DRN-4270243

The complaint

Ms L complains about advice provided by Attivo Financial Services Limited (Attivo) to transfer her self-invested personal pension (SIPP) to another provider.

Ms L's complaint has been brought on her behalf by a professional representative.

What happened

Ms L met with Attivo in 2015 for pension advice. She already held a SIPP with another provider. Approximately £90,000 of this SIPP was held in a cash fund following a property sale within the SIPP. Ms L wished to leave the remaining property investments within the existing SIPP and was looking for advice for on getting potentially better returns on the funds within the cash fund.

The existing SIPP had an SIPP wrapper charge of 0.75%, an ongoing advice charge of 0.5%, an annual management charge of 0.35% and an administration charge of 0.25%. These charges totalled 1.85% per year.

Attivo completed a fact find and at the time of the advice, Ms L was recorded as:

- 59 years old, in good health and single with no dependents.
- employed and a director of her own company earning £50,000 and paid basic rate tax
- having assets of £245,000 and liabilities of £65,000.
- having an intended retirement age of 67

Ms L's objectives were listed as:

- reviewing her current retirement planning, to ensure funds are being accumulated in the best way for eventual phased retirement
- providing funds for improving lifestyle in retirement
- achieving a return better than cash
- diversifying her retirement investments to spread the risk of overinvestment in any one market or economy
- receiving ongoing investment advice to ensure her portfolio continues to be managed in line with her risk profile and objectives

Attivo also completed a review of Ms L's attitude to risk (ATR). In summary, this confirmed that Ms L:

- saw her attitude to investment risk as cautious
- would not like to expose her investment to a great chance of loss
- wanted to spread the risk of her investment so not to be overexposed to one part of the market or economy
- was comfortable taking risks in order to aim for better returns
- wished to invest for a further 5 -10 years
- did not intend to take an income from these funds in the next 20 years and would intend only to access these funds in the next 10 years in exceptional circumstances
- had limited investment knowledge
- had never invested in the stock market
- did not feel confident with investment matters

Attivo assessed Ms L as having a "low medium" ATR or two out of five. And Ms L signed to agree to this.

Following this, Attivo recommended Ms L transfer her investment in her existing SIPP's cash fund to a new SIPP, and that she should use Attivo Investment Management Limited's discretionary Managed Portfolio Investment Service, investing in the Tier 2 Conservative Portfolio.

Attivo charged 3% of the amount transferred in. The new SIPP had an investment management charge of 0.5% per year, plus a charge on the portfolio of 1.07%per year, and an Attivo advisor fee of 0.65% per year. A total annual charge of 2.22% per year.

Attivo noted that the SIPP fees were higher for this than her existing arrangement. But it explained the new SIPP offered a wider range of fund choice, and it would provide ongoing monitoring, advice and management of her SIPP.

Ms L proceeded with the recommendation and the new SIPP was set up with Ms L's funds being transferred in soon after.

In 2022, Ms L complained to Attivo about the advice. Ms L's complaint was brought on her behalf by a professional representative. The representative said that the advice was unsuitable and this had led to Ms L suffering a financial loss. It didn't explain why this was the case.

Attivo responded to the complaint saying Ms L hadn't suffered a financial loss and that the advice it provided was suitable. Ms L's representative didn't accept this and referred the complaint to our Service.

One of our Investigators looked into the complaint. In summary, she thought the advice was suitable and didn't think the complaint should be upheld. Ms L's representatives didn't accept this and asked for the complaint to be reviewed by an Ombudsman. So it was passed to me to consider.

I issued a provisional decision on 13 July 2023 in which I explained I disagreed with our Investigator. I explained why I intended to uphold the complaint and how I thought things should be put right. In that provisional decision, I said:

Conduct of Business Sourcebook ('COBS') in the regulator's handbook, set out the rules regulated businesses have to follow. At the relevant time, COBS 9.2.1R required Attivo to take reasonable steps to ensure a personal recommendation was suitable for Ms L. It had to obtain information as to Ms L's knowledge and experience (relevant to the specific type of designated investment), her financial situation and investment objectives.

