

The complaint

Mr S complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan. 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 S approached Portal in 2015 to discuss his pension and retirement needs.

A suitability report was issued by Portal on 12 November 2015. The report started by saying it recommended he should *not* transfer his pension at all but leave it where it was instead. Nevertheless, in the same report, Portal said that because Mr S insisted that 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.

The information gathered by Portal about Mr S was broadly as follows:

- Mr S was 55 years old and living in a house he owned. The property was said to be valued at around £80,000.
- He worked in the public sector earning approximately £19,000 (gross) a year and had a disposable income after expenses of £500 per month. He had £3,000 in savings.
- Mr S was a current member of an OPS which he'd joined in the 1990s. The cash equivalent transfer value (CETV) of this scheme was around £99,000 at that time. (I have since confirmed the correct normal retirement age in Mr S's circumstances was 66).
- Mr S had a three-year loan which was being paid off monthly. He had no further assets or liabilities other than those outlined above.
- In the light of recently changed rules - 'pension freedoms' - Mr S told Portal he wanted to access his OPS to take the maximum tax-free cash available. He also said he wanted to drawdown a further £23,000 each year until the fund was depleted. However, Mr S said he didn't have any current plans to retire or stop working. He said he wanted cash to pay for items such as a car, a Rolex watch and to trade in gold items. He also said he'd give some money away to relatives.

Portal went on to help facilitate the transfer out of Mr S's OPS. It says this was on an 'insistent client' basis.

Mr S says he was given unsuitable advice by Portal. The complaint has been referred to our Service. One of our investigators looked into the complaint and said we should uphold it. They thought Mr S would not have transferred out if Portal had given him suitable advice. Portal hasn't agreed with our investigator. 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 S ultimately went against its advice of 12 November 2015. It says that he was advised in the suitability report that he ought to stay inside the DB scheme, and it was Mr S himself that insisted he wanted to transfer out. It says this meant he became an 'insistent client'. I've therefore considered this point first.

There was limited guidance available specifically about 'insistent clients' at the time of this advice, but nonetheless, the regulator placed important general obligations on firms like Portal. These included the overarching principles such as: Principle 1 – Integrity; Principle 2 – skill, care and diligence; Principle 6 – customers interests; Principle 9 – reasonable care.

In addition, the Conduct of Business Sourcebook ('COBS') rules required Portal to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr S had to have understood the consequences of going against the recommendation.

However, I should also point out that there is no rule to prevent advisers transacting business against their advice, if the client insists. So, I need to think here about whether enough was done by Portal to try to find alternative ways of meeting Mr S's objectives. I have also considered whether the 'insistent client' process in this case was simply used by Portal to transact what Mr S thought he wanted to achieve.

I have considered all these things carefully in determining whether I think Portal did anything wrong, because Portal ought to have taken these things into account at the time.

Was Mr S an insistent client?

Everything I've said above demonstrates that firms, like Portal, had a number of important responsibilities when providing advice. Despite what Mr S thought he wanted, I think his expectation in paying for regulated financial advice was that he would be clearly guided on the basis of his circumstances and means. The information ought to have been clear, fair and not misleading. In particular, it should be clear that the business has not recommended the transaction and the risks proposed by the client ought to have been pointed out.

I don't think Portal adequately did this.

Portal's 'fact-find' was completed on 29 October 2015. Given this pension represented the vast majority of his retirement provision, I don't think Portal did a good job of really finding out enough about Mr S's circumstances. It was not a comprehensive document, by which I mean it was summarised and shortened to a somewhat careless extent. For example, Mr S's outgoings were not individually detailed and there were quite a few fields in the document

unfilled. So, in my view, the extent of all the information listed about Mr S cannot be guaranteed as being complete.

I also note the amount of cash Mr S was said to 'need' was the exact amount of tax-free cash he could access from transferring out of his current pension scheme. When asked where the money would be used, generalised comments were made on the 'fact-find' and the important section about loss of his guaranteed pension income wasn't filled out in any real detail. In all, this was a poor document which in my view implies there were substantial shortcomings in the financial discussions with Mr S. I think the 'fact-find' was already forming the basis of him transferring out of the DB scheme.

So, when Mr S was written to by Portal a few days later, on 4 November 2015, the letter reflected that he wanted to access his pension early and enter drawdown with the remaining sums. The course had also already been set for him to access the rest of the pension soon after. In my view, there had been no meaningful dialogue about the risks involved and that he'd be leaving a pension scheme he was currently a member of and which had built up guarantees and benefits over the last 20 years.

