DRN-3160466

The complaint

Mr F complains about the advice he received from Portal Financial Services LLP ('Portal') to transfer an occupational pension scheme ('OPS') he held with his former employer to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ('UCIS').

Mr F is being represented by a third party but for ease I'll refer to all their comments as those of Mr F.

What happened

Mr F was introduced to Portal in 2014 after he'd been in contact with another business, from here on referred to as 'Firm C'. At the time, Firm C was an appointed representative ('AR') of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority ('FCA') to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice. Portal had an established business arrangement with Firm C, whereby Portal would provide the pension transfer advice before referring the client back to Firm C for investment advice on the transferred funds, and this arrangement was followed for Mr F.

At the time the advice was given by Portal, Mr F was 56 years old, married and living in property he owned worth approximately £110,000 with an outstanding mortgage of £70,860. He earned approximately £23,000 per annum and had no other assets or investments. He had an overdraft and an outstanding loan from consolidated debts totalling approximately £19,000 with monthly repayments of £700. His desired retirement age was recorded as 65 in the fact-find. His attitude to risk ('ATR') was recorded as 'balanced'.

Mr F held retained benefits in an OPS, which had offered a Cash Equivalent Transfer Value of £74,080.23 at the time of advice. This was projected to provide a pension of £6,012 from the age of 65 if he took tax-free cash ('TFC') of £13,060. It also provided a 50% widow's pension in the event of Mr F's death. Due to Guaranteed Minimum Pension requirements, no TFC was payable from the scheme until retirement. Mr F also held an OPS with his current employer and Portal recorded that he'd been working with them for approximately 14 years at the time of advice.

Portal's suitability report noted that Mr F wanted to maximise the amount of TFC he could release in order to repay his debt. It also said he wished to be able to draw down an income from aged 65 and felt the flexibility to drawdown a higher pension in the early years would be better for him. In addition, it noted that enhanced death benefits were a significant priority to ensure Mr F's wife had the best possible pension were he to pass away before her.

Portal recommend that Mr F transfer his OPS benefits into a new SIPP enabling him to take £18,520 TFC. It also said that the investment advice would be provided to him by Firm C.

The final transfer value of the OPS was £98,988.58 and this was transferred to the SIPP on 2 April 2015. Mr F then took a lump sum of £23,493.36 as TFC.

Firm C made the following initial investments into UCIS totalling £12,000:

Biomass Investments Plc - £2,100.00
Brisa Investments Plc - £1,800.00
Lakeview UK Invest - £2,100.00
Motion Picture Global - £2,100.00
Real Estate Invest USA - £2,100.00
Strategic Residential Dev - £1,800.00

The remaining funds were used to purchase regulated investments with a small amount remaining in cash.

In October 2019 Mr F complained to Portal that the advice to transfer his OPS was unsuitable for him. He said that as a low earner, a SIPP was not suitable because it carried higher fees than a standard pension when including advisor charges. He stressed that he had no previous investment experience or knowledge of pensions or the financial markets and had a low capacity for loss and low ATR at that time. He said he was led to believe he'd make more money by transferring his pension.

Portal didn't agree. It said releasing TFC was a priority and it had taken into consideration Mr F's circumstances when making this recommendation. It said Firm C was responsible for any investment advice and it couldn't comment on this further. It noted that Mr F was aware that his OPS provided a guaranteed income as this was explained to him. It also said SIPPs are suitable for retail clients and that the chosen wrapper was low-cost and "stakeholder friendly". It stressed the chosen scheme allowed Mr F to take TFC from the age of 55, unlike his OPS.

Mr F remained unhappy with this response and brought his complaint to our Service.

Our Investigator looked into things and upheld the complaint. They felt the advice to transfer into the SIPP was appropriate given Mr F's aim was to release TFC to service his debts and there were no other suitable options to enable this. However, they said Portal failed to assess the investment strategy put forward by Firm C, and Mr F's investments were too risky for him. They therefore asked Portal to compensate Mr F as though his funds had been placed into investments in line with a medium risk investment strategy.

