DRN-4372684

The complaint

Ms K says an Appointed Representative ('AR') of Quilter Financial Planning Solutions Limited ('Quilter') gave her unsuitable investment and pension switch advice in 2021. The investment advice element of her complaint has been separated. This decision is only about the pension switch advice and the complaint about the AR failing to provide log-in details for the recommended pension platform. Quilter disputes the complaint.

What happened

Ms K met the AR in the summer of 2021. She wanted to look into consolidating her pension and took its advice for this purpose. She had three Personal Pensions ('PPs') with (and managed by) Aviva, a Defined Contributions pension policy with Capita and a Section 32 Buy-Out pension policy (the "s32 policy') with Fidelity.

The AR recommended consolidation of all the pensions within a single Aviva Pension (the 'AP'). It charged an initial fee of 3% and ongoing service fee of 1% per year – both based on the pension fund value.

It said its recommendation gave Ms K the consolidation she wanted, alongside greater fund choice and regular financial advice, and that additional benefits were the platform facility, online access to the AP/platform, a high rating for the AP/platform (and for its service), drawdown facility (unavailable in four of the previous five pensions) and transparent charges.

The AR also recommended the underlying investments for the AP – six funds; 20% of the AP's portfolio allocated to two of them (each); and 15% allocated equally to the remaining four. It said they matched Ms K's balanced/medium risk profile, that they provided "excellent diversification" and that they had similar or better historical performance than the existing (or potential alternative) funds in the previous pensions. However, it also confirmed there was no guarantee on performance.

The AP increased the costs for Ms K, and the AR acknowledged this in its advice. It showed how, based on fund and plan charges only (but excluding its initial and ongoing charges) the AP would be 0.77% more expensive for each of the Aviva PPs, 0.81% more expensive for the Capita pension and 0.40% more expensive for the s32 policy. With the initial and ongoing charges added the additional expense rose to 3.04%, 3.08% and 2.67% respectively, and the AR acknowledged that investment outperformance in the AP at the same rates would be required to balance the increased costs.

The AR also noted that the switch would result in the net loss of 6.8% protected Tax-Free Cash ('TFC') in the s32 policy – that is, loss of the protected 31.8% TFC level within it and a return to the standard 25% TFC level in the AP. Its suitability report says Ms K felt comfortable with this because she was likely to be a non-taxpayer in retirement anyway and would rather have the benefits of the switch.

The report says consolidation of Ms K's pensions within an existing policy and fund switching within them was discussed but decided against; that, with regards to fund switching, she preferred the recommendation's benefits (wider fund choice, regular reviews, simplification of her pensions and the platform facility); and that the same reasons broadly applied against the idea of consolidating in an existing policy. Later in the report it also says there were no suitable funds available in her existing policies.

Ms K followed the AR's advice but queried her exposure to risk and investment timing in the course of doing so. She says she was reassured in both respects. She began to move her pensions but stopped before they were all moved, after noticing losses in values. In this respect, she also refers to a delay in having access to the AP platform because the AR did not share log-in details. Eventually, she says she obtained those details directly from Aviva, after which she gained access and learnt about the financial loss.

She complained thereafter. Quilter did not uphold her complaint. It said the AR's recommendations were suitable, that the isolated matter of poor investment performance does not mean its advice was unsuitable, and that performance was/is beyond anyone's control and was not guaranteed. The matter was then referred to us.

One of our investigators looked into it and concluded, on balance, that the AR's advice was unsuitable. She mainly found as follows:

- There is merit in some of what Quilter has said about the difficulty of investment timing without the benefit of hindsight and the benefit of investing for the longer term.

- However, an issue in Ms K's case is that she had a much shorter time horizon at the point of advice. She was self-employed and on a low annual income at the time, but she planned to retire within three years thereafter. It does not appear that either party had a firm idea of when and how she expected to begin drawing benefits from her pension. Her low income meant she might have needed to do that earlier than three years. She had limited time and capacity to recover from any lost value in her pensions, and there appears to have been no discussion of using an income drawdown strategy in this respect.

- The recommended switch was significantly more expensive for Ms K, due to the higher level of charges. This emphasised the need for investment outperformance within the limited time horizon. Achieving that – on the basis of her risk profile and with the possibility that she would need to access the pension earlier than planned – could not be guaranteed.

- Available evidence does not show that the funds in her previous pensions were inappropriate for her.

- Ms K should have been advised to retain her previous pensions until when she had further considered her retirement plans.

- The AR did not provide her with online access to the AP. Typically the pension provider would contact the policy holder about this, but the AR could have assisted.

- Quilter should calculate and pay financial loss redress to Ms K and £200 for the trouble and upset the matter has caused her.

