less volatile.

Whether Mr C told Attanta that he'd been very disappointed with the performance of his Prudential pension, or as he remembers it Attanta telling his funds could be better invested elsewhere, the analysis indicates a fundamentally different picture. And it was Attanta's responsibility to have conveyed this clearly to him because it had to act with skill and care, and in his best interest.

Attanta hasn't responded effectively on this matter. It follows that it hasn't done enough to satisfy me there was a clear potential for Mr C to be better off, compared to his then existing personal pension, as a result of its recommendations, given the fees and charges he was incurring and the nature of the investment strategy it was recommending. The basis for its recommendation for him to switch was flawed.

### *Risk*

Mr C completed a risk appetite assessment. Attanta said he was a balanced investor. It went on to describe this in the following terms:

*“The Balanced investor may be somewhat concerned with short-term losses and may shift to a more stable option in the event of significant losses. The safeties of investment and return are typically of equal importance to the Balanced investor.”*

I'd start by noting that Mr C's former Prudential pension appears to have been a reasonable fit with his assessed appetite for risk, invested in funds with a volatility rating somewhat lower than the FTSE 100 index.

I think the assessment Attanta conducted of Mr C's risk appetite was a reasonable starting point. Mr C wasn't a novice in investment matters. Mr C wanted his pension funds to work hard and to achieve capital growth. And he had over 10 years until his planned retirement age.

The RS Real Assets Balanced Portfolio factsheet shows a 42.8% weighting towards property, 11.9% was equity related with the remainder being invested in alternative assets, other real assets, fixed income and cash. It shows a tolerance to volatility of 4 on a scale of 1-7. The time horizon for the investment was around 5 to 7 years and the loss capacity was indicated as somewhere between low and medium. Attanta Limited judged this investment to be consistent with Mr C's balanced attitude to risk.

Taken in isolation, the investment recommendation made by Attanta appears to be a reasonable fit for Mr C's risk outlook. But it needed to look more deeply and broadly.

The suitability report states that Mr C had previously invested in a range of products and had taken an active interest in following investment markets and reviewing his financial plans. Mr C says he had no investments outside of his pensions. The fact-find shows most of his

available funds were in a bank account. His wife had £6,000 in a PEP or an ISA. The fact-find also shows a combined total of 'other investments' to the value of £14,000.

Given the available evidence, I think it somewhat overstates the case to say Mr C was an experienced investor or knowledgeable about pensions. Of course, that's why he sought professional advice from Attanta.

Turning to Mr C's capacity for loss. The suitability report records he confirmed his financial position was such that any loss of capital would not impact on his standard of living or his objectives. He had sufficient resources in place that he could use for current everyday needs, and he was taking a long term view on retirement planning.

Mr C had less than £400,000 in pension provision at the time of the advice. He was also in the process of enrolling in his employer's workplace scheme. Given his objective was to maintain his current lifestyle in retirement, his capacity for loss was in fact limited. As the Investigator noted, he may've had sufficient resources for current everyday needs, however access to a pension income was not a current need and it was misleading to suggest he had sufficient capacity for loss on this basis.

The recommended transfer equated to more than 25% of Mr C's overall pension wealth. His other personal pension with Guinness Mahon was also heavily reliant on property assets. This meant, he had a lot of eggs in one asset basket. There's a potential lack of diversification across his pension provision Attanta should've been alert to and managed. Mr C's capacity for loss should've been explained and explored on this basis, and in the context of his other modest available assets.

Unfortunately, Attanta didn't provide an analysis of what level of income Mr C wanted in retirement, and how much his pensions would provide of that. And it didn't help him understand the balance between the investment risk he was taking and the fulfilment of his retirement provision, which he might have had to live off for up to 30 years.

#### *Ongoing fund management*

Mr C was said to have required active management of his pension. I'd note his Prudential investments were in four managed funds. It's not clear he would've appreciated this from the suitability report Attanta provided. Nor that he could've chosen up from around 40 funds. I've already noted the relatively good performance of his investments.

The DFM arrangement was introduced by Attanta. There was a duty of care on it to make sure the firm it was recommending was appropriate for him. But it's not clear to me he would've had a clear idea about the added value being provided by RS and Attanta respectively. Yet he was paying a lot of money for both services.

A key element of Attanta's recommendation for Mr C to switch his personal pension into the PY SIPP appears to have been the expectation the DFM investment portfolio would perform better than his existing plan. But that flies in the face of what we know about the targeted yield from the RS portfolio he was placed in compared with the performance of his former personal pension.

Mr C had limited investment experience, but he wasn't a sophisticated investor. His Prudential plan was modest at less than £100,000. Attanta hasn't done enough to demonstrate the recommendations it made to Mr C to establish a SIPP, with a DFM facility, investing in vehicles he had limited experience of, which also required its ongoing advice service, was suitable.

The arrangements Attanta put in place were over-engineered, complicated, relatively expensive and it wasn't clear they were reasonably likely to be able to produce a better return than his personal pension.

In responding to the Investigators' views Attanta noted the role of both RS and PY in what happened to Mr C. It says he should pursue those organisations for their failings. And that he could do so via the FSCS.

Where a firm concludes that it may be jointly liable along with another firm for the investor's loss then *generally* the firm that gave the first advice should review the whole period (including the period after the other firm became involved) and then seek to obtain redress from the other entity, as appropriate. But where a firm believes the causal link between the advice it gave and any ongoing loss has been broken, then the first firm *may* need only consider the period up to the second advice.

