DRN-3266239

The complaint

Miss W has complained about advice she received from Portal Financial Services LLP (Portal) to transfer a defined-benefit occupational pension scheme (OPS) she held with her former employer to a Self-Invested Personal Pension (SIPP).

Miss W is being represented by a third party, but for ease I'll refer to all representations as being made by Miss W.

What happened

Miss W was introduced to Portal in 2014 after she'd been in contact with another business, which I'll refer to as 'Firm C'. At the time, Firm C was an appointed representative (AR) of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority (FCA) to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice. Portal had an established business arrangement with Firm C, whereby Portal would provide the pension transfer advice before referring the client back to Firm C for investment advice on the transferred funds, and this arrangement was followed for Miss W.

At the time of the transfer it was noted that Miss W was aged 56, with bank deposits and savings of around £28,000 and she owned her home, which had an interest only mortgage of £122,000. Miss W had a preserved final salary pension that was projected to pay a pension of £15,067 from age 65. Prior to the transfer it had a Cash Equivalent Transfer Value (CETV) of £283,455. And her desired retirement age was noted as 60. She also had a pension through her current employer that she was contributing to.

In May 2015 Portal recommended that Miss W transfer her OPS into a new SIPP. Portal carried out a risk-profiling exercise and determined Miss W had a 'balanced' attitude to risk and that transferring would meet her objectives. The fact find and suitability report said she wanted investment flexibility, noting she wanted tax free cash (TFC) to clear her outstanding mortgage, draw income and retire early. She said enhanced death benefits were a significant issue, as she wanted her nephews to benefit from these. She said the pension plan under review was very important to her retirement. She didn't want to suffer a significant loss in pension benefits to achieve flexibility and she'd be prepared to risk a 10% reduced pension to gain more control of her fund.

Portal noted a general asset allocation that it believed was suitable for Miss W and that it believed this would be invested in, but said the investment advice would be provided to her by Firm C.

In July 2014, Miss W's pension benefits with an updated CETV of £309,402 were transferred to the SIPP and just under £114,000 was invested in the following:

- Biomass Investments - £21,900
- Brisa Investments - £13,100
- Lakeview UK Invest - £21,900
- Real Estate Invest USA - £21,900

- Strategic Residential Developments - £21,900
- Tambaba Investments - £13,100

In 2018, with the assistance of a representative, Miss W complained to Portal about the advice she received to transfer her OPS benefits, saying that it caused her significant financial loss. Portal didn't agree. It said it provided suitable transfer advice that met Miss W's stated objectives. It said Firm C was responsible for any investment advice and it didn't know what the current situation was with her investments.

Miss W referred her complaint to our service, adding that she'd got in contact with an adviser through a comparison website when looking to renew her mortgage and they asked about her pension. As she had some dissatisfaction at work, it was of interest to hear about the option to drawdown from it if she opted to change employment. The idea of investing in car parking and real estate was promoted to her. After the pension transfer, she withdrew a lump sum, completed some home renovations and invested in a scheme which had been promoted to her. And her mortgage was later repaid from an inheritance.

One of our investigator's reviewed the complaint and said it should be upheld. He said the critical yield required to match the benefits being given up of 6.3% demonstrates Miss W was likely to be worse off in retirement compared with the discount rate of 4.6% per year for eight years until usual retirement age here. He said Miss W's OPS offered a tax-free lump sum in exchange for a reduced yearly pension. And that Portal undervalued her OPS benefits, quoting the income she'd accrued by 2007, rather than obtaining a current valuation which showed the investment returns required to match the pension benefits was likely to be higher. The investigator said Miss W should be put back into the position she would've been in but for the unsuitable advice and that Portal should pay her £300 for the distress and inconvenience caused.

Portal didn't agree. It said, in summary, that although taking a tax free lump sum and reduced annual pension from her OPS was an option, Miss W wasn't ready to start receiving an annual pension and was still working full time. So this wouldn't have been the most tax efficient way to receive those funds and it could have pushed her into a higher tax bracket. Instead Miss W wanted TFC to pay off her mortgage and have the residual reinvested via drawdown until she required a pensionable income. This meant any investment strategy or proposal by Firm C would have a minimum of eight years to achieve further growth, which could potentially replicate or improve on the growth rate required figure calculated by it.

