

The complaint

Mr M complains that Profile Financial Solutions Limited (PFS) failed to provide regular reviews of his pension within the agreed terms he had with the firm.

What happened

In late 2013 and early 2014 Mr M received advice from PFS to consolidate several of his personal pensions into a single personal pension with Scottish Widows.

PFS received an initial fee for their advice. They also received regular fees from the pension for on-going advice.

In late 2022 Mr M complained to PFS via a professional representative. He said that although he remembers having some meetings with PFS, he was not contacted within the agreed terms of his agreement with them. He said PFS had failed in their regulatory obligations by failing to carry out reviews which he'd been charged for. Mr M asked for a refund of all of his fees.

In response PFS said that in the last eight years, since the initial advice in 2014, they'd had nine detailed discussions with Mr M around the suitability of his pension. They went on to say that during those calls Mr M's circumstances and the position of his pension were discussed. PFS provided a timeline of their contact with Mr M since 2014.

The first part of PFS' timeline noted contact with Mr M in; June 2015, May 2016, May 2018 and January 2020.

Mr M remained unhappy with PFS' response and so brought his complaint to our Service. An investigator looked into this complaint. She asked PFS for evidence that a review had taken place in 2019.

PFS sent our investigator a screenshot from their systems which they say demonstrated they attempted to call Mr M in May 2019 for a review.

I sent Mr M and PFS a provisional decision on this complaint. In it I said that I didn't think PFS had evidenced that they'd provided the service they'd agreed to in 2017 and 2019. I've copied the relevant part of my provisional decision below which forms part of this decision.

My provisional decision

In my provisional decision I said;

'When considering what is fair and reasonable, I take into account relevant laws and regulations as well as the regulator's rules, guidance and standards. Where appropriate I also consider what was good industry practice at the time of the advice.'

What the regulator had said?

As a regulated firm, PFS had many rules and principles that they needed to adhere to when

providing advice to Mr M. Many of these were found in the regulators handbook under the Conduct of Business Sourcebook (COBS) and Principles for Businesses (PRIN).

The most relevant rule to this complaint is;

COBS 6.1A.22

A firm must not use an adviser charge which is structured to be payable by the retail client over a period of time unless (1) or (2) applies:

(1) the adviser charge is in respect of an ongoing service for the provision of personal recommendations or related services and:

*(a) the firm has disclosed that service along with the adviser charge; and
(b) the retail client is provided with a right to cancel the ongoing service, which must be reasonable in all the circumstances, without penalty and without requiring the retail client to give any reason; or*

(2) the adviser charge relates to a retail investment product for which an instruction from the retail client for regular payments is in place and the firm has disclosed that no ongoing personal recommendations or service will be provided.

The regulator also produced guidance in the form of an FCA factsheet (For investment advisers - Setting out what we require from advisers on how they charge their clients). The factsheet said;

'Ongoing adviser charges

Ongoing charges should only be levied where a consumer is paying for ongoing service, such as a performance review of their investments, or where the product is a regular payment one. If you are providing an ongoing service, you should clearly confirm the details of the ongoing service, any associated charges and how the client can cancel it. This can be written or orally disclosed. You must ensure you have robust systems and controls in place to make sure your clients receive the ongoing service you have committed to.'

While the factsheet wasn't published until late 2014, it didn't mark a change to the rules PFS were already expected to follow. The essence of the factsheet, in my view, was to remind PFS of the standards that should already have been relevant when inviting Mr M to agree to on-going advice.

PFS say they don't have a copy of the specific client agreement that was sent to Mr M when he was advised by them. But they've provided a template of the client agreement used in November 2013 which is when they say Mr M would have been sent it.

Regarding on-going advice fees the client agreement says;

'We will also discuss our on-going reviews options during our initial consultation. This service includes, but is not limited to, providing you with:

- annual reviews to give you peace of mind;*
- an opportunity to re-assess your Attitude to Risk;*
- an assessment of your plans should your circumstances change;*

- regular updates and information regarding your holdings;
- on-going support with correspondence and administration issues.'

