DRN-3173931

The complaint

Mrs T complains that Portal Financial Services LLP (Portal) gave her unsuitable advice when recommending she transfer the benefits from her occupational pension scheme (OPS) into a self-invested personal pension (SIPP). She also says the underlying investments were too high risk for her.

Mrs T is represented in bringing this complaint. But for ease, all comments and actions will be noted as Mrs T's.

What happened

Mrs T met Portal in October 2011. It recorded that she wanted to discuss whether it would be in her best interests to transfer her OPS to an alternative provider whilst receiving a tax-free cash lump sum.

Portal completed a 'fact find' on 4 October 2011 noting that Mrs T:

- was 57 years old and married; she hoped to retire at 64;
- was in good health;
- had grown up 'dependents' and a grandchild who she helped to support;
- worked full time and earned roughly £1,700 a month net. She also received other income of around £200 a month. Mrs T's husband was retired and earned an income of around £1,000 a month from annuities;
- owned a property worth approximately £175,000 with an outstanding mortgage of £55,000. She was making monthly mortgage payments of £1,078 and still had about five years left to run on her mortgage;
- had an outstanding loan of £5,000 and was making payments of £170 a month. The loan had about three years left to run;
- had credit card balances of £4,500 and was making repayments of £200 a month;
- had a life assurance policy (connected to the mortgage) worth about £5,000. She paid £50 a month towards this;
- After meeting her financial commitments, Portal noted she had a net disposable income of £50 a month or less;
- had two OPS:
    - employer A – with a transfer value of £32,953 (critical yield 10.6%)
    - employer B – with a transfer value of £71,864 (critical yield 9.2%)

Portal noted that Mrs T wanted to take the maximum tax-free cash from her OPS with employer A in order to pay off debts. But she didn't want to take an income at that time and instead wanted to invest the remainder of her OPS. She wasn't looking for advice in relation to transferring her OPS with employer B although Portal noted that she hoped to take early retirement from that employment in due course. In the meantime, she'd continue to build up her pensionable service. Portal also noted that, in time, Mrs T intended to start up her own business, which was another reason for wanting to reduce her debts.

In its suitability report Portal noted Mrs T had no other assets or liabilities.

In a risk attitude profiling questionnaire, Mrs T said things like:

- she had no strong opinion about whether she found financial matters easy to understand;
- she felt comfortable investing in the stock market - although she had little experience of investing in stocks and shares;
- she felt comfortable investing in property – although she had little experience;
- she'd rather take her chances with high risk/high return investments than increase the amount she saved;
- when it comes to investing, she'd rather be safe than sorry.

Portal deemed Mrs T to be a "moderately adventurous" investor.

Portal said it would normally have recommended that Mrs T leave her pension benefits where they were as that would be most beneficial to her in retirement. However, Mrs T said she wanted to take her benefits immediately (and was aware of the downside of doing so) and had ruled out other ways of generating cash. Therefore, Portal recommended:

Mrs T transfer her existing pension fund to a SIPP as it said this "*combined the traditional elements of a personal pension with a self-investment option, giving you the opportunity to invest outside conventional insured funds".*

Portal recommended that Mrs T invest in the following funds:

47.5% Raithwaites hyper fund (unregulated collective investment scheme)

12.5% Hya Asia fund (unregulated collective investment scheme)

17.5% Venture Oil International

12.5% EOS solar energy

10% Cash deposit

It noted the charges that Mrs T would have to pay, including an initial charge of 5% of the total transfer value. And whilst it accepted this would cost more than her existing arrangement, it said the SIPP provider offered "*an extremely competitive fee structure for their product".* It also said there were other charges in relation to the underlying funds.

Mrs T went ahead and invested in the SIPP.

Due to changes in her circumstances, Mrs T needed to withdraw a further £3,559.88 from her pension in June 2015. This had the effect of depleting liquid assets to the extent that further withdrawals became temporarily unavailable.

Portal sent Mrs T an investment update in September 2015. In summary it explained that some of the investments hadn't performed as initially expected. However, it also referred to the '*strenuous efforts'* being made to return Mrs T's capital together with the growth she was entitled to, earlier than expected.

