

The complaint

Mrs D complains that an Appointed Representative (AR) of Openwork Limited (Openwork) gave her unsuitable advice to transfer her pension in 2019.

Openwork is responsible for this complaint, so I'll only refer to it in my decision.

Mrs D is represented in her complaint by a claims management company (CMC), but I'll only refer to her in my decision.

What happened

Mrs D had an Occupational Money Purchase pension scheme with a provider I'll refer to as provider S. This was an Executive Pension Plan (EPP) linked to her own business. It was invested in provider S's conventional With-Profits fund. Openwork said that the pension didn't offer flexible drawdown options. I understand that in 2019, Mrs D wanted advice on investing the funds held within that pension.

Openwork said it set up a meeting in April 2019 with one of its ARs. It said it also sent Mrs D a link to an Attitude To Risk (ATR) Questionnaire, which it wanted her to complete in preparation for the meeting.

In April 2019, Mrs D met with an AR of Openwork to discuss her options regarding her EPP. Mrs D's husband was present at the meeting and also received advice surrounding his own pension options. During the meeting, the AR completed a fact-finding exercise which recorded Mrs D's circumstances as follows:

- She was 58 and married. She had no financial dependants.
- She jointly owned her home.
- She was self-employed with an annual income of £104,000. She had just over £4K each month of disposable income available.
- She had a total of around £365K in savings products, of which £130K was cash-based. She also had access to a joint emergency fund with her husband of £70K.
- As well as the EPP, which was worth around £93K, Mrs D had a Defined Contribution (DC) pension worth around £393K.
- Mrs D was thinking about selling her business and retiring the following year. She wanted an annual retirement income of £35,000. She also wanted to invest for the future and to achieve better returns *"and a level of guaranteed income."* The fact find recorded that Mrs D was: *"looking at investing your [EPP] now, and then around this time next year you are then looking at investing all your [other DC pension funds] as you currently enjoying investing yourself with [the provider they're currently invested with]."*

Openwork also assessed Mrs D's ATR in April 2019, after considering her questionnaire responses and discussing them with her. It said her agreed ATR was "Balanced."

Provider S provided an illustration of the benefits Mrs D could expect from her EPP on 3 June 2019. This showed the benefits at both age 60 and age 65. The figures provided showed that a Guaranteed Annuity Rate (GAR) applied at age 60. The GAR meant that Mrs D could receive potentially better benefits at age 60 than she could at age 65.

Openwork produced a Suitability Report (SR) dated 17 October 2019. The SR stated that Mrs D's financial objectives were:

- To withdraw the funds from her pension flexibly when she wanted to.
- To benefit from the death benefits in her new pension, as it would fall outside her estate on death.
- To be invested to gain better returns in line with her risk profile.

The SR recommended that Mrs D transferred her EPP to a platform with a new provider, which I'll refer to as provider N. And then invest those funds in the Openwork Graphene C1 Balanced Model Portfolio.

The SR stated that Mrs D's existing EPP investment no longer met her objectives because she wanted to benefit from pension savings that could be:

- passed down family generations under a pension tax wrapper.
- retained in a taxed advantaged environment until such time they were needed, and then accessed flexibly.

Within the SR, the AR demonstrated that Mrs D could meet her retirement income requirements from her state pension, her other DC pension and her existing assets, without any consideration of the value of her business.

The SR highlighted the costs of the initial advice and ongoing advice. Openwork would receive 2% of the transferred fund for the initial advice. It would also charge 0.75% of the fund value each year for ongoing advice. It also stated that provider N's charges would be higher than provider S's going forward.

The SR also noted that the existing pension benefitted from a GAR and protected Tax-Free Cash (TFC). It explained what the GAR could mean to Mrs D if she took the benefits from her EPP at age 60. The figures showed that Mrs D could've received a substantially larger annuity using the GAR than she could receive from the open market. But the report recommended that Mrs D transferred her EPP to provider N for legacy planning and for the flexibility she could get from flexi-access drawdown. The SR also noted that Mrs D didn't want to take an annuity approach despite the high value guaranteed annuity rates offered.

Provider N provided an illustration of the benefits Mrs D could expect from the recommended arrangement at age 65 on 18 October 2019.

Mrs D signed Openwork's fee agreement on 18 October 2019. Her pension with provider N was set up shortly afterwards.

I understand that in November 2019, a business announced its proposed purchase of the provider N platform. And that on 14 January 2020, the funds in Mrs D's EPP transferred to

provider N. And that from then on, the funds were invested as recommended.

