

The complaint

Mr P complains that Embark Investment Services Limited (Embark) mis-administered his pension transfer request, causing financial losses and distress and inconvenience. He wants the losses re-imbursing and compensation for the inconvenience.

What happened

Mr P's SIPP was originally with Alliance Trust Savings who were in the process of migrating this part of the business to Embark when Mr P decided to transfer his plan to a new pension provider, Interactive Investor (Interactive) in October 2020. He felt Interactive offered more flexibility and would enable him to better manage his investments.

Mr P says he was told he could transfer in cash in around three weeks or in specie (where the holdings are re-registered to the new plan, rather than requiring these to be sold and transferred as cash) in around six to seven weeks. Interactive advised Mr P that it could accept the transfer of all but two of the various investment funds held in his plan in specie and he decided to proceed on this basis.

Embark contacted Interactive to say it would start processing the transfer in the week commencing 23 November 2020. But there was a delay and Mr P says he pressed Embark for updates. In early January 2021 Mr P says Embark advised there was a problem with the transfer technology and his case had been "escalated". Having heard nothing further Mr P complained on 25 January 2021 saying:

"You are basically keeping my pension fund hostage – I cannot access it and make changes."

Mr P says he told Embark he wanted to make investment trades due to concerns he had about the stock market. He says it said doing so would put his transfer to the back of the queue and potentially take months to complete as it was "very busy".

Mr P continued to ask for updates. In mid-February 2021 Embark said the problem was that its system wouldn't facilitate in specie transfers and nothing had been progressed since November 2020. He emailed Embark again on 21 February 2021 saying:

"I've told you in a number of emails and calls that I want to access my account to be able to make trades in view of current market conditions and concerns about a market crash."

Most of the funds were transferred in specie to Interactive by the end of February 2021, but there were further delays.

Due to the ongoing problems Mr P decided to refer his complaint to our service on 5 April 2021. Our investigator asked Embark for an update on his complaint and it asked, on several occasions, for more time to complete the transfer and investigate the complaint. The two funds that couldn't be transferred in specie weren't sold until 19 April 2021 and the cash

proceeds were sent to Interactive on 21 May 2021. A further problem with one fund delayed its in specie transfer until 23 July 2021.

Embark then provided its response to Mr P's complaint. It apologised for the delays, saying this was because its system "*would only transfer out accounts which were fully encashed*" so it couldn't process his request until the process changed in mid- February 2021. It accepted it hadn't told Mr P this in January 2021. It said it processed Mr P's transfer on 15 February 2021. And should have sold the two funds to be transferred as cash within three working days of this but hadn't instructed this until the 19 April 2021 "*due to an uplift in volumes*".

It said the final in specie transfer had been delayed due to technical issues with Interactive's systems rather than its own, which it had queried with Interactive on 27 April 2021. It said Interactive hadn't been able to resolve the issue until 7 June 2021 and the transfer was completed the same day. It said the delay in selling the two investments to be transferred as cash had caused Mr P a loss of £2,171.43 and this amount would be sent to Interactive. And it offered him £250 in compensation for the inconvenience caused by the delays as a gesture of goodwill.

Embark said it noted Mr P's comments about not being able to trade investments, but that it couldn't accept a compensation request for a "*hypothetical claim*". However, if Mr P provided proof of his investment intentions it could investigate further.

Mr P didn't accept this. He said if he'd known an in specie transfer couldn't be undertaken he'd have proceeded with a cash transfer. He asked our investigator to consider his complaint. Embark then agreed to refund the fees it had charged Mr P between 25 March and 3 August 2021.

Our investigator looked into it and he decided to uphold the complaint.

He said it was clear that Mr P followed investment markets and wanted to react to investment opportunities as they arose. And he wouldn't have chosen the in specie transfer process if he'd known it would take over three months to complete. Instead, he said Mr P would have requested a cash transfer. Our investigator said Embark should have advised Mr P of the delay by 18 November 2020, when it told Interactive it would process the in specie transfer the following week. Had Mr P then decided to proceed with a cash transfer, our investigator said it should have been completed within four weeks, so by 21 December 2020 at the latest.

Our investigator said as all assets should have been transferred by 21 December 2020, Embark should undertake a calculation to establish if there was a fall in value between the date they should have been sold and transferred and when they were actually sold or transferred. If this calculation showed a loss, he said Embark should compensate Mr P for it.

He said Mr P had missed opportunities to trade because Embark had said doing so would have further delayed the transfer. And whilst Mr P hadn't specifically told Embark what trades he would've made he had told it he wanted to make changes.

