DRN-4350969

The complaint

Mr H complains that Evelyn Partners Financial Planning Limited (Evelyn) delayed selling the assets within his self-invested personal pension (SIPP) which he says then led to a reduction in the value of his pension following a sharp fall in the market. He would like Evelyn to pay the transfer value it would have paid had the transfer completed within "normal timescales".

What happened

Mr H held a SIPP with a provider which was managed by Tilney – now known as Evelyn. In January 2022 Mr H wanted to transfer his SIPP to a new provider and instructed the new provider accordingly. The request was acknowledged by the existing provider who then sent two instruction emails to Evelyn.

One of the emails was to Mr H's registered adviser – although he no longer worked for Evelyn at that time. It said "*as you have requested a cash transfer I would be grateful if you could arrange for the investments in the xxx SIPP to be liquidated and confirm back to us once this has been processed, so that we can continue with the SIPP transfer…"*

The other email was sent to Evelyn's transfer team and said "*please accept this email as instruction to close the above account. This email must not be treated as a disinvestment request. As a cash transfer has been requested the adviser/client will be in touch shortly regarding disinvestment."*

Evelyn discussed internally how the sale should proceed especially as some of the investments ought not to be sold, but it said it would wait for further instruction from the provider.

On 17 February 2022 the existing provider requested an update from the registered adviser to its earlier request for the liquidation of assets within Mr H's SIPP. On the same day Evelyn told the existing SIPP provider that there were some structured products within the portfolio that the investment manager would rather not sell although they weren't illiquid and were tradeable.

A further update request about the liquidation and account closure was sent by the existing SIPP provider on 28 February and following this email the portfolio was sold on 3 March with an expected settlement date of 11 March 2022. There was a short delay to allow a monthly income to be paid and the transfer was eventually completed by CHAPS on 28 March 2022.

But Mr H thought the transfer should have completed earlier and that his instruction from 8 February 2022 had been ignored. And because the markets had fallen during this process, he said he'd suffered a significant financial loss.

Evelyn didn't uphold the complaint. It said it didn't believe it had caused any delays to the selling of any assets within Mr H's SIPP. It referenced an email that its administration team had received from the ceding provider which stated, "*this email must not be treated as a*

disinvestment request." It also referred to the disinvestment emails which were sent to an adviser who no longer worked for Evelyn. It said the existing provider should have received an email "*rejection notification*" but in any case, it didn't believe it was responsible for any loss Mr H had suffered.

Mr H remained unhappy with this outcome, so he brought his complaint to us where one of our investigators looked into the matter. He didn't think the complaint should be upheld, making the following points in support of his assessment:

- The email Evelyn received from the existing SIPP provider on 8 February 2022 didn't, in his view, constitute a disinvestment instruction.
- The email address that the provider used for the registered adviser had been closed since 2019. Evelyn was unaware the email had been sent so was unable to respond or disinvest the assets instead. The email Evelyn's "transfer out' desk received stated it wasn't to be "*treated as a disinvestment instruction*".
- Evelyn only became aware of the disinvestment instruction on 28 February 2022. It completed the process within a further 10 working days which he thought was reasonable in the circumstances.

Mr H didn't accept this outcome making the following points in response:

- It wasn't correct that Evelyn wasn't asked to sell the assets on 8 February 2022. An instruction was sent on this date.
- An email sent by his new adviser to Evelyn on 15 February 2022 asked if it had received a request to sell down the assets – and if not, it said it should now do so.
- It wasn't correct that Evelyn was only made aware of the instruction to disinvest on 28 February 2022 as there was evidence to show that Evelyn responded to the existing provider regarding the structured products on 17 February 2022. This showed Evelyn had understood the original disinvestment instruction.
- It was unlikely that Evelyn wouldn't have received all the emails the SIPP provider sent on 8 February 2022. Either it received all the emails or none of them.
- An organisation the size of Evelyn should have had a better system in place for "off boarding" leaving employees – particularly to ensure future emails are redirected appropriately.
- On the basis of the emails that were sent – and received - Evelyn ought to have been aware of the disinvestment instruction by 15 February at the latest and then ought to have been able to sell the assets by 22 February 2022.

