DRN-3932473

The complaint

Ms R complains about advice given by Openwork Limited trading as The Openwork Partnership in relation to a personal pension and ISAs. She says investments were not made in appropriate funds.

What happened

Ms R sought advice from a representative of Openwork. She had an initial meeting in March 2021 where a fact-find was completed. Her circumstances were recorded as including that she:

- was 52 years old, single with no dependents
- was employed as a doctor with income of around £95,000 a year and had been a member of the NHS Pension Scheme for around 28 years
- held £94,000 on deposit with her bank, £25,000 in a stocks and shares ISA and £59,000 in another ISA
- owned her home worth £225,000, with no mortgage.

A risk profile questionnaire was completed which recorded that she was a balanced investor and was prepared to take some risk, but had little knowledge or experience of investing.

The adviser sent an email to Ms R providing copies of their meeting notes and outlining the points discussed. Following further email correspondence between them, a follow-up meeting took place on 27 March 2021. An email sent the same day gave a summary of the points discussed, including the following:
"*The funds at this stage will be in a Balanced fund… as discussed but we will go into greater detail when everything is completed and we have more time."* And *"We will then go into more detail as to the funds you can self select for access to Renewable Energy and you can decide where you might like to invest*."

There was further email correspondence over the following days, including discussion about where funds would be invested. Openwork then issued a suitability report which said Ms R wanted to

- invest £80,000 from her bank account, aiming for capital growth with tax efficiencies in mind; and
- have ongoing advice and service as she didn't want to make her own investment choices.

The report recommended that Ms R invest £80,000 – half in ISAs and half in a pension (£30,000 to be invested in the pension straightaway, with £10,000 put in cash, to be invested in April, being the new tax year). This was recommended on the basis it would meet her attitude to risk and was the lowest cost way to invest with the longest performance track record.

Ms R signed 'The Openwork Partnership Fee Agreement'. The charges were set out as:

- an initial fee of £3,150, equal to 3.5%; and
- ongoing service fee of 1.25%, equal to £1,125 a year.

The adviser sent an email on 31 March 2021 providing further information about the funds in which she'd be invested, including the portfolio factsheet.

On 9 April 2021, Ms R sent an email saying she was keen to move her investments into ethical companies. Following some email correspondence, a further meeting took place on 7 June 2021, with the following notes made in respect of her investment choices:

"At present her Attitude to Risk is Balanced and she would like to look at more Ethical Funds and I have given her the details of these so that she can decide herself whether to move monies across.

I have informed [Ms R] that any decision regarding these Funds would be outside our remit, and she would have to take responsibility for this herself, especially if the Funds were Speculative. [Ms R] will look at this."

The adviser sent an email the following day, providing copies of their meeting notes. Further emails were then exchanged about Ms R's investment choices. These included Ms R saying "*Re the shares breakdown, am I investing in the… and the… holdings? If so, they are not investments I would be happy with. Can you advise alternatives please?"*

The adviser said if she wanted to invest ethically she would need to come out of the portfolio and opt to self-select – he couldn't advise on the funds to choose, though he could provide information about funds and said "*we will look at all the Funds and see if we can come up with any solution*".

In December 2021, Ms R complained that she had been misled from the outset about her wish to invest ethically, which she was given to believe would be available through Openwork. She said as she didn't have any financial experience, she wasn't able to self-select funds, and was looking to move her investments to an alternative provider which could deal with this for her.

Openwork didn't consider there had been any failing, so Ms R referred her complaint to this service. Our investigator thought the recommendations made were not suitable for Ms R or in line with her objectives, in particular because she wanted to invest in ethical funds, and didn't want to make her own investment decisions. He said the complaint should be upheld and asked Openwork to carry out calculations to see if she had suffered any loss as a result of the advice and, if so, compensate her for that. He also recommended compensation of £300 for the distress and inconvenience caused to her.

Openwork didn't agree with the investigator and raised some further comments, including:

- the fund was selected initially and she would then be able to consider the most suitable funds;
- tax planning for the end of the financial year was Ms R's main priority;
- she was told there were funds that would meet her desire to invest ethically, but those funds were not in line with her attitude to risk;
- the investigator wasn't taking account of the fact it could only assess a client's needs as presented to it and then follow the route the client wanted;
- Ms R was given all the relevant information and was happy to proceed on the basis agreed.

Another investigator reviewed the further comments but agreed that the complaint should be upheld.

As no agreement has been reached, the complaint has been passed to me to determine.

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.

Openwork had to ensure it obtained the information needed about Ms R's circumstances to be able to advise her, and ensure that its advice was suitable taking into account her circumstances, including her attitude to risk. I don't consider the recommendation Openwork made was suitable for her. I'll explain why.

It's clear from the suitability report and other documents that Ms R wanted to have ongoing advice and service as she didn't want to make her own investment choices. It's also documented that she wanted her funds to be in ethical investments. She sought professional advice to provide her with an investment recommendation in accordance with her attitude to risk and views on ethical investing. Openwork should have recommended something that was line with Ms R's attitude to risk; could provide ethical investments; and did not require Ms R to make her own investment choices.