Portal said that as Miss W wasn't looking to purchase an annuity at retirement, it relied on the hurdle rate as a more accurate means of measuring the scheme benefits. It also said Miss W preferred the flexibility of changing her retirement age to later than 65 and was keen to gain control of her funds. It added she wanted the enhanced death benefits and to be able to access TFC at 56. Portal said Miss W's investments were recommended by Firm C and so it wasn't responsible. It said it gave its advice in knowledge of the likely investment strategy Firm C would employ for Miss W. It added that it had undertaken due diligence on Firm C and provided a copy of the "Compliance Health Check" completed in 2012. Firm C said it didn't invest client funds in UCIS so Portal said it shouldn't be held responsible given Firm C had deviated from this.

Portal added that the regulator's alert of 2013 did not apply to Miss W's case, as it only covered instances where the other firm was unregulated. As Firm C was regulated, it said Miss W has recourse to the Financial Services Compensation Scheme (FSCS) and our service. It also believed that the redress methodology was unfair, as it didn't take into account that Miss W could claim compensation from the FSCS.

So the complaint's been passed to me for a decision. I let Portal know Miss W has confirmed she made a successful claim to the Financial Services Compensation Scheme ('FSCS') in respect of the UCIS investments made by Firm C, and she received an award of £50,000.

So, I explained to Portal that I think it should compensate Miss W for the entirety of her loss, despite her having received compensation from the FSCS. This was because Miss W had agreed to repay the compensation she received from the FSCS if she received compensation from a third party relating to the same claim. So, I'm satisfied that Miss W wouldn't be compensated twice for the same loss.

Portal didn't respond.

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.

Portal advised Miss W to transfer her OPS to a SIPP but says it didn't provide any recommendation about the investments held within the SIPP, as Firm C was meant to provide this. Although the intention was for another regulated firm to advise on and arrange Miss W's underlying SIPP investments, I don't think that meant Portal's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. I believe that as Miss W's financial adviser, Portal still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved.

Suitable advice couldn't, in my view, be given without thinking about the intended investment. Portal appeared to recognise this in its suitability report when, despite saying Firm C would provide specific investment advice, it set out recommendations for the fund asset classes Miss W should invest in and to what extent. The recommendations made up a model portfolio for a balanced investor, which Portal satisfied itself Miss W was. And it's partly on the basis that Miss W invested in line with a suitable model portfolio and achieved the relevant targeted returns that Portal concluded transferring could increase her overall pension benefits and could therefore be worthwhile.

The regulator's position

Having thought carefully about what happened here, I don't think Portal's advice to transfer was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time, the regulator had made clear that it considered in order to suitably advise on pension transfers, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

"*Financial advisers (…) are under the mistaken impression (…) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in *implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…)*

If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."

A further alert from the regulator in April 2014 said:

"*Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.*

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6)."

Portal says that the 2013 alert was specific to situations where the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. It believes this distinguishes the circumstances of Miss W's transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. While I've given that possibility careful thought, I don't agree that the alert was limited to those very specific circumstances.

I can see the alert makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Miss W's case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension switch and transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these standards have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. And I think the 2014 alert makes it clear that this applies to all firms when providing pension switch or transfer advice. So, I think these alerts are relevant to firms in the position of Portal in this case.

Portal appears to have been under the impression that, as it told Miss W it wasn't providing advice on the underlying investments, this enabled it to provide advice on a restricted basis. But this wasn't right. It couldn't separate out the two elements. Its advice on the suitability of the transfer had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portal was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Under COBS 2.1.2 Portal also couldn't seek to exclude or restrict its duty or liability to Miss W under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Miss W's funds would be invested.

COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Miss W. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Miss W to ensure its recommendation met her objectives, that she could bear the related investment risks consistent with these objectives and that she had the necessary experience and knowledge to understand the risks involved in the transaction. COBS 9.2.2R included the following wording:

"*(…) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment."*

So as part of the fact-finding process Portal had to understand Miss W's objectives and the related risks. It wasn't free to ignore how Miss W's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Miss W would invest in within the wrapper, doesn't in my mind seem reasonably possible.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portal's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above, I've considered Portal's advice with these in mind.

