DRN-4777710

The complaint

Ms G complains that advice given by Quilter Financial Planning Solutions Limited to switch her personal pensions to a self-invested personal pension ("SIPP") wasn't in her best interests and has caused a financial loss.

What happened

In late 2011 Ms G was 44 and earning around £12,000 per year as a part-time, self-employed hairdresser, so she had no workplace pension. She met with an adviser from Charles Derby, to discuss her finances, in particular how she could boost her pension in the 21 years until she intended to retire.

Charles Derby is part of Quilter Financial Advisers Limited which is in turn an appointed representative of Quilter Financial Services Limited ("Quilter"), so for ease of reading I'll refer to Quilter in this decision.

Ms G had two plans with Clerical Medical ("CM") both started in 2005: a paid-up personal pension valued at around £20,725, which included protected rights of around £6,798 from contracting out of SERPS, and a stakeholder plan valued at around £4,304 to which she was making contributions.

The Quilter adviser noted Ms G wasn't happy with her current pension provider due to the lack of annual statements or annual reviews. So he recommended Ms G switch both CM plans to a SIPP with Zurich (administered by Curtis Banks) to give her access to a wider range of funds, annual reviews, and the prospect of a better performing pension.

The advice was confirmed in two suitability letters in January and February 2012 which set out his recommendation that Ms G's plan be invested 50% in Zurich's *Balanced* fund and 50% in Zurich's *Aberdeen Life Multi asset inc Property* fund, which he said matched Ms G's moderate attitude to risk ("ATR") and had outperformed the CM plan. He'd selected Zurich due to the range of available funds, and the bonus paid on the fifth and tenth anniversary of the plan. He recommended Ms G make monthly contributions of £100 (£80 net, being a basic rate taxpayer), the maximum she could afford. Assuming growth of around 7% per year it was predicted to provide Ms G with retirement income at age 65 of around £4,823 a year.

The report acknowledged the charges of the new plan would be "*slightly"* higher than CM, so the funds would have to perform 0.54% better than the stakeholder plan, 0.64% better than the non-protected rights element of her personal pension and 0.77% better than the protected rights element every year, to achieve the same result at retirement. The adviser thought this was achievable, as the investments he recommended had outperformed the sector average over the past one, three and five years.

The January 2012 report set out that Ms G would pay an initial advice fee of 5.5% of the transfer value. And she'd pay for Quilter's "*Regular Review Service"* by a 0.5% deduction each year which would vary as the pension fund fluctuates. The February 2012 report included Zurich's fund charges of 1.4% annually, but it said the adviser would receive remuneration of £600 of the first year's premiums, payable over two years, and in return Ms G would receive annual reviews starting in February 2013, at no additional cost. Zurich's illustration explained that it would take an initial charge of 27.96% of each monthly payment for the first two years, plus 0.7% of the monthly payment fund value every year. Plus it set out the annual management charge and fund expense for the two funds which totalled 0.36% a year.

Ms G accepted the advice and signed the SIPP application form, which also included a section showing the adviser's remuneration of 50% of the first year's contributions, on 18 February 2012. Unfortunately due to the timing of the application being processed, the SIPP was set up on 29 February 2012, which is leap year day. This meant instead of Zurich (or the administrator) issuing annual SIPP statements, they were only generated every four years. The statements generated in 2016 and 2020 had been sent to an obsolete email address, so Ms G didn't see them. Neither did she receive the promised annual reviews from February 2013 with the Quilter adviser. In the intervening years Ms G didn't think much about her pension, but she continued making monthly contributions.

In June 2023 Ms G wanted to find out how her pension was doing after speaking to a friend whose pension was worth about £100,000 even though he'd contributed less than her for fewer years. She isn't particularly IT literate and didn't have access to a computer until recently when her daughter could assist. Ms G was upset to discover her pension was worth only £54,000, which she thought seemed low after more than ten years of contributions. And she'd been paying £200 a year in charges but not receiving a service. She didn't feel her pension had been well managed and she'd been forgotten about.