Mrs T complained to Portal that the transfer from her OPS was unsuitable; the investments were too high risk and that she'd suffered a financial loss.

Portal didn't agree and didn't uphold the complaint. However, it accepted there were unresolved issues concerning interest payments from some of the funds Mrs T was invested in, so said it had agreed to pay her an income until that was resolved - without any admission of liability on its part. Portal said it would continue to pay this income until the fund issues had been resolved and Mrs T could take an income directly from her pension. And she wouldn't be asked to reimburse the income payments made.

Mrs T complained to our service and one of our investigators looked into the complaint. He partially upheld it on the basis that, whilst he had some concerns about the advice given to Mrs T, (but didn't say it was unsuitable per se) he thought Mrs T would have gone ahead with the transfer anyway given her circumstances at the time. However, the investigator concluded that the investments recommended weren't suitable for Mrs T, especially as she wasn't an experienced investor. He set out how he thought Portal should put matters right.

Mrs T (via her representative) accepted the assessment. Portal didn't. It didn't provide any additional comments.

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 for many of the same reasons that our investigator gave, I'm intending to partially uphold it.

Apart from the overarching principles for businesses, which include:
Principle 1 – Integrity; Principle 2 - skill, care and diligence; Principle 6 - customers interests; Principle 9 - reasonable care, the Code of Business sourcebook (COBS) sets out other obligations. In particular, COBS 9.2.1 R required Portal to take reasonable steps to make sure any personal recommendations were suitable for Mrs T. That meant it was required to find out about her knowledge and experience (relevant to the specific type of investment); her financial situation and investment objectives.

COBS 9.2.2 R says that businesses should gather enough information to ensure the recommendation met the customer's objectives; the customer could bear the risks involved; and had the necessary experience and knowledge to understand the risks.

So, it's against that backdrop that I've considered whether Portal acted fairly and reasonably in Mrs T's particular case.

Was Portal's advice to transfer suitable?

Portal had to bear in mind that Mrs T had accrued valuable benefits and guarantees as a member of the OPS scheme. Unlike other types of pension, those weren't based on investment returns. And the regulator made clear that the starting point for any firm when advising a client to transfer out of a final salary (also referred to as defined benefits) OPS was to assume that it wouldn't be suitable.

This is set out in COBS19.1.6G, which says:
"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.

The OPS that Mrs T was looking to transfer formed roughly a third of her overall retirement provision. So, it wasn't an insignificant sum. And Portal did indicate that ordinarily, it would have told Mrs T's to leave her pension where it was because it felt that would be the most beneficial to her in her retirement. But as she'd indicated she wanted to access tax-free cash straightaway, it said that was the main basis for its recommendation. And whilst I can see that Portal did set out a number of risk warnings, including those which highlighted the guaranteed benefits Mrs T would be giving up, ultimately, it recommended that she transfer her OPS to a SIPP. In doing so, therefore, Portal had to be satisfied that this was in Mrs T's best interests <u>overall.</u>

Like our investigator, I too, have some concerns about aspects of the advice process. To properly advise Mrs T, I'd normally have expected Portal to ensure it understood her wider financial circumstances and income needs in retirement. Otherwise, I think it becomes more difficult to say with any confidence, whether its advice was suitable; met her overall retirement needs and was otherwise in her best interests. Portal said "w*e normally only give advice when we have obtained a full picture of your financial and personal circumstances, on this occasion you have requested that we limit our advice to your retirement planning only"*. And whilst I accept that Mrs T wasn't looking for advice about transferring her other OPS, as that made up about two thirds of her retirement provision, (and Mrs T was also still looking to build up funds in that for her retirement), I'd have expected Portal to take more account of that when looking at the bigger picture. But, other than references to the transfer value and critical yield, there's limited information about that in the fact find. Nor does Portal appear to have explored in any real detail, Mrs T's income needs in retirement.

