

The complaint

Mr G complains that True Potential Wealth Management LLP ('TPWM') gave him unsuitable advice to switch his personal pensions to a new personal pension.

What happened

Mr G had personal pensions with two providers, having received financial advice in March 2018 from an IFA I will refer to as X.

In 2021 X moved to become an adviser with TPWM. X met with Mr G in May and June of 2021. And following those meetings Mr G switched his pension plans to TPWM.

Mr G became unhappy with the performance of his pension and complained to TPWM. TPWM told Mr G that his pension had been switched on a non-advised basis, after it had sent him a Direct Marketing Offer (DMO).

Mr G was unhappy and asked our service to help. Our investigator looked into this case and was unable to resolve the matter, so this case was referred for an ombudsman's decision. I looked into what happened and issued a provisional decision explaining to both sides why I thought Mr G's complaint should be upheld. And I explained how I thought it could be put right.

TPWM responded to accept my provisional finding. And Mr G responded to accepted what I'd said and provided further evidence that he thought made his case stronger.

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.

Neither TPWM nor Mr G have provided further arguments about the outcome I proposed in my provisional decision. And having considered everything in this case a final time, my final decision is the same as indicated in my provisional decision. And for the same reasons which I set out again below.

The crux of Mr G's complaint is that the switch to a pension with TPWM and the subsequent investments weren't suitable for him. It is clear, from his testimony, that Mr G considers his decision to switch his personal pensions was made following advice from X.

TPWM explains that, after X had informed Mr G that he was moving to work for TPWM it sent Mr G a Direct Marketing Offer (DMO). And it says that Mr G responded to that offer and decided to make the switch of his pension without any opinion being offered by X or TPWM.

Did TPWM provide Mr G with regulated advice to switch pensions?

There is a fundamental difference in interpretation of what took place that led Mr G to switch his pensions. So I will start by determining whether or not I think that TPWM provided Mr G with, what amounted to, a personal recommendation to switch. Where evidence is

incomplete I must make a determination of what happened on a balance of probabilities – that is what I think, more likely than not, happened.

And then, having decided what happened I will make my decision on a fair and reasonable outcome, considering the relevant rules, legislation and industry best practice at the time. Of particular relevance in this case are the following rules and guidance in the Financial Conduct Authority (FCA) Handbook:

- COBS 2.1.1 – which sets out how a firm must act honestly, fairly, and professionally in accordance with a client's best interests.
- COBS 9 – which refers to the suitability of advice. It refers to *personal recommendations* which it defines as, “*a recommendation that is ... advice on conversion or transfer of pension benefits ... and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person*”
- PERG 8.28 – which gives guidance to help determine the difference between providing information and providing advice. PERG 8.28.2G(3) says, “*regulated advice includes any communication with the customer which, in the context in which it was given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell*”. And (4) explained, “*Key to the giving of advice is that information: (a) is either accompanied by comment or value judgement on the relevance of that information to the customer's investment decisions: or (b) is itself the product of a process of selection involving a value judgement so that the information will tend to influence that decision.*”

According to TPWM X started working for it in May 2021. And it appears that X met with Mr G on 10 May 2021 and then again on 14 June 2021. The second meeting that X had with Mr G was therefore whilst he was a representative of TPWM.

There are no contemporaneous notes from those meetings. But X has provided his recollection of what took place. In the first meeting, prior to working for TPWM X explained to Mr G that he would be leaving to go to TPWM. I won't go into the likely content of that meeting in much further detail as TPWM weren't responsible for any action or activity of X at that point. X however explains that in the second meeting he met Mr G at his home to confirm that he had now moved over.

Mr G considers that he was receiving advice in these meetings and I've thought about what may have made him think that. I've considered the relationship that Mr G had with X. Mr G knew X in his capacity as his financial adviser. He had received advice from X previously and, as recently as 2018, he'd received pension advice from X. There is no indication that these were merely social calls. And the visit in June wasn't to provide Mr G with the information that X was working for TPWM. As Mr G already knew that from the meeting in May.

Mr G has explained that he recalled X explaining that he would be better served to move his pensions to TPWM when he moved. I understand that X hasn't said that was the purpose of these meetings. But I find Mr G's testimony to be persuasive. He knew X as his adviser. And X went to the trouble of meeting with Mr G twice in quick succession. X explains that Mr G asks a lot of questions, so I think it's more likely than not that Mr G would have wanted to know what X recommended he do. And I think that it's likely that X would have responded in some way. Most likely along the lines that Mr G suggests.

I've also considered whether or not Mr G was likely influenced by these meetings in making

his switch to TPWM. X had previously recommended that Mr G set up the personal pensions that he already had. So X presumably considered that they were perfectly suitable for Mr G when he made those recommendations. Mr G had accepted those recommendations and explains that he was quite happy with them. So I don't think that Mr G was proactively looking to dispense with the pensions that he'd been recommended in 2018. In a process whereby he'd paid for advice. Which again adds weight to my belief that the meeting in June went further than just making Mr G aware that TPWM also offered personal pensions. And was instrumental in the decision Mr G went on to make regarding this pension switch.

