DRN-3174403

The complaint

Mr L complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a deferred defined-benefit ('DB') occupational pension scheme that he held. Portal processed the transfer of Mr L's DB scheme benefits to a personal pension to allow access to tax-free cash on an 'insistent client' basis. Mr L says that he didn't understand the risks involved and wasn't put in a position to make an informed decision. Mr L says he's suffered a loss as a result of Portal's actions.

What happened

Mr L contacted Portal in 2012 to discuss his pension and retirement needs after receiving what he says was an invitation for a free pension review.

In December 2012 Portal completed a fact-find to gather information about Mr L's circumstances and objectives. It also carried out an assessment of Mr L's attitude to risk, which it deemed to be 'moderately adventurous'.

On 5 December 2012 Portal sent Mr L a letter saying that it recommended he didn't transfer his DB pension scheme benefits because the growth rate required to match his guaranteed benefits was 9.68% and because he'd be giving up a guaranteed pension of just over £2,500 a year from age 65. But Portal said it could still help Mr L if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client forms'.

On 7 December 2012 Mr L returned the insistent client forms. On one form he indicated he wanted to go ahead, and on a separate form he signed to acknowledge that his new pension was unlikely to achieve the required growth rate and that he was likely to be worse off in retirement. It also said that he wanted to proceed as his main priority was to release funds rather than retirement planning.

On 11 December 2012 Portal sent Mr L a suitability report setting out its advice. The report outlined Mr L's circumstances at the time, which in summary said that he was employed; aged 57; he owned his own home with an outstanding mortgage of £7,000; he had around £2,000 in investments; and he had an outstanding loan costing him £200 a month.

The report set out the details of Mr L's existing DB pension scheme, which included the transfer value. It also said the critical yield required to match Mr L's existing scheme benefits was 9.68%.

The report said that Mr L's objective was to access the maximum tax-free cash entitlement to pay off his mortgage.
Portal noted that it had explored with Mr L other ways to generate the money required to meet his objective - but said that he didn't want to take on further lending or pay any interest and he didn't want to re-mortgage due to the redemption penalties involved.

The report then set out Portal's recommendation. It said that it had already recommended that Mr L shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr L had decided to disregard the advice and that it would be treating him as an insistent client. It went on to propose that Mr L transfer his pension to enable him to meet his objective and it set out which pension provider and product it recommended.

Mr L signed the relevant application forms and the transfer went ahead. Mr L received his tax-free cash payment and the proceeds were invested in an investment portfolio, which Portal deemed matched Mr L's attitude to risk.

In October 2020 Mr L complained, via a representative to Portal about the advice he received.

Portal considered the complaint and issued its final response to Mr L in December 2020. In summary it said that the complaint had been brought out of time because Mr L ought to have known he had cause for complaint more than three years before he did. It pointed to the point of sale documentation and the fact that Mr L had moved his pension to another provider in 2016 as evidence that Mr L had an awareness of the issues at these times. It therefore said it wouldn't investigate the merits of Mr L's complaint.

Mr L referred his complaint to our service. An investigator considered the matter and they concluded the complaint was not out of time – they didn't think Mr L was on notice that something might have gone with the advice he received sooner than said he did – so they said it was a complaint we could consider.

Because Portal agreed with the investigator's conclusions, an investigator then considered the merits of the complaint and they concluded the complaint should be upheld. In summary they said they didn't think Mr L was a true insistent client. They said Portal only provided Mr L with its suitability report and the reasons why he shouldn't transfer out of his DB scheme after he'd been asked and given his decision to go against Portal's advice. They said they didn't think this was fair because Mr L wasn't able to make an informed decision and he didn't likely understand the implications of completing the insistent client forms. They said Mr L's objective of paying off his mortgage could've been achieved by other means – but that in any event it didn't appear that he needed to repay it at this time and it could've waited until he reached 65. Overall they said Mr L wasn't sufficient experienced or qualified to be described as an insistent client and they thought he'd have likely remained in his DB scheme if things had happened as they should have.

Portal disagreed. In summary it said:

- it acted fairly and reasonably and conducted its advice in Mr L's best interests.
- Mr L signed the relevant documentation, which explained the benefits he would be giving up and that the transfer was against Portal's advice.
- its process meant Mr L was not put under any pressure to proceed and he was given time to digest the information he received.
- the suitability report repeatedly said that its recommendation was that Mr L should not transfer his pension.
- it believes it followed the correct insistent client process and says that its postal correspondence process demonstrates best practice for insistent client transactions.
- it believes Mr L would've transferred his pension regardless of Portal's involvement because he was intent on paying off his mortgage early as recorded in the fact-find.

Because the investigator wasn't persuaded to change their mind, the case was passed 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

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. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr L's best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr L as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were rules in the regulator's Handbook, which required Portal to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Portal to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr L had to have understood the consequences of going against the recommendation.

Portal says that it provided suitable advice and acted in Mr L's best interests. It says that it followed the correct insistent client process and that its postal correspondence process demonstrates best practice for insistent client transactions.

