DRN-4236341

The complaint

Mr M complains about the suitability of the advice he was given by Futures Assured Limited (FAL) to transfer his existing pension plans into a new plan with another provider. He's also complained about how the adviser was able to approach him knowing the details of his existing plans and why he wasn't advised that the adviser had recently retired – and given the details of his new adviser.

What happened

In 2014 FAL contacted Mr M to discuss his retirement provision. Mr M says he doesn't know how the adviser from FAL obtained his details. At the time Mr M held two pensions with different providers both invested into with-profit (WP) funds. One was an appropriate personal pension which had received national insurance contributions instead of them going towards the state earnings related pension scheme, the other was a personal pension into which Mr M made monthly net contributions of £78.63.

Following a meeting with the adviser a recommendation was made to transfer a total of £83,423.28 to a new personal pension plan with another provider, and to make a regular net monthly contribution of £100. The money was to be invested into an equity based balanced portfolio. The transfer completed in November 2014 although the funds were held in cash and not invested until early 2015.

In June 2022 Mr M discovered that the value of his plan had fallen by around 25%. He then complained to FAL. He said he didn't understand how its adviser had managed to find out that he had two pensions in 2014. He also said that he should have been made aware that the adviser had retired and who his new adviser/point of contact was instead. But his main complaint was that, as he told FAL he was a low risk investor in 2014, he thought he'd now be in a better financial position had he not transferred his pension plans in 2014.

FAL didn't uphold the complaint making the following points in support of its decision:

- The adviser obtained Mr M's details from a lead generation company.
- The adviser was only able to obtain details of Mr M's two pensions after Mr M signed a letter of authority for him.
- Mr M had indicated he didn't require an ongoing face to face service – only ad-hoc contact. This was confirmed through a service agreement. The adviser had confirmed he also contacted Mr M each year but a face to face review was always declined. Since the adviser retired a new adviser would only have been assigned to Mr M if he wanted further "one off" advice.
- Mr M had been confirmed as medium risk investor following completion of an investment risk profiler. His funds were invested in line with this attitude to risk (ATR). In addition Mr M was sent numerous emails about proposed changes to his investment strategy but he chose not to respond. Therefore his portfolio remained "non reviewed".

But Mr M remained unhappy with this outcome, so he brought his complaint to us where one of our investigators looked into the matter. He thought the complaint should be upheld, making the following points in support of his assessment:

- Looking at the regulator's checklist for pension switching from 2009, he didn't think FAL had met the four key issues that were highlighted.
- Mr M wasn't an experienced investor and only had a low capacity for loss – based on his circumstances at the time.
- He accepted the moderate risk profile that FAL determined for Mr M given the term to his retirement.
- But the information Mr M was provided with to compare performances wasn't reasonable. It was based on future potential returns but compared with bonus rates and not fund performance. He didn't think therefore that Mr M was put into an informed position.
- He thought Mr M's needs could probably have been met by other funds offered by his existing pension providers. FAL itself had stated that Mr M wouldn't be better off by transferring based on charges alone – which he agreed seemed to be the case.
- He didn't think that fund performance itself was a compelling reason to transfer the pensions to more expensive plans.

FAL didn't accept the outcome and made the following points in response:

- It calculated that Mr M's pension equated to less than 30 % of his overall retirement income requirements. It didn't agree with the investigator's conclusion that the pension represented a large part of his retirement planning. It also believed that with the additional monthly contributions it had recommended the final pension fund ought to provide the income shortfall Mr M required.
- It thought Mr M had a reasonable capacity for loss given he had 22 years left to retirement. It maintained the balanced risk profile it identified was appropriate.
- It didn't accept the criticism of it comparing bonus rates instead of fund performance, because the main plan Mr M held was invested into a traditional (not unitised) WP fund which only offered bonus rates as a comparison. It accepted this position wasn't the same with the other plan but only provided the information about bonus rates to demonstrate how the fund had grown over the past years.
- It didn't agree Mr M wasn't put into an informed position as it thought it had tried to provide information that was "*clear and concise*".
- It didn't agree with the investigator about a number of points he raised which suggested Mr M wasn't made aware of the *correct* information.
- It didn't agree that the existing WP funds had a balanced or moderate risk profile.
- The investigator's suggestion of combining the pensions and switching to more appropriate funds contradicted his view of the adviser's (unsuitable) recommendation. It thought it was more appropriate to combine the existing pensions and then to transfer them to a plan that offered greater fund choice and greater flexibility as well as the potential for greater returns.
- However, it had carried out the calculation as set out by the investigator and had worked out that Mr M was £3,952.25 better off as a result of the transfer – so it thought the investigator should revise his assessment.