Mr G has shared some correspondence he had with X via text message on Friday 18 June 2021. This is the date that TPWM say Mr G set up his account following the DMO. Mr G explains that he was struggling with setting it up. And this would seem to be corroborated by the messages that Mr G had been sending to TPWM's help chat. But, in a message with X Mr G apparently queried about how any pension should be invested. And X replied "*Hi [Mr G] just with clients but **cautious is good** regards [X]*".

This evidence leads me to believe that Mr G was in contact with X whilst processing the response to the DMO. Which I don't think would have been the case if Mr G was truly acting independently. But moreover, I think the context of this message, is that Mr G didn't really know how his pension should be invested. He had no specialist knowledge and had previously followed advice from X about his existing pensions. And, based on what I've highlighted in bold above, it appears more likely than not that X gave Mr G specific advice to choose a cautious investment profile. And TPWM show that Mr G then went on to select a cautious investment profile for the personal pension.

Looking back now at the rules and guidance regarding advice that I've referenced above. Mr G says that he was persuaded to switch his pension to TPWM following his meetings with X. And, as I've said, I find that plausible. I can't really see why X would have visited Mr G a second time if he was just providing information. Or why TPWM didn't simply write to Mr G. The personal contact from a person with a long standing IFA relationship with Mr G makes it far more likely that some form of recommendation was given in that meeting.

I've considered the relevance of PERG 8.28 here. The DMO may well be information in some cases. But, in the context in which it was given in this case, went beyond the provision of mere information. I say that because of the groundwork that went into preparing Mr G for the receipt of the DMO. X, who Mr G had always known as his IFA, went to lengths to visit him more than once and arranged for the DMO. And, based on the evidence I've seen, continued to provide Mr G with support and guidance through the DMO process. Including by text message appearing to be advising Mr G on his investment selection within the new pension.

I'd like to reassure TPWM that I have considered the content of its DMO. And I can see that it is intended as an offer without advice. And, if the only contact that Mr G had was in the form of that, or another form of direct marketing, then I may agree that it didn't amount to the provision of regulated advice. But, for the reasons I've explained, that wasn't the case here. The active intervention from X meant that Mr G, more likely than not, believed he was acting on the advice of an IFA. Putting it another way, Mr G had pensions that he was satisfied with, having paid for full financial advice to set those up. He wasn't seeking new pension arrangements, and I'm not persuaded that he would have responded to TPWM's direct marketing offer if that was all he had received. He had far too many questions and seems unlikely to have decided to make such a big decision without advice.

TPWM have explained that it didn't carry out a fact find or provide Mr G with a written suitability report. And Mr G agrees with this. But that doesn't mean that advice wasn't provided. That would merely have a bearing in whether advice was provided in a way that

complied with rules under COBS 9. Whether or not advice was provided depends on the definitions that I referred to above. And for the purposes of COBS 9, and considering PERG 8.28, I've decided that what TPWM did amounted to providing Mr G with regulated advice that I can consider here.

Did TPWM treat Mr G fairly?

COBS 9 placed a number of obligations on TPWM which it has identified weren't completed. For instance there's no recorded fact-find completed with Mr G by TPWM. Although X was arguably already in possession of a good understanding of Mr G's circumstances as his existing financial adviser. And there is no written record of the recommendation.

In the absence of that I have to consider what Mr G understood of the advice. And I think that the fact that he went on to make a switch, that he had no obvious reason to, means that the context of Mr G's meetings with X persuaded him that it was in his best interests. Were that not the case, as I've already said, I don't think that Mr G would have considered making this switch.

TPWM have provided no opinion on whether or not this pension switch was in Mr G's best interests or not. But I think that it's clear that, because of TPWM's understanding of the way this switch came about, TPWM didn't go to sufficient lengths to understand Mr G's circumstances to be able to consider the suitability of this switch. And didn't properly give him full and considered advice in a format he could carefully consider prior to making this decision.

This meant that Mr G ended up switching from personal pension arrangements, where suitability had been fully considered and advised upon, to a personal pension where little to no support had been given regarding the suitability of the pension wrapper or investment choice. This wasn't fair to Mr G. And didn't comply with TPWM's obligation under COBS 2.1.1R or rules within COBS 9, referred to above.

I've considered what the likely consequences of this were.

Mr G had two pensions prior to the switches in 2021. One of those, pension A, had a fund value around £190,000 when it switched to the TPWM pension. At the time of transfer it had a platform fee of 0.3% of the fund value. And approximate fund charges of 0.62%. So overall fees around 0.92%. The second pension, pension B, had a fund value around £263,000 when it switched. It had a product charge of 0.35% for funds valued over £250,000. And an investment charge of 0.79%. So overall fees of 1.14%.

