

The complaint

Ms M complains about Embark Services Limited's (Embark's) administration of her Self-Invested Personal Pension (SIPP). She has raised concerns about Embark's failure to keep her updated in respect of her SIPP and the lack of annual statements. Ms M has also told us that she's unhappy Embark has charged her fees for the management of her pension but has failed to manage her funds properly.

What happened

Ms M transferred her existing pension to a SIPP and invested in a few corporate bonds on the advice of her then financial adviser. The SIPP was established with Avalon Investment Services Limited (Avalon). Avalon subsequently went into administration. Embark took over administration of Ms M's SIPP but it didn't take responsibility for anything that happened in respect of the SIPP prior to it taking over.

After Embark took over it didn't send Ms M annual statements for her SIPP for a couple of years.

It has since sent the missing annual statements and a number of letters confirming the current position of Ms M's SIPP and her options going forward.

For example, on 30 December 2019, Embark wrote to Ms M explaining that Avalon was responsible for the establishment of the SIPP, confirmed that advice had been provided by Bank House (Ms M's then financial adviser) and encouraged her to seek advice in respect of her options. Amongst other things it said:

"Your Avalon Freedom SIPP was originally provided and administered by Avalon Investment Services Limited (AISL) until 23 February 2016, when AISL went into administration. The administration proceedings were overseen by KPMG, until AISL was dissolved on 4 August 2018. Embark Investment Services Ltd (EISL) took over as the operator of your SIPP from 26 February 2016 but are not responsible for liabilities accrued whilst AISL operated your SIPP. Rowanmoor Personal Pension Limited (RPPL) are administering your SIPP on behalf of EISL and both are part of Embark Group Limited.

As you will be aware, your SIPP is invested in the Allenbrooke plc 6% 2024 Bond, Malborough Equity plc 8% 2024 Bond and Allenby Commercial Property plc 7% 2024 Bond (the bonds), which you were advised to invest in by the financial adviser appointed to your SIPP when it was established with AISL. That financial adviser was Bank House Investment Management Limited (trading as Mountbatten Wealth)."

Background to the complaint

Ms M raised a complaint about Embark. Embark issued a final response letter, it accepted that it hadn't provided Ms M with annual statements for 2016 and 2017. It offered her £100 compensation for this and provided Ms M with the missing statements.

Unhappy with its response, Ms M referred her complaint to us. One of our investigators looked into Ms M's complaint and concluded that the offer Embark made was fair under the circumstances. He also highlighted that Ms M may be able to make a claim to the Financial Services Compensation Scheme (FSCS) about the advice she received to take out the SIPP and invest in the manner that she did. The investigator obtained some information about Ms M's then current position and options from Embark. In summary Embark told us that:

- At the time Ms M held around £9,000 in cash in her SIPP.
- All of the bonds held within her SIPP were valued at nil.
- Ms M could not withdraw the cash balance from her SIPP as she was under 55 but she could transfer it to another pension.
- Embark would not require that Ms M keep a £2,000 buffer to cover ongoing fees.
- The SIPP would have to remain open until the position with the investments is settled but it wouldn't charge any ongoing fees.
- A transfer free of £300 plus VAT would apply.

Ms M didn't accept the offer, she said that her complaint wasn't just that Embark had failed to provide her with statements but also that it had charged her fees for the management of her fund but had failed to manage it.

The investigator explained why this didn't change his view of Ms M's complaint. Because agreement couldn't be reached, this case was passed to me for review.

I issued my provisional decision explaining why I thought that Embark's offer was fair and reasonable under the circumstances, I confirmed that I would consider any further submissions either party wished to make as long as I received them by 21 February 2023. Embark didn't respond. Ms M responded explaining that the provisional decision was along the lines she expected. She also said that she would need to seek advice on transferring funds from her SIPP and that she doesn't think that the ongoing fee of £300 is justified under the circumstances.

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.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

When considering what's fair and reasonable, I've taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

It's my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

My findings remain as set out in my provisional decision; I've largely reiterated these below. Adding to these only to address the points Ms M raised in response to my provisional decision.

Relevant considerations

When considering what's fair and reasonable in this complaint I consider the Financial Conduct Authority (FCA) Principles for Business to be of particular relevance.

