DRN-5005004

The complaint

Mr B complains that Vision Independent Financial Planning Ltd gave him unsuitable advice about his pension which has led to him incurring a tax charge.

What happened

I issued my provisional decision on this complaint on 21 August 2024. The background and circumstances to it and the reasons for my provisional decision to uphold the complaint in part were set out in that decision. I've copied the relevant parts of it below, and it forms part of this final decision.

Copy of provisional decision

Mr B's complaint was considered by one of our investigators. He issued his assessment of the complaint to both parties on 5 April 2024. The background and circumstances to the complaint were set out in that assessment. However to summarise, the investigator said he didn't think we could consider Mr B's complaint about the original advice he'd been given to access his pension flexibly in 2015 as it was outside of our jurisdiction (we had previously sent both parties our opinion on this, saying that complaint hadn't been referred to us within the relevant time limits). However that we could consider the complaint about the subsequent contributions paid into the SIPP (as they had been made within six years of the date that Mr B raised his complaint).

The investigator said Mr B first used the services of Vision Independent in 2015 when it advised on him accessing benefits from his pension arrangements flexibly. One of the pension providers wrote to Mr B on 16 July 2015 saying it had paid Mr B a cash lump sum and it included details of the implications of him having flexibly accessed his benefits. This included the reduction in the annual allowance to £10,000.

Mr B subsequently transferred another of his pensions to a SIPP using a pension transfer specialist in 2018. His SIPP provider wrote to Vision Independent in March 2019 confirming that it had been appointed as his adviser on his SIPP. The investigator said the SIPP provider had confirmed that the following contributions had been received by the SIPP. And he understood these were all paid by bonus sacrifice.

6 April 2019 - £60,000 (it was subsequently found this was on 3 April 2019)
17 April 2020 - £50,000
9 June 2021 - £30,000
26 July 2022 - £24,500

The investigator also said Mr B and his employer had contributed to his workplace pension scheme, making combined contributions of £10,868 in 2019/20 and £9,793 in 2020/21.

The investigator noted that the adviser had sent Mr B a suitability report dated 7 October 2019 which included:

"You wished for advice in the area of pensions and wishes for professional investment

management and fund managers with a robust investment process to manage the monies. You wish to hand the managing of it to fund managers who will have more time and are suitably qualified. This is even more important now as you will be making lump sum contributions once a year from your annual bonus and you feel that you can substantially build your [name of SIPP provider] *Pension."*

It also noted that *"You have also confirmed that you receive a substantial annual bonus, which you intend to put all of into your* [name of SIPP provider] *Pension via bonus sacrifice."*

The investigator said there were limited records regarding the contribution paid in April 2019. And he'd seen no specific written recommendation regarding the contributions made. But he said that it was clear the adviser was aware that Mr B was intending to fund his SIPP by bonus sacrifice. And there was an e-mail dated 2 April 2019 from the adviser to Mr B saying *"Please get the illustration as per section 3 and put details on from* [the SIPP provider]. *Stress its urgent Please sign and date section 14. Please send a copy to me and post to* [the SIPP provider]."

The SIPP provider wrote to the adviser on 24 April 2019 confirming that an employer contribution of £60,000 had been credited to the SIPP.

The investigator said in considering the complaint he'd taken into account The Principles and other rules set out in the Financial Conduct Authority's (FCA) handbook. He referred to Principle 2 - A firm must conduct its business with due skill, care and diligence; Principle 6 - A firm must pay due regard to the interests of its customers and treat them fairly; and COBS 2.1.1(1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interest rule).

The investigator said he didn't have copies of any recommendations given by the adviser to Mr B to specifically pay the contributions from 2019 to 2022. Mr B had said it was the adviser who had suggested the tax advantages of making contributions via bonus sacrifice. And Mr B had started paying contributions in this way very shortly after the SIPP provider recorded Vision Independent as the new advisers on Mr B's SIPP. Mr B had said he wouldn't have been aware of this being an option. He said the adviser also suggested that he use the carry forward facility to maximise the contribution he could pay which he again said was an option he wasn't aware of.