As Portal didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Miss W's transferred funds would ultimately be invested. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, it says it saw no issue with this.

I accept that as a result of its AR agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portal's duty to do the same. As Miss W's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in her best interests. And as I've said, this had to include an awareness of where Miss W's funds would be invested.

Portal has stated that they undertook due diligence on Firm S and provided a copy of the 'Compliance Health Check' for Firm S completed by a third party on 12 May 2012. Notwithstanding the statement on page 19 that Firm S did not intend to promote UCIS funds in the future, this document was over two years old by the time the transfer actually took place. So, I don't think it should have been relied on in perpetuity.

Furthermore, Portal chose to rely on a general statement, given over two years previously, that said recommendations of broad categories of investments, with potentially broad gradings of risk, might or might not be made in any given case and that UCIS would not be recommended. I don't think that was a reasonable basis on which Portal should have assessed the suitability of the pension transfer for Miss W. In my opinion, Portal needed to understand the nature of the investments envisaged for Miss W specifically, rather than rely on a general statement about Firm C's investment philosophy.

It is worth noting that Portal's own model portfolio included an allocation of 18% of Miss W's assets into "Secured Structured Bonds". I'm aware these were asset backed debt securities, issued for a fixed term with a fixed interest rate. They were not regulated collective investments and could only be recommended by authorised and regulated IFAs. So, I think Portal was effectively recommending UCIS-like funds as part of its own portfolio and it is unclear why it would do so if it did not expect Firm C to make a similar recommendation.

Miss W was one of many clients that Firm C referred to Portal for pension transfer advice. Portal has indicated that roughly two to three cases a month were intended to be referred to it by Firm C over a year. There were multiple dealings with Firm C throughout 2014 and 2015, during which time Firm C repeatedly invested consumers' pensions in UCIS and Portal continued to recommend pension transfers where the funds would be invested at Firm C's discretion. I've not been provided with any information to demonstrate that Portal checked it was still Firm C's position not to recommend UCIS when it was making other enquiries with Firm C. I think it was important that this was confirmed. But in any event, as I've explained above, because Portal needed to consider the proposed investment for Miss W – and it didn't do this – I don't think it did enough to assess the overall suitability of the advice given to Miss W.

This doesn't mean that I'm holding Portal responsible for the failings of another regulated firm. I've focused on Portal's own responsibilities as the business involved with the capacity to 'unlock' the funds held in Miss W's OPS. There's no dispute that Portal gave that advice and in my view it incorrectly thought it could limit its advice to the transfer without seeking information about the investments Firm C intended and eventually arranged for Miss W.

It is clear to me that Firm C and Portal had come to an agreement about their working relationship. Firm C did not have the required regulatory authorisations to give pension transfer advice whereas Portal did, and an agreement to work together for pension release clients came about. Portal has stressed it had never before agreed to work with another authorised firm, as the processes and controls required to set up the relationship would be disproportionate to the level of business it might bring about. However, an exception was made for Firm C, as it had proposed to send significant levels of business to Portal.

In those circumstances it seems to me that Portal needed to do more to ensure that the two firms worked together to give suitable pension transfer advice to clients. Aside from the initial due diligence checks carried out at the outset of the relationship, I have not seen any evidence that further checks were made by Portal to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was, as I say, a necessary part of the suitability assessment carried out by Portal on a case by case basis for individual clients. But it was also, in my view, a reasonable due diligence requirement brought about by the ongoing relationship itself, so that any patterns of unsuitable or unaligned advice could be identified and addressed.

I don't think this required Portal to 'police' the activities of Firm C, but it did require Portal to take reasonable steps to ensure that both firms were acting, together, in their clients' best interests. For Miss W Portal set out in the suitability report what spread of investments it thought would be suitable for her, as follows:

- Cash 10%
- Equities 60%
- Other Fixed Interest 12%
- Secured Structured Bonds 18%

But with what I've said above in mind, I don't agree that it was sufficient for Portal simply to recommend a broad spread of investments in the expectation that that would bring about the necessary alignment with Firm C's investment recommendations. As things transpired for Miss W, and in the absence of any further checks by Portal, the investments she was eventually advised to purchase were significantly removed from the investments Portal contemplated when it advised her to transfer away from her OPS in the first place.

