

complaint

Miss W is unhappy with the advice she received from Anthony Feeney Financial Services (AFFS) to transfer her existing pension plan into a self-invested personal pension (SIPP). The reason for making the transfer was to allow Miss W to invest in store pods through Store First. Miss W's complaint is made, on her behalf, by her representative.

background

Miss W was put in touch with AFFS in late 2013 to talk about her pension arrangements. An adviser from AFFS carried out a review of her situation. AFFS advised Miss W to transfer her existing pension plan into a SIPP. This was so she could then invest in store pods, an unregulated investment.

I understand that the transfer value of Miss W's existing pension was, after a £916 exit fee had been deducted, just over £46,300. It was this amount that was transferred to the SIPP. This was at the end of 2013 / beginning of 2014. Soon after the transfer, £30,750 was invested in store pods. Around the end of March 2014, just under £15,000 was invested in a Nucleus portfolio. But it seems the store pods investment is now illiquid. Miss W is worried she's lost the value of her investment.

So in May 2016 Miss W complained, via her representative, to AFFS about the advice she'd received. In brief, Miss W said: the advice was unsuitable; her attitude to risk was wrong; and AFFS hadn't followed the relevant rules and regulations. Miss W wants compensation for the money she says she's lost.

AFFS rejected the complaint. Again in brief, it said it had warned Miss W about the risks involved with this investment, but she still chose to go ahead with it. This meant AFFS wasn't to blame for any loss Miss W might have suffered.

Miss W wasn't happy with this response. So she brought the complaint to us. One of our adjudicators looked into it. In summary, he thought the complaint should be upheld. The adjudicator said there was no evidence that Miss W had any experience of investments like store pods and that she couldn't afford to lose her money. AFFS should have advised Miss W that the proposed investment was unsuitable for her. He also said there was no evidence Miss W was either an insistent client or that the transaction was carried out on an execution only basis. The adjudicator then set out how he thought AFFS needed to put things right.

AFFS didn't agree with the adjudicator's view. Via its representative at that time, AFFS said that while Miss W had made it clear she wasn't looking for advice on the store pods investment, it still carried out due diligence on it. Miss W invested against the clear indications of the risk in this type of investment. AFFS asked for an oral hearing to be held by our service.

This didn't change the adjudicator's view. He still thought the complaint should be upheld and repeated what AFFS needed to do to put things right. In reply, AFFS's representative again asked for an oral hearing. Later, it sent another response stating that store pods weren't either a specified investment or a designated investment as set out in the relevant regulations – so we are wrongly classifying these as an unregulated collective investment scheme (UCIS).

As AFFS didn't agree with the adjudicator's view, this complaint has been passed to me for a decision.

my provisional decision

I issued my provisional decision dated 14 May 2019. In it, I explained I'd considered all the available evidence and arguments to decide what was fair and reasonable in the circumstances of this complaint. Having done so, I decided to uphold this complaint. But I thought Miss W should be compensated in a slightly different way to that set out by our adjudicator. I've detailed that below. I also went on to explain why I thought the complaint should be upheld.

I said that both AFFS and Miss W, via their various representatives, had made numerous points to support their respective positions. I was very aware that I'd summarised this complaint in far less detail and in my own words. I said I wasn't going to respond to every single point made by all the parties involved. No discourtesy was intended by this. Instead, I'd focussed on what I thought was the key issue here: was AFFS's advice to Miss W to transfer her existing pension to a SIPP suitable?

I explained our rules allow me to do this. This simply reflects the informal nature of our service. If there was something I'd not mentioned, it wasn't because I'd ignored it. I hadn't. I was satisfied I didn't need to comment on every individual argument to be able to reach what I thought was the right outcome.

I then turned to the matter of the hearing request. The original representative for AFFS requested that we hold an oral hearing to decide this case fairly. But since that hearing request, AFFS had changed representatives. The new representative had been silent on the matter of a hearing. Our adjudicator emailed the representative asking if it felt a hearing was necessary. No response was received.