Quilter disagreed with this outcome and asked for an Ombudsman's decision. It mainly repeated its key submissions and said:

- The suitability report confirms that Ms K wanted drawdown facilities, which were unavailable in four of her previous pensions. She also wanted to consolidate pensions that had not been reviewed since they were paid up, and to benefit from a platform service and associated ongoing advice, but her previous pensions did not allow for adviser charging.

- Her previous pensions offered limited fund choices. The AR considered internal fund switches for each pension but this limitation of choices meant the pension switch was better for her.

- The time horizon was at least three years, but Ms K wanted drawdown facility and around £15,000 annual income, so she clearly would not have accessed the pension in one move and there would have been a remainder invested for growth.

- All fees were disclosed and the recommendation matched her risk profile.

- The recommendation was suitable, and it is the downturn in performance that has caused Ms K's complaint. However, performance was never guaranteed.

The matter was referred to an Ombudsman.

Ms K had the chance to comment on Quilter's response. She mainly said – her objective for the pensions was their consolidation; she repeatedly asked about investment timing and was assured the AR had considered that; the AR did most of the talking and presented its recommendation very positively; the idea of a platform based solution was the AR's, not hers; she does not recall specifying a drawdown figure, it was the AR who presented what could be drawn down; the idea of an annual drawdown of £15,000 does not take her state pension and taxation into account, and it would have required a pension fund around three times the value of hers; time has shown that the funds recommended to her have underperformed those she previously had; the AR applied poor investment/market analysis and timing; and it did not react when her losses began to appear.

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, I have reached the same conclusion expressed by the investigator. I uphold Ms K's complaint. The AR's pension switch recommendation was unsuitable for her. Instead, she should have been advised to retain the pensions she already had. But for the unsuitable pension switch/consolidation, the new investments under the AP would not have happened. The switch is primarily what went wrong in her case.

It is undisputed that Ms K presented a pensions consolidation objective to the AR. However, that did not automatically mean the AR was obliged to execute it. She sought advice, and the objective was part of what she wanted to be advised on. In other words, the AR was the expert in the relationship, so it was responsible for ensuring that its advice to Ms K was suitable for her, as required by the regulatory rules and expectations I will summarise below.

Such advice included an assessment of whether (or not) the pensions consolidation was, in itself, suitable for her. Based on the AR's analysis, there was enough to conclude that the consolidation was inherently unsuitable. That should have been its advice. If Ms K subsequently proceeded with it, against advice, that would have been a matter beyond the AR's control but, at least, it would have discharged its obligation to give suitable advice. None of these happened. Instead, the AR recommended the unsuitable pensions consolidation/switch and Ms K relied on, and followed, its recommendation.

The regulator’s Principles for Businesses, at Principle 6, requires a firm to pay due regard to the interests of its customers and treat them fairly. This is partly echoed in the regulator’s Conduct of Business (‘COBS’) rules, at COBS 2.1.1R, which requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients and in relation to designated investment business carried on for a retail client.

These regulatory provisions are directly relevant to a firm’s responsibility for the suitability of its recommendations – which is confirmed in COBS 9.2.1R. The duty upon a firm to give suitable advice sits in the overall context of its duty to uphold its clients best interests.

In 2009, the regulator produced a checklist for pension switching, which highlighted four key issues that advising firms were/are expected to consider. That checklist has been followed by a number of regulatory reminders, guidance and alerts over the years concerning the same subject (and associated aspects of pension switches). In 2021 the AR would have – or ought reasonably to have – been mindful of all this. The four checklist considerations included ‘charges’, whereby the following question was to be addressed – is the client being switched to a pension that is more expensive than the existing one(s) without good reason?; and ‘existing benefits’, whereby the following question was to be addressed – is the client losing benefits in the pension switch without good reason?

The AR’s recommendation included acknowledgements that the pension switch was significantly more expensive for Ms K, and that she would be losing the enhanced element of her protected TFC in the s32 policy. Overall and on balance, I have not seen evidence to persuade me that there was good reason(s) to recommend the switch despite these important drawbacks.

I repeat and quote what I said in the background section above –

“*The AP increased the costs for Ms K, and the AR acknowledged this in its advice. It showed how, based on fund and plan charges only (but excluding its initial and ongoing charges) the AP would be 0.77% more expensive for each of the Aviva PPs, 0.81% more expensive for the Capita pension and 0.40% more expensive for the s32 policy. With the initial and ongoing charges added the additional expense rose to 3.04%, 3.08% and 2.67% respectively, and the AR acknowledged that investment outperformance in the AP at the same rates would be required to balance the increased costs.*”

The total post-switch additional costs/charges to Ms K stood at almost £3,000 per year. Disclosure of the fees to her, at the time, is not in dispute. The issue is about whether (or not) these significantly increased costs rendered the recommendation unsuitable.

