

The complaint

Mrs R has complained to St James's Place Wealth Management Plc (SJP) about the difference in the performance of the 'uncrystallised' and 'crystallised' elements of her Retirement Account (RA). SJP upheld the complaint but Mrs R doesn't agree with its proposal to put things right.

What happened

Mrs R holds a RA with SJP. After noticing a difference in the way her crystallised pension account was performing compared to the uncrystallised account, Mrs R raised concerns with SJP. SJP's Investment Management team conducted a review of Mrs R's RA in February 2022. It explained that the crystallised and uncrystallised pension accounts held different funds and this was the main reason why they were performing differently.

Mrs R wasn't happy with this so she complained to SJP. She said that the growth of her crystallised account had been "inadequate" in comparison to her uncrystallised account. She wanted SJP to amend the fund allocation of her crystallised account to reflect the better performing uncrystallised account and to complete a loss assessment based on what her returns would have looked like if this had been done from the beginning. She said she was also unhappy that her concerns had been ignored by SJP during her annual review meetings. So she wanted to be compensated for the poor service she'd experienced.

SJP partially upheld the complaint. It accepted it should have taken Mrs R's concerns about the difference in performance seriously, and if it had been more proactive the crystallised and uncrystallised accounts could have been aligned by January 2019. SJP calculated a loss of £19,192.41 resulting from this mistake. It offered to pay the amount directly to Mrs R (making a deduction for income tax) plus £400 compensation to reflect the impact of its poor service and delays.

Mrs R was happy with SJP's response relating to her concerns about the service she had received. However, she raised further points for SJP to consider regarding the rest of her complaint, including, amongst other things, concerns about the performance of the crystallised account. She also requested that SJP backdate its loss assessment to 2017, when she first entered flexi access drawdown. She also requested that the redress was paid into her pension rather than directly to her bank account.

SJP reviewed these concerns. It didn't uphold Mrs R's complaint about investment performance and it remained of the view that it was appropriate for the loss assessment to start in 2019. It also explained that due to HMRC regulations it was unable to pay the redress into Mrs R's pension. But it accepted Mrs R's comments about the frustrations she'd experienced and it increased the compensation to £650 overall.

Mrs R remained unhappy so she referred the complaint to our service for an independent review.

One of our investigators considered the complaint and initially thought SJP needed to do more to put things right. In summary the investigator thought completing a redress

calculation based on aligning the portfolios in January 2019 was a reasonable approach. But he thought SJP needed to pay the redress into the pension plan as this would put Mrs R back in the position she otherwise would have been in. The investigator was satisfied £650 compensation was fair in the circumstances of the complaint.

Neither Mrs R nor SJP agreed with the investigator's view. Mrs R said her loss dated back to the crystallised account being set up incorrectly in 2017. And Mrs R's own calculations show the loss suffered is significantly higher at £33,942.40. She also didn't agree that she should pay tax on the redress because she hasn't requested any income; it is a payment to reflect growth that should otherwise have been in the account if it had been managed correctly.

SJP said that it's unable to make adjustments to Mrs R's plan without it compromising the tax treatment of the plan. So it considers its offer to pay the redress directly to Mrs R with a notional deduction of income tax is in line with Financial Ombudsman Service guidance in situations such as this.

Our investigator reviewed the arguments from both parties and updated his findings. In summary he said that:

