DRN-4315162

The complaint

Mr R presented (and represented) a collective complaint about a number of investment related accounts held with Henderson Rowe Ltd ('HR'). The complaint was then split and separated.

This decision is only about his accounts and about the following – he says HR failed to execute his instructions on 10 and 11 March 2022 to liquidate his Self-Invested Personal Pension ('SIPP'), a holding in his Individual Savings Account ('ISA') and his jointly held General Investment Account ('GIA') prior to an impending transfer; that it had done nothing when he issued a reminder on 14 March 2022; and that, on 15 March 2022, it eventually took action.

HR says there was no clear instruction to liquidate the SIPP; that it has conceded responsibility for the delay (between 11 and 15 March) in liquidating the GIA; and that its analysis for financial loss (arising from that delay) shows no such loss was incurred by Mr R.

What happened

One of our investigators looked into the complaint and agreed with HR's approach towards its compensation analysis for the GIA aspect of the complaint. She disagreed with Mr R's claim that the SIPP should have been liquidated on 11 March, and concluded that no instruction to do so was clearly given by him on that date (and that the terms of his instruction on 10 March could not be evidenced). However, she found that his reminder to HR on 14 March ought to have led it to liquidate the SIPP on 15 March.

Mr R disagreed with this conclusion. In the main, he retained his claim that his instruction on 11 March, alongside his instruction the day before, clearly included the SIPP's liquidation, he disputed the prices used by HR in considering financial loss in the GIA, he said they were non-market prices and he asserted that the use of market-based pricing shows financial loss that he should be compensated for. He also noted that the delayed liquidation of the ISA holding is missing from HR's calculations. The investigator addressed his rebuttals but retained her initial view. Overall, she made the following main findings:

- Mr R's instruction on 10 March was given over a WhatsApp call to the personal number of an HR official. It was an unrecorded call and it happened outside the requirement, which he was aware of, for instructions to be given on HR's recorded landline number. He alleges failings in HR's operations with regards to the landline number being inaccessible, forcing him to use the WhatsApp call, but the matter of HR's operations is outside the remit of the complaint.

- As the call on 10 March was not recorded, there is no recording evidence of the instruction given on that date.

- His instruction on 11 March was in an email. The liquidation reference is immediately followed by a specific list of accounts which a reasonably minded reader would conclude was the list of accounts to be liquidated. The list did not include the SIPP, so it was not unreasonable for HR to conclude that the instruction did not extend to

the SIPP.

[Mr R has explained that the email was sent to HR and to the firm to whom his accounts were being transferred, that it was drafted in a way designed to address both recipients and that the listed accounts stood in this context. He accepts that, in isolation, the email could be read in the way the investigator described but he says the email was not isolated, that it was sent to the same individual he spoke to on 10 March, so it stands in the context of that conversation.]

- However, his reminder of 14 March happened through another unrecorded call to HR and then an email. In the email he referred to that of 11 March and to an instruction to 'sell everything'. HR had a two-stage instruction process – telephone and email – for the purpose of checking and clarifying instructions. On this basis, the email should have been followed by a call to Mr R to clarify his liquidation instruction. HR did not do this. Had it done so, it would have realised the SIPP was to be liquidated and it would have done that at the next trading point on 15 March. For this reason, it should compensate him on this basis.

- HR should also pay Mr R £200 for the upset and inconvenience the matter caused him.

Mr R presented his calculations of financial loss from the liquidated GIA assets and ISA holding, based on closing mid prices on 11 March. He then drew comparisons between the prices used by HR in its calculations and the relevant market prices on 11 March, at 11.30am (the price point used by HR). He highlighted that none of the former matched the latter. He acknowledged that, in terms of redress, a range of price time points on 11 March and price types (the day's low, closing or average prices, for example) could be used – which he said the Ombudsman can consider in determining the complaint – but he argues that it is unacceptable for HR to use prices that did not exist in the market on 11 March at 11.30am.

Mr R also made submissions about flaws he perceived in HR's position on the SIPP liquidation instruction.

