DRN-4310756

The complaint

Mr F's complaint is about advice he received from Acumen Financial Services (Acumen) in 2021/2022 about early retirement.

Acumen is an appointed representative of Sense Network Limited who, as principal, is responsible for the advice Acumen gave.

What happened

I issued a provisional decision on 19 July 2023. I've recapped here what I said about what had led up to Mr F's complaint together with my provisional findings.

'*In brief, Mr F met with Acumen's adviser in July 2021. Mr F wanted to retire early, in 2022 at age 61. Mr F was a member of his employer's Group Personal Pension (GPP). He also had two policies with Phoenix Life which had Guaranteed Annuity Rates (GARs) and pension plans with Standard Life and ReAssure.*

Acumen recommended that Mr F retain his GPP, to which his employer was contributing, and his Phoenix Life policies. The latter had valuable guarantees which would be lost on transfer. Acumen recommended that Mr F transfer his Standard Life and ReAssure plans to a new Flexi Access Drawdown (FAD) arrangement with Aviva with the investments to be managed by Square Mile Investment Consulting and Research Limited (Square Mile).

Mr F accepted the recommendations and, after taking some of his tax free cash, the remainder of the funds were transferred to Aviva and the new FAD arrangement was set up with effect from 25 March 2022. Mr F was able to view his investments online. He quickly became unhappy about how his funds were performing and contacted Acumen. What Acumen said didn't reassure him and, as the fund value continued to fall, Mr F ended his agreement with Acumen. He dealt himself with the transfer from Aviva to Canada Life to purchase an enhanced annuity. I understand Mr F took his remaining tax free cash of £153,175.67 which left the sum of £463,539 which bought an annuity of £20,284 pa, which I think was set up in late June 2022.

By then Mr F had complained to Acumen. Amongst other things Mr F said his risk profile was extremely cautious and his priority was to protect his investment and generate an overall pension of about £30,000 pa without risk. The adviser had said, to grow the investment and keep pace with inflation, it may be necessary to take some risk with a small proportion of the investment. The safer option of an annuity seemed to have been disregarded as the income would be too low. Mr F said, given his risk profile, FAD wasn't the right product for him. The losses and fund value fluctuations had caused stress and impacted on his mental health. He was seeking compensation of £30,633.91 which represented the loss from his initial investment, plus a refund of fees of £6,295.

Sense Network Limited didn't uphold the complaint. But it accepted that the adviser hadn't completed the implementation of his recommendations regarding the Phoenix Life policies. And that Mr F had spent time contacting Phoenix Life about the matter. A refund of fees of £1,059.98 was offered plus £200 for distress and inconvenience. There were some further *exchanges but Sense Network Limited's position didn't change.*

Mr F referred his complaint to us. It was considered by one of our investigators who upheld it. He said Sense Network Limited had agreed that the adviser had failed to deal with Mr F's Phoenix Life policies and so the offer to refund fees and pay distress and inconvenience should be reinstated.

As to the recommendation to go into FAD, the investigator didn't think any responsibility rested with Square Mile. The losses had happened over a short period of time and Mr F's investment was intended to be longer term. But the investigator didn't think Acumen's recommendations had been suitable for Mr F. His primary concern was to protect his investment. Although he had an ideal income figure in mind, he wasn't prepared to subject his investment to the degree of risk represented by the FAD arrangement. Mr F appeared to be a Very Cautious investor and, although global events and his decision to terminate the relationship had contributed to his losses, the investigator thought the losses would've been less if Mr F had been in an investment portfolio more suited to his cautious approach.

The investigator recognised that an investor's attitude to risk (ATR) could be subject to review and Mr F had accepted the adviser's recommendations. Mr F had also told our investigator that he was under some pressure at the time and that may have impacted on him accepting advice that he may not have been entirely comfortable with. The investigator said the fact find and the recommendation letter didn't indicate that any alternative strategies had been discussed with Mr F and that, despite contacting Sense Network Limited for an explanation about that and other matters, we hadn't heard further. The investigator's view was that the recommendation was unsuitable. He set out how Sense Network Limited should compensate Mr F fairly.

Mr F accepted what the investigator had said. Sense Network Limited didn't. And in response to what the investigator had said about not having had a response to some queries, Sense Network Limited asked if the investigator had seen its email of 23 February 2023, which made the following main points:

- *Mr F's initial ATR score was 25 (Very Cautious). His responses to the ATR questionnaire were discussed against his overall objectives and any discrepancies or amendments were fully discussed and disclosed. And the suitability letter gave Mr F a record of the final discussions and rationale.*
- *Mr F had an income objective of £30,000 pa. The annuities with GARs provided around £9,000 pa and a pension forecast showed he'd get a state pension of approximately £8,800 pa in 2026. So over half of his income needs were guaranteed for life. It was agreed that with the remainder of the funds he'd take a small but higher risk profile for a sustainable income with added flexibility. That was discussed and agreed with Mr F. The increased weighting in the ATR was recorded on the fact find, a copy of which was supplied to Mr F and it was confirmed in the suitability report issued to him.*
- *Given the guaranteed element of the income currently and shortly to be received, along with the investment timeframe of over twenty years, Mr F agreed to a portfolio with an element of risk but defensively placed which provided the guarantees Mr F required and flexibility for the remaining income.*
- *The file given to Mr F confirms all that within the report and fact find and which is an accurate representation of the discussions held. Mr F was aware of the recommended solution and was happy to proceed with the investment. He'd taken a very short term view and not the longer view as originally intended.*
- *A full annuity purchase wasn't discussed but was considered holistically due to the annuity plans recommended to underpin the guaranteed income.*