In April 2020, Mrs D's business went into administration.

The proposed purchase of the provider N platform completed by May 2020. Mrs D's pension was subsequently transferred to the new business's platform with no change to the arrangement other than the name of the provider. I also understand that the AR wrote to Mrs D on 5 June 2020 to tell her what was happening.

In September 2020, I understand that Mrs D transferred the funds that had initially been invested with provider N away. Her representative said that she did so due to charging and performance issues. And that she thinks she transferred the funds to two other providers.

I understand that Mrs D saw an advert for her CMC in 2023. She said she was only made aware that the 2019 advice was unsuitable on her first discussions with it.

In July 2023, Mrs D's CMC raised a complaint with Openwork about the 2019 advice. It felt that the advice had been unsuitable and made the following complaint points:

- Openwork hadn't adhered to FCA Principles 2, 6,7 and 9. Nor had it followed to the FCA Conduct of Business Sourcebook rules 9.2 1R, 9.2.2R,9.2.3R. 19.1 and 19.2.
- The adviser had failed to establish Mrs D's true ATR as she'd recommended investment into funds which were too high risk for Mrs D, who was a retail investor without sophisticated Investment experience. Mrs D's previous pensions with provider S provided her with access to a diverse range of mainstream regulated funds that gave her with a suitable spread of risk. By transferring her pension to the provider N pension recommended, the adviser invested Mrs D's pension funds in funds with an overall high level of risk that was unsuitable for her.

Openwork issued its final response to the complaint on 18 September 2023. It felt that the evidence showed that the adviser had established Mrs D's ATR correctly. And that the level of risk had then been confirmed by Mrs D after discussions during meetings.

Openwork acknowledged that some of the funds Mrs D had been invested in had an ATR that was higher than her agreed ATR of Balanced. But said that the portfolio she'd been invested in was part of the recommended Openwork Graphene C Balanced Model Portfolio, with allocations determined by the Openwork Investment Committee to be suitable for investors with a Balanced ATR. It said that the adviser hadn't recommended any individual funds to Mrs D.

Openwork also said that Mrs D had been invested in the With-Profits fund with provider S. And that there'd been a further seven funds she could've invested in. But it said it hadn't authorised its AR to comment on the suitability of the provider S funds. So she wasn't in a position to comment about the suitability of those funds for Mrs D and her agreed ATR.

Openwork felt that the adviser had acted in Mrs D's best interests. And that all Regulatory documentation had been presented to Mrs D throughout the advice process. It also said it completed a cost comparison of charges before the recommendation, including full disclosure of any potential loss of benefits. It therefore felt that the advice had met all appropriate guidance.

Mrs D didn't agree. So she brought her complaint to this service through her CMC. She still felt the advice had been unsuitable, for the following reasons:

- The adviser shouldn't have recommended a transfer away from provider S as she hadn't been authorised to comment on the suitability of the provider S funds available.
- She didn't think that Openwork had addressed the loss of her GAR. She felt that the adviser had failed to justify the loss of this significant benefit in favour of a flexible drawdown pension. She also felt that provider S could've provided a suitable product for this purpose without the added expense and complication of the transfer.
- She also didn't consider the potential of leaving the funds to her beneficiaries was an important factor to her.
- She acknowledged that the adviser hadn't recommended individual funds to her, but felt that it was clear from the Omnis Graphene C1 fund fact sheet that the fund contained high risk investments that were unsuitable for her as an inexperienced investor.

Mrs D wanted to be put back into the position she would've been in but for the unsuitable advice.

I understand that Mrs D at some point cancelled the ongoing advice service. And that she did this before she'd had an annual review.

Our investigator felt that the complaint should be upheld. He felt that the recommended transfer appeared to be more expensive than the EPP. And that as the adviser hadn't been able to compare the performance of the EPP against the recommended arrangement, there was no way to determine if the EPP was underperforming relative to any applicable charges. So it couldn't confirm if Mrs D would have benefited from a different investment strategy rather than a switch. Our investigator felt that the recommended arrangement would've needed to perform better overall to compensate for the higher charges. But Openwork hadn't been able to compare the performance between the existing and recommended arrangements. So it couldn't have known if its recommendation offered better value for money for Mrs D or not.

Our investigator wasn't persuaded that Mrs D had presented with a clear need for a wider range of investment choices at the time of the advice. He felt that the existing arrangement probably had sufficient funds for an investor with Mrs D's experience.