The investigator thought that, on balance, it was likely the adviser suggested that it would be advantageous to pay contributions by bonus sacrifice. He thought the adviser had been closely involved in facilitating the payment to the SIPP provider in April 2019.

The investigator said the adviser should have been aware, following his previous involvement with Mr B when he took his benefits and correspondence he'd received about him, that Mr B was subject to the MPAA (Money Purchase Annual Allowance). He thought the adviser should have reviewed the tax consequence of the proposed payment to the SIPP and reviewed any other pensions Mr B was paying into.

At the time Mr B was in his employer's workplace pension scheme where contributions in excess of the MPAA of £4,000 were already being paid. The investigator thought the adviser should have recommended against Mr B paying any contributions to his SIPP. And also, if possible, reduce or stop his personal contributions to his employer's pension. However, he said if employee contributions were a requirement for membership of the scheme, he thought it would have been appropriate to continue paying them even though they would have exceeded the MPAA, so that he continued to the receive the employer contributions.

The investigator said potentially a penalty may have been incurred as a result of Mr B not informing his other pension providers that he had plans that he had triggered the MPAA. He thought the adviser should also have identified this as being a potential problem and ensured that Mr B had made the necessary notifications.

The investigator thought that had the adviser alerted Mr B to the issue in April 2019, Mr B wouldn't have made the further contributions to the SIPP, and minimised the extent to which his pension contributions exceeded the MPAA.

Vision Independent didn't agree with the investigator's findings, and the complaint was therefore passed to me to determine.

What I've provisionally 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've come to the largely the same conclusions as the investigator about the merits of the complaint. However I've come to different conclusions about what's fair compensation.

Vision Independent and Mr B provided further evidence and arguments when responding to the investigator's assessment. I've considered what was said in making my provisional findings below. However I've only commented where I think it's appropriate to do so given some of my findings are different to the investigator's. Both Vision Independent and Mr B have the opportunity to provide further evidence and arguments when responding to this provisional decision.

Firstly, to confirm, for the reasons outlined by the investigators, I think Mr B's complaint about the advice to access his pension in 2015 hasn't been referred to us within the relevant time limits. Mr B has said he thinks there are exceptional circumstances and the advice he was given in 2015 was linked to his complaint about the subsequent contributions. He's said he didn't feel the need to read the 'small print' as he thought he was getting expert financial advice which he thought was in his best interests. He said his relationship with the adviser had developed into a *"sign and date that please"* Mr B, and he trusted the adviser was acting with due skill and care.

As the investigators have explained, the test for the time limits isn't only when Mr B actually became aware that he had cause for complaint, but also when Mr B ought reasonably to have become aware. For the reasons outlined by the investigators, I think Mr B was given sufficient information about the MPAA applying by different sources. These were more than three years before he made his complaint. Whilst I accept that he may not have read those documents, I think it would have been reasonable to expect him to have done so, irrespective of having a trusting relationship with the adviser – these were important financial transactions. I'm not persuaded that the complaint about the 2015 advice has been referred in time.

In relation to the further contributions made from April 2019 onwards, I think the key documents are the following:

9 February 2019 – A letter from the adviser to the SIPP provider asking for information about Mr B's SIPP and including a Letter of Authority of the same date.

10 February 2019 (a Sunday) – Mr B e-mails his employer saying, amongst other things:

"I write to make a request concerning the bonus I am due in my March salary for 2018 performance.

On Saturday I met with a financial adviser and had some very useful advice, I will require the full value of my bonus to be transferred into my private pension as an Employer Pension Contribution in lieu of bonus.

As I'm sure you are aware there are a number of benefits of doing this both for [the employer] and myself."

