DRN-4220924

The complaint

Mr D's complaint relates to his pension held on a Zurich 'Wrap' platform on advice from Openwork Limited since 2016. He complains that:

- There were delays when he had to chase Openwork, time-wasting on unnecessary enquiries, sending him incorrect values and documents – all while losses escalated.
- He asked necessary questions but only received fragmentary and generic responses from Openwork. The adviser hadn't maintained replies in one email chain despite Mr D asking him to do this in 2019.
- His risk profile (which goes back to 2016, when the Wrap was set up) was misconceived, hence any advice dispensed would be misguided by definition. He gave instructions which were not confirmed.
- From November 2021 onwards he became concerned about the events in Russia/Ukraine and the general economic situation. He was also contemplating retirement in 2022, making him a vulnerable client. There was a lack of due consideration of this, meaning he was treated with neglect and superficiality.
- In the interest of preserving his financial security, and out of concern about his attitude to risk had been recorded, he had no option but to react unilaterally and move his pension investments to cash in June 2022.
- He suffered a pension fund loss of £90,671 between November 2021 and June 2022 and ongoing loss after that point.

What happened

In my provisional decision of 31 May 2023 I set out a lengthy background of all the actions Openwork had carried out for Mr D since 2016. I will summarise it more briefly here, with some amendments following Openwork's response to my provisional decision.

Mr D's circumstances and objectives in April 2016 were as follows:

- Aged nearly 68, single with no dependants and in good health
- Earning £50,000pa from his own consultancy company, and receiving a small defined benefit pension of £104
- Expenditure of £900 per month meant income was sufficient for his needs at the time
- Held an £11,900 ISA with Openwork, a paid up Group Personal Pension worth £338,000, a personal pension with Aegon worth £556,000, and an Openwork personal pension worth £91,500
- Main residence was worth £1.5m, and £500,000 was held in other property
- Held other assets of £34,000, plus £18,000 in the bank

The adviser assessed Mr D's attitude to risk as 'balanced', as he had done in the years previously. He said they *"…talked about investment growth, keeping the money invested long/medium term as the money is not needed at present."* Combining the tax-free cash of about £162,000 from the Aegon and Zurich policies with other surplus cash to invest a total of £500,000 in the non-pension part of the platform was being discussed.

The subsequent suitability report dated 30 March 2016 also noted that Mr D had a high capacity for investment loss given his other sources of income and two unencumbered properties. Mr D's business was still providing a lucrative income, and the adviser didn't foresee any problem with Mr D being able to keep the bulk of his pension invested for the next five years in order to take the risk of investing on the stockmarket. Although he said Mr D wanted an investment that was "*reliable and boring"*, he confirmed that Mr D understood and would withstand the risks of investing on the stockmarket.

Mr D went into the Openwork Graphene Balanced Portfolio, comprising these funds:

Omnis Developed Markets (ex-UK/ex-US) Equity
Omnis Emerging Markets Equity
Omnis UK Equity
Omnis US Equity
Omnis Alternative Strategies
Omnis Global Bond
Omnis UK Bond

In August 2017 there were email exchanges between Mr D and the adviser. The adviser was trying to arrange a meeting to conduct a review, but Mr D was evidently unhappy with how his funds had been performing up to that point. He wanted recommendations in writing, in a single email chain.

In February 2018 Openwork was arranging a further Mobeus Venture Capital Trust (VCT) for Mr D – he had taken out some of these previously as a means to mitigate income tax on his company earnings. By June of that year the then moved a new £16,500 pension he'd accumulated with L&G onto the same platform. This was invested into the Jupiter Merlin Balanced Portfolio, which had underlying investments across international equities, fixed interest stocks, commodities and property.

I note there were some concerns about Mr D's attitude to risk for the pension investment. He came out as 'balanced' (three on a five-point scale, where four was 'adventurous' and five was 'speculative'). He was aged 70, and the adviser had given him the option for a family member to be present when making investment decisions. It's evident that Mr D found this insulting as he considered himself fully able to make those decisions. The adviser referred to the concerns about risk, saying:

> *"All investments carry risk…"* and *"it is appropriate to proceed with my recommendations because an investment fund that contains a wide array of securities to reduce the amount of risk in the fund. Actively maintaining diversification prevents events that affect one sector from affecting an entire portfolio, makes large losses less likely…."*

By July 2018 Mr D's drawdown account of £536,000 was spread across a range of funds managed by 7IM, Artemis, Jupiter, M&G, Newton and Omnis. £33,600 of this was held in cash. The proceeds of his L&G transfer hadn't yet been put into drawdown and were separately worth £16,500.

The overall split on the platform (which also included £36,500 in a stocks & shares ISA and £126,800 in non-pension cash) was 25% money market, 66% equities (under which I've included a small component noted as "other") and 9% fixed interest. The relatively low holding in fixed interest funds appears to be because of Openwork's response to concerns Mr D raised in March 2018.

Mr D had asked the adviser about the continuing decline in his fund, saying "*I am a pensioner and cannot afford this loss… I raised the issue with you initially in June 2017 and have no recommendations."* He said that churning was going on in the portfolio to generate fees, asked whether he should report this to the ombudsman, and also that the adviser had made money from the portfolio when he hadn't. In a later message he added:

> "*The annual loss continues and is now £2500. Having raised concerns in June 2017 I remain concerned at the speed of the advice and now want to examine its quality. A tactic of culling non*

performers and replacing them could have been done before I faced a loss. I would welcome your comment."

