

The complaint

Mr M complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a defined-benefit ('DB') occupational pension scheme that he held with his former employer. Portal processed the transfer of Mr M's DB scheme benefits to a personal pension with an income drawdown facility on an 'insistent client' basis. Mr M says Portal should have clearly recommended that he didn't transfer instead of providing him with insistent client documentation. Mr M says he's suffered a loss as a result of Portal's actions.

What happened

Mr M first approached Portal in 2016 in response to a social media advert to discuss his pension and retirement needs.

No action was taken at this stage – but in January 2018 Portal completed a fact-find to gather information about Mr M's circumstances and objectives. It also carried out an assessment of Mr M's attitude to risk, which it deemed to be 'moderately cautious'.

On 5 February 2018 Portal sent Mr M a letter saying that it recommended he didn't transfer his DB pension scheme benefits because of the guarantees / benefits that he would be giving up. It said that the growth rate required to match his guaranteed benefits available from his DB scheme at age 65 – a pension of just under £1,200 a year and a tax-free lump sum of over £5,500 - was too high at 5.2%. But Portal said it could still help Mr M if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 7 February 2018 Mr M returned the insistent client form. Where asked, Mr M indicated on the form that he acknowledged his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits. Mr M indicated that he wanted to access his pension money early to "*...go on holiday and do some DIY.*"

On 15 February 2018 Portal sent Mr M a suitability report setting out its advice. The report outlined Mr M's circumstances at the time, which in summary said that he was employed; he was renting his home; he had around £2,500 in assets; he had no liabilities; and he had no disposable income each month.

The report went on to set out the details of Mr M's existing DB pension scheme, which included the transfer value and the amount of pension Mr M could expect from his scheme at age 65. It also said the critical yield required to match Mr M's existing scheme benefits was 18.4% (assuming a reduced pension and tax-free sum being paid.)

The report said that Mr M's objective was to access his tax-free cash entitlement to go on holiday and make home improvements.

Portal noted that it had explored with Mr M other ways to generate the money required to meet his objective - but said that he didn't have enough assets to raise the money required, or enough disposable income, he didn't own any property and he didn't want to take on further lending or pay the resulting interest.

The report then set out Portal's recommendation. It said that it had already recommended that Mr M shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr M had decided to disregard the advice and that it would be treating him as an insistent client. It went on to propose that Mr M transfer his pension to a flexible drawdown arrangement to enable him to meet his objective.

Mr C signed the relevant application forms in June 2018 and the transfer went ahead. Mr M subsequently received his tax-free cash payment and the proceeds were invested in a range of funds, which Portal deemed matched Mr M's attitude to risk.

In 2020 Mr M complained, via a representative to Portal about the advice he received.

Portal considered the complaint and issued its final response to Mr M in November 2020. In summary it said that it had provided suitable advice and had acted in Mr M's best interests. It said that it had recommended Mr M not to transfer the benefits from his DB scheme because of the guaranteed benefits it provided. It said that it fully explained the risks involved and that Mr M was better off remaining in his DB scheme. But it said that Mr M insisted on going ahead against the advice, so it treated him as an insistent client and facilitated the transfer.

Mr M referred his complaint to our service. An investigator considered the matter and they concluded that his complaint should be upheld. In summary they said that Portal hadn't acted fairly towards Mr M and they didn't think he was a true insistent client. They said Portal only provided Mr M with its suitability report and the reasons why he shouldn't transfer out of his DB pension scheme after he'd signed the insistent client form, so they didn't think Portal made Mr M fully aware of the risks involved in transferring his pension or the benefits that he would be giving up. They went on to say that Portal didn't properly explore the alternatives available to Mr M to meet his objective and that overall they didn't think Mr M would've gone ahead and transferred had things happened as they should have.

Portal disagreed. In summary it said:

- it believes it acted fairly and reasonably and with Mr M's best interest in mind.
- it advised against the transfer and clearly explained this to Mr M.
- Mr M clearly chose the option to go against Portal's recommendation and he confirmed that he was aware of the risks and the benefits he would be giving up by transferring.
- the returned insistent client form was in Mr M's own words contrary to the view of the investigator.
- it believes it followed the correct insistent client process and says that its postal correspondence process demonstrates best practice for insistent client transactions.
- it refutes the finding that Mr M wasn't a genuine insistent client.

