

## **complaint**

Mr and Mrs K complain about benchmarks and calculations used by Wagstaffs Wealth Management Limited (Wagstaffs) to show how their pension funds were performing.

## **background**

I set out the background to the complaint in my provisional decision dated 1 November 2016. A copy is attached to and forms part of this decision.

Both parties responded to my provisional decision. Wagstaffs didn't agree with the outcome as I'd upheld the complaint in part. But in the interests of bringing the matter to a conclusion it didn't want to comment further.

Mr K said he and his wife were pleased that the provisional decision upheld their primary complaint – that Wagstaffs misled them when it changed the benchmark used in reports from February 2013 from the FTSE 100 including dividends to the FTSE 100 excluding dividends. But they didn't agree with what I'd said about Mr K having monitored the performance of the portfolio regularly; was aware of how it was actually performing; and, as no changes were made, wasn't unhappy with its performance. Mr K said, in summary:

- He'd obtained, from the platform provider, a list of access dates and times which showed that from 2013 (when he'd first suspected there might be a problem) until February 2015, he'd logged in only eight times and his wife only four times. There was only 7 different days in the two year period when either account was accessed.
- It wasn't the case that they hadn't made changes to the funds selected during the three and a half year period because they understood how the portfolio was performing and they were happy with that. They were being advised by Wagstaffs – they believed what was being reported to them and they were unaware of the true situation until February 2015.
- Shortly after that, and once they'd had time to make sure their suspicions were correct, they moved all of their funds elsewhere.
- It was vital to understand that the figures used in all of the periodic reports presented by Wagstaffs' were impossible for Mr and Mrs K to check as they were portfolio growth figures as opposed to percentage change in the FTSE 100 index.
- Mr K provided copies of periodic reviews. And a letter from the platform provider confirming that a comparison of the portfolio's performance couldn't be done without the appropriate software.
- The summary report Wagstaffs produced in February 2013 showed that the portfolio growth was almost twice that of the benchmark (20.91%, compared to 11.68%). They had no way of checking those figures.
- Discussions at periodic meetings revolved round the summary reports. Mr and Mrs K were entitled to rely on the accuracy of the figures presented and that the basis of the comparison for growth of the portfolio hadn't been changed without them knowing.

Mr K also disagreed with what I'd said about them having to pay similar fees to Wagstaffs' if he and his wife had moved their investments to another company in February 2013. They would have gone back to their previous low cost, no advice, arrangement – which is exactly what they did when they realised they'd been misled by Wagstaffs. A low fee (there was a fee for annual service and fund charges) drawdown facility was available from mid November 2013 from their previous (and current) provider.

Mr K suggested that appropriate compensation would be £16,299 plus interest and the award for stress and inconvenience.

### **my findings**

I've considered again all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In particular I've considered very carefully all Mr K has said in response to my provisional decision – although I've only summarised above what I see as his main points.

I do understand Mr and Mrs K's position. I accept they've been misled. I can understand why they are very unhappy about that. And why they consider that a full refund of the fees they paid for the two years from February 2013 (when the index was changed) to February 2015 (when they found out what had happened) is due.

But having considered everything Mr K's said I'm not going to say that Wagstaffs should pay more than I suggested in my provisional decision.

I said Mr K was aware of the charges that would be applied to the new arrangement and that he wasn't unhappy with the funds that had been recommended – there's no suggestion that the fund selection was inappropriate. Or that he's suffered any financial loss due to entering into the arrangement with Wagstaffs – on the contrary the portfolio seems to have shown reasonable growth.

Mr K says he didn't make any changes not because he was happy but because he believed what Wagstaffs had said about how the portfolio was performing. But, as I've said, although Mr K may have been misled as to the relative performance of the portfolio, he was aware as to how it was actually performing. So to that extent he wasn't misled and the fund value wasn't misrepresented.

Mr K has said that he didn't continually monitor his funds and he's stressed that it wasn't possible for a lay person to do a comparison with the appropriate index without appropriate software. That may well be the case. But, irrespective of the benchmark index used, the reports Wagstaffs provided showed the absolute status or value of the funds. If the investments hadn't performed well and his fund value was adversely affected, Mr K would have seen this.

Mr K had previously managed his funds for some 20 years and he's now returned to that sort of arrangement. I think that shows he's confident in his ability to manage his funds. The statements provided indicate that he's not actually suffered a loss as a result the investment decisions he made with Wagstaffs. In view of his experience, I think he'd have had some idea of the sort of return he was looking to achieve and regardless of how that compared with any formal comparison with a particular benchmark index. If he'd been unhappy with how the portfolio had been doing overall, I'd have expected him to have instigated changes.