The adviser's administrator responded on 23 March 2018 that most of the existing bond holding in the drawdown portfolio (which until then had followed the Openwork Graphene Balanced Portfolio) would be sold. The email planned to "*cull non – performers and replace them with higher performers*", representing 26.7% of the funds:

"1. Fidelity Money builder Income Y Acc GBP Clean – Limited Risk
2. Omnis Alternative Strategies A Inc GBP Clean - Cautious
3. Omnis Global Bond A Inc GBP Clean - Cautious
4. Omnis UK Bond A Inc GBP Clean – Limited Risk"

Openwork has said that Mr D went ahead with buying the following:

"1. Jupiter Merlin Balanced I Acc GBP Clean - Balanced/Adventurous
2. M&G Optimal Income I Acc GBP Clean - Limited Risk/Cautious
7. 7IM AAP Balanced C Acc GBP Clean - Cautious/Balanced
9. Omnis Managed Balanced B Acc GBP - Balanced
10. Omnis Multi-Asset Income A Acc GBP - Cautious/Balanced

There had been other funds under discussion at the time, all of which were marked as 'speculative' (one 'adventurous/speculative'). The adviser says that those were provided for reference purposes, but he didn't consider Mr D should invest in them and nor did Mr D do so.

On 11 July 2018 Openwork's administrator emailed Mr D in an attempt to reassure him that the move was taken to protect against the fear that interest rate rises would result in further asset falls. She showed how they'd calculated that Mr D's returns of £3,300 were now £1,000 higher than they would have been but for these sales. And the Jupiter Merlin Balanced Portfolio in which the L&G pension had been invested had also performed more strongly. She passed on further suggestions from the adviser in this message that there could be an opportunity for Mr D to invest in China and Emerging Markets at lower prices. But she added:

"…all the companies on this chart are adventurous and have high expected volatility therefore taking you out of your risk profile. You are holding a significant amount of cash (£126,294.89) for safety reasons and to guarantee an income stream, for example say for a year or so this would provide an income of £25,000pa for 5 years without the need to destabilise the portfolio to provide that income (i.e. this is money that is profit)."

On 19 August 2018 Mr D emailed the adviser asking:

"Can you send me a letter making suggestions if I were further up your risk profile please? Without a comparison I feel that I may be being limited by the "classification" your bureaucracy/licence which leaves me without sight of alternative strategies."

A fact find completed at this time now noted Mr D's income from employment had increased to £125,000. And the following month, the adviser reiterated that the risk profile questionnaire had come out as 'balanced' but Mr D's capacity for loss had come out as 'very low'. The adviser was suggesting that this should be reassessed because Mr D's funds had returned 5% net in the year to date and a large amount of cash was already held, echoing the quote above. He asked the administrator to send Mr D another risk questionnaire.

The adviser subsequently responded to Mr D's suggestion about a higher risk approach. His view was that Mr D did have sufficient funds (including his pension) to take up to a speculative approach (five on the scale). But he noted Mr D's *"impending retirement / taking* *of income"*. And as Mr D seemed to have a low capacity for loss, he thought Mr D would need to hold sufficient funds in cash for such a scenario not to be a problem for him.

Mr D remained interested in looking at *"…things you have not shown me. Please let me look at possibilities."* He clarified that he *"shall not switch the pension* [into payment] *for several years".* But he nonetheless maintained *"This is my pension; I cannot take risks with it…Is now the time to go into gold. It rose today."*

By the adviser's 11 October 2018 email the adviser noted that *"you want to take income soon"*, but emphasized the 6% growth (or £40,100) the portfolio had gained since outset. He added, "…Y*our risk profile seems to have changed to speculative, with no capacity for loss. The paperwork shows now that you can take big risks and cope with large potential and real market downturns, yet, your comments confirm that you have no capacity for loss. Please confirm that the cash account should be invested and that you are happy for this level of exposure."*

It's not clear this contradiction was resolved. Again in January 2019 the adviser acknowledged that Mr D wasn't happy with the performance of his portfolio. The adviser gave his view that markets would slowly decline to about 20% below their high. But even so Mr D should remain invested as it was possible this was a correction and markets will recover. He concluded:

> "*Either way the markets are high and a turn may be spooked by possibly any insignificant negativity. This is why I have advised holding so much cash…We are yet to agree a percentage trigger for reinvestment. The move to cash may be triggered when the markets have recovered, or you feel uncomfortable. The buyback could be as a reverse "pound cost averaging" i.e. buying in tranches on the way down (to be well positioned to catch a positive correction (almost impossible to predict the Bottom). Spreading an investment/ reinvestment over a period of time is a cautious approach."*

The adviser's view on the instability of the markets didn't change through March 2019, where he suggested waiting for the outcome of parliamentary votes and continued to refer to Mr D's "*little or low capacity for loss"* preventing him being able to take short-term chances. But Mr D asked the adviser for more information the next month on investing in China and its Belt and Road Initiative (BRI). Having asked around, the adviser was unable to locate a fund concentrating on BRI.

At the end of July 2019, £33,000 was taken from the cash within the Retirement account in order to invest in M&G Global Government Bond, as the adviser thought that it might be a good time to start drip feeding some of the cash back into the market. Within a month, Mr D was concerned that there might be a recession and asked should 99% of the funds now be switched back to cash. The adviser reiterated that his advice was to hold position as there might be false signs of a recession, and some adverse movement was already priced into the market.

There is a history on this case of Mr D not being placated by the assurances the adviser was giving him, such as this comment in October 2019: *"Being told that it will be alright, don't do anything, there may be buying opportunities in the future is not what I thought I pay you for."* The adviser maintained his mantra: *"it is all about time in the market, not timing the markets"*. He added that at this time he still considered Mr D's overall portfolio to be 'balanced', so to downgrade it further to cautious would erode the possibility of a recovery in its growth.

