DRN-4492088

The complaint

Mr S is represented. His complaint is about the ongoing advisory service provided by David Williams IFA Ltd ('DW') for his employer based Self-Invested Personal Pension ('SIPP'), between 2015 and 2021 ('the period'). He mainly says DW –

- Provided poor ongoing advice and service during the period. [issue 1]
- Caused the SIPP portfolio to have a holding of uninvested cash, contrary to his profile and to an agreement to keep the SIPP invested. [issue 2]
- Caused breaches of his annual contributions allowances for the SIPP, resulting in a tax charge. [issue 3]

What happened

One of our investigators looked into the complaint and concluded that, overall, it should be upheld. However, he made specific findings on the individual issues. He mainly said:

- DW recommended the employer-based Master SIPP in 2015, using Mr S' jointly owned company as the employer, and it was established with a gross employer contribution, for him, of £90,000 on 27 March 2015 (for the 2014/15 tax year).

- Transaction statements for the SIPP show that subsequent employer contributions followed during the period – £40,000 on 24 May 2018 (for 2018/19), £15,300 and £80,000 on 29 May 2019 (for 2019/20), £40,000 on 4 May 2020 (for 2020/21) and £40,000 on 28 May 2021 (for 2021/22).

- Other transactions, during the period, advised by DW included the transfer of around £25,000 from another pension into the SIPP in December 2015, and investment transactions within the SIPP in 2016 (a property holding and Cofund holdings).

- DW confirmed in its 2018, 2019 and 2020 suitability reports that the employer contributions that were recommended in those years (and then made) had been verified with Mr S' accountant as appropriate.

- Coupled with the May 2018 contribution, DW also recommended £20,000 investments, each, in two funds (the VT Redlands Multi-Asset Portfolio ('VTRM') and the VT Redlands Equity Portfolio ('VTRE')) which Mr S agreed, but it failed to action the recommendation. DW discovered this omission in September 2018 and calculated that, because the funds' performances had dropped since May there was no financial loss caused by the omission. It made new recommendations in November 2018 for the investment of £45,000 and chased Mr S for instructions to act (including the fund switch and expression of wish documents it sent him on 11 November), but never received his response.

- The first of the two May 2019 contributions was recommended for investment, but the second was to be held in cash pending an investment recommendation. Mr S could not attend the September review meeting at which investment was to be discussed.

The £45,000 fund switch document was again sent to him in October and DW chased for the return of the document up to December, but never received his response.

- By May 2020 the SIPP held around 64% in cash and DW's advice, in that month, was to invest most of the cash (leaving around 6% in cash in the SIPP). The investment recommendations were sent to Mr S, and chased by DW, during the same month, but it did not receive a response. It asked him, twice, in October to attend a review meeting, but he did not respond. Then on 23 March 2021 he informed DW that he had found a new adviser. The employer contribution recommended the following month was subsequently made, but no investment advice was given for that.

- In December 2021 DW acknowledged that the 2019/20 and 2020/21 employer contribution recommendations had exceeded Mr S' tapered annual pension contribution allowance of £10,000 (with the level of his earnings triggering application of this taper). It calculated that the excess was a total of £95,300, apologised and referred to the SIPP provider being able to pay the tax due on this excess under the 'scheme pays' arrangement.

- Issues 2 and 3 are the main focus of the complaint.

- With regards to issue 3, irrespective of DW's engagements with Mr S' accountant, it retained responsibility for the suitability of its advice, so it had the duty to ensure the recommended contributions were appropriate for his circumstances. Information about Mr S' earnings was available to it at the relevant times. However, he has been referred to the scheme pays arrangement to rectify the excess contribution and tax charge in this issue.

