

The complaint

Mr A complains about the suitability of the advice he says he was given by Portal Financial Services LLP (Portal) to transfer the benefits of his Occupational Pension Scheme (OPS) into a self invested personal pension (SIPP), and then to invest the benefits into Unregulated Collective Investment Schemes (UCIS).

What happened

Mr A had been a member of the National Railways Pension Scheme for seven years. In 2012, just prior to his 55th birthday, having seen an advert suggesting ways of increasing his retirement provision, Mr A met with Portal to discuss his retirement planning options. In May 2012 Mr A decided to withdraw his tax free cash lump sum of £8,214.95 from the scheme and transfer the residual balance of £22,995.62 into a SIPP across four UCIS, although Portal said that it advised against the transfer because the critical yield figure that was required from the SIPP to match the OPS benefits was too high.

Later that year Mr A needed some more funds to help his partner to buy a car and the following year he decided he wanted to take a one off income payment from the SIPP for a holiday.

But by 2018 the unit prices of the UCIS were valued at £0.0001 which made the SIPP almost worthless. So in June 2019, using a representative, Mr A complained about the suitability of the advice he'd been given which had led to the loss of virtually the entire value of his SIPP.

Portal said Mr A's complaint had been made outside of the time limits allowed and therefore it wasn't obliged to answer it, but it did say it would ensure that Mr A was provided with an income at retirement based on the original expected performance of the funds and prevailing annuity rates. It said this would be paid until the situation with the fund's liquidity was resolved.

Mr A wasn't happy with that outcome and brought his complaint to us where initially one of our investigators considered whether the complaint had been made in time. She said it had but Portafina didn't agree – so one of our ombudsmen reviewed the matter and decided that the complaint had been brought in time and was one that we *could* consider.

The investigator then considered the merits of Mr A's complaint and said she thought that the complaint should be upheld. She made the following points in support of her findings:

- The regulator's position at the time of the advice was that a firm should start by assuming that a transfer from a defined benefits OPS wasn't suitable.
- Mr A would be giving up significant "guaranteed" benefits - such as a secure income for life - if he transferred.
- The critical yield figure which indicated what growth was required from the SIPP to match the OPS benefits was 7.8% per year – which was above the relevant "discounted rate" for an investment horizon of nearly 10 years.
- The investments recommended were outside of Mr A's attitude to risk (ATR) and outside of his capacity for loss.

- She believed the answers Mr A gave in his risk profile questionnaire suggested he was a cautious investor.
- There was insufficient exploration and recording of the reasons given for Mr A requiring access to his tax free cash at that time.
- She didn't believe Mr A met the criteria for being an insistent client, nor did Portal correctly follow the insistent client process.
- The recommendation to invest 87% of his funds into UCIS meant Mr A was exposed to significant risk which led to significant losses. It wasn't suitable advice for Mr A's ATR at all. And there was no evidence to suggest that Mr A had significant financial experience or sophistication, so it was unlikely the UCIS should have been promoted to him.
- Mr A wasn't presented with any information about the risks, consequences, or implications of opting out of his OPS in order to then be able to transfer the benefits.
- Portal should undertake a redress calculation in line with the regulator's pension review methodology and also pay Mr A £200 for the trouble and upset caused by the disruption to his retirement planning.

Portal didn't agree. It said it had acted fairly and reasonably throughout and with Mr A's best interests in mind. Specifically, it said it had:

- Recommended against the transfer and that Mr A chose to transfer against its advice.
- Mr A was assessed as having a balanced ATR – which he accepted and agreed with. It didn't think the small sample of questionnaire answers we'd used to determine that he should have been assessed as having a lower ATR looked at the situation as a whole. Portal said it should be entitled to rely on information provided by Mr A.
- Treated Mr A as an insistent client according to the regulatory guidance at the time. It believed it had integrated most aspects of the insistent client process into its advice standards and was able to document a "best practice" for such transactions – including Mr A's.

