



<b><u>Decision Ref:</u></b>	2020-0139
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Personal Pension Plan
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions in a timely manner Failure to process instructions Maladministration Switching funds
<b><u>Outcome:</u></b>	Substantially Upheld

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant has held a personal pension product with the Provider since **November 1993**.

#### **The Complainant's Case**

The Complainant states that he issued a letter to the Provider on **13 December 2010** requesting a switch of all units held by him in his retirement fund (**Fund A**) into a different fund (**Fund B**). He states that the decision to switch funds was taken following discussions with one of the Provider's employees K and that the Provider did not subsequently inform him that the switch could not take place. The Complainant has argued that he did not become aware that the switch had not taken place until he raised enquiries in **March 2013** and that he suffered a substantial financial loss as a consequence.

The Complainant states that he was keen to get his pension invested in a high yield fund to take advantage of what he felt was the inevitable recovery of the stock market. A meeting was arranged with K and he states that K issued him with brochures and answered some queries. K then followed up by letter dated **8 June 2009** providing details of Fund B. The Complainant states that he was interested in the option of managing the fund himself but was advised by K that he was better to leave his fund with the Provider because he would have penalties applied if he left. The Complainant states that despite numerous attempts to progress the issue, it took until **30 November 2010** to get the information he was looking for, in order to make an informed decision. After a short deliberation, he decided that his

best option was Fund B. He wrote a letter directly to the Provider dated **13 December 2010** as per his instructions from K in his letter dated 8 June 2009. He argues that this letter gives a clear instruction to switch his pension fund to Fund B with immediate effect. The Complainant states that he noticed he had not received any confirmation or update of his pension, but assumed it was due to an incorrect address.

The Complainant states that he made an enquiry in March 2013 and discovered that not only was the switch instruction not carried out, but the fund had been switched to low-risk in line with policy and that it had actually reduced in value. The Complainant states that he received a letter addressed to his broker on 27 March 2013 in which the Provider attempted to explain why the switch was not made. The Complainant points out that the Provider acknowledges that it informed K that the fund was not available and then followed up with him numerous times. Despite the fact that there was no reply from K to confirm that he would inform the Complainant that the fund was not available, the Provider decided instead to close the matter. He questions how the head office could do so on the assumption that an employee who they could not contact, was going to inform the client of the problem.

The Complainant states that he made a complaint to the Provider and was assured that the issue would be sent to the actuarial department to calculate what the fund would have achieved had the original instruction been carried out. After a two-month delay, he states that he received a letter dated 26 January 2016 apologising for the delay and accepting a communication breakdown in relation to the switch instruction. He states that the sum of €500 was offered to him by way of compensation. This was rejected by the Complainant.

The Complainant states when he became aware of the position in **March 2013** in relation to the value of his pension, this was a major setback and he suffered a prolonged period of anxiety and depression.

The Complainant argues that the stock market has doubled in the five years since the switch instruction was sent by him in December 2010, with an average growth of 15% per annum. By his calculations, the value of his pension should have reached almost €190,000 by June 2015 in line with the average growth. The Complainant is seeking to be compensated accordingly.

### **The Provider's Case**

The Provider states that the range of funds available under different products, varies. It states that while Fund B was a fund available for certain products in December 2009, it was not at any time available in respect of the personal pension product that the Complainant held with the Provider.

The Provider's records reflect that the Complainant met in **May 2009** with K, a broker consultant and employee of the Provider who provided support to the Complainant's broker, WW, to obtain information in relation to Fund B. The Provider argues that K assisted the Complainant by responding to general enquiries raised and providing general information but he did not provide the Complainant with financial advice and was not a financial adviser. It argues that the Complainant's financial adviser was WW. The Provider

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has no record of any correspondence between the Complainant and K between a letter written by K to the Complainant dated **8 June 2009** and the switch request dated **13 December 2010**. Its records reflect that K met with both the Complainant and his broker in December 2010 to discuss options in relation to the personal pension. The Provider accepts the following the meeting, the Complainant decided to switch his unit holding from Fund A into Fund B and confirmed this to the Provider by letter dated 13 December 2010.

