DRN-4216205

The complaint

Ms R says H C I Financial Services Limited ('HCI') did not deliver the advisory service for her Standard Life Self-Invested Personal Pension ('SIPP') that she was entitled to, and paid for. She seeks compensation for financial loss and distress, and a refund of the fees she paid. She says the main issues are:

- Poor performance of the SIPP, especially hindered by excessive fees/charges which she objected to and which eclipsed the SIPP's investment returns. [issue 1]

- Poor advisory service from her adviser – unsuitable advice; lack of advice; and failure to follow her requests to make changes to the SIPP's investments. [issue 2]

- Poor service from, and misconduct by, her adviser – lack of communication; reluctance to arrange meetings/appointments to discuss changes to the SIPP's investments; rude and disrespectful behaviour towards her; and an incident (on 29 July 2022) in which a telephone conversation about her SIPP was on speakerphone in an office reception area without her consent. [issue 3]

- HCI's failure to provide an alternative adviser to service the SIPP. [issue 4]

What happened

I issued a detailed Provisional Decision ('PD') for this case on 7 June 2023. My findings were quite lengthy and both parties are familiar with the full contents of the PD. As such, and for the purpose of this decision, I will quote only the key background summaries and, with more details, the key provisional conclusions in the PD.

<u>Key background summaries</u>

"*Ms R previously held (from 2018) an Aviva Pension (the 'AP'), which was serviced by a different adviser firm, which had been subjected to switches to cash around March 2020 and which had then been partly invested (and partly retained in cash) by the time she met with HCI in December 2020. She sought a new adviser and appointed HCI. HCI recommended transfer of the AP into the SIPP. This was implemented in early 2021, with a transfer value of around £230,000.*"

"*Overall and in conclusion, HCI said her concerns about loss of value in the SIPP were mishandled by the adviser; she should have been given an appointment to review her/the SIPP's profile in light of her concerns; the adviser's tone, comments and approach in the telephone conversation of 29 July breached its standards and it apologises for that; her complaint is partly upheld for these reasons and it sincerely apologises for the distress and inconvenience she has been caused; and, as a gesture of goodwill, it offers her £2,000 for the distress and inconvenience caused and in full and final settlement of her complaint.*

Ms R did not accept HCI's findings and conclusion, so the matter was referred to this service. One of our investigators looked into it and concluded that it should be partly upheld, *for broadly the same reasons as HCI had found but also for an additional reason. He mainly said …*

- *With regards to issues 1 and 2, we would not comment on investment performance (in isolation) because that is not guaranteed and is influenced by external factors. However, we will consider suitability of investments …*

- *By 28 July it was clear to the adviser that Ms R's main concern was about losing money in the SIPP and that she needed reassurance its value would not continue to fall. The adviser did not listen to this concern and did not review the strategy for the SIPP (to consider lowering its risk profile) as he should have. He ought to have given her options for the defensive and cautious risk profiles, but did not.*

- *In relation to issue 3 and the adviser's service to Ms R, he could have tried to make other arrangements to see her sooner after their conversations on 28 and 29 July. He also could have been empathetic towards her urgent requests for a meeting, but there is nothing specific to conclude he provided poor service or behaved unreasonably directly to her at other times. However, the disclosure she received in response to her Data Subject Access Request ('DSAR') uncovered conduct by the adviser that was/is unacceptable and lacked professionalism. The contents of the recording for the call on 29 July, in which the adviser also made unprofessional comments, are uncomfortable to listen to.*

- *With regards to issue 4, when Ms R spoke to HCI on 3 August 2022 (in relation to her complaint) it offered her an immediate meeting with a different adviser. However, she had already removed HCI from the SIPP and had lost trust in it.*

- *Ms R should receive the £2,000 compensation that HCI has offered. HCI should also calculate any redress arising from a comparison between how her SIPP would have performed if rebalanced into a defensive risk profile on 28 July 2022, as should have been the case, and how it actually performed since then – with the calculation end date being when HCI was removed from the SIPP.*"

<u>Key provisional conclusions</u>

Issue 1 –

"*I endorse and echo the investigator's reluctance to address the SIPP's performance in isolation. I make no findings in this respect. Investment performance was not guaranteed to Ms R. In general terms, an investment's performance is inherently influenced and subject to the market it is exposed to. The same was the case for the investments in Ms R's SIPP, and HCI had no control over the relevant markets.*

However, HCI was responsible for suitability of the initial investment advice for the SIPP and, based on the terms of its ongoing advisory service, for periodical reviews of that suitability and of the SIPP. These factors are usually important in setting up, and maintaining, a portfolio to give it a chance to achieve the desired performance and outcome, and they usually sit within the advising firm's responsibility. They did in Ms R's case. Another important element of investment suitability is the impact of fees/charges to be incurred in investments and associated advisory services. This also affects how investments are given a chance to achieve the desired outcome.

Suitability is a matter that features under issue 2, so I will address it in the next sub-section."

"*This service does not regulate adviser fees, platform fees or fund fees, so it is beyond my remit … to make isolated findings on the fee rates applied to the SIPP. However, as I said above and as I will address in the next sub-section, investment related fees can be considered in the context of suitability of advice. In Ms R's case the key questions would be, were the initial and ongoing fees/charges associated with HCI's investment recommendation properly disclosed to (and understood by) her and did they cause the recommendation to be unsuitable?*

The matter of fees disclosure can be addressed presently. Evidence shows that the associated fees/charges were properly disclosed to and agreed by Ms R. The pension switch report that was issued to her disclosed HCI's initial and ongoing advice charges clearly, and she proceeded with its service on this basis. The initial fee (2.5% of the transfer value) was somewhat isolated, in the sense that it resulted from her obtaining fresh advice from a new firm. However, the report also showed that HCI's ongoing charge rate of 1% was higher than the 0.75% charge rate applied by her previous adviser. Ms R was never bound to accept HCI's fees. As I said above, financial advisers (like HCI) operate in a competitive market, so she could have sought service elsewhere if she disagreed with its fees. Furthermore, if she subsequently objected to the fees she had the freedom and discretion to terminate HCI's service in response.

