

The complaint

Mr F complains about the investment performance of his self invested personal pension (SIPP). He says Killik & Co LLP (Killik) has failed to keep the commitment it made to outperform another SIPP he held with another advisory firm which took over the investment of the other 50% of his transferred Occupational Pension Scheme (OPS) benefits. He also complains about the fees Killik has charged.

What happened

Mr F was a deferred member of three OPS's. In 2016 he wanted to transfer the benefits of one of those schemes into a personal pension so he could pay off his mortgage and some other commitments. He agreed to transfer the benefits – valued at around £1,700,000 - to another adviser firm. But he also shared his plans with Killik, who he was already a client of, and it said it could provide greater returns than the other company. As a result Mr F decided to split the investment of the OPS transfer value between Killik and the other firm. Mr F said this meant he could easily compare the performance of both firms as they had similar amounts to invest starting at roughly the same time.

In a suitability report dated 30 November 2016 Killik confirmed its recommendation for Mr F to transfer £732,133 and invest into its 'balanced managed' portfolio – which it said was in line with Mr F's moderate attitude to risk (ATR).

In January 2020 Killik noted that, as of 18 December 2019, the SIPP was valued at £791,843 which meant it had increased in value by £59,710.

In February 2020 Mr F reviewed the performance and charges of the plans and calculated that his portfolio, which included the SIPP and an ISA, had gained £57,984 whereas he'd paid £60,109 in fees. He said the portfolio had underperformed in every area against the other one he held and thought it was unacceptable that he only managed to keep less than 50% of the share of profits.

Killik accepted that it had underperformed. It explained what it thought was the reason and confirmed its hope to "catch up" with the other portfolio before the end of the five year period that had been discussed in 2016. It also confirmed it had corrected an issue with some incorrect commission being deducted (over £11,000) and refunded that back to the portfolio. Following further discussions around the commissions deducted, Killik proposed a solution whereby it didn't charge any further commission until its portfolio was worth more than the other one Mr F held.

But Mr F wasn't happy and complained about the level of fees applied to his SIPP. He also complained about the investment performance of the portfolio.

Killik noted that its investment manager had reccredited Mr F's SIPP with a refund of some commission which should have been charged at a lower rate, and offered to suspend all ongoing commission charges until its performance exceeded the other SIPP. With regards to the assertion of poor investment performance, Killik noted that Mr F had asked for his account to be invested into equities rather than funds to achieve equity growth. It thought

that, along with aligning the account to Mr F's ATR, the portfolio it had managed for Mr F was suitable. But, as a gesture of goodwill, Killik offered to refund Mr F a total of £15,749.02 – which represented all its fees and commission received during 2019.

In March 2021 Mr F told Killik that he thought it had lost him £80,000 and taken fees of £65,000, whereas the other firms' portfolio had made him over £200,000. So he brought his complaint to us where one of our investigators looked into the matter, but he didn't think we should uphold the complaint. He made the following points in support of his assessment:

- Killik provided Mr F with a "rate card" alongside its suitability report which set out the total costs involved in the transfer and its ongoing management of the SIPP. He was satisfied therefore that Killik communicated its charges to Mr F and that they were "reasonable".
- He thought Killik's offer to refund the 2019 fees that had been applied to the SIPP was a reasonable resolution to the matter.
- He thought the method Killik had used to refund the commission that was overcharged in 2020 was in line with our approach.
- He thought Killik had made Mr F aware that investment returns weren't guaranteed and wouldn't consider "underwhelming" investment performance as a reason to uphold a complaint unless it was because of unsuitability.
- Having considered the suitability of the investment advice he thought Killik correctly identified Mr F's ATR and invested his funds in accordance with his risk profile and objectives.

Initially, in response, Mr F said that, if the investigator thought that Killik's offer to refund fees of £15,749.02 was fair, he would accept that as a resolution to the matter. But on reflection he thought the investigator hadn't fully understood his complaint which he said was that:

- He had given Killik the opportunity to manage his SIPP because it was "adamant" that it could outperform the other advisory firm he wanted to invest with. He said Killik had justified its higher fees on the basis of this "greater performance".
- Evidence of the "promise" that Killik made is shown by its offer to waive all its fees until it outperforms the other SIPP. This could conceivably cost Killik £15,000 "in perpetuity" and would have been unnecessary if it hadn't made its promise.
- He thought that we hadn't taken certain emails into consideration when forming our assessment.
- He wanted to appeal the investigator's assessment and asked for his complaint to be referred to an ombudsman.