- *Death benefits were also important to Mr F whose partner is ten years younger.*

The investigator hadn't seen Sense Network Limited's comments and reviewed them but he didn't change his view. Sense Network Limited didn't agree and reiterated why it considered FAD had been suitable for Mr F. The investigator told Mr F and Sense Network Limited that as agreement hadn't been reached the complaint would be referred to an ombudsman.

What I've provisionally 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 considered first what happened in respect of Mr F's policies with Phoenix Life. Sense Network Limited offered to refund charges calculated at £1,059.96. I don't think there's any dispute that Acumen agreed to deal with the Phoenix Life policies on Mr F's behalf and then didn't do that work. Like the investigator, I don't think the offer should've been made conditional when it was clear, despite what Sense Network Limited thought about other aspects of Mr F's complaint, there'd been an obvious failing on Acumen's part in overlooking the Phoenix Life policies. I've made a direction below for Sense Network Limited to refund Mr F and pay him £200 for the distress and inconvenience this aspect of the matter will have caused him.

I've gone on to consider if Acumen's advice that Mr F switch to the FAD arrangement was suitable for Mr F. A considerable amount of documentation has been supplied, all of which I've seen. But I'm going to focus on what I see as central to the complaint.

It seems agreed that Mr F's starting position is that he didn't want to take any risk with his pension. His ATR was initially assessed as being Very Cautious which was adjusted to Cautious or the Low end of Cautious to Moderate. I think that's quite a significant uplift. Sense Network Limited says Mr F's responses to the ATR questionnaire were discussed against his overall objectives and any discrepancies or amendments were fully discussed and recorded. I don't dispute that such discussions may take place. And I accept that, in some circumstances, an investor's ATR might change, having been made aware of the options. But I think an adviser needs to be careful, in any discussions which might lead an investor to agree to accept more risk, to ensure the investor is fully comfortable with that and aware of the possible consequences.

Sense Network Limited says the agreed adjustment to Mr F's ATR was recorded in the fact find and the suitability letter. But what's set out is more the outcome, not how the amended position was arrived at and the rationale. The suitability letter simply says that Mr F is a Cautious Investor, prepared only to take a small amount of investment risk. There's nothing to indicate that's a change to Mr F's natural and lower ATR or how the increase has come about and why Mr F was prepared to adopt a higher risk approach. Especially given the large amount involved. It wasn't the case that Mr F would be adopting a higher risk profile for a small element of his pension provision. He'd be taking more risk with a very significant fund size which increased the overall risk.

I'd also expect there to have been some clear reference to the risks that FAD presented. I note there are some warnings in the letter about performance and other issues. But I don't think that's enough to be satisfied that the risks of FAD were fully explained and why, despite the fact that he was a Cautious investor (whether that's Cautious or very Cautious), FAD was nevertheless considered suitable for him.

The recommendation letter seems to have been framed instead on the basis that Mr F wanted the flexibility that FAD would provide. And, in responding to Mr F's complaint, Sense

Network Limited has stressed the flexibility afforded by FAD which, by purchasing an annuity, Mr F has given up. I don't doubt that flexibility might have been attractive to Mr F. But I'm not convinced that was necessarily at the expense of his other objectives. I think, properly assessed, Mr F's main priorities were protecting his accumulated pension savings and generating an income of around £30,000 pa on a risk free basis.

Mr F's Phoenix Life policies with GARs would provide an income of around £9,000 pa and a pension forecast showed he'd get a state pension of approximately £8,800 pa in 2026 which meant from then over half of his income needs were guaranteed for life. I agree that formed an important baseline income. And Mr F had the GPP too. I agree he had some capacity for loss and that there might be some room for adopting a more flexible approach for the pension plans Acumen was considering.

But, and even if flexibility was as important to Mr F as Sense Network Limited says, I'd expect to see any other options available to Mr F, including annuity purchase, set out and fully discussed in the recommendation report, with reasons as to why other options had been discounted, so Mr F could make a fully informed decision. Sense Network Limited has stressed that the recommendation was fully discussed and Mr F agreed with it. But I don't think the report – which was the central document on which Mr F's decision would be based – was balanced. For example, it seems that an annuity of £28,219.23 was available from Aviva. It didn't match Mr F's target income of £30,000 pa. But it wasn't too far short. There's nothing to indicate that there were any discussions as to whether Mr F would be prepared to compromise a slightly lower income in return for certainty.