Portal didn't agree and argued it was not responsible for the investments nor the fact they didn't match Mr F's ATR. It said that it had conducted appropriate due diligence on Firm C and Firm S, including checking their regulatory status and researching for evidence of adverse reputation. Portal said it also requested details of the investment strategy envisaged for clients like Mr F. It highlighted that it had considered the likely asset-allocation when making its recommendations.

As the parties couldn't agree, this complaint has now been passed to me to decide.

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 think the complaint should be upheld. I'll explain why.

Portal advised Mr F to transfer his OPS to a SIPP but says it didn't provide the recommendation regarding the investments held within the SIPP, as this was to be done by Firm C. Although the intention was for another regulated firm to advise on and arrange

Mr F's underlying SIPP investments, I don't think that meant Portal's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. I believe that as Mr F's financial adviser, Portal still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved.

In my opinion, Portal couldn't ensure suitable advice was given without thinking about the intended investment. Portal appeared to recognise this in its suitability report when, despite saying Firm C would provide specific investment advice, it set out its own "fund recommendations" for the asset classes Mr F should invest in and to what extent.
It suggested that, due to his risk profile, retirement age and objectives, Mr F should invest in the following assets:

- Cash 10%
- Equities 60%
- Other Fixed Interest 12%
- Secured Structured Bonds 18%

The recommendations made up a model portfolio for a balanced investor, which Portal satisfied itself Mr F was. And it's partly on this basis that, if Mr F invested in line with a suitable model portfolio and achieved the relevant targeted returns, Portal concluded that transferring could increase his overall pension benefits and therefore be worthwhile.

The regulator's position

Having thought carefully about what happened here, I don't think Portal's categorisation of Mr F as a balanced investor was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time of the advice the regulator had made its view clear that it considered in order to suitably advise on pension transfers and pension switches, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

"Financial advisers (…) are under the mistaken impression (…) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…)

If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."

A further alert from the regulator in April 2014 stated:

"Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying

investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6)."

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portal was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these precepts if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Portal may say the 2013 alert was specific to situations where the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. It believes this distinguishes the circumstances of Mr F's transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. Whilst I've given that possibility careful thought, I don't agree that the alert was limited to those very specific circumstances.

I can see that the 2013 alert makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Mr F's case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension switch and transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these are standards that have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. I think the 2014 alert supports this view as it clearly refers to what the regulator expects advisers to do when providing pension switch or transfer advice more generally. So, I think these alerts are relevant to firms in the position of Portal in this case.

Portal appears to have been under the impression that, as it told Mr F it wasn't providing any advice on the underlying investments, this enabled it to provide advice on a restricted basis. But this wasn't right. Under COBS 2.1.2 Portal couldn't seek to exclude or restrict its duty or liability to Mr F under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable - again, this had to include consideration of how Mr F's funds would be invested. So, Portal couldn't separate out the two elements. Its advice on the suitability of the transfer and switch had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr F. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr F to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

COBS 9.2.2R included the following wording:

"(...) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment."

So, as part of the fact-finding process, Portal had to understand Mr F's objectives – two of which were the release of TFC and to have the ability to draw down an income on retirement – and the related risks. It wasn't free to ignore how Mr F's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr F would invest in within the wrapper, doesn't in my mind seem reasonably possible.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portal's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above. I've considered Portal's advice with these in mind.

As Portal didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Mr F's transferred funds would ultimately be invested. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, it says it saw no issue with this.

Portal also says that its advisers carried out extensive due diligence on Firm C and Firm S, including background checks on key individuals, assessing the scope of their permissions and information about previous complaints. It also said it requested details of the investment strategy Firm C was likely to deploy for clients such as Mr F. Portal says it was satisfied Firm C was qualified to provide investment advice and the FCA allows for one regulated firm to assess the pension transfer and the other to provide investment advice.

