DRN-3723409

The complaint

Mr F referred his case to this service in late 2021. He said Barclays Wealth Management [under Barclays Bank UK PLC ('Barclays')] had falsely claimed it was required by regulation to insist upon his presence in the UK in order to conduct a review of his Self-Invested Personal Pension ('SIPP') portfolio – *issue 1*. He objected to this and he disputed Barclays' reference to regulation. He sought compensation for the distress caused to him and he asked that Barclays withdraw its insistence. He also referred to the personal and financial costs he would incur if he had to travel to the UK at the time for the review.

One of our investigators looked into the matter and gave his findings. Mr F then extended his case to say Barclays had misrepresented/mis-sold its investment management service to him at the outset – *issue 2*.

This decision is about issue 1 only. Issue 2 has been separated.

What happened

The investigator expressed his findings in correspondence with both parties. Overall, he mainly said as follows:

- Mr F set up the SIPP in 2018 and Barclays was appointed to manage its underlying portfolio in 2019.

- In retirement, Mr F had split his presence between the UK and a country abroad. He spent time in both places in 2019. He ended the year in the latter and planned to return to the UK in the summer of 2020. However, the pandemic and its impact on international travel prevented that return.

- In 2021 Barclays sought to conduct an annual review of the portfolio and insisted that it would and could not do so unless Mr F was present in the UK. It said its review constituted advice and the regulatory remit for its advice was limited to the UK. Mr F disputed this and complained. Barclays did not yield. It said it would withdraw its management service if the review was not conducted. Mr F then returned to the UK in November 2021 for the review.

- Barclays says its position is supported by its terms of service and by regulation. It is true that regulation [specifically cited] refers to the need for a periodic (annual) review of an investment firm's suitability assessment. Such practice is what this service would expect from that firm. However, regulation [specifically cited] also requires that an investment firm providing such reviews must disclose to the client the arrangement for them (including the conditions that trigger them, their frequency, their remit and how updated recommendations resulting from them will be communicated). Evidence does not show that, prior to raising the review in June 2021, Barclays ever clearly disclosed to Mr F that one will be necessary. Barclays should have done this at the outset. It knew, at the outset, that Mr F's presence was split between the UK and abroad so it would have been important to highlight to him any concern it had about advising clients abroad.

- However, evidence also shows that it would have probably made no difference to Mr F's decision making if this had been disclosed to him. His presence was split between the UK and abroad anyway. The requirement to be in the UK once a year for the annual review is unlikely to have discouraged him from appointing Barclays, but it would at least have informed him about that requirement. By being so informed his expectations would have been managed and that would have avoided the distress caused to him in 2021 when the matter unexpectedly arose. For this reason, and to compensate for the distress caused, Barclays should pay him £200.

- Barclays was not authorised to advise Mr F in the relevant country abroad, and the annual review would have constituted advice. Even though Barclays fell short by failing, earlier, to disclose the review requirement, it could not reasonably be expected to act in breach of its regulated authority. It would have been expected to make reasonable adjustments for Mr F's circumstances by allowing additional time, but it could not do so indefinitely, so the deadline it set was reasonable. Its position was supported by the terms of service and it had reasonable commercial discretion to withdraw its service if it was unable to meets obligations under those terms.

- Mr F's argument that Barclays misrepresented its service to him at the outset is a separate matter. His dissatisfaction with the way in which Barclays handled his complaint is a matter beyond this service's remit. We address cases about regulated activities and complaint handling is not a regulated activity.

Mr F disagrees with this outcome. Some of his comments relate to issue 2, so they will not feature in this decision. With regards to issue 1, he mainly disputed the notions that the annual review constituted advice and that Barclays could not conduct the review without his presence in the UK; and disputed the investigator's finding that non-disclosure of Barclays' review requirement at the outset was inconsequential to his decision making at the time. He argued that disclosure of the requirement at the outset would probably have made a difference because Barclays was not his only consideration at the time, he had approached an alternative firm and would probably have opted for their service if he knew Barclays was limited in servicing him abroad.

Mr F stressed that both firms were aware of his split presence and that neither said it was a problem [he provided evidence of the alternative firm confirming ability to provide service to him abroad]. He said he chose Barclays mainly because even though the alternative firm had lower running costs their penalty for early client termination of service/exit (within the first seven years) was overly punitive, and also because he already had a pre-existing relationship with Barclays and he preferred dealing with the Barclays representative.

