DRN-4186285

The complaint

Ms K complains about the acts of Mr Y. She says he gave her unsuitable advice to switch her pensions to a self-invested personal pension (SIPP) to be able to invest through a discretionary fund manager (DFM) – SVS Securities PLC (SVS). She says Pi Financial Ltd (Pi) is responsible because Mr Y was with a business that was an appointed representative of it at the relevant time.

What happened

I can see from the Financial Conduct Authority (FCA) register that Mr Y worked for a business called Future Wealth Management Ltd (Future) between 13 May 2015 and 11 October 2018. That business was an appointed representative of Pi between 15 January 2015 and 5 March 2019.

Understandably, given the time that's passed, Ms K's recollections of exactly who gave what advice have been contradictory at times. What seems clear however, is that in 2017 she was contacted by a Mr G about her pensions and met with him on 1 September 2017 to discuss her options. She was then sent a recommendation letter purporting to be from Mr Y dated 18 September 2017. That recommendation letter was on Future headed paper with Mr Y's name at the bottom and read:

> *It was good to meet with you on 1st September 2017. I am now writing to confirm the content and outcome of our discussions…*
>
> *You will recall you were provided you* [sic] *with a copy of my Client Agreement on the 1st September 2017 in which my terms of business and charging structure has been laid out. You instructed me to specifically limit my advice to Pension Planning, specifically setting up a Self-Invested Personal Pension (SIPP) and I have acted accordingly. I have, therefore, only obtained the necessary information from you to advise on the above area. You should be aware that my recommendations may have differed if I had undertaken a full review of your financial circumstances…*
>
> *At the present time, your prime objective is to review your existing pension contract…& set up a SIPP to provide you with greater investment choice and flexibility. You have been unhappy with the service you have received as you have never had a review and only receive an annual statement. You have not been satisfied with the growth in any of your pensions and wish to have an arrangement that allows you more flexibility in investment choice. You have requested that I research the market for a suitable SIPP provider with whom to invest all of your pension monies…*
>
> *Your only objective in retirement is that you wish to have a good standard of living and although your outgoings will be reduced you definitely want to know that you can still afford the standard of life to which you have become accustomed…*

You completed a risk profile questionnaire and this confirmed you would be classed as a balanced investor. You agreed with this and feel this is a fair reflection of your understanding of financial products and your goals and aspirations…

It was clear, given your requirement to have flexibility in terms of where your pension monies are invested, that a SIPP would be the best vehicle to allow you to do this…

As previously outlined you wish to have your monies managed by an appropriate DFM with whom I will be recommending for you, having researched the market…

As part of my duty of care to you I have considered the proposed portfolio and believe it suitable for you based on your current attitude to risk and capacity for loss…

After due consideration of your attitude to risk, tolerance and capacity we have agreed that the most suitable portfolio for you is within the Mixed Model Portfolio…The potential growth on this plan in comparison with the growth on your existing plans gives your pension monies a real opportunity to grow so that you have enough income in retirement and do not have to work on longer than you would like.

I believe that for you the active portfolio management that SVS Securities charges represent good value…

Our fee structure is detailed in our client agreement which was given to you at your meeting.

- *An initial fee of **3.25%** will be charged to meet the cost of our recommendation…*

- *There is an ongoing **1.00%** charge of funds under management for ongoing service and advice, payable monthly.*

Following this, Ms K moved her pensions – just under £38,000 in total – to a SIPP to be able to invest through SVS.

SVS went into administration in August 2019, and after trying to make a claim with the Financial Services Compensation Scheme, Ms K complained to Pi.

Pi didn't uphold the complaint because it said the advice had been given by Mr G, not Mr Y. Although it also had an agreement with Mr G, this was an introducer agreement and it said he wasn't allowed to provide any advice.