The original representative for AFFS stated the reason it wanted a hearing was to discuss the matters set out in correspondence between it, AFFS, Miss W's representative and ourselves.

I repeated that I'd reviewed all the available evidence and arguments. Having done so, I was satisfied a hearing wasn't needed. I said this because I thought all parties had been able to state their cases clearly in the numerous submissions that had been made.

I understood that AFFS might be disappointed by this. But as I'd said, its representative had been silent on the matter. I added that it's very rare that a complaint can't be fairly decided without a hearing. This is because, unlike a court, we don't just rely on the parties involved to prove their own case. We have the power to make our own investigations. If particular information is needed to decide a complaint fairly, there are very few cases where we can't request it from either side or a third party.

Even without a hearing, it was still possible for AFFS to make the key points of its case out loud – either directly or through its representative. It could have spoken to the adjudicator and a recording of the call added to our case file for me to listen to. Or a recording could have been left on the phone without interruption. If AFFS wanted to do this, I invited it to contact the adjudicator within two weeks to arrange this. But neither AFFS nor its representative responded to this invitation.

I then turned to our jurisdiction. In general terms, the original representative for AFFS argued that the store pods investment wasn't either a specified investment or a designated investment. So it wasn't an UCIS. This meant the advice to invest in store pods wasn't an activity covered by our service.

But I said that wasn't the activity I was looking at. I'm looking at the advice to Miss W to open a SIPP. That is a regulated activity. It doesn't matter whether or not the store pods investment was an UCIS.

I then went on to say that the rules that AFFS had to follow are set out in the regulator's handbook. The advice given to Miss W needed to take into account the relevant rules. This was irrespective of whether or not the store pods investment was a regulated product. The regulations required the advice given to Miss W to be suitable. To do that, AFFS had to get enough information about her circumstances.

AFFS completed a fact find for Miss W. She signed this in December 2013. This recorded some of her personal circumstances. But not a lot of detail was included. For instance, it didn't include Miss W's outgoings, or if she had any other assets, savings or other investments other than her existing pension plan.

The fact find stated that while Miss W's existing pension plan was of value, its benefits didn't represent a significant proportion of her financial wealth. But it wasn't clear at all how this conclusion was arrived at. As I'd said, there was no record of any other assets, savings or investments.

The fact find listed five levels of risk under a section titled "risk and reward". These ranged from "very cautious" to "speculative". The fourth box "adventurous" was ticked. This attitude to risk was explained as:

"You prefer to invest in more specialised stock-market linked investments, in return for the potential for increased capital growth. Again, investment values will fluctuate according to market conditions, however, these fluctuations will be more pronounced."

Underneath was a handwritten note:

"Although I would not consider myself a high risk investor I understand that to achieve my goals in retirement I need to take higher risks with my pension and I am happy to do so."

The following was also ticked:

"I have no – or very little – experience or understanding of investment markets."

This was also followed by another handwritten note:

"I have little understanding of investment markets. I like the idea of a SIPP and fixed returns they offer. They have been explained to me and make more sense than traditional bonds."

But there was no detail on how Miss W's attitude to risk was assessed. In the complaint letter to AFFS, it stated her attitude to risk wasn't adventurous. The available evidence pointed to her having very limited investment knowledge, if any at all. Miss W certainly didn't seem to have invested in high risk speculative products before. Other than her existing

pension, there was nothing to show she had any other investments whatsoever. So I didn't think I could rely on the fact find recording her attitude to risk as adventurous.

I was satisfied that given Miss W's lack of investment experience, she was relying on AFFS to give her suitable advice. Whatever her actual attitude to risk was, it was also important for AFFS to look at Miss W's capacity to actually take that risk. I could see from the fact find that her annual salary was around £12,000 and she lived with her father. As I'd said above, the fact find stated Miss W's existing pension wasn't a significant proportion of her financial wealth. But I wasn't satisfied this was a realistic record of her situation.

