DRN-3657298

The complaint

Mr H complains that he was provided with negligent advice by M&S Financial Solutions Ltd, an appointed representative of Pi Financial Ltd (referred to throughout as Pi) which has caused him to suffer a financial loss.

The complaint was brought on Mr H's behalf by a claims management company however for the purposes of clarity I will refer to all correspondence as having been received from Mr H.

What happened

In April 2017 Mr H met with an adviser from Pi in order to review a pension arrangement with Aviva which he had forgotten he had until he found some old correspondence relating to it.

At the time he was aged 66, married and already retired. The file confirms that the Mr H had completed his own cash flow forecast and was confident of having surplus income throughout retirement. An appendix of the suitability report shows him as having pension income of £650 per month and £5,000 per month from loan repayments. Expenditure was stated to be £1,200 per month. His state pension entitlement is unclear as the report states that Mr H should check his national insurance contributions to make sure he qualified for full state pension, although the fact find states that Mr H and his spouse believed that they would receive a full state pension.

Mr H's attitude to risk (ATR) was assessed to be adventurous following completion of a set of risk profiling questions, and discussion with the adviser. It is stated that he regarded his Aviva pension as a bonus (as he had forgotten about it) and therefore was willing to take a higher level of risk with it. Due to his income needs being met by other sources, it is stated that this fund was surplus to his requirements and he could therefore afford to take this higher level of risk.

The Aviva pension was worth approximately £75,800 and had no transfer penalties. It was invested in the Aviva defined benefit (DB) Replacement scheme, which was a scheme set up to buy out the benefits that had been available to Mr H under a previous DB pension scheme. The suitability report confirms that because the plan was a buy out bond it had a guaranteed income available on the GMP element (just over £73,000), which was £2,364 per year. This compared to £2,232 which would have been available on the open market (although Pi later corrected its comparison figure to £1,998).

Mr H wanted to take tax free cash from the pension and review how he could best take money on a flexible basis. His intentions for the tax free cash have not been recorded, nor the reason he wanted to have access to flexible income.

Pi recommended that the Aviva pension was transferred to a SIPP with Gaudi and invested on a discretionary basis within the Mercantile Invest Adventurous funds with Agincourt as the Discretionary Investment Manager. He was sent a suitability report confirming the recommendation dated 8 November 2017. He was charged an initial fee of 1.5% and an ongoing advice charge of 0.5%

A file note dated October 2017 outlines the discussion with Mr H about the Mercantile discretionary fund management (DFM) proposition, and details the reasons it was considered appropriate. It states "*Client liked the various components of the fund including ETFs (which I explained) and the fact they are prepared to alter a portfolio shows a flexible approach which would not be found in larger fund manager holdings*." It explains that fund choices were discussed at length and Mr H thought the recommended investment proposition was a good alternative approach to a normal fund manager's approach.

The suitability report in the appendix sets out the costs of establishing and administering the pension. However it did not fully disclose the total costs associated with the recommendation, particularly the investment costs.

The file note states that a SIPP had been selected as it offered flexibility on how benefits are drawn, and the fact they have online access by clients so they can find out how their pensions are performing. Mr H transferred his Aviva pension in line with the recommendation.

In March 2020, Mr H transferred his pension away from Gaudi to an alternative provider. Mr H complained to Pi about the advice he was given to transfer his Aviva plan. It did not uphold the complaint. Mr H referred his complaint to us.

Our investigator's initial view upheld the complaint in part. The investigator decided that the transfer to the SIPP itself was not unsuitable, however the recommendation to utilise the Mercantile Invest DFM adventurous portfolio incurred additional cost unnecessarily and was therefore unsuitable. Mr H accepted the investigator's view. Pi did not respond to accept or reject the view within the investigator's timescales and therefore the complaint was referred to me for a final decision. Pi has since responded with its reasons why it thinks the complaint shouldn't be upheld.

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.

The complaint is lengthy and highlights a number of issues. I've considered what I understand to be the key complaint point, namely whether a recommendation to transfer from Mr H's Aviva pension to a SIPP (to be invested via a DFM) was suitable. Having reviewed the file and considered Mr H's circumstances, I agree with the investigator's view, that the transfer to the SIPP was suitable but that the investment recommendation was not appropriate.

When considering whether it was appropriate for Pi to have recommended that Mr H transfer his benefits from his Aviva pension arrangement to a personal pension and invest via a DFM portfolio, I have considered the relevant rules and guidance in place at the time, alongside Mr H's circumstances, objectives and previous knowledge and experience.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time, and carefully considered the additional submissions made by Pi. The FCA's suitability rules and guidance that applied at the time Pi advised Mr H were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Pi, 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.

I have considered whether Pi gathered the necessary information required to make a recommendation for Mr H, and I am not persuaded that they did. COBS 9.2.1R states;

"When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
(b) financial situation; and
(c) investment objectives;
so as to enable the firm to make the recommendation, or take the decision, which is suitable for him"

At the time of the advice, Pi gathered information relating to Mr H's income and objectives. However, whilst they did document the income being received at that time, they have not established a sufficient level of detail to allow a robust recommendation to be made. Firstly, relating to his financial situation, Mr H was receiving £5,000 per month as a loan repayment. However, Pi have not established how long this income would continue. The fact find states *"term not disclosed but believed to be over several years."* As this income would have been likely to be central to Mr H meeting his income needs throughout retirement, ascertaining how long it would last would have been a key factor in assessing any dependency Mr H may have had on the income available from his Aviva plan and, therefore, how much risk he could reasonably take with that pension. Alongside this, the fact find states that Mr H and his wife both had pension income of £650. There is no detail relating to this, however based on their ages at the time the fact find was completed (April 2017), it is more likely than not that this was the state pension.