The investigator said that he accepted that Killik had said it would outperform the other firm – but this wasn't a legal agreement. He didn't think Killik had been negligent in its "duties" but had simply offered to waive some fees in order to give it further time to meet Mr F's expectations.

But Mr F still wanted his complaint to be referred to an ombudsman, so it was passed to me to review.

By September 2021, Mr F said his SIPP was valued at £853,202 - still £279,194 less than the one managed by the other firm. So he said he wanted compensation of £237,524 which was the difference in performance of the SIPPs.

My provisional decision

In my provisional decision I said Mr F's complaint should be upheld. I made the following points in support of my findings:

- Mr F hadn't complained about the suitability of the advice to transfer his OPS benefits, so I hadn't considered that matter. But I had considered the suitability of the investment strategy Killik recommended to Mr F.
- I thought Killik had set out the investment risks involved in its suitability report, and so it then needed to make a recommendation that was in line with Mr F's ATR – which was as a moderate risk investor. I would therefore have expected Killik to recommend a mix of equities, fixed interest and cash as a strategy.
- But the first SIPP statement I'd seen showed that the entire portfolio – except for a small amount of cash – was invested into individual stocks and shares. This was the same situation in a statement from late 2019 to early 2020.
- So I didn't think the portfolio had been invested in line with Mr F's balanced or moderate ATR.
- Although Killik said it had invested Mr F's funds in line with his wishes, I thought – as the professional adviser involved, it should have set out a recommendation in line with his ATR. I'd listened to the call Killik had with Mr F regarding the investment strategy and, while I thought it was reasonable for Killik to invite his input, it should still have set out its own recommendation within the suitability report.
- Mr F wanted to be compensated by comparing the SIPP's performance against the other advisory firms' performance, but I didn't think it was fair to compare the two as Killik needed to make a recommendation based on Mr F's circumstances, ATR and his objectives. So I thought it was right to ensure Mr F was put as close as possible to the position he'd now be in if Killik had recommended a suitable investment strategy.
- I didn't think the evidence supported Mr F's claim that Killik hadn't set out its fees and charges appropriately. It would seem that the transactional nature (buying and selling of shares) of Killik's management led to its fees being higher than would be the case with a traditional fund based charge – but that didn't mean Killik had acted unfairly or hadn't explained that to Mr F.
- I hadn't endorsed Killik's offer of a refund of fees as I thought my redress covered that eventuality. I left it to both parties to decide what agreement they may wish to make.
- I thought Killik should compare the current value of the SIPP against a notional value had it had been invested using an appropriate benchmark.

Responses to my provisional decision

Mr F broadly accepted the provisional decision but wanted to make the following submissions before any final decision was made:

- He didn't accept Killik's assertion that he was an experienced investor. He said he hadn't ever bought any kind of investment apart from property, and the shares he owned were given to him as part of an employee bonus scheme. He provided some emails which he'd previously sent to Killik which told it not to risk his ISA capital as he would use it to pay off his mortgage – which he thought showed his lack of propensity to invest.
- He wouldn't have followed Killik's recommendation to invest in shares if he was an experienced investor. He followed Killik's recommendation because it was the professional adviser and he was not an experienced investor.
- He understood his complaint about the recommendation to take out an ISA would be dealt with separately.
- He understood my decision not to compare his losses against the other advisory firm's SIPP – but he still felt that Killik's poor investment performance should be judged against the actual benchmark that it set itself.

- He wasn't familiar with the benchmark I'd set out in my provisional decision and wanted me to provide further information so that he could obtain an understanding of it.

Killik also accepted the provisional decision although it said it was disappointed with the outcome. It confirmed that it would follow the recommended redress formula if accepted by Mr F. However, Killik did say that it thought its relationship with Mr F had broken down and it wanted him to begin making arrangements to transfer his plan to another provider – although it said it would waive any usual transfer fees on this occasion.

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.

And as both parties broadly accepted the provisional decision, I see no reason to depart from my previous findings. So I'll explain my reasons and address the further points raised by both parties.