The Provider states that it confirmed to K in early **January 2011** that the fund was not available and the switch could not be processed. K raised enquiries with the Provider to establish if a workaround could be identified to permit the switch. The Provider states that despite representations being made by K on the Complainant's behalf, it was not possible to make Fund B available and as a result the switch did not take place.

The Provider states that while its records reflect that this was communicated to K, there are no records that reflect that the Complainant or his broker was notified at that time. The Provider confirms, however, that the matter was discussed with the Complainant's broker during a telephone call on **23 June 2011**. It further submits that records also reflect that a follow-up call was made by the broker on **29 June 2011** to further discuss details of the personal pension. Despite these calls, however, no steps were taken by the Complainant or his broker to establish other fund options or request a switch to another fund.

The next contact received was when the broker telephoned the Provider on **22 January 2013** and again on **22 March 2013** to discuss the personal pension. The Provider states that it has been unable to retrieve the audio recording of the call made on 22 January 2013 but it can be seen from the recording of the call on 22 March 2013 that the broker was aware that the Complainant remained invested in Fund A at that time. The Provider states that a letter was issued to the broker on **27 March 2013** to confirm in writing what had happened following receipt of the switch instruction in December 2010.

The Provider states that following requirements introduced by the Consumer Protection Code 2012 (**CPC**), the Provider began issuing annual benefit statements to the Complainant in April 2013. It states that these statements reflected that the Complainant remained invested in Fund A and a cover letter invited the Complainant to contact the Provider if he wished to discuss his personal pension. In a section dealing with the suitability of the investment strategy, details were included as to the investment of the fund and the Complainant was encouraged to contact his broker or financial adviser to review the way in which his pension contributions were being invested. Further annual benefit statements were sent in December 2013 and December 2014 which confirmed that the Complainant remained invested in Fund A. The Provider states that the Complainant's broker also telephoned it in August 2014 and was given details in respect of the personal pension.

The Provider states that the Complainant did not contact the Provider to discuss his personal pension until 30 October 2015 and during the call he discussed the risk profile of Fund A. He also raised the 2010 switch request and it was agreed that the Provider would review the matter again before the Complainant raised a formal complaint. The Provider gave the Complainant the response of 26 January 2016 which outlined that due to an internal communication breakdown of December 2010, the Provider did not appear to have

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informed the Complainant that the switch request could not be processed at that time. The letter outlined that the Provider had written to the broker in March 2013 to explain what happened and to offer the Complainant and *ex-gratia* payment in recognition of the customer service received. Following a letter from the Complainant's solicitor on 1 April 2016, the Provider responded by letter dated 11 April 2016 and the matter was referred to this office in May 2016.

The Provider reiterates that it was not open to the Complainant to switch into Fund B. The Provider states that while it cannot confirm if this was conveyed to the Complainant or his broker at the time, it was confirmed to the broker by phone in June 2011 and no further action was taken at that time. The Provider accepts however, that the first written notification that issued to the Complainant directly confirming that he remained invested in Fund A was the April 2013 annual benefit statement.

The Provider's actuarial Department has calculated that if it had been possible for the switch to take place on 30 December 2010, by 23 June 2011 (when the Complainant's broker was informed that the switch had not taken place) the Complainant's personal pension would have been worth €2,350 less in Fund B than in Fund A. Alternatively, if the switch had taken place, by April 2013 (when the first annual statement was issued to the Complainant) the value of the personal pension would have been €4,180 greater in Fund B than if the Complainant had remained invested in Fund A.

The Provider accepts that K suggested in error that Fund B was available under the Complainant's personal pension product. It also accepts that it ought to have confirmed the position regarding the unavailability of the fund to the Complainant in writing in January 2011 and it apologises to the Complainant in this regard. In May 2018, in formally responding to this complaint, the Provider offered the Complainant €2,000 by way of settlement of the complaint which offer was to remain open until the present adjudication. This offer was increased to €4,180 in a later submission of September 2019, again to expire on the present adjudication.

