

The complaint

Mr D says Fogwill & Jones Asset Management Limited (F&J) failed to adequately assess and advise him on his attitude to risk, both initially and on an ongoing basis. He says it hasn't acted in his best interests or treated him fairly and that as a result he has suffered significant financial detriment.

Mr D is represented in his complaint by Pension Justice.

What happened

Mr D was referred to F&J for advice about his pension arrangements. He was 62 and thinking about taking some of his pension benefits when he reached 65 or 66. F&J conducted a fact-find with him from August 2020. This included gathering information about his circumstances, objectives and his attitude to risk.

Mr D's stated financial circumstances were summarised in the suitability report F&J produced for him in November 2020:

"You receive £30,000 per annum for works carried out through your limited company. However, as a result of the £85,000 redundancy payment you received earlier in the year, and the income you received from employment up to your redundancy, you feel you have received sufficient income for the year..."

"You have £15,000 left from your redundancy payment in accessible cash deposits which you plan to live on between now and April 2021. Your annual expenditure is £18,400, meaning your approximate expenditure for the remaining 6 months of the tax year amounts to £9,200. You should therefore be left with a comfortable surplus in cash deposits at the end of the tax year, of around £5,800. At this point, you then plan to access income from your Limited company."

"Upon turning 66 [in] June 2024 you will be in receipt of the full State Pension of £9,110 per annum. You are also due to receive a guaranteed defined benefit pension of £9,000 gross per annum from AON scheme and a further approximate £2,500 gross per annum from your [public service] pension. These collectively are likely to cover your current expenditure, therefore you may not require any access to your defined contribution pensions to supplement your income."

"In approximately three years you do have a lump sum of £95,000 due for the repayment of an interest only mortgage... You may need to access funds from your defined contribution pensions at this point to cover this expense."

"You also hold direct shareholdings to the value of approximately £60,000."

In the same report Mr D's objectives we recorded in the following terms:

"You were made redundant from your role ...at the end of July 2020. You have more recently set up your own limited company working 3 days a week and therefore do not anticipate to retire in the near future. During our discussions you mentioned potentially retiring at age 65 or 66."

“You would like to review the performance of the existing defined contribution pension arrangements you have in place for when you choose to retire.”

“During our discussions you stated that whilst your existing Old Mutual policy benefits from being managed by an adviser, you haven’t met with the adviser in over 2 ½ years and you are unhappy with the service you are currently receiving.”

“You would prefer for your pension arrangements to benefit from an ongoing, proactive management style and for the investment funds to be reviewed and monitored on a daily basis.”

In the suitability report F&J noted Mr D wanted to adopt the highest level of risk with the objective of potentially maximising his retirement savings over the next few years. He had completed a risk questionnaire which indicated he had an adventurous attitude to risk. And his capacity for loss was said to be high.

During the fact-find exercise, Mr D indicated to F&J that he had two defined benefit pensions, which together would provide him with an income of around £11,500 per annum. Since he wasn’t proposing to take his pension benefits imminently F&J made it clear these pensions wouldn’t be within the scope of its advice. Instead it focussed on an Added Voluntary Contributions plan in which he’d accumulated around £123,000 and a personal pension plan with Old Mutual Wealth (OMW) with a transfer value of about £278,000. His OMW plan was subject to a discretionary fund management (DFM) arrangement.

F&J recommended he should retain his AVC plan, but that he should switch his OMW personal pension. Its rationale for the switch was as follows:

“Both the recent and historic fund performance figures of the selected funds within your Old Mutual Wealth arrangement are deemed fairly poor. You are unhappy with the level of service being provided by the adviser of your Old Mutual Wealth policy, making the switch would allow for the funds to be actively managed under Fogwill & Jones Discretionary Management Service. You may benefit from higher growth in your investments, although this cannot be guaranteed. Moving your investment will mean that the underlying funds can be aligned with your Adventurous attitude to risk. Fogwill & Jones would risk rate the current portfolio of funds in your Old Mutual arrangement as Medium.”

Ultimately, Mr D accepted F&J’s recommendations and he switched his personal pension into an Embark Options Self-invested Personal Pension (SIPP), with a DFM arrangement and he opted for an ongoing advice service. This took effect from December 2020.

