DRN-4270253

The complaint

Mr R complains that Virgin Money Unit Trust Managers Ltd (VMUTM) switched his pension investment without his consent. As a result, he says he's suffered financial loss.

What happened

Mr R had a pension plan with VMUTM. At the time of opening the plan in 2010, Mr R was in his mid-thirties. He completed an application form which asked him to pick the investment strategy he wanted to follow, either self-selection or the 'automatic fund selector'. I'll refer to this as 'AFS'. VMUTM say Mr R opted for AFS from the outset and this did not change.

VMUTM explained in the application form Mr R signed that if AFS was selected, Mr R's money would be invested in its Pension Growth Fund, until 10 years before retirement. From then it would gradually switch his savings into the Pension Income Protection Fund to protect it from stock market fluctuations and interest rate falls as Mr R neared retirement. VMUTM said that at no point did Mr R self-select any funds between 2010, when the plan was set up, and it was switched.

In 2018, Mr R gave VMUTM authority to provide information about his plan to another business.

In 2020, VMUTM took a commercial decision to move away from its established AFS to a new automatic fund selector, referred to as 'Glidepath'. VMUTM described Glidepath as its new form of AFS, the key differences being that VMUTM would move investments from growth investments to more stable investments over a longer period of 15 years and much more gradually. It said it would be using two new funds: the Pension Growth Fund 3 and the Virgin Money Pension Defensive Fund for stability.

VMUTM said that it wrote to Mr R on two separate occasions in August and September 2020, telling him about the change and giving him the option of opting out of being switched into Glidepath. VMUTM told this service it wasn't able to provide copies of the actual letters sent to Mr R because they were sent via a bulk mailing exercise. VMTUM provided a template of the letters it said were sent to Mr R and other customers.

The template letters gave optional content, depending on whether the customer was self-selecting or using AFS. The template showed that staff had to pull in the correct content from its data 'F63 steam' number. VMUTM did not supply the 'F63' stream' information to demonstrate what would have been included in Mr R's letter.

Mr R said he did not receive these letters from VMUTM about Glidepath

This service asked VMUTM to provide a redacted copy of its mailing list showing that Mr R was included in this bulk mailing exercise. This had not been provided by the time I issued my first or second provisional decisions.

A spreadsheet showing one entry only, referring to Mr R was provided by VMUTM after my second provisional decision was issued.

Mr R is unhappy that VMUTM treated him as having provided assumed consent to switch, because he did not respond to its letters. He considers that unfair. He also says he has lost out financially as a result as he would have taken action, if advised of the change.

Our investigator looked into Mr R's complaint and did not uphold it. They took the view that Mr R:

- Opted into AFS from the outset and did not change that selection;
- Was sent copies of the letters by VMTUM giving him the option to opt out of the switch to Glidepath and did not exercise that option; and
- Therefore, it was reasonable for VMTUM to assume that Mr R had provided consent to the switch as it was part of a commercial decision taken by VMTUM and was overseen by the regulator, the Financial Conduct Authority.

Mr R didn't accept our investigator's view and asked for his case to be referred to an ombudsman. Mr R said, in summary:

- He didn't receive the letters that VMTUM said it sent;
- He believes he opted out of AFS around 2018 and was self-selecting funds. He later confirmed that we could disregard this. He realised this applied to a separate stakeholder pension plan, not this plan;
- It is not clear to him on what basis VMTUM was able to make a unilateral decision to change the terms and conditions of a customer's policy to the customer's detriment;
- As Glidepath did not offer a mirror arrangement the losses he suffered following the switch were locked in at the point of transfer; and
- He was under the impression that the ombudsman's role was to assess whether a business' actions were fair and reasonable and therefore he does not understand why the investigator has concluded that this service cannot go behind the commercial decision taken and overseen by the regulator.

1st Provisional Decision

I issued a provisional decision on Mr R's complaint in March 2023. I'll refer to this as my first provisional decision. I provisionally found that there was insufficient evidence to show that Mr R had received the letters, but I considered it unlikely that he would have opted out of the new AFS even had he been provided with information about the change. I was not satisfied therefore that he had suffered any financial loss, but I did think VMTUM should pay him £200 for the inconvenience caused.