I've already highlighted some failings in the approach Attanta took with Mr C given his circumstances and objectives. These are around the basic rationale for switching, charging, the prospect of Mr C being better off as a result of its recommendations, its approach to risk assessment and the fund management arrangements.

Given Attanta's role which has seen Mr C switch his personal pension into a SIPP with his funds being invested through a DFM in funds that were said to be a match for his risk appetite, which I've found to be unsuitable for several reasons, it's fair and reasonable for it to provide compensation for any losses arising in this case.

Of course, it is a matter for Attanta if it wishes to pursue RS and PY for any acts and omissions which it believes gave rise to any element of the redress costs it now faces.

### **Putting things right**

Mr C can't benefit from double recovery of losses and compensation in respect of substantively the same case. As such, if he accepts this decision, he'll need to give an undertaking to assign any rights he has to take action against RS and PY and any associated redress, including from the FSCS, over to Attanta.

I'm upholding Mr C's case. So, he needs to be returned to the position he would've been in now - or as close to that as reasonably possible – had it not been for the failures which I hold Attanta Limited responsible for.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

**Decision and award:** I uphold the complaint. I think fair compensation should be calculated as set out below. My decision is Attanta Limited should pay Mr C the amount produced by that calculation – up to a maximum of £160,000.

**Recommendation:** If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Attanta Limited pays Mr C the balance.

This recommendation is not part of my determination or award. Attanta Limited doesn't have to do what I recommend. It's unlikely that Mr C can accept my decision and go to court to



ask for the balance. He may want to get independent legal advice before deciding whether to accept this decision.

If Attanta had provided suitable advice, I don't think Mr C would've switched his Prudential personal pension into a PY SIPP. It follows that I don't think he'd have taken on an RS investment portfolio.

So, Attanta Limited needs to provide redress as follows.

*1. Calculate a notional loss Mr C has suffered as a result of making the switch of his personal pension*

In respect of Mr C's former Prudential pension, Attanta should obtain its notional value as at the date of calculation. So, as if it hadn't been transferred to the PY SIPP. It will need to obtain the value of the plan as previously invested.

Attanta should then find the current (*actual*) value of his PY SIPP, including investments and any cash held. Concerning the valuation here – the approach to be taken is set out in step 2.

I'm not aware if Mr C made further contributions to his PY SIPP. Nor whether he's taken any benefits from it. After confirming the detailed position, then the value Attanta obtains or the calculations it makes should assume these adjustments would still have occurred and on the same dates.

The adjusted, as appropriate, like for like difference between the notional value of Mr C's former personal pensions and the current value of his SIPP will be his basic financial loss that Attanta needs to redress.

*2. Pay a commercial value to buy any investments which cannot currently be redeemed*

To close Mr C's SIPP and avoid ongoing fees, the investments need to be crystallised.

If, at the date of settlement, any residual investment is illiquid (meaning it can't be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Attanta should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If Attanta is unable to purchase the residual investment the *actual value* should be assumed to be nil for the purpose of calculation. It may wish to require Mr C provides an undertaking to pay it any amount he may receive from the investment in the future. This must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Attanta will need to meet any costs in drawing up the undertaking.

Had Attanta done what it ought to have done then there wouldn't have been a PY SIPP. So, it wouldn't be fair if Mr C continued to have to pay SIPP fees because of illiquid holdings preventing it from being closed. Ideally, Attanta would take over any illiquid holdings, thus allowing the SIPP to be closed. But third parties are involved, and I can't tell them what to do.

So, to give certainty to all parties, if there are illiquid holdings and Attanta is unable to buy them from the SIPP, then it's fair that it should pay Mr C an upfront lump sum equivalent to

five years of SIPP fees (calculated using the previous year's fees). This gives a reasonable period to arrange for the SIPP to be closed.

*3. Pay an amount into Mr C's pension pot so the value is increased by the loss calculated (resulting from 1 and 2) or pay him an equivalent cash sum notionally adjusted for tax.*

If compensation is paid into Mr C's SIPP, payment should allow for the effect of charges and any available tax relief, so that he is in the same position as if he'd stayed in his original personal pension scheme.

If paying compensation into Mr C's SIPP would conflict with any existing protection or allowance and / or the plan is closed and Attanta takes on his investments, then it should pay his compensation as a cash sum. In doing so it should make a notional deduction to allow for income tax that would otherwise have been paid.

The notional deduction should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age. For example, if he's likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if he would've been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Attanta Limited must pay the compensation within 28 days of the date on which this Service informs it that Mr C accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

Income tax may be payable on any interest paid. If Attanta considers that it's required by HM Revenue & Customs (HMRC) to deduct income tax, it should tell Mr C how much has been taken off. It should also give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC if appropriate.

Attanta Limited should also pay Mr C £250 for the stress and aggravation caused by persistently having to engage with a number of parties in order to attempt to resolve his concerns around the loss of his pension entitlement.

Attanta Limited should provide the details of the calculation to Mr C in a clear, simple format.

### **Further information**

There is guidance on how to carry out calculations available on our website, which can be found by typing 'compensation for investment complaints' into the search bar on our website: [www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk).

### **My final decision**

For the reasons I've already set out, I'm upholding Mr C's complaint. Attanta Limited must now put things right in the way I've outlined.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 29 November 2022.

Kevin Williamson

**Ombudsman**