### **The Complaint for Adjudication**

The complaint is that the Provider failed to follow the Complainant's instructions in December 2010 to transfer his pension investment from one fund into a specified Fund B, and failed to inform him that the switch has not been made, as a result of which he suffered financial loss.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's

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response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 10 March 2020, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

There is substantial agreement between the parties to the present complaint in respect of the key facts. Firstly, the Complainant was wrongfully informed by an employee of the Provider, K, that the Complainant was entitled to switch his units into Fund B. Secondly, the Complainant wrote to the Provider in December 2010 some 18 months after his discussion with K, requesting that his units be transferred into Fund B with immediate effect. Thirdly, although the Provider communicated to K that the switch was not available, the Provider did not communicate this directly to the Complainant. The Provider has relied on a phone call from **June 2011** that it says demonstrates that the Complainant's broker was at that time, informed that the switch had not been possible. The Complainant states that he was not made aware that the switch had not been possible, until March 2013. It therefore appears that at some point as early as June 2011 or as late as March 2013, the Complainant was informed that the switch had not been possible.

It is useful to catalogue communications between the parties insofar as they are recorded by letter, email and telephone recording. By letter dated 8 June 2009, K wrote to the Complainant referring to a discussion a couple of weeks previously and queries raised by the Complainant in relation to Fund B. The letter provides as follows:

*"If you wish to proceed and switch/transfer your existing pension funds into [Fund B], please apply in writing through your broker a letter stating that you wish to switch your policy from [Fund A] into [Fund B]."*

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The letter enclosed information in relation to Fund B, including an up-to-date listing of companies the fund was invested in. Approximately 18 months later, by letter dated 13 December 2010, the Complainant wrote to the Provider referring to his pension policy number and his meeting with K to discuss the policy. The letter provided as follows:

*"I would be grateful if you would act on this instruction to switch this pension to [Fund B] with immediate effect.*

*I look forward to receipt of confirmation that this is been carried out."*

The Provider has submitted evidence of internal emails between P and Q, employees of the Provider, and K. P informed K on 5 January 2011 that the fund was not available to the Complainant's product type. In response to P's suggestion that she would write directly to the Complainant in this regard, K asked that she hold off writing to the Complainant as he wished to see if there was a workaround available. P followed up with K in relation to the switch request on 19 January 2011. On 25 January 2011, K again requested a move to Fund B indicating that he had informed the Complainant and his broker at a meeting before Christmas that Fund B was available. Another employee of the Provider, Q, looked into the matter but confirmed on 2 February 2011 to K that the fund switch requested was not possible. P then asked K if she should close the case on her side. She followed up again with K on 17 February 2011 noting that she had not received a response and stating that she would end the case on her side. She requested that K inform the client that the switch was not possible.

The Complainant has rightly pointed out that this decision by P to close the case on her end and not write out directly to the Complainant to inform him that the switch request could not be accommodated was a strange one, in light of the fact that she had emailed K on a number of occasions and had been unable to elicit a response from him. As the Complainant had written directly to the Provider in December 2010 to request the switch, the Provider, in my opinion, ought to have written directly to the Complainant to inform him that this was not possible. It seems clear that K did not follow up with the Complainant or his broker in this regard, even though he had created the difficulty by wrongly informing the Complainant that he was entitled to switch his units into Fund B. The Provider has properly accepted responsibility for both of these failings, and apologised to the Complainant.

There is a call recording from 23 June 2011 between the Provider and the Complainant's broker. On that call, the Provider clearly confirmed to the broker that the Complainant remained invested in Fund A, and his pensions had a 2017 maturity. The Provider explained to the broker that the fund would move to lower risk assets as the policy grew closer to maturity. The broker specifically raised a query in relation to the letter of December 2010 whereby the Complainant had requested a move to Fund B. The Provider's representative confirmed that the letter had been received but indicated that there had been an issue with the request as Fund B was not available to the Complainant's product type. The Provider's representative confirmed that it had written to K to tell him to contact the Complainant to inform him of this. The broker indicated that he would follow up with K in this regard before informing the Complainant.

