

The complaint

Mr H complains that Portal Financial Services LLP (Portal) provided him with unsuitable advice to transfer two personal pension plans (PPPs) to a Self-Invested Personal Pension (SIPP) and to invest the fund value in unregulated collective investment schemes (UCIS). Which Mr H says has caused him a loss in his pension fund.

What happened

Mr H held two PPPs and received advice from Portal regarding those pensions. Portal issued a suitability report on 16 May 2013 that advised him to transfer his PPP's to a SIPP. And provided investment advice within that SIPP. It recommended that Mr H invest his fund across four different UCISs.

Mr H didn't proceed with the transfer at that stage. Instead he came back to Portal later and on 4 October 2013 Portal issued Mr H with another suitability report. That report related to the transfer of the same PPPs. In it Portal recommended that Mr H transfer his PPP's to the same SIPP that was recommended in the May report. That suitability report told Mr H that it wasn't advising on the investments as he'd already decided on how he wanted to invest his pension.

Mr H's PPPs were then transferred to a SIPP. And the transfer value was invested in two of the four UCISs that had been recommended to Mr H in the May suitability report.

Mr H brought a complaint to Portal via a claims management company (CMC). The letter of complaint was dated 30 August 2019. In it the CMC complained that the advice to transfer and the investments recommended weren't suitable for Mr H.

Portal initially asked whether our service could look into this complaint. It suggested the complaint had been made too late. I issued a jurisdiction decision explaining why I thought the complaint had been made in time.

Our investigator then considered the merits of Mr H's complaint. She thought that the complaint should be upheld.

Portal disagreed with our investigator. Portal said that:

- Mr H wasn't advised on the investments, and that it just facilitated the transaction for him;
- the transaction was execution only so the assessment of appropriateness in the Conduct of Business Sourcebook (COBS) 10 didn't apply.

Mr H has provided a SIPP statement from August 2021 which shows that the UCISs have failed and been removed from the SIPP as having no value.

The case was passed to me to give an ombudsman's decision. I issued a provisional decision explaining why I thought the complaint should be upheld and offering both parties the opportunity to consider my reasons and respond

Mr H accepted my provisional findings, and Portal offered no further evidence or comment for me to consider.

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 considered this matter again in full, my decision is to uphold this complaint for the same reasons that I previously explained to both parties.

I'll start by referring to the jurisdiction decision that I issued for this complaint. When Portal responded to Mr H's complaint, it didn't respond on the issue of whether or not they'd done anything wrong – the merits of his complaint. Portal pointed out that the Suitability report that it gave Mr H on 16 May 2013 was more than six years before Mr H's complaint was made. And Portal argued that Mr H ought to have been aware that something was wrong more than three years before he complained.

I explained why I thought that Mr H had made his complaint in time, identifying a complaint that Mr H made to Portal on the phone within six years of May 2013. And explained that as Portal issued no referral rights to our service, our rules meant that the six months that Mr H would normally have to refer a complaint to us didn't apply. And I've seen no further arguments to change my mind, so am still satisfied that we can consider this complaint.

I think it's worth noting the jurisdiction argument that Portal raised in its final response to Mr H's complaint made in August 2019. It said that *"the original point of advice to you was in your suitability report dated 16 May 2013, which you received over six years ago"*. So when arguing that the complaint was made too late, Portal thought its advice in May 2013 was the relevant recommendation. But now that the merits of this complaint are being considered, Portal wishes to disregard that suitability report, and instead argue that it was superseded by its recommendation in October 2013. Which it says was on an *execution only* basis.

Our investigator focused on Portal's recommendation of May 2013 and explained why it was unsuitable. And Portal haven't responded to explain why it was. Portal's argument focussed on the October 2013 suitability report, which it says made no recommendation as it was an *"execution only"* transaction. I don't think Portal's argument is very reasonable though. Portal's relationship with Mr H was in the capacity of an adviser. It had made a full recommendation in May 2013 that included a recommendation about how the pension fund should be invested after the switch. And in October, knowing what the intended investment would be in the SIPP, recommended a SIPP to enable those investments. So, for reasons I'll explain, neither of the recommendations it made were suitable.