Barclays said it considers that the investigator essentially agrees with its position, but partially upheld the complaint on a technicality. In this respect, and in aid of settlement, it said it might be willing to pay Mr F the £200 compensation. However, after being informed that Mr F disputes the investigator's view, it confirmed it is prepared to have the case proceed to a final decision. Another investigator reviewed the previous investigator's findings and made some comments about them. Mr F disagreed with some of those comments and considered some of the others unclear and conflicting. He retained his request for an ombudsman's decision and he summarised his case again – including reference to having evidence in which, he says, Barclays concedes that the review did not constitute advice. The matter was then referred to an ombudsman.

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.

As I said above, this decision is about issue 1 only. Mr F's strength of feeling about issue 2 and about the matters associated with it is clear from his more recent submissions. However, the two issues have been separated and my remit – and that of this decision – is limited to issue 1.

I will not be addressing any complaint Mr F might retain about the way Barclays approached and/or handled his complaint. As the investigator said, complaint handling is not a regulated activity. Our jurisdiction covers complaints about regulated activities. In some cases, it might be that a complaint to a firm and then the mishandling of that complaint form part of the overall claim (about a regulated activity) pursued by the complainant. Where such a claim is upheld and if compensation for trouble and/or inconvenience is awarded, the uphold and award might then cover relevant elements of the firm's complaint mishandling. An example is where mishandling of a complaint is found to have added to the substantive problem or partly delayed its resolution. This potential exception does not apply to Mr F's case. The substance of his case is distinct and isolated from Barclays' complaint handling. Barclays' position on the review was/is the core matter, that position was already set by the time his complaint was made in August 2021, and the complaint response in September 2021 did not affect that.

The review in this case was an Annual Suitability Review ('ASR'). Barclays' complaint response accepted that there was no express regulatory requirement for this ASR, or periodic reviews, to be completed in the UK. It said it considered provision of the ASR akin to the provision of advice and it did not have the requisite framework to provide advice to clients outside the UK. As a secondary concern, it said this meant that if it gave such advice it 'could' be in breach of regulations in the external country.

I do not consider it necessary to go into whether (or not) Barclays would have been in breach of the regulations of the country abroad in which Mr F had a partial presence. I note what appears to have been a debate during our investigation on his residency status and its relevance to the case, but I also do not consider it necessary to be drawn into that. In the absence of grounds and/or evidence to the contrary, an inability – and then refusal – by Barclays to provide the ASR to Mr F abroad because it invoked investment advice and because it did not have the framework to give investment advice abroad is a potentially fair position. A firm cannot reasonably be expected to provide a service where it lacks the framework to do so. Key questions that arise are whether (or not) there are grounds and/or evidence to the contrary in Mr F's case.

For the sake clarity, I do not suggest that the above are the only key considerations in the wider case. They are not. Below, I will treat the question of whether (or not) Barclays gave Mr F full and true disclosure about the ASR and about the limitations posed by his split presence between the UK and abroad. Another relevant question is whether (or not) Barclays' service should have been deemed unsuitable for his circumstances, because of the limitations in providing aspects of the service to a client abroad. This a question for issue 2, which I do not address. As I said above, the idea of a regulatory requirement for the ASR to take place in the UK is not Barclays' position, so it is not a matter to address, and Barclays appears to have only feared that providing advice to Mr F abroad 'could' breach regulations in the relevant country – it does not say such breach would definitely have happened, so this too does not need to be addressed.

On balance, I am persuaded that the ASR was comparable to investment advice. I acknowledge that Mr F says he has evidence in which Barclays conceded the opposite, but the regulated activity of 'advising on investments' has a set definition in regulation/legislation. Whether (or not) the ASR involved this activity depends mainly, or only, on assessing a

match (or otherwise) between the contents of the ASR and the definition – and less so on what Mr F says Barclays has conceded.

The Regulated Activities Order 2001 provides a list of regulated activities and, in the context of investments, advising on investments is defined as:

"[advice] *given to the person in his capacity as an investor or potential investor … and advice on the merits of his doing any of the following (whether as principal or agent) –*

(i) buying, selling, subscribing for or underwriting a particular investment which is a security or a [relevant investment], or
(ii) *exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment*."

In the regulator's *Handbook* further guidance is given in the Perimeter Guidance Manual (PERG) section. At PERG 8.28.2 is the following –

"*…*
(3) Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.
(4) A key to the giving of advice is that the information:
(a) is either accompanied by comment or value judgment on the relevance of that information to the customer's investment decision; or
(b) is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision.
(5) Advice can still be regulated advice if the person receiving the advice:
(a) is free to follow or disregard the advice; or
(b) may receive further advice from another person (such as their usual financial adviser) before making a final decision."