There was no agreement that the portfolio would outperform the index by a certain margin. As I said in my provisional decision, it's difficult to say at what stage, if any, Mr K wouldn't have been happy with the performance of his portfolio against the correct index. And what changes that might have prompted and with what result.

Mr K has indicated that had he been aware that he was being misled he would have reverted to a low cost platform provider – as he did in 2015. But it seems that the arrangement he

transferred to then wasn't available with his original provider until mid November 2013. So I don't think it's unreasonable to say he may have incurred charges elsewhere, and for at least some of the period.

And it's not the case that Wagstaffs did nothing – reviews did take place. I bear in mind what Mr K's said about the reviews focusing on the summary reports. But I would have thought that some of the discussions would have been wider.

But in any event that's all secondary to my main finding that I can't say for sure Mr K would have switched – given that he knew, in real terms, how his portfolio was doing. He may have been satisfied in any event with performance and so not made changes. And it's impossible to pinpoint at what stage any divergence would have prompted him to rethink his funds.

Using the wrong benchmark index has understandably damaged Mr K's trust in the business and so he's chosen to transfer away and resume full responsibility for his and his wife's funds.

It's clear that Mr and Mrs K are very upset with Wagstaffs and what's happened. But – and taking into account the uncertainties I've mentioned, I still think an award of £10,000 (about a year's fees plus an allowance for interest and distress and inconvenience) is fair and reasonable in the circumstances.

#### **my final decision**

I uphold the complaint. Wagstaffs Wealth Management Limited should pay Mr and Mrs K compensation of £10,000.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs K to accept or reject my decision before 27 February 2017.

Lesley Stead  
**ombudsman**

*PROVISIONAL DECISION dated 1 November 2016*

**complaint**

Mr and Mrs K complain about benchmarks and calculations used by Wagstaffs Wealth Management Limited (Wagstaffs) to show how their pension funds were performing.

**background**

Mr and Mrs K were advised by Wagstaffs to transfer their self invested personal pension (SIPP) from their original provider to another platform in September 2011. Dimensional funds were used and the portfolio would consist of 100% global equities.

Before the recommendation was made the FTSE 100 Total Return Index (including dividends) was used as a benchmark when the fund comparison was made against the original fund performance using Trustnet comparison tools.

On 22 February 2013 the adviser recorded the benchmark they were using for reports in respect of the performance of the portfolio. No agreement was made with or explanation given to Mr and Mrs K as to why the FTSE 100 Index (excluding dividends) would be used as a benchmark against their portfolio.

Essentially Mr and Mrs K say that the benchmarks and calculations used by Wagstaffs were misleading. They say that if accurate information had been given they may not have remained invested in the funds that Wagstaffs had recommended for the time they did. The benchmark used wasn't appropriate. And figures produced by Wagstaffs to show that the funds had outperformed the previous funds weren't accurate at the outset. Mr and Mrs K have also said that Wagstaffs didn't disclose their fees and misinterpreted transaction costs so as to encourage the initial transfer.

The complaint was investigated by one of our adjudicators, who wrote to both parties in October 2015. She explained why the complaint should, in part, succeed. In summary that adjudicator said:

- Wagstaffs had explained it had used the index excluding dividends as a benchmark to compare the performance of Mr and Mrs K's portfolio because it demonstrated volatility in the market place. But Mr and Mrs K were experienced investors and were well aware of the effect of volatility in their portfolio.
- Mr and Mrs K were invested 100% in various global equity funds – an appropriate index would have been one that reflected a similar approach in order to make a reasonable comparison.
- An index excluding dividends only widens the gap between the benchmark and Mr and Mrs K's own portfolio which did include dividends. So the index used was inappropriate.
- The charges were disclosed in a clear and transparent manner and so that part of the complaint wasn't upheld.

Mr K responded:

- Wagstaffs' selection of the wrong index in 2013 without reinvestment was deliberate.
- Wagstaffs had tried to hide their fees.

- Only the primary complaint issues had been addressed. All the points needed to be addressed so the regulator could then investigate.
- The index selected for redress comparison purposes wasn't suitable as it didn't have the same level of risk as the selected portfolio. So it won't give a true indication of the losses incurred.

The adjudicator wrote to Mr K.