An investigator was satisfied we could consider Ms K's complaint against Pi. In summary, he said there was no dispute that Mr G had been involved but he said the evidence suggested Mr Y of Future had also given advice and made arrangements and this was something that had been allowed under the appointed representative agreement. He was also satisfied the complaint should be upheld.

Pi didn't agree. I've read and considered its response in full. In summary, it said Ms K had confirmed to it that the advice had been given solely by Mr G and this goes to our jurisdiction as Mr G was an introducer to Future and couldn't give advice. It said this is a question of law and not something that can be decided on a fair and reasonable basis. Whilst Ms K agreed with the investigator's view, she felt that the £300 that'd been recommended as compensation for the trouble and upset she'd been caused wasn't sufficient.

The issue has therefore been passed to me for a decision.

What I've decided – jurisdiction

I've considered all the evidence that's been provided. Having done so, I'm satisfied this complaint is one that the Financial Ombudsman Service has jurisdiction to consider.

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). Future (and therefore Mr Y) wasn't directly authorised. Instead, it was an appointed representative of Pi. Pi is an authorised firm. It's authorised by the FCA to carry out a range of regulated activities including advising on investments and arranging deals in investments. We can therefore consider complaints about Pi. And this includes some complaints about its appointed representatives.

But this service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the DISP rules and the legislation from which those rules are derived, whether it's one we have the power to look at.

DISP 2.3.1R says we can:

> *consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*.

Guidance for this rule at DISP 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

And Section 39(3) FSMA says:

> *The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

The responsibility of a principal was considered by the judge in the case of *Anderson v Sense Network* [2018] EWHC 2834 (this case was the subject of an appeal, but the Court of Appeal issued a decision agreeing with the earlier decision). In the High Court, Mr Justice Jacobs said, at paragraph 33:

> *There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register*.

So, a principal isn't automatically responsible for the actions of its appointed representatives and it's necessary to go beyond looking at the activities Pi was authorised to do.

To decide whether Pi is responsible here, there are three issues I need to consider:

- What are the specific acts Ms K has complained about?
- Are those acts regulated activities or ancillary to regulated activities?

- Did Pi accept responsibility for those acts?

What are the specific acts Ms K has complained about?

Ms K complains Mr Y gave her unsuitable advice to switch her pensions to a SIPP to invest through SVS.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 FSMA defines "*regulated activities*" as follows:

> *(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –*
>
> *(a) relates to an investment of a specified kind;…*
>
> *(4) "Investment" includes any asset, right or interest.*
>
> *(5) "Specified" means specified in an order made by the Treasury*.

The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). The rights under a personal pension scheme (which includes Ms K's previous pensions and the SIPP she moved to) are specified as investments by a provision in Article 82 RAO. Advising on investments is a specified activity under Article 53 RAO. And making arrangements in relation to them is a specified activity under Article 25 RAO.

As I've set out above, Ms K's recollections of who advised her have been contradictory at times but the advice letter she received came from Mr Y. Pi says Mr Y didn't give advice and it was only Mr G that did.

I've thought carefully about all of the evidence. Taking everything into account, I'm satisfied it's most likely Mr Y advised Ms K to switch her pensions and invest through SVS. This is something I've decided as a question of fact – I agree with Pi that it's not something to be decided on a fair and reasonable basis.

In the circumstances here, there are several things that satisfy me it's most likely Mr Y advised Ms K:

- The recommendation letter dated 18 September 2017 clearly gave advice and I'm satisfied it's most likely Mr Y was aware of the content of this letter and allowed it to be sent in his name, even if he didn't draft it himself. I say this because on other cases involving similar facts, I've seen emails Mr Y has been copied into which make it clear he knew what was happening. Taking everything into account, I don't think there's enough to reasonably conclude the recommendation letter was created and sent without Mr Y's knowledge.

- The SIPP application form named Mr Y as Ms K's adviser – giving a Future email address and Pi as the firm name. It was also selected that advice had been given and SVS was named as the chosen DFM.