In September 2020 Mr D emailed the adviser to ask *"Why can't we just buy gold and put it in a pension pot?"* Mr D had spotted that the FCA had added physical gold to a list of standard assets in 2014. The adviser sought approval from his head office for Mr D to self-select an investment into an Exchange Traded Fund tracking gold. He was reluctant to himself advise on an investment in gold, which he felt was overvalued at a time of uncertainty with the US presidency and the timing of a COVID vaccine. I can see that in the same chain of emails Mr D had commented *"I cautious* [sic] *but you have me losing money."*

During 2020 Openwork had recommended Mr D transfer £90,000 of cash into his investment account and then put £20,000 into an ISA. For these investments he said Mr D's attitude to risk *"remained as Speculative (Adventurous) which is an appropriate description, considering the level of risk you are prepared to take with any investment you make."* During 2021 Mr D also invested in a number of Mercia and Octopus Titan VCTs, with a recorded attitude to risk of 'speculative'. (In 2022 the same speculative portfolio was used for another ISA transfer.)

At the time of a January 2022 review, Mr D was still earning £80,000pa and was receiving £50,000pa of pension income. However, he had been suffering from 'long COVID' for some time and was looking into taking further pension benefits. The Octopus and Mobeus VCTs Mr D held were paying him tax-free dividends of about £48,600 and £18,000 annually respectively. He held the following assets other than property:

IFDL	ISA	£ 17,430
Embark (Zurich platform)	ISA	£117,864
Embark (Zurich platform)	Investment Acc	£ 78,311
Embark (Zurich platform)	Retirement Acc	£681,527
Mercia	EIS	£119,140
Octopus Titan	VCT	£506,082
Mobius Income & Growth	VCT	£155,000
Gold		£200,000
Bank accounts		£300,000

The adviser made recommendations based on a request from Mr D to start depleting his pension pots to mitigate against potential LTA tax charges above the Fixed Protection 2016 Mr D held. He spent some time exploring whether the income from Mr D's company pensions could be paused, so that his tax bands could be used up with income from pension drawdown instead. After the scheme trustees confirmed this wasn't possible, a recommendation letter followed in March 2022 for a £60,000 investment into the Mercia Northern VCT. Due to the tax relief available, the adviser said this would enable Mr D to draw up to £140,000 more from his pensions.

In April 2022 Mr D emailed the adviser saying that all his responses were 'passive'; the pension fund was 'in decline'; and the adviser adopted a 'buy and forget' strategy. The adviser responded that most of the funds were trending above the benchmark, and he didn't think a restructure was wise as Mr D might lose out on a potential bounce back. Nevertheless four new proposed funds were discussed at a meeting on 28 April: Pictet Clean Energy, Schroder Global Energy Transition, TB Guinness Global Energy and BlackRock GF Continental Europe.

By June 2022 Mr D was now concerned that only the new investment in TB Guinness Global Energy was steadying otherwise poor performance in the portfolio, including the new BlackRock GF fund. An administrator responded that the TB Guinness fund was 96% invested in gas and benefited from increasing gas prices, whereas the BlackRock fund focused on industrials, health care, media and retail.

The adviser told on 17 June 2022 that *"normal advice on a portfolio with a good spread is to hold on to what you have and ride out the storm."* He again commented on a mismatch between what he said was Mr D's 'adventurous' attitude to risk, and Mr D referring to himself recently in conversation as 'cautious'. The adviser felt conflicted in what recommendations he could make and suggested two different approaches depending on whether Mr D was indeed cautious or adventurous.

However, on the same day as this email Mr D instructed that the investments held on the platform were encashed, as his funds had fallen by £30,000 (4.7%) over the preceding months. His drawdown account was valued at 617,041 on 22 June. Mr D says that upon the sale of the portfolio, Openwork's administrator forwarded an illegible screen shot of her work. And her estimate of the sale value had been understated by about £100,000.

Openwork provided the following overall response to Mr D's complaint:

- Whenever asked prior to late 2021, Mr D had been non-committal on his intended retirement age, due to the lucrative contract work he was getting. Although he wound up his company at age 70 in preparation to retire, he actually continued working.
- From August 2018 onwards, Openwork had received risk questionnaires identifying him variously as adventurous as speculative. When this was subsequently summarised to Mr D in writing he hadn't challenged it.
- Although the level of service provided was a subjective assessment, Mr D had a high level of interaction with the adviser. There was no evidence of poor service.
- The adviser was entitled to check whether Mr D's occupational pension trustees had the discretion to pause his income payments. It hadn't delayed matters as other information was outstanding from the scheme about Mr D's LTA valuation.
- Openwork wouldn't expect its adviser to be constantly advising on alternative sectors of investment, e.g. energy, as a matter of course whenever funds had fallen. Its focus was on recommending a diverse portfolio of investments.
- The adviser did furnish recommendations in response to particular sectors that Mr D wanted to invest in, where he felt able to support those recommendations.
- The adviser had no notes of being warned before it actually happened that Mr D was going to switch to cash himself. This was not advice Openwork would expect the adviser to give as it was a decision that itself bore particular risks.
- The overall performance of the portfolio in a difficult investment environment wasn't poor enough to justify a reason to switch to cash.
- It offered Mr D £1,541 of fees it erroneously received from the Embark platform going back to August 2022, rounded up to £1,575.

Mr D has rejected this offer as he doesn't consider Openwork has explained its method of calculation. Openwork arranged for an alternative adviser to contact Mr D to attempt to offer advice on reinvestment. The original adviser also told Openwork that he was monitoring the markets in the event that there was an opportunity for Mr D to go back in at the same prices. My understanding is that Mr D has now gone to a different adviser, as I'll mention later.

Mr D told our service that he had never agreed to an adventurous risk profile for his pension. He thought Openwork had failed to observe standards for dealing with vulnerable consumers, and had a responsibility to protect him from harm to his pension. He disagreed he'd played an active role in investing, if that was only to question the absence of advice. He wanted to both improve performance and prevent losses and didn't see why that was wrong. And he'd raised his concern about the security of his pension fund on 'plural occasions'.