19 March 2019 - the adviser e-mailed Mr B *saying "I have actually scanned it as when I am sending the filled out one on Adbe its coming out blank even though its filled in. The following actions need completing: Employer needs to sign 2d, print name , date and put in position. You have to sign and put your name and date in section 3 Have to Bacs money or do a TT."*

2 April 2019 - the adviser e-mailed Mr B saying *"Please get the illustration as per section 3 and put details on from* [the SIPP provider*]. Stress its urgent Please sign and date section 14. Please send a copy to me and post to* [the SIPP provider]."

24 April 2019 – the SIPP provider wrote to the adviser confirming that an employer contribution of £60,000 had been credited to the SIPP.

A Confidential Financial Review Form dated 7 October 2019 recorded:

We met to discuss your Pension Scheme with …..You currently have an employer's autoenrollment …Group Personal pension Plan and your employer pays in 3% of your basic salary and you pay in 6% of your basic salary per annum….This is even more important now as [Mr B] will be making lump sum contributions once a year from his annual bonus and feels he can substantially build up his [SIPP Provider] pension.

6 April 2020 - Mr B e-mailed his adviser saying *"…It's that time of the year when I need to draw down 25% of the lump sum paid into my pension. Like last year this was by way of bonus sacrifice which this year totalled £50,000 into my iSIPP so I wish to draw down £12,500. Last year you filled this form for me and I wondered if you would be kind enough to do this again and let me know what information you need from me…"*

The adviser e-mailed the payroll department on 8 April 2020 following an e-mail from Mr B. In his e-mail he said:

"I could do with some urgent help with this. Please see email below. Payroll did not pass the money over in time even though payslip shows its last years contribution and we are doing a Carryforward. Please can you call me at 2pm."

29 April 2020 - the SIPP provider wrote to the adviser confirming that an employer contribution of £50,000 had been credited to the SIPP on 17 April 2020.

30 March 2021 - Mr B e-mailed the adviser saying *"I think this answers my question I sent you on WhatsApp so there is no panic to get this years bonus pushed into the current tax year. I can now complete the form you sent me and request it is paid in the 21/22 tax year."*

And on the same date Mr B sent an e-mail to the adviser with the subject heading 'Bonus Sacrifice Documents' saying *"Hi mate, I've started the ball rolling - let me know if I've made any errors."*

12 April 2021 - Mr B e-mailed the adviser (subject heading BONUS SACRIFICE DOCUMENTS) saying *"…apologies - the HR Director had signed the document on the attached file. Can you please make any changes that are necessary as looking at the form I'm slightly confused what you meant having looked at sections 2a & 2b."*

8 June 21 - The SIPP provider sent the adviser an e-mail dated 8 June 2021. The subject was 'ER contribution' The e-mail included:

"Thank you for your time on the phone earlier.

I have investigated the contribution process with the team involved and we have located the employer contribution, this will now begin the process of being applied to [Mr B's] *SIPP cash account."*

10 June 2021 - The SIPP provider wrote to the adviser confirming that an employer contribution of £30,000 had been credited to the SIPP.

31 May 2022 - the adviser e-mailed Mr B copying in his employer's payroll department saying, *"Please check the form and both you and* [S**]…*will to need to sign this. To make the payment* [S**]….*will need to the send the payment WITH THE UNIQUE REFERENCE number and sent the form to*....[the SIPP provider]."

28 July 2022 - the SIPP provider wrote to the adviser confirming that an employer contribution of £24,500 had been credited to the SIPP.

Mr B first e-mailed his employer about salary sacrifice on 10 February 2019 – the day after the adviser sent a letter of authority to the SIPP provider and requested information from it. In his e-mail Mr B said he had met with the financial adviser the day before who had some *'very useful advice'*, and Mr B went on to ask the employer to use salary sacrifice for his bonus.

This e-mail is contemporaneous. It's consistent with Mr B saying he was advised about the salary sacrifice. Like the investigator, I think it was more likely than not that the adviser advised Mr B about his contributions.