The Principles for Businesses ("PRIN") which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G – at the relevant date).

In addition, in *British Bankers Association, R (on the application of) v The Financial Services Authority & Anon* (2011) EWHC 999 (20 April 2011) Ouseley J said:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules" (para 77)."

"...The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules" (para 162).

I consider Principle 6 to be of particular relevance:

Customer's interests – A firm must pay due regard to the interests of its customers and treat them fairly

In September 2009 the FSA published a thematic review report on SIPP's which stated:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients..."

The context that these comments were made in was in relation to the quality of the business that a SIPP operator accepts. I understand that in this complaint Embark isn't responsible for the acceptance of Ms M's business, but it's clear from the regulator's comments that SIPP operators were obliged to ensure fair treatment of their customers.

I've carefully considered Embark's obligation to treat its customers (and specifically Ms M) fairly when deciding what is fair and reasonable in the circumstances of this complaint.

Embark is not the business that was responsible for advising Ms M in relation to her SIPP and investments in the first place. I note Ms M appears to have accepted that this is the case. By acquiring the business book of Avalon, Embark didn't accept any liability for any acts by Avalon, in administering her SIPP, or any advisors who initially advised Ms M.

In these circumstances, I'm satisfied that Embark can't be held responsible for the charges applied to Ms M's pension, the advice that was provided to Ms M or how the SIPP was administered before it acquired the SIPP. However, it's responsible for what happened thereafter.

Overall, I think that Embark's offer is fair and reasonable under the circumstances. I understand that this will come as a disappointment to Ms M, but I'm not persuaded that it should fairly and reasonably do anything further under the circumstances.

As confirmed in the background to this complaint Embark has told us that:

- The offer of £100 compensation for failing to send two annual statements is still open.
- It will allow Ms M to transfer the remaining cash held in her SIPP and will not require her to keep a £2,000 cash buffer in her SIPP.
- The SIPP will need to remain open but Embark will not charge Ms M ongoing administration fees until such time as the position with her investments can be resolved.
- Ms M would need to pay a transfer fee and Embark will not be able to pay the funds to Ms M directly as she is still under age 55.

Given Embark's limited responsibility for the position Ms M's pension is in, I think the above is fair. This, in summary, is because:

- Embark isn't the firm responsible for the establishment of the SIPP or for accepting the underlying investments.
- I think £100 is fair compensation for Embark's failure to send two consecutive annual statements.
- It's not unreasonable that Embark charged Ms M some fees for the administration of her SIPP. Ms M's investments are now valued at nil but I don't think this is as a result of mismanagement on Embark's part.
- Allowing Ms M to transfer all of the cash remaining in her SIPP and waiving any further ongoing fees until the position with the investment can be resolved should allow Ms M to retain as much of the remaining value of the pension as possible.

I understand that Ms M may wish to seek advice on transferring the cash balance of her SIPP. Deciding what to do with one's pension can be a complex matter and it is, of course, open to Ms M to seek advice on this.

Ms M remains unhappy with the level of fees being applied by Embark. If Ms M moves her cash balance away and all that remains in the SIPP are the illiquid assets, in accordance with its offer, Embark won't charge any further fees until the position with the investments can be resolved. So, Ms M will incur the transfer fee of £300 plus VAT but shouldn't need to incur any ongoing fees, if she decides to take this route. The transfer of funds from a pension does involve administrative work, so I don't think it's unreasonable for Embark to charge a fee for this.

As highlighted initially by the investigator and then in my provisional decision, Ms M may be able to make a claim to the FSCS about the advice she received to transfer her existing pensions to a SIPP and invest in the bonds that now hold no value. She may also be able to make a claim to the FSCS about her original SIPP provider, Avalon, as it also went into default. I note from Ms M's submissions that she hasn't felt up to submitting a claim to the FSCS.

It's clear that this has been a stressful time for Ms M and I sympathise with her position. I hope she understands that, whilst I make no further award, this is not because I underestimate the seriousness of the situation – in respect of her pension. Rather, it's because I'm not persuaded that Embark is responsible for what has gone wrong.

My final decision

For the reasons set out above, it's my final decision that Embark Services Limited's offer is fair. I direct Embark Services Limited to pay to Ms M £100 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 21 March 2023.

Nicola Curnow
Ombudsman