

The complaint

Mr K complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan. He says the advice was unsuitable for him and believes this has caused him a financial loss.

Portal Financial Services LLP is responsible for answering this complaint. To keep things simple I'll refer to "Portal".

What happened

Mr K approached Portal in 2016 to discuss his pension and retirement needs. I can see there were essentially two main occasions where he was provided with advice.

The first was an initial 'fact-find' and suitability report produced by Portal in late April 2016. The suitability report recommended he should transfer out of the OPS, take some tax-free cash and invest the rest because at that point Mr K had implied he didn't yet need an annual pension. However, after this recommendation was issued Mr K took a little time to consider what he wanted to do.

Following this, a second suitability report was issued a short time later by Portal, on 27 June 2016. This time, the report recommended he should *not* transfer his pension at all but leave it where it was instead. Nevertheless, in the same report, Portal said that because Mr K was adamant he wanted to transfer out of his OPS, it would help him do this. It said it could treat him as an 'insistent client', a term used in the industry to describe a situation where a client goes against the advice of a professional financial adviser.

The information gathered by Portal about Mr K was broadly as follows:

- Mr K was 55 at the time and married with a dependent child. He had some health conditions which required medication but was otherwise healthy.
- He was employed full-time with an income of around £35,000 per year and with no disposable income left after expenditure. He had accumulated some debt, said to be around £46,000. He was in a debt management plan paying £250 per month. He appeared to have no other assets other than his pension. Mr K and his family were in rented accommodation and paying £1,000 per month.
- Mr K had an OPS which had an overall cash equivalent transfer value of around £286,000 as a result of a 12-year career which had ended in redundancy in 2001.
- In the light of recently changed rules - 'pension freedoms' - Mr K had an aspiration as of late June 2016 to access his pension, although he said he didn't intend to actually stop working until the age of 65.

- Mr K told Portal he wanted to access his OPS to take the maximum tax-free cash available and have an annual pension with the remaining funds. He said he wanted to pay off the debts and buy items such as a car and take a holiday.

Portal went on to help facilitate the transfer out of Mr K's OPS. It says this was on an 'insistent client' basis.

Mr K says he was given unsuitable advice by Portal. The complaint has been referred to our Service. One of our investigators looked into the complaint and said we should uphold it. They thought Mr K would not have transferred out if Portal had given him suitable advice. Portal hasn't agreed with our investigator. As the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've decided to uphold the complaint.

What was Portal required to do?

Portal says Mr K ultimately went against its advice of 27 June 2016. It says that he was advised in the suitability report of that date that he ought to stay inside the DB scheme, and it was Mr K himself that insisted he wanted to transfer out to access cash and be in receipt of an annual income from an annuity. It says this meant he became an 'insistent client'. I've therefore considered this point first.

There was limited guidance available specifically about 'insistent clients' at the time of this advice, but nonetheless, the regulator placed important general obligations on firms like Portal. These included the overarching principles such as: Principle 1 – Integrity; Principle 2 – skill, care and diligence; Principle 6 – customers interests; Principle 9 – reasonable care.

I have also taken account that the regulator has previously expressed concerns and expectations about how businesses should execute 'insistent client' business in connection with defined benefit transfers. It did this in July 2014 when it published '*TR14/12 Enhanced transfer value pension transfers*'. In February 2016 it also published a guidance note on insistent clients where the following concerns were listed of these types of cases:

- there was often an inadequate assessment of the other options that could meet the client's objectives
- there seemed to be excessive numbers of 'insistent clients' resulting from advice which wasn't sufficiently clear
- the risks of the client's preferred course of action weren't always clearly explained
- some examples were found to be a 'papering exercise', for example, the adviser had processed the case on an 'insistent client' basis but this didn't really reflect what had happened in practice
- the client was advised not to transfer out of the DB scheme (although the client insisted) but then the adviser recommended a product that was not suitable

I have considered all these things carefully in determining whether I think Portal did anything wrong. And Portal ought to have taken these things into account.

However, I should also point out that there is no rule to prevent advisers transacting business against their advice, if the client insists. So, I need to think here about whether enough was done by Portal to try and find alternative ways of meeting Mr K's objectives. I have also considered whether the 'insistent client' process in this case was merely, in the words of the regulator, a 'papering exercise'.

