

complaint

Mr P's representative complained about the advice provided by Anthony Feeney Financial Services to transfer his personal pension to a new self-invested personal pension (SIPP). This was with the intention to invest into a high risk unregulated investment, Store Pods.

background

Mr P's representative said he was not a sophisticated investor and had never invested in an unregulated investment scheme. A fact find document was completed with Mr P. It said Mr P was:

- a self-employed contractor earning about £35,000 per year.
- held an existing personal pension but had no current pension provision
- had limited knowledge of investments but had a pension and understood the basics.

In the notes it was recorded that Mr P had said: *'I understand that for my pension to perform as I need it to. I need to be more adventurous with my investments i.e. alternative investments.'*

In addition: *'I have no experience in investment markets so the prospect of fixed returns is appealing.'*

Mr P's personal pension was invested in with-profit funds and had a transfer value of around £24,000. Anthony Feeney recommended switching the personal pension plan to a SIPP. The adviser noted:

'You have sought my advice regarding the setting up of a SIPP by transferring the funds of the pension schemes listed above with the intention of Investing in commercial Property, specifically Self First Storage Pods. You have not sought my advice regarding the suitability of this investment and have stated that you are an experienced investor and as such understand the additional risks associated with such an investment.'

As of 31 March 2014, Mr P's newly arranged SIPP had a value of about £23,000. Of which just over £14,000 was invested in Store Pods and about £9,000 remained in the scheme bank account. On 14 April 2014, after the SIPP was arranged, Anthony Feeney recommended a further investment. Mr P's adviser said they were not currently making a complaint in respect of that investment so I have not considered it directly.

Mr P's representative said the Store Pods investment was worthless or of nominal value. The Financial Services Compensation Scheme had determined the units were worthless and attempts by other investors to sell had found no buyer save for one auction sale that yielded £1.

Anthony Feeney didn't respond to the complaint made by Mr P's representative.

An adjudicator reviewed Mr P's complaint and said Anthony Feeney hadn't acted fairly. He said that in January 2013 the Financial Services Authority (FSA) issued an alert which referred to Store Pods and advising on transfers with a view to investing in unregulated products. The FSA alert made clear the proposed investment needed to be assessed when recommending a pension switch. But the Anthony Feeney report said Mr P hadn't sought advice on the suitability of the proposed investment.

Mr P was 15 years away from retirement and the only reason to switch was to access other investments. So the suitability of the advice rested on the suitability of the intended investment. In fact more than half of Mr P's pension was invested in an unregulated property investment which was too high risk. It was illiquid and there was no guarantee of long term income but it carried costs and management fees. In the long term after the guarantee period there was considerable risk.

He didn't agree that Mr P was an adventurous investor. Mr P was clear he had little experience or knowledge.

Anthony Feeney had a duty to act in Mr P's best interests but it was clear the switch wasn't suitable. Overall his existing arrangement was more suitable for his long term needs and the recommendation should've been to retain his existing plan. The adjudicator thought Mr P would've accepted that recommendation.

He suggested an award that compared the actual performance of the Store Pods investment with that of a benchmark to see if there was a loss. He also awarded £300 for inconvenience and upset.

Anthony Feeney didn't reply to the adjudicator's decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Anthony Feeney gave advice about starting a SIPP. This is a regulated activity. The advice had to take account of the rules set by the regulator whether or not the underlying investment was regulated. Anthony Feeney needed to ensure that the advice to start the SIPP and transfer his pension was suitable for Mr P. That would necessarily mean it needed to consider the underlying investment. The regulators alert issued in January 2013 also underlined this.

The regulator's rules include principles including about the relationship of trust with a client. This says that a firm must take reasonable care to ensure the suitability of its advice. The underlying rules further say that the firm mustn't make a recommendation,

"unless the recommendation or transaction is suitable for the private customer having regard to the facts disclosed by him and other relevant facts about the customer of which the firm is or reasonably should be, aware".

It is clear Anthony Feeney knew Mr P was intending to invest in Store Pods. I say that because the papers produced by it state that Mr P hadn't sought advice on the proposed investment and warned about some of the risks associated with it.

It's clear Mr P has no savings and limited capacity to put his pension at risk. Mr P has had a recent business loss and he says his current business relies on one customer so is vulnerable. He doesn't have any current pension provision or any other savings. While Mr P clearly wants to have the best possible pension his capacity to suffer loss in an investment is extremely limited.