Mr L says that he didn't understand the risks involved and wasn't put in a position to make an informed decision. He says the insistent client paperwork was pre-drafted and he was advised he had to sign it to proceed with the transfer and obtain the tax-free cash.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr L's best interests. And I think Mr L likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because, following the telephone discussion Portal had with Mr L on 5 December 2012 about his pension options, it sent him what I think can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match Mr L's guaranteed benefits from his DB scheme, and because he'd be giving up a guaranteed pension of around £2,500 a year from age 65, it recommended Mr L should not transfer away from his DB scheme.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr L's best interests. But the information in this letter was limited to the loss of guarantees and the growth required to match his existing benefits. While Portal later sent a more detailed suitability report, which I will refer to later on, at this stage Mr L had very little information to go off to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portal recommended Mr L should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Portal's recommendation, it enclosed the necessary forms Mr L needed to complete and return to pursue this option. And the first option he was presented with was to go against Portal's advice – the second option was to do nothing as per its recommendation. It strikes me that Portal's process here was geared towards facilitating the transfer.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr L's best interests, it would've given more detail about its advice and recommendation upfront and placed greater emphasis on the reasons why the transfer wasn't in Mr L's best interests. And it also wouldn't have told him at the same time as delivering its recommendation - albeit a brief one - how he could put it aside and bypass it. I think the wording and the emphasis placed on how Mr L could ignore Portal's recommendation was unfair to Mr L and wasn't in his best interests.

I don't think it was in Mr L's best interest to go against Portal's recommendation – yet Portal made it very easy for him to do so. I also think that, given the context and the emphasis placed on this, Mr L could reasonably have interpreted this overall that Portal was recommending he go ahead and transfer.

I think it ought to have been clear to Portal that Mr L had limited knowledge or experience of financial matters based on the information available at the time of the advice. While I can see the fact-find recorded that Mr L had £2,000 in 'realisable assets', it's not entirely clear that this was in risk-based investments. This is because the adviser has recorded the sum of £2,000 and placed brackets around all of the different types of asset this might have been, including cash deposits. But even if it was in risk-based investments, I don't think a £2,000 investment reasonably means Mr L was an experienced investor. In my view his experience was limited.

Mr L's attitude to risk was categorised by Portal as 'moderately adventurous'. This might suggest Mr L was someone who therefore possessed the experience and/or confidence to make decisions about investments and take matters into his own hands. But I have serious concerns about how Portal arrived at this overall categorisation – I don't think this accurately reflected the level of risk Mr L was prepared to take. I say this because looking at the series of questions Portal asked Mr L in assessing his attitude to risk, I think there are a number of inconsistencies, which suggest Mr L didn't fully understand the questions being asked of him. For example, the first two questions recorded that Mr L agreed he would be described as a cautious person and that he wasn't comfortable about investing in the stock market. But in a later question he said that he was willing to take a substantial financial risk to gain substantial rewards.

I think Portal should've picked up on these inconsistencies and clarified things with Mr L. Because it didn't, I think it categorised Mr L as someone who was willing to take more risk than I think he was reasonably prepared to take. And so I think Portal attributed Mr L as having far greater investment knowledge and experience than he actually had.

Had Portal properly considered things, I think it should've put it on notice that it had to be careful if it was to take matters through the insistent client route - I think it ought reasonably to have concluded that Mr L's attitude to risk was significant lower than moderately adventurous and that he was not as knowledgeable or experienced in financial matters.

The insistent client form Mr L signed was a template. It wasn't in his own words. I accept it wasn't a requirement at the time - but given Mr L's level of experience, I think it would've been important for Portal to ensure Mr L understood what he was getting into. And a good way to have done this would've been to see in his own words that he understood the recommendation being made and why he wanted to proceed. In the absence of this, and because crucially as I indicated earlier on, he hadn't yet received Portal's written recommendation and advice and had time to digest it before deciding to go ahead anyway, I'm not persuaded Mr L was able to make an informed choice here.

It was only after receiving Mr L's confirmation that he wanted to proceed with the transfer that Portal sent Mr L its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, this was followed by a positive recommendation, advising Mr L to transfer his benefits to a personal arrangement to facilitate a tax-free cash withdrawal. And this was all set out under a heading titled '*Our recommendation'.*

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr L advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr L advice on the advice to transfer, and only considered the suitability of the proposed solution in the full suitability report *after* securing Mr L's confirmation to proceed on an insistent client basis.

So, by recommending that Mr L transfer his benefits to a particular scheme, not only did this undermine and cloud the recommendation not to transfer, I think Portal has effectively recommended that Mr L transfer out of his DB scheme. If Portal didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr L's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. It couldn't separate out the elements. For this reason, I think on receipt of the full suitability report Mr L likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Mr L's objective was to pay off his mortgage early. The fact-find provides a little more detail here – it says that Mr L wanted to start saving, so by taking the maximum tax-free cash to pay off his mortgage, this would allow him to do so immediately.

