DRN-3077944

The complaint

Mr P has complained about the advice he was given by Portal Financial Services LLP (Portal) to switch his personal pension to a self invested personal pension plan (SIPP). The SIPP funds were then used to invest in several unregulated collective investment schemes (UCIS).

What happened

In 2012 Mr P was introduced to Portal, by an unregulated business I'll call 'Firm A', for a pension review. Firm A's 'client information form' recorded Mr P was aged 46, in good health, with an intended retirement age of 60, and was employed with a salary of £30,000 and monthly disposable income of £500. It noted that Mr P was cohabiting, and his main residence was valued at £150,000 with an outstanding mortgage of £95,000. And that he had no other assets, investments or savings. The form recorded Mr P's attitude to risk (ATR) as 'adventurous', the highest possible ATR listed. An 'additional notes' section set out an allocation between UCIS (totalling 87.5%) and cash (12.5%):

Portal gathered further information about Mr P's circumstance and objectives. It's 'introduced business' form recorded Mr P wanted "*better performance than his current [personal pension] is providing. Client has a very adventurous attitude to risk".* It recorded the annual management charge (AMC) of Mr P's personal pension as 1% compared to 0.5% for a SIPP through a provider I'll call 'Firm C', though it noted that *"funds may be more expensive".* It listed the funds Mr P's current pension was invested into, and projected their growth to be 0.0% and 0.6% in five years' time. And it noted *"Due to the clients appetite for better performance I believe it would be in there [sic] interest to transfer to [Firm C]. Client aware of liquidity but cannot access funds until 2020 at the earliest. Clients ATR is appropriate for investing in Alternatives".*

An undated and unsigned 'introducer checklist' recorded that Mr P's personal pension had no guaranteed annuity rate (GAR) or protected tax free cash (TFC).

Portal prepared a 'pension switch report'. This recorded Mr P's objectives were to have the option of TFC at age 55; retain a residual fund that stayed invested until he needed a retirement income; be aware of available investment opportunities; ensure his portfolio reflected his current risk and reward profile; have access to a system that would monitor the performance of his investments; be kept informed of his portfolio's investments. It recorded Mr P's age and occupation, and that he was living with his partner. And that his personal pension fund had a transfer value of £13,599.

Portal's 'pension switch report' recommended Mr P switch his personal pension to a SIPP with Firm C, *"due to the possibility it would exceed the benefits available through his existing person pension".* It said the answers Mr P gave indicated his ATR was 'adventurous'. And recommended Mr P invest his SIPP funds into UCIS and cash as follows, a similar allocation to that set out in Firm A's client information form:

- 40% Raithwaites Hypa Fund
- 17.5% Cool Blue Fractional Plus Fund

- 22.5% Venture Oil International
- 7.5% EOS Solar Energy
- 12.5% cash

Portal's 'pension switch report' did note UCIS may carry greater risks, gave less protection and right of redress, and usually required a sophisticated understanding of investments. However, it also said *"You are not a person who is exempt under the FSMA 2000 PCIS orders i.e. a high net worth or sophisticated investor, however you are a person for whom we as an Independent Advisory Firm qualified to advise on UCIS investments have taken reasonable steps to ensure that the investment in the particular collective investment scheme(s) is suitable following a full KYC (Know Your Customer Investigation) and ATR (Attitude to Risk Assessment), this therefore provides an exemption under COBS (Conduct of Business) regulations 4.12."*

The 'pension switch report' also said Portal would charge Mr P an initial adviser charge of 5% of the total transfer value and an ongoing charge of 1% per annum to manage the investments; that Firm C would charge him an initial set-up fee of 0.2% of the fund, and an annual administration fee of 0.5% plus £80; and an enclosed illustration set out the SIPP funds AMCs and individual fund charges, though I've not been provided with this illustration.

On Portal's advice, Mr P's personal pension was switched to a SIPP with Firm C and invested in several UCIS and cash.

A note of a telephone call from Firm C suggests Mr P removed Portal as his adviser in 2015, though Mr P says this isn't something he would have contacted Portal to do.

In 2019 Mr P complained to Portal about the suitability of its advice, saying his very limited knowledge of investments meant he was totally reliant on its advice. And that the total value of his SIPP funds had fallen to £1,563.16.

In response, Portal didn't accept any liability but said that if the issues with interest payments from Mr P's SIPP funds weren't resolved by his state retirement age, Portal would itself pay Mr P a retirement income. However, Portal also said Mr P had brought his complaint too late, as the advice Mr P complained of was given more than six years ago. It also said Mr P ought reasonably to have realised he had cause for complaint more than three years ago, since he hadn't received any income from his pension investment since 2013.

Mr P rejected Portal's offer and brought his complaint to our Service. He wanted to be financially compensated and to have access to his pension now he'd reached age 55. Ultimately an Ombudsman at our Service decided Mr P had brought his complaint about Portal's pension advice within the time limits.