I am of the view that the investment in Store Pods was a high risk investment, potentially illiquid and unsuitable for Mr P. Anthony Feeney was aware of that and refer to some risks in their papers. They state there is no guarantee of rental income longer term but the running costs still needed to be paid. It referred to the illiquidity of the investment and said that although there was a buy back guarantee there was little to back it up. Based on these comments it should've been clear the investment wasn't suitable for Mr P.

I think Mr P thought it would improve his pension. I say that because in the fact find he specifically referred to it and said he'd selected it because it was UK based and offered fixed returns. While it's clear he wants to achieve positive growth for his retirement this does not mean that he is an adventurous investor and clearly could not afford to lose his investment. In the fact find, while Mr P selected the option of an adventurous investor he added a hand written note that he had "no experience in investment markets so the prospect of fixed returns is appealing".

Even if Mr P fully understood the risks of transferring to a SIPP and making such an investment, which seems unlikely, I don't think it could be said to be suitable for him having regard to his level of financial knowledge and experience and his personal financial circumstances. That was the only investment considered at the time the advice was given. Further advice about an additional investment wasn't given until April 2014 by which time the SIPP was already established.

Even though Anthony Feeney says it didn't advise on the Store Pods investment, the regulator guidance is clear that it should've. Had it done so it should've been clear that the extra charges associated with a SIPP and the Store Pods investment are not justified based on what was proposed at the time, and he should've been advised not to invest in Store Pods. If that advice had been given I am satisfied that Mr P would not have transferred his existing pension.

To compensate Mr P fairly Anthony Feeney should:-

First compare the performance of Mr P's investment in Store Pods with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

It should also pay any interest set out below.

If there is a loss, Anthony Feeney should pay it into Mr P's pension plan, to increase its value by the amount of the compensation and any interest. Anthony Feeney's payment should allow for the effect of charges and any available tax relief. It shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If Anthony Feeney are unable to pay the compensation into Mr P'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr P would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation. It seems very possible that Mr P might not pay any income tax in retirement as his income is likely to be any state pension and an amount drawn from his pension. Given the current income tax annual allowance is £12,500 it seems unlikely that his annual retirement income would exceed the annual allowance at his retirement.

In addition, Anthony Feeney should pay Mr P £300 for the inconvenience and upset caused by arranging an unsuitable pension plan and investment.

It should also provide the details of the calculation to Mr P in a clear, simple format.

Income tax may be payable on any interest paid. If Anthony Feeney considers that Mr P is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr P how much it has taken off. It should also give Mr P a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	Aviva personal pension (based on pre transfer investments in)	date of transfer to the SIPP	date of settlement being the date of this decision	8% simple a year from date of my decision to date of payment.

actual value

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

If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation.

Anthony Feeney should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above. If Anthony Feeney are unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation.

Anthony Feeney may wish to require that Mr P provides an undertaking to pay Anthony Feeney any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Anthony Feeney will need to meet any costs in drawing up the undertaking.

fair value

This is what the Store Pods 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 distribution 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'll accept if you total all those payments and deduct that figure at the end instead of deducting periodically.

The SIPP only exists because of the Store Pod investment. In order for the SIPP to be closed and further SIPP fees and charges prevented, this investment and his other investment needs to be removed. But if Anthony Feeney Financial Services can't buy the Store Pods investment Mr P is faced with future SIPP fees and charges. I think it is fair to assume five years' of future SIPP fees. So, if Anthony Feeney Financial Services can't buy the investment, it should pay an amount equal to five years of SIPP fees, charges and expenses based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

further information

Some examples of how the calculation should be carried out are available on our website under 'Publications' / 'Online Technical Resource' / 'Investment' / 'Calculating compensation in investment complaints'.

my final decision

I uphold this complaint.

I direct that Anthony Feeney Financial Services must:-

1. Calculate whether Mr P has suffered a loss as set out above. If there is a loss compensation should be paid as set out above.
2. Pay Mr P £300 for distress and inconvenience.

Anthony Feeney Financial Services must pay the total compensation within 28 days of the date on which Mr P accepts my final decision.

If it considers it is legally required to deduct income tax from any interest, it must send a tax deduction certificate with the payment so that Mr P can reclaim the tax if he is able to.

Mr P should refer back to Anthony Feeney Financial Services if he is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

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

Colette Bewley
ombudsman