It is true that the fees incurred in the SIPP eclipsed its portfolio's performance … It is also a matter of fact (based on account statements) that the impact of fees/charges on the SIPP's returns was significant. However, the question to answer is still about whether (or not) HCI can reasonably be held responsible for this, in terms of suitability of its initial and ongoing advice."

Issue 2 –

"*By the time of her approach to HCI the AP's asset mix included, in order of size, around 38% in cash, around 31% in overseas equity, around 14% in overseas fixed interest securities, around 10% in UK equity and around 4% in UK fixed interest securities. With around 41% exposed to the equity markets the AP was arguably on its way to having a balanced risk profile. The cash holding was disfavoured by Ms R and she wanted more investment exposure in that respect. Notably, the investments in the AP's portfolio prior to the move to cash presented a balanced profile, so this suggests she held a balanced ATR since 2018. Added to these circumstances is the fact that she wanted (and needed) to give her pension a chance to recover from the previous loss in value, undertaking some more risk was necessary.*

Overall, on balance, in the above context and despite the questionnaire inconsistencies, I am satisfied that Ms R presented a balanced ATR as HCI assessed."

"*Ms R's position at the outset could therefore be summarised as follows – she was around two years away from retirement, she needed annual retirement income between £19,000 and £24,000, she had around half of that seemingly catered for outside the AP, she would potentially have around £40,000 cash in retirement (if she paid off her mortgage) and she needed the other half of her annual retirement income from the AP (worth around £230,000 at the time).*

Overall, I understand that Ms R probably did not consider herself as having much of a capacity for loss in her pension. Recovering from past loss and maintaining (and hopefully growing) an improved pension value were her goals, so the idea of incurring further loss would have been unwelcomed.

However, evidence shows there was a need to adopt more, and enough, exposure to risk for *a chance of achieving the performance required for these goals. The position summarised directly above also shows that there was broadly enough capacity for loss in her financial set-up (including the AP) to match the balanced ATR that was assessed. This does not mean she wanted such capacity to be tested or exhausted, or that pension loss would not have caused an impact upon her. She did not want the former and the latter would have been impactful. However, it means she had the capacity to cope with some loss, if that happened, in the pursuit for the pension performance she required.*

For the above reasons, I consider that Ms R's investor profile at the outset was as HCI assessed. It recommended the switch to the SIPP and recommended the underlying portfolio. This, I consider, is where HCI failed. On balance, and for the reasons addressed below, its recommendation of the pension switch (and associated portfolio) was unsuitable.

The regulator's Principles for Businesses, at Principle 6, requires a firm to pay due regard to the interests of its customers and treat them fairly. This is partly echoed in the regulator's Conduct of Business ('COBS') rules, at COBS 2.1.1R, which requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients and in relation to designated investment business carried on for a retail client. These regulatory provisions are directly relevant to a firm's responsibility for the suitability of its recommendations.

In 2009, the regulator produced a checklist for pension switching, which highlighted four key issues that advising firms were/are expected to consider. HCI would have – or ought reasonably to have – been mindful of this. The four considerations were/are – Charges (is the consumer being switched to a pension that is more expensive than the existing one(s) without good reason?) …"

"*My provisional conclusion is that the switch from the AP to the SIPP, as recommended by HCI, was not in Ms R's best interests because it increased costs and charges without good reason …*

In comparing the AP to the SIPP, some evidence from the point of advice shows that the pension product charge was to be higher than before (from 0.35% to 0.40%), and the same for the fund charge (from 0.72% to 0.75%). Other evidence is differently presented and shows a slight drop in Annual Management Charge from 0.35% to 0.33% but a significant increase in fund charge from 0.41% to 0.75%. In addition, there was a one-off initial advice fee of 2.5% to incur and an increased ongoing advice fee (from 0.80% to 1% per year) to incur.

Overall, it was clear that the SIPP was to be more expensive than the AP, and that HCI's ongoing servicing of the SIPP was to be more expensive than the cost of the previous firm's servicing of the AP. HCI's recommendation letter to Ms R readily and repeatedly stated this in a number of pages (within the main letter and its appendices). The pension comparison it conducted showed that – based only on charges, without including investment performance and based on all three assumed growth rates that were used in the comparison – the SIPP was to under-perform the AP by around 5%, and that the under-performance was to take the SIPP into capital loss. Indeed, HCI concluded the following – "If you based your assessment solely on charges then it would not be advisable to transfer".

The recommendation letter presented two main reasons why the switch was to be viewed as suitable, despite the increased costs. HCI considered that the AP's portfolio lacked the facility for regular fund reviews/fund switches, whereas the SIPP had such a facility; and HCI broadly considered that the portfolio it recommended for the SIPP could perform better.

I am not persuaded by the fund reviews/fund switches point. The AP had already been subjected to fund reviews and switches. Both happened in the move to cash in March 2020.

The [consolidated] AP was set up in April 2018. I have considered its transactions statement between then and December 2020. Its initial investments were completed in May 2018 and they remained until the liquidations that began in March 2020. The liquidations ended in April 2020. However, notably, reinvestments began in November 2020 – leading to the asset mix (in December 2020) that I summarised above. Therefore, the AP was not unyielding and the events in 2020 show that funds could be reviewed and switched within it as and when required/advised. Even if the SIPP had better arrangements for such switches, it does not negate or dilute the fact that reviews and switches were possible in the AP."

