DRN-3189022

The complaint

Mr J complains that Portal Financial Services LLP (Portal) provided unsuitable advice to transfer a personal pension plan (PPP) to a self-invested personal pension (SIPP) and to invest in unregulated collective investment schemes (UCIS).

What happened

Mr J contacted Portal in 2012 because he was interested in taking the tax-free cash benefit from his PPP.

Portal advised Mr J to transfer his PPP to a SIPP in order to take 25% tax free cash, and to invest the remaining funds in the SIPP in four UCIS with 12.5% of the remaining fund held in cash.

Mr J followed Portal's recommendation and transferred his pension to the SIPP. Mr J took 25% tax-free cash (TFC) and the residual funds in his SIPP were invested in line with Portal's recommendation.

Mr J complained via a claims management company (CMC) that Portal had given him unsuitable advice. For ease of reading I'll simply refer to responses as being from Mr J. The basis of the complaint was that the UCIS investments weren't suitable for Mr J. They were illiquid. And presented a greater investment risk than was appropriate for him.

Portal responded to Mr J's complaint by explaining why it thought Mr J had complained too late for it to consider his complaint under the Financial Conduct Authorities (FCA) dispute handling rules (DISP rules). However it also commented on the merits of Mr J's complaint. Explaining that it thought the advice it provided was suitable. Portal acknowledged that there were issues with the investments that weren't yet resolved. And explained that it had already made an offer to pay retirement income to Mr J as he'd already reached pension age. It said that the payments would be based on the original expectations of the fund performance. And that Portal would continue the payments until the fund issues were resolved.

Mr J wasn't satisfied with Portal's answer and brought his complaint to our service. Portal didn't agree that the complaint was raised within the time limits that gave us jurisdiction to consider it. I considered the evidence and issued a jurisdiction decision explaining why the complaint had been made in time.

Our investigator then looked at the merits of the complaint. He thought the case should be upheld. He agreed that Mr J had the objective of taking his full TFC. But was of the view that the investments that Portal recommended were unsuitable.

Portal didn't respond to the investigator's opinion. So the case was referred for an ombudsman decision. After which Portal acknowledged the process but chose to offer no further comment on why it disagreed with the opinion that had been given.

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.

I can see that Portal have chosen not to submit any further evidence relating to this case's merits since I issued my jurisdiction decision in September 2021. But I'm satisfied that it has had the opportunity to have done so. Having looked at all of the available evidence I'm upholding Mr J's complaint for reasons that are similar to those given by our investigator.

I won't repeat my earlier decision on jurisdiction here. But having reviewed everything on this case I've seen nothing that changes my mind. I acknowledge that Mr J's complaint was made more than six years after the event complained about. But for the reasons I gave to both parties previously, his complaint was brought three years from the point that I think he ought to have known he had reason to complain.

Portal have provided the recommendation that it gave Mr J in its document entitled "pension release report". We haven't been given records of meetings that portal had with Mr J or supporting documentation like fact finds or attitude to risk questionnaires. Where the information that we have is incomplete, I need to make a finding of fact based on a balance of probabilities.

Portal based its recommendation to transfer on the basis that Mr J wanted to take the maximum TFC he could from his pension. And Mr J has confirmed to us that he wanted to take his tax-free cash. He was over 55 and wanted early access to that money to clear debts. But didn't need to access the remaining pension as he was still working.

Portal's report explained that it discounted remaining in his pension or switching to a different personal pension or stakeholder pension because it wouldn't meet his objective of taking his TFC and leaving the remainder invested. Transferring to a SIPP did afford Mr J the possibility of taking his TFC and deferring any decision about taking benefits from his remaining pension fund.

Mr J's pension fund was around £23,000 before taking his tax-free cash. Meaning that he would be left with a residual fund just over £17,000. Portal were aware that it was Mr J's only pension. Portal assessed Mr J as having a balanced attitude to risk. It hasn't provided evidence to support its conclusion. But I don't think that the recommendation Portal made was suitable even assuming this assessment was correct. I think Mr J's capacity for loss was very low. This was his only pension, he had debts that he needed to clear, and at 59, didn't have enough working years to recover from much loss.

Portal argued that the UCIS that it recommended were suitable for a balanced risk investor. But I disagree. The lack of regulation and the type of assets invested in meant these UCIS potentially had a high degree of volatility. And Portal identified that the investments were illiquid. They weren't suitable investments to recommend putting all of Mr J's pension fund into.

In July 2010 the regulator issued guidance about unregulated investments in a 'Good and Poor Practice Report'. It contained examples of good practice, citing firms that had robust controls in place and that limit client exposure to 3% to 5% of their portfolio. So Portal should have known that recommending Mr J invest his whole pension fund in UCIS was contrary to regulatory guidance and was not suitable for Mr J.

Mr J only had an investment term of five to six years before he was likely to need to take some form of income from this pension. The advice was given before the introduction of the

‘Pensions freedoms’ in 2015. So the options for taking benefits weren’t the same as now. Portal explained that the UCIS it proposed should have provided annual returns that would generate potential income that could be paid from the SIPP. But the potential returns were highly speculative. Two of the schemes, that Portal recommended Mr J put 55% of his fund into, involved investment in off-plan hotel developments with no history of investment returns at that stage. The illiquidity of the funds meant that Mr J would not easily be able to draw benefits from his SIPP should those investments fail to perform as Portal suggested they should.

For the reasons I’ve given, Portal’s recommended investments weren’t suitable for Mr J. Given Mr J was likely to switch his pension to enable him to access TFC, I can’t now say what alternative investments Mr J should have been recommended instead. So I think that the following is a fair way to put Mr J, as close as possible, into the position he’d be if Portal had given suitable investment advice.

Putting things right

To compensate Mr J fairly Portal should:

- Compare the performance of Mr J'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.

  Portal should also pay any interest set out below.

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

  If Portal are unable to pay the compensation into Mr J's pension plan, it should pay that amount direct to him. 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 Mr J's actual or expected marginal rate of tax at his selected retirement age.

  For example, if Mr J is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr J would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- In addition, Portal should pay Mr J £300 for the trouble and upset caused, by the uncertainty Mr J experienced as a result of the recommended investment’s failure.

- Provide the details of the calculation to Mr J in a clear, simple format.

Income tax may be payable on any interest paid. If Portal considers that its required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr J how much its taken off. Portal should also give Mr J a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from ("start")	to ("end date")	additional interest
Transact SIPP	still exists	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 the complainant's acceptance)

Actual value

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

If, at the end date, there are illiquid investments (meaning they cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investments. So, the *actual value* of illiquid assets should be assumed to be nil to arrive at fair compensation. Portal should take ownership of the illiquid investments 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 investments the *actual value* should be assumed to be nil for the purpose of calculation. Portal may wish to require that Mr J provides an undertaking to pay it any amount he may receive from the investments in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal 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, you 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. Apply those rates to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr J wanted capital growth with a small risk to his 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 his 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 Mr J's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr J into that position. It does not mean that Mr J would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr J could have obtained from investments suited to his objective and risk attitude.

SIPP fees

Where the SIPP only exists because of the illiquid investment. In order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr J can discuss with his SIPP provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that Portal should pay Mr J a lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees) if Mr J is unable to close the SIPP. This should provide a reasonable period for the parties to arrange for the SIPP to be closed. Mr J should provide Portal with evidence from his SIPP provider to show if he's unable to close the SIPP.

My final decision

I uphold Mr J's complaint and require Portal Financial Services LLP to compensate Mr J in the manner that I've set out under '*putting things right'* above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 14 March 2022.

Gary Lane
Ombudsman