DRN-4386462

The complaint

Mr B complains that Progress Financial Planning Limited (PFP) incorrectly advised him to switch his occupational pension scheme into a capped drawdown plan.

Mr B would now like PFP to put him back into the position that he would've been in had it not been for their advice.

Mr B is represented by a claims management company but for simplicity, I'll refer to all submissions as having come from Mr B.

What happened

In 2013, Mr B sought retirement planning advice from PFP about what to do with his occupational money purchase pension plan, as he was approaching the scheme's selected retirement age of 60. The provider of the plan had written to Mr B explaining that, as he'd nearly reached his selected retirement age, he had the option of either taking the fund as an annuity (which would provide him with a guaranteed income for life), or he could move his monies into an income drawdown plan with a third-party provider. The plan provider also explained that should Mr B not provide them with his wishes, they would extend his selected retirement age by five years to 2018.

In June 2013, PFP issued a suitability letter to Mr B, recommending that he move his pension fund to an Aegon capped drawdown plan. PFP's letter explained that they'd reached that conclusion because, during their discussions with Mr B, he'd explained that he wanted to take the tax-free cash from his pension scheme to provide him with the monies to purchase shares in his employer's share option scheme. In addition, he also wanted to take the maximum income permissible from the plan to enable him to recycle the monies back into the pension plan to benefit from tax relief.

Whilst PFP's letter explained that they couldn't give advice to Mr B on his plans for the tax-free cash investment, he did subsequently take the £9,000 tax free cash from his pension fund and invested the monies into his employer's share option scheme. The remaining monies from the occupational scheme were invested into a managed fund with a balanced risk profile. Whilst Mr B originally took the income from the plan in 2013, the following year, he opted to switch the income payments off. In June 2016, Mr B switched his pension savings out of the balanced fund that PFP had recommended and moved the monies into a cash fund. The following year, Mr B then switched his funds again into a cautious fund.

In February 2023, Mr B decided to formally complain to PFP. In summary, he said:

- He'd been switched into a pension fund that was less diverse than his existing arrangement.

- PFP hadn't properly assessed his attitude towards risk (ATR) and it wasn't clear why they'd recommended that he take his tax-free cash from the pension.

- Switching to a new pension wouldn't provide the longevity and security of an annuity when he reached his retirement date.

After reviewing Mr B's complaint, PFP concluded that, as Mr B had brought his complaint to them more than six years after the event being complained about, they weren't going to look into his concerns. They also went on to state that having considered their original advice, they didn't agree that it was unsuitable.

Mr B was unhappy with PFP's response, so he referred his complaint to this service. In summary, he said that he was unhappy with their decision to time-bar his complaint because, he said, he only recently became aware that he had cause for complaint. He felt therefore that he had raised his concerns with PFP within the time limits set out by the regulator.

The complaint was then considered by one of our Investigators. He concluded that Mr B's complaint was one which this service could consider because he didn't believe that the events of 2016 and 2017 would have prompted him to believe that something was wrong with his pension at those points. He then went on to look at Mr B's concerns that the original advice to switch his pension wasn't appropriate for his needs at the time. After reviewing the advice that Mr B was provided, our Investigator explained that whilst he thought PFP shouldn't have undertaken the switch, Mr B would've more likely than not done so anyway and as such, didn't believe the complaint should be upheld.

Mr B's representative, however, disagreed with our Investigator's findings. In summary, they said:

- PFP were fully aware of the purpose of Mr B wishing to access the tax-free cash. They went on to say that the monies were being used to purchase shares in a single company in an industry that was prone to be volatile in nature. They also said that despite the fact that the investment had turned out to yield positive returns, it wasn't in line with his stated ATR.

- Had PFP explored funding the share purchase through other options with Mr B, his representative says that he wouldn't have needed to access his pension.

- They also disputed our Investigator's view that, even if PFP hadn't recommended Mr B switch the pension, he would've still gone ahead against their advice anyway.

Our Investigator was not persuaded to change his view as he didn't believe that Mr B had presented any new arguments that he'd not already considered or responded to. Mr B then asked the Investigator to pass the case to an Ombudsman to review that outcome.

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.

The purpose of my decision isn't to address every single point raised. My role is to consider the evidence presented by Mr B and PFP, in order to reach what I think is an independent, fair and reasonable decision based on the facts of the case. In deciding what's fair and reasonable, I must consider the relevant law, regulation and best industry practice, but it is for me to decide, based on the available information that I've been given, what's more likely than not to have happened. And, having done so, I'm not upholding Mr B's complaint and it's largely for the same reasons as our Investigator. Whilst I'm not sure I can add a great deal more over what our Investigator has already set out, I'll explain why below.

