DRN-2896231

The complaint

Mr B complains that Portal Financial Services LLP (Portal) gave him unsuitable advice to transfer the benefits he held in an occupational pension scheme (OPS) into a self-invested personal pension (SIPP). Mr B says he's suffered a financial loss due to Portal's advice.

What happened

Mr B was an active member of his employer's OPS. He'd been a member of the scheme for over 30 years.

In 2016, Mr B spoke with Portal about transferring the benefits of his OPS.

Portal conducted a fact-finding exercise with Mr B in which they recorded;

- He was 56 years old and co-habiting with a partner;
- He was in good health;
- He had an annual income of £23,800 and was employed full time;
- He owned his house but had an outstanding mortgage of £34,000 and a credit card balance of £2,500. Mr B had a disposable income of £600 per month.

Portal also assessed Mr B's attitude to investment risk. They said he had a balanced attitude to risk.

In February 2016 Portal produced a suitability report which recommended that Mr B transfer his OPS to a SIPP. In order to do so, Mr B had to opt out of his OPS scheme. Although Portal also recommended Mr B opt back into his employer's current scheme.

The suitability report recorded that;

- Mr B had an objective of taking the maximum tax-free cash from his pension in order to go on holiday and pay off his debts.
- The OPS would provide Mr B benefits of £15,260 per year and an additional lump sum of £27,837 at age 66. He could also give up some of the annual income to take a lower income of £11,301 per year and a larger lump sum of £75,343.
- The OPS had a CETV (cash equivalent transfer value) of £180,376 which Portal said took account of a pension sharing order Mr B needed to pay.
- The critical yield to match the OPS benefits in a personal pension was 12.2%. The growth rate required to match the income by using a drawdown arrangement was 5.7%.
- Mr B didn't intend on taking an income from the pension and would likely continue working until age 67.
- Following the payment of the tax-free lump sum, Portal recommended that Mr B invest in four different funds which they said matched his attitude to investment risk.
- Portal's fees were set out as 5% of the transfer value (£9,018) and an on-going adviser fee of 1%.
- There was an annual fee of £75 for the SIPP administration and an annual management charge of 0.42%. Fund charges would also apply.

In 2016 Portal also produced two transfer value analysis reports (TVAS). One in January 2016 and the other after Mr B had opted out of the OPS in August 2016. The TVAS recorded the critical yields and growth rates required to match the OPS benefits in various different scenarios.

Mr B followed Portal's recommendation and transferred the benefits of his OPS into a SIPP. He took the maximum tax-free cash and invested the remaining funds as Portal had recommended.

Mr B later used the funds held in his SIPP to fund a business purchase.

In June 2020, Mr B complained to Portal via a professional representative. In his complaint he said that Portal shouldn't have advised him to transfer his OPS and as a result he's facing a significantly lower retirement income. He said Portal had breached the regulator's rules by doing so.

In their response Portal said their recommendation had been suitable as it had achieved Mr B's objective of releasing tax free cash to pay off his debts and go on holiday. They said their suitability report had made clear the risks of transferring, the loss of guarantees and the fees involved in transferring Mr B's OPS.

Mr B was unhappy with Portal's response and so he brought his complaint to us. Our investigator said she didn't think it was in Mr B's best interests to transfer his OPS to a SIPP. She said it was unlikely Mr B would achieve the critical yield required to improve on the benefits he already held in the OPS. She also said Mr B was repaying the debts he had without being caused any financial difficulties, so she didn't think it was in his best interests to lose the guarantees of the OPS to repay his mortgage and credit card. Our investigator acknowledged that, at the time of the advice, Mr B hadn't planned on buying a business with his pension funds. And, Portal couldn't have foreseen that.

Portal disagreed with our investigator's assessment. They said as a result of the advice Mr B could have paid off his debts and had more financial security entering retirement. They also felt the new plan had a significant chance of exceeding the growth rate which they felt was a fairer assessment than using the critical yield. They reiterated that they felt their advice met Mr B's objectives at the time and was therefore suitable.

As Portal disagreed with our investigator's assessment, the case has been passed to me for 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Portal's suitability report contained several figures in relation to the growth rate required in order to match the benefits of the DB scheme. Portal had a responsibility under the COBS Rules to consider Mr B's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up. With that in mind, I think the critical yield figures were the important ones in determining whether his pension might be worth more or less by transferring.

Portal however chose to focus on the growth rate (5.7%) rather than the critical yield. But Mr B's existing scheme guaranteed him an income for life and provided a spouse's benefit in the event of his death. I don't think the growth rate figure provided would have enabled Mr B to make a direct comparison with the benefits he was giving up. So, I think the critical yield is the figure that Portal ought to have given due weight to.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

Mr B was 56 at the time of the advice and wanted to retire at 66. The critical yield required to match Mr B's benefits at age 66 was 12.2% if he took a full pension and 10.8% if he took tax free cash and a reduced pension. This compares with the discount rate of 4.1% per year for 9 years to retirement.

For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year. Portal don't think the discount rate were an accurate comparison to use. They instead used a historic returns rate. But as Portal will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be a more realistic indicator of expected fund growth in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. So, had returns been lower, I think its clear Mr B's funds were at risk of running out sooner which was never explained to him.

I've taken all of this into account, along with the composition of assets in the discount rate, Mr B's balanced attitude to risk and also the term to retirement. There would be little point in Mr B giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. And the regulator has made clear that in recommending a transfer, the purpose isn't just for things to stand still. But here, given the lowest critical yield was 10.8%, I think Mr B was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, particularly when investing in line with his attitude to risk.