Was Mr K an insistent client?

Everything I've said above demonstrates that firms, like Portal, had a number of important responsibilities when providing advice. Despite what Mr K thought he wanted, I think his expectation in paying for regulated financial advice was that he would be clearly guided on the basis of his circumstances and means. The information ought to have been clear, fair and not misleading. In particular, it should be clear that the business has not recommended the transaction and the risks proposed by the client ought to have been pointed out.

I don't think Portal adequately did this.

On first look, the suitability report of 27 June 2016 appeared to be cautioning against transferring out of Mr K's DB scheme. However, it said Mr K had wanted to be treated as an 'insistent client'. Our investigator pointed out that this appeared to be based on Mr K signing an insistent client form which I've noted has a date stamp of 14 June 2016 on it. The investigator also pointed out the obvious flaws on this, notably that the first half of the form only involved him selecting two tick-boxes already pre-determined for him by Portal. Portal said the second half of the form showed Mr K had explained in his own handwriting more about why he wanted to transfer out. But I've seen that this doesn't even appear to be from Mr K – it's from an unconnected person and dated the year before. I'm assuming this relates to a completely different case. I therefore don't think there's any evidence showing the idea to go against 'the advice' came from Mr K; it was directly presented to him by Portal.

As for the suitability report, despite Portal saying its advice was against transferring out of the scheme, there was a clear underlying bias in the report in favour of actually transferring out anyway. Directly under the report's first recommendation it said Mr K had told Portal he wanted to transfer out and so Portal made another recommendation just a few lines down from the first. This second recommendation was directly at odds with the first; it said Mr K would be treated as an 'insistent client' and that Portal would carry on with the transfer process. The report said, "*my recommendation is therefore that you transfer the pension summarised in the next section to [an] Enhanced Annuity*". This recommendation went on to say that by accepting this Mr K would meet his stated objectives which were to release 25% tax-free cash and be able to have an income as a result of buying an annuity.

Overall, I think this report was unclear on what it was actually saying. And despite what Portal says, I think it was merely setting the scene for Mr K to transfer out anyway.

Mr K was then asked to sign a Declaration Form and return it to Portal. This contained a number of statements which I think were intended basically to indemnify Portal from any responsibility.

So, Portal's actions and inactions here fitted the regulator's definition of a 'papering exercise'. In my view, its advice as regards transferring out was indecisive. In April 2016 it had initially advised a course of action that would involve Mr K transferring out. In June 2016, the recommendation fundamentally changed to not transferring out. And then in doing this, Portal immediately offered a very easy option to go ahead anyway – involving only minimal effort from Mr K - to transfer out.

I don't believe the evidence is plausible that Mr K even was an 'insistent client'. Mr K wasn't experienced in these matters and so was heavily influenced by his advisor to whom he'd paid a considerable sum. Portal produced mainly templated forms and statements which failed to highlight the risks and issues of him giving up his pension, in a meaningful way.

Given the flaws on the insistent client form I can't say if this was even from Mr K. And I also note, for example, that Portal asked Mr K to sign the Declaration Form I've mentioned above at the same time as giving him the advice rather than after. This allowed no time for the risks associated with the course of action which Mr K apparently wanted, to be properly set out or explained in a way that was personal to him. Nor was he apparently given an opportunity to explain in his own words why he'd like to ignore the recommendation to stay in his existing scheme. Of course, given his somewhat vulnerable financial situation, there may also have been an opportunity for Portal to explain to Mr K that there simply was no suitable course of action which would fulfil his objectives at that time. And if this was the case, this should have been pointed out clearly by the adviser.

Given that I don't think Mr K met the definition of an 'insistent client' I went on to consider whether I thought this made a difference to the outcome of the complaint. In particular, I've given a great deal of thought to whether transferring out could be said to be suitable.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. This means Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr K's best interests (COBS 19.1.6).

Financial comparisons

There's no real dispute in this case that Mr K could be losing out in the longer term by transferring out of his DB scheme. After all, Portal itself says its recommendation of 27 June 2016 originally said he shouldn't be transferring out.