Given Miss W's modest income, and apparent lack of any other savings or investments, I thought it was likely that a pension pot of around four times her annual income would be a very significant part of her financial wealth. So Miss W could ill afford for her investment to fall in value, or be lost completely.

In a section which asked if Miss W was intending to invest in an unregulated or alternative investment, the answer "Store First" was given. This section went on to say that Miss W thought the alternative investments seemed more straightforward. She'd become disillusioned by her existing provider's lack of service and its preference for investing in mainstream bonds. Given Miss W's lack of investment experience, it wasn't clear to me how this position was arrived at.

AFFS then issued a financial planning report. I assumed this was provided to Miss W after the fact find was completed. The copy I'd seen wasn't signed or dated. It said Miss W especially liked the control that a SIPP would give by allowing her to take a more active role in choosing what she deemed were suitable investments rather than the traditional funds in her existing plan.

The investment strategy section stated Miss W sought advice from AFFS about the intention of investing in commercial property, storage pods in particular. It said she hadn't sought advice about the suitability of this investment and had stated she understood the additional risks associated with such an investment. But even after they'd been explained to Miss W, given her limited knowledge of investments, I wasn't satisfied she would have had a good enough understanding of the risks to adequately judge the suitability of the store pods investment. She would have been heavily reliant on AFFS.

In any event, the report then went on to consider the proposed store pod investment. It said AFFS had done research to familiarise itself with the investment. It listed some of the risks involved. This included investing in a single undertaking or having one investment as a large part of Miss W's pension assets bringing considerable risk.

This section of the report ended by saying – in bold type – that Miss W's fund shouldn't be placed in one asset class. Instead, it should form part of a diversified portfolio across a number of asset classes. But at the time, the report didn't make any recommendation of alternative investments that could be used.

I could see that soon after the transfer to the SIPP and the store pods investment took place, AFFS did recommend that Miss W should make an additional investment in a Nucleus portfolio. This was for just under £15,000. The paperwork for this investment said Miss W should be categorised as a sophisticated investor. This was totally at odds with the original fact find and financial planning report.

While dealing with this complaint, I was very aware that the regulator, the Financial Conduct Authority, and its predecessor, the Financial Services Authority, issued alerts about advising on pension transfers. These dealt with transfers to invest pension funds into unregulated products through a SIPP. One of these was published in early January 2013, some months before the advice given by AFFS. Another one was issued in April 2014. These alerts didn't change or alter the regulations in any way. Instead, they simply re-stated the principles that were already in place when AFFS advised Miss W.

The 2013 alert clearly stated the regulator's position when it said:

"The FSA's view is that the 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".

I was satisfied it wasn't possible for AFFS to advise Miss W on the suitability of the SIPP without also considering how she planned to invest. It was very clear to me that AFFS knew all along that Miss W intended to invest in store pods. With this in mind, I didn't think it was suitable to advise Miss W to transfer her existing pension into a SIPP to allow her to make this investment.

AFFS said it did set out some risks of investing in store pods in the suitability report. These were:

- Investment in a single undertaking or having one investment as a large part of a scheme's assets brings considerable risk.
- The buyer may grant a lease for a term of 6 years to the Seller at fixed rents that are stepped throughout the term. This is an attractive option for the Buyer as it would appear to provide a guaranteed income for 6 years after purchasing the property, however after the initial period stated, there is no guarantee of occupancy or rate of return.
- You may not always be able to secure a tenant and if there is a prolonged period of unoccupancy [sic], surplus funds may have to be used up to cover the annual sipp fees, service charge, buildings insurance and electricity rent in addition to the nominal ground rent during the term, you may also be required to make contributions to the scheme if there are insufficient funds available to cover the fees.
- You must consider the potential marketability carefully in respect of a specialist commercial property such as this. It will have to be sold in order for you to secure pension benefits at your chosen retirement age via an annuity.
- The investment comes with a buy back guarantee which does reduce the inherent illiquidity risk of this type of asset, however there is little to back up this guarantee apart from the word of the company.

