

## **complaint**

Ms R was advised by ABC 123 Limited (trading as AR & JE Hull Partnership) in 2013 to transfer her existing self-invested personal pension (SIPP) into a personal pension plan (PPP) with a different provider. She agrees she was aware some commission would be payable to ABC for the transaction, but when she noticed later in 2015 how much was paid she felt it was excessive. She says she doesn't think she would've transferred, had she fully understood what would be charged by ABC at the time.

## **background**

ABC had originally advised Ms R to set up a SIPP in April 2010 by making regular contributions of about £450 per month. Ms R invested in a range of internally and externally managed funds across shares, property and bonds, with a charge averaging about 1.6% per year.

Commission was payable amounting to 25% of the first year's premiums, and this was collected from the SIPP over the first four years. I understand ABC was also taking trail commission of 0.5% of the fund per year from the SIPP since it started. And it was being paid a retainer by Ms R and her partner together of £75 per month, which covered ad-hoc issues with this pension but also other property and accountancy issues they discussed with the adviser.

By July 2013 her plan was valued at about £9,000. ABC recommended Ms R transfer this to a new PPP, into which she would continue paying £500 per month. She was aged about 48 at this point. ABC took its standard fee of 4% of the amount transferred, and a further 25% of the first year's premiums under the new PPP.

Ms R recalls being told the reason for the transfer was because ABC found it easier to deal with the new provider, and she believed all ABC's clients were moving across. ABC denies that was the case – and has instead referred to the lower charges overall under the new PPP together with a 'lifestyling' option that was chosen.

Ms R says she believed ABC's fee for the transfer – which she didn't examine in detail at the time – would be similar to what she'd paid in 2010 (around £1350). She hadn't been expecting to pay nearly £1,000 more than this – which appears to be a combination of ABC's 4% fee on the transfer, and a one-off deduction of the remaining establishment charges for the regular premiums under the SIPP.

ABC provided a written record of its advice to Ms R on 28 June 2013. That said the transfer was Ms R's preference and the advantages and disadvantages of the transfer were:

- The new plan had lower charges than the SIPP
- The new plan had a good range of funds and online access
- There would be a 4% adviser fee deducted from the transfer value
- A further 25% of the first years' premiums would be deducted as an adviser fee
- There was a transfer penalty of £560 for transferring out of the SIPP
- There was no guarantee the new pension plan would provide higher benefits at retirement. They may in fact be lower
- Over the term to retirement the projected fund value of the new plan was higher than the old one

Ms R had already signed a letter on 13 June 2013 explaining she had decided to transfer the value of her SIPP into another plan, and the advantages and disadvantages of that had been discussed with her.

Ms R was recorded as having an adventurous attitude to investment risk, as a result of a questionnaire she'd completed for ABC. So a lifestyling approach was chosen which started out with adventurous funds, but switched to more cautious funds as Ms R approached a selected retirement age of 65.

The following year Ms R was disappointed to find the pension had fallen in value. She raised her concern at a meeting with ABC in October 2014. It is common ground that ABC offered her compensation, although the amounts and reasons for that are disputed. Ms R thinks that she was offered £1,000 compensation in addition to a waiver of ABC's retainer in future. ABC maintains it only offered to waive the £75 retainer for Ms R and her partner for a year (£900), as a gesture of goodwill in order to retain their business. There was no offer of £1,000 in addition to this.

As Ms R wasn't satisfied, ABC decided to defend the complaint in full and offer no compensation in its final response letter. (Ms R and her partner did in any event cancel the ongoing retainer.) It explained that it had met Ms R and her partner 23 times over a ten-year period, and had advised on many aspects of their finances without taking any fee at all. It stressed that the advice to transfer in 2013 was based on the better prospects for growth in a lower-charging environment. Service levels from the provider weren't the primary consideration. Its fees for this weren't excessive, on the basis that Ms R had confirmed she didn't intend to access her pension until age 65 – and this gave a considerable term for them to be recovered through lower charges.

The adviser believes that Ms R (and her partner)'s admissions that they were aware of some fees being payable supports that – as with all clients – he explained these fees to them verbally as well as in writing. Although Ms R doesn't recall her suitability letter, she ought to have been expecting one – after she or her partner acknowledged receipt of similar letters in the past. ABC denies its advice was motivated by how much it would be paid and believes its careful attention to other aspects of their finances demonstrates this.