In July 2023 Ms G complained to Quilter about the performance of her pension and the lack of attention she'd received. Around the same time Ms G also complained to Zurich and Curtis Banks in relation to the lack of statements. I'm not looking at that point in this decision which only concerns the actions Quilter is responsible for, but I understand she was offered £500 for this.

In its response of 25 July 2023 Quilter explained that because the advice was given prior to the Retail Distribution Review in December 2012, the 0.5% fee Ms G had been paying was "*trail commission*" to the adviser, rather than ongoing advice charges. It maintained there had been no written agreement to provide ongoing advice or reviews. But it recognised Ms G may not have realised this, so offered a refund of two years' commission charges which it rounded up to £450, as a gesture of goodwill. I understand Zurich has stopped paying the trail commission to Quilter.

In early August 2023 Ms G asked Quilter for a pension review, but was told she'd be charged, as there was no ongoing advice arrangement. But if she wanted to change her contributions she could deal directly with Zurich. Ms G was adamant she was entitled to annual reviews for which she'd been paying charges of £200 per year. She wanted someone to take responsibility for the poor performance of her plan, not just a £450 refund of the fees.

Quilter issued a formal complaint response in September 2023, acknowledging that although Ms G had been paying trail commission, the suitability report had said she'd have annual reviews. So they said she was entitled to a full refund of those fees, plus they used an index to calculate the growth she'd lost out on between 1 January 2013 and 20 September 2023 had those fees not been deducted. This resulted in redress of just over £1,926 to which they added a further £250 for the trouble and upset this caused, bringing the total to just over £2,176. But they said the recommendation met Ms G's ATR and didn't feel the adviser was responsible for the performance of her plan. And as she'd been receiving annual statements she could have raised her concerns much earlier.

Ms G wasn't happy with this, and she referred her complaint to this service, but Quilter objected to our consideration of the complaint. They said Ms G had complained too late as she'd done so more than six years since the advice in 2012, and more than three years since she ought reasonably to have been aware of the performance of her pension.

One of our investigators reviewed the available information including some provided by Zurich and Curtis Banks. While Ms G had clearly complained more than six years since the advice, he didn't think she ought reasonably to have realised she had cause to complain sooner. He found that Ms G hadn't been receiving annual statements as her plan had been set up with a leap year day anniversary, and she'd received no annual reviews.

So he was satisfied the complaint had been raised in time and went on to consider the merits.

By this time Curtis Banks had provided copies of the missing 2016 and 2020 statements which showed that in 2016 Ms G's PR element was valued at around £8,168 and her SIPP was valued at around £20,029. And by 2020 those values had increased to £10,817 and £40,149 respectively. Curtis Banks couldn't provide copies of annual statements for the other missing years (2013-2015 and 2017-2019) as they'd never been produced. Ms G told our investigator that Quilter had explained the performance of her plan had been impacted by external factors such as the pandemic and the war in Ukraine, which she didn't accept. And that didn't account for its failure to offer the annual reviews she should've had.

The investigator didn't think Ms G had been treated fairly and thought the relatively high charges were the main factor impacting the performance of her plan. He referred to the regulatory guidance from 2009 that advisers are obliged to follow. He didn't think Quilter had sufficiently justified the increased charges Ms G was paying by switching to a SIPP, and that the initial 5.5% fee had a significant drag on performance. CM offered free fund switches and there was no real need for consolidation as both plans were with the same provider. So to put things right, he said Quilter should compare the performance of Ms G's SIPP with the notional value had she not switched, and pay any loss into Ms G's pension, plus he recommended £250 for the trouble and upset.

Ms G accepted the outcome, but Quilter didn't. They felt the offer to refund the charges was fair and maintained the suitability and performance element had been made too late as they still thought Ms G would've received annual statements.

So the case has come to me to make a decision, firstly about whether we have the legal power to consider the complaint, and if so whether Quilter has done something wrong.

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.

Was the complaint made in time?

