

The complaint

Mr M says FACET INVESTMENT MANAGEMENT LTD ('FACET') mismanaged his pension portfolio, causing a 39.5% (£87,230) loss between September 2019 and March 2022 ('the period'). FACET disputes the complaint.

What happened

Mr M's case is about the pension portfolio in his Aviva Self-Invested Personal Pension ('SIPP'). He has set out the following main grounds and submissions for his complaint –

- FACET provided a Discretionary Investment Management ('DIM') service for his SIPP portfolio. Its mandate for that included his mainly cautious investor risk profile. This risk profile applied throughout the period.
- Up to September 2019 his pension portfolio's value was £220,805.64, and by March 2022 its value had dropped to £133,652.96.
- This significant loss in value was caused by FACET's mismanagement, mainly in a number of identified ways – first, it exposed his pension to a combination of FACET funds (the EF FACET Cautious Discretionary Portfolio (the 'CDP' fund) and the EF FACET Balanced Discretionary Portfolio (the 'BDP' fund)) which conflicted with his risk profile; this was compounded by the inclusion of a sub-fund called the Carpe Valorem ('CV') bond within the CDP and BDP funds, to which his portfolio was over-exposed and which was too risky for his profile; then, it unduly delayed in reacting to notice of problems in the funds, and despite its foresight of those problems it failed to mitigate his losses and his exposures to the failing sub-funds in the pension's portfolio.
- It also misrepresented the valuations of his portfolio during *the period*.

In response, FACET mainly said –

- The fund mixture in the portfolio matched Mr M's 75/25 cautious/balanced risk profile. 75% of the portfolio was invested in the CDP and 25% of it was invested in the BDP. Both funds had independent risk scores provided by FE Trustnet, ranging between 25 and 35 out of 100. Overall, they were funds that suitably matched its mandate (including risk profile) for Mr M's portfolio.
- The fund manager for the CDP and BDP funds – WAY Fund Manager Ltd. ('WAY') – took the decision in October 2019 to suspend, and ultimately terminate, both funds. WAY was/is a separate entity and its decision was outside FACET's control and responsibility. Therefore, the timing of the sales and returns of cash to Mr M's portfolio was also outside its control. The pandemic shortly thereafter also contributed market volatility and disruption to the problem.

One of our investigators looked into the complaint and concluded that it should be upheld. He mainly said –

- Mr M had a cautious risk profile, as was the result of the risk profile assessment that happened on 27 May 2015. The CDP and BDP funds (especially the level of potentially illiquid and illiquid sub-funds with them) mismatched his risk profile.
- Both the CDP and BDP funds were described as having potential to invest in some high-risk assets (such as UCIS) which could also become illiquid.
- The winding down of the CV bond, which existed in both funds, was a material cause of their suspensions. The underlying operation of the CV bond included the purchasing and restructuring of high-risk credit lines, and its bond yield of 7% was quite high at the time, which indicated associated higher risks.
- Evidence of the CDP's and BDP's components around January 2020 and onwards shows that the former held around 33% in illiquid sub-funds and the latter held around 24%, and that some of them shared similar high yields like the CV bond. These sub-funds were too risky for Mr M's profile.
- He should receive redress for financial loss resulting from the mismanagement of his pension portfolio. He has been delayed in taking his pension due to the loss he has suffered, and that must have been stressful for him. For the distress caused in this respect he should receive £500 compensation.

FACET disagrees with this outcome and maintains its original position on the complaint. It expressed concern that the investigator had been unduly influenced by his findings in another, separate, complaint involving FACET. It did the same with regards to what it viewed as the investigator misguiding himself by referring to Mr M as having a cautious risk profile. It said the investigator was wrong about this, and that the DIM service agreement he signed on 26 May 2015 confirms that Mr M had a cautious/moderate risk profile, which was/is not comparable to a cautious or low risk profile.

It also considered the £500 award proposal from the investigator to be flawed. It said there is evidence of Mr M's losses amounting to no more than 7% of his assets in 2020 (excluding the value of his home) so, it argued, whilst regrettable, the losses are unlikely to have impacted on his decision to draw from his pension to the extent that the investigator concluded.

