

The complaint

Mr G complains he was given negligent advice by Portal Financial Services LLP to transfer the benefits of his occupational pension scheme to a self-invested personal pension, causing him a financial loss.

Mr S is represented in this complaint by a claims management company (CMC).

What happened

In 2017 Mr G responded to an online advertisement for a “no obligation pension review” with Portal Financial Services LLP (“Portal”). Mr G completed the form Portal sent, and said he was interested in getting better performance from his pension and access to a tax-free lump sum.

Portal’s suitability report set out Mr G’s circumstances at the time as follows:

- He was aged 54 and married, with no dependent children;
- Employed by his local authority in a manual role on a salary of around £16,700;
- He was a member of his employer’s defined benefit occupational pension scheme (OPS) with 15 years’ contributions;
- He had a part-time job as a fire-fighter earning around £300 a month. He’d been a member of the defined benefit pension scheme relating to that employment for around three years;
- He was renting a property, had no savings and a credit card debt of around £200 to which he was making monthly repayments;
- His attitude to risk (ATR) was recorded as being “moderately cautious”

The transfer value of his OPS was just under £59,000. Based on a retirement age of 67 it would provide annual income of £5,042 after taking tax-free cash (TFC) of £6,288. Or it provided the option of enhanced TFC of £23,905, with a reduced annual income of £3,586; Portal conducted a transfer analysis report (TVAS) which concluded the critical yield needed to provide equivalent benefits to Mr G’s OPS was 11.4% for the first option and 10.1% for the option with the enhanced TFC.

Portal recorded Mr G’s objectives as being to buy a car and go on holiday. The report said the critical yield of 11.4%, being the investment growth needed to match the benefits from the OPS was unlikely to be achieved, so they didn’t recommend the transfer. However Portal’s post-sale options letter dated 13 July 2017 gave Mr G the option of disregarding its advice, proceeding with the transfer of his OPS on an “insistent client basis” into a flexi-access drawdown plan, releasing the tax-free cash (TFC) of £14,970 and reinvesting the remaining £44,913.

Mr G signed the insistent client form on 18 July 2017 explaining in his own words that his wife was disabled with spine problems, and he wanted to take her on the “*holiday of a lifetime*” before her condition deteriorated, and that he needed to replace his car. The Portal adviser produced a suitability report dated 28 July 2017 about what Mr G should do with the balance of his funds, after taking the TFC of £14,700. It reiterated the

recommendation not to transfer and set out the benefits Mr G would be giving up, based on taking them at age 67. It told Mr G he'd need to contact his OPS and "opt out" of his employer's scheme before the transfer could go ahead. This report said Portal recommended Mr G transfer to a self-invested personal pension plan with "A" invested 67% in equities, 28% global bonds and 5% in cash. Portal's advice fee of 5% would be deducted from the transfer value, and the annual management charge was 1%. The transfer went ahead, the TFC was released to Mr G and the balance was invested according to the strategy set out by Portal.

In June 2020 Mr G's CMC complained to Portal on his behalf. Portal didn't uphold the complaint, disagreeing its advice had been negligent. It said Mr G had fully understood the implications of giving up the benefits in his OPS. But he'd given clear reasons for wanting to proceed and Portal had followed the regulator's guidance in relation to insistent clients.

So Mr G's CMC brought his complaint to this service where one of our investigators upheld it. He thought a firm's recommendations should be given independently of any insistent client process, whereas Portal had sent the forms together. And Portal's fee was contingent on Mr G proceeding with the transfer. He didn't think Mr G fully understood the long-term implications of the benefits he'd be giving up. So he went on to explain how he thought Portal should put things right.

Portal disagreed with the investigator's assessment and set out their objections in detail, saying they believe they had treated Mr G appropriately as an insistent client.

As agreement couldn't be reached the case has been passed to me to issue a decision.

What I've decided – and why

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

The approach of this service when considering transfers from defined benefit pension schemes aligns with the FCA guidance (COBS 19.1.6G), which is the assumption they will generally not be suitable.

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

- *(a) start by assuming it will not be suitable, and*
- *(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."*

Under COBS 19.1.2 Portal was required to:

- Compare the benefits likely to be paid under the OPS with the benefits which Mr G could expect by transferring
- Ensure that the comparison included enough information to enable Mr G to make an informed decision.
- Provide Mr G with a copy of the comparison, drawing his attention to the factors that do and don't support its personal recommendation, in good time.
- Take reasonable steps to ensure that Mr G understood its comparison and how it contributed towards the personal recommendation.

COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients. And a firm must communicate with its customers in a way which is clear, fair and not misleading.