Our investigator considered the benefits Mrs D had lost on the transfer from provider S. He noted that the GAR could only be used at age 60 and was on a single life, non-escalating basis. He also acknowledged that only part of the funds in the EPP attracted the GAR rate. But he felt that as Mrs D had been relatively close to age 60 at the time of the advice, and despite the fact that it wasn't clear that she'd wanted to take an annuity in retirement, Openwork shouldn't have dismissed the possibility of a guaranteed income, as this had been one of Mrs D's listed objectives. Our investigator felt that the AR should've at least recommended that Mrs D deferred any decision on transferring away from any guaranteed benefits until closer to the time of her retirement.

Our investigator felt that Openwork had fairly considered Mrs D's ATR, although he queried why some of the questions on the questionnaire had been left unanswered. He also considered that the portfolio Openwork had recommended was, overall, balanced. Our investigator also felt that Openwork had clearly explained both the need for and the cost of ongoing reviews.

Overall, our investigator felt that the advice had been unsuitable. He felt that if Mrs D had

been given suitable advice, she would've remained with provider S. To put things right, he felt Openwork should carry out a loss calculation to put Mrs D as close as possible back to the position she would probably now be in if she had been given suitable advice. He also felt that Openwork should repay the adviser's fees.

Mrs D's CMC said it largely agreed with our investigator. But it made the following additional points:

- It had some concerns over the GAR and the protected TFC element of 41.78% that it said was lost on the pension transfer. Although it agreed with our investigator's view that the GAR and protected TFC element had been lost on the transfer, it didn't agree that because Mrs D didn't appear to have taken pension benefits to date, this loss didn't need to be considered for compensation.
- It therefore felt that the loss of the protected TFC and GAR should be considered for a compensation calculation.

Openwork didn't agree with our investigator. It still felt the advice was appropriate based upon on Mrs D's circumstances at the time of the advice and her future objectives. It made the following points:

- It said that Mrs D's pension hadn't transferred away from provider N to another provider in 2020. It said that this had simply been a rebrand.
- Openwork felt that our investigator had incorrectly stated that the adviser had failed to compare the performance of Mrs D's existing pension plan against the plan it had recommended, and therefore hadn't been able to determine if the existing plan Mrs D was in was underperforming relative to any applicable charges. It said that the adviser had stated in the Suitability Report: "*The performance of the investment has been poor. This can be shown by the fund fact sheets I have provided to you comparing the Scottish Widows With-Profits Fund you are currently invested within, to the Graphene C1 Balanced*". It therefore felt that this showed that the adviser had discussed the existing plan's performance with Mrs D.
- Openwork felt that Mrs D's existing experience of running her own business, alongside her previous investment history and her existing assets, showed that she was an experienced investor.
- Openwork said that although our investigator had stated that Mrs D had wanted a guaranteed income at the time of the advice, and that this was listed as one of her objectives, it couldn't find evidence that this was recorded by the adviser as one of Mrs D's objectives. It said that if it had been, it felt that the adviser would've recommended utilising the GAR. It acknowledged that Mrs D did want income and that she had a clear plan to obtain her desired level of income. But felt that the way she could achieve that plan was clearly detailed in the SR.
- It didn't agree that Mrs D should've been advised to wait until she attained age 60, so that she could then consider whether she wanted to utilise the GAR. It said that Mrs D had confirmed that she wanted to access her pension funds flexibly through income drawdown, rather than through any sort of annuity. It also felt that the adviser had clearly shown the value of the GAR at the time of the advice.
- Openwork acknowledged that Mrs D's business had gone into administration in 2020. But it said that the business had been a long running and successful business at the time of the advice. It didn't think that anyone could reasonably have anticipated the

potential economic consequences of the Covid 19 pandemic. And felt that the events of the pandemic shouldn't be retrospectively applied to assess the suitability of the advice. It also felt that the adviser had costed Mrs D's desired income in retirement requirement based on her and her partner's assets, excluding proceeds from the business.

As agreement couldn't be reached, the complaint has come to me for a review.

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'm going to uphold it, for largely the same reasons as our investigator. I consider the advice was unsuitable. However, the redress I've suggested is slightly different from that proposed by our investigator. This is because I'm satisfied that the loss calculation he suggested will effectively return the initial advice fees to Mrs D if it identifies a loss. Therefore I don't consider that Openwork needs to separately repay the initial advice fees in the event the calculation shows a loss. I'll explain the reasons for my decision.

