

## The complaint

Mr N has pursued complaints about Hansells Solicitors' ('HS') recommendation of a Defined Benefits Pension ('DBP') transfer in 2016 and its Ongoing Advice Service ('OAS') since then (until 31 July 2020 when HS sold its financial services business). This complaint is only about the OAS matter. The DBP transfer matter has been addressed separately.

Mr N says the OAS was not delivered to him, so he seeks a full refund of all the Ongoing Advice Fees ('OAF') deducted from his pension portfolio. HS and its representative say the opposite. They have referred to engagements with Mr N in 2017, 2018 and 2020 as examples of the ongoing service it delivered to him, so they do not consider he is entitled to a refund of the OAF. They also say that, in any case, the OAF has been captured and resolved within the calculation (and resolution) of redress in the separated DBP transfer matter, so this is a distinct, or additional, reason why no OAF refund should be due.

## What happened

HS mainly says –

- The DBP transfer advice and execution happened between March and April 2016; in November that year Mr N sought and obtained HS' assistance in arranging a lump sum withdrawal from his new pension and in finalising the pension's investment strategy; both sides met in January 2017 to discuss how the balance of his pension (after the lump sum withdrawal) should be invested; the agreed approach was executed between February and March 2017; during the same period Mr N sought and received HS' advice on a workplace pension related matter; in September 2018 HS conducted an annual review of his pension and issued a detailed review report for this purpose; and in March 2020 Mr N contacted HS to review his accounts, which was done (including execution of changes) in the same month.
- Its financial services business was sold in July 2020, so thereafter it had no responsibility to provide the OAS to Mr N's pension.
- Overall, Mr N received two reviews (in 2018 and 2020), in addition to the ongoing advice and assistance he sought and received at other times.
- The DBP transfer matter has been separately upheld and the financial loss calculation independently conducted for it concluded that no loss, resulting from the DBP transfer recommendation, had been suffered in Mr N's pension. All paid OAF (alongside other fees incurred in the pension) were included in the calculation. A duplicate claim for a refund of the OAF cannot reasonably be upheld because that refund has already been factored into the financial loss calculation in the DBP transfer matter.

Our investigator disagreed.

Mr N had also asked for a refund of the Initial Advice Fee ('IAF') charged at the point of the DBP transfer advice, but the investigator explained that the IAF is associated with the DBP

transfer matter and has formed part of the loss calculation (and redress consideration) for that matter. Therefore, it is outside the scope of his separate claim for a refund of the OAF (on the grounds that the OAS was not delivered).

With regards to the OAS/OAF, the investigator explained to HS that a distinction must be drawn between the issue of suitability addressed in the DBP transfer matter and the issue of an undelivered but paid for ongoing service, as Mr N alleges in the separate OAS/OAF matter.

He referred to the regulator's 2012 Retail Distribution Review and its requirement for separate and transparent treatment of payments to firms for investment advice; to the regulator's Conduct of Business Sourcebook rule relevant to this requirement; and to the regulator's guidance to firms, which says they must ensure their clients receive the ongoing service they have committed to. He considered that the sum effect of all these was/is that if a client does not receive an agreed OAS from a firm the associated fees should be refunded.

In Mr N's case, the investigator cited the definition of the OAS in HS' terms of business document and found that it mainly entitled him to annual reviews. He then concluded as follows – none of the 2017 engagements between the parties amounted to an annual review in that year; there is evidence that an annual review was conducted in 2018; there is no evidence of any other annual review thereafter (up to the sale of business in July 2020); so, Mr N only ever received one annual review between 2016 and 2020; that happened in 2018, but he did not receive the OAS he paid for in the other years; so he should be refunded the OAF for the years he did not receive the OAS/annual reviews, plus compensation for lost performance on the refund (performance, based on the pension portfolio's performance over the same period(s), that the refund would have generated had it not been deducted as OAF).

HS and its representative disagreed with this outcome and, in the main, restated their position (as summarised above). The matter was then referred to an Ombudsman.

### **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 have reached the same conclusion expressed by the investigator.

This decision is only about the OAS/OAF related complaint. Suitability of the DBP transfer has been dealt with separately, it is beyond the scope of this decision, and I do not comment or make any finding on it.

However, I must briefly address HS' reference to the redress outcome in the suitability complaint because it is one of the two grounds on which it disputes the OAS/OAF complaint; and I must also briefly address Mr N's claim for a refund of the IAF associated with DBP transfer advice because he appears to maintain that claim within the OAS/OAF complaint.