The reality is that having followed Portal's transfer advice, nearly 50% of the funds remaining in Miss W's SIPP (after she'd taken tax-free cash and fees were deducted) were invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here. It said that as well as UCIS only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), as an example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. In any case, I don't think UCIS was suitable for Miss W at all. There's nothing to indicate Miss W had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

In my view, had Portal requested information about the proposed investments and been advised that Firm C intended to invest this amount of Miss W's funds in UCIS, it could've queried this, given how at odds it was with what it determined an appropriate asset allocation for Miss W was. For the avoidance of any doubt, had Firm C's recommendation mirrored Portal's own model portfolio's allocation of 18% of assets into UCIS-like funds, I still think the portfolio would've been unsuitable for the reasons noted above. I think that had appropriate enquiries been made, it would've become apparent something was amiss with Firm's C's proposal and that the switch was therefore unsuitable and likely to lead to Miss W being exposed to more risk than Portal considered appropriate.

Overall, I think Portal needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Miss W. It should've asked Firm C for the specifics of this or, as a minimum, an outline of the proposition. Had it done so, and Firm C had given it a clear framework of the proposition, then I would've expected Portal to have advised Miss W that it couldn't recommend she transfer away from her OPS in those circumstances. If Portal had warned Miss W against investing in line with Firm C's proposal, I think it's more likely than not that Miss W would've listened to it and not gone ahead with the transfer.

Notwithstanding what I've said above, I don't think the suitability of Portal's advice turns solely on where Miss W's funds were ultimately invested. Portal's recommendation that she transfer to a SIPP in the first place is an important consideration. And were it not for the transfer and Portal's incomplete and, in my view, flawed advice regarding this, I'm not persuaded Miss W would've ultimately gone on to invest as she did.

The advice to transfer

OPS' typically have significant benefits and guarantees. Giving up the benefits and guarantees available under an OPS and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6) at the time of the advice, stated:

"*When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer, convert or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests*."

Given what the regulator says, my starting point is that a transfer won't usually be suitable. There'll need to be good reasons why a transfer will be in the consumer's best interests. And generally, a transfer will only be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

At the time of Portal's advice, Miss W was 56 years old and employed. She was a standard retail investor with four years until she expected to retire and nine years until her full OPS benefits became payable. Aside from her state pension entitlement and her pension with her current employer, which she hadn't been a member of for long, this OPS represented most of her retirement provision. While she had some savings and an ISA, this wasn't significant. Although she was a homeowner, she had an outstanding interest only mortgage, seemingly with no vehicle or plan in place to repay it. So it seems to me Miss W's OPS was her most valuable asset. It provided a guaranteed income at retirement. And, based on this, I think Portal should have recognised the significance of Miss W's OPS and proceeded with caution.

Based on a risk profile Miss W completed, Portal said it believed she had a balanced ATR. While this hasn't been challenged by Miss W, she had no investment experience, she was only four years from her desired retirement age and therefore didn't have much investment time horizon to expose her funds to a medium or balanced level of risk.

Portal's advice was given at a time 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 discount rate was 4.6% per year for eight years to retirement and 4.1% for three years to retirement. For comparison, the regulator's assumed future growth rates for personal pension illustrations were 2% (low); 5% (intermediate); and 8% (high).

In terms of the investment risk Miss W would be taking on by transferring, Portal produced a Transfer Value Analysis (TVAS) report. It hasn't given us a copy, but it said in its suitability report and accompanying documents that this showed the critical yield required to match benefits from the OPS at age 65 was 6.3%. So, the funds transferred needed to consistently grow at this rate for Miss W not to be financially worse off by transferring. This was higher than the discount rate of 4.6%. So, based on this alone I think Miss W was likely to receive benefits of a lower value at retirement if investing in line with her attitude to risk.

The TVAS was also based on Miss W retiring at 65, rather than her desired age of 60. So Portal didn't consider whether or not it was feasible for Miss W to retire at 60 and how much her funds would need to grow by to meet her needs. And I think it's likely the SIPP would've needed to perform better than the 6.3% quoted to match the benefits she was giving up in light of the shorter time until her intended retirement age. In which case I think the critical yield would have been even higher.