My provisional decision of 31 May 2023

Mr D's attitude to risk

Openwork assessed Mr D's attitude to risk as 'balanced' on several occasions up to 2018 [details were provided]. In 2016 Openwork's survey concluded that there was less than a 5% chance of Mr D being in the higher category ('adventurous' or 4) on its risk scale. The results printed out in May 2018 are identical, although given the adviser's comments about Mr D's reluctance to complete these surveys I'm not sure if this means the questionnaire was re-taken. But overall, I'm satisfied that the survey initially undertaken in 2016 shows that Mr D was willing to take up to a balanced risk approach.

I also think when Mr D's position in 2016 is objectively assessed, he did have at least a moderate capacity for loss. His pension funds were substantial and not all of them appear to have been brought under Openwork's management. Before 2016, his Aegon pension had been 58% invested in its Retirement fund, which was originally purposed (before the wider uptake of pensions freedoms) for taking an annuity at retirement. As such this was relatively low risk. But this was balanced out by the remaining 42% of Mr D's Aegon plan being spread across four equity funds and a balanced managed fund. So I think a balanced attitude to risk is broadly consistent with how Mr D had invested with Aegon previously.

Mr D had a defined benefit pension already in payment and was still working, with no firm retirement date in mind at that time (when he was approaching 68). He also didn't have dependants to provide for, meaning that not all of these funds were going to be needed to secure the baseline of income he'd need throughout retirement. On at least some of those funds, he could take risks. That meant remaining invested in the market and was consistent with a balanced risk approach.

Mr D mentions that he might have been prepared to consider annuity purchase – in effect making it more important to de-risk the portfolio as he neared retirement. But I find that unlikely. When he was asked to look into the options for Mr D taking an income in early 2022, the adviser concentrated on the level of drawdown income that could be sustainable for the rest of Mr D's lifetime. At no point did the adviser gain the impression Mr D was attracted to an annuity, and I can see why. The market had developed since the time Mr D had taken an annuity-led approach in his Aegon pension. Annuity rates were at an historical low, Mr D was not in poor health, and an annuity would die with him in any event - as he didn't have a dependant to pass annuity income on to.

An annuity was an inflexible way of providing income given the significant fund size Mr D had accumulated, whilst continuing to work and displaying frequent concerns about mitigating the impact of income tax. Mr D would have sufficient funds to contemplate drawdown when he later retired (or phased into retirement), so when also taking into account Mr D's capacity for loss, his risk profile could fairly be said to be balanced overall.

The original platform illustration didn't set out the split of the seven Omnis funds that were used in this portfolio. However these are in any event subject to minor variation, within the stated risk range of balanced. Currently, this portfolio holds 68.5% in shares, 29% in bonds, and 2.5% in mutual funds and cash. It's very similar to the split that Openwork set out in Mr D's risk questionnaire in 2016 would be employed for a balanced portfolio.

The 2018 complaint

I think Openwork should have treated the concerns Mr D raised in 2018 as a complaint. These concerns (whether justified or not) extended to the fact that Openwork had assessed his attitude to risk wrongly*: "I am a pensioner and cannot afford this loss."* The file Openwork has provided demonstrates that from this point, and contrary to its previous assessment that Mr D had a 'high' capacity for loss, it now knew that Mr D felt he couldn't tolerate a continuation of the losses he'd been experiencing since 2016.

That is not to say that Openwork should have immediately switched Mr D to cash there and then, or even de-risked the portfolio: that would likely have risked crystallising further losses. And I'm not persuaded that Mr D's comment was a true reflection of the fact that, up until that point, he had knowingly been prepared to take risks. He was a pensioner but also one who was still earning more in income and not yet seeking to draw an income from his portfolio. So although dissatisfied with its performance, there was at that time only a paper loss. To a large extent I think Mr D's comment reflects his nervousness at the state of the market, and he wasn't alone in having those concerns at the time.

However I am puzzled at the way Openwork 'batted off' the complaint by simply ceding to Mr D's suggestion of a 'cull' of poorly-performing funds. And by doing so in such a way that it replaced funds largely of one asset class (bonds) with more share-based funds, which the adviser admits took Mr D right to the brink, and in my view over, the threshold of what I would consider to be an adventurous approach.

To use the 16 May 2019 snapshot of the portfolio as an example, and excluding the funds that were 'multi-asset' or 'balanced', the remaining two-thirds (£371,323) broke down into a 7.6% holding in UK smaller companies, 14.1% in Global Income, 2% in Asia Pacific ex-Japan Equity, 7.5% in Emerging Markets Equity, 7% in European Equity, 14.8% in US Equity, 3.4% in Japanese Equity, 24.4% in UK All Companies, 2.6% in UK Smaller Companies. These were all equity funds, with a further 7.8% in M&G Optimal Income (which invested in bonds) and 8.8% in cash.

In my view, having an equity content as high as 83.4% in two thirds of the portfolio would have significantly outweighed the more moderate equity holding that would have been held in the other third that invested in the balanced and multi-asset funds. From what I can see from the current fund factsheets, some of these balanced/multi-asset funds could have had over 70% in equities.

Openwork is welcome to demonstrate otherwise from contemporaneous factsheets, but otherwise I'm inclined to take the view that this made the portfolio higher risk than Mr D's overall risk profile suggested he was prepared to accept – particularly following his comments during 2018. It also compares unfavourably with the more moderate equity content that was present in the Graphene Balanced model portfolio.

By April 2022, again excluding the funds that were 'multi-asset' or 'balanced', the remainder of the portfolio still amounted to about two-thirds (£442,583), of which 78% was in equity funds, 12.5% in bonds and the remainder in cash. So it hadn't significantly changed, and in my view a further shift to bonds (of about 5% on two-thirds of the portfolio) hadn't lowered the risk by enough. As a result, I don't agree with the adviser's comment in late 2019 that the portfolio was already of balanced risk, and reducing it would amount to being cautious. Rather, I think the equity content needed to be lowered further for it to remain balanced.