I think that the 2019 advice failed to meet the regulator's requirements for pension switching in the following areas:

- switching to a more expensive pension without good reason.
- losing benefits in the pension switch without good reason.

I say this in the first instance because the evidence shows that the recommended arrangement was more expensive than the existing one. And because I'm not persuaded that the evidence shows that Mrs D definitively wanted or needed to switch her pension with provider S when she sought the advice. In doing so, she lost the potential benefit of the GAR. And she may have lost the potential benefit of the protected TFC, although the evidence is unclear on this point.

I can see that the SR stated that *"the way the pension benefits can be paid on death, in addition to any potential future income requirements, is your main priority and feel that having all available options definitely outweighs the additional costs you now have to pay."* While I acknowledge that there was a wider range of investment choice in the new arrangement than in Mrs D's existing pension, I'm not persuaded that the benefits of the additional choice, or the treatment of future death benefits, outweighed the downsides of the transfer.

Nor am I persuaded that Mrs D's desire to access her pension funds flexibly was sufficient to make the transfer suitable at the time. I say this because the adviser could've reasonably suggested that Mrs D wait until closer to the time that she actually needed to access her benefits. It may then have been the case that Mrs D had instead decided to choose the GAR option instead.

I acknowledge that the adviser did clearly show Mrs D the value of the GAR at the time of the advice. I also acknowledge that Openwork didn't agree that Mrs D should've been advised to wait until age 60, given she'd told it that she wanted to access her pension funds flexibly, rather than through any sort of annuity. But this doesn't persuade me that it wouldn't have been in Mrs D's best interests to defer the decision on whether or not to transfer.

Openwork said it couldn't find evidence that its adviser had recorded at the time of the

advice that Mrs D had wanted a level of guaranteed income. It said that if this objective had been noted, its adviser would've recommended utilising the GAR. But the evidence shows that the adviser recorded on the fact find that alongside her desire for better returns, Mrs D also wanted: "*a level of guaranteed income*".

I'm persuaded that, at the time of the advice, with Mrs D being relatively close to age 60 - at which point she could benefit from the valuable GAR - and with no pressing need to take income from the pension, the adviser should've recommended she waited to see if her plans might change. While I agree with Openwork that if Mrs D had waited until her 60th birthday to decide whether or not to transfer, provider S could've applied a Market Value Adjustment to her fund, I don't agree that this should've been the most important consideration within the advice. As Mrs D had stated she wanted "*a level of guaranteed income*", I'm satisfied that the adviser should've recommended Mrs D deferred her decision to transfer until she was closer to age 60.

I agree with our investigator that the 2019 advice did meet the regulator's requirements for pension switching in the following areas:

- the transfer was into a pension that matched Mrs D's recorded ATR and personal circumstances.
- The need for ongoing investment reviews was explained.

Openwork said that Mrs D's existing experience of running her own business, alongside her previous investment history and her existing assets, showed that she was an experienced investor. The fact find recorded that Mrs D herself enjoyed investing.

In my view, the ATR questionnaire, although only partly completed, appears to show that Mrs D was correctly assessed as a balanced investor. Based on all the evidence, I'm satisfied that Mrs D was invested in a portfolio which overall matched her ATR.

I also consider that the evidence shows that the need for ongoing advice was clearly explained and the charges confirmed and agreed before the transfer.

I've gone on to consider the other points raised by both Mrs D's CMC and Openwork.

Would Mrs D have taken the GAR if she'd been suitably advised?

Mrs D's CMC felt that both the GAR and the protected TFC had been lost on the pension transfer. It didn't agree with our investigator that because Mrs D hadn't yet taken her pension benefits, the loss of these protections/guarantees shouldn't be compensated.

Openwork told this service that although Mrs D had wanted to benefit from the protected TFC within the EPP, its advice hadn't detrimentally affected this benefit. As I've not been provided with any evidence to the contrary, I'm persuaded that Mrs D's protected TFC wasn't lost on the transfer. I'll therefore not consider this point further.

I've carefully considered whether Mrs D would've taken the GAR if she'd been suitably advised. From what I understand, Mrs D didn't access her pension benefits at or before age 60.

The evidence shows that the benefits of the GAR were clearly explained to Mrs D at the time of the advice. I'm therefore satisfied that she knew what the benefits were and that she would have to access them at age 60 by taking an annuity.

