DRN-4222952

Financial Ombudsman Service

The complaint

Mr M has complained about the actions of EB Associates Group Limited ("EB Group") which advised him to amalgamate two personal pensions into the one new plan in 2019. He says the advice to switch his pensions in this way was unsuitable.

What happened

In May 2019, EB Group collected information on Mr M's circumstances and objectives. At the time, Mr M had two personal pensions held with different providers who I will refer to as "Firm A" and "Firm B". In September 2019, EB Group wrote to Mr M with its suitability report, which recommended he switch his two pensions to a self-invested personal pension ("SIPP"). The SIPP it recommended was also managed by Firm A. EB Group also recommended the fund for the SIPP to invest in. Mr M accepted the advice and the switches were made in October 2019.

Mr M, who is represented by a claims management company, complained to EB Group in 2022. His complaint, in brief, was that the costs, and the proposed underlying investments, of the new arrangement weren't suitable for someone in his position which was: unemployed, married, 50 years old, with little investment knowledge and a low attitude to risk and capacity for loss. EB Group's response was that its advice was suitable because Mr M's pension with Firm A was invested in a fund that was too high risk for him and the Firm B pension was invested in an underperforming with-profits fund. It said the new arrangement meant Mr M had consolidated his pensions in a cost-effective new plan and was invested in a more suitable manner than before.

Mr M disagreed and referred his complaint to us. Our investigator upheld the complaint, arguing that Mr M ended up paying more in charges without good reason as a result of EB Group's advice. EB Group didn't agree so the matter is with me.

What I've decided – and why

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

Having done so, I've come to the same conclusion as our investigator. EB Group has fallen short of what I would expect and needs to put things right for Mr M.

Firms such as EB Group are subject to the FCA Handbook, and under that to the Principles for Businesses and to the Conduct of Business Sourcebook ("COBS"). The following is not a comprehensive list of the relevant rules, regulations and principles. But I consider them to be particularly relevant here:

- Principle 2 – A firm must conduct its business with due skill, care and diligence;

- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;

- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading;
- COBS 2.1.1R – A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule);
- COBS 9 – which covers what firms must do when assessing suitability.

I also consider the Financial Services Authority's 2008 "Quality of advice on pension switching" report to be relevant. It identified areas of good and bad practice in pension switching advice – the latter including switches that result in extra product costs without good reason.

My starting point here are the charges Mr M ended up paying under his new arrangement. The suitability report included a table which showed the "before" and "after" reduction-in-yields for Mr M's pension; in other words, a comparison of fund costs, including platform fees and management costs, that Mr M was paying and what he went on to pay after he switched his pensions. The reduction-in-yield for the fund with Firm A was 0.38%. For the Firm B fund it was 1.03%. Taking into consideration the fact that the Firm A pension represented a large proportion of the switched funds, this means Mr M was previously paying 0.54% p.a. for his pension arrangements. The fund/pension recommended by EB Group had a reduction-in-yield of 1.00%. This meant Mr M needed his new fund to produce additional returns of 0.46% p.a. just to break even – a considerable uplift.

In itself, this doesn't necessarily mean the advice was unsuitable. There may be reasons why it's reasonable for someone to pay more for their pension provision. For example, someone may need the greater functionality of a new platform or have good reason for changing their fund selections even if those selections are more expensive. However, I don't think there were sufficiently good reasons for Mr M to pay so much more in this case. He didn't have need for the greater functionality of his new pension because he wasn't 55 so the ability to take his retirement income flexibly through the SIPP wasn't something he needed at that time. And I'm satisfied he didn't have need for the SIPP's greater fund range given his investment experience was limited (something that was recorded in the fact-find/attitude-to-risk exercise). In short, Mr M didn't need to pay extra for additional features because those features weren't especially useful for him at that time.

Yes, Mr M's existing funds with Firm A and Firm B were potentially unsuitable for his purposes. The Firm A fund appeared to be too high risk for him given it was a 100% equity fund and Mr M was assessed as having an attitude-to-risk of 4 out of 10, or "lowest medium risk"; the fund EB Group recommended was more cautious which, at face value, doesn't seem unreasonable. And the Firm B with-profits fund may well have been suffering from poor returns. So investing in a different way may have been suitable advice. But paying significantly more to do so wasn't, in my view, the answer here. Mr M's attitude-to-risk and investment needs weren't particularly esoteric. I'm satisfied Mr M could have accessed funds in keeping with his objectives more cheaply.

I think a business, acting with the Principles, COBS rules and regulator commentary on good and bad practice in mind, shouldn't have acted in the way EB Group did. If EB Group had acted as it should have done, I'm satisfied it wouldn't have made the recommendation it did and Mr M wouldn't have been put in the position of paying more than he needed to for his pension.

EB Group must therefore put things right for Mr M in line with the approach outlined below. The approach is the same as the one outlined by our investigator. I note that EB Group feels the benchmark used in that redress is unfair because the fixed interest element of the benchmark doesn't accurately reflect falling capital values. EB Group says this will result in complaints that are incorrectly upheld and unfairly high levels of redress being awarded (especially during periods of financial turbulence).

EB Group should note that the outcome of the complaint isn't dependent on redress being awarded. If a business has given poor advice but their client has nevertheless benefited from that advice (by being in a too risky fund that ended up performing strongly for example) then the complaint would still be upheld. It's just that, fortuitously, the complainant hasn't lost out because of the business's poor advice. But the business would have still done something wrong and this would still need recognising, even if there is no redress to pay.

On the point about redress levels being too high, EB Group should note the fixed rate bond element of the benchmark is to account for someone who wanted to achieve a reasonable return *without risk to their capital*. So EB Group is correct up to a point – that part of the benchmark may not be picking up on the falls in capital values that EB Group would like. But EB Group is drawing the wrong conclusions from this. As our investigator pointed out – and it's a point I agree with – Mr M wanted to protect some of his pension from capital falls and the fixed rate bond element of the benchmark is a fair and reasonable way of capturing this.

Putting things right

My aim is that Mr M should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr M would have invested differently. It's not possible to say precisely what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr M's circumstances and objectives when he invested.

To compensate Mr M fairly, EB Group must:

- Compare the performance of Mr M's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- EB Group should also add any interest set out below to the compensation payable.

- EB Group should pay into Mr M's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If EB Group is unable to pay the total amount into Mr M's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr M won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr M's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, as Mr M would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay to Mr M £300 for the distress EB Group's poor advice would have caused him and the inconvenience he will face if he decides to review his pension as a result.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Aviva SIPP	Still exists and liquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of transfer	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EB Group should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if EB Group totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I’ve decided on this method of compensation because:

- Mr M wanted Capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It’s a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr M's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr M into that position. It does not mean that Mr M would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr M could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold the complaint. My final decision is that EB Associates Group Limited should pay the amount calculated as set out above.

EB Associates Group Limited should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 17 November 2023.

Christian Wood
Ombudsman