There is a distinction to be drawn between redress aimed at compensating for investment based financial loss, and the matter of resolving a firm's failure to deliver a distinct service it was paid to deliver. The OAS/OAF matter is the latter, and I consider it unrelated to any finding(s) about redress in the suitability case concerning investment loss connected to the DBP transfer. The issue to determine in the OAS/OAF matter is about ongoing service provision, not suitability of the initial DBP transfer advice.

For the reasons I address below, I uphold Mr N's complaint on the same terms expressed in the investigator's view. Therefore, I agree with the provision to calculate performance on the

OAF refund due to him. HS might view this provision as connected to the redress outcome in the suitability case. If so, I disagree.

That outcome was based on considerations related to the suitability (or otherwise) of the DBP transfer advice. The notion of calculating performance on the OAF refund due to Mr N has nothing to do with that. Its aim is to use his pension portfolio, as it was during the periods for which the OAF refund is due, as a benchmark to calculate any performance the refund amount would have achieved had the money deducted for the OAF (which forms the refund) remained invested in the portfolio. This is different to calculating investment loss arising from unsuitable advice, and it does not use a benchmark arising from any finding of unsuitability, it uses the portfolio as it was.

With regards to the IAF, a similar finding applies. The IAF was connected to the initial DBP transfer advice. That advice was provided, so there is no ground to consider it undelivered. If, as it appears, Mr N believes he is entitled to a refund of the IAF because the initial DBP transfer advice was unsuitable, then that too is patently an issue related to the suitability case, not the OAS/OAF case.

In simple terms, HS cannot reasonably retain fees for a service it did not provide, and Mr N's pension portfolio is entitled to compensation for any such fees deducted from it. As I show below, the OAS in his case featured mainly annual reviews, followed by other components.

The absence of annual reviews is the focus of his complaint. The first review after the initial March/April 2016 advice and implementation would have been due no later than April 2017. HS essentially says that the sum of the following amounted to a form of review at the time – assisting Mr N in November 2016 to arrange a lump sum withdrawal from his pension, meeting with him in January 2017 to discuss investment of the post-withdrawal pension balance, executing said investments between February and March 2017, and advising him on a workplace pension matter around the same time.

The January 2016 version of HS' Financial Planning Service ('FPS') document defined the ongoing Annual Review Service as follows –

“

- *An annual review meeting and update on changes to your situation and plans for the short, medium and long term.*
- *A report to update on your planning and to ensure that it is on track which will include any relevant advice.*
- *Pro active contact and advice if investments should be changed*
- *Pro active contact and advice if legislative changes impact on planning*
- *Full implementation of all advice*
- *Full administrative support*
- *Ongoing assistance and availability of adviser and support team.*
- *Additional advice when it is required which may be chargeable.”*

I consider it reasonably clear that the first two bullet points above – concerning annual reviews – are sufficiently distinct from the other listed components of the service. In particular, separate provisions were made for ongoing administrative support and ongoing assistance and availability of an adviser, neither of which substituted for the annual review obligation.

I also consider that, on balance, the annual reviews were the main benefit in the service. They were the only component of the service that had to be routinely delivered by HS without requests. The others were either subject to initiation by either party – depending on

whether (or not) HS had, on an ad hoc basis, cause to advise and/or Mr N had, on an ad hoc basis, cause to ask for advice/assistance – or were about implementation of advice and/or administration when needed. If neither party had such causes, and in the absence of requested advice or administration, the only element of the service that always had to be delivered were the annual reviews. Therefore, failure to deliver the annual reviews can reasonably be considered as a failure to deliver the OAS.

Advice related to Mr N's workplace pension would arguably have been remote to a review of the 2016 advice, so it can be discounted for this reason. If I am wrong, then such advice would come under the ongoing assistance and availability of an adviser element of the service. In any case, I am persuaded that it did not amount to being a part of an annual review. I find similarly on the lump sum withdrawal and post-withdrawal investment events cited by HS, they too would have come under the ongoing assistance and availability of an adviser element of the service, and they were not part of, or substitute for, an annual review.

There is evidence of what the annual review element of the OAS was supposed to look like. HS delivered an annual review in 2018. Its Review Report of 6 September 2018 shows reviews of Mr N's objectives, risk profile, and the performance of his pension portfolio; a detailed review of the investment strategy for the portfolio (over around four pages); additional strategy and performance related considerations; and a review of costs and charges. I have not seen evidence of a service provided by HS to Mr N in 2017 that matched, or served as a meaningful substitute for, these. The events it has referred to were isolated and, as I said above, they fell under the ongoing assistance/advice element of the OAS, not the annual reviews element.