I'm very sorry that Mrs D's business went into administration in April 2020, a few months before her 60th birthday. But I don't think this would've changed whether or not Mrs D would've taken the GAR at age 60 if she'd been suitably advised.

I say this because the SR showed that Mrs D could meet her income target in retirement without accessing the funds from the pension in question and without considering any capital that might be raised from the sale of her business.

As I've not seen any evidence that Mrs D accessed her pension benefits at age 60, I'm not persuaded that she would've taken the GAR if she'd been suitably advised. And I don't agree that the loss of the GAR should be considered in the compensation calculation.

I next considered the remaining points raised by Openwork.

Was Mrs D's pension transferred away from provider N to another provider in 2020?

I've already explained in the background to this decision that Mrs D's pension was simply rebranded in 2020, rather than transferred. So I agree with Openwork on this point.

Did the AR compare the performance of Mrs D's EPP with the pension it recommended?

While I agree with Openwork that the adviser did take some steps to compare the performance of Mrs D's existing pension against the pension it had recommended, there's no evidence that she compared potential performance from other available funds with provider S. Nor is there any evidence that the adviser even considered whether any of the existing funds with provider S might be appropriate for Mrs D. I acknowledge that the adviser didn't have the authority to carry out such comparisons. But consider that a costly and unnecessary transfer could've potentially been avoided if the adviser had made it clear to Mrs D that it was possible other more suitable funds were available with provider S.

Overall, I uphold the complaint. I'm satisfied that the advice was unsuitable for the reasons I've explained above.

Putting things right

My aim in awarding fair compensation is to put Mrs D back into the position she would likely have been in, but for the unsuitable advice.

I think Mrs D would've remained with provider S. However I can't be certain that a value will be obtainable for what the previous policy would've been worth. But I'm satisfied what I've set out below is fair and reasonable, taking this into account and given Mrs D's circumstances and objectives when she invested.

Although our investigator asked Mrs D's CMC what she did with the funds she transferred away in September 2020, the only response received to date is: "*Information to follow*". Therefore I don't know what Mrs D did with the funds that she originally transferred from provider S. I've simply been told that she thinks she transferred the funds to two other providers. Mrs D and/or her CMC will need to provide Openwork with clear and specific information about what she did with those funds in order for it to be able to calculate the actual and notional values I refer to below.

What must Openwork Limited do?

To compensate Mrs D fairly Openwork must:

- Compare the performance of Mrs D's investment with the notional value if it had remained with provider S, with no initial advice fees having been paid. 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.
- Openwork must also add any interest set out below to the compensation payable.
- If there is a loss, Openwork must pay into Mrs D'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. Openwork shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If Openwork is unable to pay the compensation into Mrs D's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would've 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 Mrs D won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mrs D's actual or expected marginal rate of tax at her selected retirement age.
- It's reasonable to assume that Mrs D is likely to be a higher rate taxpayer at the selected retirement age, so the reduction would equal 40%. However, if Mrs D would've 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 30%. If Mrs D is still eligible for a higher rate of TFC than the usual 25%, after her September 2020 transfer, the appropriate overall reduction should be calculated using that rate instead of 25%.
- Provide the details of the calculation to Mrs D in a clear, simple format.

If payment of compensation is not made within 28 days of Openwork receiving Mrs D's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on any interest paid. If Openwork deducts income tax from the interest, it should tell Mrs D how much has been taken off. Openwork should give Mrs D a tax deduction certificate in respect of interest if she asks for one, so she can reclaim the tax on interest from HMRC if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
EPP with provider S	No longer in force	Notional value from provider S	Date of investment	Date of my final decision	8% simple each year

Actual value

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

Notional Value

This is the value of Mrs D's investment had it remained with the previous provider until the end date. Openwork should request that the previous provider calculate this value.

Any additional sum paid into Mrs D's current pension arrangement should be added to the notional value calculation from the point in time when it was actually paid in.

Any withdrawal from Mrs D's current pension arrangement 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 all those payments to be totalled and then deducted at the end to determine the notional value instead of deducting periodically.

If provider S is unable to calculate a notional value, Openwork will need to determine a fair value for Mrs D'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:

- Mrs D wanted Capital growth and was willing to accept some investment risk.
- If provider S 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.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mrs D's circumstances and risk attitude.

My final decision

For the reasons explained above, I uphold Mrs D's complaint. I require Openwork Limited to take the steps detailed in the "Putting things right" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 3 October 2024.

Jo Occleshaw
Ombudsman