The investigator said:

- He thought, based on its use of a gross income instead of net, that FAL's analysis of Mr M's income and expenditure was flawed.
- He thought it was appropriate to base the recommendation on a moderate ATR. He believed WP funds were within that risk category.

- The critical yield calculation FAL used showed that the new plan would need to outperform the existing plan by 0.4% just to match what was being given up. So unless Mr M had other reasons to pay higher charges and take additional risks he ought to have remained where he was.
- There was no suggestion that Mr M had raised any concerns about the performance of his existing funds. He simply accepted FAL's offer of a review and was entitled to receive advice which was in his best interest. He thought the reasons given for transferring were, in the main generic, and not necessarily justified.
- His view had been that Mr M ought to have remained invested within his existing plans. But he had tried to explain that if the adviser thought that Mr M ought to reconsider the funds he was invested in, then a good starting point would have been to discount the other risk appropriate funds available through the existing providers.
- He asked FAL to provide a breakdown of how it arrived at its figures showing Mr M hadn't suffered a financial loss following the transfer.

FAL provided some documents and figures to support its position. It wanted to know if Mr M was now happy to withdraw his complaint. Mr M said he wasn't and so, as no resolution could be found – particularly because there were some concerns about the monthly contributions Mr M had made to the new plan, the complaint was referred to an ombudsman and has been passed to me to review.

As of 26 July 2022, Mr M's plan was valued at £113,305.16

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.

And having done so I agree largely with the outcome reached by the investigator. I think FAL needs to carry out a calculation to see if Mr M has suffered a financial loss as a result of its advice to transfer his two personal pensions into a new plan in 2014. I'll set out the redress methodology below. But first I'll set out the reasons for reaching my decision.

In reaching my conclusion I've carefully considered what the regulator said about the "*quality of advice on pension switching*" in its thematic review from December 2008. The review had been published before FAL gave its advice so the conclusions that had been drawn and recommendations made were widely available at the time. And the outcomes remain as relevant today as they did at that time. The review set out the regulator's approach to assessing the suitability of a firm's advice to switching existing pensions into new personal pensions and self-invested personal pensions. It said:

"We assessed advice as unsuitable when the outcome was the customer switching into one of the following:
• A pension incurring extra product costs without good reason (this outcome involved assessing cases where, for example, the reason for the switch was for investment flexibility, but this was not likely to be used; the reason was fund performance, but there was no evidence the new scheme was likely to be better; or the reason was flexibility of a drawdown option, but there was no evidence that this option was needed).
• A pension that was more expensive than a stakeholder pension, but a stakeholder pension would have met the customer's needs.
• A more expensive pension in order to consolidate different pension schemes, but where the extra cost was not explained or justified to the customer.
• A new pension and the customer had lost benefits from their ceding pension (for example, guaranteed annuity rates) without these being explained or justified.
• A pension that did not match the customer's attitude to risk and personal circumstances.

• *A pension where there was the need for ongoing advice, but this had not been explained, or offered, or put in place."*

So I need to look at each of these findings to see if there were any of the unsuitable outcomes that tied in with FAL's recommendation. As a guide I've taken into account FAL's justification behind the recommendation to switch, which was confirmed overall as "*a new arrangement with an extensive fund range and access to external funds."*

In the suitability report more detail was given around these reasons such as:

- Larger fund choices.
- The potential for better fund performance.
- The possibility of switching to income drawdown in the future.
- No penalties for transferring.
- The possible loss or decrease of the existing with profit "final bonus" – which accounted for over 40% of one existing pension's growth.

So I've looked these reasons to determine the extent to which they supported the recommendation to transfer.