On first look, the suitability report recommendation of 12 November 2015 appeared to be cautioning against transferring out of Mr S's DB scheme. However, the report then said Mr S had wanted to be treated as an 'insistent client' and had indicated this on a form he'd signed the previous week. I've looked at the form that Portal refers to. It was signed by Mr S on 6 November 2015 which was before he'd received the suitability report. I note the first part of the form involved Mr S selecting from one of three 'tick-box' pre-determined options which had been set out by Portal. In my view, these were not the only options available to Mr S and Portal's advice ought to have fairly reflected this.

Portal said the second half of the form showed Mr S had explained in his own words more about why he wanted to transfer out. However, I disagree with the relevance of this as I've seen that this part of the form is also substantially flawed. I say this because the explanation in Mr S's own words is very short indeed and in my view is demonstrative of someone who may not have understood the situation he may be getting into. Mr S's statement contains very little information as to why he is prepared to discount the apparent 'advice' from Portal not to transfer out of his DB scheme. And it only says Mr S wants to buy a number of items and give some money away. In my view, this does not show, nor does it even imply, Mr S was aware of the longer-term consequences of giving up his pension benefits and his retirement security. I also believe the forms returned by Mr S indicate a vulnerability, clearly demonstrated by his lack of understanding of the process.

I conclude that Portal were accepting a decision that Mr S had made based purely on the information it had sent him in its letter of 4 November 2015. And that information wasn't very comprehensive. It fell short of being a well-considered recommendation. If Portal thought that transferring this DB pension wasn't suitable, the Principles of business, that I've referred to above, meant that Portal had a duty to explain its advice in a persuasive and clear way. It ought to have been convincing Mr S that its recommendation was suitable. Had Portal done that, then Mr S could have made a genuinely informed decision.

The letter of 4 November ought to have been a more comprehensive recommendation. It started, like an earlier letter in October, by letting Mr S know how much tax-free cash he could get by transferring, which Portal knew Mr S was already attracted by. It then said, "*as the critical yield ... with this provider is 9.5% it would be against our recommendation to do this*". It also explained what the DB benefits could be at retirement age of 66. But it offered no further explanation why Mr S ought not to transfer. Given Portal expected him to make such an important decision based on this letter, I think it should have been much clearer.

It could, for example, have included the following supporting reasons why the transfer was unsuitable:

- Leaving the scheme would deny Mr S the opportunity to continue to accrue benefits in the scheme
- Mr S may be unable to access a pension scheme on similar terms after coming out of his scheme
- It ought to have considered his income needs in retirement and how they could be met if he did transfer, given that Portal understood that Mr S was likely to use his entire fund within three years of the transfer.
- It could have given an opinion on his reasons for wanting the tax-free cash early and made it clear that it was costly way to raise unnecessary cash at that time

So, I think all these things show how Portal's dealings with Mr S fell substantially short of what I would expect to see from regulated financial advisers. I think the 'insistent client' situation was simply engineered by Portal and the various forms – which were mainly pre-populated – were used to facilitate this. The whole process was just presented to Mr S - who clearly wanted to access some cash and he was required to do very little to get it. Portal failed to ask reasonable questions about how he might fare in retirement or how his plans for later life could be financially supported. Portal should have reiterated the risks this course of action would cause.

The suitability report that Portal issued on 12 November 2015 afforded Portal another opportunity to provide Mr S with a suitable recommendation to prevent him being financially disadvantaged. But this report started with the acceptance that Mr S was insisting on transferring. It said that it hadn't recommended a transfer but directly under that, it said Mr S had told Portal he wanted to transfer out. So Portal made another recommendation just a few lines down from the first. This second recommendation was directly at odds with the first; it said Mr S would be treated as an 'insistent client' and that Portal would carry on with the transfer process. By following the recommendation to access cash and put the remaining sum into a drawdown account Portal said Mr S would meet his stated objectives. This recommendation went on to say that by accepting this Mr S could release £24,657 tax-free cash and a taxable gross lump sum of £23,000 from his pension.