COBS 9.2.2R required Attivo to gather sufficient information from Ms L to ensure the recommendation met her objectives, that she could bear the risks involved and had the necessary experience and knowledge to understand the risks involved in the transaction.

And COBS 2.1.1R required Attivo to act, "honestly, fairly and professionally in accordance with the best interests of its client." In 2009 the then regulator, the Financial Services Authority (FSA), published a report and checklist for pension switching that is applicable in this case. That checklist identified four main areas where consumers had lost out. In my view, the relevant area applicable to Ms L's case is:

[The consumer] had been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension (because of exit penalties and/or initial costs and ongoing costs) without good reason.

At the time of the advice, Ms L was 59 years old and single with no dependents. The fact find recorded that she intended to retire at age 67. Ms L already held a SIPP which had some investments in property. This was to remain in place and Ms L was only looking to invest the money held in the cash fund with the previous SIPP provider. However, Attivo noted Ms L wanted to switch pensions and her priorities for switching were recorded as increasing her funds available in retirement, to diversify her SIPP investments, to have ongoing investment advice and to provide a return greater than that available with cash investments. Ms L was recorded as planning a "phased retirement" meaning she wouldn't access the entire pension in one go upon retirement. She was employed and had no need to take any funds sooner.

Attivo asked Ms L a number of questions and presented a number of scenarios when exploring her ATR. I won't repeat them all here. But, based on the answers Ms L provided, and her situation at the time of the SIPP transfer, I think that a "low medium" ATR was likely in line with the level of risk Ms L was willing to accept with her pension. She already held a SIPP, with investments in a property syndicate, so it seems she was comfortable investing with some level of risk. Plus she wanted to increase the potential returns available above those she might receive by leaving the remaining pension funds in cash, which understandably she'd need to take some risk to achieve.

Furthermore, the fact find indicates that Ms L wasn't dependent on this pension for her retirement income and wanted to use it to boost her retirement provisions. Given that she had at least eight years until her planned retirement, I think she had time to take some level of risk with the SIPP.

Ms L's representatives haven't disputed that Ms L had a "low medium" ATR. And based on the evidence I've seen, I think it was a fair assessment of her ATR. And I don't think the advice to invest her cash funds on this basis was unsuitable. However, I need to consider whether Ms L needed to switch her funds to a new SIPP to achieve her objectives and whether the advice was suitable for Ms L overall.

The new SIPP attracted higher annual charges than Ms L's existing SIPP. The costs are set out above and totalled 2.22%. However, this didn't include dealing charges on UK assets, which the suitability report said cost £2 per trade. So, in reality the costs were likely higher than the 2.22% disclosed because of the discretionary fund management (DFM) arrangement, where fees were charged on certain types of trades. And in addition to higher annual charges, Attivo was also charging a 3% initial fee on the amount transferred. So, there was significant cost to the switch and so I've considered whether the benefits of the transfer outweighed these extra charges.

One of the reasons Attivo gave for the transfer to the new SIPP was that Ms L's existing SIPP would only allow up to ten separate funds to be held at any one time. I can see that the portfolio Attivo recommended invested in more than ten funds. But all Ms L wanted to achieve was some growth rather than leaving her funds in cash. So, I can't see that Ms L had a need for this. Her ATR was rated at low to medium and she was an inexperienced investor. So, I don't think she had a need to invest in a higher range of funds to achieve more growth. This could've still been achieved by investing in less funds and funds which had diversification within them.

I also think that the extra charges meant that Ms L would achieve less growth overall. Given her ATR I think she could've expected somewhere between the regulators lower and middle projected growth rates (2 – 5%). But with charges of over 2.22%, in reality her funds might not achieve much growth at all once charges were taken into account. So, given this I think it was important to find a solution that involved the same or lower costs than her existing arrangement. So, for this reason alone I think the advice was unsuitable.

The investment strategy Attivo recommended utilised a DFM, who would rebalance the portfolio daily. And this came at a cost.