The investigator wasn't minded to change her view. She made the following points in response:

- She'd considered the principles for business within the regulator's handbook and concluded that Portal hadn't satisfied its regulatory duties.
- The fact find that Portal completed suggested Mr A had no savings or investments apart from his OPS benefits.
- She didn't believe Mr A's acknowledgement that he was acting against Portal's recommendation was written in his own words. So she didn't think Portal had followed the insistent client process properly.
- She thought the process Portal followed undermined its own attempts to treat Mr A as an insistent client. For example, she noted that Mr A agreed to be an insistent client without having had access to the analysis that he would have needed to make such a decision.
- She didn't think Portal had made Mr A aware that he was giving up guaranteed benefits for "short term gain" that might have been achieved through alternative means.
- She remained unsure, based on his risk assessment responses, how Mr A had been assessed as having a medium ATR. But even if that was the case, to invest 87.5% of his funds into UCIS was outside of his ATR and capacity for loss.

As no resolution could be found the complaint was passed to me for a review.

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.

And having done so I agree with the investigator's assessment – so I'll explain my reasoning.

Was Mr A an insistent client and was the process followed correctly?

Portal has said that it recommended against the transfer and that it treated Mr A as an "insistent client" when he confirmed he wanted to go against its advice and transfer his OPS benefits into a SIPP. It says it had worked within the regulator's guidance around insistent clients for some time, and by the time it met with Mr A these practices were integrated into its processes – so that it could document a "best practice" for such cases.

So I've looked carefully at Portal's requirements in treating Mr A as "insistent", particularly in respect of the regulator's position, to see whether I think Portal acted fairly – and also whether in fact he could be categorised as being "insistent".

The regulator had defined an insistent client as:

- *A client who has received a personal recommendation from the business.*
- *Who wants to enter into a transaction that is different from that recommended by the business; and.*
- *Who wants the business to facilitate that transaction.*

I've looked at the "*pension release review*" letter that Portal sent Mr A which was dated 20 February 2012 – the same day that Portal completed a fact find with him. It stated that "*as the critical yield (growth rate required to match your guaranteed benefits with Railways) is 7.8% it would be against our recommendation to do this.*" So I think Mr A did receive a personal recommendation from Portal – which was not to transfer, but the same letter also said that "*if you decide that you still wish to proceed, we can help you release money from your pension, but we would have to treat you as an insistent client, as this would be against our recommendation.*"

Although this set out Mr A's options going forward it's unclear to me why Portal confirmed the potential to use its insistent client process at this point, as there's no evidence to suggest that Mr A had said he wanted to go forward with the transfer, against Portal's advice. He was also told to "*return the form to us immediately*" if he wished to proceed, because of the possible expiration of the guarantee period of the transfer value. But I think this put unnecessary pressure on Mr A with regards to being able to consider his next course of action.

Three days later Mr A received a 28-page suitability report setting out "*the options that fit your priorities and requirements*". The report noted that Mr A wanted to transfer his existing OPS benefits into a SIPP to release his tax free cash and leave his residual fund invested. But it also set out a recommended investment portfolio, which hadn't previously been referred to in the pension release letter and didn't seem to be a suggestion from Mr A of an "insistent" investment strategy on his part.

However, this report was accompanied by a letter which also enclosed the necessary application and discharge forms and a declaration that covered off Mr A's "insistent client" status and his decision to opt out of the OPS.

The declaration, which required Mr A's signature said that, *"I am fully aware that by opting out of my Railways Pension Scheme, I may not be able to rejoin at a later date to accrue future benefits. I fully understand that the funds invested in the Transact SIPP are relatively illiquid and therefore may not produce an income in the first few years of starting the SIPP. This is acceptable to me as I do not wish to take an income for 10 years and therefore do not need to access the funds within my SIPP at this time. I wish to proceed on this basis as my main priority is to purchase a car and make home improvements (ahead of retirement planning)"*.