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 suitability report of 27 June 2016 said the critical yield required to match Mr K's benefits at age 65 was 10.3% if he took a full pension and 8.5% if he took tax-free cash and a reduced pension. The relevant discount rate was 4.1% per year for 9 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year. I've noted Mr K's aspiration was to access his pension much earlier, at the age of around 55.

So, I've taken all these things into account, along with the composition of assets in the discount rate. I have also considered what Portal said about Mr K's attitude to risk being 'balanced'. And there would be little point in Mr K giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 8.5%, I think he was highly likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his realistic attitude to risk.

For these reasons a transfer out of the DB scheme wasn't in Mr K's best interests. Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

I saw conflicting statements about Mr K's desire for pension flexibility and his needs going forward. But I accept that at the time his main objective was to access his pension early.

Portal said in its initial suitability report that flexibility and control over his pension was something that Mr K would benefit from; this was not mentioned in the second suitability report. However, to be clear, I don't think there's any evidence Mr K ever wanted this type of flexibility or control. The fact that Mr K purchased an annuity reflects the fact that he had no intention of investing his pension.

He also had an income, as did Mrs K (part-time) and his debts were already within a structured plan. So, whilst obviously an attractive prospect for Mr K in some respects, accessing his pension needed to be considered very carefully in his circumstances and balanced against other aspects of his overall situation and longer-term retirement security. I don't think it's clear that Mr K had a genuine need to transfer out of his DB scheme to access cash to the exclusion of everything else.

Mr K was only around 55 at the time of the advice, and based on both what I've seen and been told by Portal, he didn't have concrete retirement plans. I think this just added to the fact that it was simply too soon to make any kind of decision about transferring out of the DB scheme.

Accordingly, I don't think it was suitable for Mr K to give up all the guaranteed benefits the DB scheme came with when he didn't really yet know what his needs in later life would be. I can't see evidence that he had such an urgent need for cash and a variable income at this point. Accessing the pension at 55 was therefore to the exclusion of other major priorities, especially when considering what he'd have to forgo to get at it. I don't think Portal explained any of this to Mr K.

Death benefits

This issue was also originally cited by Portal as of importance to Mr K but it was poorly evidenced why. So, whilst I appreciate Mr K might have thought it was a good idea to transfer his DB scheme to another scheme just to access more flexible benefits, Mr K was already in a scheme with good death benefits, which Portal underplayed. As we know, Mr K was married and so the spouse's pension provided by the DB scheme would have been useful to his wife if Mr K predeceased her. I don't think Portal made the value of this benefit clear enough to him.

Summary

I have set out in this decision why I don't think Mr K met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by Portal simply to transact what Mr K had said he wanted to achieve – access to his pension early.

As a result of this finding, I went on to consider whether the transfer out was suitable. Portal facilitated the transfer and recommended a course of action which was not in Mr K's best interests. As regards suitability, given Portal itself has said it advised against a transfer, it

would be hard for it to argue that the transfer was in fact suitable. And I agree that it was not. The financial comparisons showed he'd be worse off transferring and there was no coherent assessment of Mr K's retirement needs.

Mr K's existing DB scheme contained a number of valuable guarantees and benefits which made transferring out something that needed a great deal of consideration. Portal's job wasn't to simply transact what Mr K thought he wanted – it was required to understand his needs and provide him with advice.

Finally, I've gone on to think about whether, if Mr K had been given clear and persuasive reasons why transferring wasn't in his best interests, he would have followed advice to remain inside the DB scheme. My view is that I think he would. With his circumstances and lack of investment experience, Mr K went to Portal seeking advice, which he paid for. I think it's more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

Portal failed in its duty, so I'm upholding Mr K's complaint.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr K, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr K would have most likely remained in his DB scheme if suitable advice had been given.

Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

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 K's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr K'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 K as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr K within 90 days of the date Portal receives notification of his acceptance of my final decision. Further interest must be added to the compensation

amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr K.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

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

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr K 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 would additionally require Portal Financial Services LLP to pay Mr K any interest on that amount in full, as set out above.

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

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 1 August 2022.

Michael Campbell
Ombudsman