Subsequently, Mr D initiated a meeting with his F&J adviser which took place on 18 October 2021. It was a face-to-face meeting at his home. F&J’s file note indicates he was going through difficult personal circumstances. He was also considering moving house and wanted to discuss his income options for the following years.

At the meeting Mr D provided information about his defined benefit pension entitlement that was substantially different to what he’d stated previously. Rather than providing an annual income of around £11,500, it seems that he could only expect £4,000 per annum.

The file note also records that at the meeting Mr D indicated his dissatisfaction with the performance of his new SIPP, which was worth about £300,000 at that time. F&J says its adviser offered him the chance to change his risk exposure if he wasn’t comfortable with how his funds were invested, but he declined.

F&J followed up the October meeting with an annual review in December 2021. Its file note indicates that there had been no material changes to his circumstances, objectives or attitude to risk. It says it posted a follow-up review letter to him on 12 January 2022.

F&J says it sent Mr D a letter on 25 January 2022 about the performance of his SIPP. It said:

"...we are required to inform you when your portfolio drops by 10% or more since the start of a quarter (known as a reporting period). The current reporting period started on 1st January 2022. We have been notified that your portfolio has fallen by 12.2% since that date."

F&J says it sent Mr D another letter on 10 May 2022 to notify him that his portfolio had fallen by 11.81% since April. This letter explained the reason for the fall was largely to do with high inflation, global supply chain problems and Russia's invasion of Ukraine.

Mr D disputes F&J's account of the notifications sent to him. He says the first time he was told about a fall in the value of his investments he checked his SIPP and it was only worth £210,000, having been worth £330,000 at its height. Given that his SIPP was being managed on an active basis he couldn't understand why he was losing so much value.

On 19 May 2022, a new adviser visited Mr D at his address. Mr D explained he thought his SIPP had reduced in value by £120,000. The adviser's file note of the meeting put a different slant on matters:

"...the value which came across was £289k less the initial fees deducted [c£7k]... The portfolio stands at £226,750.30 which equates to a fall of £55,250..."

F&J's note went on to record:

"Given the high volatility in the markets and his Adventurous approach to investing this is comparable to the falls he should expect. He restated his desire to remain as an Adventurous Investor at his annual review last year with [his first adviser]. I informed [Mr D] he should reduce his risk tolerance if he was unhappy with the volatility. I pointed out his single company shares have experienced much greater losses this year and these are also classed as Adventurous/High risk investments."

"[Mr D] did not wish to carry out a full annual review and asked that I contact him in December with the hope the markets have begun to recover by that stage. [He] does not wish to reduce his attitude to risk at this stage."

Mr D disagrees with F&J's version of events. He says until May 2023 he was never asked to fill out another attitude to risk questionnaire.

F&J issued a further Suitability Report on 14 December 2022. The report confirmed there was no change in Mr D's circumstances or his attitude to risk since his previous annual review. The report confirmed that his SIPP was now worth around £218,000.

In May 2023, F&J contacted Mr D via email to arrange a catch-up meeting. In response, Mr D raised concerns about the performance of his SIPP and the charges associated with it. He asked to delay the meeting until the end of the year. F&J replied and said:

"Your risk tolerance needs strong consideration given your comments of drawing down on the plan next June, you stated you wished to remain at Adventurous when we met last year. Having a high risk approach running up to accessing your retirement benefits is not recommended and we should be having a further discussion."

Mr D replied and said:

“Please be advised that after a couple of sleepless nights I believe that a meeting is pointless, the figures speak for themselves do they not.. I do feel so let down and have little faith in Fogwill...Moving forward as such there's a year to go until my mortgage & pensions, please pencil in a meeting for December which will be paramount.”

F&J replied and expressed concern at Mr D remaining as an adventurous investor. The adviser strongly recommended a meeting to discuss it further. A meeting was arranged at his home for 19 May 2023. Following this meeting, the adviser agreed to look into the possibilities of annuities for Mr D. Another meeting was arranged for 2 June 2023. Mr D asked the adviser to email him with the annuity illustrations he had found.

Mr D vigorously disputes that risk was discussed at the meeting in May 2023.

