

The complaint

Mr J complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused him a financial loss.

Portal Financial Services LLP is responsible for answering this complaint. To keep things simple I'll refer to "Portal".

What happened

Mr J approached Portal in 2013 to discuss his pension and retirement needs. The information gathered by Portal about Mr J at the time was broadly as follows:

- Mr J was 48 years old living with his wife and two children in a mortgaged property. They had no other debts.
- Mr J earned approximately £22,000 (gross) a year. Mrs J earned £20,000 (gross). They were said to have disposable income of around £200 per month.
- Mr J was a deferred member of his OPS, having joined the scheme in the mid-1980s and accrued 14 years of benefits. The cash equivalent transfer value (CETV) of the OPS was £97,563 with a normal retirement age of 65. Mr J was a member of his current employer's pension scheme with 4 years' service.

A suitability report was issued by Portal, on 2 May 2013. The report started by saying it recommended Mr J should not transfer his pension at all but leave it where it was instead. Nevertheless, in the same report, Portal said that because Mr J insisted he wanted to transfer out of his OPS, it would help him do this. It said it could treat him as an 'insistent client', a term used in the industry to describe a situation where a client goes against the advice of a professional financial adviser.

Portal therefore went on to give Mr J a second recommendation within the same document - to transfer his OPS to a SIPP and invest the money in unregulated collective investment funds ('UCIS') also recommended by Portal.

Mr J now says he was given unsuitable advice by Portal and referred the complaint to our Service. One of our investigators looked into the complaint and said we should uphold it. They thought Portal hadn't treated Mr J correctly when categorising him as an 'insistent client' and that he'd lost a lot of money as a result of the higher-end risk investments Portal had recommended after the pension transfer. The investigator said Mr J would not have transferred out of his OPS if Portal had given him suitable advice.

Portal responded by saying it had dealt with Mr J correctly and he'd been warned that transferring out of his OPS came with certain risks, which were explained to him. As the complaint couldn't be resolved informally, it's come 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.

Having done so, I've decided to uphold the complaint.

What was Portal required to do?

Portal says Mr J ultimately went against its advice. It says that he was advised that he ought to stay in the DB scheme, and it was Mr J himself that insisted he wanted to transfer out. Portal says this meant he became an 'insistent client' and that accordingly, it followed a process to transfer Mr J's pension to a SIPP as per his wishes.

At the time when Portal met with Mr J and was advising him, there was no specific regulatory advice or guidance in place in respect of 'insistent clients'. However, there were a number of important Conduct of Business ('COBS') rules in the regulator's Handbook. These included but were not limited to a requirement upon Portal to '*act honestly, fairly and professionally in accordance with the best interests of its client*'. In addition to this, COBS required Portal to provide information that was clear, fair and not misleading.

So, everything I've said above demonstrates that firms, like Portal, had a number of important responsibilities when providing advice. Despite what Mr J might have thought he wanted at the time, I think his overall expectation in paying for regulated financial advice was that he would be clearly guided on the basis of his circumstances and means. And in particular, it should have been clear that Portal had not recommended the transaction and the risks of the transfer-out Mr J was apparently interested in should have been pointed out.

I don't think Portal adequately did this.

Initial contacts between the parties

On 22 March 2013, a client information form was completed, most likely by an introducer firm, setting out Mr J's details. It was noted on this form that Mr J was interested in transferring out of his OPS and into a SIPP which comprised of "*alternative investments*" although it wasn't clearly detailed what those were at the time. It seems this document was also the basis for Portal later classifying Mr J's attitude to risk as 'moderately adventurous'.

Looking at the types of questions Mr J was apparently asked about investing during the initial contacts, and the contradictory answers listed to some of these, I think there's very little evidence to justify that eventual description of Mr J's attitude to risk. I note Mr J said, for instance, that he preferred the safest types of investment, that he had little experience of investing in stocks and shares, and that when it came to investing, he'd rather be safe than sorry. So I think Portal categorised Mr J at a much higher risk level than was justified, a factor which became relevant later on when Portal recommended how he should invest his SIPP funds. However, I've also noted parts of this form weren't properly filled out, a feature I've noted in some of the other client documentation in this case we've been sent by Portal.

Next, I considered Portal's 'fact-find' form which was completed on 1 May 2013. Given this particular pension represented a significant portion of Mr J's overall retirement provision, I don't think Portal did a good job of really finding out enough about Mr J's circumstances on this form either. It was not a comprehensive document, by which I mean it was summarised and shortened to a somewhat careless extent. For example, Mr J's outgoings were not all individually detailed and there were quite a few fields in the document unfilled.

I think there were also statements in the 'fact-find' which needed clarification, particularly around the types of investments Mr J would potentially like to enter into. I've also seen an apparent 'adviser recommendation' page at the end of the copy of this form which we've been sent. However, I don't think this section formed part of the original 'fact-find' document. I say this because this 'recommendation' page is typed, whilst all other pages are handwritten. And I don't think a recommendation would normally have been given during a 'fact-find' discussion. I've also noted the other pages in this document are numbered, whilst the page headed 'adviser recommendation' is not. This part of the form also says, "*the client has returned the form stating that they wish to continue with the pension transfer*". So, in my view, this 'recommendation' page, attached as it is to the 'fact-find' and dated 29 April 2013, almost certainly didn't form part of the same exercise completed on 1 May 2013.