I am aware that the TVAS was based on a CETV of £283,455, whereas the final transfer value had increased to £309,402 in July 2014. This would likely have the effect of the reducing the level of the critical yield needed to match the same benefits, but the recommendation was based on the figures at the time and it wasn't known that the value would increase. Even with the higher CETV, a critical yield which took account of all charges and Miss W's intended retirement age of 60 would still likely be above the mid-range projection of 5% and Portal's own estimate of 6.3%. So, I'm not persuaded that there was any realistic chance of Miss W improving on the benefits being given up.

The guidance under COBS 19.1.3 states that the comparison undertaken by Portal should:

1) take into account all of the retail client's relevant circumstances;
2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;
3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and
4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested.

Portal says the hurdle rate of 4.6% demonstrates that the transfer was financially viable, given it projected returns of 6.13%. I recognise Portal's model projected returns of 6.13% a year before charges, which was closer to the critical yield. But Portal didn't know how Firm C was going to be investing Miss W's funds so I don't think this figure could reasonably be relied upon. And, while this figure was higher than the hurdle rate of 4.6%, I don't think it was reasonable to base the advice to transfer on the hurdle rate in any event.

COBS 19.1.7 says:

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

Portal's argument for its reliance on the hurdle rate in Miss W's case ignores the importance of the critical yield in demonstrating the value of the benefits being given up and is essentially saying that it was suitable to give up a guaranteed income without gaining anything, because she could get by without it.

But using the hurdle rate is not supported by the customer's own responses to the risk questions, as she stated she would only be prepared to suffer a 10% reduction in pension to gain control of her fund and that she could only afford to lose 20% of her fund before it affected her standard of living significantly. Neither of these indicate that the consumer was happy to give up a secure income in retirement. I am therefore satisfied that it is appropriate to use the critical yield to measure the value of the benefits being given up and not the hurdle rate.

A consumer may still have wanted to transfer from an OPS to a personal pension if doing so offered opportunities or alternatives which were not available within the ceding scheme and fulfilled a genuine need. The "Key Financial Objectives" on page six of the suitability report listed several objectives which would be met by transferring her pension plans to the SIPP. But having considered these carefully, I do not believe that any of these objectives justified Portal's recommendation to transfer.

The suitability report states that Miss W's wanted to take TFC, seemingly to repay her mortgage based on the fact finds completed by Firm C. The appendix goes on to say that maximising the amount available to her was a significant benefit. And that she would be prepared to suffer a reduced pension to maximise TFC, provided the reduction was reasonable.

Yet Portal doesn't seem to have explored whether she could take TFC from her OPS and at what age. Or whether Miss W had any other means of achieving her objective, and the timescales in which she needed to do so, aside from transferring her OPS.
For example, I can't see that Portal talked to Miss W about the time she had left on her interest only mortgage, whether she had other means to repay it or discussed other options with her, such as contacting her provider to extend the term if it was nearing the end.

I can see she could have taken a reduced pension early, from March 2014, with a £67,740.67 tax free lump sum from her OPS. This is more than the £67,318 Portal noted in its fact find that she could achieve by transferring her pension. I appreciate Miss W achieved a bit more than this in reality by transferring due to the increased CETV. But, as Portal was basing its recommendation on this objective of accessing TFC, it should have been able to demonstrate *at the time of the advice* why it was necessary to take it early from elsewhere, rather than from Miss W's OPS. And, based on these figures, the best way for Miss W to maximise her TFC would've been for her to remain in her OPS. I cannot see that this was explained to her by Portal.

Portal says Miss W didn't want to take TFC early from her OPS, as that also meant taking an income she didn't need and being taxed on it rather than investing it, when transferring allowed her to take TFC and invest the rest. But Miss W could have waited until her intended retirement age to take her benefits (less than four years away) if she didn't want the income at 56. I haven't seen any evidence to suggest that Miss W needed to repay her mortgage at the time of the advice rather than when she retired. This also would've most likely meant an increased sum being available to her.