Larger fund choices

I note that FAL promoted the extensive fund range that the new pension appeared to offer. I can see it recommended a balanced equity based portfolio which – by its very nature, comprised a number of funds which might then be rebalanced over time to maintain the appropriate risk profile of the portfolio. I note that initially Mr M was invested across 12 funds plus a cash fund to cover the fees. But I also note that, using FAL's own research analysis, one of the existing pension plan providers offered 40 internal, 84 external, and 10 multi manager funds at the time. While the other provider said consumers "*can invest in a wide range of unit-linked funds from different fund managers."*

So I don't think the evidence supports the idea that transferring gave Mr M access to a larger number of funds. Given that he was invested across 12 different funds I'm satisfied that the other providers offered a similar variety of choices, and those choices covered the full range of ATR profiles including a number which were in line with Mr M's "moderate" ATR. I don't think the evidence supports the idea that Mr M either had access to, or indeed even needed, a larger number of funds available to him on transferring.

Potential for better fund performance

The best way to give some idea of future fund performance is to use historical investment performance and data. But of course, it's important to be mindful of the warning that "*past performance is no guarantee of future results".*

The comparison of funds that FAL undertook to try to *show better fund performance* wasn't, in my view, appropriate. By its own admission FAL used the bonus rates from a WP fund from one of the other providers to compare against the new portfolio it had recommended. I don't think it was fair to make such a comparison as, not only is it unclear that the risk profile was the same, but the bonus rates returns are declared after the process of *smoothing* WP funds to demonstrate a longer term outlook designed to avoid "peaks and troughs". Whereas the investment linked portfolio would simply have reflected the value of the funds, in terms of annual returns, on any particular day – without taking into account any significant falls or increases. I know FAL has said that it was only able to compare bonus rates against investment performance because that was all the information that was available, but I don't think that put Mr M in the informed position that it ought to have done.

I think FAL needed to provide Mr M with a full explanation of how WP funds worked against investment backed funds and portfolios. This would have allowed Mr M to look at the past performance of both types of funds and given him the necessary understanding to determine what would have been in his best interest going forward. I haven't seen any evidence to suggest that Mr M was previously disappointed or concerned about the performance of his existing funds – so I think FAL needed to be much clearer and concise in making Mr M aware of what he was given up in favour of the new portfolio.

Thereafter the idea of a comparison of alternative funds offered by the existing provider which was supposed to match the risk profile of the new fund was, in FAL's own words "*a fund that best matches your attitude to risk that is available."* This supports the idea that it wasn't possible to compare the past performance between an existing *fund* and a new *portfolio.*

In my view FAL needed to provide Mr M with an illustration of benefits from all the schemes based on the same retirement age and including the same regular contribution it recommended that Mr M paid into his new plan. This needed to be carried out using the regulator's assumed growth rates of the time and this would have given Mr M the best guide of what he could expect, using various rates of return, at retirement. It would then have been for Mr M to use the historical date available to decide which rates of growth he wanted to use to determine what he thought might happen in the future. FAL could have supplied that information as indeed it tried to do during its advice process in 2014, but I'm not persuaded that the information made Mr M sufficiently aware of the real potential for better fund performance with his new plan.

Switching to income drawdown in the future

The option of switching to a drawdown plan would have been a good benefit for Mr M at some point in the future. But at the time of the advice he was 45 years old – some 10 years away from the earliest possible date he could have drawn his pension benefits. And I note that FAL extended the theoretical retirement date of the new contract to age 67 – which would suggest it didn't expect Mr M to draw his benefits for around 22 years. So, while at some point I think this option may have been used as a reason to consider transferring, Mr M didn't need to consider that option for at least 10 years – so it wouldn't be fair to consider it as a justification to transfer in 2014.

No transfer penalties or the possible loss of accrued final bonus

Although it was beneficial for Mr M not to have to pay any penalties to transfer I don't think it constituted a good enough to transfer on its own. I think Mr M would have expected not to have to pay any penalties or market value adjustments as part of the recommendation and I think it's more likely than not that the inclusion of any additional costs such as penalties would have made the advice to transfer unsuitable in any case.

FAL said that by transferring his plans Mr M was in effect "crystallising" the final bonuses that he had earned on his existing pension plans.
It said this meant he was no longer at risk of losing that value. And it's correct to say that the value of those bonuses couldn't be guaranteed until the normal retirement age of the plans when Mr M would draw his benefits. But there's no evidence to suggest the bonuses were "at risk" or in danger of falling significantly at that point. I think it's likely that the same investment factors which might affect the bonus rates in the future would probably have the same effect on Mr M's new investment linked portfolio.

