

## The complaint

Mrs R complains that some advice she received about making pension contributions, from an appointed representative of Openwork Limited trading as The Openwork Partnership ("Openwork"), was incorrect.

## What happened

The advice that forms the subject of this complaint was given by an appointed representative of Openwork. In this decision, for ease, I will simply refer to the business as Openwork throughout.

Mrs R has been assisted in making this complaint by her accountant, and by her husband. I am also dealing with a similar complaint made by Mrs R's husband ("Mr R") about identical advice that he received from Openwork about making pension contributions. Again for ease, in this decision I will simply refer to any communications as if they have been with, and from, Mrs R herself. And given the very similar nature of the advice provided to Mrs R and her husband, I am sure both parties will understand the inherent similarities in the provisional decisions I issued on both complaints.

I issued a provisional decision on this complaint in October 2023. In that decision I explained why I thought the complaint should be upheld and what Openwork needed to do in order to put things right. Both parties have received a copy of the provisional decision but, for completeness, I include some extracts from it below. In my decision I said;

*Mrs R, along with her husband, is a director and owner of a company. They approached Openwork in October 2021 to seek advice about the company making pension contributions on their behalf to a new personal pension plan. Given the funds the company had available at that time Openwork advised Mrs R that the company should make a single contribution of £247,500. Similar advice was provided to Mr R. Mrs R accepted the advice and the company paid the required pension contribution.*

*Shortly afterwards Mrs R's accountant noticed that the advice she'd been given was incorrect. Even allowing for the ability to carry forward past unused allowances, the maximum contribution that could be paid into Mrs R's pension plan that year was £160,000. So, as a result, Mrs R says she became liable for a tax charge of £30,873.60. That charge was due for payment in January 2023, but Mrs R has not had the means to make any payment. So she has incurred late payment penalties and interest, and has recently been contacted by debt collectors regarding the outstanding balance.*

*Openwork accepted that the advice it provided to Mrs R was incorrect and failed to take account of the annual contribution limits. So it offered to pay her compensation for the tax charge she would need to pay. But it said it would reduce that compensation to reflect the corporation tax saved by her company, and the income tax she has saved by having the excess contributions paid into her pension rather than being paid as dividends or salary. So it said it would be willing to pay compensation for the tax charge amounting to £14,248.60. It also said it would pay*

*Mrs R £1,050 for the additional accountancy fees she has incurred, and a further £150 for the distress and inconvenience she had been caused. Mrs R didn't accept that offer so brought her complaint to us.*

*Openwork has accepted that the advice it gave to Mrs R was incorrect, and as a result she has incurred a significant taxation charge. So what I need to decide is what should be done in order to put things right. There appears to be no dispute about the amount of the tax charge that Mrs R has incurred – that has been assessed and set out by HMRC. What I need to consider is whether there are other factors that need to be considered to ensure that Mrs R is not unduly enriched by any compensation that will be paid.*

*I've thought carefully about what would have happened if nothing had gone wrong. It seems that both parties accept that the advice Mrs R should have received would have been for a pension contribution of £160,000 to be made by her company. That would have been within the annual allowance (including that carried forward from previous years) permitted by HMRC. So it seems clear that Mrs R's pension savings have been increased above where they would have been at that time. And the profits of the company will have been reduced by the payment of a higher than allowed pension contribution so potentially saving some corporation tax liability.*

*But Mrs R has provided what I currently consider to be a plausible explanation why neither of those factors should be used to reduce the compensation that is payable. She has said that in order to make the pension contribution the company decided to defer some investment in new equipment that had been planned. I have no reason to doubt that is the case and her testimony is supported by her accountant who has said similar investments had been made in the past. And if instead the monies had been used to purchase new equipment, the annual investment allowance means no additional corporation tax liability would have arisen from the retention of the excess payment.*

*And Mrs R has explained that, had better advice been provided, she would have asked the company to spread her pension contributions over a three-year period and managed the investment in new equipment to mirror the additional funds that made available to the company in the initial year. So the amount that was added to her pension savings is the same as she would have ultimately held, albeit they will potentially benefit from some tax efficient investment returns that might be achieved over the following two years. And there is no indication, for the same reasons, that Mrs R would have taken any additional income either as salary or dividends from the company if the pension payments had been correctly spread over multiple years.*

*I have considered that Mrs R is now in the position that she could continue to make further contributions to her pension utilising the allowances that would otherwise have been used for the original contribution if it had been spread over a number of years. And I cannot discount that might happen. But I don't think it reasonable to reduce any compensation on that basis. So I don't think that making the excess contribution will mean Mrs R is unduly enriched in terms of the amount she holds in her pension savings.*

*So I'm not currently persuaded that there are any reasonable grounds to offset other saved expenses against the compensation I think should be paid to Mrs R for the tax charge that is due. So as I set out below I think Openwork should pay Mrs R compensation equal to the entire tax charge of £30,873.60 that HMRC has assessed is due.*

*But I don't think that should be the end of my consideration of the redress. The tax charge was due to HMRC in January 2023, but Mrs R says that she doesn't have sufficient funds to make that payment. Again I have no reason to doubt what she says. So HMRC has levied late payment penalties on that charge and continues to add interest to the outstanding balance. I think it fair that Openwork should pay Mrs R compensation equivalent to those charges too.*