He said Embark should compare the actual value of Mr P's SIPP to a notional value calculated if all assets had been sold on 7 December 2020. And had been reinvested on 21 December 2020 and provided a return in line with the FTSE UK Private Investors Income Total Return Index, until the day Embark accepted this outcome.

If the notional value was higher than the actual value, then Mr P had suffered a loss and Embark should pay this amount into Mr P's Interactive SIPP. But if this wasn't possible then it should pay the compensation directly to him allowing for any tax implications.

Our investigator said Embark should also reimburse any fees it had taken from 21 December 2020. And as the delays had spanned several months and had been entirely avoidable it was fair that the compensation for the distress and inconvenience should be increased to £500 from £250.

Mr P said he agreed with our investigator. Embark initially didn't respond, before asking for more time to consider matters, saying it needed to contact Interactive for more information. It then said:

- All its fees between 21 December 2020 and 10 August 2021 had already been refunded to Interactive. And it had made a payment of £2,172.43 in respect of the delayed sale transactions.
- It agreed that the compensation for the inconvenience should be increased to £500.
- It said it had not carried out the loss calculation proposed by our investigator as this is *"based on a hypothetical claim"* that Mr P would have sold his portfolio in December 2020. Whereas he'd actually expressed concern that this had happened in error in January 2021:

"due to an automated letter being produced by the platform ... which suggests Mr P wouldn't have risked a loss in his portfolio".

- It said Mr P had expressed his intent to trade and make changes whilst the transfer was ongoing. But, having made enquiries with Interactive once the transfers had been made, he hadn't made any trades until 17 June 2021, around four weeks after the cash transfer had been completed. Which:

"Embark do not deem was made in a timely manner and therefore, wouldn't consider a further loss assessment"

Our investigator agreed it was hypothetical that Mr P would have sold the entire portfolio. But said Embark had made a mistake in not telling Mr P about the problem in November 2020. And he should be put back in the position he should have been in had the mistake not been made. As Mr P would have proceeded with a cash transfer and invested his portfolio in keeping with his risk appetite.

Our investigator said Mr P had queried the erroneous letter in January 2021 because at that time he understood Embark was processing the in-Specie transfer and the letter contradicted his instructions. He said Mr P had provided compelling reasons why he hadn't immediately made trades once the transfer was completed, but these have no bearing on the outcome. And having considered the points Embark had made he still thought outcome proposed was fair.

As Embark doesn't agree it has come to me to decide.

My provisional decision

I issued my provision decision on 11 October 2022; I explained the reasons why I was planning to uphold the complaint. I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm planning to uphold the complaint.

However, I think it is fair that the loss calculation should be carried out over a different time period than proposed by our investigator. This being to the point Mr P was largely back in control of his investments. I'll explain why I think this is fair below, but first I'll set out why I think Embark did mis-administer Mr P's transfer, which caused him distress and inconvenience, and potentially financial losses.

I think this transfer took an unacceptably long time to complete and Embark should have advised Mr P that it had problems with in specie transfers at the earliest opportunity. It didn't do that. This mistake was compounded by excessive delays in completing other aspects of the transfer, notably the sale of investments that couldn't be transferred in specie. And the subsequent delay in sending cash proceeds to Interactive, meaning this wasn't received until around six months after Mr P requested the transfer be made.

Given the comments Mr P made to Embark as he chased it for updates, I think it is clear that he wanted to make investment trades. In an email to Embark on 22 February 2021 he said:

"Given the choice I would have shifted my holdings to cash when the US market peaked a couple of weeks ago..."

Mr P's reason for having a SIPP where he managed the investments himself was to be in control. Embark's administration problems and the failure to communicate these to him meant he wasn't, and this caused him distress and inconvenience over many months.

I think Embark should have advised Mr P there was a problem by 18 November 2020, when it told Interactive it would begin processing the transfer in the next few days. If it had done so, I'm satisfied Mr P would have made the decision to sell the investment holdings and transfer the proceeds as cash. I think it's reasonable that the holdings would have been sold by 7 December 2020, and the transfer completed with the funds re-invested by 21 December 2020. Mr P would have then been free to manage his investments as he wished.

I think it's likely Mr P would have made investment trades during the delay. And that he didn't immediately make trades once the transfer was largely completed is irrelevant. Mr P says he wanted to respond to opportunities or risks he saw in financial markets, some of which were missed during the delay, and once missed there was no point in acting after the event. That seems an entirely reasonable investment approach.

Putting things right

Embark has already refunded its administration fees deducted after 21 December 2020, which I think is fair. It has also agreed to increase the compensation for the distress and inconvenience from £250 to £500 as proposed by our investigator. I think this is reasonable in the circumstances of the complaint.