I should first confirm that my decision only covers Mr F's complaint about his SIPP. We've explained to him that his ISA complaint will need to be looked at by Killik in the first instance and we can then set up a new complaint if he remains unhappy with the response.

The suitability of the investment strategy and its performance

Mr F said that when he gave Killik the opportunity to invest some of his OPS transfer benefits it was because it said it would outperform a SIPP set up by the other advisory firm who invested the rest of the benefits. He says Killik's performance has been poor in comparison, so he now wants it to make up the difference between the two SIPP's.

But we wouldn't normally uphold a complaint purely about investment performance unless we decide that the advice to take up the investment strategy was unsuitable in the first place. So that's what I've looked at here – and I began by looking carefully at the suitability report Killik issued to Mr F in November 2016. The report did set out what Mr F's expectations should be when investing. These were that, *“the value of investments held within a SIPP may go down as well as up and the value when you come to take your pension benefits may be less than you have put in. Investment returns are not guaranteed and may be lower than expected and past performance is not a reliable indicator of future performance. There is no guarantee that overall benefits from a SIPP are higher than those which your current plan may provide. Investment returns are not guaranteed and may be lower than expected”*.

So Mr F was alerted to the risks involved in investing, which would have been relevant to him when Killik went on to establish his ATR. This was important as it would have underlined the investment strategy Killik would go on to recommend as well as focusing Mr F on the amount of risk he could tolerate.

It was agreed that Mr F was a moderate risk investor – defined as, *“prepared to take a reasonable amount of investment risk in order to increase the chance of achieving a better return. Capital protection is less important to you than the return on the investment. A typical Moderate investor will usually invest in a variety of assets to obtain diversification. There would be a higher proportion of equities compared to fixed interest and cash, and the range of assets provides diversification benefits.”*

So I would have expected Killik's recommendation to have included such a mixture of diversified assets and this was confirmed in its report which said, *“you are aiming for a*

combination of capital growth and income from the portfolio via investment in equities and fixed income securities. A proportion of the portfolio may also be invested in other assets classes, such as absolute returns". And the risk was further explained as, "whilst there will be some volatility and capital risk, this should be less than that of a portfolio exposed only to equities."

So I went on to look at the first SIPP statement Mr F received in 2017 to confirm the investment strategy that was recommended. I found that, apart from £3,663 held in cash, the entire portfolio was invested into individual stocks and shares. I then looked at a later statement from 2020 to see if the content of the investment had changed, but it remained invested in shares apart from a small amount of cash.

Although the portfolio was described as "managed" I don't think it could be classed as balanced or moderate. It was invested almost entirely in stocks and shares which in my view would indicate that it was a high risk investment. And as Mr F's ATR was defined as being moderate, I don't think the portfolio was invested in line with his ATR and I don't think therefore that it was a suitable investment strategy recommendation in the circumstances.

I have listened to the telephone discussion Mr F had with Killik when the money had been received into the SIPP. The adviser began by asking Mr F "*what do you want to do now?*", to which Mr F said he wanted to do "*something different*" and not invest "*in the same old shares*". I would have expected Killik to ask Mr F for some input into his proposed investment strategy and I think it was reasonable for Killik to take this into account. But as the professional adviser, paid by Mr F to give him investment advice, I would have expected Killik to have presented its own recommendation to Mr F before it took on board his suggestions.

And I would also have expected Killik to have presented a recommendation for a strategy that was in line with Mr F's moderate ATR. Had it done that, and despite any suggestions he might have made during the telephone discussion, I think Mr F was more likely than not to have accepted Killik's recommendation. After all it was Killik that had said it would outperform the other firm's SIPP and I think Mr F would have accepted its recommendation on the basis that was Killik's objective.

Mr F's request for compensation in line with his other SIPP's performance

Mr F says any redress should be calculated by comparing Killik's SIPP against the one he held with another company. He says that Killik committed to outperforming the other SIPP and should be held to account by using the other SIPP as its benchmark. He also says that his original intention was to invest fully with the other firm and that it was only Killik's insistence that it would provide him with greater returns that persuaded him to give it the opportunity to invest half of his funds. He says he wouldn't have allowed it to invest his funds if it wasn't able to meet its "commitment".