The PFS client agreement notes several quite clear services that it would provide Mr M in return for its on-going fees in the above bullet points. So, I've considered whether PFS delivered the services it promised to Mr M in its agreement with him.

Mr M seems to broadly accept that he was contacted, and his pension was discussed and reviewed with him in line with the timeline contained in PFS's response to his complaint. But, he says no review was conducted in 2019, so he asks for a refund of PFS' fees for that year. So, I've first considered what happened in 2019.

PFS don't think it would be fair to refund their fees from 2019 as they say they offered Mr M a review. They provided evidence in the form of a screenshot of an attempted telephone call. But I don't think that goes far enough to demonstrate PFS provided Mr M with the services he'd agreed to. I'll explain why.

While I acknowledge it's likely an attempt was made to call Mr M in 2019, PFS's agreement is worded in such a way as to suggest a review will be completed, not simply offered.

I also take the view that I'd only expect PFS to take the on-going charge for a service being given and not simply just offered. I say that because the rules say the charge must be in respect of an ongoing service – so the service must actually be provided if the charge is going to be made.

When considering the specific services PFS said they'd provide Mr M in their client agreement I've seen no evidence that in 2019 his pension was reviewed, or the results of that review were shared with him to give him 'peace of mind'.

Similarly, because Mr M was never spoken to, there was no opportunity to re-assess any changes to his attitude to risk or his circumstances. And I've seen no evidence PFS provided him with any information on his holdings.

Therefore, I have to conclude that PFS didn't provide Mr M with the on-going service he'd paid for in 2019, despite PFS accepting the fees from his pension.

Additionally, when reviewing Mr M's complaint, I asked PFS if they had any evidence that he was contacted in 2017. PFS confirmed that they had no record of speaking to Mr M in 2017.

PFS haven't been able to provide any evidence that they provided any of the agreed on-going services to Mr M in 2017, including any reviews of his pension or assessments of his attitude to risk and circumstances. So, for the same reasons as above, PFS also didn't provide Mr M the services it agreed to in 2017 either.

Summary

I've considered the specific rules and guidance from the time. Which means that PFS were required to clearly set out the services that it would provide Mr M for the ongoing fee it was receiving.

I've considered the agreement PFS say they had with Mr M for the services it ought to have provided. And for the reasons I've explained above, I don't think that PFS provided Mr M with the service that he paid for. He didn't receive annual reviews; assessments of his risk attitude or circumstances; or yearly updates on his holdings from PFS in 2017 or 2019. I

come to that conclusion based on the specific circumstances of this case and the evidence that's been presented.

It follows that I don't think it's fair or reasonable for PFS to have taken its adviser charge from Mr M's pension scheme without delivering the service that it had promised him. This was an agreement between PFS and Mr M. Put simply, it would be reasonable for PFS to be paid the agreed amount for providing a service that had been agreed. But not where that service hasn't.

I've thought carefully about what would be a fair and reasonable way to put things right. PFS have said "To clarify periodic suitability assessments and review calls are only a part of our ongoing service and commitment to our customers. We monitor funds for quality and suitability and as the customers Pension Advisers, we have been here to answer any queries and help with any issues with pension providers, accessing pension benefits and changes to pension regulations and more."

PFS have also offered to refund a proportion of the fees from 2017. But I have to consider that the regulator asked PFS to clearly set out the services it was going to provide for the fees it charged. And I've seen no evidence PFS provided the majority of the services it set out in its client agreement with Mr M – other than the potential for on-going support which Mr M didn't require in 2017 or 2019. So, I think the most reasonable outcome is to refund all of the fees for the years 2017 and 2019.'

The responses to my provisional decision

Mr M made no further submissions for me to consider.

PFS said they didn't agree with my decision. They said an annual review took place in every year except 2019 when Mr M was invited to a review, but the review didn't take place. They said they cannot force a customer to complete a review. So, they didn't think they should refund the fee if Mr M didn't accept their offer.

Furthermore, PFS said the annual review only made-up part of the service they offered Mr M. Their customers also benefited from monitoring of funds for quality and suitability; the ability to contact an adviser at any point; yearly updates and information on holdings; and ongoing support with correspondence and administration.