Collectively, these issues give me cause for concern. I think they portray a lack of diligence on Portal's part and also a failure to really understand Mr J's retirement needs in the years ahead. They also point to earlier discussions with Mr J where he had already agreed to transfer his pension, before any advice had been given to him. So, rather than understanding his needs and acting in Mr J's best interests, the advice from Portal appears to me to have been almost entirely based on his apparent desire to transfer out of his existing scheme at the age of 48, with no real consideration about his future retirement plans.

Objectives listed during the advice

I then looked at portal's suitability report, dated 2 May 2013. This should have been an opportunity for Portal to clearly and formally set out what its recommendations to Mr J were for his OPS, based on the information it had collected thus far. The report listed Mr J's pension objectives as follows:

- To have more flexibility
- To have access to a greater investment fund choice
- It said he was concerned with the scheme funding position
- It said he was worried about the employer's capability of reducing the fund deficit

I've thought about these apparent objectives and I considered the likelihood of them originating from Portal, rather than from Mr J himself. I think, for example, that the objectives listed here are simply further evidence of a misunderstanding of Mr J's circumstances and needs. I've seen no evidence that his circumstances demanded greater flexibility, which in any event, seems poorly defined in this case. Mr J was only 48 so was some way off retiring. Nor is there any evidence he had either the capacity or desire to actively manage his pension funds going forward. Instead, everything I've seen shows Mr J to be an inexperienced investor who had a desire for financial stability more than anything else. In my view, the pension he had was already within such a scheme, entirely managed for him and containing guarantees for the future.

In addition to these things, I think the comments and objectives listed about the security of Mr J's OPS, were also contradictory. Portal's own records show the overall funding of Mr J's OPS to be at around 95%. We know it's not uncommon for DB schemes to have deficits but there's simply no credible evidence in this case that the deficit, if there was one, wasn't being addressed by the pension provider. Nor is there any real evidence that the scheme was somehow at a risk of collapse. Even if this were the case, I'd have expected a broader explanation from Portal and reassurance on this point in the suitability report. I would have also expected to see a more expansive explanation of the pension protection fund, to explain these types of concern to Mr J, and to help him come to an informed decision about what he ought to do.

So, in short, whilst I think it's possible Mr J may have found the prospect of transferring out of his OPS worthy of exploring at the time, the apparent objectives as listed in the suitability report were no more than generic issues. They were also unrelated to Mr J's situation and I think they are much more likely to have come from Portal, as part of justifying its transfer advice, than from Mr J himself.

The recommendation

While on first look, Portal's suitability report did set out that its initial recommendation for him was *not* to transfer out, I think this was seriously undermined by statements and actions it made elsewhere. To me, Portal's report was pre-disposed to enabling Mr J to transfer out of his OPS from the outset and so its initial recommendation did no more than pay lip service to the important benefits and guarantees Mr J would be giving up in the process.

I say this because although there was a recommendation not to transfer out of his DB scheme, this was set out at the beginning of the report in only one short sentence. Here would have been an appropriate point at which Portal could have clearly told Mr J why he shouldn't transfer. In my view, there should have been an explanation of the benefits he'd be giving up and a demonstration that his funds, if transferred out of the scheme, would be highly unlikely to grow in a way that would match the benefits of leaving them inside the scheme. This could have been done with reference to the critical yield or other growth-related comparisons, together with accompanying explanations. It also ought to have explained the impact of transferring on Mr J's retirement plans, including whether he'd have enough income to live on at his desired retirement age if he transferred out. Furthermore, it should have addressed Mr J's concerns about the financial stability of the scheme and explained why it was not in his best interests to transfer out of the scheme for this reason.

However, it was only later in the report that references were made to what Mr J would be giving up and, in my view, these dangers were substantially underplayed. The majority of the remaining part of the suitability report was devoted to the SIPP fund recommendations, all of which were inappropriate for an investor like Mr J who had specifically said he wanted financial stability and preferred safe investments. In this situation, what I would expect to see was a meaningful emphasis in the documentation showing the reasons why the transfer was not in Mr J's best interests. However, the information Portal provided was once again generic and limited to the loss of guarantees. There was only a brief mention of the critical yield required to match the OPS benefits and the significance of this was not explained.

So, ultimately what happened in the report was that immediately following a very short and unsupported recommendation to stay inside his OPS, which didn't address Mr J's objectives at all, Portal said it was treating Mr J as an 'insistent client' and was therefore recommending Mr J *should* transfer out after all.

But I think it ought to have been clear to Portal that Mr J had little knowledge or experience of pension related matters. Based on the information available at the time of the advice I think this should have put Portal on notice that it had to be careful if it was to take matters through the 'insistent client' route. However, every reference I can see to Mr J being an 'insistent client' comes from Portal, rather than Mr J himself. I therefore don't believe the evidence is plausible that Mr J even was an 'insistent client'. And as I've said above, it seems Portal had recorded that Mr J had already agreed to transfer out before any recommendation was given to him, so its advice was geared towards this.