May 2013 recommendation

Portal carried out a fact-find ahead of providing its recommendation in this suitability report. It established Mr H's financial circumstances including the pensions he held. The recommendation that it provided Mr H was limited to the pension switch, which is the subject of the complaint.

Portal identified Mr H as having certain objectives. These included:

- consolidating his pension plans
- benefitting from potentially higher investment performance
- having a plan with less volatility
- moving away from equities

- taking responsibility away from his ex-employer
- passing benefits to his family

But Portal's suitability report stated the following:

"The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider".

In fact the suitability report shows little consideration being given to the objectives that were identified for Mr H, offering no commentary on whether the recommendation met them. By itself I don't think the reason Portal gave was a good enough reason to justify making this recommendation. Portal provided no evidence to support the claim that Mr H would improve his retirement benefits by making this switch. So Mr H was given no idea of how likely it was that he would be better off. The suitability report provided no past performance information for the investments that it recommended.

I've considered whether the recommendation may have been suitable given Mr H's other objectives. Mr H had a third pension that was left as it was. And whilst consolidating these two pensions may have simplified Mr H's pension position, Portal didn't comment on whether consolidating these two PPPs offered any genuine benefit to Mr H. And I can't see that it did. He still had another separate pension that wasn't consolidated. And it wasn't necessary at this stage to consolidate in order to take his benefits as he was too far away from his chosen retirement age.

Considering the other objectives:

- Portal don't seem to have explored why Mr H wanted to move away from equity based investments. I'd have expected Portal to question this further. And I can't see that it did.
- The PPPs that were transferred weren't related to Mr H's ex-employer, so this recommendation made no real difference to this stated objective.
- Portal made no comment on the comparative death benefits of the PPPs and the SIPP. But I would think that, it's more likely than not, that switching offered no benefit in this regard either.

The suitability report addressed Mr H's attitude to risk. Portal defined Mr H as having a *"moderately adventurous"* attitude to risk.

Portal assessed Mr H's attitude to risk using a questionnaire. In March 2011 the FCA issued guidance for assessing suitability. They said firms shouldn't rely solely on risk profiling tools to establish their client's attitude to risk. The FCA said that firms should have a robust process for assessing the risk a customer is willing and able to take, which includes assessing their capacity for loss; appropriately interpreting customer responses to questions and not attributing inappropriate weight to certain answers; and ensuring that tools are fit for purpose with any limitations recognised and mitigated.

The responses that Mr H provided in the risk attitude questionnaire were conflicting which can be the case. His answers indicated that he wasn't comfortable investing in the stock market and was concerned about the volatility of investments. Mr H agreed that people who know him would describe him as a cautious person and that he usually took a long time to make up his mind on investment matters. He disagreed that he was willing to take substantial investment risk to earn substantial returns. But he disagreed that he would look

for safer investments if that meant lower returns. And disagreed that he preferred bank deposits to riskier investments.

Portal have provided no scoring method for its questionnaire so it isn't clear why it considered Mr H to have a moderately adventurous attitude to risk. But I think the answers he gave indicated someone who was prepared to take some risk in order to get returns on his money. But wasn't prepared to take substantial risks. I'm not persuaded that this questionnaire and Mr H's circumstances meant that he had a moderately adventurous attitude to risk for this investment. I think it would have been more reasonable to treat Mr H as having a balanced attitude to risk.

However, I think that the UCISs Portal recommended represented high risk investments. Which weren't suitable for the attitude to risk that Portal considered Mr H to have. The lack of regulation and the type of assets invested in meant these UCISs were complex and high risk. They potentially had a high degree of volatility, which wasn't suitable for Mr H.

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 limited client exposure to 3% to 5% of their portfolio. So Portal should have known that recommending Mr H invest his whole pension fund in unregulated investments was unsuitable.