As evidence of this, Portal provided a copy of the 'Compliance Health Check' for Firm S completed by a third party on 12 May 2012. Notwithstanding the statement on page five that Firm S did not intend to promote UCIS funds in the future, this document was almost three years old by the time the transfer actually took place. So, I don't think it should have been relied on in perpetuity.

Furthermore, Portal chose to rely on a general statement, given over two years previously, that said recommendations of broad categories of investments, with potentially broad gradings of risk, might or might not be made in any given case and that UCIS would not be recommended. I don't think that was a reasonable basis on which Portal should have assessed the suitability of the pension transfer for Mr F. In my opinion, Portal needed to understand the nature of the investments envisaged for Mr F specifically, rather than rely on a general statement about Firm C's investment philosophy.

It is worth noting that Portal's own model portfolio included an allocation of 18% of Mr F's assets into "Secured Structured Bonds". The suitability report issued to Mr F stated that these were asset backed debt securities, issued for a fixed term with a fixed interest rate. They were not regulated collective investments and could only be recommended by authorised and regulated independent financial advisers (IFAs). It said the investments were not covered by the Financial Services Compensation Scheme (FSCS), although any recommendation to invest was. So, Portal was effectively recommending UCIS-like funds as part of its own portfolio and it is unclear why it would do so if it did not expect Firm C to make a similar recommendation.

Mr F was one of many clients that Firm C referred to Portal for pension transfer advice. Portal indicates that roughly two to three cases a month were intended to be referred to it by Firm C over the course of a year. There were multiple dealings with Firm C throughout 2014 and 2015, during which time Firm C repeatedly invested consumers' pensions in UCIS, and Portal continued to recommend pension transfers where the funds would be invested at Firm C's discretion. I've not been provided with any information to demonstrate that Portal checked it was still Firm C's position not to recommend UCIS when it was making other enquiries with Firm C. I think it was important that this was confirmed. But in any event, as I've explained above, because Portal needed to consider the proposed investment for Mr F – and it didn't do this – I don't think it did enough to assess the overall suitability of the advice given to Mr F.

This doesn't mean that I'm holding Portal responsible for the failings of another regulated firm. I've focused on Portal's own responsibilities as the business involved with the capacity to 'unlock' the funds held in Mr F's OPS. There's no dispute that Portal gave that advice and in my view it incorrectly thought it could limit its advice to the transfer without seeking information about the investments Firm C intended and eventually arranged for Mr F.

It is clear to me that Firm C and Portal had come to an agreement about their working relationship. Firm C did not have the required regulatory authorisations to give pension transfer advice whereas Portal did, and an agreement to work together for pension-release clients came about. Portal has stressed it had never before agreed to work with another authorised firm, as the processes and controls required to set up the relationship would be disproportionate to the level of business it might bring about. However, an exception was made for Firm C, as it had proposed to send significant levels of business to Portal.

In those circumstances it seems to me that Portal needed to do more to ensure that the two firms worked together to give suitable pension transfer advice to clients. Aside from the initial due diligence checks carried out at the outset of the relationship, I have not seen any evidence that further checks were made by Portal to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was, as I say, a necessary part of the suitability assessment carried out by Portal on a case by case basis for individual clients. But it was also, in my view, a reasonable due diligence requirement brought about by the ongoing relationship itself, so that any patterns of unsuitable or unaligned advice could be identified and addressed.

This required Portal to take reasonable steps to ensure that both firms were acting, together, in their clients' best interests. Whilst Portal set out in the suitability report what spread of investments it thought would be suitable for Mr F, I don't agree that it was sufficient for Portal simply to recommend a broad spread of investments in the expectation that that would bring about the necessary alignment with Firm C's investment recommendations.