"*HCI conducted its comparison inclusive of the effect of the AP being moved into cash in March/April 2020. In the circumstances of Ms R's case, this was an unreasonable approach that was bound to produce an arguably misleading outcome. The move to cash and its effects were the problems that she objected to and that all concerned viewed as being the cause her past loss. The AP was not set up to be held in cash. It was set up in April 2018, invested by May 2018 and remained invested until what both HCI and Ms R considered to have been an unexpected and/or unsuitable move to cash (by the previous adviser) in March/April 2020. The events of March and April 2020 were therefore exceptions, not the rule. In this context, due weight should have been given, in the comparisons, to the period before the move to cash when the AP appears to have been invested as intended.*

There is 'FE Analytics' performance comparison evidence from the time, used by HCI and partly quoted and presented in its recommendations letter to Ms R. This evidence shows the following – it compares the AP's portfolio's performance to performance of the portfolio recommended for the SIPP (the 'SIPP portfolio') and to a performance benchmark for the SIPP; the period captured is May 2018 to December 2020; the AP's portfolio consistently outperformed the SIPP portfolio up to May 2020; there was a significant calendar outperformance in the year of 2019, where the AP's portfolio performed at 20% and the SIPP portfolio at 15%; during the captured period the AP's portfolio had a high in performance of around 26%, whilst the SIPP portfolio's high was around 17%; because of the effect of the move to cash in March/April 2020, the SIPP portfolio then out-performed the AP's portfolio from May to December 2020; but there is separate illustration evidence suggesting that, but for the move to cash, the AP's portfolio would probably have continued to out-perform the SIPP portfolio during this part of 2020.

Overall and on balance, the AP's portfolio's performance prior to the move to cash supported more promising prospects for the future than the SIPP portfolio's …

The AP was cheaper and its portfolio's performance (when invested), up to May 2020, was better than that of the portfolio it was considering, so there was cause to take the view that its future potential was also likely to be better. These served as reasons for her to remain with the AP and switch funds within it to try to recapture where it was prior to the move to cash, or to try to achieve a better position.

Evidence from the DSAR disclosure suggests there were (or could have been) some privately held considerations within HCI around the notion of retaining the AP. An internal email dated 6 January 2021 features feedback on the contents of the draft recommendations letter (to Ms R) and comments on areas to amend. The feedback and comments included the following –

"At Alternatives Considered please add/address the following. The first point is particularly important as she has been with Aviva such a short time and is now incurring a second initial charge within a short timescale. Why not stay with Aviva and fund switch? Presumably Aviva doesn't support the Cambrian portfolios and desire for active management? As for not transferring into Nest, rationale would presumably be lack of FAD and limited fund choice. ***Retain plans with existing provider(s) & revise investment solution****.*

o Why you didn't do this goes here
***Transfer/Redirect to your employer sponsored pension scheme**.*
o Why you didn't do that here, e.g. "you do not have access to an employer-sponsored pension scheme at this time because…"
o If there are any regular contributions, we need to establish the limits of any employer contribution matching available and recommend this is taken full advantage of first (as this essentially provides a 100% investment return on day 1), then why any further contributions are best placed with our recommended provider." [my emphasis underlined]

The above shows HCI was mindful that retaining the AP and fund switching within it was, or should be, the primary consideration. Instead, it appears to have looked for reasons to recommend the pension switch, as opposed to proper treatment and exploration of this primary consideration. The following additional feedback illustrates this further –

"If possible, at Comparison of Performance, confirm the risk score of her Aviva portfolio (I can't see it on the FE saved to file). Hopefully it's not Balanced which will bolster the need to move. Despite of the large cash holding, she's still in some weird funds, precious metals etc so I'm guessing volatile, and this is worth a mention." [my emphasis]

The above, especially as emphasised, strongly suggests that HCI prioritised recommending the pension switch (perhaps at all costs) and the need to find grounds to 'bolster' the recommendation, as opposed to prioritising Ms R's best interests. Those best interests were not served by a pension switch which involved foreseen significant higher costs and charges to her and which involved a new portfolio that, up to May 2020, had performed notably poorer than the AP portfolio she had.

… she should have been advised to retain the AP and to conduct fund switches within it in line with her balanced investor profile (which HCI correctly assessed). It follows from this finding that, with suitable advice, she probably would not have moved her pension into the SIPP, so the ongoing advice matters in 2022, which also fall under issue 2, would not have happened. As such, I do not need to address those matters, the detriment was caused at the outset with the pension switch. My provisional conclusion is that Ms R's claim about unsuitable advice is upheld and, as I will set out below, redress for this is to be calculated from the point of the pension switch."

Issue 3 –

"*Having listened to the relevant telephone call recordings and read the previously undisclosed internal communications from the adviser, his unprofessionalism towards Ms R is apparent. The latter includes some derogatory and/or disrespectful references to her that were uncalled for, and that were clearly below the standard of service that he was obliged to uphold (by HCI and by regulations). In the former, his disregard towards and contempt for her seems even more apparent. These included, especially in the conversation of 29 July, him repeatedly raising his voice and seemingly scolding her. Like the investigator, I too found it uncomfortable to listen to the recordings. During the calls, Ms R was very transparent about the profound distress she was feeling at the time, yet the adviser displayed little to no empathy in response – instead, he seemed irritated by her and by the entire affair, but I do not consider he had grounds to feel that way …*

Ultimately, he was concerned (on Ms R's behalf) that though she was alarmed by the state of the SIPP at the time, a knee-jerk reaction from her could worsen the situation and could result in crystalising losses if liquidations to cash and/or rebalancing was conducted (thereby losing the opportunities for rebounds/recoveries). During the calls, Ms R repeatedly said that she had never asked for liquidations to cash.