In 2012, the FCA issued guidance which covered, amongst other things, considerations for firms recommending the use of a DFM. This guidance said there were three key factors to take into account when recommending the use of a DFM. These were:

- *The likely cost*
- *The amount of funds being invested and managed by the DFM*
- *The investor's knowledge and experience*

The cost of the DFM was set out as a percentage of the fund value. So I'm satisfied that Ms L would've understood the cost. However, I'm not persuaded that Ms L incurring the additional cost was in her best interest.

The recommendation letter set out that the existing SIPP would need manual rebalancing over time which could be costly and time consuming. As such, it recommended Ms L use Attivo's DFM service which would provide daily rebalancing. However, Ms L was paying for ongoing advice and having regular reviews. So the funds could've been rebalanced at the regular review and as such, it seems to me the extra cost of the DFM wasn't worth the extra cost. I've seen no reasons as to why Ms L needed daily rebalancing on her portfolio.

The value of the funds was fairly modest, and taking this into consideration alongside the fact that Ms L wanted to take a low to medium risk with it, I don't think daily rebalancing was necessary for Ms L to achieve her stated objectives.

Whilst Ms L did have other existing investments and an existing SIPP, I'm not persuaded she'd be considered a particularly experienced investor. Had Attivo clearly set out what the DFM would do and the cost for this, versus a standard managed fund within her existing SIPP, I think Ms L would've opted for the standard managed fund and lower costs.

Ultimately, Ms L's objectives were to obtain a better return than available through a cash based investment fund. Whilst returns couldn't be guaranteed, Ms L could've moved into another fund (or funds) within her existing SIPP which invested in areas other than cash which would've given her the chance for returns higher than the cash-based fund would've provided, without the additional costs involved in switching to the new SIPP and paying for discretionary portfolio management. So I don't think the advice to switch to the new SIPP was suitable. I think Ms L should've been advised to retain her existing SIPP and switch to a fund or funds more in line with her ATR.

I recognise that in 2020 a new recommendation was made for Ms L to invest in a standard managed fund within a different SIPP provider (Fidelity). To me, the fact that her SIPP was moved to another provider with significantly lower costs in 2020 re-enforces that the initial advice set out above wasn't suitable. Based on what I've seen, this later recommendation was suitable. This recommendation had lower costs than the initial recommendation and was a regular diversified fund with no DFM and therefore no additional DFM charges, which Ms L didn't need. It seems this investment was in line with Ms L's ATR and her objectives, so I think Ms L's pension investments started back on track at this point. This will impact the recommendation of redress that I will set out and explain below, but in short, I'll be capping the redress calculation as of the date the SIPP was transferred again in 2020.

I invited both parties to respond to this provisional decision by 27 July 2023. And both parties did.

Ms L generally agreed with the decision. But she said she didn't agree with the statement within the background of my decision which said she *"did not intend to take an income from these funds in the next 20 years".* Ms L said she planned to retire in her mid 60s, and by 67, not at 67. She said she was absolutely dependent on this pension, other than her state pension.

Attivo responded and disagree with the provisional decision. It said, in summary:

- Ms L wanted a better return on the pension funds that were held in cash, and it was this that led to a DFM being recommended. This wasn't available in her existing SIPP.
- There was nothing to indicate that Ms L didn't want the use of a DFM.
- Ms L was made aware of the fees for the DFM.
- Ms L did have some level of knowledge with regards to SIPPs.
- Ms L had never indicated she was unhappy with the fees, service or portfolio she had in place.

The complaint has now been passed back to me to make 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.

I've also carefully considered the responses to my provisional decision from Ms L and Attivo. And, having done so, I find myself coming to the same conclusions that I did within my provisional decision. I'm satisfied this is a complaint which should be upheld, for the same reasons I've given in my provisional decision, which should be considered as part of my final decision. However, I'll briefly address some of the points made by Ms L and Attivo.

Ms L said she didn't agree with the statement that she *"did not intend to take an income from these funds in the next 20 years".* This was simply part of my setting out of the background to what happened and was part of a broader summary of the objectives Attivo recorded at the time. I wasn't making any finding here. And this doesn't affect the outcome of my decision.