Another important part of considering the viability of an OPS transfer is the level of return needed to match (let alone exceed) the benefits from an OPS. And the regulator made clear that, in order for a pension transfer to be financially viable, the assets a customer's attitude to risk allowed them to invest in, shouldn't just mean it's a case of achieving the critical yield, it should be capable of *exceeding* it. I can see that Portal told Mrs T that it didn't think the critical yield (10.6%) needed to match the benefits she was giving up could be achieved. And it noted that Mrs T wanted to go ahead in any event. In other words, it said that Mrs T knew and accepted that it was highly unlikely she'd be able to receive an amount equivalent to what she would have received from her OPS. And whilst that's certainly reflected in the evidence, I think Portal probably didn't put enough emphasis on just how much worse off Mrs T might be in retirement. I say that because the critical yield it mentioned was likely to have been significantly understated once charges and investment growth were factored in.

Having said all of that, Mrs T made it clear that she was looking to clear her existing debts and needed tax-free cash to enable her to do that. Pensions are primarily designed to provide retirement income, so the adviser needed to consider whether Mrs T could meet her objective of clearing debts by using alternative means. And it's evident from its fact find that Portal discussed other options for clearing the debt with Mrs T, but she'd ruled out the possibility of securing other credit. This also accords with what Mrs T told our service.

But as well as taking her tax-free cash to reduce her debts, Mrs T wanted to continue investing in her pension. So, it seems unlikely that her existing pension arrangements would have allowed her to do that. If there was the option to take retirement benefits at 57, I think she'd likely have to draw an income, which wasn't something that Mrs T wanted. And, as she was also still working and intended to do so for another few years at least, I think there would have been tax implications by taking an additional income.

Given its starting point that it would normally have told Mrs T to leave her pension where it was, (as that would most likely have been more beneficial in retirement) I've thought very carefully about whether Portal's advice for Mrs T to go ahead with the transfer was the right advice. And, on balance, I think it probably was.

I accept it could have told Mrs T it wasn't willing to facilitate the transfer. But by Mrs T's own admission, given her needs at the time, she'd have gone elsewhere to make sure she could access her tax-free cash. So, I think there's little doubt that reducing the debt at the time of the advice was more important to Mrs T than a higher income in retirement. And when thinking about whether the advice is in the client's best interests overall, I think it's as much about balancing their circumstances at the time of the advice with their needs in retirement. Arguably, reducing her debts would have given Mrs T a better standard of living at the time, whilst perhaps helping pave the way towards a more comfortable retirement.

But Portal was also aware that Mrs T had another OPS (that made up the bigger proportion of her pension provision) which was being topped up whilst she continued to work. And, in addition to that, I can see it suggested that some of the disposable income she freed up by repaying her debts could perhaps be re-routed towards her pension, whilst still giving her more money to live on at the time. Taking all of these factors together, I can't fairly say that Portal's advice to transfer was unsuitable. It helped Mrs T achieve her immediate objective, whilst thinking about what she could do to minimise any income shortfalls in retirement. So, on balance, I think Portal has done enough to demonstrate its advice to transfer was in Mrs T's best interest overall.

Was Portal's advice in relation to the underlying investments and SIPP suitable?

Given what I said earlier, I think Mrs T knew and understood she'd lose the valuable benefits within her OPS once she transferred it. And, notwithstanding what I said (about Portal probably not placing enough emphasis on the fact that Mrs T would likely be much worse off in retirement) Portal still had a duty to make sure any investment advice was suited to Mrs T's attitude to risk. That's because it needed to make sure it didn't unnecessarily expose her to undue or extra risk. For the reasons I'll outline, I don't think Portal accurately assessed and categorised Mrs T's attitude to risk. To a large extent, that influenced the investment and other advice to transfer into a SIPP as opposed to a different type of personal pension. And the upshot is that I think it subjected Mrs T's investments to unnecessary risk. I'll explain why.