In addition, FACET said –

- There is an earlier Ombudsman decision in a separate case about FACET, that also features the CDP and BDP funds. It is comparable to Mr M's case. In it, the Ombudsman concluded that both funds, overall, were suitable for the complainants. The Ombudsman in the decision also took the approach of considering the suitability of the funds overall and of the pension portfolio as a whole, as opposed to focusing on a single sub-fund within it. This is what the investigator should have done, but did not do.
- Despite their ability to invest in UCIS neither fund, as a matter of fact, ever invested in UCIS, so their ability to do so is irrelevant to the complaint.
- Due regard must be given to the separation of roles in the case. FACET cannot and should not take or share any of WAY's responsibilities as fund manager for both the CDP and BDP. The investigator's findings about fund liquidity relate to WAY's responsibility, not FACET's, and the illiquidity problems were not foreseeable to

FACET at the relevant time. The Ombudsman in the decision it has referred to addressed a similar point and concluded that FACET could not reasonably be expected to foresee the fund's suspension as that related to matters under WAY's control.

The case was then referred to an Ombudsman. Mr M also contacted us to share information about another earlier Ombudsman's decision in a separate case about FACET, in which the complaint (which he considers comparable to his) was upheld.

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 have reached the same conclusion as the investigator's, for the main reason that, on balance, FACET's management of Mr M's pension portfolio conflicted with the mandate it had and was required to comply with.

The background summary above mentioned FACET and Mr M citing a total of three other cases involving FACET that have been submitted to us. We have received a number of such cases, more than the three mentioned, and they appear to feature the same CDP and BDP funds, allegations of mismanagement similar to that of Mr M's and events around the same, similar or connected periods. FACET will know that I previously issued a provisional decision in yet another separate FACET related case featuring the CDP and BDP funds (and a similar mismanagement allegation), and that I sought and obtained additional information about both funds and about its awareness of their sub-fund contents. With regards to the latter, FACET has confirmed the following –

“WAY Fund Managers reported to FACET on a daily basis on the underlying holdings within the EF FACET funds. Therefore FACET had full awareness of the holdings within each of the EF FACET funds on a daily basis (but not the full constitution of the holdings within any external funds)”.

For the above reason, we have a range of available evidence, across different cases, about FACET's DIM service and about the CDP and BDP funds that are relevant to Mr M's case, and I have considered such evidence.

Also related to the above is the fact that FACET and Mr M have referred to earlier decisions from our service which, essentially, they would like me to follow in the present case – with each decision supporting each party's position. Our service works towards consistency in the decisions we issue. However, each complaint is addressed on its own facts and merits, so a previous Ombudsman's decision is not automatically binding on another Ombudsman. Therefore, my findings in Mr M's complaint have been reached through this approach. In doing so, and as stated above, I have considered evidence available from other cases, but my findings are based on the facts and merits of his case.

Mr first and main finding is quite pivotal. It relates to Mr M's risk profile. That risk profile was key in defining FACET's mandate for the DIM service it conducted in his SIPP portfolio. The investigator identified that he had a cautious risk profile. FACET says that is wrong, and that he had a cautious/moderate risk profile (at a ratio that was matched by the CDP/BDP funds' combination ratio in the portfolio).

Evidence exists for both, but, on balance, I consider that evidence supporting the conclusion that Mr M had a cautious risk profile is credible, whilst the evidence FACET has referred to (about the cautious/moderate profile) is questionable.

The evidence FACET has referred to is the DIM service agreement of 26 May 2015, signed by both parties (on that date). It is a brief document, a single page, and the selection of a cautious/moderate risk profile for Mr M is limited to a single sentence, which simply says – “*The Client’s risk profile is ... Cautious-Moderate ...*”. There is no explanation in the document about how the profile was concluded or about what it meant.

Between 26 and 27 May 2015 Mr M underwent, completed and signed (on 27 May) documentation for a risk profile assessment. The documentation for this assessment is what the investigator appears to have relied upon. In contrast to the DIM service agreement, this assessment document is lengthier (seven pages), it confirms that Mr M had a cautious risk profile, it shows how that profile was reached – based on his answers to 18 risk profile assessment questions – and it defines the profile.

As part of his assessment answers, Mr M confirmed that – he would not invest in high-risk products and he was not a high-risk taker; he was neutral about the risk/rewards philosophy in general; he would worry a great deal about investment loss; he would be anxious about a fall in his investment’s value; he was neutral about short term falls in exchange for long term gains; and he would prefer a lower predictable outcome than a higher unpredictable one.