Nothing Mr D was telling Openwork in 2018 indicated that he was now prepared to take more risk. And its role, as Mr D points out by referring to the FCA's outcomes of fair treatment of consumers, was to give him suitable advice. That was what it was paid to do, and giving suitable advice doesn't always – as Openwork has shown on other occasions – mean agreeing with Mr D's suggestions. Yet on this occasion it did, and I'm not satisfied it was suitable advice to increase the risk in the portfolio at a time when Mr D was concerned that he couldn't tolerate further losses. That risk was potentially exacerbated because bond funds that had underperformed were being sold before they had a chance to recover.

Openwork made these changes before it reassessed that Mr D's profile could accommodate them. And it only made that reassessment after tempting Mr D with offers of funds it indicated were outside his attitude to risk – which understandably prompted him to ask to see what he was potentially missing out on. I don't think that was treating Mr D fairly. Nor was attempting to justify that as he had held a significant sum back in cash, this would balance out taking higher risk elsewhere in the portfolio. I don't think that justified being underweight in an asset class (bonds) and missing out on a potential recovery.

Coming as it did just after Mr D's capacity for loss had been assessed as 'very low', and even if he still had a 'balanced' attitude to risk, I'm puzzled by the adviser's comment in mid-2018 that Mr D had enough assets to adopt a speculative approach – the highest on the scale. As the adviser rightly noted, Mr D had an *"impending retirement / taking of income"*, which in my view was in and of itself a bar to him taking increased risk. I'm satisfied that the funds reserved in cash gave Mr D scope to continue in the Graphene Balanced model portfolio, rather than risk crystallising further losses. But I think the advice to cut out a significant bond element from the portfolio during 2018 was unsuitable for him.

Mr D's understanding of risk

Although there is evidence that Mr D ascribed a 'fairly cautious' description to himself in 2016, and has used the same description at times since, it is *his understanding* of what that term meant that matters. Through his regular engagement with Openwork, Mr D has shown that he was seeking higher growth in his portfolio but trying to minimise the downside risk. I'm not persuaded that Mr D appreciated the extent to which this was achievable, particularly at a time when most assets were falling in value.

I've looked at the description Openwork gave of the balanced risk profile, which Mr D originally accepted. I think he agreed to this profile with an understanding that this would involve putting a portion of his portfolio at greater risk – mainly by investing in shares, but as recent years have shown bond investments are not immune to some fluctuations, sometimes significant over the shorter term.

The overall risk profile suggested for a particular investment can also depend on its purpose, the time horizon and capacity for loss. Mr D was seeking to beat inflation and I'm satisfied that he would (or should) have understood that he needed to take a balanced risk approach to do that, and he had the capacity to do so.

I take a different view to the investigator about what Mr D's requests for the adviser to investigate certain assets say about his understanding of and approach to risk. There is evidence that some of the funds Mr D was interested in, including energy funds and China, were because the adviser first planted a seed in his mind. Mr D doesn't strike me as being particularly sophisticated in investment management. He doesn't work in that field, and he was liable to making inappropriate comparisons between what was intended as a diversified portfolio, and specific low-risk or highly concentrated investments that he thought he could make instead.

Mr D mentioned on several occasions that his portfolio would have been outperformed by gold, or even cash in a high-interest account, but that misses the point that neither of these are diversified or appropriate for medium to long-term investment. The adviser did disabuse Mr D of his feelings towards gold. I see that Mr D did proceed to invest £300,000 of other money in this asset, and he may have been fortunate with his timing – but this can turn out to be a high risk move, as it's very difficult to accurately predict future price movements. As the investigator commented, Mr D was often attracted to investments that were at the time going up - but there wasn't a sound logic that they would continue to do so.

What the adviser didn't do often enough was to emphasize to Mr D that going overweight into any particular asset was too great a risk for a profile that, at best, needed to be balanced overall. The portfolio had started out in 2016 for at least a medium term, over which underperforming funds or assets could well recover from their past falls (at a time when the stronger performers might have reversed). The adviser did sometimes say this, urging Mr D to ‘sit tight’ – but often in funds he’d already made changes to that hadn’t worked. Mr D described the adviser as reactive and I think that is a fair description, in that he only agreed to take action at Mr D’s request on a portfolio that was intended to be left in place.

I don’t think the adviser always needed to react, when there hadn’t been enough time for cycles in the market to have their effect. He could simply have said this to Mr D more often. I appreciate this might have been difficult, as Mr D would likely have been dissatisfied with the adviser’s unwillingness to make short-term changes to the portfolio, but I still think that would have been suitable advice – and defendable in this complaint.

I’ve taken into account that some of the market movements in recent years have been unprecedented, and at times both major types of asset (shares and bonds) have been falling. But I can’t see how that gave the adviser any particular expertise in being able to pick something better. Particularly over the short term, past performance was not a reliable guide to the future, as his previous fund selections had proven. In my view more medium-term adaptations to the market situation would have been better addressed through the asset allocation in the model portfolio itself, which would then apply to Mr D’s portfolio, and through the actions of the fund managers themselves.

What risk profile should have been adopted from April 2018

Even when Mr D’s attitude to risk was assessed to have changed to speculative later in 2018, the adviser noted this was still with ‘no’ capacity for loss. In my view even these two competing measures couldn’t have combined to produce an overall risk profile of more than balanced, and Mr D’s failure to confirm this assessment as requested by the adviser doesn’t change that. Nor does the fact that the adviser had supplied him with a definition for the ‘speculative’ category.