On 19 June 2023, F&J says an internal discussion took place regarding how the adviser could move forward with Mr D as he wouldn't complete an up-to-date risk appetite questionnaire. An ongoing suitability letter was issued to him on 21 June 2023. The adviser said:

“Having spoken with you on the 19th of May 2022 at your home address, I highlighted that selecting a high risk approach to investing increases the level of volatility and with that the fluctuations in the value of your portfolio. However, you chose to leave the arrangements untouched. Taking account of our discussions over the last six weeks I advise your Attitude to Risk / Capacity for Loss is reassessed and reduced to a more tolerable level.”

Mr D again disputes F&J's version of events. He says that by this time he'd lost all faith in it. He says the losses his fund incurred speaks for itself. He said he received no guidance about how to move forward. He says the only time he was asked to review his risk appetite was in May or June 2023, to which he replied he had no appetite for risk.

In July 2023, Pension Justice submitted a letter of complaint on Mr D's behalf. F&J sent its final response letter in September 2023. It didn't uphold his case.

Mr D wasn't happy with F&J's response to his complaint and he brought his case to this Service in September 2023. He summarised his complaint points saying F&J:

- Failed to undertake a full and detailed original fact find from me to enable them to ascertain the true extent of my attitude to risk.
- Failed to provide me with any form of constructive advice regarding my proposed course of action in relation to my recorded adventurous attitude to risk.
- Failed to sufficiently review my attitude to risk and to adequately or at all to set out the risks of continuing with an adventurous attitude to risk.
- Failed to investigate adequately whether I was either a high net worth or sophisticated investor in accordance with the COBS Rules and, having failed to conduct such an enquiry, treated me as a sophisticated investor when indeed it should have been obvious that I was anything but.
- Provided advice which was not in my best interests.
- Provided advice that was quite clearly unsuitable for my needs.
- Failed to treat me fairly.
- Were negligent and/or in breach of contract in relation to their responsibilities as my independent financial advisor

An Investigator considered Mr D's case but she didn't uphold it. She concluded:

“Mr D was invested in line with his adventurous ATR, which he steadfastly maintained he wished to remain at, until his email in 2023. I’m sorry Mr D is unhappy with the performance of his SIPP but this service takes the approach that an investment not growing as much as had been hoped, or even losing value, is not something we can hold a business responsible for. This is due to the very nature of investment performance. Therefore, I won’t be recommending [F&J] do anything to put things right for Mr D.”

Mr D disagreed with the Investigators findings. As both parties couldn’t agree to the Investigator’s view, Mr D’s complaint has been passed to me to review afresh and to make a final decision.

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.

Where there’s conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what’s most likely to have happened.

I’ve not provided a detailed response to all the points raised in this case. That’s deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I’ve taken into account all submissions, I’ve concentrated my findings on what I think is relevant and at the heart of this complaint.

I’m not upholding Mr D’s complaint. I’ll explain why.

The first thing I’ve considered is the extensive regulation around the services like those performed by F&J for Mr D. The FCA Handbook contains twelve Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 2.1.1 R in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly.
- Principle 7, which requires a firm to 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.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms. As such, I need to have regard to them in deciding Mr D’s complaint.

In responding to the Investigator’s view, Mr D concluded by saying:

“My previous pension was also placed into a market tracker I believe, which was not the same as Embark, which seems to be a very high and aggressive type of account. Had there been deep conversations, and a higher degree of understanding the outcome could have been different. Also the focus of stating that with three years to go until pension drawdown, things I am sure would have been a little different with more information. It’s strange that if F&J told me that every 10 years their market collapses, again with the insight things could have been different. Why was I not advised to spread risk, especially as this was my last three years or even to put a loss control in place, especially with a mortgage to pay. I was given no proper advise on options and no checks and balance with a greater degree of understanding. After all, is this not what I was paying for, a professional body to advise and grow funds with competence. After all, again I say why was I paying a higher fee so every second day my account was to be over viewed, from this how did my account go from £330,000 to £210,000.

At the heart of Mr D’s complaint is whether F&J failed to adequately assess and advise him on his attitude to risk, both initially and on an ongoing basis.

I note the positions of F&J and Mr D vary considerably. I’ve reviewed the casefile carefully and the evidence provided by each party. I tend to give more weight to information which is contemporaneous with events. That is because memories can and do fade. And there is less scope for effects such as hindsight to play a role in deliberations.