The document says the cautious profile was what he chose and was what he was assessed as matching. It defined the profile as one for which low risk growth was the objective, but it distinguished it from that of a *defensively cautious* profile. Further reading of the definition explains that this distinction served the purpose of defining a cautious risk taker who nevertheless understood the need for a little more exposure to risk than would apply to a defensively cautious profile, in order to achieve the growth objective.

Overall, on balance and based on the above evidence, I am satisfied that Mr M had a cautious risk profile. It is not clear why the DIM agreement said something different, especially as the risk profile assessment was not concluded until the day *after* the DIM agreement was signed. For the sake of completeness, I note evidence of a low to medium risk profile mentioned in communication from FACET in August 2020 (which was during *the period*) but I do not consider it to be relevant to the 2015 assessment, or to the present case, because it references a joint risk profile that Mr M supposedly had with his wife. The communication was sent to them jointly. An investor’s individual risk profile is not automatically the same as the risk profile s/he jointly holds with a spouse or partner, and available evidence is that Mr M’s individual risk profile was cautious.

Based on the above finding, and because no part of his risk profile was moderate or balanced, no part of Mr M’s SIPP portfolio should have been exposed to the BDP fund. That fund was for those prepared to take a moderate level of risk in their investment approach, and based on his profile and assessment answers Mr M was not such a person. Even though he was not defensively cautious and even though he sought growth, his pursuit for growth was expressly qualified by the need for a cautious approach. The BDP’s risk profile was 4 out of 7, which meant it was slightly above balanced and even more so above cautious. FACET’s use of the BDP for Mr M’s SIPP portfolio was therefore unsuitable and was in conflict with its mandate for management of the portfolio.

Furthermore, evidence from other cases shows that from around 2017 onwards the BDP was populated by an increasing number of sub-funds featuring corporate bonds (which have higher credit worthiness and default related risks than sovereign bonds (or Gilts, as in the UK)) and corporate bonds with high yields, which are commonly regarded as high/higher risk corporate bonds (hence the higher yields). Over a relatively short period of time, around half of the BDP’s contents were these types of sub-funds, including the CV bond, and available evidence shows that this continued into the period relevant to Mr M’s complaint.

Something similar happened within the CDP fund. The same body of evidence shows, within this fund, the same trend mentioned above (but not quite to the same extent as in the BDP) from 2017 onwards, and into the period relevant to Mr M's complaint. This appears to have been why the CV bond was also held within the CDP. Others (that is, high yield high/higher risk corporate bonds) broadly like it were there too.

Whilst the CDP fund's title would have suggested that it matched Mr M's cautious risk profile, given that it was a FACET fund and given that, as FACET has confirmed, it had full day to day awareness of its underlying holdings, it was responsible for doing more than just relying on the fund's title. Even though it did not manage the fund, it owned it, it was fully aware of the fund's contents at all times, and it actively and discretionarily managed Mr M's SIPP portfolio (which held the fund). Its primary responsibility was to ensure that the SIPP portfolio was suitably managed in line with its cautious profile.

The notion of an increasing and relatively substantial exposure to higher risk corporate bonds in the CDP did not match that mandate, so it ought reasonably to have reviewed and corrected the SIPP's exposure to that – but it did not. This is distinct from any argument about FACET foreseeing any illiquidity problems within the fund or its contents. It is also distinct from WAY's responsibility for selecting the fund's contents and managing the fund. It is about FACET's *awareness* of the relevant sub-fund contents that were at a level which created exposure to notably higher risks than Mr M's cautious profile was prepared to undertake, and about its failure to address and correct this in his portfolio, as part of its DIM service to the portfolio.

It is also important to highlight that these sub-fund contents within the BDP and CDP funds during *the period* also create grounds, on their own, to uphold the complaint even if Mr M had the cautious-moderate risk profile that FACET has asserted. This is because, on balance, the higher risks in the relevant high yield corporate bonds in both funds – and at the overall size of their presence in both funds – created exposure to a level of risk that went beyond that of a cautious-moderate profile.

Overall, on balance and for the above reasons, I conclude that FACET mismanaged Mr M's SIPP portfolio, and that his complaint is upheld.

Putting things right

Fair compensation

My aim is to put Mr M as close as possible to the position he would now be in if his SIPP portfolio had not been mismanaged during *the period*. On balance and for the reasons given above, I consider that the portfolio's contents would have been different, because they should have matched his cautious risk profile, but they did not. It is not possible to say *precisely* what those contents would have been, but I am satisfied that what I have set out below is a fair and reasonable basis for redress based on his cautious risk profile.