Our Service therefore went on to consider the merits of that complaint, and our Investigator upheld it. He thought Portal gave Mr P unsuitable advice, as Mr P wouldn't benefit from switching his personal pension to a SIPP. And that the UCIS investments were unsuitable for Mr P given his circumstances. To put things right, our Investigator said Portal should put Mr P back in the position he should have been in but for its unsuitable advice. And that it should also pay Mr P £500 compensation for the distress and inconvenience its unsuitable advice caused him.

Portal didn't agree its advice was unsuitable. It said it had thoroughly assessed Mr P's ATR using a third party risk profiling system, and Mr P's ATR was 'very adventurous'. That its adviser had considered Mr P's circumstances and capacity for loss. And they had thought the switch was suitable for Mr P because he could access more adventurous alternative funds and this was in Mr P's best interest at the time of the advice. Portal also said this wouldn't have been Mr P's only pension provision, because in 2012, the year it gave this advice, Mr P's employer became obliged to automatically enrol Mr P into its occupational pension scheme. Portal said this would have increased Mr P's capacity for loss and enabled him to take more risk with his existing, and modestly valued, personal pension, which would likely then not be his main retirement provision.

Our Investigator didn't change their opinion. They said Mr P didn't fall into the category of a suitable investor for UCIS. And the majority of his SIPP was invested in UCIS, beyond the 5% the regulator said was a suitable amount. Our Investigator asked Portal for evidence of the risk profile assessment that was completed, but this wasn't provided by Portal.

As agreement couldn't be reached, this complaint has come 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.

Having done so, I'm upholding the complaint. I'll explain why.

I've considered whether Portal's advice to switch Mr P's existing pension plans was suitable, and I don't think it was.

At the time of the advice, Mr P was 46 years old, employed, in good health, and had around 14 years until he intended to retire. He owned a home but had a significant outstanding mortgage amount. And it wasn't recorded that he had any other savings or investments apart from his personal pension. That personal pension was invested in equity and index tracker funds, so with some element of risk.

I acknowledge Portal says Mr P's employer would have been obliged to automatically enrol him in its occupational pension scheme in 2012, the year Portal advised Mr P. But no such pension was recorded by Portal. It would have been a new pension in any case, and it isn't known how much Mr P's employer would be paying in and how much Mr P could afford to contribute to it. So I think it's reasonable to conclude the personal pension being switched formed most, if not all, of Mr P's retirement provision at the time of the advice.

Portal recorded that Mr P wanted better performance, access to TFC at 55 whilst keeping some funds invested, for his investment to match his ATR, to be aware of investment opportunities, and to have access to a system for monitoring the performance of his investments. The first three of these objectives may or may not have been achieved by switching. But I don't think they provided sufficient reason for Mr P to switch his personal pension to a SIPP. And I've seen nothing to persuade me that Mr P needed to be aware of investment opportunities or access to a system for monitoring his investments - as I'll return to, I don't think Mr P was an experienced or knowledgeable investor.

The regulator's 2009 report regarding pensions switching identified key considerations. One of these was unnecessary additional costs. Portal's 'introduced business' form recorded the AMC of Mr P's existing personal pension was 1%, with no other costs recorded. Portal's 'pension switch report' said Portal would charge Mr P an initial adviser charge of 5% of the total transfer value and an ongoing charge of 1% per annum to manage the investments; that Firm C would charge him an initial set-up fee of 0.2% of the fund, and an annual administration fee of 0.5% plus £80; and an enclosed illustration set out the SIPP funds AMCs and individual fund charges, though I've not been provided with this illustration. Based on this, I think there was a significant cost to the switch and it would result in Mr P paying higher ongoing annual fees.

In my view, any increased costs would provide a good reason not to proceed with the switch. So, the benefits of switching would need to outweigh the cost to Mr P's pension, as he was unlikely to be able to recoup these charges through improved fund performance over the short to medium term. So, I've considered whether it would've still been suitable advice to switch despite the increased costs.

Mr P wanted to be able to take TFC at age 55 and leave the funds invested. It isn't clear whether Mr P's existing pension allowed for this – Portal didn't establish this, which it should have. But even if it didn't allow for this, it was still nine years before Mr P could access TFC. And Portal didn't establish why Mr P wanted access to TFC, so switching for this reason was premature and could have been explored closer to age 55.

Mr P's other objectives appear to be based around him investing in UCIS – Portal says Mr P wanted his portfolio to reflect his current ATR and he wanted to be able to take advantage of other investment opportunities. Portal recorded Mr P's ATR as 'adventurous'. It says it reached this conclusion after carrying out a thorough assessment of Mr P's ATR and this assessment supports Mr P's need to switch his pension so he could access alternative investments more in line with his ATR.