In my view the adviser still had no mandate to proceed to take more risk on Mr D’s portfolio. He acknowledged this during 2019 by referring back to Mr D’s low capacity for loss and advocating a more cautious ‘wait and see’ approach. In keeping with this, the M&G Global Government Bond fund was a lower risk addition to the portfolio at this time, although as I’ve said above I don’t think this did enough to lower the risk. The adviser documented that, in his view, the portfolio was still overall of balanced risk, but as I’ve explained above I think it had strayed outside (and remained above) Mr D’s risk profile since April 2018.

There also seems to be a starker difference between the pension’s risk profile compared with the other investments amounting to £90,000 Mr D made during 2020 into the investment account and then ISA – which *were* noted to be adventurous or speculative. As Mr D’s complaint focuses on the pension, I will simply comment that there isn’t a particular reason why his risk profile had to be the same for both ‘pots’ in 2020. He was increasingly likely to start accessing his pension in the coming years, whereas as Mr D was relatively asset-rich I don’t have the impression he was going to access the other investments in as short a time frame – particularly an ISA which is intended to be held so as not to lose the tax breaks.

Again, some more specialised investments such as energy funds had crept into the pension portfolio by 2022, following further requests from Mr D for better performers. I think the same trend was continuing of the overall risk profile of the portfolio being distorted in the hunt for better growth. Openwork hasn’t explained how it continued to ensure the pension portfolio was of balanced risk, and I think it was actually increasing at a time when Mr D was closer than ever before to retiring (he was nearly 75). It seems to me that the adventurous/ speculative risk profiles being adopted for other investments were at times being confused with the pension. And this further runs counter to the logic of Mr D’s portfolio potentially being needed to provide an income when he retired.

Openwork's responsiveness to Mr D and its level of service

Because I think Openwork should not have been reactive to short-term market movements – let alone pro-active in the way Mr D suggests – I haven't found reason to conclude that its delay in responding to his requests was itself a cause of further loss. I don't agree that this is conflating the service issue with his attitude to risk.

The remedy this service would give for an overly risky portfolio construction is to replace its performance with that of a different portfolio more suited to Mr D's attitude to risk. We do not provide redress that replicates steps an adviser or their client might have taken to time the markets. Not only does that approach rarely work, but it would be impossible to demonstrate, without hindsight, that one particular course of action would have been taken over another. So the redress I can award wouldn't alter in respect of individual instances of Openwork being slow to respond to Mr D or giving him incorrect information.

On the whole I agree with the investigator that Openwork was attentive to Mr D's concerns, although not always in a way that was ultimately helpful to him. As I've said above, in effect I don't think it should always have been expected to keep coming up with solutions for Mr D in a falling market – but in an attempt to keep him happy, it did. I can see there were also some occasions when it gave him incorrect information, which he had to point out. And I agree with Mr D that the adviser could have saved time by not entertaining the possibility that Mr D's occupational pension trustee could 'pause' his income.

Annuity income can't generally cease once in payment except on death, and it can't reduce except in defined circumstances (including where it is investment-linked or pension sharing on divorce). Other changes would be treated as an unauthorised payment, making it unheard of for a scheme trustee to agree to such a request. I'm surprised that the adviser didn't know this – or couldn't establish it quickly with Openwork's technical department. I think this was preferable to raising Mr D's expectations that a solution might be found. Whilst I don't think this altered the advice Mr D ultimately should have received, I accept his point that this is one of the reasons why he lost faith in the adviser.

However, this and other clerical errors aren't the only reason Mr D became dissatisfied. Crucially, not all of the problems Mr D had with Openwork's approach to advising on his pension portfolio were of its own making. As I've set out above I think Mr D misunderstood Openwork's role, the purpose of medium to long term investment and Openwork's inability to accurately predict what assets would perform in the shorter term (in a way that even fund managers themselves would struggle to do). Mr D requested that Openwork dealt with him particular ways, such as setting details out in writing before meetings and keeping all emails in one chain, but it was under no obligation to agree to this.

Importantly, Mr D had been expressing concerns about the performance of his portfolio since at least 2017 and as I've said, by 2018 these extended into Openwork's role in advising on it. Whilst Openwork didn't treat those concerns as a complaint, Mr D has shown in his comments at the time that he knew he could raise those concerns with our service. Had he done so, we would have asked Openwork to deal with them as a complaint. Mr D also had the option during that time of looking for a different adviser as he was evidently unhappy with Openwork over an extended period. For all these reasons, the award I think I could fairly make for the distress and inconvenience Openwork has caused Mr D, in addition to any financial loss, is not going to be significant.

Mr D's vulnerability and unilateral switch to cash

I've taken the same view as the investigator on these aspects. I'm not persuaded that specifically being in the later stages of accumulating a pension (or even though he hasn't suggested as much, his advancing years), renders Mr D a 'vulnerable consumer' under the FCA's guidance. I don't think he came across to Openwork as having an impaired ability to address his financial planning – as I've noted, he took exception to any such suggestion. And his extensive assets and income at the time is contrary to any indication that he had low resilience to cope with financial or emotional shocks.

Mr D didn't however need to meet the definition of a vulnerable consumer for Openwork to need to pay due regard to his proximity to retirement, and to the signs he hadn't understood or appreciated its approach to building a portfolio over the medium term. It was required to take these factors into account in order to treat him fairly and provide suitable advice under the regulator's principles and rules.

I must point out to Mr D that the Consumer Duty to which he's referred does not come into force until this July. For the same reason, the FCA's November 2022 consultation on broadening access to financial advice is not relevant here. And neither of these (or the 'six outcomes' of the fair treatment of consumers which were on the FCA's website during Mr D's advice) have the effect of requiring an adviser to shield their client from investment loss - providing they have assessed that their client is willing and capable of accepting that loss, which I'm satisfied is the case here with Openwork's categorisation of Mr D as 'balanced'.