I further considered a Declaration Form Mr J was either sent or given in a letter. Because this was also dated 2 May 2013, it's fair to say this would have been issued together with the suitability report I've described above. Portal points to this form being evidence that Mr J wanted to go ahead and transfer against its advice. However, I disagree with this and I think this form falls substantially short of what I'd expect to see from regulated financial advisers

and their approach to an 'insistent client'. I say this because the Declaration was prepared wholly by Portal, rather than Mr J. And it contains a list of statements which in my view are obviously designed to remove any responsibility from Portal.

So, this Declaration Form was no more than a template which made a number of unrealistic assumptions about Mr J's understanding of the process. Examples include a failure to explain the different types of growth rates, and a description of 'illiquid investments' which I think Mr J would have needed much more information about. Given Mr J's likely levels of financial knowledge and experience, I think it was important for Portal to ensure Mr J understood what he was getting into. A good way to have done this, for instance, would have been to see in his own words that he understood the recommendation being made and why he wanted to proceed. It would also have been important for all these warnings and statements to have been set out for Mr J at a different point in the advice proceedings and not together with the suitability report.

In my view, therefore, Portal's actions and inactions here fitted the regulator's later definition of a 'papering exercise' designed to quickly complete the transfer-out process. In my view, Portal's recommendation wasn't clear and it failed to set out its advice with due care and skill.

Suitability of advice

Given Portal itself has said it advised against a transfer, it would be hard for it to now argue that the transfer was in fact suitable. And I see that in responding to our investigator's 'view' Portal now accepts that transferring out of the OPS wasn't suitable for Mr J – so there's no dispute about this matter. I also agree that transferring out was not suitable.

In my view, there were a number of shortcomings in this case preventing Mr J from making a fully informed decision. I also think it's more likely than not that the provision of full information and better analysis would have influenced Mr J's decision making. So, if Portal had followed a better process, I don't think Mr J would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mr J what he would be losing out by transferring his deferred benefits.
- There's no evidence that Mr J, an inexperienced investor, desired any input or control over the investment choices of his pension funds.
- Mr J was paying for independent financial advice, and if that advice had been persuasive about the suitability of remaining in his OPS, I think it's more likely that he'd have followed that advice, rather than being pushed immediately down an 'insistent client' route.

Mr J was also only 48 at the time of the advice, and based on both what I've seen and been told by Portal, he didn't have concrete retirement plans. I think this just added to the fact that it was simply too soon to make any kind of decision about transferring out of the DB scheme.

I don't think Portal explained these issues to Mr J or really emphasised why it wasn't suitable for him to give up all the guaranteed benefits the DB scheme came with when he didn't really yet know what his needs in later life would be. I also don't think it ever truly established why Mr J wanted to transfer out of the scheme at that time.

Suitability of investments

Portal recommended that Mr J invest his funds in a SIPP. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr J and I don't think he would've insisted on transferring out of the scheme if clear advice had been given to him, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

Summary

I have set out in this decision why I don't think Mr J met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by Portal simply to transact what Mr J may have thought he wanted to achieve at the time – to transfer his pension out to another provider.

I then explained how Portal's initial recommendation not to transfer was not comprehensive, meaningful, or easy to understand. It did not adequately explain why transferring out was not in Mr J's best interests, in a way that was personal to him or with reference to his objectives. Portal then immediately offered Mr J a very easy route to transferring his pension anyway, via a series of signatures on pre-populated forms. In this respect, the advice did not meet the standard I mentioned at the beginning of this decision about being clear, fair and not misleading.

Finally, I went on to think about whether, if Mr J had been given clear and persuasive reasons why transferring wasn't in his best interests, he would have followed advice to remain inside the DB scheme. My view is that I think he would. Mr J went to Portal seeking advice. I think it's much more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

Portal failed in its duty, so I'm upholding Mr J's complaint.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr J, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr J would have most likely remained in his DB scheme if suitable advice had been given.

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 J's acceptance of the decision.

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

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

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 current understanding is that some elements of Mr J's investments in the SIPP may be illiquid, meaning they can't be readily sold on the open market. If this is the case it can be complicated to establish its value. To calculate the compensation in this event, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investments.

If Portal is genuinely unable to buy the investments, it should give the illiquid investments a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr J to provide an undertaking to account to it for the net amount of any payment he may receive from the investment in future. That undertaking should allow for the effect of any tax and charges on what he receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr J to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If the circumstances are that the SIPP only really exists because of the illiquid investments, then:

In order for the SIPP to be closed (should Mr J wish to move his investment portfolio) and further SIPP fees to be prevented, the investments need 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 pays Mr J an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

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 Portal pays the balance.

My final decision

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

If Mr J accepts this decision, the money award becomes binding on Portal Financial Services LLP. My recommendation would not be binding if he doesn't accept. Further, it's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 26 August 2022.

Michael Campbell
Ombudsman