DRN-4442956

The complaint

Ms S complains that Holyoakes Group Limited consolidated her two pensions into a self-invested personal pension (SIPP) plan, which has now reduced in value.

Ms S says that the advice to switch the two plans was negligent and she would now like Holyoakes to put her back into the position that she would've be in, had it not been for their advice.

Ms S is being represented by a third party in her complaint.

What happened

In December 2017, Ms S took advice from Holyoakes about her retirement planning needs. At the time, she held an occupational defined benefit pension and two workplace defined contribution pensions that she wanted to explore transferring. As Holyoakes weren't able to provide advice on the defined benefit pension, that transfer was considered by another advice firm and was ultimately transferred into a new Aegon SIPP.

After assessing Ms S's circumstances and objectives, the Holyoakes adviser recommended that Ms S switch her two defined contribution pension schemes (which I shall call Plan A and Plan S) totalling around £58,000, to her existing Aegon SIPP. Holyoakes delayed issuing the suitability letter setting out their recommendation until June 2018, when her occupational defined benefit pension that was also being transferred, had been completed.

In August 2022, Ms S decided to formally complain to Holyoakes. In summary, her representative stated that the switch was unsuitable, namely for several reasons:

- That Holyoakes failed to properly understand her financial circumstances.
- That her attitude to risk wasn't properly assessed.
- That she didn't have the capacity to take risks at the level Holyoakes had claimed.
- That the risks of the new solution being recommended were not properly explained.
- That she was promised performance in excess of her existing funds.
- That Holyoakes failed to consider the higher costs associated with the replacement plan.

After reviewing Ms S's complaint, Holyoakes concluded that they were satisfied that they'd done nothing wrong. They also said, in summary, that having reviewed Ms S's concerns, they felt that they could demonstrate that the switch of the two plans was in her best interests.

Ms S, however, was unhappy with Holyoakes's response so her representative referred her complaint to this service. In summary, they said that Holyoakes's advice to switch Ms S's two former workplace pensions was unsuitable and she would've been better off leaving the monies where they were.

The complaint was then considered by one of our Investigators. He concluded that Holyoakes hadn't treated Ms S fairly and didn't think that the switch of the two plans looked to be in Ms S's best interests.

Holyoakes, however, disagreed with our Investigator's findings. In summary, they said that they didn't think that Ms S had suffered a financial loss and asked for more time to look into things before responding in full. After chasing the business on several occasions, Hollyoakes failed to provide any further response. As the business explained that they didn't agree with our Investigator's view, the case has come to me to review that outcome.

After considering the complaint, I issued a provisional decision on this case as, whilst I explained that I was minded to agree with the Investigator's initial view, I wanted to add wider context about the upheld decision.

<u>What I said in my provision decision:</u>

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have summarised this complaint in far less detail than Ms S has done and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this; our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it - I haven't. I'm satisfied that I don't need to comment on every individual argument to be able to reach what I think is the right outcome. Instead, I will focus on what I find to be the key issue here – and that's Ms S's concern that she shouldn't have been advised to move her two defined contribution pension schemes. Having carefully considered both sets of submissions, I'm upholding Ms S's complaint and it's largely for the same reasons that our Investigator has set out. I'll explain why below.

In reaching my decision, I've taken into account the relevant laws and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The list below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Holyoakes's actions here.

PRIN 6 : A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 7: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.

COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

I've also considered the provisions in COBS 9, which deals with the obligations when giving a personal recommendation and assessing suitability. In addition, the regulator's checklist (published in 2009) for pension switching, which highlighted four key issues it thought should be focussed on, have also been considered:

• Charges (has the consumer been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?)

• Existing benefits (has the consumer lost benefits in the switch without good reason?)

• Risk (has the consumer switched into a pension that doesn't match their recorded ATR and personal circumstances?)

• Ongoing fund management (has the consumer switched into a pension with a need for ongoing investment reviews, but this was not explained, offered or put in place?)

I've also considered the regulator's pensions related industry alert to firms in 2013, which included the following: "It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages or disadvantages of investments proposed to be held within the new pension".

I've considered the regulator's further alert in April 2014 too, which included the following: "Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable".

"If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole."

<u>Was the original advice to transfer Ms S's two pensions suitable?</u>

The regulator's guidance above was all issued prior to Holyoakes providing advice in 2017/18.