Portal said she was a "*moderately adventurous*" investor which is someone who typically has "*moderate to high levels of financial knowledge and will usually keep up to date on financial issues. They will usually be fairly experienced investors, who have used a range of investment products in the past. In general, moderately adventurous investors are willing to take on investment risk and understand that this is crucial in terms of generating long-term return. They are willing to take risk with a substantial proportion of their available assets".*

In the risk questionnaire that Mrs T completed, she indicated that she had little experience investing in stocks and shares or in property. Nor did she have a strong opinion about whether she found investment of financial matters easy to understand. So, I think these statements were instantly at odds with Portal's categorisation. Elsewhere, Mrs T said she'd rather take her chances with high risk high return investments, but in another section, she said she'd "*rather be safe than sorry*" when it came to investing. These don't strike me as the sorts of responses a high-risk investor would typically give.

In these circumstances and in order to comply with COBS 9.2.2R, I'd have expected Portal to do more to probe and challenge the apparent contradictions in Mrs T's answers so that it could satisfy itself that she could bear the risks involved in any investments made. It also needed to be satisfied that she had the necessary experience and knowledge to understand the risks. As I'm not persuaded that she did have that knowledge and experience, I don't think transferring her OPS into mainly high-risk investments within a SIPP would have given Mrs T the flexibility and control that Portal alluded to. Nor does the evidence show that Mrs T wanted or needed that flexibility and control. And the reality is that, as an inexperienced investor, Mrs T would still have needed to rely on Portal for ongoing advice.

Contrary to what Portal said, I think the evidence shows Mrs T was a more cautious investor. And the fact that she had limited or no means to make up any further losses (over and above any she might reasonably have been expecting from the transfer of the OPS itself) ought to have been something that it gave careful thought to - especially when recommending such a high-risk investment strategy. And, as I've indicated, Portal's failure to fully explore and challenge some of the answers given (so as to agree a more appropriate risk category) led it to recommend investments that were wholly unsuitable for Mrs T's experience as an investor or which suited her *true* attitude to risk.

I say that because Portal recommended that Mrs T invest around 60% of her pension in unregulated collective investment schemes. By their nature, they are very high risk and often illiquid investments. There can also be a lack of regulation, longevity, potential insolvency, offshore and currency exchange, and other factors which could prevent investors from accessing their funds and the funds are mostly dependent on specific market areas.

So, they're only suitable to a certain type of investor. But, even in the absence of additional questioning on Portal's part, I think it would have known that Mrs T didn't fit that bill based on what it did know. And, whilst I can see that Portal did give Mrs T various warnings about the high-risk nature of these investments, that doesn't suddenly make unsuitable investments become suitable. And in any event, when considering unregulated investments, the regulator's good and poor practice report of 2010 sighted an example of good practice. This was the practice of restricting such unregulated investments to between 3% and 5% of a portfolio with ongoing monitoring. Portal was aware that it was recommending a much greater proportion of Mrs T's investments be invested in this way.

In its own evaluation, Portal recognised that these types of investments are suited to those comfortable in investing in property. And whilst Mrs T might have indicated she was comfortable doing so, she also said she had no experience in it. I think it's also worth saying that just because a consumer indicates that they have a certain tolerance for risk doesn't mean they have the capacity to accept that risk and absorb any losses that might then follow. And I think that's true in Mrs T's case. But I don't think Portal did enough to explore this with her. Nor am I persuaded that the assurances it gave about why they were considered suitable justified its actions or was enough to satisfy the regulator's expectations.

Again, as I've said, I think Portal exposed Mrs T to a higher level of risk than was appropriate for her. More recent statements indicate that Mrs T's investments aren't performing as expected. And, as one of the investments couldn't pay the promised interest, Portal stepped in to make payments until such time as the position recovered.

Taking all of these factors into account, it follows that I think Portal's investment advice was unsuitable in Mrs T's case. And I think it's responsible for losses that may have followed.

Portal said it recommended Mrs T invest in a SIPP because it gave her the opportunity to invest in funds outside of conventional ones. For similar reasons to those I've already given, I don't think Mrs T needed access to the range of investment choices that Portal thought she did. Given the size of her pension pot; attitude to risk and investment aims, it seems to me that her aims could just as easily have been achieved through a different sort of personal pension.