Attivo, in response to the provisional decision, has explained that Ms L wanted better returns than available within the cash funds she was invested in, and this is why the use of a DFM was recommended.

As I set out within the provisional decision, I accept that one of Ms L's objectives was to improve the returns on her pension investments. However, I don't agree it follows that, simply because Ms L wanted better potential returns, a DFM was required.

I set out within the provisional decision (copied above) why I didn't think a DFM was suitable for Ms L. Ms L's pension was of a relatively modest value. Whilst she did have an existing SIPP, she was still a relatively inexperienced investor with a low to medium ATR. And I don't think she required this level of diversification or daily rebalancing at the additional cost this came with. I've seen nothing within Attivo's response to change my opinion on this.

Attivo has explained that Ms L was made aware of the DFM fees and there was nothing to suggest, either at the time of the sale or at the subsequent annual reviews, she didn't want to use a DFM or was unhappy with the use of the DFM. I accept that Ms L was made aware of the fees. And she may not have questioned the use of the DFM. However, Ms L had approached Attivo for its professional advice on how to invest her funds. Attivo explained to her that moving her SIPP and using a DFM was right for her. So, I wouldn't have expected her to have questioned the advice at the time. She was, after all, paying for the professional expertise of Attivo and I think she was entitled to rely upon it. However, I don't think the advice to transfer her SIPP or use a DFM was suitable for her.

Ultimately, I'm satisfied Ms L could've achieved her objectives of a better potential return than cash-based funds by remaining with her existing SIPP and switching funds. I accept that she may not have been able to diversify as much as she could within the new SIPP, or benefit from the use of a DFM. However, for the reasons set out above and within my provisional decision, I don't think Ms L required this level of diversification within her SIPP. Nor did she need the use of a DFM bearing in mind the additional cost for this service.

For completeness, I don't think that Attivo would've charge the initial advice fee had Ms L simply completed an internal fund switch within her existing SIPP. And Attivo hasn't challenge this in response to my provisional decision. So, I think this fee should also be refunded.

So, I'm upholding this complaint for the reasons above and as outlined in my provisional decision. As such, I think Attivo should compensate Ms L for any potential loss she's suffered as a result of the unsuitable advice.

Putting things right

Fair compensation

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

As I explained within my provisional decision, I think Ms L would have most likely remained in her existing SIPP but changed the funds she was invested in. I remain of that opinion. It's not possible to say *precisely* what she would have done, but I'm satisfied that what I've set out below is fair and reasonable given Ms L's circumstances and objectives when she invested.

What must Attivo do?

To compensate Ms L fairly, Attivo must:

- Compare the performance of Ms L'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.

- If the calculation shows a loss, then any additional amount that would've been achieved using this methodology would've been available to invest in the Fidelity SIPP in 2020. So Attivo should find out what growth Ms L achieved within her Fidelity SIPP from inception to the date redress is paid. And any growth this additional amount would've achieved within the Fidelity SIPP should be added to the total redress amount.

- If there is a loss, Attivo should pay into Ms L's pension plan to increase its value by the 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 Attivo is unable to pay the compensation into Ms L's pension plan, it should pay that amount direct to her. But 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 Ms L won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms L's actual or expected marginal rate of tax at her selected retirement age.

- It's reasonable to assume that Ms L is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Ms L 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%.

- Repay the adviser's initial transfer fee together with simple interest at 8% a year, from the date the fees were paid to the date of settlement. If the above comparison shows that no compensation is payable, the difference between the *actual value* and the *fair value* can be offset against the fees with interest.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")
MYSIPP	Transferred to Fidelity SIPP	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of transfer of funds to Fidelity SIPP

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, Attivo 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 withdrawal from the portfolio 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 Attivo 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 chosen this method of compensation because:

- Ms L wanted Capital growth with a small risk to her 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 her 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 Ms L's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Ms L into that position. It does not mean that Ms L would have invested 50% of her 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 Ms L could have obtained from investments suited to her objective and risk attitude.

My final decision

I uphold this complaint and direct Attivo Financial Service Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms L to accept or reject my decision before 29 August 2023.

Rob Deadman
Ombudsman