In the main, and in addition to his points about HR's operations (and access to the landline), he said the lack of a recording for the call on 10 March should not be used unfairly against him; HR could not reasonably say the email on 11 March was unclear because it (including the official he spoke to and wrote to) was very familiar with him, with the relevant accounts and with the need at the time to liquidate and transfer (out) all the accounts imminently, so it would have known that his reference to 'everything' included the SIPP; furthermore, the list of accounts (in the email) that HR claims to have relied upon included some accounts that were already in cash, so this shows the list was not related to the liquidation instruction; and the claim that the email was unclear is also arguably irrelevant, because the facts show that it was not read by HR and that no liquidation was carried out by HR until after his reminder on 14th March.

The complaint was referred to an Ombudsman.

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.

The key issues to determine are the effects of the telephone call instruction on 10 March, the email instruction on 11 March and Mr R's reminder to HR on 14 March; whether (or not)

there was a delay in executing the instruction(s); and, if so, redress for any resulting financial loss.

I do not consider it necessary to address the circumstances surrounding Mr R's use of a WhatsApp call to HR on 10 March, as opposed to a call to its landline number. I have read and understood the points made by both parties in this respect and I appreciate that Mr R has presented his case on why he felt compelled to use the WhatsApp call in the face of what he viewed as an inaccessible, or non-functioning, landline number. He has made that case partly because, as he has also said, he objects to the absence of a recording for the WhatsApp call being used against him.

The absence of such a recording is not being used against him. The point the investigator made, and that I share, was simply that the absence of a recording means there is no independent evidence or verification of what exactly was said during the call. Mr R says his instruction included the SIPP. HR does not agree. The matter is therefore in dispute, and without a recording to resolve it, there is no basis to reach a fair conclusion on it. I have not found cause to consider one party's account more credible than the other's, so without a recording I am not in a position to make a safe finding on whether (or not) the telephone instruction on 10 March made clear to HR that the SIPP was to be liquidated.

Helpfully, Mr R followed up the call on 10 March with the email on 11 March, so the matter can be addressed on the contents of the email. Unfortunately for him, for the reasons given in the paragraph above, his arguments that the email is not isolated and that it stands in the context of the call on 10 March are essentially unsupported arguments. Without recording evidence of what was said in that call, it remains disputed and there is no finding for the context he asserts.

For the sake of completeness, and mindful of what I said earlier about not being drawn into the circumstances surrounding the WhatsApp call, I do not find any wrongdoing by HR with regards to the absence of a recording for the call. Calls to its landline number were set up for transaction instructions (amongst other business contact reasons) and set up to be recorded, that was reasonable. Its officials' personal mobile phones were not to be used for the same purpose, so it was not unreasonable that Mr R's call was not recorded.

Mr R has said that, in isolation, he can see how the email on 11 March could be read as falling short of an instruction to sell the SIPP. On balance, this is my finding, the instruction does not read as one that extends to instructing the sale of the SIPP.

The email was addressed to HR and the firm Mr R's accounts were being transferred to. It began with his references to having spoken to them (both) and to the email as a 'confirming email'. The next paragraph (two sentences) spoke only to the new firm, about transferring an asset in specie. The paragraph (and sentence) after that spoke only to HR, and said as follows –

"*For everything else … please sell and transfer as it settles.*"

This was immediately followed by –

"*There are 3 ISAs:*
…

There are also two GIAs
…"

On balance, I consider that the above instruction could, and would, reasonably have been

read as one to liquidate the three ISAs and two GIAs only. The SIPP is not mentioned, so I do not accept that the instruction extended to liquidation of the SIPP too. This does not mean I doubt Mr R's intention (as of 10 and/or 11 March) to liquidate the SIPP. I accept that he probably held that intention, especially given the background he has explained about transferring all the accounts and having to do so by a particular deadline. However, the issue to determine is much less about his intention. It is much more, and mainly, about what exactly HR was instructed to do. Hence this finding.

I disagree with Mr R's suggestion that HR's interpretation of the email is irrelevant.

I appreciate that his core arguments are that HR knew on 10 March what the instruction was; its inaction from then up to 14 March shows it had not read the email of 11 March and had done nothing towards complying with the instruction within it; so his claim about a breached instruction has been established.