The AR was aware that there were no performance guarantees. Yet, to recover from the financial loss caused by charges (alone) associated with the AP she needed investment outperformance of around 3%. This stood in the context of investments being inherently unpredictable and subject to both losses and gains. As I also noted above, the AR acknowledged that the six newly recommended funds for the AP had similar or better historical performance compared to the funds she previously held in her pensions. However, nothing appears to have been specifically highlighted as the potential source of the required outperformance.

The recommendation burdened Ms K with immediate and continuing losses (due to significantly increased charges) which needed to be recovered. However, she was seemingly left without a tangible strategy to recover those losses – or, at best, she was left with the *hope* that the six new funds will provide the required outperformance and recovery. As the investigator highlighted, and as Quilter accepts, the investment time horizon was around three years. In other words, the *hopeful* outperformance and recovery needed to happen in a relatively short period of time.

This was a situation that Ms K did not have to be placed in. Without the switch, she did not have the same charges induced losses to recover from in her previous pensions. The consideration that follows is whether (or not) there was good reason to recommend the switch and put her in such an unsuitable position.

The AR essentially said the benefits of the switch outweighed the increased costs. Those benefits were said to be consolidation, greater fund choice, regular financial advice, having a highly rated platform facility with online adviser led access, having a drawdown facility and transparent charges.

As I said above, the objective to consolidate was still subject to advice and to suitability, so it was not to be viewed by the AR as something to pursue at all costs.

The AR noted that the Aviva PPs had access to 24 funds, the Capita policy had access to 15 funds and the s32 policy (which was the most valuable of the five pensions, and was around half of their total value) had access to 48 funds. This amounted to a total of almost 90 funds. I appreciate that the recommended AP had access to more, but the task for the AR was to ensure Ms K's pensions were suitably invested. A greater number of available funds did not automatically mean those already available in the existing pensions were unsuitable.

I share the investigator's view that Ms K's previous pensions' funds do not appear to have been unsuitable. The suitability report did not identify any such meaningful unsuitability amongst the investments, instead the AR's view was mainly that the six recommended funds could potentially perform better. Furthermore, the report set out comparisons with potential replacement funds from within each pension. Again, the view was that the six recommended funds could do better, but this stands as evidence that potentially suitable alternative funds were available, and appear to have been identified, within the existing pensions.

Overall, I do not consider that greater fund choice justified the increased costs and charges to Ms K.

The same applies to the matters of regular financial advice and having an online adviser led platform facility. I have not seen evidence that Ms K attached any particular value to either of these, or that she asked for them, as she says, her objective was the pension consolidation. I appreciate that both can potentially give added value to a pension holder, but my consideration is specifically about whether (or not) having both was worth the immediate and continuing charges induced losses (and need for recovery) summarised above.

Her somewhat obvious ultimate goal would have been to maintain and hopefully build value in her pension arrangement. In the circumstances of her case, I am not persuaded that it was suitable for her to endure the opposite (a loss in value) mainly or partly because of any benefits in having these two facilities. Even if a good argument can be made for the benefits of ongoing advice in her case, I do not consider that the same could be done for the platform facility that she does not appear to have asked for and seemingly had no intention to use for additional investments. With regards to advice, it could also be said that her proximity to drawing benefits from her pensions – and the relatively short three years time horizon – meant the advice in 2021 could possibly have been structured to cater for her time up to retirement.

I have not seen evidence that the charges in her previous pensions (or in their underlying funds) were opaque or that understanding them was a source of problem for Ms K. As such, transparency of charges was not a credible selling point for the pensions switch.

The s32 policy already had a drawdown facility. Overall, all five previous pensions had a total value at the time of around £101,000 (slightly more in terms of ‘transfer’ value). As I said above, the s32 policy was the most valuable and it accounted for around half of this figure. In other words, Ms K already had a drawdown facility within her existing pension arrangements and that facility gave her access to drawdown from around half of her total pensions’ value. On balance, and in this context, I am not persuaded that the drawdown facility in the recommended AP was worth the higher costs to her.

In addition to the higher costs, the AR’s recommendation also lost Ms K the enhanced element of her protected TFC in the s32 policy. It essentially considered that the same benefits mentioned above and the likelihood that she would be a non-taxpayer in retirement either nullified or mitigated this loss. I disagree. I have already addressed why the asserted benefits fell short of justifying the increased costs, and the same conclusion applies to this loss in her enhanced protected TFC entitlement. Whether (or not) she was likely to be a non-taxpayer in retirement was somewhat irrelevant. The loss amounted to almost £3,700 of tax-free cash at the time and, with growth, that could potentially have been more at a future point of withdrawal. I do not consider it suitable to lose such a relatively valuable protected benefit without good reason to do so – and I have not found such good reason in Ms K’s case.