As I'd already said, the report went on to say ***"I recommend that your fund is not placed within one asset class and should form part of a diversified portfolio across a number of asset classes."*** But I didn't think this went far enough. There was no warning to Miss W that all of her investment was potentially at risk. Given Miss W's lack of understanding of investment markets and that she didn't consider herself to be a high risk investor, I wasn't satisfied she realised the extent of the risk she was taking with her existing pension. AFFS should have been much clearer in its warnings to her.

The store pods investment was unregulated. It was a specialised, non-mainstream type of investment. I thought it was also a high risk investment that wasn't suitable for somebody with Miss W's low capacity for loss. The available evidence didn't show me that Miss W was fully aware of the risks involved in investing in store pods. I was satisfied the investment wasn't suitable for her – and that's what AFFS should have told her.

I was satisfied that given a realistic assessment of Miss W's attitude to risk as balanced, or medium, a standard personal pension would have been suitable for her needs. I thought the extra charges normally associated with a SIPP weren't justified. I thought suitable advice should have been not to invest in store pods. If that advice had been given, I didn't see any reason why Miss W would have transferred her existing pension to the SIPP. There would simply have been no need for the SIPP. So the advice to open a SIPP was unsuitable for Miss W's circumstances.

fair compensation

I said my aim is to put Miss W into the position she would likely now be in had she been given suitable advice. I thought if Miss W had been given suitable advice, she would have kept her previous pension.

I said AFFS should establish the notional current transfer value of Miss W's previous pension plan, assuming it hadn't been transferred. The current transfer value of the SIPP investments, including any cash held in the SIPP bank account, should be compared to the current notional value of Miss W's previous pension plan.

If there are any difficulties getting the notional valuation, then the FTSE UK Private Investor Income Total Return Index should be used. That's a reasonable proxy for the kind of return that could have been achieved if suitable funds had been chosen.

If there's a loss, AFFS should ideally pay an amount into Miss W's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

It's unlikely that AFFS will be able to pay the compensation into Miss W's pension plan. If that's the case, it should pay the amount direct to her. But if it had been possible to pay into the plan, it would have provided a taxable income when Miss W takes the benefits. So 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 Miss W's marginal rate of tax in retirement. I think she's likely to be a basic rate tax payer in retirement. The reduction should equal the current basic rate of tax. But, as Miss W would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Since the store pods investment is now illiquid – it can't readily be sold on the open market – its value should be treated as "nil". The resultant sum represents the redress due from AFFS to Miss W. AFFS can then arrange to take ownership of the store pods investment. If that's not possible, then Miss W can sign an undertaking that she will pay AFFS any future disbursements she may get from the store pods investment. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the SIPP. AFFS will need to meet any costs in drawing up the undertaking.

I think it's very likely Miss W will have to maintain the SIPP for a period of time as the store pods investment can't be sold. This will stop the SIPP from being closed. If AFFS is unable to buy the store pods investment from the SIPP provider, it should pay Miss W five years' worth of SIPP fees to compensate her for these costs.

In addition, AFFS should Pay Miss W £250 for the disruption caused to her retirement planning. This is around the amount our service typically awards in these situations.

AFFS should also provide details of the compensation calculation to Miss W in a clear, simple format.

Finally, simple interest is to be added to my award at a rate of 8% gross a year from the date of my final decision to the date of payment. Income tax may be payable on any interest paid. If AFFS deducts income tax from the interest, it should tell Miss W how much has been taken off. AFFS should give Miss W a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I then gave all parties two weeks to raise any further points if they wished to do so. Miss W's representative confirmed it didn't have anything else to add. No response at all was received from the representative for AFFS, or AFFS itself.

my findings

I've considered afresh all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, and as no additional points have been raised, I see no reason to depart from my provisional findings and decision.

my final decision

My final decision is that I uphold this complaint. Anthony Feeney Financial Services should calculate the loss and pay compensation to Miss W as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 11 July 2019.

John Miles
ombudsman