

The complaint

Mr R complains that some advice he 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.

Mr R has been assisted in making this complaint by his accountant, and by his wife. I am also dealing with a similar complaint made by Mr R's wife ("Mrs R") about identical advice that she 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, Mr R himself. And given the very similar nature of the advice provided to Mr R and his wife, 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;

Mr R, along with his wife, 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 Mr R that the company should make a single contribution of £247,500. Similar advice was provided to Mrs R. Mr R accepted the advice and the company paid the required pension contribution.

Shortly afterwards Mr R's accountant noticed that the advice he'd been given was incorrect. Even allowing for the ability to carry forward past unused allowances, the maximum contribution that could be paid into Mr R's pension plan that year was £160,000. So, as a result, Mr R says he became liable for a tax charge of £29,373.80. That charge was due for payment on 31 January 2023, and I understand that Mr R paid it from some cash savings that he held.

Openwork accepted that the advice it provided to Mr R was incorrect and failed to take account of the annual contribution limits. So it offered to pay him compensation for the tax charge he would need to pay. But it said it would reduce that compensation to reflect the corporation tax saved by his company, and the income tax he has saved by having the excess contributions paid into his 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 £12,748.80. It also said it would pay Mr R £1,050 for the additional accountancy fees he has incurred, and a further £150 for the distress and inconvenience he had been caused. Mr R didn't accept that offer so brought his complaint to us.

Openwork has accepted that the advice it gave to Mr R was incorrect, and as a result he 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 Mr 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 Mr 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 Mr R should have received would have been for a pension contribution of £160,000 to be made by his company. That would have been within the annual allowance (including that carried forward from previous years) permitted by HMRC. So it seems clear that Mr 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 Mr 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. He 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 his testimony is supported by his 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 Mr R has explained that, had better advice been provided, he would have asked the company to spread his 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 his pension savings is the same as he 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 Mr 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 Mr R is now in the position that he could continue to make further contributions to his 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 Mr R is unduly enriched in terms of the amount he holds in his 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 Mr R for the tax charge that was due. So as I set out below I currently think Openwork should pay Mr R compensation equal to the entire tax charge of £29,373.80 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. Mr R says that he used some cash savings to make that payment. I think it fair that Openwork should pay Mr R compensatory interest for the loss of use of those savings too.

I have considered that Openwork told Mr R that it might be possible for him to pay the tax charge out of his pension savings using what is called a "Scheme pays" option. But I don't agree that would have been a fair approach. Mr R's pension savings are intended to provide him with an income in his retirement. Reducing their value to pay a tax charge might not be in his best interests. I have considered that it would be possible to replace those pension savings in the future through additional contributions – as Mr 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 Mr R's pension savings. And the same might apply to the cash savings Mr R held himself, that he used in January 2023 to pay the tax charge. 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 Mr R. That charge was calculated as being 2% of the contribution that was made on his behalf. Given that the redress I am proposing here will leave Mr R with the entire contribution in his pension savings, I don't think it unreasonable that he should pay the full advice charge. So I'm not intending to award any compensation in regard of the advice charge he has paid.

I am persuaded that this matter will have caused some distress and inconvenience to Mr R, both in terms of the disruption to his finances, and the need to deal with the situation he found himself in after following the incorrect recommendations of his professional advisor. So I think it reasonable that Openwork should pay Mr R some additional compensation for that distress and inconvenience. In the circumstances here I currently think an additional payment of £500 is warranted.

In summary I currently think Mr R's complaint should be upheld. I think the incorrect advice he received from Openwork has caused him to face a tax liability of £29,373.80. 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 Mr 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. Mr R has said that he agrees with my provisional findings. Openwork didn't specifically comment on my findings in relation to Mr R, but has asked for clarification on some of the findings I made on Mrs R's complaint that I think could equally apply here.

In particular Openwork says it doesn't agree that it was fair for Mr R to not use the "scheme pays" option to mitigate the interest losses that I have said he has incurred. It says that it thinks that is precisely why that option has been put in place, so that Mr R would not have needed to use his own funds to pay the incurred 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 Mr 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 Mr 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 Mr R. But as I explained in my provisional decision I don't think the long-term impact of that error would have seen Mr R have more in his pension savings than he otherwise might have. Although the initial contribution he made was in excess of his annual allowance, he could have achieved similar levels of pension savings by asking the company to make a smaller initial contribution followed by further contributions utilising his 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 Mr R's pension savings. I accept that he 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 he was certain to receive. The initial offer that Openwork had made to Mr R, to compensate him for its error, was significantly less than the tax charge he was being asked to pay.

But even so, Mr R's pension savings would have been worth less than they should have been. That isn't a prudent way for him to ensure financial stability into his retirement. So he chose to use his own monies to pay the taxation charges. Had Openwork made, at the outset, what I would consider to have been a fair offer of compensation to Mr R, then he wouldn't have needed to use his own funds to pay the tax charge.

So my only reasonable conclusion here is that the taxation charges, and Mr R's loss of use of some of his savings, have only arisen, firstly because of the incorrect advice that Openwork gave to Mr R, and then because it failed to offer him 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.

Putting things right

To put things right, Openwork should;

- repay to Mr R the entire amount of the annual allowance tax charge that has been levied by HMRC.
- it should add simple interest to that amount at a rate of 8% per annum from the date it was paid by Mr R to HMRC to the date of settlement. Openwork may reduce that interest payment by the value of any investment returns Mr R received on the excess contribution added to his pension savings. HMRC requires Openwork to take off tax from this interest. Openwork must give Mr R a certificate showing how much tax it's taken off if he asks for one.
- it should, as it previously offered, pay Mr 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 Mrs R's complaint). In response to my provisional decision Mr R's accountant estimated the total charges that have been incurred to be £1400 + VAT.
- Openwork should pay Mr R £500 for the distress and inconvenience this matter has caused to him.

My final decision

My final decision is that I uphold Mr 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 Mr R to accept or reject my decision before 10 January 2024.

Paul Reilly
Ombudsman