Financial Ombudsman Service

complaint

Ms B's complaint concerns her Unit Trust portfolio recommended by Protection and Investment Ltd. She says the equity funds in which she was advised to invest weren't consistent with her recorded attitude to risk.

Ms B is also unhappy the business continued to receive commission from her investments after their relationship broke down in April 2010. She would like all commission received by the business since that point to be returned, plus interest.

background

Our adjudicator was of the opinion the complaint should be upheld in part; in respect of the recommendation but not the commission issue. This was because she felt there was insufficient evidence to demonstrate that Ms B made the business aware between April 2010 and March 2011 that she no longer wished to be their client. As such, the adjudicator was not persuaded that any commission received during this period should be refunded.

The adjudicator was, however, of the opinion that the recommendation didn't reflect Ms B's recorded attitude to risk. She was recorded as being a 'cautious' investor, which was option 2 from a total of 5 options, with 5 being the highest level of risk a consumer would take. The adjudicator felt that the advice to invest in predominately equity based funds exposed Ms B to more risk than she was prepared to accept.

The business didn't agree with this view, saying:

- The adjudicator had said the portfolio recommended did not correspond with Ms B's risk profile of a low risk to her capital. But there had been no capital loss as a result of the recommendation.
- It was said that the portfolio was predominately invested in equities but in fact only 21% was.
- No reference had been made by the adjudicator to the £310,000 that Ms B had on deposit, which was more than half of her portfolio.
- The advice given to Ms B was for her entire investment portfolio.
- Ms B held £310,000 on deposit, regardless of whether she intended to gift part of this to her children in the future. It does not seem that she acted on any advice given to her to gift any of this money to her children.

Ms B made the following comments:

- The letter from the business sent to this service in August 2013 was inaccurate and her circumstances at the time were more accurately reflected by the recommendation letter sent in November 2005. She enclosed her tax return for the 2005/06 tax year to support her position.
- A letter from the business in November 2012 stated that it had contacted all the product providers to confirm it was no longer acting on Ms B's behalf. However, a letter from one provider in May 2012 showed that this had not been the case. Ms B said that she only contacted the business about utilising her capital gains tax allowance because she was advised by the provider that she would need to do this.

As an agreement could not be reached, the complaint has been referred to me to review.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Ms B met the adviser in November 2005. At this meeting he completed a 'confidential client information' document (more commonly known as a fact find) as a record of her personal and financial circumstances and objectives.

It was recorded that Ms B was in her 50s and a company director receiving £4,000 per annum. According to the fact find, Ms B also had personal savings of £110,000. An additional schedule showed that Ms B had just under £90,000 in investments with most of this in with profits funds, a small Personal Equity Plan (PEP) and Individual Savings Account (ISA) in equities funds.

Towards the end of the fact find Ms B's attitude to risk was indicated as the second lowest on a scale of five. This risk category was described as:

"*You prefer to accept only a low risk of capital loss in return for the opportunity to earn more than from deposit type investments. You recognise that this will limit the potential for real capital growth*".

Directly below a handwritten note recorded that no more than 10% should be in high risk investments.

This meeting was followed by the adviser sending a letter to Ms B later in the month. It explained that she had decided to surrender an investment bond for which she was the beneficiary. The adviser wrote that the proceeds of £400,000 should be paid to Ms B and her two sons. He said the money could be invested in a unit trust portfolio and he recommended this be placed into the following asset categories considering Ms B's "slightly cautious view of investments".

UK equities	£165,000
US equities	£40,000
EU equities	£60,000
SE Asia equities	£25,000
Property	£110,000

Ms B decided to follow the recommendation to invest her share, which was £200,000, into eight different funds to broadly fit within the above asset allocation. A third of this amount was placed in a property fund and around half was placed into three funds that invested in UK equities. The remainder of the amount was divided between three overseas equities funds and a £7,000 ISA in a bond fund.

Ms B does not believe the funds recommended by the business were consistent with her recorded cautious risk profile. I note that the risk scale in the fact find described Ms B as accepting only a low risk of capital loss to be able to earn more than would have been the case with deposits. However, the adviser recommended that Ms B place a large part of the capital she had to invest in various funds that invested either in UK equities or overseas equities. As a result, Ms B could have experienced a significant reduction in her capital if the markets fell. Therefore, I'm not satisfied these recommendations sat easily with her 'cautious' risk profile.