Therefore, thus far, I am satisfied that the annual review service (and therefore the OAS) was not delivered in 2017.

It appears to have been delivered late in 2018 – around September, instead of around March/April – but an annual review was delivered. I am satisfied with evidence of this in the Review Report I mentioned above. I have noted comments from Mr N about the absence of fresh fact-finding and risk profiling behind the report. He does not consider that a proper annual review took place, and he says HS did no more than 'rehash' its approach to the initial 2016 advice. On balance, I do not get that impression from the report.

It leads with confirmation that the initial 2016 advice is under review, but that is not uncommon for annual reviews. Their subject matter can, and often does, relate to an initial advice. The idea being that the continued suitability (or otherwise) of the initial advice is kept under review. There is also an early invitation, in the report, for Mr N to correct any inaccuracies and/or declare any disagreements with assumptions within it. He appears to have done neither at the time, which suggests the summary of his profile in the report was accurate and up to date. The performance and investment strategy assessments were presented in an up-to-date context, as were the additional considerations and costs/charges review. Overall, I consider that the 2018 annual review was meaningful.

There was no annual review in 2019, so the OAS was undelivered in this year too (alongside the non-delivery in 2017).

HS refers to contact it made with Mr N in March 2020 which, it says, essentially served as the annual review for that year. On balance, I am not persuaded this contact constituted an annual review.

It wrote to Mr N and his wife on 19 March 2020, in response to an email enquiry from him about 'income and cash'. The letter contains some assurances about management of the pension portfolio during the pandemic outbreak at the time, and then it goes into a form of

market performance analysis (for which a few chart/graph enclosures were attached). As part of the letter's conclusion, the author said – *"I will be happy to discuss your planning and your investments with you and, if you would like to do so, please do make contact."*

Overall, I consider that this was another event that fell under the separate ongoing assistance and advice element of the OAS, prompted by contact from Mr N. It was not an annual review, and it did not substitute for an annual review. The assurances and performance analysis in the letter were somewhat generic, and the sentence quoted above shows that no discussion over his financial planning and pension investments had taken place. Hence the invitation extended to him to make contact if he wished to discuss them. He ought not to have been required to ask for that discussion. The OAS entitled him to an annual review around the same month (March 2020, the fourth anniversary of the March 2016 initial advice) in which the letter was sent, so HS should have conducted the annual review automatically, without awaiting a request to do so.

Overall, on balance and for the reasons given above, I conclude that Mr N was not given the OAS he paid for and was entitled to receive for his pension portfolio in 2017, 2019 and 2020. As HS says, it sold its financial services business in 2020, so it was not responsible for the OAS thereafter.

I uphold Mr N's complaint on the above grounds, and for the reasons given above I find that HS must pay him a refund of all the OAF it deducted/received from his pension portfolio in 2017, 2019 and 2020, plus compensation for lost performance on the money that was deducted from the portfolio during these periods in order to pay the OAF.

### **Putting things right**

#### **what must HS do?**

To compensate Mr N fairly, HS must:

- Calculate the total of all the OAF payments deducted from Mr N's pension portfolio for the purpose of paying for the undelivered OAS in 2017, 2019 and 2020. The result is 'A'.
- Calculate how each and every OAF deducted from his portfolio during the above periods would have performed had there been no such deductions and had the deducted monies remained invested in the portfolio. The result is the total growth, if any, the OAF deductions would have achieved, and the result is 'B'.
- Pay A + B (jointly 'the compensation') to Mr N. If the compensation is not paid to him within 28 days of HS being informed about his acceptance of this decision, it must pay him interest on the compensation at the rate of 8% simple per year from the date of this decision to the date of settlement. This is to compensate him if settlement is unduly delayed.
- Pay the compensation (and any interest) into Mr N's pension plan to increase its value by the total 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 HS is unable to pay the total amount into the pension plan, it should pay that amount direct to Mr N. Had it been possible to pay into the plan, it would have

provided a taxable income. Therefore, the total amount 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 is not a payment of tax to HMRC, so Mr N would not be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using his actual or expected marginal rate of tax at his selected retirement age. If he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.
- Provide the details of the calculation to Mr N in a clear and simple format.

### **My final decision**

For the reasons given above, I uphold Mr N's complaint, and I order Hansells Solicitors to compensate him as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 26 March 2025.

Roy Kuku  
**Ombudsman**