- The SIPP operator's "*key facts*" document named Mr Y of Future as Ms K's adviser.

- A risk profile report dated 18 September 2017 was said to have been prepared by Mr Y.

Pi says it was Mr G who advised Ms K – and Ms K recollections previously have been that she received advice from Mr G. But just because Ms K received advice from someone else, that doesn't mean Mr Y didn't also give advice.

Taking everything into account, I'm also satisfied that Mr Y carried out the regulated activity of making arrangements. In particular, I've been provided with letters from Ms K's previous pension providers addressed to Mr Y of Future on 1 November 2017 and 2 November 2017 respectively which both thanked him for requesting details about Ms K's pensions and provided information.

My conclusion therefore is that Mr Y did give advice to Ms K about the SIPP and investments and made arrangements in relation to these so regulated activities took place.

Did Pi accept responsibility for those acts?

Which business was Mr Y acting for?

Taking everything into account, I'm satisfied Mr Y was acting as Future when he advised Ms K and made arrangements. The only mention of any other business is a risk profile report said to have been prepared by Mr Y on 18 September 2017 but under a different business name. This was signed on 17 October 2017. But the fact the recommendation letter was sent in his capacity at Future, the application documentation all referred to Future and the previous pension providers referred to him as representing Future satisfy me that he was acting as Future when he carried out the acts complained about here. I've therefore gone on to consider whether Pi accepted responsibility for those acts under the agreement it had with Future.

The agreement with Future

The appointed representative agreement between Pi and Future says:

> *The Company appoints the Appointed Representative to provide Services for the Company on the terms set out in this Agreement and the Appointed Representative accepts such terms, with effect from 15th January 2015.*

"*Services*" was defined as:

> *any Regulated Activity which the Company is authorised to undertake from time to time notified by it to the Appointed Representative and also giving advice, making arrangements (or offering or agreeing to do either) in relation to term assurance, mortgages, tax planning, long term care products and any other product offered in the giving of financial advice pursuant to this Agreement.*

And "*Regulated Activity*" was defined as:

> *Any activity requiring authorisation under The Act or by the FCA and "Regulated Activities" means more than one of them.*

The agreement therefore is broad and envisages advice being given on, and arrangements made in relation to, investments. And Pi hasn't disputed that. So, I'm satisfied that Pi did accept responsibility for Mr Y advising Ms K to switch her pensions and invest through SVS and making arrangements for that.

My decision – jurisdiction

For the reasons set out above, I'm satisfied Pi is responsible under Section 39 FSMA for the acts being complained about and this is a complaint that we can look at.

What I've decided – merits

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As I'm satisfied it's most likely Mr Y advised Ms K to move her pensions to a SIPP to invest through SVS, I've considered whether that advice was suitable. The kind of things I would expect Mr Y to consider when assessing suitability are:

- The likely cost of the proposed arrangement compared to the existing arrangements.
- The level of funds involved.
- Ms K's knowledge and experience.

Ms K was noted to have had a salary of £21,000 at the time and the pensions that were switched (just under £38,000) seem to have been Ms K's only pensions. She was 50 at the time of the events complained about so approaching retirement age with a low capacity for loss. The recommendation letter of 18 September 2017 referred to her as a "*balanced investor*" according to the risk profile questionnaire she completed. And the risk profile report that was signed on 17 October 2017 showed her selected risk profile as "*Low medium*".

Taking everything into account, I'm satisfied Ms K was a relatively low risk, inexperienced, investor and someone for whom traditional low-cost pension arrangements would have been appropriate.

The new arrangement Ms K entered wasn't a low cost or traditional pension arrangement. The SIPP was stated to have a set-up fee of £100 and an annual fee of £199. And the DFM service would also have had costs – both an initial management charge and ongoing transaction charges. Additionally, there were the adviser fees – an initial fee of 3.25% and an ongoing fee of 1%.

