

complaint

Mr H has complained about BlackStar Wealth Management Ltd. He says that it gave unsuitable advice when it recommended that he transfer two personal pensions he held to a self-invested personal pension (SIPP) to make an investment in unregulated bonds.

background

Mr H approached BlackStar for advice on making an investment into Colonial Capital bonds using funds from his pensions. Colonial Capital bonds were an unregulated investment. Mr H had preserved benefits in a defined benefit pension held with his former employer and two personal pensions. BlackStar recommended that he transfer the personal pensions, which were valued at around £26,000, into a SIPP and then invest in Colonial. The personal pensions represented about 10% of his overall pension provision. The defined benefits were left intact.

One of our adjudicator's investigated this complaint and recommended that it should be upheld. He considered that the transfer to a SIPP was only to facilitate the unregulated investment that Mr H was proposing to make.

He considered Mr H's circumstances were sufficiently similar to those as set out in the regulator's alert of January 2013 (before this advice was given), about advising on pension transfers with a view to investing pension monies into unregulated products:

"...provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating."

BlackStar endorsed the investment and recommended it to Mr H as being suitable for his personal pensions. It says that it took into account the low risk nature and the much greater value of the preserved benefits he held with the former employer's scheme.

The adjudicator's view was that Mr H was not an experienced or sophisticated investor and BlackStar had assessed him as having a medium attitude to risk. Although the personal pension only represented 10% of his overall pension provision he considered it was unsuitable for BlackStar to recommend that Mr H should invest 85% of his personal pension in an unregulated investment.

Also, he was not persuaded, that due to the size of Mr H's personal pensions, there were sufficient compelling reasons to transfer such a modest pension into a SIPP. The effect of any additional costs, incurred on transfer, would likely have a negative impact on the value of the fund going forward.

The business did not agree and said with 90% of Mr H's existing pension portfolio in a low risk and safe environment the overall portfolio was out of line with his medium attitude to risk. The advice to transfer had to take into consideration the overall portfolio, therefore, the smaller personal pensions could be considered for high risk investment.

The adjudicator was not persuaded to change his opinion and said he did not consider it appropriate to invest the majority of Mr H's personal pension in a high risk unregulated investment. It exposed Mr H's pension to a higher level of risk than he was prepared to accept. There were significant penalties and fees on transfer amounting to approximately 16% of the personal pensions. And there was no like for like comparison between the old and the new schemes for Mr H to make an informed decision on whether it was in his interests to transfer.

BlackStar said its remit had been to advise on Mr H's specific objective of using his pensions to invest in Colonial Capital bonds. It had advised him to leave the preserved benefits with the former employer's scheme and considered that low risk environment would allow Mr H to take a high level of risk with the remainder of his pensions to meet his overall medium attitude to risk. And Mr H had demonstrated knowledge and understanding of these matters by enquiring in the following year about transferring his preserved benefits to a Qualifying Recognised Overseas Pension Scheme (QROPS).

BlackStar also said that one of the regulator's principles of good regulation was that consumers should take responsibility for their decisions. Mr H had been advised according to the circumstances he presented and the advice and implications were clearly set out for him.

As agreement was not reached the complaint has been referred to me for a decision.

my findings

I've considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I find I'm in agreement with the adjudicator and largely with his same reasons. I've addressed the issues which I consider most relevant to the outcome of this complaint but I have read all the submissions from both parties.

Mr H was introduced to BlackStar, by what appears to have been an unregulated introducer, for the purpose of receiving regulated advice about whether to invest in a specific unregulated investment using his existing pension schemes.

I consider BlackStar had a duty of care to consider the proposed investment and its suitability for Mr H very carefully.

The investment was unregulated and reliant on the success of a single business rather than being diversified with the risk spread in a pooled fund. Its lack of diversity and regulatory control meant it carried higher risks than mainstream regulated funds. In my view, unregulated investments are speculative and not normally suitable for the ordinary investor and only a small proportion of a suitable investor's portfolio should be invested in unregulated investments.

I note BlackStar's comment that Mr H's enquiry about transferring his pension to a QROPS indicated a level of knowledge and understanding that supported its interpretation of him as an investor. However, this enquiry was in the year after the pension advice was given. And I have seen no evidence to persuade me that Mr H was a sophisticated or experienced investor to whom it might be suitable to recommend unregulated investments.

I also note BlackStar's comments that by having 90% of Mr H's pension provision in a low risk safe environment, within a defined benefit scheme, an investment of 85% of the remainder in a high risk investment was suitable.

I disagree. I do not consider it was suitable to recommend a speculative unregulated investment by 'balancing' it against the safe preserved benefits Mr H held with his former employer's scheme. The Colonial Capital bond was speculative and offered a higher level of risk than Mr H ought to have been advised to accept. It was not suitable for Mr H to invest what amounted to around 85% of his personal pension into an unregulated investment.

Mr H's personal pensions were relatively modest with a combined value around of £26,000 on transfer. Like the adjudicator I also consider a pension of that size would need particularly compelling reasons to justify a transfer to a SIPP. The only reason for the transfer I can see was to make the unsuitable investments. Therefore I consider that the pension transfer advice was unsuitable.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr H as close to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr H would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

what should BlackStar do?

To compensate Mr H fairly, BlackStar must:

- Compare the performance of Mr H's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

BlackStar should also pay interest as set out below.

If there is a loss, BlackStar should pay such amount as may be required into Mr H's pension plan, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If BlackStar is unable to pay the total amount into Mr H's pension plan, it should pay that amount direct to him. 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.

The *notional* allowance should be calculated using Mr H's marginal rate of tax at retirement.

For example, if Mr H is likely to be a basic rate taxpayer in retirement, the *notional*

allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr H would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

- Pay to Mr H £300 for the trouble caused to him and the disruption to his retirement planning.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

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

My aim is to return Mr H to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. BlackStar should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr H and the balance be paid as I set out above.

If BlackStar is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. BlackStar may wish to require that Mr H provides an undertaking to pay BlackStar any amount he may receive from the investment in the future.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

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 BlackStar totals all those payments and deducts that figure at the end

instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr H wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing 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 Mr H's circumstances and risk attitude.
- Mr H has not yet used his pension plan to purchase an annuity.
- As the SIPP only exists because of the Capital Colonial corporate bond investment, in order for the SIPP to be closed and further SIPP fees prevented, this investment needs to be removed. But if BlackStar can't buy it Mr H is faced with future SIPP fees. I think it is fair to assume five years' of future SIPP fees. So, if BlackStar can't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

my final decision

I uphold the complaint. My decision is that BlackStar Wealth Management Ltd should pay the amount calculated as set out above. BlackStar Wealth Management Ltd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H either to accept or reject my decision before 5 March 2019.

Keith Taylor
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