

The complaint

Mr L complains that advice he was given by Rational Finance Ltd (“RFL”) failed to take sufficient account of his existing pension benefits, and so has caused him to be liable for a significant taxation charge.

What happened

Mr L has been assisted in making this complaint by his current financial advisor. But in this decision, for ease, I will simply refer to all communication as having been with, and from, Mr L himself.

I issued a provisional decision on this complaint in earlier this month. In that decision I explained why I thought the complaint should be upheld and what RFL needed to do in order to put things right. Both parties have received a copy of the provisional decision but, for completeness and so those findings form part of this decision, I include some extracts from it below. In my decision I said;

Mr L was given advice regarding his pension savings by RFL on two occasions – in February 2019 and February 2020. Mr L’s wife was also present at those meetings, and also received advice about her pension savings. But this complaint only relates to the advice given to Mr L – in my decision I will make no further reference to the advice provided at the same time to Mr L’s wife.

At the time the advice was given Mr L was in receipt of an occupational pension that had been in payment since before April 2006. He also held pension savings with two other providers – a pension plan that provided him with a guaranteed annuity rate (“GAR”) that could be taken when Mr L reached 65 in June 2019, and a further pension plan that had been accrued during Mr L’s employment.

In February 2019, RFL advised Mr L to exercise his GAR when it became available later that year. It also advised that he should transfer his other pension plan into a new arrangement. Mr L accepted that advice – his GAR pension was put into payment later that year and his other plan was moved to a new provider. And, in February 2020, RFL advised Mr L to make a further contribution to his other pension plan. Mr L again accepted that advice.

But the following year Mr L discovered that the value of his pension benefits, at the time he exercised his GAR, needed to be tested against the Lifetime Allowance (“LTA”). And since his occupational pension had commenced before April 2006, the value of those benefits were tested at the same time by multiplying their current annual payment by 25. That meant that Mr L’s pension savings exceeded the LTA and he became liable for a taxation charge. That charge was calculated by HMRC to be £11,565. Mr L paid the amount due to HMRC in May 2021.

By paying the pension contribution that RFL had advised in 2020, Mr L says that he lost the opportunity to apply for “Fixed Protection 2016” (“FP16”). He says that if he had been able to apply for FP16 he wouldn’t have needed to pay that additional tax.

And he says that when he takes his pension benefits from the remaining pension plan he will incur a further income tax charge for exceeding the LTA. If he held FP16 Mr L says that the additional tax would be reduced by £1,816.

RFL is no longer a regulated firm and the advisor who dealt with Mr L has retired. So the contemporaneous documents we have received on the complaint have largely been provided by Mr L, although I note that RFL has provided some commentary on what happened. But that does mean that some of the information that we would normally see is missing.

In 2019 RFL says that it conducted a “fact find” exercise with Mr L, although we haven’t been provided with a copy of the document. But it says that exercise was limited to gathering the information it needed to consider the two pension plans held by Mr L that were not yet in payment. It noted a warning on the fact find document that the advice RFL could provide would naturally be limited by the quality of the information Mr L had given.

RFL says that advice it gave to Mr L in February 2019 was only in relation to the switching of one of his pension plans to the new provider. It says that later in the year, when Mr L put the GAR into payment, he declined RFL’s assistance and completed the application himself. It says it would have been at that time that any LTA issues should have been identified.

But I don’t think that is a reasonable conclusion based on the evidence I have seen. In the advice report produced for Mr L in February 2019 RFL said;

“I recommend that [Mr L] arranges to take the guaranteed annuity from [provider] when you reach age 65 in June. The guarantee is too valuable to ignore. This will mean that you will become a higher rate taxpayer when this pension and your state pension are added to your [occupational pension]”

I think that statement clearly shows that RFL advised Mr L that he should put his GAR into payment as soon as he was able – advice that Mr L followed later in the year. And I think it also reasonably suggested to Mr L that RFL had given at least some consideration to the likely impacts on his taxation situation of taking his GAR pension.

But the LTA situation regarding Mr L’s occupational pension, that was already in payment, was more complex than RFL had assumed. RFL has accepted that, at the time it gave the advice, it had assumed that the pension has started being paid after 2006. That would mean that its value had been tested against the LTA at the time it was put into payment. And given the assumed starting value of those pension savings it would have left a good portion of the LTA unused for Mr L to apply against his remaining pension savings.

