DRN-3140780

The complaint

In summary, Mr R complains that the advice provided by Portal Financial Services LLP to transfer a personal pension into a self-invested personal pension (SIPP) was unsuitable. In bringing his complaint, Mr R is represented by a claims management company (CMC).

What happened

In 2012 Mr R met with Portal to discuss his pension. From the available information it appears that at the time of the advice Portal recorded that:

- He had an income of approximately £18,000 a year.
- He was aged 53.
- Had approximately £1,000 in savings.
- His intended retirement age was 65 with no need for Tax Free Cash until 65.

In respect of his objectives Portal said:

- He was looking for potentially higher investment performance than lower charges.
- He was looking for greater investment fund choice

In respect of Mr R's attitude to investment risk, Portal referred to answers it said Mr R gave in his attitude to risk (ATR) questionnaire. In summary it said:

- Mr R agreed that he generally looked for safer investments, even if that meant lower returns.
- Mr R disagreed that it usually took him a long time to make up his mind in investment matters.
- Mr R agreed that he associated the word 'risk' with the idea of 'opportunity'.
- Mr R agreed that he preferred bank deposits to riskier investments.
- Mr R agreed that he had had little experience of stocks and shares.
- Mr R disagreed that he tended to be anxious about the investment decisions he had made.
- His responses from the ATR questionnaire would have informed Portal that his overall attitude to risk outcome was that of 'Balanced' investor and that outcome would have been the basis on which his recommendation was made.

Mr R's personal pension, which was transferred into the SIPP, was taken out in 2005. Shortly prior to the transfer in 2012, it appears that the pension was invested in a combination of property, 50/50 Cautious Collective and a Blackrock Cautious fund. The funds had a 1% annual management charge.

Portal advised Mr R to transfer his personal pension into a SIPP. The initial adviser charge was 5% of the value of the funds invested. There was an ongoing adviser charge of 1% a year. Transact charged 0.5% of the fund as a commission charge on an annual basis.

In 2015 Mr R complained to Portal. It wrote to Mr R explaining why it didn't think the advice it provided to him had been unsuitable.

In July 2020, Mr R's CMC raised the complaint with Portal. It decided that the complaint wasn't one that could be considered as it believed it had addressed the complaint back in 2015. As Mr R hadn't pursued the complaint with our service, Portal believed the complaint hadn't been referred to our service in time.

When Mr R's CMC referred the complaint to our service, Portal told our investigator it believed the complaint had been made outside the six-month referral deadline. It also said it didn't think Mr R's CMC was regulated to bring complaints.

Our investigator explained why they believed the complaint was one our service could consider. Portal remained of the view that the complaint couldn't be considered by our service. So, the case was reviewed by one of my ombudsman colleagues. They decided that the case was one our service could consider. And they explained in summary in a provisional jurisdiction decision, why they believed Portal's response to Mr R in 2015 did not meet the requirements of a final response.

They also explained that they believed the complaint made in 2015 also covered the suitability of the advice that Portal gave to Mr R, including whether transferring the pension was appropriate for him. They concluded that Mr R complained about those issues in 2015, which was within six years of the original event complained about - the 2012 advice. The ombudsman concluded the letter Portal sent Mr R didn't start the countdown for the six-month deadline for complaining to our service. So, the complaint wasn't out of time. The ombudsman invited the parties to make any final points if they wanted before formalising their decision. A final jurisdiction decision was issued on 22 July 2021.

Our investigator then considered the merits of Mr R's complaint. They explained why they were upholding the complaint. In summary, based on the available information and taking into account the initial and ongoing fees, the SIPP recommended was more expensive than Mr R's existing pension plan. Also, they thought Mr R's existing pension plan was reasonable for his circumstances and that the switch wasn't in his best interests.

In relation to the investments recommended, the investigator said Portal had a responsibility to assess the underlying investments. It recommended investing a large proportion of the proceeds of transfer into unregulated collective investment schemes (UCIS) weren't consistent with Mr R's ATR or suitable for his wider circumstances and capacity for loss. They didn't think Mr R was willing to take substantial financial risks or had any capacity for loss. They also didn't think that an assessment had been carried out to see if Mr R fell within one of the PCIS or COBS exemptions in relation to the promotion of UCIS investments. They thought Mr R was a cautious investor with no investment experience of UCIS and that the portfolio of UCIS Portal recommended wasn't suitable for Mr R.

In response to the merits view, Portal set out two principle concerns. In summary:

1) It refuted the CMCs authorisation and permission to submit complaints.
2) It didn't accept the assessment.