So, looking at the reasons that FAL gave to justify the transfer, I'm not persuaded that they were sufficiently compelling to show it was in Mr M's best interest. But that's not to suggest the transfer was unsuitable – simply not necessary at that point. So I've gone back to the original question of suitability as set out in the regulator's thematic review.

A pension incurring extra product costs without good reason

I've looked carefully at the suitability report that FAL issued to Mr M in 2014. And in respect of the charges involved it noted that there was an initial charge of 5.1% (£4,254.58) for carrying out the transfer as well as a 0.5% "ongoing" charge – but only if a further review was carried out. This was because Mr M chose an ad-hoc service going forward that wouldn't involve automatic regular reviews.

FAL went on to set out a comparison of charges. It noted that age 67 there was a total shortfall of £9,754 between the fund values of the existing pensions when compared to the new pension – using various assumed growth rates. This was just under 12% of the transferred amount and would have require continued improved investment performance to make up for those charges. And when the investment horizon might only potentially have been around 10 years, I think it's difficult to conclude that Mr M would have been financially better off following the transfer.

The regulator's findings suggested that it regarded switches where pension costs were higher going forward as being unsuitable where "*the reason for the switch was for investment flexibility, but this was not likely to be used; the reason was fund performance, but there was no evidence the new scheme was likely to be better; or the reason was flexibility of a drawdown option, but there was no evidence that this option was needed."* I'm not satisfied there's sufficient evidence to support the idea that the new scheme was likely to be better (fund performance) or that a drawdown option was needed – so I think those would be regarded as examples of practices which wouldn't justify the transfer as being in Mr M's best interest and would make it unsuitable.

Mr M's ATR

The risk profiler that was used to define Mr M's ATR confirmed that he had no experience of investing and no understanding of investment markets. His risk profile was agreed as being five out of a total score of eight. The definition of this "moderate" ATR said, "*your earning capacity is such that you can absorb this risk…you are prepared to invest for the longer term and do not necessarily require access to your money in the medium term."* The risk was determined as Mr M accepting a moderate loss of his money.

Looking at Mr M's situation I don't regard this as being an inaccurate assessment of his ATR – especially considering his age and the likely investment horizon. But as Mr M was already invested in what I would regard as "moderate" risk rated investments I don't this gave much potential for the new investment portfolio to improve on fund performance – given the risk profile of both existing and recommended funds.

I think FAL probably defined Mr M's ATR reasonably correctly given his situation, but at the same time I think there were a number of existing funds that the previous providers offered which may have been equally appropriate, if FAL thought that Mr M's investment strategy needed refining in line with the ATR it established.

I think that Mr M's existing investments were appropriate and broadly in line with his ATR – so I'm not suggesting that FAL ought to have switched him to new funds within his existing plans. But if FAL wanted to review Mr M's retirement planning I would have expected to see a more robust comparison of the alternative funds available within his existing plan's range against the new recommended portfolio as a starting point of any discussion.

The lost pension benefits and the need for ongoing advice

The other two reasons the regulator gave for advice being unsuitable were where a recommendation was made that led to the loss of guarantees or other benefits upon transferring. And where ongoing advice was an important part of a new pension plan and its strategy, but this advice wasn't included or explained. But there's no evidence to support the idea of any guarantees being lost following FAL's recommendation here or that it didn't offer ongoing advice. Indeed it did offer a regular ongoing advice service which Mr M declined to accept.

Summary and conclusion

So I've carefully considered the reasons that FAL gave to justify its recommendation for Mr M to transfer his existing pensions. I've then gone on to look at the outcomes the regulator considered when it set out its guidance around advice for switching pensions in its thematic review of 2008.

And I'm not persuaded that FAL's reasons for the recommendation are compelling enough. I think the reasons are largely generic and I don't think there's sufficient evidence to support the idea the transfer was suitable for Mr M's own individual needs. I think, if FAL thought any switch of funds was warranted, Mr M's needs could have broadly been met by the alternatives offered by his existing pension providers – although I don't think he needed to switch funds at all based on the reasons I've set out above. Mr M didn't ask for FAL's advice because he was disappointed with his pension's performance, or because he wanted to get away from his existing providers, and it was simply because FAL, as the professional adviser here, put forward its recommendation that he agreed to go ahead.