#### *our investigation*

ABC didn't obtain 'like for like' projections comparing Ms R's SIPP and PPP at the time of the sale, because they were based on different growth rates. So it sent us a spreadsheet reconstructing the projections using the same growth rates over the term to retirement. It suggested Ms R would 'break even' in terms of charges by transferring after about seven years.

One of our adjudicators thought this meant that the new plan did have a reasonable chance of providing a higher fund value at retirement. And ABC would have undertaken research in order to recommend the transfer, for which it was appropriate to charge 4% of the fund value.

But monthly deductions were still being made from the SIPP as a result of the advice given in 2010, which were clawed back in a single payment on transfer. And ABC then set up another stream of these payments for Ms R resuming her monthly contributions to the new plan. The adjudicator didn't consider it was fair for ABC to take commission twice on the regular premiums within a short space of time.

So the eventual conclusion she reached was that ABC should refund the commission it had received for re-establishing the regular premiums in the new PPP to Ms R directly with interest.

In response, Ms R was still confused as she recalled ABC's initial response to her complaint (verbally) was that her pension shouldn't have been moved, as it had been too small; and the error had been treating it the same way as her partner's pension. She'd replied to ABC in an email at the time, confirming her understanding of what it had said. This also said she understood it was offering her £1,000 in addition to a waiver of its retainer. ABC didn't dispute her email at the time.

Whilst she welcomed the adjudicator's proposal, she didn't think it would recover all the charges for advice which she thought ABC had already admitted was deficient. The reason she maintains she was given for transferring (better service standards) had been outweighed by the higher charges. And if the new PPP was so much better, why wasn't it recommended in 2010 instead of the SIPP? ABC has told her this PPP wasn't available in 2010, but the provider had suggested otherwise.

ABC also didn't agree with the adjudicator. It denied it had ever admitted to Ms R that it had been wrong to transfer her SIPP, or that the motivation for doing so had been linked to its advice to her partner. It failed to see how it would likely have said this only one year after the transfer.

It also didn't think she could say its charges were excessive, as the costs of the advice had been discussed and agreed with her in person and confirmed in the documentation provided to her. Two pieces of advice have two separate costs attached, even if part of the second advice involves adjusting the advice which had been given previously. It pointed out that it would actually have received more (in the long term) from the 0.5% per year trail commission that was being paid under the SIPP.

The complaint was passed to me for further review and I issued a provisional decision on 19 January 2017. Regarding *the fees Ms R was charged*, I said:

- The regulator hasn't actually set limits on what a financial adviser may charge. It introduced certain requirements, such as the 'keyfacts about our costs' document, which allow consumers to compare the likely costs when choosing an adviser.
- Ms R did have a reasonable opportunity to understand how much she would be paying to transfer her pension. And that part of what she paid would be determined from a percentage of the sum actually transferred across (which was different to what she'd paid just to set up the regular premiums in 2010). This was because:
  - her partner had previously seen what ABC charged when he transferred a sum of over £100,000 to a SIPP in 2007, which likely led to a shared understanding;
  - ABC said at the time it had supplied Ms R with a copy of its keyfacts document;
  - It was likely Ms R got the suitability letter, as it was correctly addressed to her. But this and the illustrations (which the provider would also have sent to Ms R directly) also likely reflected what the adviser discussed with Ms R in person.
- Ms R would reasonably also expect the adviser to be able to demonstrate why the switch to a new provider was still worthwhile *after* his fees that would be triggered by making the switch.

- It wouldn't necessarily be apparent to Ms R what further work ABC was required to complete in terms of the selection of the provider (or funds), simply because she was also paying regular contributions.
- I thought many advisers who were taking 4% commission on the transfer value probably wouldn't have charged Ms R all over again just for continuing to pay regular premiums into her plan. So Ms R's reasonable expectation here would actually have matched what many advisers themselves would've done.
- In deciding what's fair and reasonable in a case I may take into account the law, the regulator's rules, guidance and standards, and good industry practice at the relevant time. The regulator expects firms to conduct their business with integrity, paying due regard to the interests of their customers and treating them fairly.
- But I don't think this would be an easy matter to decide given that ABC still has a right to decide what it wants to charge; and having been told of that charge Ms R was entitled to reject the advice or seek advice elsewhere if she didn't want to pay it.
- Nevertheless it could still have been a pragmatic approach to resolve Ms R's complaint if ABC had agreed to refund just the additional charge it applied to her regular premiums. But it hadn't agreed to do so. And looking at the fees in isolation wasn't the only way to fairly and reasonably resolve Ms R's complaint.

