DRN-4411634

The complaint

Mr B complains that Timmins Whittaker Ltd (TW) gave him unsuitable advice to switch a personal pension with one provider to a new personal pension and start making regular contributions.

Mr B complained via a claims management company (CMC). It said that Mr B may have suffered a loss as a result.

What happened

Mr B approached TW in 2004 for financial advice about pension planning. He had a personal pension that he'd had since around 1992 that had been started with a single transfer from a defined benefit occupational pension scheme. He also had deferred defined benefits in another occupational pension scheme.

TW established that Mr B was employed and in a position to make regular pension contributions. He intended to retire in 2014. Mr B had made no contributions to his existing personal pension since 1992.

TW recommended that Mr B start a personal pension making contributions of £300 a month. And that he also transfer the fund – valued around £85,000 at that time – from his existing personal pension to the new one. Mr B followed TW's recommendation.

In 2011 Mr B took the benefits from his pension by purchasing an annuity.

In 2021, Mr B responded to an advert from a CMC. As a result of contacting the CMC he was caused to consider that the advice he'd received in 2004 may not have been suitable for him. And the CMC complained to TW on Mr B's behalf.

TW considered what happened. It explained that it didn't think that Mr B's complaint had been made in time. But also explained that it didn't think its advice had been unsuitable and thought that Mr B had been satisfied with the service he'd received.

Mr B's CMC referred the complaint to our service. One of our investigators looked into what happened and was unable to resolve the complaint. And TW asked for the case to be considered by an ombudsman.

The cased was passed to me to consider whether it was something that was in our jurisdiction. And if so what I thought a fair and reasonable outcome should be. After considering all of the available evidence and arguments, I issued a provisional decision to allow both parties to understand what my likely decision was and offering them the opportunity to respond with any further evidence or comments.

In that provisional decision I explained why I'd decided Mr B's complaint was in our jurisdiction. And I gave a provisional finding to explain why I didn't think that the advice Mr B had been given was unsuitable.

I have acknowledgements from both parties that my provisional decision was received.

Neither party has provided any further evidence or arguments for me to consider prior to making this final decision.

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 considered this case a final time, my final decision is the same as the view I expressed in my provisional decision. Which means that I am not upholding Mr B's complaint. As I expressed before, I don't think that Mr B has any clear understanding about whether or not he has suffered a loss. So I hope that he will be reassured that his complaint has been independently considered, and by the reasons I've given for deciding that he wasn't treated unfairly by TW.

I gave my decision on jurisdiction in my previous decision before giving my provisional finding on merits. But the question of jurisdiction remains open until a final decision is given. So I would reassure TW that I have fully considered jurisdiction and remain satisfied that Mr B's complaint is not time-barred. I won't repeat the full rationale that both sides have already seen. But confirm that, what I referred to in my earlier decision as the 'three-year rule', gives our service the jurisdiction to consider the merits of this case. There was simply no clear indicator to Mr B that he may have been disadvantaged by the advised pension switch until he responded to communication from his CMC. And the complaint was made within three years of that.

Going on to consider the merits of this case. I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice in 2004. This includes the Principles for Businesses ('PRIN') and the Conduct of Business (COB) rules. In particular COB 5.3.5R meant that TW had to take reasonable steps to ensure that its advice was suitable for Mr B.

Where we are asked to consider events that happened so long ago, we are often faced with evidence that is incomplete, inconclusive or contradictory. For example, I wouldn't expect Mr B to be able to provide specific recollection of what he was told by his adviser. Or his adviser to recall precisely what was discussed unless there were notes of such meetings. Mr B has been unable to provide any documentary evidence, so all of the evidence I have has been provided by TW (or the CMC following a subject access request from TW). So I have to reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The first issue that the CMC raised related to there being no clear and obvious benefit to the pension switch. I've considered this by looking at the objectives that TW agreed with Mr B in 2004. Which I think were, most likely, to find a pension that he could start to make contributions into that would be invested in line with his attitude to risk.

TW have explained that the pension that Mr B had since 1992 was sold directly by the adviser. It couldn't make any recommendation regarding it. And it doesn't have any evidence now that it considered whether it found out if Mr B could start making contributions into that plan that could well have been considered as 'paid up'.

TW say that it would have made Mr B aware that it couldn't give advice on that closed pension product as that provider was direct sales only. It says Mr B would have been told that he would have to speak with that provider if he wanted to start making contributions into that plan. I can't see that included in any recommendation letter. But, in fairness, I wouldn't expect that to be the case. I can see that TW held meetings with Mr B as part of the advice process. There are some notes, and whilst those notes don't record that specifically being discussed, TW weren't required to record absolutely everything. Overall, I think it was more likely than not something that would have been covered at an early stage of the advice process.