- Having considered everything, he wasn't satisfied the crystallised account had been set up incorrectly. He acknowledged Mrs R had said she'd been led to believe her crystallised and uncrystallised accounts would perform the same. But he said that SJP had provided a list of funds to be held in the crystallised account and it was clear some of these funds were different to the ones in the uncrystallised account. So, the investigator didn't think SJP had done anything wrong, given it explicitly stated which funds it intended to invest in. And Mrs R signed the declaration to show she accepted this recommendation.
- Mrs R doesn't think it makes sense to set up a crystallised account which loses money. But the performance of an investment is dependent on market movements and isn't something that a business can guarantee or predict. So, the fact the funds held in the crystallised account didn't perform as well as expected doesn't necessarily mean SJP did anything wrong. It wouldn't be reasonable to look back and penalise a business for poor investment performance using hindsight.
- Mrs R hasn't complained about the suitability of SJP's recommendation and it seems she understood the risk involved. SJP categorised Mrs R as a medium risk investor and based on her circumstances at the time of advice, the investigator thought that assessment was suitable. And in terms of the recommendation itself, the Managed Funds Portfolio was diversified and included UK and global equities, bonds and some cash, in line with Mrs R's medium attitude to risk. So, the investigator thought the recommendation was suitable.
- Overall, the investigator didn't think SJP had set up Mrs R's crystallised account incorrectly. It had made a suitable investment recommendation based on her attitude to risk and her circumstances at the time. It clearly set out the funds Mrs R was to be invested in and then proceeded on that basis. The fact Mrs R's account didn't perform as expected wasn't something the investigator felt he could hold SJP responsible for. So, he wasn't going to ask SJP to calculate redress from 2017, when Mrs R sought advice to enter flexi-access drawdown.
- Mrs R also stated that that she didn't think SJP managed her portfolio correctly. She was paying an annual management fee which entitled her to an annual review to receive ongoing advice. But the investigator hadn't seen any evidence to suggest the annual management fee included a more personalised service or that SJP had authority to make investment decisions on Mrs R's behalf.

- Mrs R felt SJP should have known something was wrong at her end of year review in 2017 and should have acted on it. But the investigator didn't think this would be a reasonable conclusion as he'd not seen any evidence that Mrs R had raised serious concerns or was dissatisfied with her fund performance during the meeting. The investigator had also taken into account SJP's strategy for medium to long-term investment and the need to allow higher risk investments time to overcome volatility. So, he wouldn't have expected SJP to recommend switching investments at the first annual review meeting.
- SJP identified the second annual review meeting, at the end of 2018, as the point where it should have taken action. At this point Mrs R had raised concerns about the negative growth in both accounts and also questioned the discrepancy between their returns. The investigator agreed with SJP that if it had taken Mrs R's concerns seriously at this point, it would have likely resolved the discrepancy by switching the funds held in the crystallised account to match the better performing uncrystallised account. So, the investigator thought conducting a redress calculation from January 2019 would produce the fairest and most reasonable outcome.
- Mrs R had questioned why her funds weren't rebalanced in line with the Managed Funds Portfolio. SJP had said that consumers will not automatically be switched to the most up to date version unless they have concerns and wish to make changes following annual review meetings. The investigator thought this was a reasonable explanation and reflected SJP's advisory relationship in which it requires permission before making any changes. Moreover, the evidence suggested that neither the crystallised nor uncrystallised accounts were rebalanced. If they had been, it's possible the uncrystallised account wouldn't have produced the same desirable returns Mrs R now wants to replicate in her crystallised account.
- In terms of how the compensation should be paid, the investigator explained that if a payment into the pension would have implications on the money purchase annual allowance (MPAA), this service wouldn't usually force a business to do this. And as Mrs R has started taking income from her pension, there is a restriction on the amount that can now be paid back into it, currently £10,000. The investigator acknowledged Mrs R's point that if it hadn't been for SJP's mistake, the money would have been in her pension. But he had seen evidence that a payment into the pension might not be compatible with pension regulations. So, he wouldn't be asking SJP to do this.
- In terms of the tax position, the investigator clarified that compensation paid to resolve a pension complaint is exempt from income tax – so Mrs R wouldn't need to make any declaration to HMRC. But had the redress been paid into Mrs R's plan, it would have provided a taxable income and so the compensation should be adjusted to reflect this. Again, the investigator explained that this is in line with the approach our service takes in situations such as this.

Mrs R responded to the investigator's assessment. In summary she said that:

- While she doesn't agree with the reason provided by SJP for the difference of performance between the crystallised and uncrystallised pension accounts, she can see her arguments are being refuted so there's no point pursuing this aspect further.
- She rejects the notion that 'notional' tax should be taken from the compensation. Mrs R requests that the full compensation is paid directly into her crystallised account. This is the position she would have been in if the account had been managed appropriately. She doesn't want the compensation paid out by SJP as income as she doesn't need the additional income this year and may need it in future years. Mrs R has explained that she's a pensioner with no earned income so she

can't top up her pension account and she is nowhere near her lifetime allowance.

