

complaint

Mr D has complained that Positive Solutions (Financial Services) Limited ("Positive Solutions") failed to give the service he expected. The adviser did not move his funds into more suitable investments at the appropriate time.

background

Mr D's wife has brought an identical complaint which I have dealt with separately.

But whilst I have considered each complaint on its specific merits, I trust Mr D will understand that their similarity means my decisions are commensurately similar.

In 2008 following advice from Positive Solutions Mr D transferred his pension. The funds were invested in a Deposit Fund. Mr D understood this to be a temporary measure until the market was more stable.

Mr D said that, in 2008/09, he completed an 'Online Fund Switching Authority'. Mr D says this gave consent to the adviser exercising control of Mr D's funds, including fund switching.

Mr D has said that he received annual statements showing the funds were falling in value. Following receipt of the 2014 statement, Mr D complained to Positive Solutions.

It said it was satisfied its adviser had made sufficient attempts to contact Mr D to review his pension arrangements. Further, it said the adviser did this despite not being obliged to provide Mr D with reviews.

Page two of Positive Solutions 'Terms of Business' document states:

'When we have arranged any contract or contracts for which you have given us instructions we will not give you any further advice unless you request it, although we will be glad to advise you at any time if you ask us to do so.'

Positive Solutions also said the fund switching authority didn't mean that Mr D was opted out of making future decisions about which funds to invest in.

Mr D said that his business relies on telephone calls and so if the adviser called he would have been notified of this. He said he was always available before 11am and so disputed that the adviser had difficulty in contacting him. Mr D added that the trail commission demonstrated his funds were – or should have been – managed by Positive Solutions.

The matter was then referred to this service. An adjudicator concluded that Positive Solutions were not contractually obliged to provide Mr D with ongoing advice. She explained the trail commission stemmed from the initial advice; it was not payment to manage Mr D's funds in the future.

Mr D confirmed that he received annual pension statements. These showed the fund was falling in value. But Mr D submits he was told this would happen but to allow it to develop. He also said that he kept Positive Solutions updated when changing address.

But the adjudicator said that Mr D ought to have requested a review of his pension by Positive Solutions following receipt of the annual statements.

Mr D did not agree. He said:

- There was a verbal contract to give further advice.
- To look at page three of the terms of business letter in particular points 1, 2 and 3.

The adjudicator reiterated there was no evidence of the conversations between the adviser and Mr D. But she said that the terms of business letter provided showed there was no obligation to provide further advice.

Agreement was not reached. So the matter has been referred to me.

Positive Solutions made no further submissions. Mr D provided a copy of a letter sent to him by Positive Solutions in March 2013. This invited Mr D to arrange a meeting with an adviser for a review. Mr D says this shows Positive Solutions ought to have contacted him but failed to do so.

my findings

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

There is limited information available to support either parties' submissions. In these circumstances, I base my decision on the balance of probability. In other words, what I consider is most likely to have – or should have – happened.

Mr D relies on the '*online fund switching authority*' to say that this gave Positive Solutions discretion to manage his funds in the future, without his involvement in any investment decision. Its only purpose was to facilitate active management of his funds.

It is unfortunate that neither party has been able to provide a copy of that document. But I am not persuaded it was effectively a discretionary management agreement. In my opinion, it is more likely that it was a 'once off' authority for Positive Solutions to invest Mr D's funds once it *and* he had decided to move the funds away from the temporary deposit account.

I say Positive Solutions *and* Mr D because the terms of business letter clearly set out that it would only give further advice on the initiative of Mr D. I have not been given any persuasive evidence that Mr D attempted to contact Positive Solutions in order to discuss switching his funds away from the Deposit account.

I also note that Mr D says he received annual statements. These showed that both the fund was falling in value and specified that Mr D's funds remained invested in a deposit account. If Mr D was concerned about this, with the clear implication that his funds were not being actively managed by Positive Solutions, then I would reasonably have expected Mr D to have queried this with Positive Solutions. Irrespective of this, it would also be the case given that Mr D says that there was a verbal contract in place for his funds to be actively managed. I have not been given persuasive evidence to show that Mr D did this.

I also agree with the adjudicator that the retention of trail commission by Positive Solutions reflected the initial advice. It cannot reasonably be taken to mean, as Mr D contends, that

there was then an obligation on Positive Solutions to actively manage Mr D's funds in the absence of specific instructions from him or a comprehensive discretionary agreement.

I understand Mr D will be disappointed with my decision. But for the reasons set out above, I do not think it would be fair or reasonable to hold Positive Solutions to account for Mr D's funds remaining invested in a deposit account.

my final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr D to accept or reject my decision before 15 February 2016.

Terry Connor
ombudsman