- We'd looked into each of the points he'd raised in his complaint, namely whether it was suitable advice to move the investments from one SIPP to another; whether the charges had been fully explained; and if an appropriate benchmark from 22 February 2013 had been used. The complaint was upheld (in part) and a basis for redress recommended for the period that the funds were under Wagstaffs' control.
- This service was set up to deal with complaints in accordance with the rules laid down by the regulator – now the Financial Conduct Authority – and set out in its handbook. We consider complaints on the basis of what's fair and reasonable. We don't impose penalties or sanctions – that's for the regulator.
- Mr and Mrs K didn't agree with the redress method suggested as they didn't think the chosen index was as speculative as their portfolios. But, in cases where we can't be sure what investments would have been made instead, our approach is to use an index to see if any loss has been suffered. In this case the index selected was one which the adjudicator felt was appropriate.

Wagstaffs also commented. It said the advice given focused on Mr and Mrs K's objectives rather than outperforming any markets or benchmarks.

The adjudicator replied saying that he understood that, but the index used by Wagstaffs to compare the performance wasn't appropriate. Mr and Mrs K had said, based on the performance information provided, they didn't make any adjustments to their portfolio. It wasn't unreasonable to assume that they might otherwise have done so. The adjudicator maintained that the case should be upheld and a loss calculation as earlier set out undertaken.

In a more recent letter to us Mr K has emphasised what he considers to be the key points:

- Wagstaffs changed the benchmark to exclude dividends and so improve the performance comparison from February 2013 onwards.
- Wagstaffs had misled them. Wagstaffs' conduct (which could impact on other clients) was a matter for the FCA – but Mr K understood that the regulator would only become involved if we requested that.
- No fees should be due to Wagstaffs from the date they began to use misleading benchmark information in reports to Mr and Mrs K.
- Wagstaffs should pay compensation for loss of investment income. Mr and Mrs K would have switched investments had they realised the true performance of their investments. They were prepared to restrict their claim to a comparison of the growth of their original (Fidelity) funds and the new (Dimensional) funds from February 2013.

Mr K also made a number of comments about why the index suggested by the adjudicator wasn't an appropriate comparator to calculate redress.

In a further letter to us Mr K said that he'd now received copies of Wagstaffs' files (via a subject access request which Wagstaffs had initially refused to comply with). Mr K said

Wagstaffs had assured him the complaint would be thoroughly investigated by an independent third party compliance company. But the files revealed there'd been no serious impartial investigation at all.

More recently Mr K has told us that to simplify matters his main concern is the fees he's been charged, rather than any investment loss he may have suffered. He wanted fees for the period he'd been misled refunded.

### **my provisional findings**

I've considered all of the evidence and submissions that have been received. I think the complaint should be upheld in part. But my reasons and how I think Mr and Mrs K should be redressed aren't the same as what the adjudicator proposed.

There's been considerable correspondence about this matter, all of which I've considered. But I've concentrated on what I think are the main issues.

I've reviewed the original recommendation letter which Mr K signed to confirm his understanding and that he'd received all the relevant documents. The letter explained the charges. And also identified that the previous scheme looked slightly cheaper and illustrated it may provide greater benefits at age 75. It went on to explain that the new platform illustration included all costs but that there were fees not included in the original provider's illustration that would alter the illustrated returns.

I understand that Mr K had dealt with his own investments for the previous 20 years. Taking that and his profession into account I think he'd have read and understood the report before he signed and returned it.

At the time the proposal for the switch to the new platform was being considered an illustration was prepared using Trustnet comparison charts. It was confirmed that the FTSE 100 Total Return Index was used.

The new platform provider has confirmed that Wagstaffs' adviser chose the benchmark index without reinvestment of dividends on 22 February 2013 and this was used in its reports from that point until Mr and Mrs K moved their pension away.

Wagstaffs has said that the use of the index without dividends was 'unfortunate' but wasn't designed to mislead. It said it is the most widely used index. I also understand that it's the default index for the new platform, if no alternative selection is made.

Taking into account that Mr and Mrs K were investing 100% in global equities with 20% in emerging markets, I don't see that either index was really appropriate.

Wagstaffs has said that Mr and Mrs K did not lose out as a result of the advice they received – the value of their portfolio was greater than the initial amount transferred, even allowing for the substantial withdrawals. And there's no complaint that the funds that Mr and Mrs K invested in weren't appropriate.

At the outset, when the transfer to the new platform was made, Mr K appears to have been happy with the proposal and the funds selected. And there was no specific agreement that Mr and Mrs K's funds would outperform the FTSE 100 Total Return Index by any specific margin.