The compensation is for rectification of past, historic failures by SJP which resulted in lack of account growth. The approach proposed regards monies paid by SJP as contributions paid into the pension scheme by Mrs R. This is not appropriate. And it reduces the compensation to Mrs R by a notional 20% tax, which does nothing more than reduce the amount paid out by SJP. Even if Mrs R was earning, she couldn't put the monies back into the pension account as she would have received the amount less 20%. Mrs R also notes that although the compensation is reduced by 20%, this is not forwarded to HMRC. And she doesn't need to declare it to HMRC. So Mrs R has questioned if HMRC knows this is the approach taken by this service.

- The investigator has said that he needs to reach an outcome that is consistent with this service's general approach. And he's said that making payments directly into the pension is not consistent with decisions SJP has received previously from our service. However, the Financial Ombudsman Service's website clearly declares "*We make decisions based on what we think is fair and reasonable, accounting for the unique circumstances of each case we receive.*"

The complaint has been passed to me to decide.

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.

Mrs R has said that she no longer wishes to pursue the complaint in terms of how the plan was set up and the amount of redress due because SJP continues to refute this argument. While I don't intend to go into great detail regarding this aspect, I'd like to reassure Mrs R that I have considered the complaint in its entirety. And having done so, I agree with our investigator on this aspect of the complaint. I've seen no evidence the uncrystallised pension account was set up incorrectly.

The reason for the difference in performance between the two accounts was due to the makeup of the funds within the Managed Funds Portfolio, at the time each of the accounts was established. For example, the model Managed Funds Portfolio in 2011 invested in the following funds:

Invesco Perpetual Managed (Strategic managed)	15%
Schroder managed (Managed Growth)	15%
AXA Framlington Managed (Balanced Managed)	14%
GAM Managed (Recovery)	14%
Global Managed (Global)	14%
THSP Managed	14%
Worldwide Managed (Worldwide Opportunities)	14%

Over time, the proportion of these funds in the individual accounts will vary as some funds will perform better than others. But the fund allocation is not rebalanced automatically, other than for bulk switches. So in the case of the 2011 Managed Fund Portfolio, there was a bulk switch of the THSP Managed to Global Equity in 2013.

SJP adjusts the model Managed Fund Portfolio regularly to ensure that it remains well diversified and continues to meet its medium rated risk profile. This meant that in late 2016, when Mrs R received advice to crystallise some of her pension, the model Managed Fund Portfolio comprised of the following investments:

AXA Framlington Managed	15%
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Global Equity	15%
Global Managed	10%
Multi Asset	15%
Schroder Managed	15%
Strategic Income	15%
Strategic Managed	15%

So Mrs R's crystallised account was set up in line with the 2016 model portfolio. But because existing accounts don't get automatically rebalanced, Mrs R's uncrystallised account didn't get switched over to the 2016 model. So the investments in the two accounts differed slightly, meaning their performance differed. I appreciate Mrs R believes the crystallised account was set up incorrectly from the start but for the reasons explained, I don't think SJP made an error here.

What SJP did get wrong was that it failed to act when Mrs R's raised concerns about the account's performance. I agree with our investigator that the first review after the account had been set up was probably too early for SJP to have taken any action. Mrs R hadn't raised concerns at this point and like our investigator said, the portfolio is intended to be a medium to long term investment. So short term fluctuations are to be expected. But Mrs R says she expressed concerns about the performance of her account by the 2018 review. So I think it's from this review that SJP ought to have taken action. It seems the crystallised fund report was generated in January 2019. So I agree that it's at this point that SJP ought to have taken action to rebalance the funds held within the crystalised account. As such, I'm satisfied SJP's offer to calculate the loss from this point is fair.

I've also thought carefully about what SJP needs to do to put this matter right. But before explaining my thoughts around this, I'd like to assure Mrs R that while we may have particular approaches to the way we resolve complaints, we do also take the individual circumstances of each complaint into account when recommending what a business must do to put things right.