In any event, Miss W didn't end up needing the TFC to repay her mortgage, as she used an inheritance to do that. I recognise she still took it for home renovations and to make an investment, rather than using her savings to do so. But, while it may have been considered 'useful' to be able to take TFC earlier for these reasons, there's nothing to suggest these were pressing and couldn't have been solved using savings or waited until her intended retirement age if she didn't want the income straightaway.

Miss W's told us it was of interest to hear about the option to drawdown from her pension if she opted to change her employment. And I appreciate the suitability report also says that being able to draw flexibly from 56 onwards would be a useful benefit to Miss W. But I note she considered it useful, rather than a significant objective. And, as explained above, her answers to the risk questions don't support that she was happy to give up a secure income in retirement. And I'm not persuaded she would have transferred for this still, and given up a guaranteed income from her OPS, if she'd known she could take TFC from it.

The suitability report also said enhanced death benefits were a significant priority for Miss W, as she wanted to provide for her beneficiaries with the best possible survivor's pensions should she predecease them in retirement.

I agree that transferring did provide a higher lump sum death benefit for Miss W's beneficiaries at the outset, but in my view, this didn't outweigh the loss of guaranteed income in retirement while she was living. While I can appreciate Miss W may have wanted to pass on as much money as possible to her beneficiaries in the event of her death, I'm conscious that the main purpose of a pension is to provide an income in retirement. Other considerations, like death benefits, are secondary, particularly where there was nothing to suggest Miss W was in ill health, such that it wasn't expected that her pension fund would need to support her for a long time. Furthermore, I would've expected the adviser to explore the possibility of taking out life assurance if providing a legacy for her family was genuinely important to her.

It was noted in the suitability report that Miss W would prefer to have ownership and personal control of her pension benefits, but this reason by itself isn't sufficient justification to recommend the transfer. Miss W had no recorded investment experience and it's unclear why she wanted 'personal control' over her funds, when she would be relying on a third party, Firm C, for investment advice.

Regarding the risks associated with its recommendation, I do accept that Portal covered some of these. However, disclosure isn't the same as suitability and in my view Portal shouldn't have gone on to recommend the transfer at all.

I've thought about whether, if she'd been correctly advised by Portal not to transfer, Miss W would have gone ahead with the transfer anyway. Having carefully considered all the circumstances in this case, I don't believe she would have. There's nothing to suggest that she was seriously considering transferring out of her OPS prior to speaking with Portal. Instead Miss W's said she was referred to it after being asked about her pensions when she was looking to renew her mortgage. So she wasn't proactively seeking transfer advice.

Had she been appropriately advised, I think it's more likely that Miss W would have chosen to stay with her OPS. As a professional adviser which, unlike Firm C, was authorised to provide transfer advice, Portal's recommendation would've carried significant weight and could, I believe, have dissuaded Miss W from proceeding with the transfer and subsequent investments. I accept it's possible Miss W may still have wanted to go ahead anyway to access TFC but, for the reasons I've given above, I think that's very unlikely.

Is Portal wholly responsible for Miss W's loss?

I recognise it can be argued Firm C is also liable to Miss W and that in turn I should apportion only part of the responsibility to Portal. Having given this careful thought though, in the circumstances, I think it is fair to find Portal wholly responsible and, in turn, to direct it to compensate Miss W for the whole of her loss.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each agreed to provide services designed to bring about a single outcome for clients – pension transfer advice and investment. Because Firm C wasn't authorised to provide pension transfer advice, it referred Miss W to Portal. Portal advised Miss W to transfer her benefits to a SIPP, it set up the SIPP and arranged for her OPS benefits to be transferred to this. I acknowledge Firm C advised Miss W to invest a significant share of her SIPP funds in UCIS. But, as I've explained, Portal's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Miss W on them. It was only as a result of Portal's involvement that Miss W transferred the funds held in her OPS to the SIPP. Portal's role was pivotal, since the eventual investments were fully reliant on the funds being transferred over first; if that hadn't happened, she couldn't have invested as she did. In any event, and as I say, it is clear that Firm C and Portal had agreed to enter a business relationship together which was designed to bring about the very outcome that's caused Miss W's loss.

