DRN-4149730

The complaint

Mr R complains Scottish Widows Limited (Scottish Widows) disinvested his policy from a With-Profits and Consensus fund and reinvested the With-Profits proceeds into a Cash fund on a new platform without his consent. He says he has suffered a loss of investment growth because the cash fund was unsuitable for him.

What happened

I set out the background to this complaint in my earlier provisional decision. For clarity, I repeat it here.

Mr R held a Group Personal Pension Plan (GPP) with Scottish Widows as a member of his employer's pension scheme.

In October 2016, Scottish Widows were in the process of moving to a new technology platform. In order to obtain the information required to complete a bulk transfer, Scottish Widows Corporate Relationship Manager (RM) was in correspondence with Mr R's employers Financial Adviser (FA).

On 26 October 2016, the RM requested by email confirmation from the FA that those members in with-profits and closed funds "had agreed suitable alternatives, otherwise their existing funds would not be moved across as part of the bulk exercise."

By 23 January 2017, the RM hadn't received that information so emailed the FA again to request it as they were starting the process of moving platforms.

On 24 January 2017, Mr R received an email from his employer, which had been sent to all members of the GPP to inform them that it would be moving the scheme to a new digital platform. The email confirmed it was for information only and that no action was required. It also said the existing funds would be available on the new platform so no-one would be disadvantaged, and the change would happen automatically.

In February 2017, the SW team working on the migration encountered a problem. The administrator confirmed in an internal email he had wrongly thought With- Profits investments could continue on the new platform, but now knew that not to be possible.

On 7 February 2017, he requested the RM obtain investment instructions for those clients from the FA. The RM replied with an instruction that "in the interim and to avoid any further delay can you replace the closed funds/with profits with cash". The RM confirmed he would write to the adviser and request alternatives.
Mr R received his 2018 annual statement, this showed his plan transferred to Scottish Widows new administrative platform on 22 February 2017. The statement confirmed a transfer of £119,969.37 had been received in respect of that transfer. By the time the annual statement was produced in January 2018 the plan had a transfer value of around £130,000.

The statement said approximately £74,000 of his funds were invested within the "Consensus" fund and the remainder, totaling around £56,000 was held in a cash fund. It also confirmed the ongoing investment instruction applying to his monthly contributions was a 50/50 split of each contribution between the Cash and Consensus funds.

Mr R complained to Scottish Widows via his employer about the switch as he had not been consulted about it or provided consent to it.

On 4 August 2021, Scottish Widows wrote to his employer with their final response to the complaint. They didn't uphold his complaint and said he had been made aware of the fund switch by his Financial Adviser.

On 12 August 2021, Scottish Widows issued another final response directly to Mr R after he pointed out some inaccuracies in the previous letter. It accepted it had quoted the wrong transfer date and referred to the FA as Mr R's adviser rather than his employer's adviser. It offered to issue a cheque for £50 by way of an apology.

On 2 February 2022, Mr R brought his complaint to this service for consideration with the assistance of his employer's new FA and provided authority for them to be included in correspondence about his complaint.

An investigator looked into matters for Mr R, after reviewing all the information, she concluded Scottish Widows disinvested and reinvested Mr R's plan without confirming if he had agreed to that action, that changed investment instruction was also applied to his ongoing contributions. She found that Scottish Widows had treated Mr R unfairly and upheld his complaint.

Scottish Widows disagreed. In summary it said:

- the migration to the new platform was a bulk transfer and individual consent was not required
- the welcome pack issued after migration provided details of the transfer and funds requested so Mr R was able to amend his choices from inception if he so wished.

The investigator looked at the comments made by Scottish Widows, but this didn't change her view. She said that whilst she accepted Mr R's individual consent was not required there was a clear outstanding request from the FA that " until those members in with profits and closed funds had agreed suitable alternatives, their existing funds would not be moved across as part of the bulk exercise". This remained an outstanding request when Scottish Widows took the decision to carry out the bulk transfer and as such Mr R had been treated unfairly.

Scottish Widows went on to raise a number of concerns about how the redress would be calculated if the complaint was upheld. It said it would expect the redress comparison to be based on funds offered by Scottish Widows and capped at an appropriate date.

As Scottish Widows didn't agree, the complaint has been passed to me for a decision.
In my provisional findings I reached the same outcome as our investigator, but I'd reached a different way of calculating redress. I issued a provisional decision to allow both parties the opportunity to make any further submissions they wish me to consider before I made my final decision.

Having looked at the evidence available I could see there was a complex chain of information between the parties. There were misunderstandings about which funds would and wouldn't be available and then further requests for clarification which were not acted upon prior to the bulk transfer of the group personal pension plans. So, to review all the evidence it was necessary to look at the correspondence between Scottish Widows and Mr R's employer and the internal communication between the FA and the employer.

The employer's financial adviser was engaged to undertake the bulk transfer of the scheme with Scottish Widows. So, the employer was corporate client, not Mr R. The FA confirmed to this service that they did not have any information about Mr R because there was no client agreement. The FA didn't provide any financial advice to Mr R or recommend any alternative solution. Scottish Widows were administering the scheme and so they also had no responsibility to advice Mr R either.

The FA was required to ensure that they made Mr R aware via his employer of the alternatives he would have to consider and then decide upon himself if he wished to remain in the With Profits funds and provide that information to Scottish Widows.

In an email dated 26 October 2016, the FA says, "can you confirm you have spoken to all those in with-profits and closed funds to check they have agreed suitable alternatives., otherwise their existing funds will not be moved across as part of the bulk exercise".