Where possible in situations such as Mrs R's - where it's been determined that, but for an error caused by the business, the pension fund value would be higher - we would ask that a business pays any redress directly into the pension. I know this is what Mrs R would like to happen, but this isn't always possible. I'll explain why.

HMRC will accept scheme administrators, in some circumstances, making adjustments to a pension, for any errors they have made, without compromising the tax treatment of the pension. But Mrs R's complaint is against SJP Wealth Management Plc, as it is this business (or legal entity) that advises on the investments in the account and is responsible for any loss Mrs R has suffered. However, SJP Wealth Management Plc isn't the administrator of the pension scheme. The scheme is administered by SJP UK Plc, which, although part of the same group of companies, is a separate legal entity to SJP Wealth Management Plc.

So HMRC rules state that the only way SJP Wealth Management Plc can make a payment into the pension, is if it's treated as a third party contribution. However, we wouldn't ask a business to make a payment like this if it would have an impact on the individual's lifetime allowance or the MPAA.

Mrs R has demonstrated that a payment into the pension wouldn't impact her lifetime allowance. But as she has already started taking benefits from her pension, the MPAA does apply. This limits contributions into the plan to a maximum of £10,000 per year. However, the redress exceeds this and so for this reason I won't be asking SJP to pay the redress into the pension as this have an impact on the MPAA.

I do appreciate that Mrs R hadn't wanted to take any income from her pension at this time. But in trying to put things right, it isn't always possible to replicate the exact position the individual would be in now, if the error hadn't occurred. For this reason, it's not unreasonable for SJP to make a payment directly to Mrs R. However, this payment represents additional pension benefits that would otherwise have been taxed in future so it's appropriate for the compensation to be reduced to reflect the tax that Mrs R would have eventually paid when these benefits were taken.

SJP has provided evidence to support its stance that Mrs R is likely a basic rate taxpayer. It therefore follows that, as the compensation is being paid directly to Mrs R, it needs to be reduced to reflect the tax that she would otherwise have paid, presumed to be 20%.

I appreciate that Mrs R feels SJP benefits from this situation by paying less to put matters right if it doesn't pass on the tax payment to HMRC. But my understanding is compensation paid for poor financial advice is exempt from income tax in most situations. So to ensure Mrs R isn't over compensated, it's important the compensation is reduced to reflect the tax that would've otherwise been payable, had everything gone as it should. This approach - known as the "Gourley principle" after the 1956 House of Lords case (*British Transport Commission v Gourley*) - is well established and informs the approach taken by this service in terms of notional tax deductions. And I see no reason why SJP should depart from our usual, well established approach to paying redress.

However, I'm conscious that SJP completed its calculation quite some time ago and the compensation hasn't yet been paid. It's not known what Mrs R would have done with these funds if she had received them back in 2022. So to reflect the fact that she hasn't had the benefit of that money, SJP should update the loss by adding 8% simple interest per year, from the date of the calculation to the date of settlement.

I've also thought about the distress and inconvenience this matter has caused Mrs R. SJP has offered £500 and an additional £150 for the delay in investigating the complaint. Bringing the total payment for distress and inconvenience to £650.

I do appreciate Mrs R's strength of feeling about this matter and I know she has put a lot of work into her complaint. Her concerns about the performance of her fund were not taken seriously when she first raised them. And now, in putting things right, the compensation is unable to be paid into her pension, as she has requested. However, overall, having considered the impact this has had on Mrs R, I think the £650 offered by SJP is fair.

Putting things right

To put matters right, SJP should:

- Pay Mrs R the loss identified in its April 2022 calculation with an additional 8% simple interest to date of settlement
- Pay Mrs R £650 for the distress and inconvenience that has been caused.

My final decision

For the reasons explained, I'm upholding this complaint.

St. James's Place Wealth Management Plc has already made an offer to settle the complaint. I think that was fair at the time it was made. But given the time that has passed since the offer was made, this offer should be bought up to date by adding 8% simple interest to the loss identified in the April 2022 calculation. It should also pay Mrs R £650 for

the distress and inconvenient caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 22 August 2023.

Lorna Goulding

Ombudsman