So the starting point is the presumption of unsuitability, which meant that unless Portal could provide clear justification, the transfer wouldn't be in Mr G's best interests. By transferring his pension benefits and taking an immediate tax-free lump sum, Mr G's pension income in retirement is likely to be significantly reduced, even bearing in mind the additional pension provision he has with his second job. I can see that Portal's letter of 13 July 2017 following its "initial phase of research" strongly recommended Mr G didn't transfer, which I think was right.

But the same letter went on to say that if Mr G wanted to go ahead, that was something Portal could help him with. And it would treat Mr G as an "insistent client". Pension freedoms legislation enabled Mr G more flexibility in the way he accessed his pension, and he may have been tempted by the prospect of accessing the tax-free cash at age 55. But like the investigator, I don't think it was appropriate, or in Mr G's best interests of Portal to proactively suggest he proceed on an insistent client basis.

My understanding is the insistent client process is a means to enable experienced, financially sophisticated, and well-informed consumers make their own investment decisions. In those circumstances I'd expect the consumer themselves to have instigated the insistent client process. Having been given advice not to proceed, I'd expect the client to ask the firm if they would be prepared to facilitate the transaction on an insistent client basis. The firm is not obliged to agree. In this case it's clear Portal suggested the insistent client option to Mr G as a way of enabling him to access his TFC, about which I think they'd already set his expectations.

The fact-find completed on 29 March 2017 recorded that Mr G is the sole earner in his household. Despite working two jobs, he had no savings or other assets and didn't want to take on additional debt (other than the credit card bill he was repaying). Like the investigator I don't agree with Portal's assessment of Mr G as a "moderate" investor just because he'd had other pensions or endowments in the past. I don't think that meant he was sufficiently experienced to be considered as an insistent client.

One of the fact-find questions was "*Why do you require a tax-free cash sum?*" to which Mr G replied "*holiday of a lifetime with wife and new car*". Which again suggests the discussion was focussed around how Mr G would like to spend the money, rather than whether giving up guaranteed lifelong benefits and opting out of a final salary OPS was in his best interests.

When asked how important raising the TFC was to enable him to achieve his goals, Mr G answered "*Reasonably important but not vital*". And when asked which of three statements best fit with his attitude to the relative priority of need for immediate cash versus long-term retirement provision, Mr G didn't tick the third statement which said "*My immediate need for tax free cash is very important, I feel I would need to proceed regardless of any long-term impact on my retirement provision*".

Instead he ticked the middle one, which said that the cash was "*important*" rather than "*very important*", and that he would "*want to proceed*" rather than the he would "*need to proceed*". So I think Mr G wasn't fully committed to the transfer at that point.

I've seen no reason to dispute the CMC's argument that Mr G was unfamiliar with the term "*insistent client*". And I don't think he would have suggested proceeding against Portal's advice unless it had given him that option, which it did alongside the recommendation. I've seen no evidence Mr G "*insisted*" the transfer went ahead. It seems to me he was interested in finding a way to fund a holiday and a new car, and Portal suggested he could

do that by taking a pension commencement lump sum, commonly known as tax-free cash (TFC). I'm not sure he would've been aware initially that doing so meant opting out of his OPS and transferring the benefits to a SIPP.

Portal's letter dated 13 February 2017 headed "*We're ready to complete your pension release review*" gave the impression the review would focus on the "release" of the TFC, rather than transferring or opting out of the OPS. The letter tells Mr G Portal has received the information from his pension provider, and the next step is a 20-minute telephone conversation with one of their "*friendly*" paraplanners. It warned in bold print that the transfer value of Mr G's pension is only guaranteed for a limited time. And that if it needed to be recalculated "*This could delay how long it will take to receive your tax free cash*". Which I think put time pressure on Mr G, and also suggested it was a foregone conclusion Mr G would proceed, even before the formal analysis and discussion had taken place.

It was reasonably clear from Mr G's financial and employment situation that he was not financially experienced or sophisticated, so he'd listen to what an adviser told him. I think he'd pay attention to the adviser, even if after considering everything, the outcome was that while wanting a nice holiday was perfectly understandable, he shouldn't go ahead. As the price was giving up his guaranteed defined benefit pension, which could have a significant impact on the retirement provision for Mr G and his wife.

It's recorded that Mr G didn't wish to take on more borrowing. But his income exceeded his monthly outgoings by a small amount, so it's possible he could have taken on a modest personal loan to fund a holiday. It might not have been so lavish as the TFC would allow, but the adviser may have been able to suggest a compromise which didn't require the loss of the guaranteed benefits in his OPS.

The post-sale options letter dated 13 July 2017 headed "*Important news about taking money early from your pension*" stated that Portal didn't recommend the transfer. But then it immediately asked the question "*What happens if you still want to go ahead and transfer your funds?*". It went on to say that this was absolutely Mr G's decision because "*everyone's circumstances are different*". If Mr G did wish to go ahead then "*this is something we can help you with*". And "*Rest assured if you choose to go ahead with this transfer you will get the same level of care, attention and expertise we offer all of our clients*".