The start date for the redress calculation is the first date of *the period* cited in Mr M's complaint – 1 September 2019 – because that is how he has defined his complaint, the SIPP portfolio was already under FACET's management as of this date and its mismanagement of it already existed on this date (and over the rest of *the period*). The end date will be the date of settlement, which goes beyond the end of *the period*. The effect of the mismanaged SIPP portfolio – that is, any financial loss during *the period* that would otherwise have been part of the SIPP's value thereafter, and any loss of returns, to date, on such lost value – presently continues, so the calculation must fairly reflect this. Therefore, the calculation of redress must be conducted to the date of settlement.

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

What must FACET do?

To compensate Mr M fairly, FACET must do the following:

- Compare the performance of Mr M's SIPP portfolio with that of the benchmark shown below. If the *fair value* is greater than the *actual value* the difference must be paid to him 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 FACET is required by HM Revenue & Customs to deduct income tax from the interest, it must tell Mr M the deduction amount and give him a tax deduction certificate if he asks for one, for him to reclaim the tax from HM Revenue & Customs if appropriate.
- Pay the compensation into Mr M'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 his pension plan if it would conflict with any existing protection or allowance. If the compensation (and interest) cannot be paid into his pension plan, pay it directly to him. 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 his actual or expected marginal rate of tax at his selected retirement age. For example, if he is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. If he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.
- Pay Mr M £500 for the distress, trouble and inconvenience caused to him. I agree with the investigator's proposal in this respect. The value of Mr M's non-pension assets is irrelevant to this compensation. The SIPP served the purpose of being his pension fund, and it was mismanaged by FACET. That happened due to the discretion he had given it to manage his pension portfolio, and the trust and confidence he must have had in FACET to do that. Its mismanagement of the portfolio essentially breached his trust and confidence, and that, in addition to his journey in trying to rectify the matter, would have undoubtedly caused Mr M a notable amount of distress, trouble and inconvenience. I consider that £500 is fair compensation to him for that.
- Provide the calculation of the compensation to Mr M in a clear and simple format.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Mr M's Aviva	Part liquid, part illiquid	For half the investment – FTSE UK Private Investors Income Total Return Index (prior to 1	1 September 2019	date of settlement	not applicable

SIPP Portfolio		March 2017, the FTSE WMA Stock Market Income Total Return Index); for the other half – the Bank of England average return from fixed rate bonds			
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actual value

This means the actual amount payable from the investment at the end date. If at the end date the investment (or any part(s) of it) is illiquid the *actual value* of the investment (or its illiquid part(s)) should be assumed to be zero. This is provided Mr M agrees to FACET taking ownership of the illiquid investment (or its illiquid part(s)), if it wishes to. If that is not possible then FACET may request an undertaking from Mr M – to be drawn up at FACET's expense – that he repays to FACET any amount he may receive from the illiquid investment (or its illiquid part(s)) in future.

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, FACET should use the monthly average rate for fixed rate bonds with 12 to 17 months maturity 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 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 FACET totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

- Mr M had a low-level, or cautious, risk profile for the SIPP's portfolio.
- 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. The average rate for fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to capital.
- I consider that Mr M's profile was in between both benchmarks, in the sense that he was prepared to take a small level of risk to attain his objective. The 50/50 combination above would reasonably put him into that position and it broadly reflects the sort of return he could have obtained if the SIPP's portfolio had been suitably managed to match his risk profile.

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 Mr M's case, the complaint event occurred after 1 April 2019 and the complaint was referred to us after 1 April 2022, so the applicable compensation limit would be £375,000.

decision and award

I uphold Mr M's complaint on the grounds stated above. Fair compensation should be calculated as I have also stated above. My decision is that FACET should pay him the amount produced by that calculation, up to the relevant maximum.

recommendation

If the amount produced by the calculation of fair compensation is more than the relevant maximum, I recommend that FACET pays Mr M the balance. This recommendation is not part of my determination or award. FACET does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Mr M's complaint and I order FACET INVESTMENT MANAGEMENT LTD to calculate and pay him compensation and redress as set out above, and to provide him with a calculation of the payment(s) in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 4 March 2024.

Roy Kuku
Ombudsman