I have already explained that it is not possible to make a safe finding on what precisely was instructed on 10 March.

It is true that HR's inaction up to 14 March calls into question whether (or not) it took any meaningful notice of the email of 11 March. However, the email and how its contents were/are to be interpreted remain relevant because they determine what HR ought reasonably to have done, but for its delay in actioning the instruction (inclusive of any delay in taking notice of the instruction).

But for the delay, it ought to have executed the instruction on 11 March. I understand Mr R's point that some liquidated accounts were within the aforementioned list, so no execution would have been necessary for them. It is probable that would have led to a need for further clarification between the parties, but I have not seen enough to conclude that such clarification would have included mention of the SIPP. It seems more likely (than not) that HR could have queried specifically why there was an instruction to liquidate a cash account(s) and that Mr R would have replied to agree it (or they) did not require liquidation.

In other words, without the delay the instruction set out in the email of 11 March is what HR should have executed on 11 March. Therefore, interpretation of the instruction is relevant. On this basis, and for the reasons given above, I do not find that HR was instructed to liquidate the SIPP on 11 March. Without the delay, HR ought reasonably to have executed, on 11 March, liquidation of any assets yet to be liquidated in his ISA and jointly held GIA (both of which were in the list).

I echo and endorse the investigator's findings about the events on 14 March. Due to Mr R's reminder, HR's execution failure (or delay) was identified on this date. His email on the same date said – "*I'm afraid I did give an instruction to sell everything except Ruffer, below*". This too did not mention the SIPP, but HR was already in a position of having failed to execute the instruction on 11 March and the email of 14 March was differently presented. It did not specify a definitive list. It referred to liquidating 'everything except Ruffer'. In addition, HR appears to have been aware of his need to transfer all relevant accounts by an imminent deadline.

Overall, in these circumstances and mindful of HR's two-stage instruction process, it ought to have followed up its receipt of the 14 March email with a call to Mr R, on the same date, seeking to clarify his instruction. Had it done so, it is more likely (than not) that he would have made clear that the instruction included liquidation of the SIPP. With that confirmation, HR would have been obliged to execute liquidation of the SIPP at the next available opportunity, or dealing point. I agree with the investigator's finding that this would have been on the following day, 15 March. Mr R's email of 14 March was sent after normal business

hours (it was sent at 6.30pm), so it is reasonable to conclude that execution would have happened on the next business day.

HR already accepts that it caused a delay to liquidation of Mr R's GIA, and that it ought to have done that on 11 March.

It says no financial loss was incurred by Mr R from the delayed GIA liquidation (the liquidation on 15 March that should have happened on 11 March). It says Mr R's email at 10.37am on 11 March would have been executed by 11.30 on that date, so it calculated the total proceeds that would have been generated based on the bid prices at that time, compared that to the total proceeds generated on 15 March, and found no loss. Mr R challenges the price point of 11.30am (on 11 March) and the actual prices used in HR's calculations. He also invited us to review the price point and price type that should be used in the calculation, and submitted his alternative calculation of redress.

I agree with Mr R that a number of price points and price types could be considered for the calculation of redress. However, we must not lose sight of the specific purpose that redress should serve in his case. His instruction to HR at 10.37am on 11 March should have led HR to liquidate any investments in his ISA and jointly held GIA in a timely manner thereafter. That did not happen, instead execution happened on 15 March. Redress is therefore aimed at calculating whether (or not) the liquidations that should have happened on 11 March would have achieved higher proceeds than what was achieved on 15 March.

This exercise cannot be perfect or precise, because no-one can determine exactly when the investment sales on 11 March would have happened, or the associated sale prices. Mr R's submissions are in favour of using day-closing prices and he questions why HR selected 11.30am. I understand his concerns. He refers to price charts showing this particular time as being unfavourable for prices. I have not seen enough evidence to say this was/is HR's motivation for selecting the time. Instead, I find its explanation about this being when (just under an hour after the instruction) the sales would probably have been executed to be plausible. The same explanation refers to time being used to input and authorise the associated trades, and then time for execution by its custodian. These could have been done within an hour.