The letter of 18 September 2017 set out the reasons for recommending the SIPP as being that it would:

> *provide you with greater investment choice and flexibility. You have been unhappy with the service you have received as you have never had a review and only receive an annual statement. You have not been satisfied with the growth in any of your pensions and wish to have an arrangement that allows you more flexibility in investment choice.*

But whilst the SIPP may have had some advantages, I haven't seen anything that persuades me these benefits were needed by Ms K in her circumstances. There's no evidence that Ms K – with her modest pension funds – needed access to a wider range of investments or that such funds wouldn't have been available with her previous pensions. And if there was a genuine desire by Ms K to consolidate her pensions into one fund, it seems likely there'd have been cheaper options, such as a stakeholder pension, that would have met her needs. Taking everything into account, I'm satisfied it ought to have been clear to Mr Y that there was no obvious justification for Ms K to move from her existing schemes and enter the

arrangement she did. And this assessment is based on knowledge Mr Y ought to have had at the time – not what we now know about the failure of SVS.

In these circumstances I'm satisfied advice to switch Ms K's pensions to a SIPP to invest through SVS should never have been made as a recommendation. I'm satisfied that if Mr Y hadn't given unsuitable advice, Ms K would have left her pensions as they were.

As I've set out above, even if Mr Y didn't advise Ms K, he carried out the regulated activity of making arrangements. In conducting this regulated activity, he had to act in line with the FCA's Principles for Businesses. Of particular relevance here is Principle 6 which says:

> *A firm must pay due regard to the interests of its customers and treat them fairly.*

And COBS 2.1.1R says:

> *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

So, I'm satisfied Mr Y would still have needed to consider whether it was in Ms K's best interests to move her pensions to a SIPP for investment via a DFM. For the same reasons as set out above, I'm not persuaded it was. And if it wasn't Mr Y that advised Ms K, then it seems likely he knew she'd been advised by an unregulated introducer, and he should have taken this into account.

Pi has commented on the fact Mr G gave advice. But this decision is about Pi's responsibility. And because I'm satisfied Ms K wouldn't have moved her pensions to a SIPP to make the investments she did if Mr Y hadn't given the unsuitable advice or made the arrangements he did, I think it's fair to ask Pi to compensate Ms K for the full measure of the loss she suffered from moving her pensions and making the investments she did.

The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R). Someone else may also have given Ms K advice, but Pi had its own distinct regulatory obligations which, if met, I'm satisfied would have resulted in the pension moves to the SIPP not taking place.

In making these findings, I take account of the potential contribution made by other parties to the losses suffered by Ms K. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Pi that requires it to compensate Ms K for the full measure of her loss. But for Pi's failings, Ms K's pension moves wouldn't have occurred.

I'm not asking Pi to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That another party might also be responsible for that same loss is a distinct matter and that fact shouldn't impact on Ms K's right to compensation from Pi for the full amount of her loss.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Ms K 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 K wouldn't have moved her pensions if everything had happened as it should have. I'm satisfied that what I've set out below is fair and reasonable given Ms K's circumstances and objectives at the time.

In summary, Pi should:

1. Calculate the loss Ms K has suffered as a result of making the switches and investing through SVS.

2. Take ownership of the investments held in the SIPP if possible.

3. Pay compensation for the loss into Ms K's pension in respect of her pension losses. If that isn't possible, pay compensation for the loss to Ms K direct. In either case, the payment should take into account necessary adjustments set out below.

4. Refund any adviser fees that were paid outside the SIPP, with interest added.

5. Pay Ms K's SIPP fees for the next five years, in the event she's now not able to close her SIPP.

6. Pay compensation of £500 for the trouble and upset caused to Ms K.

7. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Ms K.

I'll explain how Pi should carry out the calculation set out above in further detail below:

1. Calculate the loss Ms K has suffered as a result of making the switches and investing through SVS

To do this, Pi should work out the likely value of Ms K's pensions as at the date of my decision, had she left them where they were instead of switching to the SIPP.