On the *suitability* of the recommendation, I said:

- If the fee is only triggered by the transaction going ahead (as seems to have been the case here), this directly impacts the whole suitability of the transaction. So it often isn't appropriate to separate a complaint about the fees payable from the suitability.
- I accepted the administrative reason Ms R recalls for the transfer wasn't mentioned in ABC's suitability letter at all. So on balance it's unlikely to have been the main reason. But ABC ought to have taken its fees into account anyway, when assessing if its advice would benefit Ms R overall.
- The spreadsheet it sent us attempted to do this. But there were a number of issues with it:
  - it doesn't take into account the large fund discounts Ms R already had in her SIPP in 2013 (0.3% on funds above £50,000);
  - the lifestyle strategy under the PPP used funds that the provider oversaw internally, whereas some of the funds in the SIPP were externally managed with higher charges. And the SIPP provider did actually have lifestyle strategies that charged as little as about 1% per year (instead of the 1.6% in ABC's analysis);
  - acting against this, the SIPP starting value in the comparison ignored the transfer penalty. That was in Ms R's favour, as she would always have paid the remainder of the SIPP setup charges, whether she transferred or not;
  - so rather than Ms R 'breaking even' after about four years, she would've done so between ages 61 and 62 (depending on the growth rate assumed). And by her selected retirement age of 65, the 'gain' would be fairly modest – less than 1% of the fund. ABC stood to gain a lot more from the transfer than Ms R ever would.
- There was some justification to Ms R's concerns about whether she could just have moved to a PPP in 2010, instead of using the SIPP at all. Even if her attitude to risk had been the same (adventurous) in 2010 as it was in 2013, the fact that she'd started out with no existing fund meant that she would accumulate benefits faster in a lower-charged environment (i.e. under a PPP).

- Funds that would be suited to an above-average (or even adventurous) approach didn't necessarily have to be the more expensive externally-managed funds under a SIPP. Some such funds are typically also accessible under a cheaper PPP. To some extent this also conflicted with the advice less than four years later that all Ms R needed was a lifestyle strategy. So it's difficult to conclude that both choices of provider were suitable at the times they were made.

I concluded that Ms R should either have been advised to remain in the SIPP throughout – if necessary using that provider's own lifestyling approach – or arguably switched into the PPP earlier, and not used the SIPP at all.

In reaching this conclusion I was aware ABC disagrees that this particular PPP was available from 2006. But the point I made was that many PPPs would've been available with a sufficient fund range – including externally-managed funds but also lifestyling – to mean that Ms R didn't need to switch providers again in 2013. And as I've said, her own SIPP provider did offer lifestyling.

For a combination of these grounds, there were actually some reasons why ABC might have admitted to Ms R in 2014 that it had been wrong to transfer her pension – and made further proposals on that basis. And as Ms R has pointed out herself, ABC didn't dispute her understanding of what it proposed when she emailed the adviser at the time.

I set out fair compensation for Ms R in my provisional decision, which I'll repeat later here. I didn't take into account the trail commission ABC might have continued to collect under the SIPP in my award. I said the reason ABC didn't set up trail commission under the PPP was likely to be related to the regulator's Retail Distribution Review (which would've required it to provide a specific ongoing service in relation to the ongoing fees taken). As that ABC evidently decided not to offer such a service under the PPP it wouldn't be appropriate for me to make allowance for a continuing trail commission under the SIPP.

Ms R spoke to the adjudicator about my provisional findings, to find out more about the calculation I was proposing. Although she appears to be satisfied with the overall outcome, she then wrote to continue to dispute some of ABC's claims. As these don't materially alter the outcome I've proposed to the complaint, I won't repeat everything she's said here.

However she reiterated that she and her partner weren't experienced investors and their priorities had been elsewhere at the time of the advice. They continued to feel that the true costs weren't sufficiently brought to their attention until they realised this later. And in their view the advice in 2013 was of a much more cursory nature than that they'd received previously, so they weren't expecting it to cost as much as it did.

