

## **The complaint**

Mr S complains about some pension investment advice he was given by Portal Financial Services LLP. In particular he complains about the information he was given on those investments when he was looking to encash some of them in 2019. When that proved unsuccessful he became concerned about the safety of all the pension savings that Portal had invested on his behalf.

## **What happened**

Mr S held pension savings, both in two occupational schemes (on a deferred defined benefit basis) and in a personal pension that he was still contributing to. In 2012, when he reached 55 years of age, he was provided with advice by Portal about his pension savings.

Portal's report from the time records that it didn't initially recommend that Mr S transfer his pension savings from the two occupational schemes (OPS). And it also advised that he left his personal pension in situ as he was still making regular contributions to that plan. But following discussions with Mr S, Portal says it agreed to treat him as an insistent client and facilitate the transfers from the two OPS arrangements. So, in late 2012 Mr S's pension savings were transferred to a new self-invested pension plan (SIPP) and invested in line with Portal's recommendations. Mr S took a pension commencement lump sum (PCLS – otherwise known as tax free cash) that he said he wanted to use to pay for a wedding and create an emergency fund.

Portal recorded that Mr S had a “moderately adventurous” attitude to risk. It recommended that his pension savings were invested across four Unregulated Collective Investment Schemes (UCIS). Although over the years Portal provided Mr S with upbeat assessments of the progress of his investments, they have in fact performed poorly. In 2019 Mr S was told by the SIPP administrator that at least one of his investments was now worthless. It was that information that caused him to become concerned about the suitability of the advice he'd been given by Portal and the security of his pension savings.

Mr S's complaint has been assessed by one of our investigators. He didn't think it had been reasonable for Portal to treat Mr S as an insistent client, and so it shouldn't have facilitated the transfer of his pension savings from the OPS. And our investigator didn't think the investments Portal recommended were suitable for what he knew of Mr S's circumstances. So he thought that Mr S's complaint should be upheld and he asked Portal to put things right.

Portal didn't agree with our investigator's assessment. In brief it said that it had carefully followed the regulator's requirements for dealing with insistent clients. It thought that Mr S had been given clear information about the risks of the transfer, and that he had decided to proceed regardless. It said that it had considered other ways that Mr S could raise the capital he was seeking, but those were unsuitable.

Since the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr S accepts my decision it is legally binding on both parties.

## 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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr S and by Portal. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

As Portal will be aware, unlike the Courts, I am not limited to looking only at the issues a consumer has focused on in their complaint. Our approach is "inquisitorial" - rather than the "adversarial" procedures of the courts, where the lawyers for the two sides "fight it out". By law, I am required to resolve complaints fairly. This means I decide what questions to ask to get to the bottom of things. And it means I can concentrate on the relevant facts of the case, rather than the complaint as presented.

Here, Mr S's complaint appears to have primarily been triggered by concerns about some information he had been given when he tried to encash some of his pension savings. But those problems would then reasonably lead to a consideration of the actual investments that had been recommended to him. And those investments only arose as a result of Portal agreeing to facilitate Mr S's transfer of pension benefits from the OPS. So I think it fair and reasonable that my starting point for considering this complaint should be the advice that Mr S was given, and Portal's actions, in 2012.

I think there are three matters that I need to consider here. Firstly, whether the advice Portal gave to Mr S about potentially transferring his pension savings from the OPS was suitable. I then need to think about whether it was right for Portal to treat Mr S as an insistent client, and facilitate the transfer of his pension benefits despite it being contrary to its advice. And finally, should I consider Portal acted reasonably in the first two aspects, then to consider the advice it gave to Mr S about the investment of his pension savings.

### The applicable rules, regulations, and requirements

Within the FCA's handbook, COBS 2.1.1R required a regulated business to *"act honestly, fairly and professionally in accordance with the best interests of its client"*.

The FCA's suitability rules and guidance that applied at the time Portal advised Mr S were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like Portal, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, Portal needed to gather the necessary information for it to be confident that its advice met Mr S's

objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a “fact find” process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

*“A firm must:*

- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;*
- 2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
- (3) give the client a copy of the comparison, drawing the client’s attention to the factors that do and do not support the firm’s advice, in good time, and in any case no later than when the key features document is provided; and*
- (4) take reasonable steps to ensure that the client understands the firm’s comparison and its advice.”*

Under the heading “Suitability”, COBS 19.1.6 set out the following:

*“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 19.1.7 also said:

*“When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client’s attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.”*

And COBS 19.1.8 set out that:

*“When a firm prepares a suitability report it should include:*

- (1) a summary of the advantages and disadvantages of its personal recommendation;*
- (2) an analysis of the financial implications (if the recommendation is to opt-out); and*
- (3) a summary of any other material information.”*

In looking at the suitability of a transfer of Mr S’s pension savings I think Portal gathered the necessary information from Mr S and the administrators of his OPS. It used that information

to calculate what is known as the critical yield. In simple terms, that is the rate at which Mr S's pension investments would need to grow after any transfer in order to replicate the benefits that he was giving up from the OPS. Portal estimated that for Mr S the critical yields for each OPS would be 9.1% and 12.61% respectively. Portal rightly concluded that achieving that critical yield would be unlikely, and so it couldn't recommend that Mr S transfer his pension savings from the OPS.