However even if I am wrong about that, I think the evidence I've set out above clearly shows the adviser was involved in arranging the contributions and over a period of time. As the investigator explained, 'arranging deals in investments' is a regulated activity in itself. And the Regulator's Principles and rules applied. So the adviser had a regulatory responsibility to act in Mr B's best interests.

Given his previous dealings with Mr B, I think the adviser ought reasonably to have been aware prior to the April 2019 contribution that Mr B was subject to the MPAA. But even if he wasn't already, given he was, at the least, helping to make arrangements for the contribution of £60,000 which was above the annual allowance in any event, he should have made himself aware of Mr B's circumstances. In my opinion it's clear that the adviser failed in his regulatory responsibility to act in Mr B's best interests throughout.

I acknowledge that Mr B had previously been sent several documents over time and from different parties involved in his pensions about the MPAA. Mr B has said about this:

"I have openly accepted the fact that as a very busy business man I didn't read the small print and I doubt if I would have understood the meaning and as I believed my pension and retirement plans were in the 'safe hands' of my financial adviser namely [name of adviser].

Mr B was ultimately alerted to the implications of the MPAA on receipt of a letter from his workplace pension scheme in September 2022. That scheme has provided copies of similarly worded letters it sent to Mr B in September 2019, 20 and 21. I understand for the 2017/18 tax year Mr B's contributions were below the MPAA, so the September 2019 letter was the first of this type received.

Mr B was already contributing to the workplace scheme and had already exceeded the MPAA for the 2018/19 tax year before the adviser's involvement in the £60,000 contribution in April 2019. And he would already have made contributions to the workplace pension scheme (for April 2019 - August/September 2019) by the time he received the September 2019 letter. However by that point the contributions would only have been marginally above the MPAA for the 2019/20 tax year.

The Pension Savings Statement sent to Mr B in September 2019 provided the same information that alerted Mr B that he had a problem in September 2022. On the one hand, I recognise the argument that Mr B should himself have been aware of the implications of making contributions above the MPAA in the September 2019 letter from the Workplace Pension Scheme.

However on the other, Mr B has said that he didn't read the documentation sent to him and relied on the adviser. Whilst I think a reasonable person, acting reasonably, *ought* to read documents that are sent to them about important transactions, I recognise that doesn't always happen in practice (hence why I consider Mr B ought reasonably to have become aware that he had cause for complaint – even though he may actually not have).

Once the adviser was involved and advising/arranging the lump sum contributions I think it was his responsibility to ensure that he was acting in Mr B's best interests. If the adviser had alerted Mr B to the implications of the MPAA at the time he advised on and/or arranged the £60,000, it's likely Mr B wouldn't have made further contributions to the SIPP.

Taking all the above into account, I have to decide what's fair and reasonable in all the circumstances of the case. I intend to uphold Mr B's complaint in part.

It seems to me that the adviser was directly involved in advising on (at least the first contribution) and/or arranging the contributions to the SIPP. I think it would be fair and reasonable to find that the adviser was responsible for ensuring that making those contributions was in Mr B's best interests given the adviser's regulatory obligations and he was acting in his professional capacity.

I've thought carefully about the contributions to the workplace scheme.

If the adviser had alerted Mr B to the implications of the MPAA in April 2019, I think it's likely he would have limited his contributions to the workplace scheme from then on (in as far as it was financially sensible to do so). However Mr B did also get the Pension Savings Statement in September 2019 which specifically said he had exceeded the allowance for the particular scheme. His adviser wasn't advising him/helping to arrange contributions to that scheme, so he wasn't acting on the adviser's advice or relying on the adviser to act in his best interests in arranging contributions to that scheme – they were of his own arrangements. So I'm not intending on finding the adviser is liable for any detriment flowing from contributions made to the workplace scheme after September 2019.