When thinking carefully about the guidance that the regulator provided, it meant that Holyoakes needed to obtain relevant information about Ms S's overall profile and, given that it considered a pension switch for her, it was also obliged to address the 2009 checklist related to her profile, circumstances and objectives at the time. The switch had to be in her best interests. It had to be worth the movement away from the two pensions and it should have had meaningful prospects of being better for her than the existing two plans – otherwise there would arguably have been no point in switching and no justification in incurring the costs associated with the switching process. It follows from this that a comparison should also have been made between Ms S's two plans and the proposed Aegon plan in order to illustrate whether or not the latter was in her best interest.

Holyoakes provided Ms S with a suitability report that set out the main themes of their discussions, along with their recommendation. Her main objectives were noted in the suitability report as, in summary:

- *You are concerned about how your plans have been performing, especially in times of poor investment performance and would like the help of an adviser during these times.*

- *You wish to give your funds the opportunity of a better return until you decide to draw on them.*

- *You do not feel that there is much flexibility in the existing plans.*

- *You wish to transfer your plans into your new Aegon plan.*

- *Although you do not have a definitive retirement date in place, for the purpose of this review, you have agreed to use 67.*

- *You like the idea of having an adviser to provide you with annual reviews.*

Having thought about this carefully, I'm not convinced that the objectives above, when considered against the wider evidence within the file, are strong enough reasons to support the recommendation to switch away from the two pensions and into the Aegon plan. I'll explain why.

I've looked at the fact-find that Holyoakes completed at the time of the advice. I'm of the view that their information gathering process wasn't particularly robust and that's because there's large sections of the fact-find document that haven't been completed, such as Ms S's income and expenditure along with her assets and liabilities. In shaping my decision, I've also considered the telephone call that our Investigator had with Ms S, where she explained her situation in more detail from the time of the interview. She explained that she hadn't been in full time employment since 2016 and was only working part-time, earning around £300 per month when she met with Holyoakes. She went on to explain that the £50,000 she received from her divorce settlement was used in part to repay her debts and the balance used to cover two years' worth of rent payments in advance on her home. In addition, Ms S explained that earlier in 2017, she'd been diagnosed with breast cancer.

At the time of her appointment with Holyoakes in December 2017, she didn't have any other assets. She also told our Investigator that she doesn't recall declining to provide any information to Holyoakes's adviser at the time, despite the fact-find suggesting otherwise. At the time of Holyoakes's advice, Ms S was 48 years old, recently divorced with two dependent children and renting her home.

So, taking the above into account, I've thought about the Regulator's checklist:

Charges

Holyoakes's adviser explained in the suitability letter to Ms S, that neither the provider of Plan A nor Plan S, had provided him with details of the charges associated with both of her pensions. He went on to explain that 'you still wish to proceed with the transfer without this comparison because of the reasons listed in your needs and objectives'. In addition, as the Aegon plan had only recently been set up to accept the transfer of Ms S's defined benefit pension transfer, Holyoakes explained that they didn't have the costs associated with that plan either, so no like for like comparison could be undertaken between her existing two pensions and the new solution that they were recommending that she switch in to.

As I've already explained, charges play a very important part when considering whether it's in the consumer's best interest to switch their pension or not. Whilst they can't be viewed in isolation, higher costs would generally point towards being a good reason not to move. So, that means there'd need to be other, more compelling reasons to justify a switch. From what I've seen from the file, Ms S's existing Plan A had an annual charge of 0.359% p.a. and Plan S had a charge of 0.4245% p.a. Following the recommendation, the Aegon plan had a platform charge of 0.45% of the fund value, an investment charge of 0.875% p.a. and an *ongoing advice fee of 0.75% p.a. That meant that Ms S saw her costs increase on Plan A and Plan S by 269% and 212% respectively, ignoring the 0.75% ongoing advice charge.*

Whilst in the later part of Holyoakes's letter, it explained that a disadvantage of the Aegon plan was 'the potential higher charges in your new plan', but because Holyoakes didn't provide Ms S with a like for like comparison of costs in the suitability letter or before proceeding with the switch, she wasn't aware to what extent the charges on the new plan were higher compared to her two existing pensions. That's problematic because when firms are undertaking switch business, the Regulator expects consumers to be given the costs (in pounds and pence) of what they're currently paying against the new recommendation, so they're placed in a fully informed position before agreeing to commit. Telling a consumer that there's a potential for higher costs when charges have doubled isn't enough. Whilst Ms S was given an illustration at the point that she signed up, just because she was advised of what the new costs were doesn't then make the advice suitable.