But, as part of the regulatory guidance on insistent clients, Portal needed to obtain from Mr A acknowledgement that:

- *The transaction is not in accordance with the personal recommendation given by the business; and*
- *The transaction is being carried out at the request of the client.*

That acknowledgement should be in the client own words.

Whilst I'm sure Portal will say that its declaration reflected the words Mr A had used when explaining his objectives, I think the requirement here was for a personal explanation from Mr A, which hadn't been previously sent to him by Portal as a kind of template – ready for him to sign. In my view this didn't show Portal's actions as being in line with the insistent client process as it has previously suggested. I think Mr A needed to confirm his actions clearly in his own words, so I don't think I can reasonably accept this as a correct interpretation of the insistent client process.

But there are also other reasons for thinking that Mr A couldn't be considered as an insistent client. I note that the declaration was part of the covering letter for the suitability report which was sent three days after the fact find and pension release form were issued. I'm not persuaded that Mr A could have been an insistent client at that point, as the only documentation he'd received confirmed Portal didn't recommend the transfer but didn't make any mention of an investment strategy that Mr A then decided he wanted to adopt just three days later.

I've also taken into account that the declaration was provided alongside the suitability report and not after it, which wouldn't have given Mr A much time to reflect on the advice and decide if it was suitable or not. It also required him to return it urgently.

I'm also not persuaded that Mr A was experienced in financial matters or had any previous financial experience. He didn't hold any investments or savings, and this was his only pension provision apart from a small personal pension he'd contributed to for several months in 1992. So, while I understand that Mr A might have been attracted to the possibility of releasing tax free cash for some requirements he had, I don't think he was likely to have insisted upon this course of action against the advice of a professional adviser. I don't think Mr A had enough knowledge about such matters to think that he knew better than the adviser here, so I don't believe he was truly an "insistent client" even though Portal said it would treat him as such.

But even if my assumptions and thoughts about Mr A's intentions are wrong, I've also considered that while Portal treated Mr A as an insistent client with regards to his transfer, it hasn't explained – or shown, that he acted as an insistent client with regards to the investment strategy. So I've gone on to look at that part of the process in more depth.

Within the "pension release form" – under the section that said Mr A would be treated as an insistent client, it said *"The reason I have recommended a pension switch to the selected provider is because the potential benefits available at retirement with them look likely to*

exceed the benefits available with other possible providers once you have taken your tax free cash lump sum from your pension”.

But it's unclear to me why – when Portal said the transfer was against its recommendation, it was able to select a provider which it thought might provide benefits which exceeded those available from other providers. There's no evidence to show that Mr A was given any point of sale material to substantiate such a claim or that Portal should have provided investment advice for the very funds it said shouldn't be transferred and was simply facilitating that course of action. I've seen nothing to suggest that Mr A had put forward the investments as being those he wanted to invest into, so I have to conclude that it was Portal who put together the investment strategy and implemented it against its own previous advice.

If Portal simply agreed to carry out the transfer on an insistent client basis I wouldn't have expected it to put forward a recommendation for a complex, high risk investment strategy, but simply to have allowed the transfer of the funds into cash for Mr A to then decide what was the best investment strategy for his situation.

So, as I haven't seen any evidence to show that Mr A was previously aware of these specific funds, or indeed that it was him who told Portal of their existence and his determination to invest into those particular funds, I don't think it's likely that Mr A would have insisted on investing in them following the transfer. And under the Code of Business Sourcebook Portal had a duty to assess the suitability of the transfer and the subsequent investment strategy. Although it said that the transfer was “insistent” and against its recommendation I haven't seen any such warning around the investment into the four UCIS.

Indeed the suitability report confirmed that, *“The reasons why we believe this investment is suitable for you are set out below which outlines all the potential risks, and rewards which we believe are pertinent to this investment and of which you should be aware”.*

The two pages that followed the above statement within the suitability report provided positive reasons and factors for investing into the funds. If Mr A was truly an “insistent client” then I wouldn't have expected to see this positive endorsement of the funds with a suggestion of the attractive returns that might be available. I would have expected Portal's position to be neutral and simply state that Mr A had chosen to invest in those funds against its advice – but it didn't and I have therefore concluded that, on balance, Portal did recommend investment into those funds.