Putting things right

The 'tax charge' that Mr B has had to pay in relation to the contributions above the MPAA is

effectively the return of the tax relief that was given on those contributions. If those contributions hadn't been paid into the pensions they would have been subject to income tax at Mr B's marginal rate. So Mr B has effectively had to repay the income tax that would otherwise have been payable on those contributions had they been paid to Mr B as income. So I don't think the 'tax charge' reflects Mr B's loss.

However given those contributions are now in a pension scheme (or part of them, given I understand the tax charge was paid from the scheme), they will be subject to income tax when they are withdrawn (or 75%, if there is tax-free cash available from them).

There are both advantages and disadvantages to having that money in the pension. On the plus side, the money in the pension will enjoy tax-free growth, and may not form part of Mr B's Estate for inheritance tax purposes. Making those payments through salary sacrifice may also have benefited Mr B in terms of recovery of some or all of his personal allowance (albeit I understand it didn't here given his level of income). And he would also have likely benefitted from reduced National Insurance contributions.

However on the negative side, when withdrawals are made from the pension they will likely be subject to income tax on part of the pension when benefits are taken from it. Those contributions could be invested for a long period, and their value won't be known or what if any income tax will be payable until they are actually taken (that value including investment growth). A pension also has less flexibility (than say an ISA, that Mr B may have alternatively invested into).

My aim, in deciding on fair compensation, is to try and put Mr B broadly back into the position that he would have been in but for the firm's failures. However that isn't particularly straightforward in the particular circumstances here.

I intend to order that Vision Independent Financial Planning Ltd calculates and pays Mr B compensation on the following basis.

• It should ask the SIPP provider to calculate the value of the 4 lump sum contributions that Mr B made to his pension (as above), as at the date of a final decision. If the 'tax charge' has been paid out of the SIPP for any of those contributions (which I understand it was), the calculation should be based on the contribution net of the charge subsequently paid (the tax charge in relation to the lump sum contributions not the workplace contributions). I'll call this value A.

• If Mr B saved National Insurance contributions through the salary sacrifice arrangement, Value A should be reduced to reflect this saving (likely to be by 2%). Vision Independent can obtain clarification from Mr B's accountant). I'll call this Value B.

• Any tax-free cash that can be taken from Value B should be deducted from its value. The remaining sum I will call Value C.

• On the assumption that Mr B will be a basic rate taxpayer in retirement, Vision Independent should calculate 20% of Value C. I will call this Value D.

- Mr B may have recovered some or all of his personal allowance as a result of making the contributions through salary sacrifice (albeit from the figures I've seen I don't think he did). However Vision Independent should deduct any income tax that was saved as a result of it from Value D. It can obtain this figure from Mr B's accountant. I will call this Value E. Value E may equal Value D if no personal allowance was recovered.

I intend to award Mr B Value E.

Mr B has said he suffered considerable stress as a result of the problems with his pension. He's said he's lost sleep due to his retirement plans being destroyed. And the stress has partly led to the breakdown of his marriage.

Clearly I cannot say to what degree the pension matter led to Mr B's marriage breakdown. However I accept the problems with his pension will likely have caused considerable stress.

However having said that, I think the main issue relating to his retirement provision/plans is that Mr B is very limited in the contributions he can make to a pension because he is subject to the MPAA. And that was a result of the advice he received in 2015 – which I cannot consider. Whilst finding out he could not make the lump sum contributions that he did without a tax charge is obviously stressful, that was the reality of the situation (once he was subject to the MPAA). And the 'tax charges' were paid out of the pension scheme - effectively repaying income tax that would otherwise have been paid if he hadn't used the salary sacrifice arrangement.

The investigator recommended £1,000 for the distress and inconvenience caused. However I have to consider the distress and inconvenience caused by the adviser's errors in arranging the lump sum contributions, and not in the light of the limitations caused by the 2015 advice – which I think is the main cause of Mr B's problem in making further pension provision. Accordingly, whilst I recognise the issues that followed making the lump sum contributions caused Mr B additional stress, I don't think it was to the same degree as the problem in being able to make limited contributions. I'm therefore intending to award Mr B £500 for the distress and inconvenience caused by the matter.