As the investigator has explained, the rules in which we operate are set by the regulator, the Financial Conduct Authority and are known as the dispute resolution or DISP rules.

DISP rule 2.8.2 says that, where the business doesn't consent, (as Quilter doesn't in this case) we cannot consider a complaint if it was made *more than:*

1. *(a) six years after the event complained of; or (if later)*
2. *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

There's no dispute that Ms G complained in 2023, which is more than six years since the advice in 2012. So I've thought about when the three-year clock started running, which is the point at which she *ought reasonably* to have realised she may have cause to complain.

Quilter says Ms G would've been able to monitor her pension from her annual statements, and if it wasn't performing as expected that would trigger awareness that she might have cause to complain.

I can see Ms G was led to believe by the adviser that the charging arrangement of the plan entitled her to annual reviews, which she didn't receive. She was continuing to make monthly contributions from her earnings and got on with running her business. In the absence of annual reviews with an adviser, annual statements enable consumers to monitor the performance of their investments, which may alert them to things being off track. But the evidence shows Quilter is mistaken in believing Ms G was receiving annual statements.

Zurich has confirmed Ms G's plan was set up on 29 February 2012, which is leap year day and only occurs every four years. Usually in these circumstances, the anniversary date would be amended to the previous day. But due to an oversight when the plan was set up this didn't happen, and the anniversary date remained 29 February, which I don't think was the fault or responsibility of Quilter. But it does mean that while Quilter may have expected and assumed Ms G was receiving annual statements in fact she was not, because they were only being generated every fourth year. And to compound matters, it doesn't look like Ms G received the statements generated in 2016 and 2020. As rather than being despatched by post, they were sent electronically to an email address she'd quoted at the time of the advice, but which she no longer had access to. And unlike a change of address, there's generally no redirection of electronic mail so I'm satisfied it's unlikely she would've received these.

I understand in the intervening years Ms G experienced a number of significant health and life events including a divorce. So while she should perhaps have taken more of an interest in her pension and how it was performing, it's not surprising it wasn't her priority. And without the prompt of annual statements or the annual reviews she was promised, I don't find there was an earlier point which triggered reasonable awareness of having cause to complain. I trust Quilter will accept that its understanding Ms G had access to annual statements which would've triggered awareness is incorrect. And I've seen no evidence Quilter invited Ms G for annual reviews, reviewed her the performance of her plan, contacted her or sent her any information about her pension since the time of the advice.

So taking everything into consideration, I'm satisfied the complaint was made in time, and so we can consider the merits.

Was Quilter's advice suitable for Ms G?

At the time of the advice Ms G had two plans with the same provider (CM), one was a paid-up personal pension with protected and non-protected rights elements, but a stakeholder plan she was she was contributing to. The adviser assessed Ms G's ATR as "moderate" and said in order to invest in a portfolio which matched her ATR it was necessary to move away from CM to a SIPP. But like the investigator, I don't agree the switch was necessary or was in Ms G's best interests.

As the investigator explained, in 2009 the then regulator the Financial Services Authority (now FCA) published a report and checklist for pension switching that is still applicable. This set out four areas of focus when considering switching a pension:

- *Charges* – was the switch to a pension that is more expensive than their existing one(s) or a stakeholder pension (because of exit penalties and/or initial costs and ongoing costs) without good reason;
- *Loss of existing benefits* – would the switch result in the loss of benefits such as the loss of ongoing contributions from an employer, a guaranteed annuity rate (GAR) or the right to take benefits at an earlier than normal retirement age, without good reason;
- *Risk* – the switch was to a pension that does not match their recorded attitude to risk (ATR) and personal circumstances;
- *Ongoing fund management* – was the switch to a pension where there is a need for ongoing investment reviews, but this was not explained, offered or put in place.

So when recommending a switch the adviser was required to consider these points to demonstrate it was in Ms G's best interests. While Ms G's plan may have increased in value since inception, that doesn't determine whether the advice was suitable.