If Portal's recommendation was based on the transfer's financial viability alone then a transfer out of the DB scheme wasn't in Mr B's best interests. Of course, financial viability isn't the only consideration when giving transfer advice, as Portal has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Mr B's objectives

Mr B seemed to only have one objective when he approached Portal – to release tax free cash. And the reason for that objective was to pay off his mortgage, debts and go on holiday.

Portal's suitability report listed several other objectives, for example, maximising tax-free cash; having greater choice and flexibility of accessing the pension; and having ownership and control of his pension fund. However, having listened to Mr B's conversation with Portal's paraplanner it's evident these were factors raised by the paraplanner. They weren't specifically raised by Mr B as his objectives and I don't think they truly were objectives he had prior to being advised by Portal.

I say that because, for example, in the suitability report Portal said *'You also said that having the flexibility to draw an income earlier or later than your planned retirement age would be a useful benefit and is important to you.'* But Portal recorded Mr B's intended retirement age as 67 (a year later than his DB schemes normal retirement age). In his conversation with Portal, Mr B had mentioned increasing his working week and made no mention of needing an income earlier than his scheme provided. So, I don't think this was genuinely an objective of Mr B's.

I also think Portal included objectives which were generic in nature and not specific to Mr B's circumstances. For example, the report suggested Mr B had an objective of maximising his tax-free cash and said *'sometimes with this type of scheme you will not be able to access the full tax-free cash amount'*. But the tax-free cash Mr B received by transferring was around £45,000. And Portal had estimated Mr B could receive a maximum of around £75,000 at normal retirement age in the DB scheme. So, Portal knew it was likely Mr B would receive less tax-free cash by transferring, but still recommended the transfer go ahead on the basis of meeting this objective.

As I don't think the other objectives were genuinely motivating factors for Mr B seeking advice on his pension, I've focused on Mr B's objective of releasing tax-free cash and whether Portal have evidenced it was in his best interest to do so.

Releasing tax free cash

During the call with Portal's paraplanner, he asked what Mr B was likely to use the remaining tax-free cash for once he'd paid off his debts to which Mr B said he wanted to go on holiday. So, I don't think Mr B's objective of going on holiday was a significant motivating factor in the advice. It appeared to be more a thought about what he might spend the money on should he have it. So, I've mainly focused on his objective of reducing his mortgage and debt.

The information I've seen doesn't suggest that Portal tested Mr B's *need* to pay off his mortgage and debts. And there isn't anything in Portal's suitability report which said why they thought paying off Mr B's mortgage was the right thing to do, or even whether they'd considered *if* he could pay off his debt without facing significant penalties. And Mr B has since told our service that it didn't benefit him to pay off his mortgage early as there was an early settlement fee. So, he ended up letting the mortgage run its course

When Portal conducted a fact find with Mr B they recorded that he paid £350 a month towards his mortgage and £150 toward his credit card debt. But they also recorded that Mr B had £600 a month of disposable income. And in their call with Mr B he confirmed on average he had £200-£300 left at the end of each month. So, I don't think Mr B had a particular need to pay off his mortgage at that point. He wasn't struggling financially at the time and he even mentioned in his call to Portal that he was looking to take up additional work on his days off. So, it was likely his disposable income each month would increase further.

I'm sure that the idea of paying off his mortgage and releasing extra disposable income each month was an attractive idea to Mr B. But it was Portal's role to not only record Mr B's objectives but to probe and really understand Mr B's motivations. It was only then that Portal would be able to understand if Mr B's objective was not only achievable but realistic and in his best interests.

Therefore I don't think Portal demonstrated it was in Mr B's best interests to give up the valuable guaranteed benefits of his DB scheme in order to achieve a benefit that may or may have not been achievable or financially viable.

Similarly, Mr B's credit card debt was modest and affordable. But Portal never explored increasing Mr B's payments towards his credit card debit, which *could* have meant it was paid off much earlier, releasing further disposable income for Mr B each month.

Summary

I don't doubt that the release of TFC through a personal pension would have sounded like an attractive idea to Mr B. Especially as that meant he could have paid off his mortgage and other debt. But Portal wasn't there to just transact what Mr B might have thought he wanted. The adviser's role was to really understand what Mr B needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr B was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr B was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr B shouldn't have been advised to transfer out of the scheme just to repay debts that were affordable, and so it wasn't worth giving up the guarantees associated with his DB scheme for that reason.

So, I think Portal should've advised Mr B to remain in his DB scheme.

Of course, I have to consider whether Mr B would've gone ahead anyway, against Portal's advice.

I've considered this carefully, but I'm not persuaded that Mr B would've insisted on transferring out of the DB scheme, against Portal's advice. I say this because Mr B was an inexperienced investor with a balanced attitude to risk and this pension accounted for the majority of Mr B's retirement provision. So, if Portal had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

While Mr B later went on to buy a business with his pension funds. I think it's likely he did this because Portal had facilitated access to his pension funds through this transfer. Therefore, I think it's likely Mr B would have remained in his scheme until normal retirement age had he been given suitable advice.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, 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.

For clarity, I'm satisfied Mr B wouldn't have taken benefits under the DB scheme, until the normal scheme retirement age. So, this should be the basis for the calculations.

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 B's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Mr B'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 B's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr B'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 B 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 his 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 B within 90 days of the date Portal receives notification of his/her 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 B.

Income tax may be payable on any interest paid. If Portal deducts income tax from the interest, it should tell Mr B how much has been taken off. Portal should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Portal to pay Mr B the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require Portal to pay Mr B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Portal to pay Mr B any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portal pays Mr B the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr B.

My final decision

My final decision is I uphold this complaint and Portal Financial Services LLP must pay the amount as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 12 August 2022.

Timothy Wilkes
Ombudsman