I think that was the correct recommendation in Mr S's circumstances. He held valuable guaranteed benefits with the OPS. And although he did hold another pension plan, these schemes would form a fundamental part of his provisions to support his living costs once he had retired. So I don't think it would have been appropriate to recommend that Mr S give up his guaranteed benefits and transfer his pension savings to a SIPP.

Portal says that, once it had delivered its advice to Mr S, to not transfer his pension savings, he asked to be treated as an insistent client. That would mean that Mr S was effectively disregarding Portal's advice and asking that the transfer progress regardless. That insistent client process does however place a number of obligations on Portal to ensure that it has provided Mr S with sufficient information about the risks he was taking. And it is important for Portal to ensure that it hasn't acted in such a way that Mr S was persuaded to follow an insistent approach.

I have a number of concerns about whether it was reasonable for Portal to treat Mr S as an insistent client. And in particular whether Portal's actions encouraged Mr S to follow that approach, or that he even fully understood the decisions he was being asked to make.

As part of my investigation into this complaint I have asked Mr S for his recollections of his relationship with Portal at the time of the transfer. I must acknowledge that Mr S is being asked to recall events that took place almost ten years ago. So, over such a period of time, even the most careful of memories can and do fade. But I have no reason to doubt that Mr S has provided his complete and honest recollections of what happened.

I asked Mr S why he thought it had been unreasonable for Portal to have treated him as an insistent client. Mr S responded with the following;

*"I don't understand why they are saying I was an insistent customer when in fact I would say they welcomed me with open arms. At the time of the transfer they could not match the rate I was getting but assured me that as a long-term investor I would achieve a better rate. At the time I was looking for advice on how to make the best of my investment so I approached Portal as I thought they would be able to advise me as they are a big company and I assumed would give me good advice. If they had told me that they could not help me I certainly would not have insisted that they take my money, after all if they couldn't help me I could, and would have gone elsewhere."*

From that testimony I think it would be fair to conclude that Mr S was aware that the calculations Portal had performed for him suggested that he would have been better off (in financial terms) by not making the transfer. But it also seems that he given the impression that, over the longer term, moving his pension benefits to the SIPP would leave him better off. And it certainly doesn't appear that Mr S understood that he was asking to be treated as an insistent client and acting against the recommendation of Portal.

So I don't think I can reasonably say that Mr S's conversations with Portal sufficiently set out the contrary argument – and in particular explained the regulator's assumption that generally transfers of this nature would not be considered to be in the best interests of a consumer. I think that Portal's actions raised an expectation for Mr S that he should take his PCLS.

It is my understanding that the “insistent client” process is in place to provide a route for experienced and fully informed consumers to be allowed to make their own investment decisions. At times consumers might wish to take approaches that are not always in their best financial interests. But it would be wrong for regulators to prevent those decisions if the consumer is fully aware of the risks they are taking.

I don’t think that sentiment applies in this case. Mr S has provided testimony that suggests he didn’t understand what was happening with his pension savings. He appears to have been unaware of the terminology “insistent client” until he made his complaint. I haven’t seen anything to cast doubt on what he says.

The options form that Portal sent to Mr S, before he made his decision about how to proceed showed the transfer of his benefits as “Option 1”. And the “Do Nothing” option was listed as “Option 2”. That in itself might have subliminally suggested to Mr S that he should proceed with the transfer, despite it being against the advice of Portal.

So, on balance, I don’t think it is reasonable for Portal to say that it only effected the transfer because Mr S requested it to do so as an insistent client. I don’t think that Portal could reasonably conclude that Mr S was fully aware of its advice that he should take no action at all – instead I think that, from the very outset of its relationship with Mr S, Portal most likely led him to understand that transferring his pension benefits and taking a PCLS would be an appropriate course of action.

Given that I have concluded that Mr S shouldn’t have been treated as an insistent client, it follows that I don’t think Portal should have assisted him with the transfer of his pension benefits from the OPS. I will therefore direct Portal to put things right for Mr S by applying the regulator’s guidance on redress of this nature. And by doing that any problems with the subsequent advice given to Mr S about the investment of his pension savings will also be corrected. So I don’t need to consider that part of the complaint any further.

So I uphold Mr S’s complaint, and direct Portal to put things right.

### **Putting things right**

A fair and reasonable outcome would be for Portal to put Mr S, as far as possible, into the position he would now be in if he had remained a member of the OPS. 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 S’s acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr S’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 S 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 S 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 S.

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.

### **My final decision**

My final decision is that I uphold Mr S's complaint and direct Portal Financial Services LLP to put things right as detailed above.

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

Paul Reilly  
**Ombudsman**