However, the adviser had a valid point nevertheless, even if the reaction she sought was limited to rebalancing. Crystalising the losses she was concerned about in mid-2022 could potentially have set back the pension value recovery pursuit that she began with HCI in January 2021. Furthermore, as is clear from evidence and as she was aware of at the time, other than investment performance the increased fees/charges she was incurring were as much, if not more, the cause of the problem she faced.

The adviser also tried to clarify that his advice would not be compromised, but if Ms R wished to dismiss it and instruct something else she could do so. This is another fair point. The adviser was not obliged to compromise his professional view, and he acknowledged her right to instruct against his view if she wished. However, it was clear from the conversations that she needed guidance.

… he could have informed her about alternative options, explained why he disfavoured them but left the final decision to her. Essentially, as the investigator said (and as HCI conceded in its complaint response), the adviser should have conducted a SIPP review at this point. I consider it more likely (than not), that guidance on alternative action Ms R could consider instructing, even if it was of her own volition and against advice, would have been meaningful to her …

Given my findings in issue 2, I take the view that her initial distress about the state of the SIPP had its root cause in the fact that the switch to the SIPP was unsuitable for her at the outset. The detrimental effects of the increased costs were always going to materialise and they were at the core of what she was distressed about in 2022. However, added to that was the adviser's misconduct in 2022.

In the above context, I commend HCI for making the offer of £2,000 compensation to Ms R for the trouble and distress caused to her. I appreciate that it did not make the offer for the same root cause reason I have found, but it made the offer with recognition of the distress caused to her by the adviser. I am satisfied with the offer and will reflect it in an award for trouble and distress in my provisional orders below. I consider that the offer/award caters for all matters under issue 3 …

As I have summarised above, there was merit in the adviser's concerns about a knee jerk reaction to the state of the SIPP. For the sake of completeness, I nevertheless consider that a form of rebalancing should still have been considered and pursued at the time. However, his concerns about locking in losses that could otherwise have been reversed as the market developed was a reasonable one and that could have been addressed within the rebalancing considerations.

In this context, he delivered ongoing advice, albeit unfortunately with a profoundly unprofessional approach. Given the lack of evidence that HCI did not deliver the ongoing service it was paid for at any other time and given that Ms R would probably have incurred ongoing advice fees even if she had not moved to HCI – she concedes that she always operated with advice and she incurred such fees with her previous adviser – I do not find grounds to say the ongoing service fees she paid should be refunded …

Ms R wilfully sought a new adviser in December 2020 and she did not wish to continue with her previous adviser. As such, a pension review (and advice) by a new adviser was inevitable and would have happened in any case. Such work would have resulted in costs to her, in any case. As I said in the previous sub-section, she should have been advised differently. However, rebalancing of, and/or fund switching within, the AP's portfolio should and would probably have been the alternative to the unsuitable pension switch HCI recommended. Such rebalancing would also have required professional work at a cost to her. It is possible, if not probable, that work short of a pension switch (by HCI or any other *adviser) would have cost less than the initial advice fee incurred in the pension switch, but I do not have enough evidence to determine this.*

Overall, on balance and for these reasons, I am not persuaded that there are grounds to justify a refund, to Ms R, of the initial advice fee."

Issue 4 –

"*With regards to this issue, and as the investigator found, by the time Ms R spoke to HCI in August 2022 and by the time it offered her a change of adviser, she had already lost trust in it. This was shortly after her complaint, so I consider HCI's offer to have been reasonably prompt. I do not find that it failed to offer her an alternative adviser. Unfortunately, and due to the circumstances of the case, the offer was essentially redundant by the time it was made*."

Redress –

"*On balance, I consider that with suitable advice she would have behaved differently. As I said above, she should have been advised to retain and rebalance the AP. I have not seen evidence to say or suggest she would not have done that, if advised to. It is not possible to say precisely how the rebalancing would have been done. She gave no instruction to return the AP to its state before the move to cash, so if HCI had suitably advised her to retain and rebalance the AP, it would have exercised its advisory discretion to determine how that could be suitably done. It is impossible to say what the outcome would have been.*

As such, I do not find that there is a natural redress benchmark to use in this case. Instead, I am satisfied that redress to Ms R should be based on the benchmark in the table below, which matches her balanced ATR. I consider that the redress I have set out below is fair and reasonable given her circumstances at the time of advice. The start date for the redress calculation will be when the pension was switched to the SIPP and the end date will be the date of settlement. The effect of the unsuitable pension switch continues to date, so the calculation must reflect this …

- *Ms R had a balanced ATR.*

- *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 is a fair measure for someone who was prepared to take some risk to get a higher return.*

- *I consider that Ms R's balanced ATR can be found in this benchmark. It broadly reflects the sort of return she could have obtained from the AP, with the same ATR, had it been retained and rebalanced*."

Both parties were invited to comment on the PD, and they did.

Ms R welcomed most of its findings but she says there is a need to highlight and stress particular issues for me to bear in mind, reconsider and/or add to my views when issuing my final decision. She explained them and provided evidence in support. She acknowledged that some of the evidence might have been previously shared with us.

Ms R mainly restated previous submissions and emphasised the following:

- Contrary to what the adviser said, she did not have a knee jerk reaction to the state of her pension in July 2022. She had been raising concerns about it for some time before hand (since 2021), and there is evidence of the concerns she emailed to him earlier in 2022 [copies of which she referred to] which were in line with the concerns she continued to raise in July. The problem was that he consistently ignored her, and the email evidence shows expressions of her concerns about this mistreatment too. As such her position in July was defined by distress caused by longstanding unanswered concerns that she had been raising with him and frustration (and upset) caused by his dismissive treatment of her.