The reality is that having followed Portal's transfer advice, 17% of Mr F's SIPP was invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here. It said that as well as UCIS only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), as an example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. I don't think UCIS was suitable for Mr F at all, let alone in the proportion invested. There's nothing to indicate Mr F had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

In my view, the fact that Portal didn't take sufficient steps to consider the investment proposal for Mr F when assessing the suitability of the proposed transfer meant that it couldn't reasonably conclude the course of action it recommended was being made on a sound basis. However, I recognise that Portal's own model portfolio included a similar allocation of 18% of assets into 'secured structured bonds', which are UCIS-like funds. So had Portal carried out the due diligence I'd have expected, I don't think this would have necessarily changed the investment of Mr F's assets into UCIS funds. But I don't think this 18% allocation was appropriate for Mr F, particularly in light of his 'balanced' ATR for the reasons outlined above. Therefore, I still think that Portal's failure to provide suitable advice in respect of the whole transaction is the reason Firm C was able to invest Mr F's assets in that way.

In my view, if Portal had requested information about the proposed investments and been advised that Firm C intended to invest almost 20% of Mr F's funds in UCIS, it could've queried this, given its understanding that Firm C did not invest clients funds in UCIS at all. And I think that had appropriate enquiries been made, it would've become apparent something was wrong with Firm C's proposal and that the transfer was therefore unsuitable as it would likely to lead to Mr F being exposed to more risk than Portal considered appropriate. I think it's likely that, having realised the investments Firm C intended to make differed from those that were likely to be suitable for Mr F, Portal could've taken preventative action or at the very least made Mr F aware of the situation so he could, if servicing rights had already been transferred to Firm C, sought to take corrective action himself.

Overall, I think Portal needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Mr F. It should've asked Firm C for the specifics of this or, as a minimum, an outline of the proposition. Had it done so, and Firm C had given it a clear framework of the proposition, then I would've expected Portal to have advised Mr F that it couldn't recommend he transfer away from his OPS if Firm C intended to invest his funds in UCIS. And if Portal had warned Mr F against investing in line with Firm C's proposal, I think it's more likely than not that Mr F would've listened to it and the investments in UCIS would not have taken place. As a result of Portal's shortcomings here, it seems to me that Firm C was in effect given the freedom and opportunity to do as it wished with how Mr F's SIPP was invested.

Notwithstanding what I've said above, I've considered whether the transfer ought to have been recommended in any event.

The advice to transfer

OPSs typically have significant benefits and guarantees. Giving up the benefits and guarantees available under an OPS and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6G) at the time of the advice, stated:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer, convert or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a

transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests."

So, the starting point is that a transfer won't usually be suitable. Generally, a transfer will only be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

At the time of Portal's advice Mr F was 56 years old, employed and in good health. He was a standard retail investor with nine years until he expected to retire and his OPS benefits became payable. Aside from his state pension entitlement, Mr F had another workplace pension which he'd had for around 14 years and remained active. But further details of this pension weren't gathered by Portal as part of its review. Mr F did not have any savings and held no investments. Although he was a homeowner, he had a substantial outstanding amount on his mortgage. It seems to me that based on the information Portal held, Mr F's OPS was one of his most valuable assets. It provided a guaranteed income at retirement with increases, along with a spouse's pension. Based on this I think Portal should have recognised the significance of Mr F's OPS and proceeded with caution.

Transferring his OPS meant that Mr F would be losing his guarantees and instead relying on investment performance from a new scheme. Portal has argued this option remained suitable given Mr F had another OPS which he could rely on for pension provision, in addition to his state pension, and given this option enabled him to access the TFC to service his debts. However, I do have some concerns about this advice.

Firstly, I'd note Portal obtained no details about Mr F's other pension scheme. It also said that knowing Mr F's employer and his salary at that time allowed it to make an approximate assumption of the level of pension Mr F could expect to receive in retirement. But I don't agree, as Mr F's salary, and therefore pension contributions, could have varied significantly in the time he'd been employed. This approach also meant Portal didn't know the benefits of the scheme or the income it would provide to Mr F in retirement. I've also seen no evidence that it calculated how much pension Mr F required at retirement which is something I'd have expected it to do given one of Mr F's objectives was to drawdown an income on retirement. So, I don't think Portal was in a position to properly assess whether Mr F's remaining pension provision, following a transfer into the SIPP and the removal of the TFC, was suitable for his needs.