- Evidence is that the funds in the contribution were intended for his benefit, rather than to remain in the company. The options to achieve that included the pension contributions, a bonus payment or a dividend payment. A comparison calculation between application of the scheme pays solution to the excess pension contributions and application of relevant taxes to the alternative bonus payment shows that his net receipt from the former would have been higher than that from the latter, so it suggests he was better off with the excess pension contributions. A dividend payment would have been subject to high dividend tax, so it is not clear that this would have been a viable alternative. Overall, Mr S does not appear to be worse off in terms of the excess contributions and the scheme pays solution.

- In issue 2, the excess pension contributions should be discounted because they should not have been paid into the SIPP. Therefore, those contributions would not have been available to invest. Consideration of this issue should be based on what would have been available to invest.

- The May 2018 recommendation to invest £40,000, in the specific funds mentioned, should have been followed up and executed by DW. It failed to do so and this part of issue 2 should be upheld. It has conceded that it identified this failure in September 2018 and it claims that, by then, there was no financial loss to Mr S. However, it has not demonstrated that. His acceptance of the recommendation continued to stand at the time. DW should have proceeded to execute it, as he would have expected, but it did not. Its advice in May 2019 did not address this, instead it recommended the investment of new money.

- But for the delay and inaction, the recommendation could have been executed by 28 May 2018, so DW should calculate (and pay) Mr S redress for any financial loss in this respect, from 28 May 2018 to when he moved servicing of the SIPP to a new firm. It should also pay him £300 for the trouble and inconvenience the matter has caused him.

- DW cannot reasonably be held responsible for the other cash holdings in the SIPP – it made investment recommendations that Mr S did not give his consent to; it could not execute those recommendations without his consent; he was aware that the relevant cash holdings had been recommended for specific investments and that the recommendations were awaiting his consent but chose not to give consent; and there is evidence that DW sought to mitigate the matter by chasing for his consent, without success.

DW agreed with this outcome. Mr S and his representative did not. In the main, they said:

- The agreed ongoing service arrangement was for DW to manage the SIPP, to ensure it (including its cash) was suitably invested (in line with his medium/high risk profile), to keep its performance and suitability under review and to give advice if either was off track. This stood in the context of DW promising him growth up to retirement age and in the context of him (an inexperienced investor) relying on the agreed service and on his belief that all the SIPP's money was invested.

- Also in the above context, DW identified its errors in not investing the SIPP's cash and rent receipts but took no corrective action. Thereafter, it made further recommendations but did not action them; it has blamed Mr S but it made no serious effort to contact him at the relevant times and he does not recall any of the chasing it alleges; its chronology of events in this respect mismatches his recollection of events; when a new DW adviser was assigned in 2020 he "*begun to engage*" but it was around the same time that he began to source a new firm to service the SIPP.

- DW had no basis to rely on advice from an accountant.

- With regards to the excess contributions, a bonus payment was an unlikely alternative. Other alternatives – such as, a property purchase in the SIPP or reinvestment in the business/company for growth – have not been properly considered.

- The calculation of loss, in issues 2 and 3, should be performed independently, properly and should include loss related to the rental income and the property fund that was to be held in the SIPP. Reasonable compensation should also be paid for the trouble caused to Mr S and for his time and effort in that respect.

- DW's fees have not been refunded, and there is evidence that it has continued to take fees after termination of its ongoing service. All fees and charges should be repaid.

The matter was referred to an Ombudsman.

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 done so, I have reached the same conclusion expressed by the investigator, for broadly the same reasons.

Issue 1

In addressing this issue, I consider it helpful to reflect the main terms of the service agreed between both parties.

We have evidence of the initial recommendation to Mr S in 2015. DW was not able to produce a copy of the client service agreement he signed in that year, but it shared a copy of the agreement executed for another director of the company on which the Master SIPP was based. It says the same terms were in the agreement signed by Mr S because the agreements related to setting up the same recommended Master SIPP. In addition, we have been given copies of the client service agreements signed by Mr S in 2018 and 2020.