Pi should ask Ms K's former pension providers to calculate the current notional transfer values had she not switched her pensions. If there are any difficulties in obtaining a notional valuation, then a benchmark of 50% of the FTSE UK Private Investors Income Total Return Index and 50% of the monthly average rate for one-year fixed-rate bonds as published by the Bank of England should be used to calculate the value. That is likely to be a reasonable proxy for the type of returns that could have been achieved if the pensions hadn't been switched.

The notional transfer values should be compared to the transfer value of the SIPP at the date of my decision and this will show the loss Ms K has suffered.

Any additional sum that Ms K paid into the SIPP should be added to the notional transfer value calculation proportionately at the point it was actually paid in.

Any withdrawal, income or other distributions paid out of the SIPP should be deducted proportionately from the fair value calculations 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 Pi totals all those payments and deducts that figure at the end.

2. Take ownership of the investments

Ideally, the assets in the SIPP – the investments – could be removed from the SIPP. Ms K would then be able to close the SIPP, if she wishes, and avoid paying further fees for the SIPP. For calculating compensation, Pi should agree an amount with the SIPP provider as a commercial value for the investments. It should then pay the sum agreed plus any costs and take ownership of them.

If Pi is able to purchase the investments, then the price paid should be allowed for in the current transfer value (because it'll have been paid into the SIPP to secure the investments).

If Pi is unable, or if there are any difficulties in buying the investments, it should give them a nil value for the purposes of calculating compensation. Pi may then ask Ms K to provide an undertaking to account to it for the net amount of any payment the SIPP might receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Ms K may receive from the investments and any eventual sums she'd be able to access from the SIPP. Pi will need to meet any costs in drawing up the undertaking.

3. Pay compensation to Ms K for the loss she's suffered in (1)

Since the loss Ms K has suffered is within her pension, it's right that I try to restore the value of her pension provision if that's possible. So, if possible, the compensation for the loss should be paid into Ms K's pension plan if it still exists. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Ms K could claim. The notional allowance should be calculated using Ms K's marginal rate of tax.

If it's not possible to pay the compensation into Ms K's pension, the compensation should be paid to Ms K direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Ms K should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Ms K's marginal rate of tax in retirement. For example, if Ms K is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Ms K would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Adviser fees

If any adviser fees were paid outside the SIPP, these should be refunded with interest added at a rate of 8% simple per year from the date they were paid until the date compensation is paid.

5. SIPP fees

If Ms K is unable to close her SIPP once compensation has been paid, Pi should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. I say this because Ms K would not be in the SIPP but for the unsuitable advice. So, it wouldn't be fair for her to have to pay the fees to keep it open. And I'm satisfied five years will allow sufficient time for things to be sorted out with the investments and the SIPP to be closed.

6. Trouble and upset

Pay Ms K £500 for the trouble and upset caused. I note Ms K's comment that the £300 the investigator recommended for this wasn't sufficient. I've thought about this carefully and I'm satisfied Ms K has been caused significant upset by the events this complaint relates to, and the loss of her pension fund. Taking everything into account, I think that a payment of £500 is fair to compensate for that upset.

7. Pay interest

Pi should pay fair compensation as set out above within 28 days of being notified that Ms K has accepted my decision. If it doesn't, interest on the compensation due is to be paid from the date of the decision to the date of payment at the rate of 8% simple interest per year.

Income tax may be payable on any interest paid. If Pi deducts income tax from the interest, it should tell Ms K how much has been taken off. Pi should give Ms K a tax deduction certificate in respect of interest if Ms K asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My decision is that I uphold Ms K's complaint and require Pi Financial Ltd to pay Ms K fair compensation as set out above.

Pi Financial Ltd should provide details of its calculation to Ms K in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 27 July 2023.

Laura Parker
Ombudsman