

The complaint

Mrs P complains that St. James's Place Wealth Management Plc (SJP) made changes to the funds invested within her Personal Pension Plan (PPP) which were unsuitable as they did not reflect her attitude to risk (ATR). And as a result, she has suffered a financial loss.

What happened

In 2015 Mrs P met with an adviser who was representing SJP as she wished to receive, amongst other things, retirement planning advice. Following this meeting, on 16 October 2015, when she was 52 years old, SJP issued its formal recommendation that Mrs P transfer her four existing pension plans, amounting to £343,853.82, into the SJP Retirement Plan. It said this advice met Mrs P's objectives in that it:

- Allowed her to continue to build a fund in retirement in a tax efficient manner;
- Allowed her to benefit from face-to-face advice together with support and servicing from SJP;
- Held her pensions with one provider, helping her to keep track and to monitor and adjust where necessary; and
- Mrs P would benefit from the SJP approach to investment management, and she would no longer have to worry if her fund manager selection was appropriate.

Mrs P accepted this advice, and the transfers were completed.

There were fund switches made within her SJP Retirement Account on the following dates:

- 19 April 2016
- 1 October 2016
- 6 June 2017
- 4 December 2019
- 27 April 2020
- 10 November 2020

Later in November 2020 Mrs P changed adviser within SJP.

As a result of ongoing discussions about the performance of her pension fund, and where it had been invested since 2016, Mrs P complained to SJP in April 2022 that, in summary, the switches recommended and implemented by her previous SJP adviser were unsuitable as the funds selected did not reflect her ATR. And as such her fund was now worth less than it would have been had it been invested appropriately. In restitution, she wanted SJP to make good the financial loss and refund the cost of advice and services.

SJP sent Mrs P 'holding' letters and said that it was waiting for information from its actuarial department. But as it hadn't yet sent its final complaint response, Mrs P referred the

complaint to our Service on 25 August 2022.

On 27 October 2022 SJP sent Mrs P its final response to her complaint. In this it said it had undertaken a calculation to determine the value her Retirement Account would have achieved if it had been invested in the Managed Funds portfolio from the outset, rather than the recommended switches between 19 April 2016 and 10 November 2020 which had occurred under her previous SJP adviser. It calculated her fund would be worth £123,602.71 more had the switches not been made.

It said it would look to redress this loss in the form of a cash payment, as there were restrictions in place preventing it being made as a payment into her pension. And as the payment was being made in cash, it would need to make a deduction for tax. It calculated that it needed to make a net cash payment of £105,062.31.

Mrs P rejected this proposal. In summary she said:

- The redress should be paid into her pension as it would then be deemed as outside her estate for inheritance tax (IHT) and savings. If paid in cash it would not restore her to the position she should be in.
- If the payment has to be made in cash, it should be enhanced by 30% (the rate applicable to IHT) and not reduced.
- She had no history and no future need to withdraw cash from her pension so there would be no future tax implication, so a deduction for income tax was unfair.
- Given the problems caused by SJP she felt compelled to switch her pension to a new provider and adviser, and this would incur additional set-up and advice charges. So SJP ought to refund her initial advice and set-up fees.
- The poor ongoing advice provided by SJP had a profound impact on her, and so the ongoing advice charges ought to be refunded.

One of our Investigators considered everything that had happened, and thought the offer made by SJP to Mrs P was fair. She said that SJP were unable to pay the redress into the pension fund as this would probably compromise the tax treatment of the pension. And the notional deduction to allow for income tax that would otherwise be paid in retirement was fair and followed the methodology our Service would require.

Our Investigator also said there was nothing to suggest Mrs P would be personally adversely impacted by IHT as a result of the cash payment, nor any possible benefits she could receive or future support with care. Only her estate would possibly be affected, and there was no way of knowing if this would happen at all.

Our Investigator thought that as SJP were making a payment to put her in the position she ought to be in had the errors not been made, it wasn't right to tell them to refund the initial advice and set-up fees. She thought this would mean she would benefit from both the redress and not having to pay the fees, and this wasn't fair. She noted that in addition SJP had offered Mrs P £300 for the distress she'd been caused, and our Investigator felt this was fair compensation for what had happened.

Mrs P didn't agree with the Investigator's view. She provided a lot of information in response, but in summary she thought:

- The tax deduction reduces the level of funds available for investment, and also

represented a crystallisation of a tax liability that does not arise due to the way she funds her income in retirement.

- Her pension was held in trust, and as such fell outside of IHT and care costs. The value of the trust was significantly reduced as a result of the errors, which were a breach of contract.
- The set-up costs she paid were only viable if the business/client relationship remained long-term. The trust she had in SJP had gone as a result of the breach of contract, and so she felt compelled to leave. The set-up cost should therefore be refunded.
- The poor performance of the pension fund meant she had to return to work, when she had retired to spend time with her husband who was suffering from a progressive illness.
- The pension fund performance had caused considerable stress, and the complaint process, taking over a year, had been extremely stressful and distracted her time and focus away from her husband at a time he needed her support.