Ms G's stakeholder plan had the advantage of charges capped at 1.5% reducing to 1% after ten years. CM may not have offered as wide a range of funds as a Zurich SIPP, but it offered free fund switches. And the suitability report acknowledged the *Balanced* fund Ms G was invested in met her moderate ATR, and had outperformed the sector average over a one, three and five-year period, although the adviser said it was invested 55% in equities, rather than a good range of assets.

I've seen no evidence the switch resulted in the loss of any guaranteed benefits. But like the investigator, I'm not persuaded the adviser followed the regulatory guidance and made a compelling argument for the switch to a plan with such high uncapped charges, when it looks like Ms G's stakeholder plan met her requirements. Particularly given Quilter didn't actually abide by the agreement to offer annual reviews from the following year at no further cost, which were important to Ms G and might have represented a "*good reason*" to justify the switch. Some of the features the adviser cited as benefits of switching to Zurich (such as no-cost fund switches and access to fund choices which matched her ATR) were also available from CM.

The suitability report acknowledged the charges in the Zurich plan were "*slightly"* higher than Ms G's existing plans, which I think underplayed how much higher they were. While the adviser said the Zurich funds had outperformed CM, he acknowledged the need for significantly better performance simply to keep pace with the charges, which wasn't guaranteed. In addition the charging structure was front loaded and was a significant drag on performance particularly in the earlier years.

The adviser assessed Ms G as having a "*moderate"* ATR, based on her answers to the risk questionnaire. And from this I think she understood investments carry some risk, and at the time of the advice she still had a reasonable number of years to retirement. In her answers she disagreed with the statements that she wasn't prepared to take *"any*" financial risk, or that she would look to the "*safest*" type of investment. But she also answered that she'd "*rather be safe than sorry",* she wouldn't be prepared to take her chances with a high risk/high reward approach, she didn't want to take "*substantial risk*" and she had little experience with the stock market. And I bear in mind at the time of the advice these plans were her only pension provision, so I think her capacity for loss was quite low.

Given her lack of experience and understanding of investments and her limited capacity for loss I'm not persuaded she needed to move to a SIPP. One of the main drivers for the switch was so Ms G could have regular reviews, but those weren't provided. And in my view even if the Zurich funds had outperformed CM historically, the level of performance necessary simply to cover the higher charges particularly in the initial years, meant the switch wasn't suitable for Ms G.

So I uphold the complaint and require Quilter to put things right as set out below.

Putting things right

Fair compensation

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

I take the view that Ms G would have remained with her previous provider (Clerical Medical) invested in its "Balanced" fund. However I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Ms G's circumstances and objectives when she invested.

What must Quilter do?

To compensate Ms G fairly, Quilter must:

- Compare the performance of Ms G's investment with the notional value if it had remained with the previous provider. 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.

- Quilter should also add any interest set out below to the compensation payable.

- Quilter should pay into Ms G's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Quilter is unable to pay the total amount into Ms G's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount 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 Ms G won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms G's actual or expected marginal rate of tax at her selected retirement age. It's reasonable to assume Ms G would be a basic rate taxpayer at retirement so the deduction should be 20%. However, if Ms G would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in a deduction of 15%.

- Pay Ms G £250 in relation to the anxiety arising from losing track of her pension, and the lack of personal attention over the years.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Zurich SIPP	Still exists and liquid	Notional value from previous provider Clerical Medical	Date of investment	Date of my final decision	Not applicable

Actual value

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

Notional Value

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

Any additional contributions or sums paid into the Zurich SIPP should be added to the *notional value* calculation from the point in time when they were actually paid in.

If the previous provider is unable to calculate a notional value, Quilter will need to determine a fair value for Ms G's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index.

The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Ms G wanted Capital growth and was willing to accept some investment risk.

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be 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 Ms G's circumstances and risk attitude.

- Quilter Financial Services Limited should provide details of its calculation to Ms G in a clear, simple format.

My final decision

I uphold this complaint and require Quilter Financial Services Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Ms G to accept or reject my decision before 26 July 2024.

Sarah Milne
Ombudsman