In contrast, the TPWM product had a platform fee of 0.4%. And the True Potential Cautious Portfolio fund sheet that we've been provided indicates an ongoing charge of 0.81%. Giving an overall fee around 1.21%. So the pension with TPWM that Mr G switched to was a more expensive product. I accept that the differences were small percentages. But the fund values were relatively large. It meant that the pension with TPWM had to outperform the ceding schemes just to give the same returns.

There was additionally an ongoing advice charge to consider. That ongoing advice charge for TPWM was 0.5%. And I have looked at what was being charged by his previous adviser and I've seen various annual advice fees from 0.5% to 0.9%. But the most recent was following an isolated piece of advice in May 2020 when an ongoing fee for 0.5% was agreed to. So I think that it's more likely than not that the ongoing advice fee being applied was the same.

This means that advice to switch these pensions placed Mr G in a more expensive product.

So was not obviously in his best interests from that perspective.

There is also the question of whether the TPWM pension switch was suitable from an investment perspective. I understand that TPWM says it didn't assess Mr G's attitude to risk prior to the switch. But I think that X guided Mr G in his choice of portfolio. Which ended in Mr G being invested in line with a cautious attitude to risk.

In the absence of any documented assessment of Mr G's attitude to risk at the point of that switch I've considered, on a balance of probability, whether or not that was suitable.

I have seen the assessments made of Mr G's attitude to risk when the ceding pensions were put in place in 2018. At the point of that advice he had been assessed as having a moderate attitude to risk. Which placed him between 5 and 6 on a scale of 1 to 10. So above the level that I would consider as being a cautious risk investor.

There were also several points of advice after that where I can see that his attitude to risk was again checked. The subsequent method had altered, but produced a broadly similar result. In 2018 he was being assessed as having a moderate attitude to risk (which at that stage was position 4 on a scale of 1 to 6). And it appeared to stay consistent as I have seen a similar assessment done as late as October 2019 when it returned the same result.

Throughout that period I think that, on balance, Mr G had a moderate or balanced attitude to risk. He was already in the decumulation period, having placed these pensions into flexi-access drawdown already. And his attitude to risk had remained consistent. I have looked at the way these pensions were invested and they were invested in line with a balanced attitude to risk.

I understand that consumer's attitudes to investment risk can alter over time. But I would need to have evidence that might suggest that Mr G's attitude to risk had dropped for some reason. And there is no evidence of that. So I think that it's more likely than not, that Mr G ended up in an investment portfolio that didn't properly match his appetite for investment risk.

Part of the service that Mr G signed up to with TPWM included an ongoing advice charge each year. This meant that TPWM were charging Mr G an annual charge to provide him with a service. Which involved reviewing his investment suitability based on the responses to an online questionnaire.

TPWM have explained that it sent an online questionnaire to Mr G around 12 months after he switched his pensions to its product. And says that he didn't respond. So no review was carried out. This meant that no proper assessment of the suitability of this pension or the investment strategy was carried out at the beginning of the policy. And even though TPWM charged Mr G for ongoing advice, no review of the suitability was carried out for over 12 months.

Overall, I don't think that the way Mr G was treated was fair or reasonable. He was given, what amounted to a recommendation at the beginning. But it wasn't properly considered. It meant that he ended up in a more expensive product in a less suitable investment portfolio. I can't see that it offered him with any other benefits over those he already had that would have made the transfer in his best interests. It means that I don't think that there was any persuasive reason for Mr G to have been advised to switch pensions. But for the actions of TPWM in this case, I think Mr G would have remained with the pensions that were set in place in 2018.

Putting things right

My aim is that Mr G should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I think Mr G would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr G's circumstances and objectives when he invested.

What must TPWM do?

To compensate Mr G fairly, TPWM must:

- Compare the performance of Mr G's investment with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- TPWM should also add any interest set out below to the compensation payable.
- If there is a loss, TPWM should pay into Mr G's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If TPWM is unable to pay the compensation into Mr G's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr G won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr G's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr G is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr G would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.
- Pay Mr G £300 for the distress and inconvenience he experienced in the switch process, whereby he felt he was advised to switch and then left unsupported. And in the way he has been left unsure whether or not this switch has left him financially worse off but for the advice.

Income tax may be payable on any interest paid. If TPWM deducts income tax from the interest, it should tell Mr G how much has been taken off. TPWM should give Mr G a tax deduction certificate in respect of interest if Mr G asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
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True Potential Personal Pension	Still exists and liquid	Notional value from previous providers	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

Notional Value

This is the value of Mr G's investment had it remained with the previous provider until the end date. TPWM should request that the previous provider calculate this value.

Any additional sum paid into the True Potential Personal Pension should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal from the True Potential Personal Pension should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if TPWM totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous providers are unable to calculate a notional value, TPWM will need to determine a fair value for Mr G's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr G wanted Income with some growth with a small risk to his capital.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The FTSE UK Private Investors Income **Total Return** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

My final decision

I uphold Mr G's complaint and direct True Potential Wealth Management LLP to compensate Mr G in the manner I have set out in 'putting things right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 18 December 2023.

Gary Lane
Ombudsman