SJP responded and said that having reviewed the timeline of events, it considered that the first fund switch, which was made on 19 April 2016, had been made more than six years before Mrs P had complained. So whilst it agreed that all the subsequent switches could be considered, it thought our Service was unable to consider this switch as the complaint had been made too late. But SJP said it was willing to honour its previous settlement offer should Mrs P accept it at this point.

As Mrs P was unwilling to accept this, our Investigator thought about the complaint time limits and initially agreed with SJP. She thought Mrs P had brought the complaint on 19 April 2022, and as the switch was made on 19 April 2016, this meant Mrs P complained six years and one day later. And as there was evidence that Mrs P was aware of problems with the 2016 switch more than three years before she complained, the rules meant our Service was unable to consider this element of her complaint.

This was explained to Mrs P, and she provided evidence in the form of emails which showed she actually emailed her complaint to SJP on 18 April 2022. SJP argued that this was sent at 5.29pm, and as this was after its normal working hours it didn't receive the complaint until 19 April 2022, so this is the date that should be used.

But having reconsidered everything our Investigator didn't agree with SJP. She thought Mrs P had complained within six years of all the switches, and as such they were all within the scope of the investigation.

So as no agreement could be reached, both about our Service's jurisdiction, and the merits of the complaint, the matter has come to me for a final decision.

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.

Jurisdiction.

I have carefully considered all the available evidence and arguments in deciding if a complaint about the suitability of all of the fund switches made between April 2016 and

November 2020 can be investigated by this Service. SJP has stated that it thinks the switch that occurred on 19 April 2016 happened more than six years before Mrs P complained, so cannot be considered.

The rules under which the Financial Ombudsman Service operates are set out in the DISP section of the Financial Conduct Authority Handbook. DISP 2.8R deals with whether a complaint has been made in time.

DISP 2.8.2 R states, as far as is relevant here:

The Ombudsman Service cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) Six years after the event complained of; ...

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period...:

(5) the respondent has consented to the Ombudsman considering the complaint...

Whilst SJP hasn't explicitly said it doesn't consent to our Service considering the 19 April 2016 switch, it hasn't said it accepts the Investigator's view that it is an element of the complaint that we can consider. So for completeness I will consider our jurisdiction now.

I can see the switch in question was completed on 19 April 2016. As SJP have no evidence of when the recommendation was made to complete this switch, I am relying on Mrs P's recollection that the recommendation was made during a telephone call. As switches are generally actioned very quickly after the recommendation is accepted, I am satisfied, on the balance of probabilities, that the recommendation was most likely given on the same day - 19 April 2016.

So to satisfy the rules in DISP 2.8.2R Mrs P would need to have complained within six years of this event – so by 18 April 2022 at the latest. And I've seen evidence in the form of emails that she sent her complaint to SJP on 18 April 2022.

SJP contend that as this email was sent at 5.29pm it wasn't received until 19 April 2022, and as such it was made too late. But I don't agree. The DISP rules do not require a complaint to have been *received* within six years, they only say a complaint has to be *referred* within this time. And it makes no mention of this having to be done within specific times of the day. So I'm satisfied that Mrs P made her complaint within six years of 19 April 2016, the date of the first switch, and as such it is within our jurisdiction to consider.

The merits of the complaint.

Mrs P has made a number of detailed points and provided a lot of evidence, and I have looked at it all. We're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to Mrs P, but rather it reflects the informal nature of our service, its remit and my role in it.

SJP doesn't dispute the fund switches made between 19 April 2016 and 10 November 2020 were inappropriate, as it agrees it invested Mrs P's pension in funds which did not reflect her ATR or financial objectives. It is agreed that her ATR was described as *medium* and the switches concerned were funds which were more cautious than they ought to have been.

In agreeing that it made errors in this regard, SJP has made a comparison of the value of Mrs P's pension fund after it was switched into a more appropriate fund, against what it would have been had it been invested throughout in its Managed Funds portfolio, which matched her *medium* ATR. This calculation showed that Mrs P's pension would have been worth £123,602.71 more had the inappropriate switches not occurred, so it agreed to compensate her.

SJP said it was unable to make the payment into Mrs P's pension plan as this may conflict with the tax restrictions in place. So it said it would pay Mrs P a cash lump sum instead. However it went on to explain that it would make a notional deduction to represent the income tax that the pension would provide in the future. It said:

"...I have considered that upon retirement you are able to receive 25% of your fund tax free, with the remaining 75% taxed at your notional rate. As such, my offer in respect of the difference in value on your [retirement account] is as follows:

£30,900.68 25% tax free amount

This leaves a remainder of £92,702.03 which would be subject to tax. I have seen no evidence to suggest you will be a higher rate taxpayer in retirement and therefore I believe you would be subject to 20% tax on this amount. This represents a reduction in value of £18,540.40 meaning the amount you would receive in this respect is £74,161.63 (please note I have rounded in your favour given the breakdown of the funds does not produce whole numbers).