I've also considered whether Mr B was likely to want to incur the expense of financial advice when he already had a personal pension product in place. And I can see that Mr B's pension was started with a single transfer of benefits Mr B held in a defined pension scheme. And that, shortly before he approached TW, compensation was paid into his pension plan as a result of The Pension Review. Meaning that Mr B would have known he'd been the victim of a mis-sale in 1992 by the business that he had his personal pension with. Bearing this in mind, I don't think it would be unusual for Mr B not to want to continue with his existing pension and that he would be prepared to consider alternatives.

Meeting notes show us that TW considered Mr B's attitude to risk (ATR) and agreed with him that he was "*more inclined towards risk than a cautious/balanced investor".* It put him about 6 or 7 on a scale of 1 to 10.

In a letter to Mr B, dated 28 April 2004, TW went on to suggest an investment strategy in his personal pension that it told him was at the higher end of his attitude to risk, at 7 out of 10. It explained, "*this is at the top end of the risk profile you suggested you would be happy with, and can of course be adjusted accordingly by increasing or decreasing the equity content".* And it went on in that letter to set out an alternative strategy that was a lower risk mix of assets.

I've considered these and think it was a fair way to approach Mr B's attitude to investment risk for this pension. Assessing attitude to risk is not an exact science and should be something that is assessed and agreed with the customer. And here, Mr B appeared to be between either 6 or 7 out of 10. So it was reasonable to give him examples of both to allow him to decide.

I've considered whether or not Mr B had sufficient capacity for loss to make an investment choice in line with this attitude to risk. And I think he did. At that stage his intended retirement age was assumed to be 10 years off. Which was a long enough term to be invested over. He had another pension with defined benefits that he wasn't transferring. That provided him with guaranteed income in retirement likely to be equivalent to this pension. And he intended to continue making contributions over the next 10 years. So, overall, I think it was likely that investing in line with his agreed attitude to risk was suitable.

TW has shown us the information, that it still retains, that was provided by Mr B's ceding pension provider at the time. It appears that Mr B's previous pension was invested in that provider's '*Managed Pension Fund'*. It appears likely to have had the fund objective of providing long term capital growth from a broadly balanced portfolio. Whilst it is difficult to establish the details of that fund from 2004, it is still running. I can see that its exposure to overseas equities is lower than TW proposed for Mr B. With a slightly higher intended exposure to fixed interest investments. I think that, in 2004, it was likely that the fund adopted a similar approach. Which meant it offered a more balanced (or lower) risk investment option to the one that TW recommended.

However, given the ATR that was agreed with Mr B in 2004 (approaching 7 out of 10), I'm not persuaded that Mr B's previous pension was invested in a way that matched his ATR. It had been set up in 1992, and Mr B was in a different position by 2004. He only had 10 more years to try to actively grow his pension fund to support his defined benefit pension when he retired.

I haven't seen any statements from Mr B's ceding scheme to indicate what fees it charged on his policy. The partial terms and conditions document that I do have is not clear. And the information that TW obtained and still have doesn't make it clear. But I can see that it checked that Mr B was not giving up any guarantees by switching. And that it ascertained that there was no exit penalty. So, based on the evidence available, I can't see that there were any specific reasons that made the switch unsuitable.

I looked at the transfer value from the ceding scheme and can see that the entire transferred value was invested in line with the recommended investment strategy. There was no deduction or fee on transfer. So the only difference on transfer was that the fund was then invested in a way that was, most likely, better suited to Mr B's ATR than in his ceding scheme. Overall, I think that moving to a personal pension to invest in a way that matched his ATR at that time would have been a benefit to Mr B.

The second issue that Mr B's CMC raised related to the investment choices that were recommended. And I have addressed that above where I have explained why I don't think the recommendation was unsuitable for Mr B.

The third issue that was raised was that the term for investment was too short. But I don't agree that is a fair or reasonable criticism. TW were advising based on the information that it had in 2004. Which, quite reasonably, led it to consider that Mr B intended to retire in 2014. The fact that Mr B's circumstances changed and he instead took his benefits in 2011 didn't mean that the originally intended investment term wasn't appropriate for the investment strategy that TW recommended for Mr B.

Having considered everything in this case, I think it's fair and reasonable to decide the recommendation Mr B was given was suitable for his likely objectives. It enabled him to contribute into a personal pension and for those contributions, and his existing personal pension pot to be invested in a way that it seems was, more likely than not, in line with his ATR. It meant that he was able to accumulate a pension fund that by 2011 he was sufficiently satisfied with to take his benefits from. And in the period since taking his annuity in 2011 he has seemingly had no cause to be dissatisfied.

I'm unable to say whether or not the recommendation that Mr B had gave him the very best outcome possible. Or even whether it ultimately ended up giving better benefits than he'd have reached in the ceding scheme. But even if I knew that, I'm not judging TW's recommendation with the benefit of hindsight. Instead I have looked at whether what it recommended was suitable. And, applying a fair and reasonable assessment of the evidence, I think it was.

My final decision

For the above reasons, I am not upholding Mr B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 November 2023.

Gary Lane
Ombudsman