- The adviser sold his recommendation to her with the misleading message that the new pension and investments would be so beneficial to her she would not even notice the increased fees, because the pension growth will outweigh them.

- The facts of the matter show that her previous AP portfolio was better for her than the recommended switch, and that the adviser made the recommendation mainly to benefit himself and HCI.

- £2,000 is not enough to properly compensate her for the severe hurt feelings and emotionally harrowing experience she endured in the matter. Especially given her age, her stage in life and the distress caused in experiencing significant losses in her pension at the same time.

- Her claim for a refund of advisory fees should be reconsidered. Especially because she is now facing the prospects of having to meet a fresh set of initial and setting up fees when she appoints a new adviser, and this would not have been the case but for the adviser's and HCI's wrongdoings.

Ms R also submitted evidence illustrating the fees and charges incurred in the SIPP, and illustrating the decline of its value over time.

HCI vehemently disagrees with the PD's conclusion on issue 2, and with the benchmark used in the PD's redress provisions. It mainly argued as follows:

- Ms R approached HCI in December 2020 because the AP had suffered significant losses under her previous adviser's service (caused by the switch to cash within it earlier in the year). She was unhappy with that switch. The AP's portfolio had begun to be reinvested in November but around 38% of it was still held in cash at the time of her approach. The task for HCI was to address these circumstances, which is what it did. ['point 1']

- The PD agrees that it correctly assessed her ATR as *balanced*, and that she had the capacity for loss to match that ATR, so "… *the Ombudsman agrees that the most appropriate course of action was to put the client back into a "balanced" portfolio in search of the returns she desired*". ['point 2']

- It disagrees with the PD's finding that the pension switch was not in Ms R's best interest and with the PD's reason for this finding (that the switch increased costs and charges without good reason and that those increased costs have since been damaging to the SIPP's returns). Based on the PD's finding that "*Only <u>investment-related fees</u> can be considered in the context of the suitability of advice*" this finding and its reasoning are wrong. ['point 3']

- In terms of product and fund related charges, the overall difference between the AP and the SIPP was a 0.31% increase, solely due to the higher fund charges in the SIPP's portfolio. The only reason the AP's portfolio had lower fund charges was because of its cash component, which "*effectively had no fund-related charges*". As such, if the adviser had done as the PD says it should have done, and rebalanced the AP to a suitable balanced portfolio – which "… *could have been done, as the available funds with Aviva are essentially the same as the funds that were available with Standard Life* …" – the result to Ms R would have been the same (as in the recommended switch) in terms of costs and charges. ['point 4']

- Also on the basis that "*Only <u>investment-related fees</u> can be considered in the context of the suitability of advice*" it is not clear why the PD considered its initial and ongoing advice fees. In any case, those fees would have been the same even if the AP's portfolio was rebalanced. Evidence showed that Ms R required initial advice at the time and could not continue to maintain her pension investments without ongoing professional advice. ['point 5']

- There was added value in the SIPP because it was easier and more cost effective for HCI to manage the portfolio on Standard Life's platform, Ms R wanted constant and ongoing regular updates on such management and that would have been facilitated better on the platform. ['point 6']

- The PD agrees that the adviser "… *gave the correct advice to remain invested and not panic when the market dropped again*", but Ms R chose not to listen to that advice. As such, other than the adviser's unprofessional conduct – which it has conceded – he did no other wrong and he did not fail to give her suitable advice. ['point 7']

- It believes – it is "… *effectively being punished for poor performance and* [was] *under the impression that poor performance was no grounds for a complaint. We also feel that the benchmark recommended to compensate the client for the "unsuitable advice" is irrelevant to anything. Her existing Aviva portfolio was not benchmarked against it, and the portfolio we recommended also was not benchmarked against it. She was also not taking an income before or after the advice. Therefore, we are unsure how it is relevant. However, we have noticed that it has outperformed other typically used "balanced" benchmarks … It feels as though a benchmark has been selected which is the most detrimental to HCI when many other benchmarks would have been representative … If the Ombudsman still feels that the advice to switch and invest in a balanced portfolio was unsuitable (which we disagree with for the reasons discussed), we feel that the only suitable redress would be a refund of the difference in <u>investment-related charges</u> between the two portfolios (which would be minimal as the charges would have been similar). We feel that anything other than this would be punishing us for poor performance which would be unfair*". ['point 8']

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.

I have reviewed Ms R's case, especially in light of her comments on the PD and the comments from HCI. Having done so, I retain the same conclusions as expressed in the PD and I incorporate those conclusions (and the findings supporting them) into this decision.

I have not been persuaded by HCI's submissions and I will set out my reasons further below. First, I begin by addressing Ms R's submissions.

I consider that most of what she has said was in aid of reinforcing the claims the PD already upheld. As such, I consider that the PD addressed those claims sufficiently and whilst I appreciate the information she has submitted to give additional support to them, the same conclusion upholding them is the end result. Beyond those claims are the matters she wants me to reconsider – her disagreement that her position in 2022 was a knee-jerk reaction, her view that the trouble and upset award should be increased and her re-stated pursuit for a refund of fees.

I can see, from the evidence cited, that her position in July 2022 was not quite the knee jerk reaction that the adviser portrayed. However, HCI's main wrongdoing was the unsuitable advice at the outset, and as I said in the PD "*… with suitable advice, she probably would not have moved her pension into the SIPP, so the ongoing advice matters in 2022, which also fall under issue 2, would not have happened. As such, I do not need to address those matters, the detriment was caused at the outset with the pension switch*", so this finding about the knee jerk reaction portrayal does not affect the key conclusions in the case.