Ms R provided the letters the PPP provider had sent them in 2013 saying, *'Please take another look at the Key Features and personalised illustration(s) provided to you previously...'*. She said this suggested only ABC should've supplied the illustrations, which they did not in fact ever get from ABC. And the application forms they signed were only partly completed at the time, with no details of the cost they would be charged. They believe they would have complained much sooner or indeed not transferred the pensions at all, had this been clear.

There was some difficulty in ABC receiving my provisional decision due to staff changes and the fact it was no longer writing new investment business. It provided a comment from the original adviser who said that the issues revolved around costs – and *'to base it on one year is totally unfair. It is the long term that is relevant.'*

## **my findings**

I've considered all the available evidence and arguments from the outset to decide what's fair and reasonable in the circumstances of this complaint. I've taken into account what the parties have said following my provisional decision.

In respect of ABC's comments, it's not clear to me why it thinks I've only based the comparison of whether Ms R was better off or not by transferring in 2013 on only one year. I explained in my provisional findings that, firstly, it didn't obtain projections on a like for like basis to compare the SIPP and PPP in 2013. And secondly that the 'spreadsheet' comparison it provided – which modelled the difference in charges up to retirement – was flawed.

I set out that once reasonable adjustments were made to that spreadsheet (to make the comparison between the old and new plan fairer), it would essentially demonstrate that it was *only* in the (very) long term that a benefit might be shown from transferring. ABC hasn't demonstrated that my conclusions around this are incorrect. I don't think it was fair and reasonable for it to provide advice that, even in the long term, was likely to be of greater benefit to its adviser than it was to Ms R.

My understanding is that Ms R is accepting my findings but continues to be concerned about how the PPP was sold to her in 2013. However the redress I've already proposed, and repeat below, is intended to put Ms R back into the position where she hadn't first taken out a SIPP in 2010; and then switched to a PPP in 2013. So the issues she's raised will now be rectified by the compensation I'm asking ABC to pay.

I appreciate the evidence Ms R has now provided does indicate that her provider wouldn't have sent a further copy of the illustration out with her cancellation rights. Commonly, this was how providers operate. Nevertheless, I note that the letter sent to us does make Ms R aware that she should've had an illustration. However for the reasons I explained in my provisional decision, whether the costs were fully disclosed in itself doesn't make the advice suitable. I remain of the view that it's unlikely to have been appropriate for Ms R to need the features of a SIPP in 2010 and then not need them by 2013. This is the reason I'm upholding Ms R's complaint.

## **fair compensation**

The losses Ms R will have suffered as a result of taking out two pensions will have been affected by investment performance which, of course, couldn't have been foreseen (before charges). And if she'd been advised to use different providers she may have selected different funds – but I'm not in a position to say which particular funds would likely have been used. What I think it is possible to say is Ms R would always have suffered a loss from paying charges to ABC a second time to switch provider in 2013. I think that switch would always have been unnecessary, and ultimately this does support the complaint Ms R has made.

My aim in awarding fair compensation is to put Ms R back into the position where she wouldn't have paid the charges specifically deducted for ABC's 2013 advice. If she hadn't paid the charges, the corresponding amounts would've remained in the funds that whichever policy she'd still had in 2013 was invested in. As I explain above, these wouldn't necessarily have been the same funds as Ms R is actually in today.

Ms R has a selected retirement age of 65, meaning that the lifestyle strategy would've already started reducing the risk shortly after the PPP began. So I think the FTSE WMA Income index (on a total return basis) would broadly represent the sort of return Ms R might have expected to get on the funds in her policy that were instead deducted to pay ABC's charges.

I therefore make an award of those charges that were taken for the advice in 2013, adjusted for the growth in the FTSE WMA Income Total Return index from the date(s) they were taken up to the date of this decision.

This amount should be paid into Ms R's current PPP after allowing for any initial charges and tax relief that may apply. If it isn't possible to pay it into the PPP, it may be paid to Ms R in cash after a reduction that reflects her likely marginal rate of tax in retirement. As Ms R will be able to take 25% of her pension as a tax-free cash sum, this reduction should only be applied to 75% of the amount paid as compensation.

Unless it can be demonstrated to the contrary, it should be assumed Ms R will be a basic rate taxpayer overall in retirement, which means a 20% reduction would be applied to 75% of the compensation. In other words, an overall reduction of 15%.

**my final decision**

I uphold Ms R's complaint and require ABC 123 Limited to pay her compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 20 March 2017.

Gideon Moore  
**ombudsman**