Moving to the requirement for the TFC, Mr F has confirmed this was one of his objectives at that time as he wanted to pay off his debts and put the monthly income this freed up towards paying off his mortgage. Mr F had also previously contacted his old employer's OPS to ask whether it was possible to release TFC prior to retirement age. That being said, just because Mr F wanted to release TFC, doesn't necessarily mean that this was a suitable option for him.

The suitability report noted Mr F didn't have enough disposable income to service his needs. No income or expenditure was completed with Mr F as I'd normally expect, so this assertion appears to be based on Portal's conversations with Mr F. Whilst our investigator suggested Mr F had used his savings to repay the debts, and that his position was therefore not sustainable, I am not persuaded that there is sufficient evidence to demonstrate this.
The question Mr F was asked in this mortgage review was whether he was making regular payments to savings and if not, could he explain why not. Mr F said, *'none left paying off cards'.* Whilst this shows Mr F wasn't in a position to save, I don't think it shows he was utilising his savings to service the debt. Nowhere in Portal's documentation, nor in anything Mr F has told our Service, has he suggested he didn't have enough income to service his debt.

A mortgage advice review completed in November 2013 stated Mr F had never failed to keep up his loan or mortgage repayments. So, it would appear any need to pay off the debt related to Mr F's level of disposable income.

Portal's suitability report contains the only evidence that it discussed alternative debt servicing options with Mr F. It states the following was discussed:

- Loan – It was noted Mr F didn't want to take on further lending or pay interest.
- Remortgage - It was noted Mr F didn't want to remortgage due to redemption penalties as well as interest concerns.
- Disposable income – It was noted Mr F didn't have enough to service his needs.
- Assets – It was noted Mr F didn't want to use these to raise the required cash.

As part of providing advice I would have expected Portal to have robust conversations with Mr F about these options to ensure they were fully investigated by Mr F. I have no evidence that this occurred. I appreciate these notes indicate Mr F didn't like the alternative options, but this doesn't mean the benefits and disadvantages of these choices shouldn't have been properly explored with him. And it's not clear if they were.

Within the advice Portal gave Mr F about this debt and his available options, it also compared Mr F's projected pension benefits at aged 65 if he were to continue servicing his debt and retain his OPS vs. if he were to transfer to the SIPP and take TFC to repay the debts. Mr F was told: *'by taking the Tax Free Cash amount you are entitled to, this will result in you receiving a higher pension value at retirement…'* However, this comparison was based on the premise that Mr F would invest his monthly debt contributions back into his SIPP until his retirement age. Which is at odds with Mr F's intentions as stated in the fact find, which were to use the money he freed up to pay off his mortgage. In addition, if Mr F's aim was paying off the debt because he didn't have enough disposable income as detailed in the suitability report, then he wouldn't have had the same level of disposable income to reinvest in any event. So, I think it's clear these figures weren't representative of the circumstances Mr F would find himself in and that Portal ought to have known that.

For all of these reasons, I'm not persuaded Portal properly analysed Mr F's circumstances. So, I don't think it truly understood Mr F and his needs in the way it should have.

That all being said, I'm not persuaded that the advice to transfer out of the OPS was necessarily unsuitable for Mr F. Despite the failings in the advice process that I've identified above, it seems more likely than not that Mr F did in fact need the TFC available to him through this pension and the only way to access this was by transferring out of the scheme.

As outlined above, it's clear Mr F's main priority was to take TFC to service his debts. It's not clear if there was a viable alternative as Mr F had no savings and I'm not clear if debt consolidation was an option or if this had already taken place. He had met with a mortgage advisor in December 2013 and I'd note he hadn't taken any additional borrowing then to help service the debt despite the debt being discussed. Mr F had already tried to drawdown from his OPS, and the need to do so was reiterated in his fact find with both Firm C and Portal. Our Service has since attempted to contact Mr F about his debt to better understand what might have happened had different advice been given; this has included asking about his income and expenditure at that time as well as his other pension. But despite multiple requests, this information hasn't been provided. I'd also note Mr F hasn't disputed our Investigator's view which concluded that the advice to transfer was suitable, but the investments were not.