There is evidence showing the concerns Ms R had been raising with the adviser earlier in 2022 and then up to July that year. Her emails to the adviser on 9 March, stated very clearly and firmly her urgent need for his attention to her pension and her concerns; her need for a meeting with him; her dissatisfaction with his lack of engagement with her in the preceding year; her view that she was better off with the AP than with the SIPP because the former had at least begun to generate growth (without exaggerated charges) at the time of the switch, but the latter had been a loss (with damaging charges); and her grievances about the charges in the SIPP, his fees, their impacts on the SIPP's returns and the ongoing loss of value in the SIPP. She followed this with another email to him on 16 March, using the same overall context and seeking advice on her concerns (also mentioning the idea of reviewing the risk profile of the SIPP). She then sent another email to him the next day, in aid of setting a meeting date.

These emails have contents that show, or at least suggest, that she had indeed been raising the same concerns earlier than March 2022 and possibly beginning from around 2021. In this context, I agree that the views she expressed in July 2022 were much less, if at all, a knee jerk reaction on her part, and were more to do with her frustration at the adviser's ongoing failure to simply review the SIPP. A review is what all her concerns called for, yet it was never offered or done. This finding is consistent with what I said in the PD – "*Essentially, as the investigator said (and as HCI conceded in its complaint response), the adviser should have conducted a SIPP review at this point*".

As I also said in the PD, and quoted above, I do not need to address the 2022 events because the advice in 2020 was unsuitable, so but for that unsuitable advice the events in 2022 would probably not have happened. Furthermore, by upholding the complaint from the wrongdoing in 2020 redress applies from then to date, so that captures 2022 too.

I am not persuaded that Ms R should receive the refund of advisory fees that she seeks, and her comments in this respect have not given me cause to conclude otherwise. I previously gave this claim for a refund due consideration and set out, in the PD (and as quoted above), the reasons why it would be neither fair nor reasonable to award a refund.

Ms R has drawn my attention to the new initial expense she will incur when she appoints a new adviser. I agree with the hypothesis that had her relationship with HCI worked well it is unlikely, or at least arguably unlikely, that she will now be in the position of seeking and appointing a new adviser at fresh initial costs to her. However, the matter still turns on whether (or not) HCI delivered the service it received fees for. Advisory relationships can dissolve for a variety of reasons, but a common factor is usually one party's decision to move on and away from the other. The terms for these relationships usually allow for that, and for termination by either party without reason. The same applied in the present case.

In other words, it is not automatically the case that the initial costs to an individual in having to appoint a new adviser should fall to the previous adviser. Grounds to consider this should exist. Facts and circumstances in cases can be different. There might well be some cases in which the facts support the sort of claim Ms R has made, but I have not found that in her case.

The adviser gave her unsuitable advice in 2020, to which redress (as set out below) applies, and he conducted himself and his service to her unprofessionally in 2022, to which the £2,000 award applies. He wrongly denied her due attention to her concerns and enquiries, and a review, in 2022, but these are also covered in the £2,000 award. As I identified in the PD, amidst his wrongdoings he nevertheless gave her advice. Without evidence that HCI failed to deliver the service it was paid for, I am not persuaded to award a refund of the fees it received for that service.

I am also not persuaded to increase the trouble and upset award to Ms R. For her information, if she has not already done so she is invited to consider the contents of our website under the following tabs – "For consumers", "What to expect" and "Compensation for distress and inconvenience". The information provides insight into how we approach distress, trouble and upset awards, if such awards apply to a case.

Such an award applies to Ms R's case, for the reasons given by the investigator and for those given in the PD. As stated on our website, awards up to the level of £1,500 can be given in cases, like hers, in which the distress caused has been substantial and has extended to serious offence and humiliation. For the reasons given in the PD, I am satisfied that the adviser's unprofessional conduct towards Ms R was notably offensive, that he sought to humiliate her and that these elements compounded her distress at the time.

Awards above £1,500 (and up to £5,000) can be given where there are lasting effects of such detriments. In her case, I consider it quite apparent that Ms R continues to experience some ongoing effects of, and perhaps pain from, the damaging way in which the adviser's behaviour made her feel. This is identifiable in her different submissions. However, this should be balanced with evidence that she has also partly moved on and seeks a conclusion to her complaint in order to do so even further. In this context, I am satisfied that £2,000 is an appropriate award to her, which reflects the factors relevant to the £1,500 level of award, but also reflects the degree of ongoing effects she has faced.

I now turn to HCI's points.

Point 1

The AP's history and its state as of December 2020 are matters transparent in documentary evidence, and are not in dispute. HCI did address the circumstances it was presented with. However, the problem is that it gave unsuitable advice in response to those circumstances.

Point 2

It is correct to say that Ms R's ATR and capacity for loss were properly determined by HCI.

I question HCI's statement that – "… *the Ombudsman agrees that the most appropriate course of action was to put the client back into a "balanced" portfolio in search of the returns she desired*". Viewed alongside its other comments about the portfolio, it is unclear whether (or not) this statement seeks to extend my conclusion in the PD to cover the precise underlying portfolio it recommended. In the interest of clarity, it is the conclusion as expressed in the PD that stands for my finding on what HCI should have done and what would have happened with suitable advice. That conclusion was –

"*On balance, I consider that with suitable advice she would have behaved differently. As I said above, she should have been advised to retain and rebalance the AP. I have not seen evidence to say or suggest she would not have done that, if advised to. It is not possible to say precisely how the rebalancing would have been done. She gave no instruction to return the AP to its state before the move to cash, so if HCI had suitably advised her to retain and rebalance the AP, it would have exercised its advisory discretion to determine how that could be suitably done. It is impossible to say what the outcome would have been.*"

I did not find evidence to determine what, precisely, the portfolio would have looked like with suitable advice – hence the conclusion quoted above and the use of a market benchmark in the provisional redress orders that followed. There is still no evidence of what, precisely, the portfolio would have looked like with suitable advice. HCI argues otherwise in point 4, but I address that below. Its argument also presents a conflicting position and the portfolio cited in relation to it cannot safely be relied upon. I also address these issues below.