Portal said that Mr H had a suitable capacity for loss. He had another pension, so I agree that he had some capacity for loss with these PPPs. And the PPPs were invested, so exposed to investment risk already. He also had over 12 years to retirement age in which to continue planning for his retirement and recover from some loss. But the volatile nature of the UCIS recommended meant there was a risk of substantial or total loss. I don't think that Mr H had that level of capacity for loss for these pensions without it adversely affecting his retirement.

For the reasons I've given I don't think that Portal's recommendation was suitable. The recommended investments were too high risk, and I don't agree Mr H had the capacity for the potential loss for such investments.

I'm not persuaded that the pension switch offered Mr H any benefits. I don't think that switching to a SIPP met his objectives any better than the existing PPPs he had. In the suitability report Portal listed the options it considered. Remaining in his PPPs wasn't listed as an option that it considered. But I think that it should have been. In this case, I don't think the pension switch was necessary. So it is the switch that was unsuitable. It was more suitable for Mr H to have left his PPPs where they were. So Portal should have advised Mr H of this.

October 2013 recommendation

Mr H explains that he approached Portal in October 2013 after having considered Portal's recommendation. He explains that, of the four UCISs that Portal recommended his preference was to go with just two of them. Mr H explains that this was following up on Portal's existing recommendation. Which seems a reasonable explanation. So I think that it's more likely than not, that if Portal hadn't recommended that Mr H switch his pensions to invest in UCISs in May 2013, then Mr H wouldn't have come back to them in October 2013 asking to transfer. It follows that what happened in October was brought about by Portal's advice in May.

Having made a full recommendation in May though, Portal haven't made it clear why it chose to issue its follow up suitability report in the way that it did. Mr H certainly appeared to be

following Portal's earlier recommendation in part, if not in its entirety.

In the October suitability report Portal had the opportunity to again comment on the suitability of the investments and the transfer though. But instead suggested that Mr H had made his own mind up on his investment choices. I don't think this is a reasonable argument. Consumers should be able to take time to consider what are quite important financial decisions. And should be able to come back within a reasonable time without a business then claiming to take no responsibility for its earlier advice. Portal should have advised Mr H on whether changing the balance of investments it recommended before made a difference to its overall recommendation. It had an opportunity to correct what I think was its earlier flawed advice, which it didn't take.

I've considered whether the fact that Mr H only wished to invest in two of Portal's recommended investments might have made a difference. And I think that it might. By limiting the SIPP portfolio to only two of the four UCISs Mr H was making his portfolio less diverse than Portal had recommended. And in doing so potentially increasing the risk even more. And it doesn't appear that Portal have made any comment on that in the October recommendation. Which it should have.

I can see that the October suitability report avoids making any comment on the suitability of the UCIS' for Mr H. But it does still provide Mr H with a recommendation.

The October report says, "*upon evaluating the different providers of income drawdown available, I have recommended that you transfer your pension plan to a [named] Self Invested Personal Pension*". So I think that Portal were clearly giving Mr H a recommendation to switch his PPPs to a SIPP. Mr H approached Portal as his adviser. Not as a SIPP provider. So this wasn't an execution only activity. The section of COBS that is relevant here is section 9 regarding suitability. Not COBS 10 as Portal have suggested.

COBS 9 applies to a firm which makes a personal recommendation to a retail client in relation to a designated investment. And COBS includes personal pension plans under its definition of designated investments. Portal had a responsibility to ensure that its recommendation – that Mr H transfer his PPP's to its recommended SIPP – was suitable for Mr H.

It's worth noting here that In April 2014, the Financial Conduct Authority (FCA) issued an alert to remind businesses of their responsibilities when advising on pension switches where monies were being invested into unregulated products. It wasn't introducing new guidance but re-iterating the existing position that was in place when Portal provided its recommendation for Mr H. The FCA said they'd seen many cases of customers who'd held traditional pension plans, invested in mainstream funds with no experience of non-mainstream propositions and limited experience of standard investments. The new arrangements proposed by businesses were typically into unregulated, high risk and highly illiquid investments. They said such transfers were unlikely to be suitable for the vast majority of retail customers.