Vision Independent should also pay Mr B the proportional cost (i.e that part of the cost relative to the lump sum overcontributions to the SIPP) of any interest or penalty levied by HMRC in respect of the 'tax charge'. Gross Interest at the rate of 8% simple should be paid from the date the interest and/or penalty was paid until the settlement date. This reflects the loss of use of that money for that period. Mr B should provide details of the dates he was notified of the penalties and dates they were paid in responding to this provisional decision.

Where interest is being added at 8% simple per annum, this is likely to be subject to tax applied by HM Revenue & Customs. If Vision Independent deducts tax, it should tell Mr B how much it has taken off. It should also give Mr B a certificate showing this, if requested so he may reclaim the tax from HM Revenue & Customs.

My understanding is that Mr B didn't suffer any penalty as a result of a delay in informing his other schemes of the MPAA being triggered. And given it would have been triggered by the workplace pension scheme itself in any event, I'm not intending to make any award for that particular penalty.

I recognise it could be argued other adjustments to the above calculation should be made to reflect other factors at play. However in my opinion it's reasonable to take as pragmatic approach as appropriate in the circumstances to prevent the calculation becoming overly complex, time consuming and costly. I accept that Vision Independent may need to obtain some information from Mr B's accountant, but I don't think the above will necessarily require actuarial assistance.

On the one hand, I don't intend to make a further allowance for the capital being invested in a pension and so subject to tax free growth. The regulator assumes a 1% higher rate of growth for tax sheltered investments on its projections of possible future returns.

However on the other, firstly, I don't intend to make an award for the income tax that will ultimately be payable of the contributions paid into the workplace pension scheme between April 2019 and September 2019. As I say, by September 2019 they were only marginally above the MPAA. I don't think the income tax ultimately payable on it (so 20% after taking any available tax-free cash) would be significant. And secondly, the loss calculation will be as at the date of my final decision. So the income tax payable on any investment growth after that date won't be accounted for and, as I've said, it could be invested over a prolonged period.

So overall I think there is a reasonable balance, and that Value E is fair in all the circumstances.

My provisional decision

My provisional decision is that I uphold Mr B's complaint in part.

I intend to order Vision Independent Financial Planning Ltd to calculate and pay compensation to Mr B as I have outlined above under "Putting things right".

Following on from the above provisional decision, I asked Mr B and Vision Independent to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Mr B said, in summary, that he had provided everything that what he wanted to say previously. He said had relied on what the adviser had told him and he wasn't financially knowledgeable. He hadn't read the small print.

Vision Independent said it had no further information to submit. However it asked if I would request that Mr B obtained all the information that would be required for the redress calculation from his Accountant to allow it to calculate any redress due in line with the direction. It said as Mr B had an ongoing relationship with his Accountant it would expect this would speed up the process of obtaining the required information.

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've seen no reason to depart from the findings set out in m provisional decision as set out above.

I do appreciate that Mr B relied on what the adviser said, and he may not have read all the 'small print'. However I think I addressed this in my provisional decision. And I've made my decision on what, in my opinion, is fair and reasonable in the particular circumstances of the complaint.

Vision Independent has asked that I require Mr B to obtain the relevant information from his Accountant. Given Vision is in a better position to understand what information is required it may be better for it to request it - albeit through Mr B. Either way, it is a matter for the parties to decide between them. I'd just ask they arrange the settlement as soon as possible and in good faith.

My final decision

My final decision is that I uphold Mr B's complaint in part.

I order Vision Independent Financial Planning Ltd to calculate and pay compensation to Mr B as I set out in my provisional decision and copied above under 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 4 October 2024.

David Ashley
Ombudsman