That assumption however was incorrect. Mr L had been able to take his occupational pension benefits before April 2006. So they hadn’t been tested against the LTA so far. The legislation meant that those benefits would be tested at the next time a benefit crystallisation event happened – in this case when Mr L took his GAR pension benefits. And at that time the occupational pension benefits would be attributed a value equal to 25 times their current payment rate. So they would exceed the current LTA and leave Mr L with a tax liability on his remaining pension savings.

I think that the future taxation consequences of putting the GAR into payment was very much within the scope of the advice Mr L was given in February 2019. He was

given very clear advice to take those pension benefits and warned of the impact that doing so would have on his future income tax liabilities. I think the only reason that the advice report didn't make Mr L aware of the LTA implications was because RFL had failed to gather sufficient information about his existing pension benefits.

Mr L says that, at that time, he hadn't paid any pension contributions since before 2016. So he says that he would have been able to apply for FP16. Had that application been successful he would have retained the previous LTA of £1.25M and so greatly reduced the amount of additional tax he would have needed to pay. I think the availability of the FP16 arrangement should have been something that RFL made Mr L aware of when it recommended he should take his GAR benefits later in the year.

When Mr L took his GAR benefits he did so without the administrative support of RFL. RFL says that Mr L failed to complete the application form for those benefits correctly as he didn't understand the questions it asked about his previous LTA usage. It says that was an error on Mr L's part and means that, if he had asked for RFL's support at that time, he could have applied for FP16 then to mitigate some of his tax liability.

I entirely agree that it is possible that, if RFL had provided assistance to Mr L when he took his GAR benefits, the LTA problems might have been identified earlier. But I think the actions Mr L took when he put his GAR benefits into payment had already been the subject of advice from RFL earlier in the year. That advice was, in my opinion, the ideal opportunity for RFL to have examined, and identified any issues with, Mr L's LTA position. I'm not persuaded that I can reasonably conclude that the same error RFL made when it provided the original advice – in assuming that Mr L's occupational benefits had already been tested against the LTA – would not have been made had it provided administrative assistance when Mr L took his GAR benefits.

The following year, before the LTA problems had been identified, Mr L was given some further advice by RFL. At that time he was advised to make the maximum permitted contribution to his pension, given that he had not earned any income in the previous year. So Mr L paid a contribution of £2,880 to his remaining pension plan.

I think that when making a recommendation of this nature it would have been appropriate for RFL to examine whether doing so would cause any LTA issues for Mr L. This was a further opportunity for RFL to gather the appropriate information about Mr L's LTA position, and would have allowed him to mitigate at least some of any future tax liabilities. But by paying that contribution Mr L gave up the ability to take FP16.

I think the regulatory environment is clear. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.*
- Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly.*

I cannot reasonably conclude that RFL's failure, on two occasions, to provide advice and guidance to Mr L about, at the very least, the need to perform some LTA analysis before taking proactive actions on his pension savings, was in line with

conducting business with due skill, care and diligence. I think that the advice RFL gave to Mr L should reasonably be expected to take into account the wider circumstances of his pension savings. So I don't currently think RFL has treated Mr L fairly and now needs to establish whether he has lost out.

I invited both parties to provide us with any further comments or evidence in response to my provisional decision. Although I am only summarising here what Mr L and RFL have said, I want to reassure both parties that I have read, and carefully considered, their entire responses.

Mr L has provided us with the additional information that I requested about whether taking Individual Protection 2016 ("IP16") might still provide him with some tax advantages. That information shows that the value of his pension benefits in 2016 would not have been sufficient to exceed the value of his occupational pension benefits when they were tested against the LTA in 2019. So IP16 wouldn't give any benefit to Mr L in terms of this complaint.

RFL has said that it doesn't agree with my provisional findings. It has now been able to retrieve and send us the fact find documents, and subsequent advice, from its meetings with Mr L in February 2019 and February 2020. It says that making the firm completely responsible for the tax charge, whilst completely exonerating Mr L, is unjust. It says that Mr L had several opportunities to provide RFL with fuller details about his occupational pension benefits.