The recommendation didn't meet these requirements. The only ethical investments available with the arrangements Openwork made were higher risk, so they were not in line with her attitude to risk. And Openwork's adviser couldn't give Ms R advice on those investments, so she would had to select the investments herself.

The adviser said it would be easier for Ms R to invest in the Balanced Model Portfolio initially and then consider ethical funds for investing at a later time. Ms R wasn't given a factsheet for the Balanced Model Portfolio until after the recommendation had been made and she had already started transferring funds for investment. And it wasn't until June that she was provided with further information about the available ethical funds, including that they were outside her attitude to risk and she would have to take personal responsibility for investing in these funds.

Although meeting notes and emails in March 2021 indicated Ms R would need to 'self-select' these funds, I don't think she was given enough information to understand the implications of this, given that she was an inexperienced investor with little understanding of the process. And this didn't fit with her need to benefit from ongoing advice and service as she did not want to make her own investment choices.

It wasn't until June 2021 that she was advised she would need to come out of the Balanced Model Portfolio altogether in order to access the ethical funds offered by Openwork.

It seems the process was driven by the aim of investing before the end of the tax year. But even if that was important, it wasn't the reason Ms R had sought advice.

Ms R chose to follow the advice given as her views on ethical investing had been discussed and she was under the impression her investment objectives would be addressed. Even though she had been told about the need to self-select, the adviser had offered to provide 'holistic advice'. So it was reasonable for her to assume this meant she wouldn't have to select her own funds without his guidance and her adviser would be advising her through that process. It was clearly recorded that she was seeking ongoing advice and service as she "*doesn't want to have to make her own financial decisions.*" She should not have been put in a position where she had to make her own choices.

Even if Ms R had thought the timescales associated with tax planning were important, she was paying for advice and her adviser had to recommend what was in her best interests. I appreciate Openwork says Ms R wanted to make the most of the tax planning opportunities available. But the fact she wanted to do that doesn't necessarily mean it should be recommended for her if that clashed with her objectives. Openwork had to ensure its advice was suitable.

The adviser should not have continued if he couldn't make a suitable investment recommendation - he should either have gained explicit agreement from Ms R to amend her investment preferences, or explained that he couldn't offer an investment solution in line with her risk profile. It wasn't until June 2021 that Ms R was advised the only ethical funds available were not aligned to her assessed appetite for risk and her adviser would be unable to provide her with any advice about investment funds.

Ms R had made clear her preference for ethical investments in an email; she had specific investment preferences that she shared with her adviser and these needed to be considered before he made his recommendations in the Suitability Report.

In my view, if Ms R had been provided with all relevant information relating to the ethical funds offered by Openwork, for which the adviser would have been unable to provide her with advice and she would have had to self-select, and which were not in line with her attitude to risk, she would not have proceeded with the recommendation and instead would have sought advice on options available to her elsewhere – which is what she has now done.

I also agree it would have been upsetting for Ms R to find that her funds were not invested in the way she wanted, and this had an impact on her feelings about seeking advice about her investments. She was also put to the trouble of having to change the investments. I agree a payment of £300 in respect of this is fair.

Putting things right

Fair compensation – ISA

In assessing what would be fair compensation, I consider that my aim should be to put Ms R as close to the position she would probably now be in if she had not been given unsuitable advice.

I take the view that Ms R would have invested differently. It is not possible to say *precisely* what she would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Ms R's circumstances and objectives when she invested.

What must Openwork do?

To compensate Ms R fairly, Openwork must:

- Compare the performance of Ms R's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.

- Openwork should also add any interest set out below to the compensation payable.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest

Embark Advance ISA	No longer in force	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held	8% simple per year 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 Openwork 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 Openwork 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 have decided on this method of compensation because:

- Ms R 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 a mix of diversified indices representing 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 Ms R's circumstances and risk attitude.

Fair compensation - pension

My aim is that Ms R should be put as closely as possible into the position she would probably now be in if she had been given suitable advice.

I take the view that Ms R would have invested differently. It's not possible to say *precisely* what she would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Ms R's circumstances and objectives when she invested.

What must Openwork do?

To compensate Ms R fairly, Openwork must:

- Compare the performance of Ms R'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.

- Openwork should also add any interest set out below to the compensation payable.

- Openwork should pay into Ms R'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 Openwork is unable to pay the total amount into Ms R's pension plan, it should pay that amount direct to her. 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 Ms R won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms R's actual or expected marginal rate of tax at her selected retirement age.

- It's reasonable to assume that Ms R is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Ms R 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 Openwork deducts income tax from the interest it should tell Ms R how much has been taken off. Openwork should give Ms R a tax deduction certificate in respect of interest if Ms R asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Embark Advance Retirement Account	No longer in force	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held	8% simple per year 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 Advance Account 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 Openwork 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:

- Ms R 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 Ms R's circumstances and risk attitude.

Finally, Openwork should pay Ms R compensation of £300 in recognition of the distress and inconvenience caused to her.

My final decision

I uphold the complaint. My decision is that Openwork Limited trading as The Openwork Partnership should pay the amount calculated as set out above.

Openwork Limited trading as The Openwork Partnership should provide details of its calculation to Ms R in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 12 June 2023.

Peter Whiteley
Ombudsman