The FCA went on to say that if the underlying investment was unsuitable for the customer, then the overall advice wasn't suitable. They also said the firm needed to understand the underlying investment proposition in order to be able to assess its suitability. Which in this case meant that Portal weren't able to ignore the intended investments after the switch to the SIPP. Portal needed to consider the switch as a whole, including the UCISs Mr H had decided upon, before recommending this pension switch to Mr H.

And as I've already explained, I don't think the investments that Portal recommended in May were suitable for Mr H. And I don't think that investing in only two of them in October could

be considered suitable either. So Portal's recommendation to move his PPPs to a SIPP, in order to facilitate those investments, wasn't suitable.

Putting things right

I've explained that it would have been more suitable for Portal to have advised Mr H not to switch his PPPs. If it'd done so, I think it's more likely than not that Mr H would have left his pensions where they were. So Portal should put Mr H, as close as possible, into the position he'd have been if the switch hadn't happened.

What Mr H's PPPs may have been worth

To compensate Mr H fairly Portal should obtain the notional values for both of Mr H's switched personal pension plans from the providers, from their transfer dates up to the date that Mr H accepts my final decision. Thereby determining what those pensions would be worth had they never been transferred to the SIPP.

If there are difficulties in obtaining a notional valuation from either pension scheme Portal should instead use the '*FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index)*' benchmark, using the same dates, to calculate the notional value of his switched pensions.

I've chosen this as a suitable benchmark because:

- Mr H wanted capital growth and was willing to accept some investment risk.
- 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.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr H's circumstances and risk attitude.

What Mr H's SIPP is worth

Portal should then find out the value of Mr H's SIPP, if it is still open and has any value, on the date of its above valuation.

Mr H's loss

The difference between the notional value of his PPPs and Mr H's SIPP valuation represents the loss that Mr H suffered.

Portal should pay this amount into Mr H's pension and that payment should allow for the effect of charges and any available tax relief, so that he's in the same position he'd have been in if he'd stayed in his original scheme.

If paying compensation into Mr H's SIPP would conflict with any existing protection or allowance and / or the plan is closed, then Portal should pay the compensation to Mr H as a cash sum. In doing so it should make a notional deduction to allow for income tax that would otherwise be paid. It should be assumed that 25% of this can be taken tax-free and that Mr H will likely pay basic rate tax at 20% on the remainder. So a reduction of 15% should be made to the loss figure to account for the likely effect of income tax.

If Mr H paid all of his SIPP fees from assets in his SIPP fund, then the above methodology will ensure that Mr H is compensated for his actual loss. If Mr H had to pay any fees directly or make contributions to his SIPP to cover fees, then Portal will need to reimburse him for this. Portal should pay Mr H the cost of any additional contributions including 8% a year simple interest[#], from the date of the payments until the date that Portal settles the complaint.

Portal must pay the compensation within 28 days of the date on which we tell it Mr H accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple interest[#].

Mr H has been caused distress as a result of Portal's unsuitable advice. It will have been alarming to find out that the value of the investments in this pension fund had reduced to zero. He'd had no options to intervene or sell the investments because they were illiquid. And he's been caused inconvenience in trying to get the UCIS removed from his SIPP. In recognition of this impact Portal should pay Mr H a further £350.

- Income tax may be payable on any interest paid. If Portal considers that it's required by HM Revenue & Customs (HMRC) to deduct income tax, it should tell Mr H how much has been taken off. It should also give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC if appropriate.

My final decision

For the above reasons, I uphold Mr H's complaint.

Portal Financial Services LLP should compensate Mr H in the manner I have set out under the heading "**putting things right**" above.

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

Gary Lane
Ombudsman