Despite a request from our Service, Portal hasn't provided a copy of this underlying assessment. But based on the evidence I have been provided with, I'm satisfied 'adventurous' wasn't a fair or reasonable categorisation of Mr P's ATR. I note Portal recorded Mr P's existing personal pension as being invested in equity and index tracker funds, which is supported by the 2008 pensions documentation Mr P has provided. So I accept Mr P's existing pension investments had an element of risk. And Mr P had about 14 years until retirement, so there was time for him to take some risk and still grow his pension before retirement. However, I've seen nothing to suggest Mr P was an experienced or knowledgeable investor – Mr P did not, in any way, reflect Portal's description of an 'adventurous' investor in the 'pension switch report'. And given what Portal recorded of his circumstances at the time of its advice, I don't think Mr P had any real capacity for loss. So, I don't think he was in a position to lose the funds held in this pension.

Given that I don't think Mr P had an adventurous ATR, I don't think he needed to switch his pension to a SIPP. I don't think he had the investment knowledge or experience to be able to take on the risks associated with investing in alternative assets. And I'm satisfied that Mr P could've switched funds within his personal pension if he wanted to take more of a risk.

Portal also said Mr P wanted to be kept informed of the performance of his portfolio, which seems to suggest he would require ongoing reviews of his investments. But I'm not persuaded this was a genuine objective for Mr P – rather it was a consequence of the ongoing advice arrangement that Portal recommended to him, for which it said it would charge Mr P 1% per year. As I've said above, I don't think Mr P had an adventurous ATR. I think investing in mainstream funds would've met his needs, and he could've done this by remaining with his personal pension. His former provider provided annual statements that explained the value of his funds and provided projections as to his future retirement income. So, I think Mr P's existing arrangement already met that need.

For these reasons, I think Portal's advice to switch Mr P's existing personal pension to a SIPP was unsuitable. I also think Portal's advice to invest Mr P's SIPP funds into UCIS was unsuitable. I'll explain why.

Portal also advised Mr P to invest the majority of his SIPP funds into UCIS, with only 12.5% allocated elsewhere (to cash), presumably to cover ongoing charges. I acknowledge Portal's 'pension switch report' noted UCIS may carry greater risks, gave less protection and right of redress, and usually required a sophisticated understanding of investments. And that it said *"You are not a person who is exempt under the FSMA 2000 PCIS orders i.e. a high net worth or sophisticated investor, however you are a person for whom we as an Independent Advisory Firm qualified to advise on UCIS investments have taken reasonable steps to ensure that the investment in the particular collective investment scheme(s) is suitable following a full KYC (Know Your Customer Investigation) and ATR (Attitude to Risk Assessment), this therefore provides an exemption under COBS (Conduct of Business) regulations 4.12."*

But I think the regulator's 2010 findings are relevant here. It said that UCIS was eligible for promotion to certain customers (generally sophisticated, high net worth investors). But even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved restricting a client's exposure to these investments to 3% to 5% of their retirement provision.

I don't think investing in UCIS was suitable for Mr P at all, let alone in the proportion invested. UCIS are high risk investments because they are volatile, illiquid and highly specialised. There's nothing to indicate Mr P had the necessary knowledge or experience to understand and accept the risks associated with these types of investments. And Portal advised Mr P to invest over 80% of his SIPP into UCIS, far in excess of the 3% to 5% restriction the regulator says was good practice even for certain customers.

As I've said, Portal was incorrect to categorise Mr P's ATR as 'adventurous' at the time of the advice, based on the way his existing pension was invested, his capacity for loss and his term to retirement. I think a 'medium' risk approach was more suitable for Mr P. So I don't think Portal's advice to invest any of Mr P's pension funds in UCIS was a suitable investment, as it didn't match Mr P's ATR.

Taking everything into consideration, I think Portal gave Mr P unsuitable advice to switch his personal pension to a SIPP and to invest his SIPP into UCIS. So, it follows that I'm upholding the complaint and requiring Portal to compensate Mr P for his loss as a result of the unsuitable advice.

Putting things right

Fair compensation

My aim is that Mr P should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr P would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr P's circumstances and objectives when he invested.

What must Portal do?

To compensate Mr P fairly, Portal must:

- Compare the performance of Mr P's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- Portal should add interest as set out below:

- Portal should pay into Mr P's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Portal is unable to pay the total amount into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr P won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr P is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr P would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay to Mr P £500 for the distress and inconvenience caused to him as a result of the unsuitable advice. Mr P's circumstances have changed since the advice, and he's had some financial difficulty. I think Mr P would be distressed and concerned to see the pension he'd built up for retirement lose most of its value.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Some liquid/some illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business

					receiving the complainant's acceptance)

Actual value

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

It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Portal should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Portal pays should be included in the actual value before compensation is calculated.

If Portal is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Portal may require that Mr P provides an undertaking to pay Portal any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Portal totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

The SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by Portal taking over the illiquid assets, or this is something that Mr P can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Portal is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair that it pays Mr P an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr P wanted Capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017,

the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr P's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Portal Financial Services LLP should pay the amount calculated as set out above.

Portal Financial Services LLP should provide details of its calculation to Mr P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr P to accept or reject my decision before 29 June 2022.

Ailsa Wiltshire
Ombudsman