The end result meant that Ms S would be paying around an additional £500 each year over what she was previously paying with her two existing plans. That meant the new funds would need to outperform her existing funds every year to make switching worthwhile. Allied to that, to provide the switch advice, Holyoakes also levied a fixed fee of 3.5%, which equated to around £2,030. So, any outperformance would also need to make up for the original advice costs that Ms S had suffered.

<u>Existing benefits</u>

In their suitability letter to Ms S, Holyoakes stated: 'You do not feel that there is much flexibility in the existing plans'. Holyoakes didn't then go on to explain what they meant by a lack of flexibility, although I suspect more likely than not, they were referring to how the pensions could be accessed at retirement. I've looked closely at the features both plans offered. Whilst Plan A didn't, Plan S already had flexible access options built into it, so Ms S didn't need to transfer to access those features. Therefore, moving from Plan S to the Aegon SIPP didn't improve Ms S's position; it simply put her in the same position that she was already in. Also, given that Ms S explained at the time that she wasn't looking to retire for around another 20 years, the ability or manner of how to access monies from the pension shouldn't have been given such prominence when determining whether to switch or not. As she was still well within the accumulation phase of her pension planning, the switch to a suitable drawdown solution could've been made nearer the time, if necessary, to accommodate Ms S's needs at that particular point.

Whilst Holyoakes stated that Ms S was planning to retire at age 67, both of her existing plans offered the option to take retirement benefits earlier (from age 55) than the normal scheme retirement age of 65.

In their suitability letter to Ms S, Holyoakes identified that instead of having the normal 25% tax-free cash entitlement that most pensions offer at retirement, Plan A had an enhanced level of tax-free cash. They went on to say that 'as of 5 April 2006, you had a protected tax-free amount of £3,507 in {Plan A} when the fund value was £9,631. As these values aren't very large, you are happy to transfer as you feel you will benefit from the opportunity of a greater return until retirement'. It seems to me that Holyoakes's explanation of the enhancement was confusing, and that Ms S wasn't presented with the full facts here. Whilst Holyoakes correctly stated what Ms S's enhanced tax-free cash entitlement was in 2006, they failed to revalue it to the point at which the decision making was taking place. Given the value of Plan A in mid-2018 was £46,000, Holyoakes's letter failed to explain that her tax-free cash entitlement at that point was around 30% of the £46,000, so it had grown to around £13,800 and wasn't the £3,507 that they'd stated. With around another 20 years' worth of investment growth available at the time that the advice was given, that additional feature *may have become even more valuable at the point that she eventually gave up work, so I don't think Holyoakes really spelt out to Ms S what she was giving up.*

Within Holyoakes's letter to Ms S, they explained that she was "concerned about how your plans have been performing especially in times of poor investment performance and would like the help of an adviser during these times". They then went on to say that was one of the reasons why she should transfer her monies away to the Aegon SIPP. However, when Holyoakes have undertaken a review of the performance of each of Ms S's pensions, both of the funds within Plan S delivered a return above their sector average over three and five years. When Holyoakes looked at the performance of the funds within Plan A, three of the six funds didn't have five-year data (presumably because of the age of the fund) and of the three that did, two of them delivered performance above the sector average. So, having thought about how Holyoakes framed their performance discussion within the suitability letter that they sent Ms S, I don't think it was particularly balanced as there was no mention of rebalancing the existing fund(s), nor proper acknowledgement that many of her funds had delivered a robust performance compared to their sector average. And, it seems to me that they were trying to fix a problem that wasn't necessarily there.

<u>*Risk*</u>

As part of their advice discussions, Holyoakes looked at the level of risk that Ms S was prepared to take with her monies. Part of that process involved the completion of an attitude to risk questionnaire that resulted in Ms S being classed as a medium risk or balanced investor, which I understand Ms S hasn't disputed. I don't intend to repeat Ms S's responses to that risk questionnaire as both parties have a copy of Ms S's answers and our Investigator also shared them in his initial view. Having looked at Ms S's responses to the questions, whilst there's inconsistency between some of the answers about the level of risk that she's prepared to take, the balanced outcome doesn't look unreasonable, particularly in light of how long she was planning on leaving the monies invested for.

