DRN-4492021

The complaint

Mr M has complained because he feels he was wrongly sold a personal pension ("the pension") by a business that Capital Professional Limited ("CPL") is now responsible for.

Mr M is professionally represented but for ease I will just refer to Mr M.

What happened

In August 2007 Mr M completed an application form for the pension. In October 2007 the pension provider wrote to *MDP Financial Services Ltd (Newell Palmer Ptners'p Ltd)* saying *"Thank you for your client's application for a pension plan with us. This has now been accepted…"*. For ease, unless I'm quoting from a document or email I'll simply refer to "MDP" and "Newell Palmer".

Documentation from the time said the pension provider would *"pay commission to … MDP Financial Services Ltd (Newell Palmer Ptners'p Ltd) … For arranging the plan, we will pay … MDP Financial Services Ltd (Newell Palmer Ptners'p Ltd) … £983.31"*.

The pension provider later confirmed to us that £938.81 was paid to MDP in 2007 as "Establishment Indemnity Commission". It also said the advisor at the start of the plan was MDP.

Mr M complained to CPL about the sale of the pension. He felt it had been mis-sold as it was unsuitable for his needs. He said the risks, implications and alternatives weren't properly explained and felt he should have been advised to purchase added years through his employer's pension scheme. CPL said it couldn't find any record of Mr M or of giving him any advice. So it didn't uphold the complaint.

Our investigator concluded that the complaint should be upheld. In summary, he felt it most likely that CPL misadvised Mr M, and had CPL correctly advised Mr M he would most likely have chosen to contribute to his employer's in-house pension rather than take out the pension. He did feel Mr M would have bought added years though.

Mr M accepted our investigator's conclusion but CPL didn't. It felt Mr M would have been aware of the need to complain before 2017. It also said there is no evidence of the advice or the warnings that may or may not have been given.

Our investigator wasn't persuaded to change his mind. He didn't think Mr M had complained too late as he wasn't persuaded that Mr M had any, or ought to have had any, awareness before May 2019 that the advice to contribute to the pension was unsuitable and/or hadn't followed the proper process. He also said that while he couldn't say *with certainty* what happened he only needed to consider what *most likely* happened on the balance of probabilities.

We didn't hear anything further from CPL so the complaint has been passed to me to decide.

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.

Which business

It's clear from the documentation and the fact MDP was paid commission that MDP was involved in the sale of the pension. Whether that involvement amounted to financial advice, and whether that financial advice was suitable, is something I'll discuss below.

According to the Financial Conduct Authority register MDP was an authorised representative of Newell Palmer from March 2006 until June 2009. CPL bought Newell Palmer in 2018. CPL has confirmed to us that when it bought Newell Palmer it took on the liability for past advice given by Newell Palmer.

With that in mind, I think it follows that if, but for the takeover, Newell Palmer would be liable now for any advice given by MDP CPL is now liable for that same advice. The question, of course, is whether Newell Palmer would be liable for this complaint had it not been bought by CPL.

CPL explained to us that MDP was 50% owned by Newell Palmer and around 2008/2009 Newell Palmer sold its 50% holding to Clay Rogers. Clay Rogers sold its business to Succession around September 2016. Essentially, what CPL is arguing is that:

- Newell Palmer was responsible for any advice (and any resulting complaint) given by MDP up to the point that Clay Rogers bought Newell Palmer's 50% share
- responsibility then shifted to Clay Rogers
- until Clay Rogers was bought by Succession, at which time responsibility shifted to Succession.

In other words, CPL is saying that when it bought Newell Palmer in 2018 Newell Palmer was no longer responsible for any advice given by MDP – as that responsibility had by that point shifted to Clay Rogers and/or Succession.

I'm not persuaded by this argument. This is because, in my view, liability for the advice and complaint doesn't come through Newell Palmer's partial ownership of MDP; it comes through the regulatory (appointed representative) agreement in place between MDP and Newell Palmer. To illustrate the point, if it was me who held the 50% shareholding in MDP that wouldn't mean I was personally liable for any unsuitable advice MDP gave or any complaint stemming from it. And if I later sold my 50% shareholding to someone else no responsibility for any unsuitable advice would shift to the new owner.

So, as MDP was an authorised representative of Newell Palmer at the material time, and as CPL took on the liability for past advice given by Newell Palmer when it bought Newell Palmer, I conclude that CPL is liable for Newell Palmer's (and MDP's) actions in respect of this complaint.

Our jurisdiction

We can't consider this complaint if it was referred to us:

- more than six years after the event Mr M is complaining about happened; or

- if the six year period has passed, more than three years after the date on which Mr M became aware (or ought reasonably to have become aware) that he had cause for complaint.

These time limits don't apply if Mr M referred the complaint to CPL and there's a written record of the complaint having been received. CPL received Mr M's complaint in December 2019 and it was referred to us in April 2020.

The event Mr M has complained about is the sale of the pension in 2007. This was more than six years prior to his referral of the complaint to CPL. So Mr M has complained too late in respect of the six year time limit.