I note what's been said about Mr F's partner who could be nominated as the beneficiary of the FAD arrangement. But I don't see that death benefits were the primary driver. The main purpose of pension savings is to provide an income in retirement. And an annuity can make provision to protect a partner. Even if a joint life annuity isn't bought the annuity may include a guarantee period. And Mr F did buy an annuity which would suggest that any inheritance considerations didn't outweigh the need to secure a guaranteed retirement income.

On a more general note, I'm not persuaded that FAD is low risk. Or that the risk element is determined by the funds selected. The FAD arrangement means that the pension funds remain invested and, even if a relatively cautious investment strategy is adopted, are exposed to investment fluctuations. There's a chance the portfolio will grow but it can also reduce, which was Mr F's experience, albeit over a relatively short investment period. The portfolio value will also reduce if ongoing charges aren't outweighed by investment returns, which generally tend to be lower if more cautious investments are selected.

All in all I don't think FAD was suitable for Mr F. I think that type of arrangement represented more risk than Mr F was prepared or should've been advised to take. And, from what I've seen, I don't think the annuity option was fully explored. So I don't think Mr F was placed in a fully informed position.

As to how things should be put right, my approach differs from what the investigator suggested. I don't think the FAD arrangement was suitable for Mr F from the outset. I think, with suitable advice, he'd have done what he's since done which was to buy an annuity. So the redress I've set out is aimed at putting Mr F back in the position he'd be in if he'd have bought an annuity instead.

Square Mile who was responsible for managing Mr F has been mentioned. The investigator didn't think any responsibility attached to Square Mile, taking into account that Mr F only remained invested for a very short period. Given my approach – that Mr F shouldn't have had the FAD arrangement in the first place and should be redressed on the basis he'd bought an annuity instead – Square Mile's involvement in the matter falls away.'

I went on to set out what Sense Network Limited needed to do to put things right for Mr F.

In response to my provisional decision Sense Network Limited said it had no new information to supply. Having reviewed the redress I'd proposed it was assumed Mr F was a basic rate taxpayer. But if the calculation determined otherwise that should be taken into consideration.

We checked with Mr F. We explained that the redress I'd set out in my provisional decision – and in particular the notional reduction of 20% from the lump sum payment – was on the assumption he was a basic rate taxpayer. But if he was a higher rate taxpayer (or would be taking into account the redress awarded) I'd agree the deduction should be 40% instead. And, as the loss in respect of past annuity payments was on a net basis, the same rate would be deducted.

Mr F confirmed he was a basic rate tax payer.

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.

Both Mr F and Sense Network Limited have accepted my provisional decision. In the absence of any new information or evidence my views remain as set out in my provisional decision. I've repeated those in full above and they form part of this decision.

Putting things right

To compensate Mr F fairly Sense Network Limited needs to take the steps I've set out below (and which follows what I said in my provisional decision). Working out what redress is due may involve liaising with Canada Life, Mr F's annuity provider. If required, Mr F should complete a letter of authority enabling Sense Network Limited to obtain information direct from Canada Life to assist in calculating redress.

Sense Network Limited should:

A. Calculate what Mr F's tax free cash would've been using the values transferred to Aviva and pay Mr F any shortfall, plus interest at 8% pa simple from 25 March 2022 (the date the FAD arrangement was established) to the date of payment.

B. Calculate what Mr F's annuity would've been had Mr F bought his annuity on 25 March 2022, assuming the annuity was set up on the same basis as the annuity Mr F actually bought.

C. Work out Mr F's past annuity losses – the difference between the net annuity payments Mr F has received and what he'd have received if the annuity had been set up earlier. Interest at 8% pa simple should be added to each net monthly payment from the date it was due to the date of payment.

D. Work out Mr F's future annuity losses by calculating the current cost of setting up an annuity (on the same basis as Mr F's current annuity) for the difference in annuity which he lost out on. The purchase price of the annuity is Mr F's gross future loss. This should be paid directly to Mr F as a lump sum after making a notional reduction to allow for income tax that would otherwise have been paid – had Mr F been able to buy a higher annuity he'd have been liable to income tax on the annuity payments he received. So that he's not over compensated a deduction to recognise that can be made. Mr F had confirmed he's a basic rate tax payer so the reduction should equal 20%. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr F won't be able to reclaim any of the reduction after compensation is paid.

E. Pay the £400 suggested by the investigator (which I agree is fair and reasonable compensation for the trouble and upset caused to Mr F) direct to Mr F.

F. Provide details in a clear and simple format to Mr F showing how the compensation in A, B, C and D above has been calculated.

G. What I've said above is in addition to the compensation offered – £1,259.96 in total which includes a payment of £200 for distress and inconvenience – which should be paid direct to Mr F. I'm not making any award in respect of the balance of the fees as the redress I've set out above aims to put Mr F back in the position he'd be in if he'd been given suitable advice, for which a fee would've been payable.

My final decision

I uphold the complaint. Sense Network Limited must redress Mr F as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 21 September 2023.

Lesley Stead
Ombudsman