In response to my first provisional decision VMUTM said it had no wish to delay matters further and accepted my decision.

Mr R accepted some parts of my first provisional decision, but not others, in particular the conclusions I had reached about what he would have done if he had been informed of the change.

Mr R and his financial adviser provided further information about how all his pension arrangements were being overseen by his financial adviser and that he would likely have acted differently had he been informed of the change.

2nd Provisional Decision

Mr R's complaint came back to me to reconsider In June 2023, I issued a second provisional decision, still upholding the complaint, but making a different award for redress. I provisionally concluded that likely Mr R would have taken action and invested differently had he been informed of the change to Glidepath.

Following my second provisional decision VMUTM sent in further information and said it did not consider it had done anything wrong. It provided a spreadsheet containing information it said was relevant to show that Mr R was sent letters about the change to Glidepath in August and September 2020.

Mr R also responded to my second provisional decision. He took the view that redress should be calculated differently and to keep things simple I should compare what his pension fund would have been worth now if it remained invested in the original fund, compared to what his fund is worth now invested in Glidepath.

Mr R also considers it unfair that a notional deduction is made for tax if any shortfall cannot be paid into his pension scheme. He also thinks that it is not fair to speculate on how he may or may not take his pension assets in 15 years' time, at retirement, or what tax rules may be in place at that time.

Mr R also asks that his financial adviser is given the opportunity to validate any loss calculation prior to a final decision being made.

Mr R's complaint comes back to me for a 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.

Having done so, my final decision is largely the same as my second provisional decision. I shall explain why.

Glidepath letters

Businesses often don't keep copies of individual letters sent out as part of a bulk mailing exercise. So, I am not surprised that VMTUM can't provide copies of the actual letters sent to Mr R. However, businesses can often produce records showing when and how the correspondence was sent, what it said and what it told the customer to do, if anything.

VMUTM did not challenge the view I set out in my 1st provisional decision, which was that I didn't have enough information to be satisfied that more likely than not the Glidepath letters were sent to Mr R by VMUTM in August and September 2020

In response to my 2nd provisional decision VMTUM said that the spreadsheet it has now produced shows these letters were sent as part of a bulk mailing exercise. I previously asked VMUTM for this evidence, It told me it was not available.

The spreadsheet I've now been shown provides reference headings, such as name, address, scheme type and so forth and then a one-line entry relating only to Mr R.

What I can't see from the spreadsheet is that this information relates to Glidepath correspondence being sent out in August and September 2020. I can't see any reference to the 'F63 stream' information to see what was included in Mr R's letter. I can see a box that says AFS was 'ON', but I can't see any read across to the content of the template letters. VMUTM also tells me that Mr R's template correspondence was sent as part of 'Segment 8'. The table refers only to Cohort 1-5 and where it says 'Mailing Stream' it says leave blank.

So, based on what VMUTM has now provided, and having already been provided with the opportunity to provide information about the bulk mailing exercise, I remain of the view that I still have insufficient information to be satisfied that Mr R was sent letters from Glidepath in August 2020 and September 2020 about the change.

I am also not satisfied that based on what I have seen so far, that, without more information, I can fairly and reasonably conclude that Mr R was told clearly what he needed to do even if he did get these letters. That's because I can't know whether VMUTM selected the correct wording to go into Mr R's letter. For example, I have not seen anything to show the data it pulled across to populate Mr R's letter was the right content to match his circumstances (ie the F63 stream information). This is relevant because different instructions about what to do were provided based on the customer's circumstances.

Was VMUTM authorised to make this change?

Mr R also challenges the basis upon which VMUTM was authorised to make this change, without his consent.

VMUTM made a commercial decision, which it appears that the Financial Conduct Authority, did not take issue with, to change its AFS to the Glidepath arrangement. Mr R thinks it unfair that VMTUM was unilaterally allowed to impose this change. As I mentioned in my provisional decisions, this service is not a regulator, we cannot go behind commercial decisions made which the regulator does not take issue with. In these circumstances, I can't fairly conclude that it was unfair or unreasonable for VMTUM to withdraw the existing AFS option and replace it with Glidepath, even at a time of market volatility.

VMTUM did need to communicate with the customer clearly, fairly and transparently about the change however, and given what I have said above, I can't see that it did this.