The investigator then asked Evelyn for its comments on the email from Mr H's new adviser dated 15 February 2022. Evelyn said it did receive a letter of authority from the new adviser in 2021 but this only allowed it to access information about Mr H's investments and didn't allow it to instruct the sale of any assets. So it didn't think it ought to have acted upon receipt of that email.

The investigator wasn't persuaded to change his view, but Mr H said the instruction to sell had come from him on 8 February 2022 and it was Evelyn's decision not to comply with that request at the earliest possible opportunity. He also pointed out that when Evelyn did sell the assets it seemed to be without an instruction from anybody.

So the complaint was referred to an ombudsman and passed to me to review.

My provisional decision

In my provisional decision I said the complaint should be upheld. I made the following points in support of my findings:

- I thought the instruction of 8 February 2022 was a clear advance notice to close the account – but not until Evelyn had been made aware that the assets in the fund had been disinvested. And Evelyn's email of 17 February 2022 to the existing SIPP provider seemed to support the idea that it acted on that instruction – so I didn't think Evelyn had done anything wrong at that point.
- I looked carefully at the other email that was sent directly to the registered adviser asking them to disinvest the assets, but I didn't think that Evelyn should have been aware of that email. I took the view that, on balance, the existing provider would have received notification that the registered adviser no longer worked for Evelyn.
- But I went on to consider the email that Mr H's adviser sent to Evelyn on 15 February 2022 which asked if it had received a disinvestment instruction and to carry out the instruction if it hadn't already done so. I thought that Evelyn should have done something in relation to that email which I thought would have led to the discovery of the earlier miscommunication and should have alerted Evelyn to begin the process of selling the assets and progressing the transfer.
- I thought this would have led to Evelyn starting the sales process on 18 February 2022, and it should then have followed that the whole transfer process would have completed earlier.
- I said Evelyn should compare the current value of Mr H's SIPP with the notional value had the transfer process begun on 18 February 2022. Any loss should be paid into Mr H's plan if possible – or directly to him if that wasn't possible.

Responses to my provisional decision

Mr H said he accepted the provisional decision but wanted to make us aware that he was still awaiting the outcome of a data subject access request (DSAR) he'd made to Evelyn. He also pointed out that my comment that, "*I don't think it was Evelyn's responsibility to ensure the existing SIPP provider had an up to date adviser registered on its systems"* was incorrect. He said that was because Evelyn was also charging him for ongoing advice, so should have updated the adviser details.

Evelyn said it accepted my provisional decision and had nothing further to add.

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.

Mr H has recently updated us with his current medical condition and I'm very sorry to learn of his current situation and diagnosis. He confirmed that he didn't wish to wait for the outcome of his DSAR and so I intend to draw this matter to a close for Mr H's benefit and because of his current circumstances. As neither side has really provided any further submissions I see no reason to depart from my provisional findings.

The instructions of 8 February 2022

On 8 February 2022 Mr H's existing SIPP provider sent two emails to Evelyn. One was sent to the "*Sipp team*" and said "*please accept this email as instruction to close the above account. This email must not be treated as a disinvestment request. As a cash transfer has been requested the adviser/client will be in touch shortly regarding investment. If you know of any illiquid stock held or expected to receive additional funds for this client, please notify*

me before proceeding with the account closure."

In my view this email was an alert to Evelyn for it to prepare to transfer Mr H's pension assets - once they had been disinvested. I don't think the email required Evelyn to do anything more than simply to check whether any of the assets were illiquid or whether there were any outstanding funds due to be added to the pension account. And I think this was Evelyn's understanding as well, as was supported by its email to the provider on 17 February 2022 when it confirmed that "*there are some structured products within portfolio (sic) that investment manager would rather not sell, but they are tradeable – nothing is frozen/illiquid*." So I don't think Evelyn acted incorrectly or caused any delays in its response to the email it received.