I think Mr G would've been reassured by those phrases, and that Portal was willing to "help" him with the transaction. He's likely to think a properly qualified and experienced adviser wouldn't be prepared to facilitate a transaction if it was a really bad idea.

The letter required Mr G to tick a number of boxes to evidence his understanding of the consequences of proceeding with the transfer. Mr G signed the form to say he wished to go ahead on 18 July 2017. And he'd ticked the boxes to show he understood the new plan would be unlikely to achieve the critical yield of 10.1%, the income the new plan could provide compared to the income available at 67 from his OPS, and that by going against the recommendation Mr G is "*therefore an insistent client*".

But I'm concerned the reassuring tone, the ease by which Mr G could go ahead simply by ticking a few boxes and the provision of a prepaid envelope, meant Mr G was effectively steered towards proceeding without having reflected on the long-term consequences.

The regulator recommended that insistent clients set out their reasoning for proceeding in their own words. It appears Mr G completed the section of the insistent client form headed "*Why you want to go ahead and transfer your [OPS] to access your pension savings early*" in his own handwriting. He wrote his wife has a spinal condition and he wanted to take her on holiday before it deteriorated and that he desperately needed to upgrade his vehicle.

While this explains what he hoped to spend the TFC on, I don't think it demonstrates his understanding of the long-term impact of his decision to opt out and transfer from his OPS. Mr G signed this form on 18 July 2017.

The typed insistent client declaration Mr G signed on 31 July 2017, set out that Mr G wished to proceed with the transfer, as his main priority is to release tax free cash to go on holiday and buy a new car. It listed in clear language the reasons why Portal didn't recommend the transfer. Which were in summary, the guaranteed benefits he'd be giving up, the relatively high critical yield, by opting out of his OPS he'd lose his employer's contributions, the transfer may affect his wife's state benefits and it set out the guaranteed income he'd be giving up. So I can't fairly say Mr G wasn't made aware that Portal didn't recommend the transfer.

But I've said I think Portal's communications tended to "steer" Mr G in a particular direction, based on his understandable wish to treat his disabled wife to a nice holiday. And to minimise or underplay the real risks for his financial future. Because having said their recommendation was not to transfer, Portal's suitability report dated 28 July 2017, did recommend the transfer to a SIPP, because Mr G had "*chosen*" to take the TFC of £14,700.

Page 8 of the report read "*we propose that as an insistent client you transfer to a flexi-access drawdown pension*" and further down the page under the heading "*Our recommendation*" it read "*We recommend that you transfer to a personal pension plan with [provider]*" because doing so is "*key to you accessing your tax-free cash*". And it set out the investment strategy of a mixture of equities and fixed income securities. It seems likely to me that the combination of the two recommendations – not to transfer, and to transfer – would have been confusing to Mr G. And because it's what he hoped to do, he might have just focused on the positive, whereby Portal was effectively recommending Mr G transfer his pension savings to a SIPP in order to release the TFC. I think Mr G would've been reassured by Portal's statement that "*we would not – and could not, make any recommendation to you that we did not believe represented the best option available for you*".

Page 6 of the report reminded Mr G he'd have to "*opt out before [Portal] can act*", and then referred to page 10 for the impact of penalties/benefits which apply. But while page 10 sets out the risks of transferring, and that Mr G may not be able to re-join his OPS in the future, I've not seen anything which specifically explained the implications of opting out, other than the sentence relating to the loss of employer contributions. So I don't think Mr G did have all the information necessary to enable him to make an informed decision.

I'm mindful that Portal's advice fee was dependent on Mr G agreeing to transfer his OPS benefits. Portal's letter of 13 July 2017 told Mr G he wasn't obliged to pay them a penny until he signed the declaration form, which would be in his OPS transfer pack. But once he agreed to go ahead, Portal's fee of almost £4,093 was deducted from the residual fund, not the TFC. Of course professionally qualified advisers are entitled to be paid for the work they do, and consumers may be unhappy at being charged an advice fee for being told they shouldn't go ahead. But I think the scale of Portal's fee is significant when taken together with the provider's annual management charges of 0.47%, in order to release £14,700. In summary I don't find Mr G met the criteria to be considered as an insistent client, and I don't think he would've asked to be treated as such unless Portal had given him that option. While I can see Mr G had an understandable desire to access his pension savings at 55, I think Portal had a duty of care to him and weren't obliged to facilitate the transfer if they believed it wasn't in his best interests.

In these circumstances I don't think Portal has acted fairly and so I uphold the complaint.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr G's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Mr G's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr G's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr G's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr G within 90 days of the date Portal receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr G.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Portal should also pay Mr G £250 for the trouble and upset caused.

My final decision

I uphold this complaint. Portal Financial Services LLP should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or

reject my decision before 21 April 2022.

Sarah Milne
Ombudsman