However, whilst Holyoakes broadly established when Ms S wanted to retire, they didn't look to understand the level of income that she'd need to meet her living standards at retirement. That omission is really important, because whilst the suitability report does cover the level of risk that Ms S is prepared to take with her monies, it's silent on whether she had the capacity or even the need to take risks at that level. I've already explained that Holyoakes's fact-finding and collection of soft facts was limited, and they failed to collect details of Ms S's other investments and liabilities at the time. We do know, however, from the conversation that Ms S had with our Investigator recently, that she didn't have any other assets aside from Plan A and Plan S and the defined benefit pension that she'd also transferred. The fact-find is silent on what entitlement to state pension Ms S may have at age 67, but I well suspect that she won't receive a full state pension because for many years, she says that she worked part-time on a low income.

Completing a risk questionnaire is only the starting point of the risk discussion. It seems to me that Holyoakes placed a significant reliance on the outcome of that questionnaire to determine Ms S's profile. They then failed to tailor the outcome of that questionnaire (that could involve either dialing the risk up or down) based on the outcome of her specific wider personal circumstances and whether she could afford to take risk – I think this was exacerbated by the fact Holyoakes failed to properly undertake a detailed enough fact-find thereby making their risk classification unclear.

<u>*Ongoing Fund Management*</u>

By Holyoakes's own admission, Ms S was an inexperienced investor. However, two of the reasons justifying the switch within the suitability letter they sent Ms S were:

- *To give you access to a far wider range of specialist investment options, opportunities and fund management groups than are currently available to you from your current plan.*

- *To allow you to benefit from greater investment choice.*

I've looked at Ms S's two existing pensions, Plan A (which was worth around £46,000 at the time of the advice) was invested in six funds but offered a choice of 13 different funds to select from. And Plan S (that was worth around £12,000) had 11 different fund options but was invested in two funds. Holyoakes then went on to recommend that Ms S spread her £58,000 across eight different funds in the new Aegon SIPP, which when combined, had a risk score of '5' that was in line with the attitude to risk questionnaire that they'd completed with her.

When I think of the modest size of Ms S's pensions, I can think of no reason why an inexperienced consumer in her position would need access to a wide range of specialist investments or a wider investment choice than the collective 24 options that were already on offer in her existing defined contribution schemes. In addition to this, I think by recommending eight different funds, Holyoakes placed Ms S in a position where she then had a greater reliance on the need to take advice than she had previously.

Holyoakes discounted retaining both Plan A and Plan S because it wouldn't allow them to provide ongoing advice. More specifically, I think what they meant was neither of the providers of Plan A or Plan S would allow adviser charging on the policies. The absence of an adviser charging feature on a plan isn't sufficient justification for discounting it, if the plan is still suitable for the consumer's circumstances.

Given that Ms S was self-employed, working part-time and on a low income at the point Holyoakes provided the advice to switch, I'm not convinced that Ms S would have really benefited from the additional features that the SIPP offered. That's because, she wasn't in a position to add to the investment, her circumstances were straight forward and could've more likely than not have been served by a simple, single managed fund undertaken through a fund switch on her existing plans.

<u>Summary</u>

I don't doubt the flexibility, control and potential for greater returns sounded like attractive features to Ms S. But Holyoakes wasn't there just to transact what Ms S might have thought she wanted. The adviser's role was to really understand what Ms S needed and recommend what was in her best interest. With the reasonable performance track record of her existing funds, her two defined contribution pensions already matched the aim of Ms S's retirement planning objectives. In contrast, the recommended SIPP compared less favourably in terms of cost and the performance drag that would have on the new, more expensive funds. The new SIPP would've needed to outperform her existing two pensions just to match the future benefits that Plan A and Plan S would've provided.

I think, given that Ms S had already transferred the monies in her existing defined benefit pension to the Aegon SIPP, the idea of consolidating the two defined contribution plans wasn't unreasonable. However, from what I've seen of Ms S's circumstances from the time, I'm not persuaded that moving Plan A and Plan S was in her best interests. At the time of the advice, she'd gone through a divorce and suffered a serious illness, both of which are markers which the regulator would point towards potential consumer vulnerability, which therefore warranted an additional layer of care on Holyoakes's part which doesn't appear to have been acknowledged.