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The Complainant has not specifically stated that his broker failed to inform him of the information he received on this call of 23 June 2011. Instead he has indicated that he did not become aware that the switch had not taken place, until March 2013. It is clear that the Complainant continued to deal with the broker in question as that broker had a follow-up call to the Provider on 29 June 2011 to confirm the surrender value of the pension and that it was a personal not an executive pension.

The broker made a further call on 22 March 2013 during which the Provider again confirmed that the Complainant's units were invested in Fund A and received a letter dated 27 March 2013 from the Provider in relation to the switch request. As the Complainant's broker was acting on the Complainant's behalf in relation to the call of June 2011, and as the broker had clearly been involved in discussions between K and the Complainant in relation to the potential switch in 2009 and 2010, it is difficult to understand why the Complainant's broker would not have informed the Complainant that the switch had not taken place. Indeed on the call on 23 June 2011, the broker informed the Provider's representative that he would inform the Complainant after he liaised with K. From the Provider's perspective, it informed the Complainant (through his agent, the broker) by 23 June 2011 that the requested switch was not available. Once again, it would have been better if the Provider had informed the Complainant in writing at this point or earlier, that the switch had not been possible.

By letter dated 27 March 2013, likely in response to the call of 22 March 2013, the Provider wrote to the Complainant's broker referring to the switch request received. The letter set out that the Provider contacted K on 5 January 2011 to advise that the fund was not available on the particular pension product type. The letter set out that the case was followed up with K numerous times and on 17 February 2011 a final email was sent to advise that the case would be ended at head office, and asking K to inform the Complainant that the switch was not possible. The letter indicates that its records confirm that a member of the broker's office called with queries on the policy on 23 June 2011 and that during this telephone call, it was confirmed that the Complainant had sent in the switch request but the fund was not available. All of these details as set out in the letter dated 27 March 2013 are reflected in the records provided by the Provider as out above.

The first time the Provider wrote directly to the Complainant appears to be by letter dated 16 April 2013, enclosing his annual benefit statement. It should be noted that this was a pro forma letter and not a personalised letter written to the Complainant in relation to the requested switch. The letter drew attention to the investment strategy section of the statement which outlined new retirement options which might be of interest. The enclosed annual benefit statement set out that the policy has been made paid-up and set out the total paid into the policy. The statement clearly showed that the pension was invested in Fund A, along with other information in relation to the surrender value and taxation. In a section entitled "*suitability of the current investment strategy*", the statement noted that the Complainant might wish to avail of new retirement options and review the way in which the pension contributions were being invested. It stated the Provider's belief that it was an opportune time to consider these issues and recommended that the Complainant contact his broker or financial adviser to discuss the new options available. Annual benefit

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statements in similar terms were sent to the Complainant on 4 December 2013 and again on 4 December 2014.

The first direct contact between the Complainant and the Provider in relation to the switch request occurred by telephone call on **30 October 2015**. On this call, the Provider confirmed that the switch had never happened because Fund B had not been available to the Complainant. The Provider's representative committed to looking into what had happened and explained this clearly to the Complainant (ie why the switch had not proceeded). The Complainant followed up with the Provider in a call on 15 December 2015 in relation to the delay in hearing from the Provider. The Complainant was assured by the same representative that there were calculations expected from the actuarial department and he hoped that they would offer different options to the Complainant. The Complainant was informed that the Provider was looking at backdating and compensation with regard to similar funds. He was told that the matter was given being given priority and that the Provider would be in touch soon.

I note in relation to this call that the Provider did not promise the Complainant that he would be compensated in accordance with the differential in fund values between Funds A and B on this call. On the other hand, there was a strong suggestion from the representative in question that he would be offered compensation which reflected that differential, and that the delay in responding to him was due to the calculations being carried out.