Indeed, the next risk category, which was the third highest out of the five, referred to a preference for investing in stock market linked investments and accepting the risk of some capital loss. Clearly, Ms B did not agree a risk profile of three or higher so, overall, the recommendation was in my view not in line with what she had agreed to at the time.

It has been noted by the business that Ms B has not suffered any capital loss. However, even if it is established that Ms B hasn't in fact incurred a capital loss, this would not make what I consider to have been unsuitable advice now suitable. For the reasons outlined it is my view the recommendation wasn't suitable bearing in mind Ms B's recorded requirements.

The business has also said that Ms B's objective was to obtain advice on what it describes as her entire investment portfolio therefore the recommendation was suitable when looking at her portfolio as a whole. Furthermore, the business has said that only 21% of Ms B's overall portfolio was invested in equities.

The adviser described Ms B in his November 2005 letter as slightly cautious and she was categorised as two out of five in terms of risk in the fact find, again indicating a more cautious attitude. Approximately two thirds of the capital Ms B was recommended to invest was placed in equities funds with the balance in a property fund. An ISA was also taken out for £7,000 in a fixed-interest securities fund.

I appreciate that Ms B also had some money in with-profits funds and a substantial sum in savings. Nevertheless, it does not appear that the adviser presented the recommendation to her as part of a wider portfolio, taking into account all her other holdings. If this had been the case the adviser should in my view have clearly identified the investments that were of a higher risk and how these fitted into Ms B's overall financial arrangements. From looking at the correspondence sent to Ms B it does not appear to me this was the case. If this had been done Ms B would have been in an informed position and able to decide whether to accept the recommendations. Instead, the adviser made the recommendations without any reference to the context of her assets as a whole.

As such, I think that even if a much smaller proportion of the capital had been recommended to be invested in equities funds, I would still be of the view this would be inappropriate considering Ms B's requirements.

I should point out that I have not considered the advice to invest in the property fund as this has been the subject of a previous complaint. Further, it is my view the £7,000 ISA into the corporate bond fund was reasonable taking into account Ms B's risk profile. So I do not uphold any complaint in respect of the suitability of this particular recommendation.

Lastly, Ms B has also complained about commission paid to the business on the investments after she considered the relationship had broken down in 2010. The payment of the commission is a matter between the product provider and the business but it can have an impact on the value of an investment as it can be indirectly deducted.

In this instance I have upheld the complaint and the calculation of compensation will need to take into account the final value of the various investments within the portfolio. So, any commission taken from Ms B's *unsuitable* investments should be included within any redress payable to her if she accepts this decision.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Ms B as close to the position she would probably now be in if she had not been given unsuitable advice.

I take the view that Ms B would have invested differently. It is not possible to say *precisely* what she would have done differently. But I am satisfied that what I set out below is fair and reasonable given Ms B's circumstances and objectives when she invested.

what should the business do?

To compensate Ms B fairly, Protection and Investment Ltd must compare the performance of Ms B's investment with that of the benchmark shown below.

The compensation payable to Ms B is the difference between the *fair value* and the *actual value* of Ms B's investment. If the *actual value* is greater than the *fair value*, no compensation is payable. Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Fidelity fund investment (excluding the property part and the corporate bond ISA)	surrendered	For half the investment: FTSE WMA Stock Market Income Total Return Index. For the other half: average rate from fixed rate bonds	date of investment	date surrendered	8% simple p.a. on any loss from the end date to the date of settlement

for each investment:

actual value

This means the actual amount paid from the investment at the end date.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, the business should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any withdrawals, income or other payments out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

If there are a large number of regular payments, to keep calculations simpler, I will accept if the business totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because Ms B wanted income with some growth with a small risk to her capital.

The average rate would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital. The WMA index is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

I consider that Ms B' risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Ms B into that position. It does not mean that Ms B would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Ms B could have obtained from investments suited to her objective and risk attitude.

The additional interest is for being deprived of the use of any compensation money since the end date.

my final decision

For the reasons given, my final decision is that I uphold the complaint. I direct Protection and Investment Limited to pay Ms B compensation as set out above.

James Harris
ombudsman