But there was another email sent by the existing SIPP provider on 8 February 2022, which went to the financial adviser it had recorded on its system for Mr H. This email said "*as you have requested a cash transfer I would be grateful if you could arrange for the investments in the xxx SIPP to be liquidated and confirm back to us once this has been processed, so that we can continue with the SIPP transfer…"* Unfortunately, that adviser had left Evelyn some years before, so the disinvestment instruction wasn't received when it should have been – and was therefore not actioned.

Mr H said that Evelyn should have had a system which forwarded emails sent to "leavers" to an appropriate team for remedial action. He also said Evelyn made no effort to update the existing provider of a change of adviser – after all he'd left nearly three years previously. However, Evelyn said a "reject notification" would have been received by the sender notifying it that the email address was no longer in use – although the provider has told us that it didn't receive any such notification.

I did test the email address in question and received an "undeliverable" response which would support the idea that the provider would have also received the same kind of message. Although I accept that this was around 18 months after the incident in question so I can't be certain the same thing would have happened at that time. But I think, on balance, it's more likely than not that a reject or undeliverable notice would have been issued to the existing provider from the email server, which ought to have alerted it to the fact that its original request hadn't reached the person it instructed to disinvest the SIPP's investments.

But even if that wasn't the case, I don't think the responsibility can be levelled at Evelyn here as it wouldn't have known that the provider had sent an instruction email to a previous adviser, and its SIPP team was specifically told not to disinvest the assets. Evelyn wasn't made aware of where the disinvestment request had been sent so it wasn't even able to make an update quest.

The email of 15 February 2022

But while I don't think Evelyn acted incorrectly following the email of 8 February, I have seen a copy of an email that Mr H's new adviser sent to it on 15 February 2022. It said "*I hope you are well - it has been a while. We have instructed (the existing SIPP provider) to transfer Mr H's SIPP to (a new provider.)*
Please can you let me know if you have had a request to sell down the assets, if not - please can you do so."

So, I think at this point Evelyn was now generally aware of a previous disinvestment instruction and that the request had most likely been sent to it – even though its "team" hadn't directly received the request. I think Evelyn ought to have acted upon this email when it realised that the original instruction appeared to have gone missing. A reasonably quick investigation of previous communications ought to have led to Evelyn to discover that the

request hadn't been actioned by its ex-adviser and that it should therefore begin the process of disinvestment itself. It did after all take that same action on 28 February 2022 when it was advised that things had "gone wrong".

Taking that into account I think it follows that Evelyn would have been able to start selling the SIPP assets three working days after it received the email of 15 February 2022 – which I think is a reasonable timescale for the "misunderstanding" to be resolved and for it to assume the responsibility of disinvesting.

I am mindful that Evelyn didn't actually respond to the email of 15 February 2022 because it didn't think that Mr H's adviser had the authority to request any transactions on the SIPP account. And I think Evelyn was right to take that approach in general, but that would be to ignore the part of the email which suggested that something had gone wrong with the original disinvestment request – which I think it had a duty of care to at least investigate on Mr H's behalf. In my view that investigation would have uncovered the problem of the request being sent to its ex-adviser and would have then given Evelyn the general responsibility for the disinvestment of assets. The position would then have been that Evelyn was responding to the existing provider's request – not the adviser request of 15 February 2022 – which I think was the authority it required.

Putting things right

My aim is that Mr H should be put as closely as possible into the position he would now be in if his SIPP assets had been sold when I think it was first reasonable for Evelyn to have become aware that it was incumbent upon it to do so.

I'm satisfied that what I've set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What must Evelyn do?

To compensate Mr H fairly, Evelyn must:

Compare the current value of Mr H's pension with the fair value of what it would have been had the disinvestment started on 18 February 2022 and then followed the same timescale and path as it did when it was actually sold.

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.

Evelyn should pay into Mr H's pension plan to increase its value by the total 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 Evelyn is unable to pay the total amount into Mr H'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. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr H won't be able to reclaim any of the reduction after compensation is paid.

The *notional* allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr H is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr H would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

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

My final decision

For the reasons that I've given I uphold Mr H's complaint. My decision is that Evelyn Partners Financial Planning Limited should pay the amount calculated as set out above.

Evelyn Partners Financial Planning Limited should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 16 October 2023.

Keith Lawrence
Ombudsman