By letter dated 26 January 2016 and following the telephone call between the Complainant and the Provider dated 30 October 2015, the Provider apologised for the delay in responding and confirmed that the switch instruction dated 13 December 2010 had been received on 24 December 2010. The Provider stated that due to an internal communication breakdown, it was not explained to the Complainant at that time that the fund was not available on his product type but that between 2011 and 2013, the Complainant's broker had been in communication with the Provider in relation to policy details. The letter further confirmed that the Provider wrote to the broker on 27 March 2013 with an explanation as to why the switch had not been effected. The Provider's letter pointed out that annual benefit statements had issued since 2010 advising that the policy remained invested but acknowledged that Provider did not directly confirm that the switch was not possible in 2010. The Provider made an *ex gratia* offer of €500 to the Complainant in recognition of the breakdown in service received.

In my opinion, this response from the Provider was seriously inadequate. The Provider by that point was aware that its employee, K, had advised the Complainant that he could switch his pension into Fund B, that the Complainant had requested to do so in December 2010, and that it had failed to respond to the Complainant's switch request by informing him that the switch was not possible. Even on the assumption that the Complainant could be affixed with the knowledge of his broker from 23 June 2011 in relation to the switch request, an *ex gratia* offer of €500 was not in my opinion, reasonable. Furthermore, annual statements had not been sent since 2010 as suggested. The Complainant's disappointment on receiving this offer must have been compounded by the fact that he was encouraged to believe after his December 2015 phone call with the Provider that compensation would be offered to him in line with fund differentials. I am not satisfied that the Provider was bound to calculate

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compensation on the basis of fund differential, given that Fund B was never available for investment in the case of the Complainant's fund. However, the sum offered was low by any standard and did not correlate in any way to what he had been encouraged to believe would be offered to him by way of actuarial calculation.

On a follow-up call dated 28 January 2016, the Complainant spoke to the Provider's representative in relation to the offer, indicating his belief that the fund should have more than doubled between December 2010 and November 2015. He pointed out that he was informed that the delay in responding to him was due to actuarial calculations but that clearly this had not been the case. In response, the Complainant was assured that the matter had been sent to the actuarial department and that was what the representative had expected but he could not account for why numbers were not made available. He did note, however, that the fund was never available to the Complainant and that may have been why calculations were not provided. A letter of complaint was sent by the Complainant through his solicitors dated 1 April 2016, arguing that the Complainant had missed the substantial upswing in equity markets owing to the admitted to miscommunication of the Provider and stating that the €500 *ex gratia* offer did not go near the loss suffered. By letter dated 11 April 2016, the Provider acknowledged that the Complainant had called to discuss his disappointment with the offer made by letter dated 26 January 2016, but emphasised that the Complainant's broker was made aware in June 2011, that the requested switch had not been processed.

A further *ex gratia* offer of €2,000 was made to the Complainant by the Provider in the course of the adjudication of this office. This offer was later increased to €4,180 – to reflect the differential between the funds from December 2010 to April 2013. While this letter of offer might have been considered reasonable if it had been made at a very early stage in the complaint process, in my opinion, the offer was made far too late. I further note that with the issue of this Decision, neither offer is now available to the Complainant.

Although I acknowledge that the Provider made admissions in relation to its service failures from an early stage, I consider it appropriate to substantially uphold the complaint, in light of the misinformation provided to the Complainant by K, the failure at multiple stages to communicate effectively with the Complainant, and the failure to offer him adequate compensation in relation to its failures.


I have considered all the circumstances set out above, including (i) that it was an employee of the Provider who wrongly informed the Complainant that he could switch his pension into Fund B, (ii) that the Provider never wrote to the Complainant in early course to inform him that the switch had not been possible, and (iii) that the Provider failed to offer him adequate compensation until late in the day. I consider it appropriate therefore to direct the Provider to make a compensatory payment of €4,500 to the Complainant, and I direct accordingly. In this regard I am bearing in mind that the Complainant states that he was unaware until March 2013, that the switch had not been possible, even though his broker was informed by 23 June 2011. Although it appears that the Complainant suffered from health difficulties after March 2013, it was in my view reasonable to expect that he would take steps to redirect his investment into a higher yield product, once he became aware that his requested switch, had not been possible.

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## Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €4,500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



MARYROSE MCGOVERN  
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

2 April 2020

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
  - (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.