What would Mr R have done differently, if anything, had he received VMTUM's letters and been aware of his options?

Because VMUTM has done something wrong in my view, I have gone on to consider whether Mr R has lost out because of that.

The options available to Mr R had he received these letters would have been to do nothing and allow the switch across to Glidepath, or to do something, and begin self-selecting his funds. The option to continue with the established AFS was not available.

I think it likely that, feasibly, Mr R could have chosen to replicate the AFS arrangement through self-selection. I provisionally concluded in my 2nd provisional decision that Mr R was receiving advice annually from his financial adviser on his pensions investments and he deliberately remained invested in the Pension Growth Fund predominantly in UK equities based on this advice.

Mr R's financial adviser contacted this service and said that he had been his financial adviser for around ten years and found Mr R to be timely and responsive in his dealings with him. The adviser said that Mr R's pension assets were considered in the round each year

and that his investment strategy and exposure to risk in relation to his other funds took into account that Mr R's VMTUM plan was invested in UK equities. The adviser said that had it been known that the level of exposure to investment risk was being reduced in his VMUTM fund, Mr R would likely have selected to dial up the risk across his investments. So, in the opinion of Mr R's financial adviser, it now seems to me that Mr R would have invested differently if made aware of the change from AFS to Glidepath.

Having accepted what Mr R and his long-standing adviser have told me about Mr R's pension investment strategy at that time and been told Mr R was pro-actively engaged in managing his pension investments each year, my view is that Mr R would have taken action if told about the change to Glidepath and so overall, he has lost out financially.

I don't know exactly what action Mr R would have taken, but think it likely that he would have looked to mirror the old AFS investment model through self-selection, as this was the strategy he had consciously been adopting, with the assistance of his financial adviser, for quite some years. That being the case, I now consider that compensation should be calculated on that basis to identify whether Mr R has suffered any financial loss as a result of the change which was inadequately communicated to him, and which he would have done something about upfront, if he had known about it.

Putting things right

My aim in awarding compensation for financial loss is to put Mr R back in the position he's likely to have been in, but for VMUTM's errors when dealing with the switch of his pension benefits to Glidepath.

Mr R is right, none of us can know what his circumstances will be at retirement, or what the tax rules will be then. But I need to determine this complaint **now** to bring this to an end, and so I must consider based on what I know already, what his circumstances more likely than not will be at the time in question. Of course, in any event, long term Investment decisions generally bring with them risk and uncertainty and circumstances can change over time.

The notional tax deduction being made is to represent the tax deduction that would be made at retirement (if current tax rules remained) at the time of payment. It only applies if the money cannot be paid into the scheme. So, to fairly put Mr R back in the **same position** as if this error was not made, it is appropriate to make a deduction in these terms.

Mr R will be provided with a copy of the calculation by VMTUM. He can show this to his financial adviser to check the figures involved.

VMUM did not dispute that Mr R has been caused some trouble and upset by this. He is understandably upset as he feels he wasn't given the option of deciding whether to switch across to Glidepath or to self-select. He is disappointed that, as he sees it, he has to live with the consequences of being moved across to Glidepath without being aware of the options.

Taking both Mr R and VMTUM's representations into account, to compensate Mr R fairly VMUTM must:

- Compare the performance of Mr R's investment in the Glidepath arrangement with what it would have been worth had it remained in the AFS arrangement from the date of switch. If the value of his investment would have been greater in the AFS arrangement, then there is a loss and compensation is payable.

- If there is a loss, VMUTM should pay an amount into Mr R's pension plan to increase its value by the total amount of the compensation. 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 VMUTM is unable to pay the total amount into Mr R'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.

- The notional allowance should be calculated using Mr R's actual or expected marginal rate of tax in retirement. I think Mr R is likely to be a basic rate taxpayer in retirement. The reduction should equal the current basic rate of tax. However, Mr R would have been able to take a tax-free lump sum. Therefore the reduction should be applied to 75% of the compensation.

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

- Provide details of the calculation to Mr R in a clear and simple format.

- Pay Mr R £200 compensation direct for the trouble and upset caused.

My final decision

I uphold Mr R's complaint and order Virgin Money Unit Trust Managers Ltd to put things right as set out above..

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 September 2023.

Kim Parsons
Ombudsman