Jurisdiction

Before I go on to explain the reasons behind my decision, I will address PFP's view that Mr B's complaint should be time-barred because, they say, he has raised his concerns outside of the timescales allowed for this service to be able to look into his complaint.

I can't look at all of the complaints referred to me. The rules applying to this service say that I can't look at a complaint made more than six years after the event being complained about – or (if later) more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint. Unless that is, the business being complained about agrees. This is Dispute Resolution rule 2.8.2R(2) – which can be found online in the Financial Conduct Authority's handbook. And in this case, PFP hasn't agreed to us considering Mr B's complaint.

Those rules are in place to protect both the consumer and the business. The relevant time limits:

The six-year period and what this means for Mr B's complaint

Mr B referred his complaint to this service in April 2023. So, it's clear that the complaint has been brought more than six years after the event that he is complaining about, which is PFP's original advice to switch his pension to the new capped drawdown plan in June 2013.

The three-year period - Does this provide Mr B longer than six years from when the advice was provided in order to complain?

Even though Mr B complained more than six years after the event that he's now complaining about, this isn't the end of the matter. This is because the DISP rules can potentially provide Mr B with longer than six years to complain, as long as he complains within three years of when he was aware, or he ought reasonably to have been aware, that he had cause to. So, I've considered when Mr B was aware, or he ought reasonably to have been aware, that he had cause to complain.

When did Mr B become aware that he had cause for complaint?

I've thought carefully about whether there were any trigger events that should have helped Mr B realise that something may not be right with his pension sooner, leading him to the point at which he ought to have known that he had cause for complaint.

In June 2016, Mr B switched his Aegon pension funds into cash and then in November 2017, his funds were switched into the Scottish Equitable Cautious Core Ptfl ARC fund. PFP say that if Mr B was unhappy with their advice in 2013, those two points should have set him on a pathway to start the three-year clock ticking. They've said that because in his complaint, Mr B has explained that the fund that PFP recommended was unsuitable and as such, by deciding to switch out of that fund, it should've prompted him to complain sooner than 2023.

However, I'm not convinced it's as simple as that. And that's because, Mr B has explained that he only switched into cash in 2016 to lock in the gains that he'd made in his fund. Given at that time, he was only two years away from his new selected retirement age of 65, the fund had performed reasonably well, and the switch to cash was just before the Brexit vote (which followed a period of increased volatility in the markets), so I don't think that's unreasonable. But importantly, I don't think that switch would have prompted him to think that something might be wrong with PFP's recommendation, particularly when he was locking in gains, rather than looking at loses. In addition, I don't think that undertaking a fund switch would've given rise to Mr B becoming aware that he'd foregone a guaranteed income for life, which is the additional complaint point that Mr B has raised.

So, it seems to me that the events in 2016 and 2017 wouldn't have put Mr B on a path of discovery that something was wrong with PFP's advice from 2013, and he only became aware that there might be a problem with PFP's recommendation when he spoke with the claims management company in early 2023. I'm therefore satisfied that this complaint falls within our jurisdiction and is a case that I can consider.

Having determined that this is a complaint that I can look at, I have gone on to look at Mr B's concerns that the advice he received from PFP to switch his pension wasn't suitable. Despite PFP's letter rejecting Mr B's complaint as being out of time, they did comment that they were satisfied his allegations had been made without merit.

<u>Was the advice to switch Mr B's occupational pension into the Aegon drawdown plan suitable?</u>

In 2009 the then regulator, the Financial Services Authority, published a report and checklist on pension switching which set out their findings following a review that they'd undertaken. It provided businesses with their expectations when providing pension switching advice. The standards, which applied at the time that PFP gave Mr B the advice in 2013 (and still apply today) covered four key areas:

1. The loss of benefits in the pension switch without good reason, such as the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits at an earlier than normal retirement age.

2. They had switched into a pension where there was a need for ongoing investment reviews, but this was not explained, offered, or put in place.

3. They had switched into a pension that did not match their recorded attitude to risk or personal circumstances.

4. They had been switched to a pension that was more expensive than their existing one(s) or a stakeholder pension (because of exit penalties and/or initial costs and ongoing costs) without a good reason.

As I've already explained, at the point Mr B approached PFP for advice on his pension, he was nearing his 60th birthday and needed to make a decision on what he wished to do with his occupational money purchase scheme. If he didn't take his benefits at that point, the plan provider said that they would roll his plan and his selected retirement age forward by five years to his 65th birthday.