CPL has referred to Mr M breaching the three year time limit as it feels he was aware of a need to complain before 2017. It said details of the employer's pension would have been given to Mr M at the start of his employment so he would have known the differences between the two pensions. It also felt any issues would have arisen when he stopped making contributions to the pension in 2016.

To have awareness of a cause for complaint Mr M simply needed to have an inkling that something wasn't right with the sale of the pension. He didn't need precise knowledge of what had gone wrong, why it had gone wrong or who caused it to go wrong. I don't think having knowledge of how the two pensions worked gave, or ought to have given, him that inkling. I think the same in respect of him stopping the contributions – particularly as Mr M has told us that he stopped the contributions as he had concerns about tax implications for his annual and lifetime allowance limits.

For completeness I've reviewed the annual pension statements that were sent to Mr M by the pension provider. For the years ending 2008 to 2011 the estimated pension fund and estimated annual pension at retirement was fairly consistent. There was then a significant drop in both for the years ending 2012 to 2015 before another significant drop in 2016. This might, and probably ought to, have given Mr M knowledge that his pension and underlying investments weren't performing as well in the latter years as they were at the start. But I think it's a significant leap to get from there to the point where Mr M knew or ought to have known that the pension had been mis-sold and/or contributing to his employer's pension was potentially the better option – particularly as he wouldn't have had anything which easily enabled him to compare what the pension statements told him to how extra contributions to his employer's pension would have performed.

Mr M has told us that he first became aware of a cause for complaint in May 2019. That was when he was referred to his professional representative by a colleague and after discussing his circumstances it became apparent that the pension might have been mis-sold. That, in my view, is a perfectly plausible explanation and I've not seen anything which persuades me that Mr M knew, or ought to have known, that he had a cause for complaint any earlier. I therefore conclude that Mr M complained within the three year time limit.

Did MDP mis-sell the pension?

The documentary evidence showing what discussions took place and what advice, if any, MDP gave is non-existent. I nevertheless have to decide the complaint based on what I think most likely happened given what I've seen and what I've been told by Mr M (because his testimony is all I've received about the sale).

The first conclusion I've reached is it's more likely than not that Mr M received advice before applying for the pension. I say this because at the time of the application Mr M was 24, he had no other significant investments and his only pension provision was through his

employer's scheme. He therefore seems to have been an inexperienced investor and, with that in mind, I think it's most unlikely that he would have entered into a new pension arrangement without having received any financial advice.

The second conclusion I've reached is it's more likely than not MDP, rather than any other business, gave Mr M the advice to buy the pension. I say this because the pension provider wrote to MDP and referred to Mr M as "your client"; the documentation from the time that I have seen refers to MDP; and the pension provider has confirmed to us that it paid the commission to MDP and that MDP was the advisor at the start of the plan.

The third conclusion I've reached is MDP mis-sold the pension. This type of complaint is one I normally see where a consumer has been advised to take out a free standing additional voluntary contribution ("FSAVC") plan rather than an additional voluntary contribution ("AVC") plan through their employer. This complaint is slightly different as Mr M took out a personal pension rather than an FSAVC plan. However, I think the principles are the same.

In 1996 the regulator issued updated guidance which outlined what advisors were expected to do. The update essentially re-stated guidance that was already in place and, in summary, said advisors needed to:

- establish what in-house alternatives were available and draw a consumer's attention to them
- discuss the generic differences between the two options (including that charges under the in-house option would normally be lower)
- direct the consumer to their employer for more information on the in-house option.

Given these requirements MDP should have identified that Mr M had the option of making additional contributions to his pension through his employer. And it should have pointed the AVC option out to Mr M and discussed the generic differences between the two options. When it issued the updated guidance the regulator referred to lower AVC charges and said *"Charges under in-scheme AVCs will usually be lower than those under FSAVCs … Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefits to the client"*. So I think MDP should also have highlighted to Mr M that the AVC option would most likely be cheaper than the pension.

So did MDP give Mr M the required information? In the initial complaint to CPL Mr M said:

- the full risks, implications and alternatives in respect of the pension weren't fully and properly explained eg he wasn't aware of the higher charges
- he was concerned that he should have been advised to buy added years through his employer's scheme
- he was never provided with a full comparison of benefits between the employer's scheme and the pension.

As part of his complaint to us he said:

- he was told the pension was the most suitable product for his needs
- added years and the employer's pension were never discussed and he was directed away from a guaranteed low charging alternative
- risk wasn't discussed.

Because of the lack of evidence I don't know for sure what MDP told Mr M. However, if it had told him about the AVC option – and specifically that it was likely to be cheaper – I think it's most likely that he would have looked into this and would have subsequently taken this

option rather than the pension. I say this because I think it's unlikely that Mr M would have chosen the more expensive option for what was to all intents and purposes the same thing – a vehicle in which to pay additional pension contributions. As Mr M didn't choose the AVC option I think it's most likely that Mr M's testimony fairly accurately reflects what happened; and I therefore conclude it's most likely that MDP didn't point the AVC option out to him or explain the generic differences.