I think that Ms S could've met her objectives by not transferring the two pensions and retaining her plans in their existing format. She could've then continued to benefit from a low-cost solution. I think, had Holyoakes recommended that Ms S retain those two pensions, she would've more likely than not followed their advice, given that she was an inexperienced consumer who was taking direction from them. Therefore, I don't think that Holyoakes's recommendation to switch Ms S's two defined contribution pensions was suitable and require them to take the following actions below to put things right for her.

<u>Responses to my provisional decision:</u>

After reviewing my provisional decision, Ms S's representative responded, explaining that they accepted the outcome in full.

Holyoakes responded, explaining that they had undertaken an analysis of the performance of Ms S's new pension, compared to where her monies were invested previously. They went on to explain that the calculations they'd undertaken showed that Ms S had been made better off financially by moving her monies. They maintained their view, that Ms S had received the correct advice to switch her two pensions. They went on to question, given the financial gain that Ms S had made, whether it was reasonable to still award her the £300 that I'd set out in the provisional decision for the inconvenience that she'd suffered.

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.

As I've already explained, Ms S's representative explained that they had nothing further to add. Despite their analysis, Holyoakes did not provide any counter submission about why the complaint shouldn't be upheld, other than to say that they believed the switch was right for her, given that their calculations showed she'd made a profit.

Holyoakes provided a range of calculations which, they say, show Ms S's pension returned a gain compared to her previous two plans. At this point I should say that this service does not offer a checking service to validate the calculations submitted by businesses. Despite the possibility that Ms S may have made a gain, that doesn't alter my thinking about the suitability of the recommendations that Holyoakes set out to her.

The £300 that I awarded Ms S in the provisional decision was in recognition of the trouble and inconvenience that Holyoakes's actions have caused her and as such, I see no reason to alter that. Regardless of whether Ms S has benefited from a financial gain, she has still lost valuable plan features that can't be reinstated (such as her protected tax-free cash which, over the years will become more valuable, and low charges) and I've not seen anything new to persuade me that Holyoakes's advice was appropriate for her.

It therefore follows that I have reached the same decision for the same reasons that I set out in my provisional decision. Holyoakes should provide copies of their calculations to Ms S and her representative, so that they can satisfy themselves that Holyoakes have correctly applied the redress methodology that I originally set out in my provisional decision and which I repeat below.

Putting things right

Had she received suitable advice, in my view Ms S would more than likely not have stayed with her existing providers.

Fair compensation

In assessing what would be fair compensation, my aim is to put Ms S as close as possible to the position she would probably now be in if she had been given suitable advice. It is not possible to say precisely what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Ms S's circumstances and objectives when she invested.

What should Holyoakes do?

To compensate Ms S fairly it should:

Compare the performance of Ms S's Aegon SIPP (specifically the defined contribution funds she transferred into the plan) with the notional value if those monies had remained within the same funds at Plan A and Plan S. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

Holyoakes should also add any interest set out below to the compensation payable.

If there is a loss, Holyoakes should pay into Ms S's pension plan to increase its value by the 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 Holyoakes is unable to pay the compensation into Ms S's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation 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 Ms S won't be able to reclaim any of the reduction after compensation is paid.

The *notional* allowance should be calculated using Ms S's actual or expected marginal rate of tax at her selected retirement age.

It's reasonable to assume that Ms S is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Ms S would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

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

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Aegon pension	Still exists and liquid	Previous DC funds in Plan A	date switched to	Date of my final	8% simple per year if

		and Plan S	Aegon plan	decision	Holyoakes have not paid any redress due within 30 days of the consumer accepting the final decision

Actual value

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

Notional value

This is the value of Ms S's investment had it remained within the original Plan A and Plan S funds until the end date. Holyoakes should calculate this value.

Any withdrawal, income or other distributions paid out of the investment should be deducted from the 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'll accept if Holyoakes totals all those payments and deducts that figure at the end.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Ms S didn't need to switch her two defined contribution pensions to Aegon and therefore, this will place her back in the same position she would've been in as if the sale had not taken place.

Trouble and upset

Given the inconvenience Holyoakes have caused Ms S, they should pay her £300 for the trouble they've caused to her retirement planning. Whilst the £300 won't recompense her for the features (enhanced tax-free cash and low charges) that she's now lost, I feel it does recognise the trouble that they have caused her.

My final decision

I uphold Ms S's complaint and I require Holyoakes Group Limited to put things right for her in the manner that I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 7 December 2023.

Simon Fox
Ombudsman