Because the investigator wasn't persuaded to change their mind, the case was passed to me for a final 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. My reasons are set out below.

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 M's best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr M as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It sets out three key steps for advisers to take.

- 1) Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).
- 2) The information which the firm should communicate to the insistent client is:
 - a) that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;
 - b) the reasons why the transaction will not be in accordance with the firm's personal recommendation;
 - c) the risks of the transaction proposed by the insistent client; and
 - d) the reasons why the firm did not recommend that transaction to the client.

Acknowledgement from the insistent client - COBS 9.5A.4

(1) The firm should obtain from the insistent client an acknowledgement that:

- (i) the transaction is not in accordance with the firm's personal recommendation; and
- (ii) the transaction is being carried out at the request of the client.

(2) Where possible, the acknowledgment should be in the client's own words.

Portal says that it followed the rules – it provided suitable advice and acted in Mr M's best interests. It says that it followed the correct insistent client process and that its postal correspondence process demonstrates best practice for insistent client transactions.

Mr M says that he was told that he could take a lump sum from his pension and attracted by this opportunity he wanted to take his family on holiday and he agreed to go ahead. He says this was an aspirational expenditure and not a necessary one – particularly not at the expense of losing guaranteed pension benefits.

Mr M says he would not have transferred his pension but for Portal's involvement.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr M's best interests. And I think Mr M likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 5 February 2018 following the telephone discussion Portal had with Mr M about his pension options, it sent him what can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match Mr M's guaranteed benefits from his DB scheme, and because he'd be giving up those guaranteed benefits, it recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr M's best interests. But the information on this form was limited to the loss of guarantees and the growth required to match his existing benefits. While Portal later sent a more detailed suitability report, which I will refer to later on, at this stage Mr M had little information to go off to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portal recommended Mr M should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Portal's recommendation, it enclosed the necessary forms Mr M needed to complete and return to pursue this option. And 'option 1' he was presented with was to go against Portal's advice – the second option was to do nothing as per its recommendation. It strikes me that Portal's process here was geared towards facilitating the transfer.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr M's best interests, not only would it have given more detail upfront and placed greater emphasis on the reasons why the transfer wasn't in Mr M's best interests, it also wouldn't have told him at the same time as delivering its recommendation - albeit a brief one - how he could put it aside and bypass it. I think the wording and the emphasis placed on how Mr M could ignore Portal's recommendation was unfair to him and wasn't in his best interests.

I don't think it was in Mr M's best interest to go against Portal's recommendation – yet Portal made it very easy for him to do so. I also think, given the context and the emphasis placed on this, that Mr M could reasonably have interpreted this overall that Portal was recommending he go ahead and transfer.

I think it ought to have been clear to Portal that Mr M had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr M was an experienced investor – in fact it appears he was completely inexperienced. I'm mindful too that Portal had deemed Mr M's attitude to risk to be 'moderately cautious'.

I think this should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route.

I can see that Mr M's insistent client forms included a section where he put in his own words why he wanted to access his pension fund early. And while this was something the FCA guidance pointed to as being good practice, I don't think Mr M's response adequately demonstrates that he knew and understood the risks involved and the recommendation being made.

I say this not only because the majority of the form was pre-completed and Mr M simply had to tick a box to say that he understood what he was giving up by transferring, but crucially as I indicated earlier on, he hadn't yet received Portal's full suitability report and had time to read and digest it before deciding to go ahead anyway. So I'm not persuaded Mr M was able to make an informed choice here. And I don't think this document alone sufficiently showed Mr M was an insistent client.

It was only after receiving Mr M's confirmation that he wanted to proceed with the transfer that Portal sent him its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, this was followed by a positive recommendation, advising Mr M to transfer his benefits to facilitate a flexible drawdown pension. And this was all set out under a heading titled '*Our recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr M advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr M advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report after securing Mr M's confirmation to proceed on an insistent client basis.