Mr D had commented at various times about other assets (including cash) that he thought had performed better than his portfolio – and questions were sometimes posed about whether he *should* switch to them. Nonetheless, the adviser had consistently advocated against this and encouraged Mr D to stay put. For example when Mr D suggested this in August 2018, the adviser's response of *"no need to dash to cash just yet"*.

I've considered whether, if Openwork had maintained a portfolio that stayed within a balanced profile for Mr D throughout the period since 2016, it would need to de-risk it further in the period running up to 2022 – given Mr D's advancing years and likely more imminent retirement. This is around the time at which Mr D says he would have liked to lower risk anyway because of the Ukraine-Russia conflict, but I think that is largely coincidental. I share the investigator's concern that Mr D couldn't have accurately forecast the impact (and timing) of this conflict.

In some cases, I might have said that if there was a definite planned retirement date, there could have been a plan to move some assets into, say, bonds to cater for this. However there are two complications here. Firstly, the compensation this service provides takes a broad-brush approach in order to resolve cases quickly and informally. We would ordinarily use the same overall benchmark throughout the period up to retirement, but one that was mindful of a potential lowering of capacity to take risk closer to retirement - rather than modelling a number of switches. And in this case I'm satisfied that when the advice began in 2016, a balanced risk profile was appropriate.

But secondly, in Mr D's case, it would be very difficult to anticipate when any further switches should have taken place when he was himself not sure when he would retire. I've had regard for the fact that the adviser did hold some sums back in cash right up to the point Mr D switched unilaterally into cash – and I think that was sufficient mitigation against Mr D potentially deciding to retire at short notice. So it follows that I consider it would have been appropriate for those sums in the pension that were *not* in cash to remain in the Graphene Balanced portfolio over the period up to when Mr D made his own switch to cash.

I think some of the investment switches the adviser made might have exacerbated Mr D's losses (or led Mr D to think they had) – this will be clarified when Openwork carries out the calculation I've set out below. But even if he has suffered losses on its advice, I don't think this changes the fundamental point that when he switched to cash in June 2022, Mr D was acting against Openwork's advice. So it can't be responsible for his decision to make that switch specifically.

Responses to the provisional decision

Mr D felt he had already thoroughly input into this service's review of his complaint and appreciated the outcome. However, he added that he has now incurred fees in moving his funds to a different adviser (0.5% initially and an annual charge that is about 0.7% higher than the Openwork charge). He says that had Openwork's adviser engaged with him adequately before he switched to cash, this action would not have been necessary.

Openwork sent us a letter including the adviser's own comments. I'll summarise this:

- He gave advice that was specific to Mr D but I've followed a 'generic, one size fits all' assessment.
- Mr D was a highly educated and intelligent investor, taking a logical and scientific approach to investing which meant he wanted to be actively involved.
- The cull of investments in 2018 didn't result in him going outside a balanced risk profile overall, because not all the proposed funds were used (I've corrected this in the background above).
- The funds encashed only amounted to around £128,000. Approximately 60% were reinvested back into better performing bond type funds. Approximately £50,000 was slightly risk uprated (approximately only 10% of the pension drawdown account).
- The replaced bond funds were underperforming against their benchmark, and by that point represented high risk. Mr D pointed out a newspaper article at the time showing these funds had not factored in future interest rate rises.
- Mr D made an informed decision to cull these funds, but the adviser could not be expected to have a crystal ball. Mr D had also been pushing to reinvest the cash which in its view he should continue to hold.
- Openwork did on occasion discuss speculative funds with Mr D that it didn't ultimately him in, to *"head off hindsight recriminations".*
- The direct, critical tone in Mr D's emails was in contrast to his manner on the phone. The comment *"I am a pensioner and cannot afford losses"* wasn't intended literally and is borne out by him remaining with Openwork for so long.
- When asked, Mr D had told the adviser he had *"no capacity for loss at all".* With £2.17m investments including cash, and over £2m in two properties, employed income of about £100,000 and total DB and state pensions of about £50,000, that didn't make sense.
- The problem was Mr D's perception of his capacity for loss. He wanted no loss and no volatility, but didn't accept the limited returns of such an approach. He knew this was unrealistic, and was prepared to invest in speculative investments like VCTs.
- I was wrong to say that the adviser introduced the idea of Far East investments or energy funds. Mr D consistently made these suggestions when these funds had already risen and it was too late to take advantage of much of the benefit.
- Some of Mr D's demands were unreasonable. He was unable himself to confine discussions to the single email chain he wanted.

The adviser provided a list, which I've noted, of the occasions on which he considered Mr D had demonstrated he was a more speculative investor. He also thought the comparison I asked Openwork to carry out (and set out below) would show there was 'no loss' against Mr D having remained in the Graphene balanced portfolio. Openwork did say that it was prepared to pay the £300 I proposed for the distress and inconvenience caused to Mr D.

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.

Mr D hasn't provided many comments for me to consider, but that is instructive in itself. I hope he is able to recognise that what he was asking the adviser (and this service) to do in obtaining a rising return in markets that were often falling, just wasn't realistic or achievable. And I agree with what the adviser has said on this point.

Whilst the way I proposed that this case should be redressed (by assuming Mr D remained in the Graphene balanced portfolio) might suggest a 'generic, one size fits all' approach, I can assure Openwork that this is not the case. Rather, it is simply that I cannot give Mr D the returns he wanted but at the same time I need to be satisfied that the changes the adviser made to his portfolio – which I didn't consider needed to be made and in some respects were ill-thought through – haven't caused him loss.

There is a disagreement between the parties about the extent to which Mr D wanted to be actively involved in his investments. I don't accept Mr D's point that he *only* became involved because the adviser in his view wasn't acting. There is enough evidence to show that he had views, sometimes prompted by press articles, on where he should invest. I accept Openwork's comments that this might have triggered the discussions on the Far East, energy and for that matter bond funds.