When Mr B approached PFP, he asked them to limit their advice to purely retirement planning and that of his occupational pension scheme. He explained that his priority was to extract the maximum tax-free cash that was available from his occupational scheme, to allow him to use those funds to purchase shares in his employer's share option scheme. As he had no need for an income at the point, he wanted to leave the remaining monies invested. So, based on the regulator's guidance and Mr B's stated objectives at the time, I've carefully considered whether PFP's recommendation to switch his pension to Aegon was appropriate.

Mr B's existing occupational pension scheme was a money purchase scheme that didn't offer a guaranteed annuity rate, enhanced tax-free cash or matching employer contributions and given that he had already reached age 60 and his selected retirement age, there was no penalty applied for taking benefits at that time. So, it seems that by switching the pension, Mr B didn't lose any valuable features.

In addition, as part of their discussions with Mr B, PFP recommended an ongoing advice service to him, levying an ongoing charge of 0.5% for an annual review and more regular interactions should he have wanted them. Given Mr B was only five years away from his selected retirement age, I think that was a reasonable approach to have taken.

When considering the amount of risk that Mr B was prepared to take with his monies, PFP completed an electronic risk scoring questionnaire with him. The result of which determined that he was a balanced, or a medium risk investor. Mr B's representative has stated that PFP failed to assess his risk appetite correctly, but having looked at the questionnaire and responses to the questions that he answered, I've no reason to doubt the outcome of that assessment, particularly when the software that PFP used was a generic package that's widely used across the industry.

In addition, Mr B explained that the fund PFP recommended was unsuitable for his circumstances because it was less diverse than his existing fund – however, I'm not persuaded by that perspective. That's because the Baillie Gifford fund, like Mr B's existing fund, was actively managed and invested in a broad spectrum of investments across a range of different geographical locations. It also held approximately the same 40-85% equity content as Mr B's existing fund, which his representative has claimed was appropriate for his needs and he should be placed back into. Whilst there will be differences between the two funds because they're managed by different fund managers, they're broadly similar in nature, and both were balanced risk funds, so it seems the Baillie Gifford fund was appropriate for his stated risk profile at that time. Allied to this, Mr B's occupational scheme offered 14 fund choices, whereas the Aegon recommendation provided a choice running into the hundreds, so I don't think that he was limiting his investment choices by moving to Aegon. To be clear, whilst Mr B may not have needed access to such a wide spectrum of funds, nor was it a reason to switch, both he and PFP had wider options should they be needed. Importantly, I've seen nothing to persuade me that Mr B was invested in a less diverse investment than he was previously, as a consequence of PFP's actions.

PFP undertook a comparison of charges on the new Aegon plan with Mr B's existing occupational scheme. His existing plan had an annual management charge of 1.25% p.a. with a bid/offer spread of 6%. The new recommendation had an annual plan charge of 0.4% and a fund charge of 0.45% (the Baillie Gifford fund that PFP recommended had a charge of 1.55% and a discount of 1.1%) and an ongoing advice fee of 0.5%. So, ignoring the cost of the ongoing advice which is something that Mr B wasn't paying for previously (and isn't a service/cost that he's complained about), that meant he would be paying less each year for the new offering. Finally, PFP didn't levy their normal 3% initial cost of advice charge, so Mr B appears to have saved costs by moving to the new Aegon arrangement.

I've thought carefully about PFP's recommendation and the objectives that Mr B set out at the start of the advice journey and whether an alternate course of action would have been more suitable. PFP's adviser did explore alternative options to the capped drawdown recommendation in the suitability letter that they issued to him. Flexible drawdown was discounted because Mr B's pension pot didn't meet the minimum income requirement and an annuity wasn't suitable because Mr B explained that he was continuing in work until age 65, so as a higher rate taxpayer, taking an inflexible income (from an annuity) would be unsuitable. In addition, phased retirement was also discounted because of Mr B's lack of a need for any income and his requirement for the maximum amount of tax-free cash at outset. So, the capped drawdown plan appeared attractive to Mr B because he wanted to access the maximum tax-free cash available (to fund the share purchase) without having to take an ongoing, indefinite income which he didn't need. In addition, it appears that Mr B didn't wish to explore using the monies from his other pension, the Self Invested Pension Plan, given the nature of its charging structure. It appears that PFP weren't able to value it given the nature of the property funds it contained.