Investment transactions are inherently time sensitive and firms are commonly expected to provide timely order (or instruction) execution. In the absence of evidence that Mr R specifically asked for liquidations at closing – which he did not ask for – I am not persuaded to prefer a day-closing price/execution point (many hours after the instruction) over a price/execution point less than an hour after his instruction.

On balance and for the above reasons, I agree with the price/execution point of 11.30am on 11 March.

In terms of price type, the sale transactions that should have happened on 11 March would have been subjected to the relevant assets' market bid prices, in the bid/offer price spreads applicable to them. HR says the bid prices are exactly what it used in its calculations. As I set out below, the bid prices are what I consider fair and reasonable in the calculation of redress for Mr R. They reflect the price type that sale of his assets would have been subjected to.

I have considered his argument about HR using non-market prices. It does not appear that the price chart evidence he cites, in support, shows the relevant bid/offer price spreads that were applicable as of 11.30am on 11 March. In contrast, HR has confirmed that its calculations were based on relevant published bid prices from 'FactSet' (the online financial data resource). This might explain the differences that Mr R refers to, given that a bid/offer

spread usually exists around a single chart price.

In any case, my task is to determine the complaint and any redress due in it. I do not need to verify the calculations behind HR's offer, instead I will be setting out below what it must do to calculate any redress due to Mr R. As the investigator explained, we would not usually go into the detailed financial assessment (or calculation) of loss in cases like his. It is enough to set out the redress methodology that HR must follow, which is what I do in the next section. I agree with the investigator that HR appears to have followed the methodology we would expect, in as far as what its analysis covered. Nevertheless, this decision provides an opportunity to fully set out that expectation.

I understand Mr R's concerns about accuracy. HR will be required to set out its calculations in a clear, informative and simple format, and to share with him the calculations and the source information about the prices used in the calculations.

Putting things right

I agree with the investigator's finding that HR should pay Mr R £200 for the upset and inconvenience he has been caused in the complaint matter. He should not have experienced HR's delayed executions of his instructions. I consider that £200 is a fair amount, in the circumstances of his case, to compensate for the upset and inconvenience that experience caused him. I order HR to pay him £200 for this purpose.

With regards to redress for financial loss, my aim is to put Mr R as close as possible into the position he would be in had any investments in his ISA and jointly held GIA been sold at 11.30am on 11 March 2022, and had his SIPP been liquidated at the first available dealing/trading point on 15 March 2022.

The basis for the provisions that follow is no different from that expressed by the investigator, so it will surprise neither party. Like her, I find that Mr R's instruction to liquidate his non-SIPP accounts should have been executed on 11 March 2022, that his instruction to liquidate his SIPP account should have been executed on 15 March 2022, and that redress is defined by these conclusions.

However, I have set out the provisions to ensure both parties know exactly what redress must look like. This is particularly necessary given the dispute about calculations and given that Mr R's point about an omitted ISA holding (from HR's calculations) appears to be supported by the absence of an ISA related contract note in the contract notes (for the executions on 15 March 2022) that HR has shared. HR should therefore re-do the entire calculation afresh and as ordered below.

Mr R and HR must engage meaningfully and co-operatively with each other to share all information and documentation, relevant and necessary for the calculation (and any payment) of redress. HR must set out its calculations in a clear, informative and simple format, it must provide the calculations to Mr R and it must share with him all relevant source information about the prices used in the calculations.

The Non-SIPP Assets

HR must:

- Verify and confirm all the investments that existed in Mr R's ISA and his investments in the jointly held GIA (the 'non-SIPP assets') as of 11.30am on 11 March 2022.

- Calculate the total value of sale proceeds that would have been achieved if the non-

SIPP assets were sold at the applicable market sale/bid prices at 11.30am on 11 March 2022. ['A']

- Calculate the total value of proceeds generated from the sale of the non-SIPP assets on 15 March 2022. ['B']

- If B is greater than A, no compensation is due to Mr R.

- If A is greater than B, the difference is the financial loss resulting from the delayed liquidation of Mr R's non-SIPP assets, and is the redress due to him (and that must be paid to him) for this part of his complaint. ['C']

- Pay Mr R the value of C plus the value of any applicable lost performance using as the benchmark the performance of his non-SIPP assets from the point of transfer up to the settlement date.