However, I have to return to the theme of my provisional decision which was that Openwork was Mr D's adviser with his best interests in mind. So it didn't always have to take action whenever he queried the investment strategy. And, in making my comments about the bond funds being sold, and not replaced to the same extent, I wasn't oblivious to the fact that there could legitimately have been concerns about bond investments looking riskier once interest rates seemed to be at the bottom. But in my view a balanced investment approach required more diversification than Mr D ended up with in his portfolio.

My main point was that Mr D was overexposed to equities to the detriment of a range of other assets (which would reasonably still include some bonds). The adviser has said that *"At the time of the cull* [April 2018] *I did a weighted mean analysis based on the asset allocation within the fund fact sheets and followed up with e-values report and found that our actual proposal was indeed Balanced in nature and remained so."*

No more evidence has been given of this analysis. But it seems somewhat at odds with what he said at the outset of the complaint, namely that and Mr D was told that the 'cull' would move him to an adventurous rating. And with Openwork's need to often repeat that Mr D's willingness to speculate with other investments justified him taking more risk with his pension. All of this suggests it was known at the time the risk level was going to increase.

My analysis wasn't based on the specific list of funds culled (which the adviser has since corrected), but on overall snapshots of the drawdown pot, in May 2019 and April 2022. I remain of the view that Mr D was overweight in equities for his balanced risk profile, and that's why I've asked Openwork to carry out a loss comparison with him remaining in the Graphene balanced portfolio.

I hope Openwork will be able to see that I haven't taken Mr D's comments literally about wanting to take no risk, or having no capacity for loss. I agree that they don't tally with his other investment habits and assets he held. But for the reasons I explained in my provisional decision, I think these should have raised concerns about his understanding of how his portfolio was designed to work, and called into question whether this was the appropriate time to be increasing risk – whilst all the time he neared the point at which he would retire.

Regarding the costs of employing a new adviser, I noted in my provisional decision that Mr D has had the option ever since 2017 of looking for a different adviser as he was evidently unhappy with Openwork over an extended period. Whilst I've questioned Openwork's approach in advising Mr D, that doesn't necessarily mean he would have been satisfied with what would likely have amounted to even less frequent changes in his investments. Ultimately, I think Mr D was looking for a different type of service that Openwork couldn't, and wouldn't reasonably have been expected to, provide for him. So, I'm not persuaded that it should reimburse him for the costs of moving to another adviser.

Putting things right

My aim in awarding fair compensation is to put Mr D as close as possible into the position he would have been in, if Openwork had given him suitable advice *on those sums which were not held in cash* in his pension portfolio whilst it was held on the Zurich Wrap up to 22 June 2022. I've already said that I think the Graphene Balanced model portfolio was appropriate from the outset.

I require Openwork to calculate the notional value that *the non-cash component* of Mr D's drawdown fund would have had on 22 June 2022, if he'd remained in the Graphene Balanced model portfolio – and compare that with the actual value on 22 June 2002. If the notional value is higher than the actual value, Mr D has suffered a loss equivalent to the difference.

If the comparison identifies that there is no loss, then this indicates that Mr D hasn't been disadvantaged by the adviser 'destructing' the portfolio so that it contained higher-risk elements than I consider he should have been prepared to accept.

It's appropriate to give Openwork the opportunity to obtain details of how *the non-cash component* of Mr D's portfolio would have performed in line with Omnis Graphene Balanced, as Mr D was informed that Openwork gave restricted advice on providing model portfolios from this company. So that enables me to identify that this is where he would most likely have been on suitable advice.

However if Openwork doesn't have the capability of obtaining this notional value it may, as an alternative, refer to the FTSE Private Investor Income *<u>Total Return</u>* Index. Data on this index can be obtained from FTSE and I consider it would be closest in comparison to the Graphene Balanced portfolio.

Any switches into the portfolio from the cash component or switches back out to cash, should be factored into the notional value with effect from the date they took place.

If there is a loss, Openwork's responsibility to compensate Mr D only extends to updating that loss suffered as at the date Mr D switched into cash (22 June 2022), to the present day, in line with how his *actual* pension portfolio has now performed since that date – whether it has been in cash or something else over some/all of that time.

The refund of fees Openwork has already offered of £1,541 must separately be paid as compensation and also updated in line with how the *actual* pension portfolio has performed since the date(s) these fees were wrongly removed from the portfolio. If any further advice fees have been taken by Openwork that shouldn't have been, these should also be included in this sum.

As the total compensation represents funds from which Mr D would be yet to take an income, it may be notionally reduced to account for tax which he would have had to pay on pension income, but won't now have to pay if this compensation is paid to him as a cash sum. I consider it would be reasonable to notionally reduce the total compensation by 20% on the assumption that Mr D will be a basic rate taxpayer once he has stopped working. Mr D may, if he wishes and to the extent that he has sufficient allowances, pay some or all of the compensation back into the pension fund himself and obtain basic rate tax relief on it.

I'm also making an award for the distress and inconvenience caused by Openwork unnecessarily increasing the risk in Mr D's portfolio, and some isolated instances of its poor service including its attempt to pause the payment of Mr D's occupational pension. In my view an award of £300 for the upset Openwork has caused Mr D would be appropriate, and consistent with the range of awards our ombudsmen make in the circumstances here.

I note that Openwork is already prepared to pay this sum, but I would remind it of the additional award I'm making in relation to the advice fees, and the need to carry out the calculation set out above. Some evidence of Openwork's calculations so far were provided with its response to the provisional decision, but I'm not in a position to tell whether these are based only on the non-cash component of the pension portfolio, as set out in the steps above. Openwork will need to provide and explain its calculations to Mr D.

My final decision

I uphold Mr D's complaint and require Openwork Limited to calculate and pay him compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 28 July 2023.

Gideon Moore
Ombudsman