In terms of potential investment losses that may have been incurred during the delayed transfer I think Embark should undertake a loss redress calculation largely as outlined by our investigator. This should be based on Mr P's Embark SIPP assets being sold to cash on 7 December 2021 and invested in the benchmark portfolio on 21 December 2021. However, I think the end date for the loss calculation should be from the point Mr P was back in control of his investments, otherwise I would be asking Embark to underpin Mr P's own investment decisions which I don't think is fair.

Whilst some funds were delayed a while longer, I think this point was once Interactive received the cash proceeds from the two delayed sales which was 21 May 2021. There

was an outstanding in specie transfer at this point but this wasn't due to a problem caused by Embark.

Whilst Mr P could have traded the investments that had been moved in specie by the end of February 2021, he has said that certain opportunities had already been missed by then. And, the cash proceeds from the two investments that did need to be sold of around £100,000 were expected to be transferred to Interactive much sooner than they were and would have provided some liquidity for any new investment. Taking these points together, I think 21 May 2021 is the date when Mr P could reasonably be said to be back in control of the majority of his portfolio and able to make changes as he wanted.

If the comparison between the value from the benchmark portfolio and the actual value of Mr P's SIPP shows a loss to that date, then interest at 8% per year simple should be added to that sum. I've set out what I think should be done below.

Fair compensation

My aim is that Mr P should be put as closely as possible into the position he would be in now had Embark not delayed the transfer.

I think Mr P would have invested differently. It's not possible to say precisely what he would have done in terms of individual investment X being sold on this date, held in cash and then invested in investment Y on this day and so on. But Mr P did tell Embark he would have sold his investments to cash around the first week of February 2021. Had he instead sold all the investments on 7 December 2020 in order to transfer as cash I think he would have re-invested by 21 December 2020.

I think liquidating all the investments to cash then would have prompted a full reappraisal. And it isn't clear what Mr P would have then re-invested into or what and when subsequent trades would have been made in this scenario.

Because of this I think it's reasonable to use a benchmark as a basis for calculations to establish if a loss has been incurred. A benchmark doesn't reflect exactly what I think Mr P would have done. But I think it is a fair approach given that Mr P knew he would have traded had he been able to in January and February 2021, but not exactly what trades would have been made and when.

It may be that a more focused appraisal could have been undertaken had Embark engaged properly with Mr P in January and February 2021, when he was raising concerns about not being able to trade, or if it had dealt with his complaint more promptly. But I'm satisfied that what I've set out below is fair and reasonable given Mr P's circumstances, his investment objectives and that the matter is being considered after the event.

What must Embark do?

To compensate Mr P fairly, Embark must:

- Compare the performance of Mr P'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.*
- Embark should calculate the value of Mr P's SIPP if all of his assets had been sold to cash on 7 December 2020; and*

- *Calculate the value of this sum if it had provided a return in line with the FTSE UK Private Investors Income Total Return Index benchmark from 21 December 2020 until 21 May 2021, when Mr P made his first investment within the Interactive SIPP – this is the fair value.*
- *Appropriate allowance should be made for the compensation of £2,172 already paid for the delayed sale of the two investments that could not be transferred in specie.*
- *Compare the fair value to the combined actual value of Mr P's SIPP with Interactive on 21 May 2021 plus the remaining actual value of his Embark SIPP on the same date (after the transfer of cash from the sale of the two funds that couldn't be transferred in specie). It should disregard any additional contributions and withdrawals Mr P may have made to his SIPP, to ensure it is comparing like for like.*
- *If the combined actual value is higher than the fair value, there is no loss. If the fair value is higher than the combined actual value, Mr P has suffered a loss and should receive compensation equivalent to this sum.*
- *If there is a loss Embark should add interest at 8% per year simple to the date it settles the compensation.*
- *If there is a loss, Embark should pay into Mr P's Interactive pension plan to increase its value by the 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 Embark is unable to pay the compensation into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr P won't be able to reclaim any of the reduction after compensation is paid.*
- *The notional allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age.*
- *It's reasonable to assume that Mr P is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.*
- *If either Embark or Mr P dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified, and Mr P receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.*
- *Pay Mr P £500 for the distress and inconvenience caused by the delay in transferring his pension and his inability to manage his investments during the delay.*

Income tax may be payable on any interest paid. If Embark deducts income tax from the interest, it should tell Mr P how much has been taken off. Embark should give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr P 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's 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 P's circumstances and risk attitude.*

I asked both parties to send me any further information or comments they would like me to consider.

Response to provisional decision

Mr P didn't respond to my provisional decision.