Therefore, the total additional amount being offered is £105,062.31."

I can see SJP is unable to make the payment direct into Mrs P's pension, as it is not the product provider, and the amount due would likely conflict with the maximum that can be paid into her pension annually (her Annual Allowance). So my aim is to see if I am satisfied that the offer SJP has made would put Mrs P as closely as possible into the position she would probably now be in if SJP had invested her pension funds appropriately.

The approach taken by SJP is in line with the approach our Service takes in these circumstances. Had SJP not made its offer already I would have used the following wording to instruct it how to pay the redress due:

- If a loss is identified, pay this compensation into [Mrs P's] pension plan. If a payment into the pension plan is not possible, then it should pay the amount direct to [Mrs P]. However, had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation 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 [Mrs P] won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using [Mrs P's] expected marginal rate of tax at [her] selected retirement age. It's reasonable to assume that [Mrs P] is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if [Mrs P] 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%.

Following our approach above, I can see that the figure of £105,062.31 is correct and in

line with what our Service would expect SJP to pay in cash.

Mrs P has argued that the notional tax reduction is unfair as she is not, and doesn't think she will ever be, in a position where she will need to withdraw cash as income from this pension account, so it wouldn't ever be taxed. She has also argued that this cash payment will have a future impact on any IHT which may be due, and also that it would be assessable as savings on any future benefits or care cost applications. But whilst I understand the points she has made, I don't agree that they render the offer made by SJP unfair. I'll explain.

Personal Pension plans provide the benefit of being able to nominate a beneficiary to receive any remaining funds held within it upon the plan holder's death. And Mrs P has stated that she has no need nor intention to withdraw any funds from this pension, so it wouldn't be taxed. But the remaining benefits held within a personal pension are only tax free to the beneficiary if the plan holder dies before they are 75. And although there is no way of knowing for sure, it is more likely than not that any withdrawals of funds held within the pension by the beneficiary, would be subject to tax at that person's marginal rate. So it follows that were SJP able to pay the amount into the pension, it is likely it would be subject to a tax reduction in the future.

And I can't see that any IHT loss, or any potential impact on carers allowance or other benefits has, or is likely to happen. Mrs P has, up to this point, been having annual reviews from SJP, and these reviews cover all of her investments. And I can't see that it is likely that Mrs P won't wish to carry on with these reviews, albeit possibly with a new adviser from a different business. But this adviser will be able to advise on any possible IHT implications and take steps to mitigate these, along with advice on tax-efficient options for the cash payment.

So for all of the reasons above, I'm satisfied that the cash offer of £105,062.31 made by SJP to Mrs P is fair and reasonable compensation for the loss in value of her pension fund.

Mrs P has also said SJP should refund the set-up fee and charges as she will have to pay these again when she moves to a new adviser, but I don't agree. Mrs P paid the set-up fee and charges to put in place a change to her pension arrangement. And the set up was suitable and met her objectives. But what happened subsequently wasn't suitable, and SJP have made a fair offer to redress this, so no loss has occurred. So a refund of the initial fees and charges would be an additional benefit Mrs P wouldn't have been otherwise entitled to, so it would not be fair. And I've seen nothing to suggest Mrs P isn't happy with the service she is being provided by her current adviser, other than they are representatives of SJP. So should Mrs P choose to move to a new business then that would be a decision for her, and not one I could fairly require SJP to pay for.

I've also considered SJP's offer of £300 compensation for the distress and inconvenience this matter has caused her. I can see that Mrs P has been going through very difficult times personally, and I'm very sorry to hear this. And I don't doubt SJP's errors caused her unnecessary worry regarding the value of her pension at this already difficult time. But I'm mindful that this worry was over a relatively short period of time, bearing in mind that in October 2022 SJP took responsibility for its errors and offered to compensate her, albeit Mrs P maintains its offer was insufficient. Taking everything into account, I'm satisfied £300 is fair compensation for the unnecessary distress SJP caused Mrs P.

Putting things right

I'm satisfied that Mrs P's pension fund has suffered a loss of £123,602.71. SJP are unable to make this payment direct into her pension, so it should make a cash payment to her instead.

As I've said above, as it is a cash payment, this amount should be notionally reduced to take into account the tax liability it would likely incur in the future. And I agree with the calculations SJP have carried out, so SJP should make a cash payment to Mrs P of £105,062.31.

It should also pay Mrs P £300 for the distress and inconvenience this has caused her.

My final decision

I require St. James's Place Wealth Management Plc to pay Mrs P the following:

- £105,062.31 in compensation for the loss in value of her pension plan.
- £300 for the distress and inconvenience it has caused her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 1 September 2023.

Chris Riggs
Ombudsman