The above findings set out the reasons why the AR’s recommendation was unsuitable and why Ms K ought not to have been advised to switch her pensions to the AP. I note Quilter’s comments about poor performance driving the complaint. However, as is evident above, I have reached no findings on the matter of performance (or investment/market timing/analysis) and I acknowledge that no performance guarantees were given. The former is not relevant to the fundamental matter of the AR’s unsuitable pensions switch advice.

The existing pensions and their invested funds do not appear to have been unsuitable. Even if Ms K insisted on fund changes within them – which I have no grounds to find – evidence shows that could probably have been suitably catered for.

I also do not have grounds to conclude that she would have disregarded the AR’s advice in any case, so I consider that if she was suitably advised to retain her existing pensions arrangements – as she should have been advised – she would have done so.

I share the investigator’s view on the delay in Ms K obtaining log-in details for the AP platform. It is fair to say the platform provider would typically provide such information. However, given that it was a platform with adviser access and the AR appears to have had that information, it is also reasonable to say it ought to have assisted her in getting those details at the time. She eventually obtained them. The award I order below for the trouble and upset she has been caused in the complaint extends to cover this aspect too.

Putting things right

Fair compensation

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

For the reasons given above, I take the view that she would have retained her existing pension arrangements. The investigator referred to the use of her previous pensions’ notional values, had the switch not happened, as the redress benchmark. I agree. However, I also cannot be certain that those values will presently be obtainable from the providers of those pensions.

I am satisfied that what I have set out below is fair and reasonable redress for Ms K, including provision for an alternative benchmark (based on her profile at the time of advice) if the notional values of the previous pension plans cannot be obtained.

What must Quilter do?

To compensate Ms K fairly, Quilter must:

- Compare the performance of her investment with the total notional value if they had remained with the respective previous providers. If the actual value is greater than the total notional value, no compensation is payable. If the total notional value is greater than the actual value, there is a loss and compensation is payable.

- Pay into Ms K'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 Quilter is unable to pay the total amount into Ms K's pension plan, it should pay that amount direct to her. 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 is not a payment of tax to HMRC, so Ms K would not be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms K's actual or expected marginal rate of tax at her selected retirement age. If she would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Ms K £200 for the trouble and upset the matter has caused her. This is a reasonable amount to reflect the trouble and upset she has faced following the unsuitable pension switch, and the trouble she faced in obtaining the AP's online log-in details.

- Provide the details of the calculation to Ms K in a clear and simple format.

Income tax may be payable on any interest paid. If Quilter deducts income tax from the interest it should tell Ms K how much has been taken off. Quilter should give Ms K a tax deduction certificate in respect of interest if she 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")	Additional interest
The Aviva Pension	Still exists and liquid	Notional values from previous providers; or alternative benchmark stated below.	Date of investment	Date of settlement	Not Applicable

Actual value

This means the actual amount payable from the investment at the end date.

Notional [Fair] Values

This is the value of Ms K's investment had the switched pensions remained with their respective previous providers until the end date. Quilter should request that the previous providers each calculate their parts of this value with regards to how each switched pension would have performed (based, if necessary, on Ms K’s balanced/medium risk profile) between the start and end dates. Quilter should then calculate the ‘total notional value’.

Any withdrawal from the AP should be deducted from the total notional 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 will accept if Quilter totals all those payments and deducts that figure at the end, instead of deducting periodically.

If the previous providers are unable to calculate notional values for the switched pensions, Quilter will need to determine a fair value for Ms K's investment instead, using this alternative benchmark (applying the same adjustments stated above) – The FTSE UK Private Investors Income Total Return Index.

Why is this remedy suitable?

- If the previous providers are unable to calculate notional values, then I consider the measure below is appropriate.
- 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 K's balanced/medium risk profile is reasonably matched by the above alternative benchmark, and that its use will broadly reflect the sort of return she could have obtained with suitable advice.

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 Ms K’s case, the complaint event occurred after 1 April 2019 and the complaint was referred to us after 1 April 2023, so the applicable compensation limit would be £415,000.

decision and award

I uphold Ms K's complaint on the basis stated above. Fair compensation should be calculated as I have also stated above. My decision is that Quilter should pay her the amount produced by that calculation, up to the relevant maximum.

recommendation

If the amount produced by the calculation of fair compensation is more than the relevant maximum, I recommend that Quilter pays Ms K the balance. This recommendation is not part of my determination or award. Quilter does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Ms K's complaint and I order Quilter Financial Planning Solutions Limited to calculate and pay her compensation (including the award for trouble and upset) as set out above. It should also provide her with a calculation of the compensation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 6 November 2023.

Roy Kuku
Ombudsman