The 2015 recommendation document mainly set out how employer contributions into the Master SIPP was to assist the company in saving corporation tax, how it would be used to purchase the company's business premises and receive associated rental income from that, how each director's individual SIPP (including Mr S') would hold a 1/3 share of the property, how further employer contributions into the SIPP were planned, and how there would be further advice/review on investing any cash surplus after the property purchase.

On balance, I consider the 2015 agreement document to be a reliable indication of the terms agreed in the version Mr S signed, because the terms in the document are broadly similar to those in the 2018 and 2020 documents that he signed. This suggests DW's terms of service were somewhat consistent throughout the period.

The contents of the 2015 document that are relevant to Mr S' complaint confirm, amongst other things, DW's initial and, at an additional cost, ongoing investments and pensions advisory service; its exclusion of responsibility for legal or tax advice; and its approach towards putting together and presenting its recommendations to the client.

The 2018 and 2020 documents are similar. Some of their contents re-state terms from the 2015 document, including those summarised directly above. The 2018 and 2022 documents set out the ongoing service in more detail than the 2015 document. Reference is made to, amongst other things, reviews of the client's profile and of the suitability of existing investments, and the implementation of any "agreed" changes.

The sum effect of these documents was that DW provided an ongoing advisory service for Mr S' SIPP, in which the implementation of recommendations was subject to his agreement/consent. The terms of the arrangement made no provisions for discretionary conduct by DW. Further support for this conclusion exists in the recommendation letters sent Mr S in 2018 and 2019. They had an 'Implementation' section in which he was asked to sign and return documentation in order to proceed with the recommendations. Another example is email correspondence that followed the recommendations made by DW, in which he was asked to confirm his agreement/instructions. These instructions and consent from him were required because no investments could be implemented without them.

Overall and on balance, evidence related to the period shows that DW provided the contracted reviews and ongoing servicing to Mr S and his SIPP. Issues 2 and 3 stand on their own, and will be treated below. The same applies to any financial losses arising in those issues. However, in terms of 'service' and with regards to what appears to be Mr S' general allegation of a complete or overall service failure by DW – which is what I have defined as issue 1 – I have not found evidence to support the allegation. It follows that I also have not found evidence to justify the full refund of the service fees that he has asked for.

Under issue 3, there is evidence that DW received a total of £953 in initial advice fees for the two contribution recommendations in 2019, and that it has offered to refund this (given that the recommendations were flawed). In addressing issue 3 below, I will endorse this offer and I will also order the refund further below. In addition, I will endorse the £300 compensation award, to Mr S, proposed by the investigator for the trouble and inconvenience he has been caused by DW's wrongdoings in issues 2 and 3. However, given that DW delivered, overall, the substantive ongoing service it was paid to deliver and given that its wrongdoings were isolated, they are not enough to justify any additional refund of fees.

Issue 2

Events in this issue began with the May 2018 investment recommendation, which Mr S accepted but which DW failed to implement. Both parties share common ground on this specific failure. It is a part of Mr S' claim and DW has essentially conceded it. It accepted the investigator's findings that it has not established there was no loss to Mr S as of September 2018, that it ought reasonably to have implemented the recommendation and especially after it identified that it had not done so since Mr S' acceptance, and that it is responsible for any resulting financial loss from May 2018 and up to when he instructed his new advisers. I see that DW has also presented, to us, its calculation of redress for this loss up to the time of the investigator's view.

I have considered the matter and reached the same conclusions as the investigator. DW's claim about the absence of loss in September 2018 does not appear to have been established. More importantly the matter cannot reasonably end there. It already had Mr S' consent to the recommendation and if, as it says, the prices of the VTRM and VTRE funds had dropped since the recommendation then it could have proceeded to implement the purchases at better prices.