So, by recommending that Mr M transfer his benefits to a particular scheme, not only did this completely undermine the recommendation not to transfer, I think Portal has effectively recommended that he transfer out of his DB scheme. If Portal didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr M's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. It couldn't separate out the elements. For this reason, I think on receipt of the full suitability report Mr M likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Mr M's objective for accessing his pension early was to take his family on holiday and to carry out some home improvements. Interestingly, during the initial telephone call with Portal in which it discussed Mr M's objectives, he said he only needed £2,000 for a holiday – it wasn't until he was told the amount he could access tax-free that he said he could use the extra amount for home improvements. I think he was seduced by the sum of money he was told he could gain access to. But in any event, it doesn't strike me that Mr M's objective could only reasonably be met by transferring his benefits out of his DB scheme. Yet I think that Mr M most likely went ahead with the transfer because he believed this to be the case.

I say this because, while Portal's recommendation says that it discussed alternative courses of action with Mr M to meet his objective and it gave the reasons these were discounted, I think Portal paid little attention to this matter and it far too readily used what Mr M said to put them to one side. For example, Portal recorded on the fact-find that taking a loan was discounted because interest rates were too high. I'm not persuaded this is exactly what Mr M said or meant during the phone call in which this was discussed. But regardless, this was during a period of historically low interest rates, so I think Portal should've explored this with Mr M in more detail – particularly given as I said above that he originally said he only wanted £2,000 for a family holiday. And because despite how Mr M's income and expenditure is recorded in the fact-find, I think it was affordable.

I think the rules and guidance that in were in place at the time were clear that Portal had to act with due care and skill and in Mr M's best interests. And by not seeking to properly address what I consider was Mr M's real objective of only wanting a couple of thousand pounds for a holiday or to fully consider the reasonable alternatives available to him to address his need before carrying things out, I'm not persuaded this was acting in his best interests.

Ultimately I don't think Mr M was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objective. I also think Portal ultimately gave Mr M a positive recommendation to transfer out of his DB scheme, which in the circumstances I think would've given him the impression that Portal agreed with his approach

Overall and on balance, given these failings, I don't think it would be reasonable for me to

conclude the process Portal followed meant that Mr M can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr M wasn't clear. It didn't act in Mr M's best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr M would've still gone ahead. Having done so, if Portal had acted in Mr M's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr M's true objective at the time, I don't think he would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr M was an experienced investor such that he possessed the requisite knowledge or had the confidence to go against the advice he was given. I think he relied solely on the advice and process Portal employed. I don't think Mr M's objective was set in stone or that there weren't other things that could've been properly explored with him meaning he'd have gone ahead in any event.

I can see that Mr M went on to make further withdrawals from his pension in addition to the initial tax-free cash he took at the time. Mr M has told us the monies were used for home improvements. I've thought about this - but I'm not persuaded this demonstrates that Mr M always intended to access his pension early and would have insisted on going ahead regardless.

As I said above, I think it was Portal that planted the seed in Mr M's head that he could access his pension benefits early. I don't think the subsequent withdrawals Mr M made were planned at the time of the advice. It seems to me that Mr M withdrew further funds because he could, by virtue of Portal having made the funds available to him through the transfer. I think the further withdrawals flow directly from Portal's failure to act in Mr M's best interests by not providing him with suitable advice and failing to communicate with him in a clear, fair and not misleading way as I have set out above. Had Portal emphasised the importance of these funds to Mr M's retirement, I think it's unlikely he would've insisted on accessing them.

So if things had happened as they should have, taking everything into account, I'm not persuaded Mr M would have insisted on going ahead with the transfer.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Portal's failings. I consider Mr M would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

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.

My understanding is that Mr C could've taken his DB pension benefits without reduction at age 65. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr M 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 any final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr M.

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.

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr M. And taking everything into account, including that I consider Mr M is now at the age when his retirement provision is of greater importance, I think the unsuitable advice has caused him distress. So I think an award of £300 is fair in all the circumstances.

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr M the compensation amount as set out in the steps above, up to a maximum of £160,000.

Portal Financial Services LLP should also pay Mr M £300 for the distress and inconvenience this matter has caused.

Where the compensation amount does not exceed £160,000, I would additionally require

Portal Financial Services LLP to pay Mr M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Portal Financial Services LLP to pay Mr M 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 Financial Services LLP pays Mr M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

If Mr M accepts this decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 July 2022.

Paul Featherstone

Ombudsman