*I have considered that Openwork warned Mrs R in January 2023, when it made its compensation offer to her, that it wouldn't consider it was responsible for any interest or penalties levied by HMRC for late payments. It told Mrs R that it might be possible for her to pay the tax charge out of her pension savings using what is called a "Scheme pays" option.*

*But I don't agree that would have been a fair approach. Mrs R's pension savings are intended to provide her with an income in her retirement. Reducing their value to pay a tax charge might not be in her best interests. I have considered that it would be possible to replace those pension savings in the future through additional contributions – as Mrs R says would have been made had better advice been provided. But I think that misses the point that the company has already paid the contribution, and might not have sufficient funds in the future (or it be appropriate in terms of spending priorities) to make additional contributions to Mrs R's pension savings.*

*As I have explained above, I think the offer that Openwork made to Mrs R was insufficient. So Mrs R would have been unable to pay the tax charge when it became due. That charge only arose as a result of the incorrect advice she had been given by the firm. So I consider that Openwork is reasonably liable for the interest and penalty charges that HMRC has added to the amount Mrs R needs to pay. But the excess pension contribution in the first year might have generated some investment returns. I think any returns of that nature should be partially, or fully, offset against this part of the compensation.*

*I have considered the charge that Openwork levied for the advice it gave to Mrs R. That charge was calculated as being 2% of the contribution that was made on her behalf. Given that the redress I am proposing here will leave Mrs R with the entire contribution in her pension savings, I don't think it unreasonable that she should pay the full advice charge. So I'm not intending to award any compensation in regard of the advice charge she has paid.*

*I understand that Mrs R, and her accountant, have been visited by debt collectors seeking repayment of the amount due to HMRC. I can only imagine how distressing that might be for them. So I think it reasonable that Openwork should pay Mrs R some additional compensation for the distress and inconvenience she has suffered. In the circumstances here I currently think an additional payment of £800 is warranted.*

*In summary I currently think Mrs R's complaint should be upheld. I think the incorrect advice she received from Openwork has caused her to face a tax liability of £30,873.60. And I'm not persuaded that there are other savings such as reductions in corporation tax due, or other income tax that would have been paid by Mrs R, to warrant any reduction in the compensation Openwork should pay.*

I invited both parties to provide us with any further comments or evidence in response to my provisional decision. Mrs R has said that she agrees with my provisional findings. Openwork has asked for clarification on some of the findings I made.

In particular Openwork says it doesn't agree that it was fair for Mrs R to not use the "scheme pays" option to mitigate the losses she is claiming she has incurred. It says that it thinks that is precisely why that option has been put in place, particularly given Mrs R did not have sufficient funds of her own to pay the outstanding tax charges.

### **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.

As I explained in my provisional decision, in deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mrs R and by Openwork. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

And I repeat my reflections on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

I set out in my provisional decision why I didn't think it was reasonable to expect Mrs R to use the "scheme pays" option to settle the outstanding taxation charges. But given the questions posed by Openwork I provide some further rationale behind those findings.

I have found, and Openwork accepts, that an error was made in the advice it gave to Mrs R. But as I explained in my provisional decision I don't think the long-term impact of that error would have seen Mrs R have more in her pension savings than she otherwise might have. Although the initial contribution she made was in excess of her annual allowance, she could have achieved similar levels of pension savings by asking the company to make a smaller initial contribution followed by further contributions utilising her annual allowance in the following years.

The impact of using the "scheme pays" option to pay the outstanding tax charge would have been to see a reduction in the amount of Mrs R's pension savings. I accept that she could have used the refund of the tax charge that I am directing Openwork to pay here to add back those missing pension savings. But at the time the charge was due, that wasn't money that she was certain to receive. The initial offer that Openwork had made to Mrs R, to compensate her for its error, was significantly less than the tax charge she was being asked to pay.

Had Openwork made, at the outset, what I would consider to have been a fair offer of compensation to Mrs R, then I would agree that using the "scheme pays" option might have been a reasonable expectation. But in saying that, a fair offer of compensation would have allowed Mrs R to settle the outstanding tax charges directly.

So my only reasonable conclusion here is that the HMRC penalties and interest have only arisen, firstly because of the incorrect advice that Openwork gave to Mrs R, and then because it failed to offer her what I would consider to be fair compensation. So I am not

minded that I should change the compensation approach that I set out in my provisional decision and that I repeat below for clarity.

Mrs R has provided us with updated estimates of the penalties interest that has accrued on the outstanding tax charge. But Openwork should liaise with Mrs R to determine the final amount that will be due when it makes the settlement I set out below.

### **Putting things right**

To put things right, Openwork should;

- repay to Mrs R the entire amount of the annual allowance tax charge that has been levied by HMRC.
- it should also repay to Mrs R any penalties or interest that have been added to that charge by HMRC for late payment. Openwork may reduce the interest or penalty payments by the value of any investment returns Mrs R received on the excess contribution added to her pension savings.
- it should, as it previously offered, pay Mrs R compensation equal to half of the accountancy fees reasonably incurred by Mr and Mrs R as a result of this matter (the other half will be awarded as part of the redress on Mr R's complaint). In response to my provisional decision Mrs R's accountant estimated the total charges that have been incurred to be £1400 + VAT.
- Openwork should pay Mrs R £800 for the distress and inconvenience this matter has caused to her.

### **My final decision**

My final decision is that I uphold Mrs R's complaint and direct Openwork Limited trading as The Openwork Partnership to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 10 January 2024.

Paul Reilly  
**Ombudsman**