It should have implemented the investments following Mr S' agreement, and in the absence of a withdrawal of that agreement it should at least have done so when it realised its omission. Instead, the task remained suspended and untreated. This serves as grounds to conclude that Mr S' investment instruction, in this specific matter, had been breached and that redress for any resulting financial loss should be due to him. Due evidence of what appears to have been his growing lack of confidence in DW thereafter, as I address next, I agree that the end date for the calculation of redress should be when he moved the SIPP to a new adviser. By then, and for this reason, it is more likely (than not) that the SIPP's contents would have been reviewed and probably revised by the new adviser, even if the VTRM and VTRE investments had been made on time in 2018.

The matter in dispute under issue 2 relates to the SIPP contributions after May 2018 that were not invested. I understand and agree with the investigator's observation that this should be approached with due regard to what would have been available for investment in the SIPP but for the erroneous excess contributions. However, as I explain below, even if all the post-May 2018 contributions are considered, a fair conclusion remains that DW cannot reasonably be held responsible for the investment inaction that followed.

The main reason for this finding is evidence of a lack of engagement from Mr S and the absence of consent (for the implementation of the relevant recommendations) from him. I note his dispute of DW's chronology of events and submissions in this respect. Whilst unrecorded telephone calls might be subject to dispute, I do not consider that the same applies to documentary evidence of particular correspondence sent to him. He says he changed his address during the period, but he does not appear to have established that the correspondence posted to him at the time was sent to the wrong address.

In November 2018 an investment recommendation (for £45.000 on deposit in the SIPP) was sent to Mr S, along with emailed fund switch forms, but he never gave his consent. There is evidence that DW continued to chase, without success, his consent in 2019 (up to December that year).

In May 2019 a recommendation (for £15,300 in the SIPP) was sent to him, at the same address to which the 2018 correspondence was sent. He responded to this communication, which suggests that the 2018 correspondence was correctly addressed and received by him. In the same month a follow-up recommendation (for the contribution of £80,000) was made and he consented to this. Available evidence is that the plan was then revised at the time. It was to address how the £15,300 and £80,000 amounts would be invested during the review scheduled for September that year. That review happened, but only between DW and the other company directors relevant to the Master SIPP. Mr S could not attend, and there is evidence that confirms this.

He consented to the May 2020 contribution recommendation, and this was followed in the same month by yet another investment recommendation (for £45,000 in the SIPP). The recommendation said, in bold, that his instructions were required. He did not give those instructions. His address appears to have changed by this time, but there is an email dated 12 May 2020 that shows the recommendation was sent to him by email, to his work email address. There is no evidence to suggest he did not receive his work emails. He was sent a chaser email on 27 May.

DW continued to chase engagement with Mr S up to and including October 2020. In this month he was twice sent invitations for review meetings, offering him a selection of dates to choose from. He does not appear to have responded to these invitations.

A review meeting was subsequently agreed for 23 March 2021. However, on the morning of this date and from his work address, Mr S sent DW an email to cancel it. He explained that he had become unavailable due to a work commitment, and he took the opportunity to give notice that he had appointed a new firm to service his SIPP.

The sequence of events summarised above stands in support of what I referred to earlier as Mr S' apparent growing lack of confidence in DW during this part of the period. He did not seem to have a problem in consenting to contribution recommendations, but he was reluctant to consent to investment recommendations. I do not consider that this would have justified his lack of engagement with regards to investing the SIPP. If he no longer believed in DW's recommendations he could have said so at the time in order to mitigate the matter. That would probably have led to discussions and either DW taking steps to restore his confidence or an earlier decision from him to move his SIPP elsewhere. By not doing so, DW continued to make recommendations in good faith, and it cannot reasonably be blamed

The above is not necessarily a criticism. Mr S' individual SIPP was his to determine as he saw fit and he was under no obligation to follow DW's investment recommendations. He could also argue that he was under no obligation to disclose, until he was ready to do so, any growing doubts he might have had about its service. However, the effect of his conduct in not giving consent to the relevant investment recommendations, not attending an important meeting in which investment of the SIPP was to be planned/decided, and his lack of overall engagement with DW, is that he is without grounds to support his allegation that DW failed to keep his SIPP invested – in as far as the allegation relates to matters after the May 2018 recommendation.