Mr B's representative has said that PFP failed to explore other sources of funding to raise the monies needed for the employee share option purchase. They've said that PFP could have suggested Mr B borrow the money from friends to purchase the shares, or re-mortgage his home. However, after thinking carefully about the practicalities of this, given the size of the share purchase and the fact that they needed to be held for in excess of three years, I think it's likely that most consumers would feel uncomfortable approaching friends to borrow such an amount, and that's assuming that they knew someone who was in a position to do so. Also, whilst borrowing rules vary from lender to lender, I well suspect that given Mr B needed only £9,000 for the employee's share scheme, that would put him below many lenders' minimum further advance level. Even if that was an option, from what I've seen of Mr B's circumstances, I don't think it would've been appropriate for PFP to recommend that he secure debt on his primary residence to undertake an investment in single company shares. I also think that, if Mr B had £9,000 at his disposal at the time, it's unlikely that he would've felt the need to seek advice from PFP to extract monies form his pension.

Mr B has explained that he used the tax-free cash of around £9,000 from his pension to purchase shares in his employer's share option scheme, later selling them in March and November 2017 for around £15,500 – a return of approximately 72%. Mr B's representative has said that PFP were fully aware that Mr B wanted to use his tax-free cash to purchase these shares and have highlighted that they were in a single company, in an industry that was prone to be volatile in nature. They also said that despite the fact that the investment had turned out to yield positive returns, it wasn't in line with his stated ATR, so they were of the view that PFP should have advised Mr B against this course of action. I don't think there's any doubt that PFP weren't aware of Mr B's wishes or his intentions for the tax-free cash, as they've clearly detailed his plans within the suitability report that they sent him. They went on to say in the letter that they weren't providing any advice on what he was doing with the tax-free cash and that was his decision – but I don't think it's as simple as that.

By facilitating the switch, PFP were knowingly enabling Mr B to invest in an investment that they knew to be outside of his balanced risk appetite. PFP failed to challenge Mr B on the drawbacks of his plan, and I think that they could have been clearer in both their letter and interactions with him that such an endeavour wasn't in his best interests, particularly because the purchase of the shares would result in investing his monies in an area that was well above his stated risk profile. PFP weren't there just to transact what Mr B asked of them; when they became aware of Mr B's plans for the tax-free cash and had established his attitude to risk, they should have advised him against the switch.

However, having thought carefully about this, I well suspect that even if PFP hadn't recommended that Mr B switch the pension, releasing the tax-free cash and thereby allowing him to purchase the employee's share options, I think it's more likely than not, that Mr B would've still gone ahead with the switch anyway - I'll explain why.

I've not been persuaded that Mr B was the inexperienced investor that his representative suggests, or that he was going into the transaction with his eyes closed. It's evident from PFP's suitability report to Mr B, that he had previous experience and reasonable knowledge of investments, as he'd purchased investments and pensions in the past. The letter also goes on to state that he has been comfortable with fluctuations in the value of his investments previously. This is backed up by the fact that he holds a SIPP, which the suitability report suggests contains property and other risk-based assets, and the responses to the ATR questionnaire which confirms that he has taken risk with his financial decisions in the past. And when asked how much confidence he has in his ability to make good financial decisions, he responded with ‘a reasonable amount’.

I’ve also seen evidence that Mr B isn’t a passive investor and has made active decisions about what to do with his investments – for example, it was him, rather than PFP, who asked for his funds to be switched into cash prior to the Brexit vote and it was Mr B again that then moved the monies into a cautious fund the following year, prior to reaching his selected retirement age.

When comparing the heavily discounted option price that Mr B’s employer offered their shares at to the average share price of the stock throughout 2013, I can see why Mr B likely found the investment opportunity attractive. As I’ve already explained, he made a return on the shares of around 72%, so it turned out to be a good investment. Importantly though, it was Mr B that also made the active decision to later sell those shares in 2017 to lock in the gains that he’d made, as he said he didn’t want to risk the share price falling.

So, when I consider his actions in the years that followed PFP’s advice, it seems clear to me that Mr B very much understood the concept of risk versus reward and reacted to market events accordingly. And, I think that had PFP declined to act for him in the switch of the pension, he would’ve more likely than not found another way of proceeding with the transaction, such as through an insistent customer basis. Whilst Mr B’s representative has stated that they doubt very much that Mr B would’ve been aware of what an insistent customer process was back then, I well suspect had he pressed PFP, they would’ve explained that alternative pathway to him.

<u>Summary</u>

I think PFP should have done more to educate Mr B about his proposed course of action earlier in their interactions, and I think they should have been clear that purchasing the shares in 2013 wasn’t in line with his stated attitude to risk. However, as I’ve already explained, it seems to me that Mr B already had his mind set that this was a path he wanted to follow given the attractiveness of his employer’s share scheme offer and as such, I think that even if PFP had cautioned against the transaction, he would’ve more likely than not found an alternative way of proceeding anyway.

My final decision

I’m not upholding Mr B’s complaint and as such, I do not require Progress Financial Planning Limited to take any further action.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 5 January 2024.

Simon Fox
Ombudsman