RFL has also said that the addition of interest, at a rate of 8% simple, would place Mr L in a far better position than he would have been. It says that if RFL had charged a client 8% interest it thinks it likely we would have upheld any complaint that client might have made.

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 explained in my provisional decision, I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr L and by RFL. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

I am grateful to both Mr L and RFL for the additional information they have sent to me. But I am sorry to tell RFL that its additional submissions haven't led me to change my findings on this complaint. I would however like to take the opportunity to provide answers to some of the matters that have been raised in that response.

Ultimately Mr L was seeking professional advice from RFL. It was RFL that was the expert in the pension matters, and so it was reasonable for Mr L to be entirely reliant on the advice and information he was given by the firm. It wasn't for Mr L to determine what information was important or relevant to underpin the advice that he was being given.

As I explained in my provisional decision, the fundamental omission that was made by RFL was failing to identify that Mr L's occupational pension had been put into payment before April 2006 and so hadn't yet been tested against the LTA. The importance of that might not have been apparent to a consumer such as Mr L. but it should have been abundantly clear to his professional advisor. And, had that important information been determined, I am sure that the advice RFL would have provided would have been different.

When he took his GAR pension benefits in 2019, Mr L was simply following the advice that he'd been given earlier in the year. It seems reasonable to me that Mr L didn't seek any further support from RFL at that time – he was simply implementing an already agreed strategy.

I have noted what RFL has said about the compensatory interest that I am asking it to pay in relation to the tax Mr L has already remitted to HMRC. Generally interest of that nature is to compensate consumers for being “deprived” of the money – that is not having it available to use. It doesn't just reflect the lost opportunities to save or invest. Someone might also have gone without other things they really needed or might have benefited from, because they didn't have the money. Or they might have had to borrow money to cover the loss and it's possible they'd have been charged more than 8%. The interest rate of 8% matches the current statutory interest rate on judgment debts. So I think that rate is fair to apply in the circumstances of this complaint.

So, in summary, I think that the advice RFL gave to Mr L should reasonably have been expected to take into account the wider circumstances of his pension savings. So I don't think RFL treated Mr L fairly and now needs to establish whether he has lost out.

Putting things right

I am satisfied that the information Mr L has provided to us clearly demonstrates that the use of IP16 wouldn't have any impact on the compensation that I direct below.

It seems clear to me that, in total, Mr L's pension savings will ultimately exceed the LTA that he could have benefitted from had he taken FP16. That would have set his LTA at £1.25M. So any tax charges as a result of pension savings in excess of that LTA would have been due regardless of any advice he should have received from RFL, and so shouldn't form part of this compensation. But I am satisfied that Mr L will ultimately crystallise pension savings up to that amount – even if he hasn't done so already. So I am basing this compensation on the full amount of the lost LTA, rather than just the tax charges incurred so far.

Mr L has provided us with details of the calculated LTA value of his occupational pension benefits at the time he took his GAR benefits. That value is £1,196,472. So that allows for a calculation to be performed on how much of a £1.25M LTA would have remained available to him to be used against his GAR benefits in 2019, and potentially in the future against a part of his other remaining pension benefits. The remaining LTA amount would have been £53,528, and Mr L's GAR benefits were valued at £46,460.

The tax charge for exceeding the LTA is currently set at 25% of the excess pension benefits. So in order to put things right for Mr L RFL should pay him

- 25% of the value of the GAR pension benefits taken (£46,460) in excess of the LTA since they were less than the remainder of the £1.25M LTA that would be available had FP16 been taken.
- 25% of the value of any remaining unused LTA (£7,068) had FP16 been taken.

Where payments have already been made to HMRC for the tax that is due (I believe this to only be in relation to the GAR benefits and paid in May 2021) RFL should add simple interest at a rate of 8% per annum to each of these amounts from the date they were paid to the date of settlement. HMRC requires RFL to take off tax from this interest. RFL must give Mr L a certificate showing how much tax it's taken off if he asks for one.

There is no doubt that RFL's failures have caused Mr L a significant amount of inconvenience. So RFL should additionally pay Mr L the sum of £500 in respect of that.

My final decision

My final decision is that I uphold Mr L's complaint and direct Rational Finance Ltd to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 February 2023.

Paul Reilly
Ombudsman