Portal argues that Firm C is responsible for the investment advice and so Miss W should avail herself of any compensation she may be entitled to by making a claim to the FSCS. It also says that the amount of any award made against Portal should be limited by taking that payment into account. In ordinary circumstances, as the FSCS describes itself as a fund of last resort, it is my understanding that it is unlikely it will pay out on claims where it is aware that another firm was involved in the transaction, and where it considers there is a reasonable prospect of the consumer making a recovery against that firm for the loss suffered.

Nonetheless, whether to postpone payment of compensation (to enable the consumer to recover compensation from a third party) is a matter entirely for the FSCS.

In this case, it seems the FSCS decided to award Miss W £50,000 before the determination of Miss W's complaint with this service. In those circumstances, I'm aware that as a condition of accepting compensation from the FSCS, Miss W was asked to give to the FSCS an assignment of her rights to make a claim against third parties. This would have enabled the FSCS to make a claim in recovery of that compensation against those third parties and the PI insurer of Firm C.

It follows that for Miss W to make a complaint to this service about Portal, she needed to ask the FSCS for a re-assignment of those rights. I can see Miss W has now obtained that which contains, as a condition, the following requirement:

"The Claimant agrees that in respect of the Reassigned Rights the proceeds of the claim shall first be applied to repay an amount equal to the Compensation Sum to FSCS together with interest on the Compensation Sum from the date of receipt of the proceeds by the Claimant to the date of payment by the Claimant to FSCS at a daily rate equivalent to the Bank of England base rate from time to time (subject to a minimum rate of 0.1%), such payment to be made to FSCS within 14 days of receipt. The payment to FSCS shall be made after the deduction from the proceeds of the Claimant's reasonable legal costs incurred in pursuing a claim in respect of the Reassigned Rights."

Portal may argue that because Miss W has already recovered £50,000 from the FSCS, it should not have to account to her for that portion of her loss. However, as per the reassignment of rights agreement Miss W entered into with the FSCS, I can see she has agreed to repay the compensation she received from the FSCS if she receives compensation from a third party relating to the same claim.

From this, I think that:

1. There is no real risk of Miss W benefiting from double recovery, as she's contractually required to pay back to FSCS the full amount of the compensation it paid to her; and
2. I have seen nothing to suggest Miss W is unlikely to comply with that requirement in accordance with the deed of reassignment;
3. If I didn't direct Portal to pay compensation to Miss W for the full amount of her loss (in circumstances where I have determined it is responsible for 100% of that loss), she would nonetheless still be required to account to FSCS from the compensation she receives from Portal and would, in turn, be left out of pocket.

All in all, I maintain my view that the fair and reasonable outcome is for Portal to pay Miss W compensation for the full amount of her loss.

Putting things right

A fair and reasonable outcome would be for the business to put Miss W, as far as possible, into the position she would now be in but for Portal's unsuitable advice. I consider Miss W would have remained in the occupational scheme. Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the FCA 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 Miss W's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss W'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 Miss W 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 her 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'. The compensation amount must where possible be paid to Miss W within 90 days of the date Portal receives notification of her 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 Miss W.

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.

In addition, Portal should pay Miss W £300 for the disruption to her retirement planning.

My aim is to return Miss W to the position she would've been in but for the actions of Portal. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

To calculate the compensation, 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 investment. If Portal is unable to buy the investment, it should give it 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 Miss W to provide an undertaking to account to it for the net amount of any payment she may receive from the investment. That undertaking should allow for the effect of any tax and charges on what she receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Miss W to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Miss W wish to move her investment portfolio) 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 Miss W can discuss with her 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 pay Miss W 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 the business pays the balance.

Determination and money award: I require Portal Financial Services LLP to pay Miss W 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 additionally require Portal Financial Services LLP to pay Miss W any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Portal Financial Services LLP to pay Miss W 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 Miss W the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Miss W.

If Miss W accepts my final decision, the money award is binding on Portal Financial Services LLP. My recommendation is not binding on Portal Financial Services LLP.

Further, it's unlikely that Miss W can accept my decision and go to court to ask for the balance. Miss W may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

I uphold Miss W's complaint and direct Portal Financial Services LLP to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 27 June 2022.

Holly Jackson
Ombudsman