But I don't think Mr M was provided with sufficient information to demonstrate that the transfer was in his interests or that he was put into a fully informed position. Had he been provided with all the information he needed, and in a form that I think it should have been presented in, it's more likely than not he would have remained where he was.

In addition I think the recommendation was also unsuitable because it contravened one of the regulator's examples of "unsuitable practice", namely the recommendation for Mr M to switch into a higher charging plan without sufficient justification for why that would be appropriate. FAL's own suitability report stated that "*by switching to the new recommended pension provider you will not benefit from an overall reduction in charges. Therefore based on charges only, you would be better off retaining your pension with your existing provider."* In my view the main reason for Mr M to consider switching would have been if it was in his best interest financially. I don't think the other reasons given would have been as important to him going forward.

I know FAL says that it demonstrated Mr M would potentially benefit from greater fund performance within the new plan – but I'm not persuaded that information was clear to Mr M and I don't think the basis on which the comparison was carried out or the figures that were used were entirely appropriate in the circumstances.

I know Mr M raised other concerns in his complaint about how the original adviser obtained his existing pension details and why he wasn't made aware of his new adviser when the other adviser retired. But I'm satisfied that FAL's explanation of how its adviser used his own lead generation source and that because Mr M didn't want an ongoing advice service he wouldn't have had a new adviser assigned, is fair and reasonable and doesn't warrant any further investigation or comment from me.

FAL's offer and calculation

Although it didn't agree with the investigators assessment and made a number of points in response, FAL did also undertake a loss assessment to try to determine whether Mr M had actually suffered a financial loss following the transfer. It wanted Mr M to withdraw his complaint as a result of showing that he had in fact made a financial gain.

To support its calculation FAL provided copies of the bonus rates that the previous providers had declared in the ensuing years. It then used these to bring the notional values of those plans up to date. It then compared these figures with the up to date value of the new pension plan.

Mr M wasn't persuaded to accept the calculation or withdraw his complaint, so I've considered FAL's calculation and supporting evidence carefully. But I think FAL needs to carry out another calculation based on the methodology I've set out below. I say that for two reasons.

Firstly I'm not persuaded that the method FAL has used would provide the most accurate notional value of the previous plans. I would normally expect to see that calculation broken down and set out in a different way and therefore I'm unable to confirm its accuracy. In my experience it would be better to approach the previous providers to obtain the notional figures as it would be much easier for them to access the correct information. Mr M might need to complete a letter of authority so that FAL can approach the providers or alternatively we can help by approaching them for the required figures.

But I'm also not persuaded that the notional calculation that FAL carried out included provision for the regular contributions that were made to the new plan. I know the investigator included a paragraph within his assessment that accounted for *capital additions*, but I want to make it clear that the notional value that should be requested from the previous provider of the plan that was receiving regular monthly contributions, should include the £100 net payments that Mr M made to the new plan. I would expect to see evidence of those contributions included within the calculation.

So FAL should carry out a loss assessment along the lines of the methodology I've set out below.

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 remained with his previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr M's circumstances and objectives when he invested.

What must FAL do?

To compensate Mr M fairly, FAL must:

- Compare the performance of Mr M's pension plan with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- FAL should also add any interest set out below to the compensation payable.
- FAL 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 FAL 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.
- For example, if Mr M is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr M would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Income tax may be payable on any interest paid. If FAL deducts income tax from the interest it should tell Mr M how much has been taken off. FAL 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
New SIPP	Still exists and liquid	Notional value of personal pensions from the previous providers. The £100 net monthly	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

		contribution that Mr M has paid into the SIPP also needs to be included in the notional figure of the previous pension that accepted personal contributions			receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Mr M's investment had it remained with the previous provider until the end date. FAL should request that the previous provider calculate this value.

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

Any withdrawal from the New SIPP should be deducted from the notional 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 FAL totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, FAL will need to determine a fair value for Mr M's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

- I've decided on this method of compensation because:
- Mr M wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- 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 would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr M's circumstances and risk attitude.

My final decision

For the reasons that I've given I uphold Mr M's complaint. My decision is that Futures Assured Ltd should pay the amount calculated as set out above.

Futures Assured Ltd 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 10 October 2023.

Keith Lawrence
Ombudsman