It is noteworthy that his lack of engagement at the time seems to have been indirectly conceded in the point made by his representative which says he "*begun to engage*" in 2020 but that was also around the time he began to seek a new firm to service the SIPP. This suggests acknowledgement that he previously did not engage with DW, that by 2020 he had decided to look for alternative service and that his search for a new firm probably competed with his attention to DW.

The summaries above show DW's efforts to keep the SIPP invested and, in response, the absence of required consent/instructions from Mr S. As I said in addressing issue 1, his consent and instructions were required before investments could be made, so the cause of his SIPP having a significant uninvested component relates to his decision(s) not to give those instructions when they were required and repeatedly requested. This conclusion extends to his argument about rent receipts. Other than the contributions, the balance of evidence shows that, in the main, he did not want DW conducting any further transactions in the SIPP.

Overall, on balance and for the above reasons, I uphold issue 2 but only in relation to the non-implementation of the May 2018 investment recommendation.

Issue 3

DW accepts that it gave flawed advice for the contributions impacting the 2019/20 and 2020/21 tax years, so arguments about its liability in this issue essentially fall away. It has also confirmed its readiness to pay a refund to Mr S covering the initial advice fee it received for the contribution recommendations in both years.

Its advice was indeed fundamentally flawed, the recommended contributions were excessive and, had it carried out its own proper analysis at the time it would have known this and would not have made the recommendations. For this reason, the initial advice fees cannot be justified, so I endorse DW's offer of the refund. In case the refund has yet to be paid, it will be reflected in my redress orders below. As I explained in my treatment of issue 1, I find no grounds for any other fee refund from DW.

Rectification of the issue would appear to be a matter that should be beyond dispute, given the proposed scheme pays solution, but I acknowledge Mr S' and his representative's points in this respect. Their argument is that more should be considered and explored in addressing whether (or not) he has faced a financial loss despite the proposed solution. It is not clear whether (or not) the solution has already been applied, or if Mr S is awaiting the outcome of his complaint first.

There is enough evidence of the agreed purpose, at the outset, of the employer contributions that were recommended during the period. I summarised this in my treatment of issue 1. The aim was to avoid retaining the funds within the company's remit with a view to reducing its corporation tax liability. Therefore, I am persuaded that a viable alternative – to the contributions – at the time would have had to be one that suitably achieved the same purpose. For this reason, I do not accept Mr S' argument that an alternative in which the funds were retained in the company should be considered further. On balance, that was unlikely.

Like the investigator, I have seen and considered the comparison calculations between the tax charge resulting from the excess contributions and scheme pays solution, on the one hand, and tax treatment of an alternative bonus payment, on the other. The calculations appear to be credible and they show that Mr S' net receipt would have been lower in the latter scenario, so in this comparison he was/is better off with the excess contributions and scheme pays solution. As the investigator also said, he was a higher rate tax payer so a higher rate of dividend tax would have applied to any alternative dividend paid to him. Furthermore, and on balance, I consider that this would have been an unlikely alternative in any case because a dividend payment would not have served the reduction of corporation tax purpose (as the parties agreed in 2015) in the ways that pension contributions and bonus payments would have. Dividend payments do not usually reduce corporation tax because such tax is usually applied before such payments.

Overall, on balance and for the above reasons, I do not consider that there is a wider financial loss to Mr S in this issue outside the excess contributions and scheme pays solution. Issue 3 is upheld because DW did something substantially wrong within it, as stated above, but the proposed scheme pays solution fairly resolves it.

Putting things right

Fair compensation

For all the reasons given above, my aim is to redress only the non-implementation of the May 2018 investment recommendation in issue 2 (to put Mr S as close as possible to the position he would be in if that recommendation had been actioned), to order the distinct refund of fees that DW has already offered and to order payment of the £300 compensation (to Mr S) for trouble and inconvenience that was proposed by the investigator.