But the email Mr R received on 24 January 2017 from his employer confirmed that "funds that are available on the current platform will be available on the new platform, so no-one will be disadvantaged, All your funds and investments will be transferred automatically".

I could see no evidence to suggest otherwise. I said there was no evidence that Mr R wanted to change his investment strategy, so on the surface it seemed both Mr R and his employer expected the With-Profits find to move as was to the new platform.

But, in another internal email on 7 February 2017, sent by the Scottish Widows administrator, to the Scottish Widows Relationship manager working with the FA, it became apparent there was a problem with moving the "With-Profits" investors onto the new platform. The administrator said he "wrongly thought they would be able to continue to invest in that". That meant a decision would need to be taken or the scheme start would be delayed.

The administrator asked the RM explicitly for the adviser to establish the investments for the new polices. The emails confirmed that the RM would write to the adviser and request alternatives. But provided the instruction "As discussed in the interim and to avoid and further delay can you replace the closed funds/with profits with cash".

So, the communications showed that Scottish Widows gave a clear instruction to move the with-profits funds (that were now not available) into cash. This was an explicit decision to move Mr R's funds into cash without any discussion or agreement from him. That decision resulted in a change to his investments and his ongoing contributions. I said I was persuaded that in taking that action Scottish Widows treated Mr R unfairly and as such should put matter right.

I considered Scottish Widows request that the redress be calculated to the date Mr R was sent his first annual statement in September 2018. I looked at the information from Mr R to his employer's adviser, and it is clear he first noticed the fund change in April 2021. When he did so, he took action and switched the funds. I'm persuaded he had no reason to be aware that the funds had changed in September 2018, as the last email he received made it clear the transfer to the new platform would not disadvantage him in anyway, so it seems he discovered the change by accident. I'm persuaded by his testimony but equally I think the calculation in the first stage should be from the date the funds were disinvested to the date Mr R switched his funds which he says was 15 April 2021.

Scottish Widows points to the fact the With-Profit fund is closed to new members and it for this reason a Benchmark index to calculate whether there has been a loss.

I said from when Mr R switched his funds there are two concerns. If a loss was sustained this difference would also have been invested earlier and it's not clear whether Mr R would have made the same investment decision in 2017 as he did in April 2021 so to compensate for this, I intend to direct Scottish Widows to pay Mr R 8% simple interest on the any losses calculated from disinvestment to the date of settlement.

I gave both parties the opportunity to respond with any further submissions they wished me to consider.
Mr R accepted my findings and had no further comment.
Scottish Widows accepted my provisional findings and the D&I payment but asked for the redress calculation to be amended. It said the actual date of the funds were switched was 15 February 2021 and provided a request to switch request to that effect.

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 have reached the same conclusion as that of my earlier provisional decision, but I have revisited the redress calculation.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered all the submissions that have been made by Mr R and Scottish Widows.

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.

Scottish Widows provided further evidence to show Mr R requested a fund switch on 15 February 2021, rather than April 2021.

The request was made on 15 February, but the actual switch occurred on 17 February according to the investment summary. In light of the confirmation of the switch, it seems fair and reasonable that the redress be calculated to 17 February 2021.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr R as close as possible to the position he would probably now be in if he had been given suitable advice.

I think it's fair to say Mr R would have invested differently. I have considered the specific alternatives that were available to him. It isn't possible to say precisely what he would have done. But I'm satisfied that what I have set out below is fair and reasonable given Mr R' circumstances and objectives when he invested.

What should Scottish Widows do:

To compensate Mr R fairly Scottish Widows should:

- Compare the performance of Mr Rs' investments with that of the benchmark shown below.

- A separate calculation should be carried out for each investment. If the fair value is greater than the actual value, there is a loss. If the actual value is greater than the fair value, there is a gain. Losses and gains should then be combined. If there is an overall loss, that is the amount of compensation payable.
- Scottish Widows should also pay any interest set out below.
- If there is a loss, Scottish Widows should pay into Mr Rs' pension plan, to increase its value by the amount of the compensation and any interest. Your payment should allow for the effect of charges and any available tax relief. You shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If Scottish Widows is unable to pay the compensation into Mr R' 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 R won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mr R's' actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr R is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr 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%.
- In addition, you should pay Mr R £300 for the trouble and upset caused by having to revise his retirement plans in light of the changes made to his plan without his consent.
- Provide the details of the calculation to Mr R in a clear, simple format.

Income tax may be payable on any interest paid. If you consider that you're required by HM Revenue & Customs to deduct income tax from that interest, you should tell Mr R how much you've taken off. You should also give Mr R a tax deduction certificate in respect of interest if Mr R asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Investment name	Status	Benchmark	From (Start date)	To (end date)	Additional Interest
With Profits transfer Value	Still exists and liquid	FTSE UK Private Investors Income Total Return	Date of disinvestment	17February 2021	8% simple interest from 17 February

		Index			2021 to the date of settlement
Monthly contributions invested within the Cash Fund following the transfer	Still exists And liquid	FTSE UK Private Investors Income Total Return Index	Date of investment	17 February 2021	8% simple interest from 17 February 2021 to the date of settlement

For each investment:

Actual value

This means the actual amount paid or payable 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, income or other distributions paid out of the investments 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 you total all those payments and deduct that figure at the end.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr 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'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 R circumstances and risk attitude.

My final decision

For the reasons I have given I uphold this complaint and direct Scottish Widows Limited to carry out the redress as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 June 2023.

Wendy Steele
Ombudsman