For all of these reasons, I don't think the advice to transfer out was unsuitable given Mr F's financial situation, the fact he had another OPS (as well the state pension) to rely on in retirement and because he intended to continue working until his normal retirement age.

Having established that it was most likely suitable for Mr F to transfer from his OPS, I've looked at the recommendation about where and how the funds were to be invested.

I don't think the SIPP on its own was an unsuitable product as it allowed Mr F to access his TFC and gave him the ability to invest the remainder until such time as it was needed. He could also access a wide range of investments within a SIPP and the fees for this product weren't particularly high in comparison with other personal pensions.

I have then thought about what would have been a suitable investment strategy for Mr F. As part of his complaint, Mr F has stated that he was a low risk investor, whereas the risk-profiling tool which Portal used classed him as having a balanced ATR, which is a higher risk profile. During a call with our Service after the complaint was raised, Mr F confirmed that he had a moderate ATR at that time, which is in line with Portal's assessment. So, there is a conflict about what level of risk was suitable for him.

Portal's report defines balanced investors as typically having moderate levels of knowledge about financial matters and may have some experience of investment, including investing in products containing risky assets such as equities and bonds. They are willing to take risk with part of their available assets if the potential reward is high enough and usually make up their mind on financial matters relatively quickly.

Mr F's answers to the Risk Profile Questionnaire he completed with Portal indicate a lower risk approach. The responses that showed caution and/or a lack of experience towards investment were listed as follows:

- *People who know me would describe me as a cautious person – agree*
- *I feel comfortable investing in the stockmarket - disagree*
- *I generally look for safe investments, even if that means lower returns - agree*
- *Usually it takes me a long time to make up my mind on investment matters - agree*
- *I associate the word 'risk' with the idea of 'opportunity' - disagree*
- *I find investment matters easy to understand - disagree*
- *I am willing to take substantial financial risk to earn substantial returns - disagree*
- *I've little experience of investing in stocks and shares - agree*
- *I tend to be anxious about the investment decisions I've made - agree*
- *I'm concerned by the volatility of stockmarket investments – agree*

Whilst the only answers which showed a potentially higher risk appetite were:

- *I'd rather take my chances with higher risk investments than increase the amount I'm saving – agree*
- *I generally prefer bank deposits to riskier investments - disagree*

I appreciate the risk profile questionnaire itself considered that his answers did amount to a balanced ATR. So, it seems to me that Portal's assessment of Mr F's ATR was mostly based on the outcome of this tool. However, the FCA has made numerous comments over the years, including in guidance issued in March 2011 about assessing suitability, about how firms shouldn't rely solely on risk profiling tools to establish their client's ATR. The FCA said that firms should have a robust process for assessing the risk a customer is willing and able to take, which includes assessing their capacity for loss; appropriately interpreting customer responses to questions and not attributing inappropriate weight to certain answers; and ensuring that tools are fit for purpose with any limitations recognised and mitigated.

For these reasons, I don't think simply relying on the questionnaire result was reasonable or in line with the FCA's guidance.

Looking at the other available evidence to help assess Mr F's ATR, Mr F explained he didn't easily understand investment matters and had no savings or assets to invest in any event. The suitability report also states Mr F couldn't afford to lose any more than 10% of his total fund before his standard of living was significantly impacted. Portal also concluded that he did not have the capacity to absorb potential losses and shoulder risk in pursuit of his overall pension objectives.

That being said, Mr F still had another nine years before he intended to retire so he had some time to tolerate some fluxes and recoup any losses. And, as outlined above, he also had another pension with 14 years of service in addition to his state pension, so he had some other provision for his retirement.