The suitability report of 12 November was the only detailed recommendation that I think Mr S received. I also note its focus was entirely on the way in which Mr S should transfer. Overall, I think Mr S would have found the suitability report unclear. Despite what Portal says, I think it was merely setting the scene for Mr S to transfer out anyway. Mr S was asked to sign a declaration containing a number of statements which I think was intended basically to indemnify Portal from any responsibility. So, Portal's actions and inactions here fitted the regulator's later definition of a 'papering exercise'.

I've also listened to a recording of Portal's 'phone conversation with Mr S from the same day to think about what happened. During the call, light appears to be being made of Mr S's plan to buy gold and a Rolex watch with the monies released from his pension. It was disappointing to hear laughter from the Portal call-handler, who should have been pointing out that there were serious risks in giving up a DB pension and to spend the full amount of his retirement provision within the next few years.

For the above reasons, I don't believe the evidence is plausible that Mr S was a genuinely 'insistent client'. Mr S wasn't experienced in these matters and so was heavily influenced by

his advisor to whom he'd paid a considerable sum. Portal produced mainly templated forms and statements which failed to highlight the risks and issues of him giving up his pension, in a way that was personal to him.

Given that I don't think Mr S met the definition of an 'insistent client' I went on to consider whether I thought this made a difference to the outcome of the complaint. In particular, I've given a great deal of thought to whether transferring out could ever be said to be suitable.

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

Financial comparisons

There's no real dispute in this case that Mr S could be losing out in the longer term by transferring out of his DB scheme. After all, Portal itself says its recommendation of 12 November 2015 originally said he shouldn't be transferring out.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The suitability report said the critical yield required to match Mr S's benefits at the normal retirement age of 66 was 9.5%. It said this figure was based on a full pension being paid by the OPS. Portal also said the critical yield would be 8.2% if a reduced pension of £5,098 per year was taken together with a lump sum of £33,989.

The relevant discount rate was 4.2% per year for 10 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year. I've noted Mr S's aspiration was to access his pension much earlier, however, at the age of around 55.

So, I've taken all these things into account, along with the composition of assets in the discount rate. I have also considered what Portal said about Mr S's attitude to risk being 'balanced'. There would be little point in Mr S giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 8.2 %, I think he was highly likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk. There seems no dispute about this.

For these reasons a transfer out of the DB scheme wasn't in Mr S's best interests. Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

Based on the evidence I've seen Mr S had very little investment experience and I think any assertion that he wanted an active role in managing his pension was likely to have come from the adviser rather than Mr S himself.

He also had an income of £19,000 and had disposable income according to Portal's own records. His debt was modest. So, whilst obviously an attractive prospect for Mr S in some respects, accessing his pension early needed to be considered very carefully in his circumstances and balanced against other aspects of his overall situation and longer-term retirement security. I don't think Mr S had a genuine need to transfer out of his DB scheme to access cash to the exclusion of everything else.

Mr S was only 55 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.

Accordingly, I don't think it was suitable for Mr S 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 can't see evidence that he had such an urgent need for cash and other income at this point. Accessing the pension at 55 was therefore to the exclusion of other major priorities, especially when considering what he'd have to forgo to get at it. I don't think Portal explained any of this to Mr S in a meaningful way.

Summary

I have set out in this decision why I don't think Mr S 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 S had said he wanted to achieve – access to his pension early.

As a result of this finding, I went on to consider whether the transfer out was suitable. Portal facilitated the transfer and in reality it recommended a course of action which was not in Mr S's best interests. As regards suitability, given Portal itself has said it initially advised against a transfer, it would be hard for it to argue that the transfer was in fact suitable. And I agree that it was not. The financial comparisons showed he'd be worse off transferring and there was no coherent assessment of Mr S's retirement needs.

Mr S's existing DB scheme contained a number of valuable guarantees and benefits which made transferring out something that needed a great deal of consideration. Portal's job wasn't to simply transact what Mr S thought he wanted – it was required to really understand his needs and provide him with suitable advice.

Finally, I've gone on to think about whether, if Mr S 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. With his circumstances and lack of investment experience, Mr S went to Portal seeking advice, which he paid for. I think it's 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 S's complaint.

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 but for its unsuitable advice. I consider Mr S 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 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 payment resulting from all the steps above is the 'compensation amount'. This 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.

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.

In acknowledgement of the importance of Mr S's pension and the knock-on effect and emotional impact of the unsuitable advice, Portal should pay £300 for distress and inconvenience.

My final decision

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

If Mr S accepts this decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding if he doesn't accept my decision. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 16 August 2022.

Michael Campbell
Ombudsman