The SIPP Assets

The investigator's proposed redress was reconstruction of the SIPP sale as of 15 March 2022, plus a form of interest based on performance from the point of transfer. Then Mr R said this suggests HR had *not* liquidated his SIPP on this date when the other liquidations happened. He said he previously understood that it had.

His redress calculations present differences between SIPP asset prices and values on 11 March (when he says the SIPP should have been liquidated) and exact prices and values (which he describes as "realised") on 15 March 2022. HR's contract notes for the transactions it executed on the latter date do not include transactions in the SIPP. This suggests HR did not liquidate the SIPP on this date. Both parties appear to have explained their positions to the extents that they can – HR has evidenced what it did on 15 March 2022 and Mr R is unsure about whether (or not) the SIPP's sale was done by HR.

Mr R's calculation evidence supports the conclusion that the SIPP has been liquidated. My orders cover the two main possibilities – that the SIPP was fully liquidated on 15 March 2022; or that it was fully liquidated thereafter – whilst maintaining the same finding reached by the investigator that it ought to have been liquidated on 15 March 2022. I do not address partial sale of the SIPP because that was neither intended nor instructed by Mr R.

The following orders apply:

- If Mr R's SIPP was liquidated on 15 March 2022, no redress is due to him for this part of his complaint. For the reasons given in the previous section, HR was not obliged to sell the assets on 11 March 2022 and the earliest that it ought to have sold them was on 15 March 2022. If, as a matter of fact, they were sold on 15 March 2022 there is no ground for redress.

- If Mr R's SIPP was liquidated on a date after 15 March 2022 –

    - He must provide full and meaningful disclosure of information to HR with regards to the relevant asset sales, sale prices and sale proceeds;
    - HR must then calculate the total sale proceeds generated by the actual liquidation ['*actual value*'];
    - HR must also calculate the total value of sale proceeds that would have been achieved if the SIPP's assets were sold, at the applicable market sale prices, at the first available trading point on 15 March 2022 ['*fair value*'];

- HR's contract notes show that all the GIA related sales were executed on this date between 8.00am and 8.25am. It is therefore reasonable to define the first available trading point for the SIPP as being the same period, unless a different trading point applied to the SIPP;
- If the actual value is greater than the fair value, no compensation is due to Mr R;
- If the fair value is greater than the actual value, the difference is the financial loss resulting from the delayed liquidation of Mr R's SIPP, and is the redress due to him (and that must be paid to him) for this part of his complaint;
- In addition, he must be paid the value of any applicable lost performance using as the benchmark his SIPP from the point of transfer up to the settlement date.
- HR should pay the total redress amount into Mr R's SIPP, to increase its value by the amount of the compensation; the payment should allow for the effect of charges and any available tax relief; the compensation should not be paid into his SIPP if it would conflict with any existing protection or allowance; if the compensation cannot be paid into his SIPP, it must be paid directly to him; had it been possible to pay it into the SIPP, it would have provided a taxable income, so the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid; the notional allowance should be calculated using his actual or expected marginal rate of tax at his selected retirement age (for example, if he is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax and if he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation).

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr R's case, the complaint event occurred after 1 April 2019 (it happened in March 2022) and the complaint was referred to us after 1 April 2022, so the applicable compensation limit would be £375,000.

decision and award

I uphold Mr R's complaint on the specific basis stated above. I think that fair compensation should be calculated as I have also stated above. My decision is that HR should pay him the amount produced by that calculation, up to the compensation limit.

recommendation

If the amount produced by the calculation of fair compensation is more than the compensation limit, I recommend that HR pays Mr R the balance. This recommendation is not part of my determination or award. HR does not have to do what I recommend.

My final decision

I uphold Mr R's complaint on the specific grounds and reasons given above. I order Henderson Rowe Ltd to calculate and pay him any resulting compensation as set out above. Henderson Rowe Ltd must also pay him £200 for the upset and inconvenience caused to him.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 9 October 2023.

Roy Kuku
Ombudsman