Without further information on Mr F's other pension and his requirements for his retirement, it is difficult to assess his true ATR at that time. Mr F has been asked for this information, but it hasn't been provided. However, I'd note Mr F most recently described himself to our Service as having a medium ATR rather than low. Our Investigator later agreed with this in his view and it also seems significant to me that Mr F hasn't challenged this.

Taking everything into account, I therefore think an appropriate assessment of Mr F's ATR would have been 'medium'. I say this despite his low capacity for loss, as the evidence indicates he could afford to take some risk and he still had around nine years before he expected to retire, meaning he had time to recoup some losses. This is in line with the assessment reached by Portal.

In summary, my decision is that whilst Portal did not clearly assess Mr F's circumstances to justify why the transfer to the SIPP was suitable, Mr F's need to access his TFC was sufficient to conclude that it was necessary. I think Portal's assessment of Mr F's ATR was not clearly justified either, but I'm not persuaded it was inappropriate in the circumstances. As I've set out above, I don't think it was appropriate for Portal to recommend a portfolio which carried such a high level of risk and certainly not one which recommended 18% of assets be invested in high risk, illiquid funds – I don't think UCIS were suitable investments for Mr F in any proportion. In my view, mainstream regulated investment funds in line with Mr F's ATR would've met his needs. And I think Portal failed in its duty to ensure that the resulting investments made by Firm C were suitable for him. And I think these failings ultimately led to Mr F's loss.

Is Portal wholly responsible for Mr F's loss?

I recognise that it can be argued Firm C may have also separately caused some of Mr F's losses. So, I've considered whether I should apportion only part of the responsibility for compensating the loss to Portal. In the circumstances though, I think holding Portal fully responsible for the whole of the loss represents fair compensation. I don't accept that anything Firm C did was an intervening act which absolves Portal of its responsibility for Mr F's losses.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension-release advice and investment. Because Firm C wasn't authorised to provide pension transfer advice, it referred Mr F to Portal. Portal advised Mr F to transfer his benefits to a SIPP, it set up the SIPP and arranged for his existing pension benefits to be transferred over. I acknowledge that Firm C advised Mr F to invest a significant share of his SIPP funds in UCIS but this was in line with Portal's own recommendations in any event. And, as I've explained, Portal's understanding that it could reasonably limit its advice to just the transfer of funds to the SIPP was wrong; it needed to consider the suitability of the proposed investments too, even if Firm C was advising Mr F on the investments. It was only as a result of Portal's involvement that Mr F transferred the funds held in his OPS to the SIPP. Portal's role was pivotal, since the eventual investments were fully reliant on the funds being transferred over first; if that hadn't happened, Mr F couldn't have invested as he did.

Firm C and Firm S are now in liquidation, which means our Service cannot consider a complaint against them in any event. In terms of the FSCS, in Mr F's case it is not clear if a claim has been considered. However, I am aware that, as a fund of last resort, the FSCS won't usually pay out on claims where it is aware that another firm, which is still trading, was involved in the transaction, and it considers that firm might also be responsible for a consumer's losses. This means that apportionment of only part of the loss to Portal could risk leaving Mr F out of pocket.

I think it's important to point out that I'm not saying Portal is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portal gave unsuitable advice and it is responsible for the losses Mr F suffered in transferring his existing benefits to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. So, overall, I think holding Portal fully responsible for the whole of the loss represents fair compensation in this case.

Fair compensation

My aim is that Mr F 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 F 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 F's circumstances and objectives when he invested.

What must Portal do?

To compensate Mr F fairly, Portal must:

- Compare the performance of Mr F'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 F'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 F'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 F won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr F is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr F 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 F £200 for the trouble and upset caused.

Income tax may be payable on any interest paid. If Portal deducts income tax from the interest it should tell Mr F how much has been taken off. Portal should give Mr F a tax deduction certificate in respect of interest if Mr F 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 F 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.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr F 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 F'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 F in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 30 June 2022.

Jade Cunningham
Ombudsman