It went onto explain why it didn't accept the CMC's authority to act on behalf of Mr R, or recognise them as an authorised body regarding complaints submitted to our service.
In relation to the investigator's assessment, it argued that the complaint had been made out of time, as the complaint had been made six years from the point of advice and three years from when he ought reasonably to have known he had cause for complaint. And it explained in relation to the three-year time limit, how it considered Mr R would reasonably have had cause for concern.

The investigator replied explaining again why they considered the complaint had been made in time and that the ombudsman had given the same answer in their jurisdiction 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 CMC's authority to submit Mrs H's complaint

Portal doesn't think the CMC who represents Mr R, is authorised to represent him by the FCA. In the context of the complaint made on Mr R's behalf, Portal could still have communicated with him directly.

Our service has written to Portal explaining why we believe Mr R's CMC is able to represent complainants such as Mr R – and that our service expects it to cooperate with us in respect of complaints brought to us by this CMC. This issue doesn't have any bearing on the merits of Mr R's complaint, so I don't intend to say anything further on this point.

Our jurisdiction to consider the complaint

In its response to the investigators view, Portal also explained again why it believed the complaint had been made out of time. As I've summarised above, one of my ombudsman colleagues issued a jurisdiction decision addressing whether the complaint had been made in time. They decided that it had been made in time, so I don't intend to make any further comment on the issue of jurisdiction.

Suitability of the advice

There is limited information available from the time of the advice. Disappointingly Portal didn't provide its business file as requested by our service. But it has provided some information from the time of the advice, in its response to Mr R from 2015. Information about the SIPP Mr R was advised to transfer into, has been obtained from the SIPP provider. And information about the policy transferred into the SIPP was also obtained from that pension provider. So, I'm satisfied I have sufficient information to be able to consider the suitability of the recommendation made to Mr R.

In 2008, the Financial Services Authority (FSA), the regulator at that time; issued a report entitled "Quality of advice on pension switching". The report summarised the findings of the regulator's thematic review of pension switching advice. It also gave examples of poor, compliant and good, practices it found regarding the quality of advice given since pensions A-day. It mentioned several examples of what it thought could constitute unsuitable advice. And I've set out some of those examples below.

- A more expensive pension in order to consolidate different pension schemes, but where the extra cost was not explained or justified to the customer.

• A pension that was more expensive than a stakeholder pension, but a stakeholder pension would have met the customer's needs.
• A pension incurring extra product costs without good reason (this outcome involved assessing cases where, for example, the reason for the switch was for investment flexibility, but this was not likely to be used; the reason was fund performance, but there was no evidence the new scheme was likely to be better; or the reason was flexibility of a drawdown option, but there was no evidence that this option was needed).

And having thought about what the regulator said in the report, I'm not satisfied from everything I've seen in this case, that there was any need for Mr R to incur the additional costs, or for him to be exposed to the increased investment risk which resulted from the advice Portal gave Mr R; to transfer his pension into the SIPP. I've set out my reasoning below.

At the time of the advice, Portal recorded that Mr R had an income of approximately £18,000 a year and approximately £1,000 in savings. He was aged 53 and intended to retire at 65.

When Mr R met with Portal, the pension policy he was advised to transfer, was invested about 85% in cautious funds and approximately 15% in property funds. This portfolio of funds doesn't suggest to me that he was someone who wanted to take any significant risk with his pension.

Portal recommended that Mr R invest a significant proportion of the monies transferred from his existing pension into UCIS funds. These type of investment funds were considered by the FSA to have a higher risk than many collective investment funds. And it provided guidance as to who they should be marketed to. From what I've seen of Mr R's circumstances, I'm satisfied that he didn't fall into the categories of investor who UCIS could be promoted to. Considering the specialised nature of the funds, I think they fell within the restrictions set out in COBS.

Portal has pointed to the ATR questionnaire Mr R completed and the answers he gave. The answers he gave to the ATR questionnaire that Portal has referred to, in my view indicate that he didn't want to take any significant risk with his pension investments. And, his answers don't suggest to me that he had an ATR which was in line with the requisite risk profile for the UCIS investments that Portal was recommending.

Portal was advising Mr R, and it had a duty to act fairly and professionally in accordance with his best interests. It should in my view, have carried out an objective assessment of his ATR. And I'm not satisfied from what I've seen that it did that.

So, considering his overall financial circumstances, I'm not satisfied that the assessment of his ATR was an objective appraisal of the level of investment risk that Mr R was prepared to take with his pension funds. And considering the information Portal has provided about Mr R's financial circumstances, I don't consider that he had the capacity to take the level of investment risk Portal recommended.

I say this because I've noted from Mr R's circumstances and history of investments, that here doesn't appear to be any significant level of experience or sophistication which would have enabled him to understand the nature of the recommended investments, or the losses which might be incurred as a result of investing in them.