Although Portal's suitability report said it was treating Mr A as an insistent client – and that his decision was against its recommendation, it also said that, *“We have recommended that you invest in the following funds...”.*

It doesn't seem reasonable that such an instruction wouldn't have confirmed to Mr A that Portal had recommended an investment strategy for his funds. So, having decided that I don't think Portal followed the insistent client process here, or indeed that Mr A should have been treated as such, I've gone on to consider the suitability of the transfer of Mr A's OPS benefits.

The suitability of the advice to transfer and invest into UCIS

As our investigator set out, when considering whether to transfer a defined benefit pension plan, the industry regulator, the Financial Conduct Authority (FCA), sets out that an adviser should, as a starting point, assume that transferring would be unsuitable and would need to clearly demonstrate that the transfer was in the client's best interests.

“When advising a retail client who is, or is eligible to be, a member of a defined benefits

occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests. (COBS 19.1.6)".

The starting position here was that Mr A shouldn't have transferred – unless there were compelling reasons to do so. So I've looked carefully at those reasons.

The fact find that Portal completed on 20 February 2012 showed that Mr A wanted to withdraw his tax free cash to buy a car and carry out home improvements. There were no further details to support those reasons although I note at the time that Mr A lived in a rented property and already held a car loan with over £4,000 outstanding. Of course that doesn't mean that Mr A wouldn't have been tempted by the opportunity to realise tax free cash for those purposes, but it would suggest that those reasons wouldn't have been compelling enough to transfer the pension if it was shown to Mr A that he'd be worse off by transferring.

The most compelling reason to demonstrate whether Mr A would be better off after transferring at that time was to look at the Critical yield or "returns" required by the SIPP to match the OPS benefits. The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return (critical yield) required to match the occupational pension at retirement was 7.8% per year. This compares with the discount rate of 5.5% per year for 9 years to retirement in this case. So, in order to match, and not better the benefits Mr A was being advised to give up, his pension pot would need to grow by at least 0.8% more each year than the mid-range growth rate considered reasonably achievable. I think it was unlikely, given the investment horizon here, that the returns would have been achieved without investing into funds that were high risk and outside of Mr A's ATR.

And Portal itself said that the critical yield was probably too high to be realistically achieved consistently over the nine years until Mr A retired and wanted access to his funds, so the prospect of an alternative arrangement not matching the scheme benefits in monetary terms, on the basis of reasonable assumptions, made it all the more important that the other reasons for transferring were sufficiently compelling.

Portal's initial recommended investment strategy was for 87% of the transferred OPS benefits to be invested across four separate UCIS. These consisted of an overseas villa complex in Thailand, a solar thermal development in Cyprus, a company making loans to a property developer in Yorkshire and a company investing in oil. These were highly speculative and leveraged investments which were restricted to being promoted to sophisticated and high net worth consumers.

Portal itself accepted that Mr A didn't fit these definitions as it explained that, *"You are not a person who is exempt under the FSMA 2000 PCIS orders. i.e. a high net worth or sophisticated investor, however you are a person for whom we as an Independent Advisory Firm qualified to advise on UCIS investments have taken reasonable steps to ensure that the investment in the particular collective investment scheme(s) is suitable following a full KYC (Know Your Customer Investigation) and ATR (Attitude to Risk Assessment), this therefore provides an exemption under COBS (Conduct of Business) regulations 4.12."*

But I don't think it had taken these reasonable steps. It had been agreed that Mr A had a 'medium' ATR with little or no capacity for loss. So I'm not persuaded investment into high risk UCIS was in line with Mr A's risk profile and therefore it wouldn't have been suitable advice following a full "*know your customer investigation*." This would suggest that the UCIS weren't promoted lawfully to Mr A as a retail client, but of course I still need to consider the suitability of such investments in respect of Mr A's overall circumstances and objectives.