Firstly it strikes me as odd as to why Mr L had to repay his mortgage to be able to start saving. I say this because his mortgage was only around £100 a month and his disposable monthly income was recorded as being £1,000. So it seems to me that Mr L was already in a position to start saving if that's what he really wanted to do. I think it might've been helpful in considering Mr L wants and needs for Portal to have understood what he wanted to save for.

But secondly it appears to me that Mr L could've ultimately met his objective by different means – and means already as his disposal – which Portal ought reasonably to have explored and considered before continuing to facilitate an irreversible transaction to transfer Mr L's pension. I don't think it was necessary for Mr L to gain access to his pension monies early to achieve this.

Mr L's mortgage term on his interest only mortgage ran to 2020 – so eight years from the time of the advice, by which time Mr L would've reached his normal retirement age of 65. Given that Mr L intended to work until 65 and his monthly budget was not under any pressure, it doesn't appear that Mr L needed to repay his mortgage at this time.
Mr L could've waited until he reached 65 at which point he could've repaid it through savings – which he had the surplus income to be able to generate over the preceding eight years – or by utilising an element of the tax-free cash from his DB scheme pension. I can't see that Portal explored this. Portal says that Mr L was clear that he wanted to pay off his mortgage. But Portal wasn't there as an order taker - its role was to discern what Mr L wants and needs were and give suitable advice accordingly. It had to act in his best interests.

I can see that Portal recorded that it discussed the alternative ways Mr L could've raised the required cash to meet his objective. But I don't think these make any sense in the context of what Mr L was trying to achieve. It's recorded that taking out a loan and the possibility of Mr L re-mortgaging were discussed with him. But why would Mr L want to take out a loan to use the funds to repay his mortgage? Or consider re-mortgaging when he wanted to repay it? Neither of these are plausible alternatives nor appropriate in the circumstances.

What Portal could've discussed with Mr L – in addition to being clear with him that he didn't need to repay his mortgage at this time as I said above – was the possibility of him using his not inconsiderable monthly surplus income to make overpayments to his mortgage. While there was a possibility that Mr L's mortgage contained early redemption penalties, in my experience most lenders at the time accepted overpayments up to a certain limit without charging a fee. Alternatively and as I indicated above, Mr L could've saved his surplus income to put aside for repayment of his mortgage either once his savings reached the outstanding mortgage balance or when the mortgage term expired. Neither of these things required Mr L to accept any investment risk with DB scheme pension benefits – his sole pension provision.

So, while I'm mindful that there were no specific insistent client rules in place at the time, I consider the rules that were in place at the time were clear that Portal had to act with due care and skill and act in Mr L's best interests. And by not seeking to fully understand and address Mr L's objective or to clearly communicate that there were other ways he could ultimately meet his objective before carrying things out, I'm not persuaded this was acting in Mr L's best interest. Ultimately, I don't think Mr L was able to make an informed choice here – it seems to me that Mr L most likely went ahead with the transfer as he believed this was the only way to meet his objective. And because importantly Portal actually gave Mr L a positive recommendation to transfer out of his DB scheme, which I think would've given Mr L the impression that Portal agreed with his approach.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant that Mr L can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr L wasn't clear or fair and it didn't allow him time to think carefully about the advice not to go ahead with the transfer. It didn't act in Mr L's best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr C would've still gone ahead. Portal says that because Mr C was intent on paying off his mortgage as recorded on the fact-find, this is evidence that he would've gone ahead with or without Portal's involvement.

But I disagree. I think that, if Portal had acted in Mr L's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr L's true objectives at the time advising him on the alternatives already at his disposal, I don't think Mr L would've insisted on going ahead with the transfer.

As I've outlined above, I don't consider Mr L was an experienced investor such that he possessed the requisite knowledge or had the confidence to go against the advice he was given. I think he relied *solely* on the advice and process Portal employed.

As I said above it wasn't Portal's role to simply transact what Mr L thought he wanted or thought was a good idea. So if things had happened as they should have and if Portal had emphasised the importance of these funds to Mr L's future retirement, I don't think Mr L would've insisted on accessing them and gone ahead with the transfer.

Putting things right

A fair and reasonable outcome would be for the business to put Mr L, as far as possible, into the position he would now be in but for Portal's failings. I consider Mr L would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

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.

My understanding is that Mr L could've taken his DB pension benefits without reduction at age 65. So, I think compensation should be based on Mr L accessing his benefits at age 65 in line with the usual assumptions in the FCA's guidance.

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 L's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr L'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 L 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 L within 90 days of the date Portal receives notification of his acceptance of a final decision.

Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of any final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr L.
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 the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and direct Portal Financial Services LLP to pay Mr L 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 L 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 L 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 L the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr L.

If Mr L accepts my final decision, the money award becomes binding on Portal Financial Services LLP.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 27 July 2022.
Paul Featherstone
Ombudsman