I consider that Mr R would have been aware that investments carried some degree of risk in order to have returns, but he relied on Portal to recommend investments which would have been not only consistent with his attitude to risk, but also suitable for his wider circumstances. Mr R had very little in the way of other recorded investments or pensions. And I think he was very likely to have been reliant on this pension in retirement.

I've also considered the charging structure and options provided by the pension Mr R was advised to transfer from and the SIPP he was advised to transfer into. From the information I have seen, the ceding pension had an annual management charge of 1% pa. The plan also had a fund bonus that would pay a percentage of the value of the fund if Mr R stayed invested for up to 10 years and a smaller bonus of less than 1% a year from year 11 onwards.

In contrast the initial adviser charge for transferring into the SIPP was 5% of the funds transferred. In addition, there was an ongoing adviser fee of 1% pa. The SIPP also had an annual administration fee of £80, annual commission charge of 0.5% pa and the funds had a further annual management charge of 0.5% per annum.

So, it seems to me taking into account the initial costs of transfer and the ongoing fees, the SIPP was a more expensive proposition from a charging perspective. And Mr R lost the benefit of the loyalty bonus that he could have received from the ceding pension if it had remained in place. Considering the available evidence, I'm not persuaded that that someone of Mr R's ATR, apparent limited investment experience and requirements needed the flexibility provided by the SIPP that Portal recommended.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr R as close as possible to the position he would probably now be in if he had been given suitable advice.

I think Mr R would have remained in the pension that was transferred. I am satisfied that what I have set out below is fair and reasonable given Mr R's circumstances and objectives when he invested.

What should you do?

To compensate Mr R fairly Portal should:

Compare the performance of Mr R's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable. Portal should also pay any interest set out below.

If there is a loss, Portal should pay into Mr R's pension plan, to increase its value by the amount of the compensation and any interest. Portal's payment should allow for the effect of charges and any available tax relief. Portal shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If Portal is unable to pay the compensation into Mr R'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

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

For example, if Mr R is likely to be a basic rate taxpayer at the selected retirement age, which seems likely to be the case, the reduction would equal the current basic rate of tax. So, that is the reduction that I think should be applied. However, if Mr R would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

In addition, you should pay Mr R £350 for the distress and inconvenience caused by the disruption to his retirement planning.

Provide the details of the calculation to Mr R in a clear, simple format.

Income tax may be payable on any interest paid. If Portal considers that it is required by HM Revenue & Customs to deduct income tax from that interest, Portal should tell Mr R how much it has taken off. It should also give Mr R a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	notional value of the pension plan that was transferred assuming Mr R did not switch into the SIPP	date of transfer	date of settlement	not applicable

- The ideal redress would be to complete the calculations by taking a notional value of the pension plan that was transferred into the SIPP, assuming that Mr R would not have switched. However, if that is not possible the above exercise should be completed using the benchmark: for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds

Actual value

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

If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Portal should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If Portal is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Portal may wish to require that Mr R provides an undertaking to pay Portal any amount he may receive from the investment 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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Portal should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Apply those rates to the investment on an annually compounded basis.

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* 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 total all those payments and deduct that figure at the end instead of deducting periodically.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr R wanted capital growth with a small risk to his capital.

- Mr R would have remained in the existing pension plan had Portal not provided unsuitable advice.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to their capital.

- 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's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr R's risk profile was in between, in the sense that he was prepared to take some level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr R into that position. It does not mean that Mr R would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr R could have obtained from investments suited to his objective and risk attitude.

SIPP Fees

The SIPP largely exists because of the unregulated and illiquid investments. In order for the SIPP to be closed and further SIPP fees prevented, these investments need to be removed. But if Portal can't buy them, Mr R is faced with future SIPP fees. I think it is fair to assume five years of future SIPP fees. So, if Portal can't buy the investments, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

Further information

The information about the average rate can be found on the Bank of England's website by searching for 'quoted household interest rates' and then clicking on the related link to their database, or by entering this address www.bankofengland.co.uk/boeapps/database, clicking on: Interest & exchange rates data / Quoted household interest rates / Deposit rates - Fixed rate bonds / 1 year (IUMWTFA) and then exporting the source data.

There is guidance on how to carry out calculations available on our website, which can be found by following this link: https://www.financialombudsman.org.uk/businesses/resolving- complaint/understanding-compensation/compensation-investment-complaints. Alternatively, just type 'compensation for investment complaints' into the search bar on our website: www.financial-ombudsman.org.uk.

My final decision

My final decision is to uphold Mr R's complaint about Portal Financial Services LLP. If Mr R accepts my decision, it needs to calculate and pay any redress that may be due using the methodology I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 22 November 2022.

Simon Dibble
Ombudsman