But, if the index with reinvestment was used in the initial Trustnet comparison, Mr K may have had a clear idea of how he expected his portfolio to perform in relation to that index.

I've looked at the difference in the performance of the index without reinvestment and the index with reinvestment from 6 September 2011 to 22 February 2013. The index with reinvestment showed an increase of 29.43% and the index without investment over the same period 22.86%. Mr K didn't make any changes to his portfolio during that period so he was presumably happy with its performance – both in absolute and relative terms.

But, during the period complained about – February 2013 to February 2015 – it seems that the divergence between the two indices was wider – 9% without reinvestment and about twice that taking into account reinvestment of dividends. So the relative performance of the portfolio would have been exaggerated.

Switching – whether intentionally or not – to a benchmark which didn't include the reinvestment of dividends wasn't appropriate. And the business has admitted as much, describing its use as “*unfortunate*”. So I agree that the business didn't act as it should. And that Mr and Mrs K were misled.

But where wrong information is given that won't always mean that a financial loss has been suffered as a result. Where a business has done something wrong we'd aim to put the consumer back in the position he'd probably be in if the business had acted as it should. So we'd need to look at what the consumer would have done if he'd been given the right information. That won't always be straightforward - sometimes it can be difficult to work out what the consumer would have done and if he'd have acted differently.

Here it seems that what happened led to a breakdown in the relationship between Mr K and the business, with Mr K deciding to move his portfolio away from the business. He's suggested, if he'd been aware of the comparative performance as at February 2013, he'd have moved his funds sooner.

As I've said, the use of the wrong index would have misled Mr K as to the comparative performance of his portfolio. And put the actual performance of the portfolio in a more favourable light.

But Mr K is an active, informed and experienced investor. My understanding is that he monitored the performance of the portfolio regularly. So he was aware of how it was actually performing. And it seems he wasn't unhappy with its performance – I note that no changes appear to have been made to the funds selected during the time the portfolio was with Wagstaffs.

I think it's difficult to say the extent to which he relied on the index as a comparator against which to make investment decisions. Or at what point, if any, a comparison of actual performance against the (correct) index would have prompted changes to the portfolio. As well as what those changes would have been and what difference that would have made to the portfolio's overall performance.

I can see why the adjudicator suggested a comparison with an index – which is our usual approach. But Mr K's argued that the index selected wasn't appropriate. I tend to agree. But the question of what index might be appropriate to use to see if any loss has resulted

would only arise if I agreed that, if the right benchmark had been used, Mr K would have switched funds. As I've indicated, it's difficult to be say that would have happened.

I note that Mr K has said that, in the interests of settling this matter, he'd accept a refund of the fees Wagstaffs charged from February 2013 until the portfolio was moved away in February 2015.

I can see there's an argument for a refund of fees. During that time the information Wagstaffs gave to Mr K (and what he saw on line) wasn't on the basis he'd understood would be used. And Wagstaffs accepts that. The annual '*investment advisory fee*' that Wagstaffs charged included reporting to the client on the performance of the portfolio. I don't see that Wagstaffs properly discharged that duty when the reporting information it provided to Mr K was on a different basis and when Mr K hadn't been told about any change.

But, on the other hand, it seems to me that if Mr and Mrs K had moved their portfolio earlier they would have paid fees elsewhere. So I don't think it would necessarily be right for them to get a full refund of fees for the entire two year period.

Assuming Mr and Mrs K's joint funds were about £1 million Wagstaffs' charges, taken quarterly, would have been 0.85% per year.

So to try and simplify matters, and taking a fair and reasonable approach, I suggest that Wagstaffs should pay Mr and Mrs K a total of £10,000. That's roughly a year's fees plus an allowance for interest and a payment to reflect the distress and inconvenience Mr and Mrs K have suffered.

I hope both Wagstaffs and Mr and Mrs K will see this as a fair settlement to allow this dispute to be concluded.

I know Mr K is very unhappy about what's happened and how Wagstaffs has handled his complaint. Mr K has mentioned contacting the regulator. My understanding is that Mr K can do that. It will be a matter for the regulator if it decides to take any action. I don't think it's a matter we'd take up with the regulator.

### **my provisional decision**

Mr and Mrs K's complaint should be upheld. Wagstaffs Wealth Management Limited should pay Mr and Mrs K compensation of £10,000.

Lesley Stead  
ombudsman