And whilst T's fees did seem to be fairly competitive in the scheme of things, I also need to keep in mind that there were other charges connected to the underlying funds themselves. Overall, Mrs T ended up with a far more expensive and complicated fee structure than she'd otherwise been used to or needed. So, as she only seems to have invested in the SIPP as a result of Portal's advice, I've set out below what it needs to do about the SIPP fees charged.

Putting things right

When we believe a consumer would have invested their funds differently, but we can't say exactly how, there are broadly three standard approaches that we can apply to imagine the consumer's money was invested with the right amount of risk for them. In Mrs T's particular case, I think she was probably able to take a small amount of risk. As such, I think Portal should use a benchmark made up of half based on Bank of England average return from fixed rate bonds and the other half with the FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index). I think that's suited to a consumer like Mrs T who was probably a more low risk, or cautious investor.

Fair compensation

In assessing what would be fair compensation, my aim is to put Mrs T as close as possible to the position she would probably now be in if she had been given suitable advice. I believe that what I've set out below is fair compensation and is a fair and reasonable outcome in the specific circumstances of this case.

What should Portal do?

To compensate Mrs T fairly Portal should (whilst taking account of any interim payments it's already made):

- Compare the performance of Mrs T's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable. It should also pay any interest set out below.

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

  If it is unable to pay the compensation into Mrs T's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

  The *notional* allowance should be calculated using Mrs T's actual or expected marginal rate of tax at her selected retirement age, assumed to be 20%. Allowing for the tax-free lump sum, the reduction should be applied to 75% of the compensation, so an overall reduction of 15% should reflect this.

- Provide the details of the calculation to Mrs T in a clear, simple format.

Income tax may be payable on any interest paid. If Portal considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs T how much it's taken off. It should also give Mrs T a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
SIPP with T	mixed	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	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 Mrs T's acceptance)

Actual value

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

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

If Portal is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of the calculation. It may wish to require that Mrs T provides an undertaking to pay it any amount she may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. It will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

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

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Portal totals all those payments and deducts that figure at the end instead of deducting periodically.

If Mrs T is unable to close her SIPP once compensation has been paid (which may be possible if illiquid investments remain), Portal should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. This is because Mrs T would not be in the SIPP but for Portal's unsuitable advice. So, it would not be fair for her to have to pay fees to keep it open. Five years would allow enough time for any issues with illiquid investments to be sorted out, and the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- It seems Mrs T wanted capital growth with a small risk to her capital.

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

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mrs T's risk profile was more cautious than Portal stated although I think she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs T into that position. It does not mean that Mrs T would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker investment. I consider this a reasonable compromise that broadly reflects the sort of return Mrs T could have obtained from investments suited to her objective and risk attitude.

I think Portal's handling of things is likely to have been a source of great worry and distress to Mrs T. Especially knowing that a fair proportion of her pension pot has significantly diminished in value due to Portal's poor investment advice. So, I think Portal should pay the £500 compensation our investigator recommended in light of this.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Determination and award: I partially uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Portal Financial Services LLP should pay Mrs T the amount produced by that calculation – up to a maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Portal Financial Services LLP pays Mrs T the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Portal Financial Services LLP. It is unlikely that Mrs T can accept my decision and go to court to ask for the balance. Mrs T may want to consider getting independent legal advice before deciding whether to accept this decision.

If Portal Financial Services LLP does not pay the recommended amount (if applicable), then any portfolio currently illiquid should be retained by Mrs T. This is until any future benefit that she may receive from the portfolio together with the compensation paid by Portal Financial Services LLP (excluding any interest) equates to the full fair compensation as set out above.

Portal Financial Services LLP may request an undertaking from Mrs T that either she repays to it any amount Mrs T may receive from the portfolio thereafter or if possible, transfers the portfolio to Portal at that point.

Mrs T should be aware that any such amount would be paid into her pension plan so she may have to realise other assets in order to meet the undertaking.

My final decision

I partially uphold this complaint. And I direct Portal Financial Services LLP to take the steps set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 25 April 2022.

Amanda Scott
Ombudsman