The initial fee for the transfer was £1,642.99 with further annual adviser payments, annual commission to the platform, and wrapper administration charges. These typically varied depending on the fund value, but I've calculated they amounted to over £400 per annum most years. Taking into account the relatively small value of the transfer, these fees amounted to around 10% of the value of that fund in the first year. So, with an investment horizon of around 9 years (to normal retirement) I think it would have been difficult to have offset the effect of those fees over that timescale.

And in the absence of any illustration which may have shown Mr A the comparative position of both schemes at age 65, it would have been difficult for him to have made an informed decision about whether a transfer was in his best interests and whether he'd be better off financially. In order to achieve the returns required to offset the higher charges Mr A would have needed to invest into higher risk rated funds or assets – such as the ones Portal recommended. But as I've already suggested these funds weren't suitable because they were outside of Mr A's agreed 'medium' ATR, as well as the fact that, in my view, Mr A had neither the financial experience nor the appetite for such speculative investments.

I've also taken into account that in order to carry out this transfer Mr A needed to opt out of his OPS. This was explained as part of the declaration form within the suitability report cover letter. "*This form is required in order that you are fully aware that you may not be able to rejoin your Railways Pension Scheme and that the SIPP you will be transferring into will have limited liquidity of funds. Please note that in order to proceed with Pension Release you need to opt out of the Railways Pension Scheme*".

I'm not satisfied this form set out the disadvantages of opting out of the OPS or explained the ramifications of such an action. It simply stated that the transfer could only be achieved by opting of the scheme. I would have expected there to have been reference to the benefits of remaining within the scheme – such as death in service benefits for example, and how these would need to be replaced after leaving the scheme. I think it would have been difficult for Mr A to have drawn an overall conclusion about whether to transfer based on the lack of information he was given about certain aspects which would have been important factors in making such a decision.

Summary

I would normally expect to see compelling reasons for the transfer of such a relatively small fund value as this one. In this case I haven't seen any compelling reasons and I don't think the transfer was in Mr A's best interest.

The charges involved in the transfer, as well as the recommendation of such high risk funds – beyond the risk that I think Mr A would have been comfortable with, would suggest that he was unlikely to be better off as a result of the transfer.

And Portal had already confirmed that the investment returns required to match the OPS benefits would probably mean the transfer wasn't in Mr A's best interest as well.

But as I've concluded that Mr A shouldn't really have been treated as an 'insistent client' or indeed that Portal followed the 'insistent client' process correctly and according to the

regulatory guidelines at the time – then I think that Portal’s recommendation to transfer and invest into various UCIS wasn’t suitable for Mr A.

Based on the evidence I’ve been presented with, I don’t think, if he’d been made fully aware of all the advantages and disadvantages of transferring – such as whether he would be better off financially by doing so, that Mr A would have decided to transfer. And I find it difficult to conclude that Mr A would have invested his funds into the investment strategy that Portal recommended if he’d been fully aware of the risks involved.

Putting things right

A fair and reasonable outcome would be for the business to put Mr A, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Portal Financial Services LLP 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.

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 A’s acceptance of the decision.

Portal Financial Services LLP may wish to contact the Department for Work and Pensions (DWP) to obtain Mr A’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 A’s SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr A’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 A as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid.

Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr A within 90 days of the date Portal Financial Services LLP 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 my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal Financial Services LLP to pay Mr A.

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.

In addition, Portal Financial Services LLP should pay Mr A £200 for the disruption caused to his retirement planning.

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

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

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

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

If Mr A accepts my decision, the money award is binding on Portal Financial Services LLP. My recommendation is not binding on Portal Financial Services LLP. Further, it's unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A may want to consider getting independent legal advice before deciding whether to accept this decision

My final decision

I uphold Mr A's complaint against Portal Financial Services LLP.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 16 January 2022.

Keith Lawrence
Ombudsman