F&J had to obtain information from Mr D in order to understand essential facts about him. In order to advise him to switch his OMW pension funds into the Embark SIPP with a DFM arrangement and invest in the funds it recommended it had to believe that:

- The service or recommended transaction met Mr D’s investment objectives (including his attitude to risk, the purpose of investing and how long he wanted to invest for).
- Mr D was able to financially withstand the investment risks.
- Mr D had the necessary experience or knowledge to understand the risks involved.

I’ve reviewed the fact find undertaken by F&J into Mr D’s circumstances in 2020. I think this provided a reasonable foundation from which to develop advice. Although, as we know, some of the information Mr D provided during that exercise about his pension provision was inaccurate. Not only did he provide the incorrect information, he failed to correct it when he had the opportunity to do so, for example when he received the suitability report. Mr D must bear the main responsibility for this deficiency.

I’ve reviewed the responses Mr D gave to the risk appetite questionnaire in 2020. It’s clear he wanted to take a significant degree of risk. Typical of his responses to that exercise was that he would go for the best possible return even if there was a higher level of risk. Asked to describe his typical attitude when making important financial decisions he replied, very adventurous.

However, it was F&J’s role to discern what Mr D’s wants and needs were and why. Its role wasn’t simply to facilitate what he wanted without any critical thinking. It had to use due care and skill. It had to do these things because it had to act in his best interests. I think there is evidence from the case file that F&J did enter into such an engagement with Mr D.

I say this because I can see that it assessed Mr D’s knowledge and experience of investments. At the time he sought advice he already had a pension plan with investments in a range of funds. And this was being overseen by a DFM arrangement. He also confirmed he had around £60,000 of shareholdings across several different companies. Shareholdings are risky investments posing a material risk of capital loss.

Mr D reasonably notes that he was only a few years away from retirement and questions the suitability of F&J's recommendations in that context. I can see it entered into conversation with Mr D about his capacity for loss. This is an important facet of any assessment of how much risk someone can bear. The following note from the fact-find provides a sense of the discussion:

“Mr D said that he would prefer to take the maximum amount of risk with the best service that we offer for the next few years to maximise the potential growth of his pension before he potentially begins accessing them at age 65. I asked how he would feel if say for example the plan fell by 30% or more, he said “I would have to take it on the chin” he said “we are only discussing 1/3rd of my pension arrangements and I still have the others if this one does fall, it would be a minimalist loss when comparing to all of my other assets”, it is actually 1/4th of the pension arrangements as he remembered he also has a small [public service] pension.”

In thinking about Mr D's capacity for loss, I'm also mindful of his broader financial circumstances, which were set out earlier.

On balance, I think F&J did effectively assess Mr D's risk appetite and capacity for loss at the outset of their relationship in 2020.

The other main thrust of Mr D's complaint is that F&J didn't do enough to provide him with advice or make sure his SIPP was effectively invested after its initial engagement, with particular emphasis on the risk exposure of his funds. I've set out earlier in this decision the broad chronology of conversations and meetings between the parties from October 2021 until June 2023. I've considered the correspondence he was sent. And I've reviewed contemporaneous notes from the case file over this period.

While I recognise both parties have very different views about the interactions I've set out. Given the weight I place on evidence contemporaneous with events, I think it's more likely than not F&J's records represent a reasonable approximation of what was happening between the parties.

Like the Investigator, I don't think it would be reasonable for me to conclude from this information that F&J was too passive. On balance, I find that it fulfilled its obligations.

Mr D was invested in line with his attitude to risk and appeared to have sufficient capacity for loss. Each time his adviser broached the subject of changing his exposure he declined a change in strategy. It wasn't until he responded to F&J's communication in May 2023 that he noted a change in his risk appetite:

“Please be advised that since losses of £120k with Fogwill my attitude is very simple. Nil...”

Shortly after this exchange Mr D raised his complaint with F&J.

I think Mr D's complaint is essentially about investment performance. The fact that an investment hasn't grown to the extent hoped for, or has even lost value, isn't something it would be reasonable for this Service to hold a firm responsible for. It wouldn't be appropriate to insulate consumers from the downside risk of investment performance, so long as advisory firms have met their regulatory obligations in providing their services. And I've concluded F&J did.

My final decision

For the reasons I've set out, I'm not upholding Mr D's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 26 April 2024.

Kevin Williamson

Ombudsman