With regards to redress, had the May 2018 recommendation been actioned the advised investments in the VTRM and VTRE funds would have been made. This means these investments are the natural redress benchmark. For the reasons addressed above, the end date for the redress calculation will be when Mr S moved the servicing of his SIPP to a new firm.

The £40,000 contribution associated with the recommendation was made into the SIPP on Thursday 24 May 2018. I agree with the investigator's analysis that DW would have been able to place the orders for the investments on the following working day, Friday 25 May 2018, and that based on the SIPP provider's terms for order execution it would probably have executed the investments by the next working day, Monday 28 May 2018. For these reasons, the start date for the redress calculation is 28 May 2018.

Mr S is ordered to engage meaningfully and co-operatively with DW to provide it with all information and documentation, relevant to its calculation of redress, that it does not already have.

What must DW do?

To compensate Mr S fairly, DW must:

- Compare the actual performance of the 24 May 2018 £40,000 contribution, between the start and end dates, with that of the benchmark shown below. If the fair value is greater than the actual value the difference must be paid to Mr S in compensation. If the actual value is greater than the fair value, no compensation is payable.

- In addition, pay any loss adjustment as set out in the table below.

- Pay the compensation into Mr S' pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation should not be paid into his pension plan if it would conflict with any existing protection or allowance. If the compensation (and interest) cannot be paid into his pension plan, pay it directly to him. Had it been possible to pay it into the plan, it would have provided a taxable income, so the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using his actual or expected marginal rate of tax at his selected retirement age. For example, if he is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. If he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Mr S £300 for the trouble and inconvenience caused to him. I agree with the investigator's proposal in this respect. The errors committed by DW in issue 2 and 3 would have caused him a notable amount of trouble and inconvenience and I consider that £300 is fair compensation to him for that.

- Pay Mr S the refund of the initial advice fees incurred in 2019. As I said above, there is evidence that DW received a total of £953 in initial advice fees for the two contribution recommendations in 2019 that resulted in breaching Mr S' tapered allowances. DW must refund this payment to him, for the reasons addressed above, if it has not already done so.

- Provide a calculation of the compensation to Mr S in a clear and simple format.

investment name	status	redress benchmark	from ("start date")	to ("end date")	loss adjustment benchmark (from end date to date of settlement)
£40,000 employer contribution into Mr S' SIPP on 24 May 2018	Unknown	For half/£20,000 – ; for the other half – the VT Redlands Multi-Asset Portfolio ; for the other half/£20,000 – the VT Redlands Equity Portfolio	28 May 2018	Date DW ceased to service the SIPP	FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index)

actual value

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

fair value

This is what the investment would have been worth at the end date had it produced a return using the redress benchmark. Any withdrawal, income or other payment out of the investment should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if DW totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

- The funds stated in the table above are the natural redress benchmark, for the reasons given earlier above.
- For the loss adjustment benchmark, 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 is a fair measure for someone who was prepared to take some risk to get a higher return. This broadly matches Mr S' risk profile and can reasonably be used for any loss adjustment, in addition to the redress amount due on the end date, in the calculation.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr S' case, the failure to implement the May 2018 recommendation happened before 1 April 2019 and the complaint was referred to us after 1 April 2022, so the applicable compensation limit should be £170,000.

decision and award

I uphold Mr S' complaint on the specific grounds stated above. Fair compensation should be calculated as I have also stated above. My decision is that DW should pay him the amount produced by that calculation, up to the relevant maximum.

recommendation

If the amount produced by the calculation of fair compensation is more than the relevant maximum, I recommend that DW pays Mr S the balance. This recommendation is not part of my determination or award. DW does not have to do what I recommend.

My final decision

For the specific reasons given above, I uphold Mr S' complaint and I order David Williams IFA Ltd to calculate and pay him redress and compensation as set out above, and to provide him with a calculation of the payment(s) in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 18 March 2024.

Roy Kuku
Ombudsman