PFS also said my decision differs to others sent by this Service.

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.

I've also re-considered my provisional findings. And having done so, I'm still upholding Mr M's complaint for the reasons I've already explained in my provisional decision. I'll explain why.

Firstly, I'd like to note the evidence demonstrates that no review was carried out in either 2017 or 2019. PFS previously acknowledged they'd had no contact with Mr M in 2017 and have produced no new evidence to support their submission that a review took place 'each year except 2019'. So, I have no reason to depart from the findings I already made that no review was carried out in either 2017 or 2019.

Secondly, it's important to note that we assess each case on its own merits. Circumstances

and evidence may differ. In this case I have based my decision on what I think is a fair and reasonable outcome. It's based on the evidence of what has happened in this specific case. And I am not bound by determination's given in other cases.

PFS claim that Mr M didn't accept their offer of a review in 2019, and they couldn't force him to. However, as I explained in my provisional decision, I don't think the evidence supports PFS' view that Mr M was even offered a review in 2019.

I say that because all PFS have offered in evidence is a contact record showing a call was attempted on 31 May 2019. But I've seen no evidence Mr M was expecting the call in order to make himself available, or that he even knew an attempt had been made to contact him. There's no evidence any voicemails were left; any further attempted calls were made; or it was followed up with a letter or email. So, I don't think it's fair to conclude a review was 'offered' to Mr M in 2019.

But even if I were to accept that a review was offered, which I don't, PFS' client agreement with Mr M was clear. The agreement told Mr M it would provide '*annual reviews to give you peace of mind*'. So, the agreement was to actually provide Mr M with a review, not simply just to offer to review his pension. And I've seen no evidence that was done in 2017 or 2019.

The FCA said in its factsheet that firms '*must ensure you have robust systems and controls in place to make sure your clients receive the ongoing service you have committed to.*' I don't think that attempting one unscheduled phone call demonstrates that PFS had a robust process in place to ensure they were providing Mr M the service they'd agreed to.

PFS also feel that the review made up only part of the service they offered Mr M. But as I've explained in my provisional decision, PFS had an agreement with Mr M which set out the services PFS had agreed to and the majority of those weren't provided to Mr M in the years of 2017 or 2019.

The agreement doesn't break down the component charges for each of the services PFS agreed to provide, giving Mr M the option to pay for some services but not others. So, Mr M only had the option of agreeing to all of the ongoing services or nothing.

PFS also haven't provided any evidence of the 'other' services they say they provided Mr M for example yearly updates on his holdings – which is something that Mr M's pension provider would have likely sent him in his annual statements. Mr M would have been paying his pension provider a separate fee for the administration of his pension.

I'm therefore still of the opinion that the fairest resolution for this complaint is for PFS to return Mr M's pension to the position it would have been in had no fees been taken in 2017 or 2019.

Putting things right

My intention is to put Mr M, as close as possible, into the position he'd have been but for PFS's mistake. In this case that means putting Mr M's pension fund into the position it would have been in had the fees not been taken. The pension would have been higher by the value of those fees and any investment returns that those fees would have gone on to benefit from.

PFS must calculate the loss in value of Mr M's pension due to the deduction of the fees taken in 2017 and 2019. To be clear, this will mean calculating the lost investment returns on each fee, based on the actual investment strategy of Mr M's pension, from the date the fees came out to the date that PFS are told that Mr M accepts my decision.

When PFS have calculated this total loss to Mr M's pension (from the fees that should not have been paid, and the lost investment returns from those amounts) it should, if possible, pay that total loss amount into Mr M's personal pension. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.

If Mr M has remaining tax-free cash entitlement, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional reduction of 15% overall from the loss adequately reflects this.

If payment of compensation is not made within 28 days of PFS receiving Mr M's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

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

My final decision

My final decision is that I uphold the complaint and I direct Profile Financial Solutions Limited to compensate Mr M in the manner set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 December 2023.

Timothy Wilkes
Ombudsman