Point 3

HCI appears to have misunderstood and/or misrepresented the quote – "*Only <u>investment-related fees</u> can be considered in the context of the suitability of advice*".

It is clear from the PD that all costs incurred by Ms R in the pension switch were/are relevant to its suitability. This is what was meant by *investment related fees*. Ms R did not approach HCI for the sake of the AP wrapper alone, her approach related to the underlying investments in the AP (and their performance). HCI's pension switch advice was not for the Standard Life SIPP wrapper in isolation, it featured the underlying investment portfolio for the SIPP. In other words, the entire affair was investment 'related' and I consider it wrong to suggest otherwise.

Point 4

This point appears to have been made for the convenience of HCI's rebuttals, but it stands in stark contrast to what the adviser said to Ms R at the time of advice. On balance, there is more weight in evidence of what the adviser said to Ms R in 2020 because that advice is the subject of her complaint – the subject is not what HCI says *now* to define the advice.

In the PD I said –

Overall, it was clear that the SIPP was to be more expensive than the AP, and that HCI's ongoing servicing of the SIPP was to be more expensive than the cost of the previous firm's servicing of the AP. <u>HCI's recommendation letter to Ms R readily and repeatedly stated this in a number of pages (within the main letter and its appendices). The pension comparison it conducted showed that – based only on charges, without including investment performance and based on all three assumed growth rates that were used in the comparison – the SIPP was to under-perform the AP by around 5%, and that the under-performance was to take the SIPP into capital loss. Indeed, HCI concluded the following – "If you based your assessment solely on charges then it would not be advisable to transfer".</u> [my emphasis]

As stated, and emphasised, in the above quote there is ample evidence that the adviser was transparent about the conclusions of his assessments and comparisons – which were that the SIPP alone would be more expensive that the AP, and that HCI's service would be more expensive than Ms R's previous adviser's service. He explicitly told her that based on fees/charges alone the switch was unsuitable. Irrespective of underlying invested funds, this was the position.

I do not accept the argument in point four. What HCI has presented as a suitable SIPP portfolio (following a suitable pension switch) that would have been the same as a suitably rebalanced AP portfolio with broadly the same overall costs level, is not credible. First, without the switch the overall costs to Ms R would have been notably lower – as above, this has been established on evidence and in the adviser's statements.

Secondly, the SIPP portfolio cannot reasonably be viewed, or relied upon, as being the same portfolio that would suitably have been recommended for the AP. The PD cited evidence, from the time of advice and from the information used by the adviser for the 2020 advice, that showed the portfolio recommended for the SIPP had poorer relevant past performance than the AP's portfolio (prior to the move to cash). In other words, an implication was that it was unlikely to perform better than the AP's previous portfolio. The evidence is as summarised in the quote in the previous section. Also from that quote, I concluded –

"*Overall and on balance, <u>the AP's portfolio's performance prior to the move to cash supported more promising prospects for the future than the SIPP portfolio's</u> …*

The AP was cheaper and its portfolio's performance (when invested), up to May 2020, was better than that of the portfolio it was considering, so there was cause to take the view that its future potential was also likely to be better. These served as reasons for her to remain with the AP and switch funds within it to try to recapture where it was prior to the move to cash, or to try to achieve a better position." [my emphasis]

In this context, and especially the part emphasised, I do not find that the proposed SIPP portfolio would have been the same portfolio *suitably* recommended for rebalancing in the AP. It might have been the same portfolio the adviser would have recommended for that purpose, but it probably would not have been suitable.

For these reasons, and contrary to HCI's submission, it has not been established that a *suitably* rebalanced portfolio for the AP would have had the same fund costs as those in the SIPP portfolio. I retain the view that precisely what that AP portfolio would have looked like is unknown – hence use of the market benchmark for redress.

Point 5

I agree, Ms R needed initial and ongoing advice and costs would have been, and were, associated with both. The PD acknowledged this. As I said in the PD, I do not have the evidence to properly determine whether (or not) the initial fee facing Ms R would have been less if limited to rebalancing the AP's portfolio, as opposed to a full pension switch (and reinvestment thereafter). However, I retain the view that such lower costs would possibly, if not probably, have been the case. This stands to reason, given the lower volume of work required in rebalancing within an existing portfolio, compared to work required in switching a pension and establishing and populating a new portfolio for it.

Point 6

In the PD I said –

"*The recommendation letter presented two main reasons why the switch was to be viewed as suitable, despite the increased costs. HCI considered that the AP's portfolio lacked the facility for regular fund reviews/fund switches, whereas the SIPP had such a facility; and HCI broadly considered that the portfolio it recommended for the SIPP could perform better.*"

As quoted in the previous section, I then proceeded to show how available evidence defeated the two main reasons used by the adviser to justify his advice. Nothing in HCI's arguments (in point 6 or elsewhere) gives me cause to reconsider this conclusion or the evidence it rests upon. Indeed, HCI appears to have volunteered a concession that adds to this conclusion by saying "… *the available funds with Aviva are essentially the same as the funds that were available with Standard Life* …". This means it accepts the fund switches favoured by the adviser could have been done in the AP.