I understand why Mr F might want us to adopt the approach of comparing the value of the two SIPP's. But I don't think that would be a fair approach to take. My objective is to put Mr F as close as possible to the position he would now be in but for Killik's unsuitable advice. In other words, the current value of the SIPP held with Killik, if it had been invested in line with his moderate ATR.

So I think the fair and reasonable approach is to use a benchmark which represents a moderate investment strategy in order to determine the position Mr F might now be in with that suitable advice. I don't think it's fair to compare the suitability of one investment strategy

against the other in this case – as I said previously, we wouldn't normally uphold a complaint that was based on investment performance alone.

The fees Killik charged Mr F

Mr F also complained about the level of overall fees that Killik has charged him. He noted that the total fees he'd been charged up to 18 December 2019 was over £60,000 and represented 50.9% of any growth he'd made on the SIPP. He thought this was "excessive".

So I first looked at whether Killik had made Mr F aware of the fees that would be applied to his plan. And I note that the plan's terms and conditions said, *"our fees vary by service and are set out in our rate card. We will charge commission when we trade for you, which includes the cost of our advice"*. Killik says it provided Mr F with a rate card.

In addition, Killik set out its charges in an email to Mr F on 24 October 2016. It said that it would charge 0.5% of the fund for the transfer and 1% of the fund for ongoing management. It also gave monetary values of its charges based on a transfer of £730,000. Mr F had also summarised his understanding of Killik's charges in an email dated 21 October 2016 and said that fees were, *"less important than the overall performance of the portfolio. 'High' fees can be justified if the return is excellent."*

So, I don't think the evidence supports Mr F's claim that Killik didn't set out its charges appropriately. I'm also not aware of any guidelines the regulator has set out which would define "excessive charges", but, from my own experience, I think Killik's charges were broadly in line with what I've seen from other advisers in the industry around that time.

In its suitability report Killik noted that, *"rather than charging for the SIPP wrapper, Killik & Co receives income from commissions on any trading activity on your account..."*. In my view Killik's approach of earning commission for the buying and selling of shares on Mr F's portfolio led to the overall fees charged being considerably higher than more traditional 'fund based' charge or annual plan charges – and may be why Mr F viewed them as "excessive". But I can't reasonably say that Killik didn't explain this to Mr F or make him aware of the way it worked.

Killik's offer

In my provisional decision I invited Killik to comment on its offer to refund the fees from 2019 and to waive its fees going forward – until the SIPP outperforms the other firm's. It didn't provide any comments. So, as I believe the issues of initial and ongoing fees are covered by the benchmark I've recommended in my redress formula below, I won't be making any further comments on Killik's previous offer. It's my understanding that Killik is looking to terminate its arrangement with Mr F in the near future – so the question of ongoing fees won't apply any longer in any case.

Putting things right

Fair compensation

My aim is that Mr F should be put as closely as possible into the position he would probably now be in if he had been given suitable investment advice on his SIPP funds.

I take the view that Mr F 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 F's circumstances and objectives when he invested.

What must Killik do?

To compensate Mr F fairly, Killik must:

Compare the performance of Mr F'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.

Killik should add interest as set out below:

Killik should pay into Mr F'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 Killik is unable to pay the total amount into Mr F'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 F won't be able to reclaim any of the reduction after compensation is paid.

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

It's reasonable to assume that Mr F is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr F 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 Killik deducts income tax from the interest it should tell Mr F how much has been taken off. Killik should give Mr F a tax deduction certificate in respect of interest if Mr F 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 interest
SIPP	Still exists and liquid	FTSE UK Private Investors Income Total	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if

		Return Index			not settled within 28 days of the business receiving the complainant's acceptance)
--	--	--------------	--	--	--

Actual value

This means the actual amount payable 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 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 Killik 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 F wanted Capital growth and was willing to accept some investment risk.

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 F's circumstances and risk attitude.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Killik & Co LLP should provide details of its calculation to Mr F in a clear, simple format.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Killik & Co LLP should pay Mr F the amount produced by that calculation – up to a maximum of £160,000 plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Killik & Co LLP pays Mr F the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Killik & Co LLP. It is unlikely that Mr F can accept my decision and go to court to ask for the balance. Mr F may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 9 November 2022.

Keith Lawrence
Ombudsman