Barclays' review service was/is defined as follows –

"*We will keep your portfolio under review to determine whether the Assets … remain invested in a manner which is consistent with the Investment Strategy and will make recommendations to you when we believe you should make changes to the contents of your portfolio.*"

Overall and on balance, I am satisfied that Barclays' review service was defined to cover investment advice – or, at the very least, the potential for investment advice – and that it was therefore reasonable for it to take the position it took in this regard. Even if, upon completion of the ASR, no advice was given because no changes were recommended, that was not foreseen and declared beforehand, that resulted from the ASR itself and it was a service in which suitability was to be reviewed. That review, in itself, would have resulted in a form of advice on whether (or not) the portfolio remained suitable, and it was a review in which investment advice was likely. Definition of the review service, as above, can and does fit within the broad regulatory definition of (and guidance on) advising on investments.

Given that the review covered investment advice and given that I have not seen evidence to conflict with Barclays' claim that it lacked the framework to advise Mr F abroad, I am persuaded that its refusal to do so in 2021 was reasonable and was due to an inability to do so.

Having said the above, I agree with the first investigator's findings about the ASR requirement being news to Mr F in 2021, around two years after Barclays' appointment. Its

failure to bring the requirement to his attention in 2019, before or as it was appointed to manage the portfolio, was wrong. Especially so because his circumstances were known to Barclays, so any existing and/or potential service delivery problems concerning his split presence in and outside the UK should have been flagged and addressed. I have noted Barclays explanation about how cross border policies it had access to in 2019 meant the problem did not exist at the time, but then developed thereafter. However, I consider that the same explanation shows that potential for the problem in the future was either known or ought reasonably to have been known, so notice of that potential, at the very least, should have been brought to Mr F's attention.

In the next section, I will order Barclays to pay Mr F £200 for the distress, trouble and inconvenience caused by the aforementioned failure. Had such disclosure taken place in 2019, his awareness of and expectation from the ASR would have been better and he would have been in the position to consider whether (or not) they made a difference to his appointment of Barclays and, if they did not, they would have ensured he was informed enough not to be surprised (and distressed) by what happened in the application of the ASR requirement in 2021. I am satisfied that £200 is a fair amount of compensation for the distress caused to him by the matter arising unexpectedly at the time.

However, I share the first investigator's finding that disclosure in 2019 would probably not have made a difference to Mr F's appointment of Barclays. He disagrees and refers to the alternative firm he was considering at the time. He appears to accept that he cannot say with certainty he would have appointed that firm instead, but he does not need to do that. The matter rests on the balance of probabilities, so he argues that he would have *probably* appointed the alternative firm if the ASR and its geographical limitation was known to him. On balance, I disagree.

Mr F confirms that he retained UK residency. At the time he had a split presence between the UK and the relevant country abroad, so this meant he maintained partial presence in the UK. As the investigator said, in this context it is unlikely that the idea of having to be in the UK for one ASR per year would have made a difference to his decision making. He might have queried this further, but this would not have been a requirement he was incapable of meeting. For the sake of clarity, I do not say or suggest it was or was not a *suitable* requirement in terms of his circumstances – that is a matter for issue 2 – but I find that it was something he could meet during his partial UK presence so it is improbable that it would have directly led to him appointing the alternative firm. Furthermore, it seems clear from his explanation that he felt very strongly against what he considered to be overly punitive exit penalties with the alternative firm. He describes this as the key reason he abandoned the alternative firm and I am not persuaded that he would have had a greater and outweighing negative reaction to the idea of being in the UK once a year for the ASR with Barclays.

It is likely that, with full disclosure about the ASR in 2019, Mr F would still have appointed Barclays and, therefore, that the ASR in 2021 would still have required his travel to the UK.

For all the above reasons, my upholding of Mr F's complaint is limited only to the distress, trouble and inconvenience caused to him by the ASR matter unexpectedly arising in 2021 (resulting from Barclays' non-disclosure of it earlier); and I am not persuaded there are grounds to compensate him further or for the costs of his travel to the UK in November 2021 for the ASR.

Putting things right

I order Barclays to pay Mr F £200 for the reasons given above.

My final decision

For the above reasons, I partly uphold Mr F's complaint and I order Barclays Bank UK PLC to pay him compensation in the amount of £200.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 8 February 2023.

Roy Kuku
Ombudsman