Point 7

I consider that the issue this point seeks to treat has been sufficiently addressed in the relevant sections of the PD and in my response to Ms R's re-submitted claim for a refund of fees.

For the sake of clarity, I disagree with HCI's comment that the PD agreed the adviser "… *gave the correct advice to remain invested and not panic when the market dropped again*".

This was not quite what I said. I concluded as follows –

"*As I have summarised above, there was merit in the adviser's concerns about a knee jerk reaction to the state of the SIPP. For the sake of completeness, <u>I nevertheless consider that a form of rebalancing should still have been considered and pursued at the time. However, his concerns about locking in losses that could otherwise have been reversed as the market developed was a reasonable one and that could have been addressed within the rebalancing considerations</u>.*" [my emphasis]

As emphasised above, the view in the PD was that the adviser should have considered and pursued a rebalancing of the portfolio at the time, and that his concerns about locking in losses could have been addressed within the rebalancing exercise. This is not quite the same as saying he "… *gave the correct advice to remain invested and not panic when the market dropped again*".

Point 8

Nothing in the PD sought to hold HCI responsible for, or punish it, for investment poor performance. Furthermore, nothing in the present decision does that.

In simple terms, it misguided Ms R and gave her unsuitable advice in 2020, and when in 2022 it had an opportunity to review the portfolio associated with its initial advice it did not do so. The initial failure and the sum effect of both failures inevitably had consequences for her and her pension, and that must be redressed. The PD explained this, and some of that explanation has been quoted above. The same explanation and orders, in full, are used below. On balance, I do not consider that HCI's arguments have shown that it is fair and reasonable to abandon the PD's provisions for redress and to substitute them with the alternative it proposes in point 8.

With regards to the benchmark, it is clear from the contents of the PD that my first consideration was whether (or not) a natural redress benchmark exists to be used. Such a benchmark does not exist in this case and I addressed the reasons why in the PD, and in my findings above. In the alternative, a market benchmark is needed, to serve as a basis for calculating how Ms R's pension portfolio would probably have performed had she been given suitable advice at the outset.

The benchmark selected below has not been chosen because of bias against HCI and it has not been chosen arbitrarily. Like there was in the PD, there is a sub-section below that explains why it has been chosen. It is neither said nor suggested that the AP's portfolio was benchmarked against it, and it is not said or suggested that Ms R took income from the SIPP portfolio. The specific benchmark is commonly used within this service as a broad indication of how suitable investments for a balanced investor would probably have performed. This is the purpose served by its use in the present case.

Conclusion

I uphold issues 2 and 3.

Putting things right

fair compensation

In deciding what is fair my aim is to put Ms R as close as possible to the position she would probably now be in if HCI had not given her unsuitable advice to switch her pension arrangement.

On balance, I consider that with suitable advice she would have behaved differently. She should have been advised to retain and rebalance the AP. I have not seen evidence to say or suggest she would not have done that, if advised to. It is not possible to say precisely how the rebalancing would have been done. She gave no instruction to return the AP to its state before the move to cash, so if HCI had suitably advised her to retain and rebalance the AP, it would have exercised its advisory discretion to determine how that could be suitably done. It is impossible to say what the outcome would have been.

As such, I do not find that there is a natural redress benchmark to use in this case. Instead, I am satisfied that redress to Ms R should be based on the benchmark in the table below, which matches her balanced ATR. I consider that the redress I have set out below is fair and reasonable given her circumstances at the time of advice. The start date for the redress calculation will be when the pension was switched to the SIPP and the end date will be the date of settlement. The effect of the unsuitable pension switch continues to date, so the calculation must reflect this.

Ms R is ordered to engage meaningfully and co-operatively with HCI to provide it with all information and documentation, relevant to its calculation of redress, that it does not already have.

To compensate Ms R fairly, HCI must do the following:

- Compare the performance of Ms R's SIPP with that of the benchmark shown below. If the fair value is greater than the actual value the difference must be paid to her in compensation. If the actual value is greater than the fair value, no compensation is payable.

- Pay any interest set out below. Income tax may be payable on any interest paid. If HCI is required by HM Revenue & Customs to deduct income tax from the interest, it must tell Ms R the deduction amount and give her a tax deduction certificate if she asks for one, for her to reclaim the tax from HM Revenue & Customs if appropriate.

- Pay the compensation into Ms R's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation should not be paid into her pension plan if it would conflict with any existing protection or allowance. If the compensation (and any interest) cannot be paid into her pension plan, pay it directly to her. Had it been possible to pay it into the plan, it would have provided a taxable income, so the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using her actual or expected marginal rate of tax at her selected retirement age. For example, if she is or is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. If she has been or would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Provide the details of the calculations to Ms R in a clear and simple format.

- Pay Ms R £2,000 compensation for trouble and distress.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
Ms R's Standard Life SIPP (portfolio)	still exists	FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index)	date of switch to the Standard Life SIPP	date of settlement	not applicable

actual value

This means the actual amount 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 withdrawal, income or other payment out of the investment should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if HCI totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

- Ms R had a balanced ATR.

- 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 is a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Ms R's balanced ATR can be found in this benchmark. It broadly reflects the sort of return she could have obtained from the AP, with the same ATR, had it been retained and rebalanced.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Ms R’s case, the complaint event occurred after 1 April 2019 (it happened in 2020) and the complaint was referred to us after 1 April 2022, so the applicable compensation limit would be £375,000.

My final decision

For the reasons given above, I uphold Ms R’s complaint. I order H C I Financial Services Limited to calculate and pay her redress (and compensation for trouble and distress) as set out above, and to provide her with a calculation of redress in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Ms R to accept or reject my decision before 31 July 2023.

Roy Kuku
Ombudsman