The file notes dated October 2017 state that the client was experienced in relation to pensions and investments, however there are no details of how this experience was gained. At that time Mr H had cash savings but no investments, and his only recorded pension was the one being transferred. I am therefore not satisfied that Pi went far enough in establishing Mr H's experience, and gathering information to support the assessment of him as an experienced investor.

Mr H's objectives were not clearly detailed, and were stated to be to use his pensions in a tax efficient manner and to take the maximum tax free cash. The suitability report also states that *"in later years you wish to have the opportunity to draw monies when required."* Having considered this, I do not think that the objectives contain a sufficient level of detail for a robust recommendation to be made. Whilst Mr H appears to have had the attitude that his pension was surplus to his requirements as he had forgotten about it, Pi (in their role as his professional adviser) had a duty of care to understand any reliance M H may have had on the Aviva pension in retirement, alongside a thorough understanding of his circumstances and objectives, and to use this information to make a recommendation that was in Mr H's best interests. I do not believe that Pi have gone far enough in doing this, and done enough to meet the requirements of COBS 9 as detailed above.

I recognise Mr H may not have been particularly forthcoming on his financial affairs. But I don't think Pi should not have made a recommendation without having done more to obtain the missing information above. It means Pi have not met the COBS requirements to demonstrate how the recommendation to transfer was in Mr H's best interests.

When considering whether a transfer to a personal pension or SIPP was appropriate, I must consider whether the transfer offered a benefit to Mr H which would not have been available to him if he had retained his previous plan. Mr H's main recorded objective was for flexibility. This would not have been available in his previous plan which would have provided an annuity income for the rest of his life due to the majority of the fund being required to provide the GMP income. Although the reasons why Mr H wanted flexibility were not recorded, and the sustainability of income from a loan not probed, it seems to me that the Aviva pension did represent a pension that Mr H hadn't factored into his retirement planning, and his outgoings were – for the time being at least – comfortably being met. In that light, I don't think the greater flexibility offered by the SIPP was unsuitable. It would have given Mr H the opportunity to spend his "windfall" pension in the way he saw fit and doing so wouldn't have compromised his financial health in retirement.

However, I don't think the DFM arrangement was suitable. At the time the recommendation was made, the suitability report stated *"the charges for the new recommended funds are higher than those with Aviva but you believe that these will be recovered by higher growth although not guaranteed."* However, I don't think that higher growth could be relied upon and couldn't reasonably be used as a reason for Pi to recommend the DFM arrangement. The higher costs of a DFM arrangement *can* be justified if someone has a particular need for the features they bring; for instance, if someone has particularly bespoke investment needs. But I can't see why Mr H would have had a particular need for the features of a DFM arrangement given his needs and circumstances. There's a file note from September 2017 that references the fact that this particular discretionary fund manager was more "nimble" than larger competitors. But I haven't seen anything to show the financial benefit this would likely have brought Mr H or whether it would have been financially worthwhile to transfer because of it. And I haven't seen any other feature of the DFM arrangement that would have particularly appealed to Mr H or which couldn't be accessed through more traditional pooled funds at a lower cost. All things considered, therefore, I don't think I can reasonably say the DFM recommendation was suitable.

Furthermore, I have considered whether Mr H was fully aware of the level of the charges of the DFM recommended. The suitability report outlines the administration cost of the SIPP. However it does not fully state the investment management charges or include any sort of useful comparison of costs and what the impact of those costs would likely be over time. I consider this is a failing in itself under the regulator's principles (most notably PRIN 7) but it feeds into the lack of suitability of the recommendation because it wouldn't have been particularly clear at the time to the parties what drag on performance the charging structure of the DFM would have caused and whether that would have been acceptable to Mr H. In the circumstances, it's difficult to conclude Mr H was given the information he needed or that the DFM arrangement was suitable.

For the reasons stated above, I uphold Mr H's complaint in part. I agree with the Investigator's view that given Mr H's situation and circumstances the transfer to the SIPP was suitable. I also agree that Mr H did not need to invest his transferred fund in a DFM arrangement, and by doing so has incurred additional charges unnecessarily which cannot be justified. I believe it would have been more appropriate for Mr H to have been recommended to invest in a less complex solution which would have been available to him at a lower cost. Had Pi's recommendation been along these lines, I've seen no persuasive reason why Mr H would have gone against that advice and insisted on utilising a DFM arrangement.

Putting things right

Fair compensation

My aim is that Mr H 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 H would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What must Pi do?

To compensate Mr H fairly, Pi must:

- Compare the performance of Mr H's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- Pi should pay into Mr H's pension plan to increase its value by the total amount of the compensation and any additional compensation. 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 Pi is unable to pay the total amount into Mr H'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 H won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr H is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr H 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%.

Income tax may be payable on any interest paid. If Pi deducts income tax from the interest it should tell Mr H how much has been taken off. Pi should give Mr H a tax deduction certificate in respect of interest if Mr H 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 compensation
Gaudi SIPP	Transferred	FTSE UK Private Investors Growth Total Return Index	Date of investment	Date ceased to be held	Use the benchmark index on any loss from the end date to the date of settlement.

Actual value

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

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the Gaudi SIPP should be deducted from the fair 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 Pi totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr H wanted capital growth and was willing to accept a higher degree of investment risk.

- The FTSE UK Private Investors Growth total return index (prior to 1 March 2017, the FTSE WMA Stock Market Growth total return index) is made up of a range of indices with different asset classes, mainly global and UK equities. It would be a fair measure for someone who was prepared to take a higher level of risk to get a higher return.

My final decision

I uphold the complaint. My decision is that Pi Financial Ltd should pay the amount calculated as set out above.

Pi Financial Ltd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 17 April 2023.

Joanne Molloy
Ombudsman