The final conclusion I've reached is Mr M wouldn't have bought added years. I say this for three main reasons. First, it's not entirely clear to me that buying added years would have been possible in Mr M's scenario. Mr M has told us that he'd chosen a vocational career and at the time of the sale he'd just started that career, he fully intended to work until normal retirement age and he had no desire or wish to retire early. That being the case, it's my view that Mr M thought he'd continue working for his employer until his normal retirement age. That in turn means he likely would have expected to complete the maximum service in the employer's scheme, so it probably wouldn't have been possible to buy added years.

Even if it was possible, cost is a factor. The cost of buying added years is usually a set percentage of salary and it was often seen as expensive in comparison to contributing to an AVC. This is because buying added years doesn't give a consumer any flexibility in being able to stop and start contributions, and the costs increase as Mr M's career progressed and his salary increased – meaning it could become unaffordable. The agreed monthly contribution for the pension was £128.21 and it didn't change in the nine years that Mr M contributed to it. I therefore think it's likely that Mr M would have chosen the AVC option where he could control how much he contributed rather than buying added years at an increased cost each year.

Finally, the projected mid-rate of growth for the pension at the time was 7%. So, along with the cheaper cost, I think the potential returns from an AVC would probably have looked appealing.

Summary

For the reasons outlined above, I conclude that:

- MDP mis-sold the pension – because it didn't properly draw Mr M's attention to or discuss the AVC option
- had MDP drawn Mr M's attention to and discussed the AVC option Mr M would most likely have explored this option and gone down the AVC route
- Mr M wouldn't have bought added years.

Putting things right

CPL should undertake a redress calculation in accordance with the regulator's FSAVC review guidance, but on the basis that the pension here is a personal pension rather than an FSAVC, and incorporating the amendment below to take into account that data for the CAPS 'mixed with property' index isn't available for periods after 1 January 2005.

The FSAVC review guidance wasn't intended to compensate consumers for losses arising solely from poor investment returns in the FSAVC funds, which is why a benchmark index is used to calculate the difference in charges and (if applicable) any loss of employer matching contributions or subsidised benefits.

In my view the FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So where the calculation requires ongoing charges in an investment-based FSAVC and AVC to be compared after 1 January

2005, CPL should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into the pension. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension 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 deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax-free and 75% would have been taxed according to Mr M's likely income tax rate in retirement. Our investigator presumed that Mr M's likely income tax in retirement would be 20%. However, I note Mr M's occupation, his likely length of service and his likely salary at retirement. I also note he stopped paying into the pension due to tax concerns because of the life-time allowance. I therefore think his likely income tax rate in retirement will be 40%. So making a notional deduction of 30% overall from the compensation adequately reflects this.

Mr M has argued that a 30% deduction is an over-estimation of his tax liability in retirement. He told me he expected his final salary pension to be £50-£60,000 (less if he retired early) and he calculated, using £55,000 as a base, that his overall tax liability would be 17% of £55,000. He later said he didn't know what his pension income would actually be and the figures he used were purely for illustration.

There are two issues to address here – whether Mr M's likely income tax in retirement will be 20% or 40% and what the appropriate notional deduction should be.

I appreciate Mr M doesn't know for sure how much his pension income will be and that he might retire early. However don't have to assess this case based on what is definitely going to happen. I only have to do so based on is most likely going to happen on the balance of probabilities.

In Mr M's first response to me after I'd told him about my proposed change he said if he didn't retire early *"I expect final pension to be in the range of £50-60k"*. I accept his calculations were then made for illustrative purposes. But I find his statement to be telling, clear and compelling as to what he expects when he retires eg he said "£50-£60k" rather than any other figure. It also needs to be remembered that his other retirement income – such as the state pension and any personal pensions – has to be taken into account because all retirement income from all sources will count toward assessing his tax liability. It won't just be his employer's pension. So while I've considered what Mr M has said I remain of the view that in retirement his likely tax-rate will be 40%.

The 30% deduction is made because for every £100 income £30 is deducted as tax – £25 is tax-free and the remaining £75 is taxed at 40%. I understand the argument Mr M makes about the total amount he pays in tax being 17%. But I don't think that means the deduction should be 17%. That's because any compensation paid directly to Mr M for pension funds lost would otherwise have eventually been received by him as a taxable income in retirement eg an annuity, withdrawals. And so that Mr M isn't over-compensated I adjust the compensation to recognise the income tax he otherwise would have paid on the retirement income. Given I think Mr M's likely tax-rate will be a 40% the 30% deduction is fair because even without this compensation Mr M's likely tax-rate will be 40%. So if the compensation was paid into the pension, it will eventually be extra retirement income Mr M receives over and above the current threshold to pay 40% tax. And as he would only receive £70 of every £100 over that threshold, the deduction should be 30%.

My final decision

I uphold this complaint. I require Capital Professional Limited to settle this matter as outlined under the 'Putting things right' heading above'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 27 August 2024.

Paul Daniel
Ombudsman