Embark said it accepted my provisional decision. It said it couldn't have advised Mr P there was a problem with in specie transfers on 18 November 2020 as his account hadn't migrated to it until 21 November 2020. It said it should have known there was a problem and advised Mr P about it then. It apologised for the errors made.

It said due to backlogs it didn't start processing the transfer until 21 December 2020. But at that time:

"it wasn't common knowledge within Embark Platform that our technology provider did not support in specie SIPP transfer outs."

Embark said that the technology provider did advise the "Transfer Team" on 22 December 2021 that it couldn't facilitate an in specie transfer and it was sorry that this wasn't communicated to Mr P then. It said that its "Service Team" were only made aware of the problem sometime between late January to mid-February 2021 (it didn't know when), and so wouldn't have been able to advise Mr P there was a problem when he was contacting the Service Team in January 2021.

It said it had undertaken the loss calculation proposed in my provisional decision. And that it would pay the £500 compensation for distress and inconvenience on receipt of Mr P's bank details.

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.

Having done so, I've decided to uphold the complaint.

I think Embark unfairly delayed Mr P's transfer and this prevented him from managing his investments as he wanted.

It accepts it should have been aware that it couldn't facilitate in specie transfers and should have advised Mr P immediately. Had it done so, I think Mr P would have instructed Embark to sell the investments and to make the transfer in cash. I think these sales would have been instructed by 7 December 2020 and the transfer completed and be available for re-investment by 21 December 2020. Mr P would then have been fully in control of his investments; as it was, he wasn't in this position until 21 May 2021. Not being in control may have caused him an investment loss. If it has, it's reasonable that Mr P be compensated for it.

Mr P should be put as closely as possible into the position he would be in now had Embark not delayed the transfer. Had he transferred his SIPP as cash I think he would have reappraised his investments and re-invested differently. But it's not possible to say precisely what he would have done. Although if Embark had engaged with Mr P properly at the time when he was raising concerns, it may be that a more focused appraisal could have been undertaken.

As that didn't happen, I think it's reasonable to use a benchmark as a basis for calculations to establish if a loss has been incurred. This won't reflect exactly what I think Mr P would have done. But I'm satisfied that what I've set out below is fair and reasonable given Mr P's circumstances, his investment objectives and that the matter is being considered after the event.

Putting things right

Embark has refunded its administration fees deducted after 21 December 2020. It offered £250 in compensation for distress and inconvenience and agreed to this being increased to £500, which I think is fair amount in the circumstances of this complaint.

In terms of the potential investment loss Embark should undertake the following loss redress calculation to identify if a loss has occurred as a result of the delay:

- Compare the performance of Mr P'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.
- Calculate the value of Mr P's SIPP if all of his assets had been sold to cash on 7 December 2020; and
- Calculate the value of this sum if it had provided a return in line with the FTSE UK Private Investors Income Total Return Index benchmark from 21 December 2020 until 21 May 2021, when Mr P made his first investment within the Interactive SIPP – this is the *fair value*.
- Appropriate allowance should be made for the compensation of £2,172 already paid for the delayed sale of the two investments that could not be transferred in specie.

- Compare the *fair value* to the combined *actual value* of Mr P's SIPP with Interactive on 21 May 2021 plus the remaining *actual value* of his Embark SIPP on the same date (after the transfer of cash from the sale of the two funds that couldn't be transferred in specie). It should disregard any additional contributions and withdrawals Mr P may have made to his SIPP, to ensure it is comparing like for like.
- If the combined *actual value* is higher than the *fair value*, there is no loss. If the *fair value* is higher than the combined *actual value*, Mr P has suffered a loss and should receive compensation equivalent to this sum.
- If there is a loss Embark should add interest at 8% per year simple to the date it settles the compensation.
- If there is a loss, Embark should pay into Mr P's Interactive pension plan to increase its value by the 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 Embark is unable to pay the compensation into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr P won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr P is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr P 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%.
- Pay Mr P £500 for the distress and inconvenience caused by the delay in transferring his pension and his inability to manage his investments during the delay.

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I uphold this complaint against Embark Investment Services Limited.

I direct Embark Investment Services Limited to undertake the loss redress calculation set out above and if this shows a loss, pay compensation as set out above, adding interest at 8% per year simple to the date it settles the compensation.

I direct Embark Investment Services Limited to pay Mr P £500 in compensation for the distress and inconvenience he has been caused.

Embark Investment Services Limited must pay this compensation within 28 days of the date on which we tell it Mr P 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.

If Embark Investment Services Limited considers that it's required by HM Revenue & Customs to deduct income tax from any interest paid, it should tell Mr P how much it's taken off. It should also give a certificate showing this if Mr P asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 11 January 2023.

Nigel Bracken
Ombudsman