DRN-3334878

Financial Ombudsman Service

The complaint

Mr M complains about the advice given by Portal Financial Services LLP ('Portal') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr M is being represented by a third party but for ease of reading the decision I'll largely refer to all representations as being made by Mr M.

What happened

Mr M says he responded to an advertisement from Portal which suggested he might be able to release funds from his pension. And in October 2016, he completed a form authorising Portal to obtain details from his existing pension provider, to explore if this was appropriate.

Portal gathered information about Mr M's existing pension and arranged for a transfer value analysis ('TVAS') to be carried out. Mr M's DB scheme was recorded as having a cash equivalent transfer value ('CETV') of £88,765.22.

Portal completed a fact-find to gather information about Mr M's circumstances and objectives. It recorded that he was 54, separated and going through a divorce, full time employed and in good health. He was living in a property owned by his family so didn't have any rental or mortgage outgoings. It said he was looking to take the maximum possible tax-free cash ('TFC') to fund a holiday, pay for a new car and increase his savings to help his daughter pay for her wedding. Portal also carried out an assessment of Mr M's attitude to risk, which it deemed to be 'balanced'.

On 5 April 2017 Portal advised Mr M to transfer his pension benefits into a personal pension, take the maximum available TFC, £22,191, and invest the remainder in a portfolio it recommended. The suitability report said the main reason for this recommendation was that the TFC would allow Mr M to pay for the things he was interested in funding. It also said the transfer would allow Mr M to meet his other objectives – which it said were greater flexibility in how he accessed the pension and the available death benefits, giving Mr M ownership and control of the fund, maximising the TFC in comparison to the current scheme and that he was willing to take investment risks. Portal said it believed the recommended scheme would deliver greater ongoing benefits than his current provider.

Mr M complained in 2021 to Portal about the suitability of the transfer advice. He said he'd been told by Portal that he'd make more money in his pension fund by transferring. But he said the value of the benefits he was giving up by transferring was underplayed and not made clear to him. He also said he didn't feel a full assessment of his circumstances had taken place and he said he didn't have a need for TFC and there was no justifiable reason for recommending the transfer.

Portal didn't uphold Mr M's complaint. It said the transfer allowed Mr M to achieve his objectives and that he had an immediate need to do so. It also said that, as Mr M had indicated he wasn't interested in an annuity, the critical yield was not as relevant as the lifetime hurdle rate. And it believed the hurdle rate was achievable. So, it felt the recommendation was suitable.

Mr M referred his complaint to our service. An investigator upheld the complaint and thought Portal should pay compensation as well as £250 for the distress caused to Mr M. He said by transferring, he felt Mr M was always likely to be worse off financially as the critical yield was unlikely to be achieved, and he felt Portal hadn't been clear about this. He also didn't think the majority of the objectives listed were genuine and that Mr M did not have a pressing need for TFC. He also didn't think Mr M had any real capacity for loss as this pension made up the majority of his retirement provisions. So, he didn't think the recommendation was suitable.

Portal disagreed, saying it felt the relevant growth rate was achievable and that this had all been made clear to Mr M. It also said capacity for loss had been correctly considered. And it felt Mr M did have a need for TFC, which he had made clear.

The Investigator wasn't persuaded to change his opinion. He said that he still didn't agree that there was a genuine need for TFC and didn't feel that Portal had explored this sufficiently – noting that the amount it had said Mr M needed was the maximum possible TFC but there was no explanation why this very specific amount was needed. And he also didn't think Mr M had sufficient capacity to absorb the reduction in retirement income – particularly bearing in mind the relatively short period of time until retirement.

As agreement could not be reached, the complaint was referred to me to make 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator.

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

After Portal had received details from Mr M's existing scheme and completed the TVAS report it sent him a letter on 21 February 2017, saying it was ready to complete its review. The first paragraph of that letter said that options outlined would not be available until Mr M's 55th birthday. And then the second paragraph immediately emphasised how much tax-free cash Mr M might be able to release from his pension. It went on to say a call would have to now take place to understand Mr M's circumstances and that options would be discussed including *"of course, the amount of tax-free cash you wish to take."* And it also said, in fact emphasising in bold, that the transfer value "*is guaranteed for a limited period of time only*" and if this needed to be re-calculated "*This could delay how long it will take to receive your tax-free cash.*"

This letter was sent before a fact-finding conversation had been completed or any details of

Mr M's aims or objectives had been obtained. Yet it was already strongly emphasising the release of TFC – involving a transfer of Mr M's pension arrangements – how much could be released and suggesting a need for urgency. I think the emphasis placed on this before a fact find had happened is likely to have influenced Mr M's thinking. And it is difficult, in my view, to say that this letter shows Portal started, as it was required to, with the assumption that a transfer was unsuitable.

And having looked at all the evidence available, I'm not satisfied transferring his pension was in Mr M's best interests.

Financial viability

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 critical yield required to match Mr M's benefits at age 60, when he would've been entitled to full benefits under the DB scheme, was 17.8% if he took a full pension and 15.4% if he took TFC and a reduced pension.

This compares with the discount rate of 3.1% per year for 5 full years to retirement – the position Mr M was in.

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%.

Portal categorised Mr M's attitude to risk as 'balanced'. And it said one of his objectives was "*Willing to take an investment risk*". I don't think willingness to take a risk is an objective. And the level of risk isn't quantified within this statement. Some of the answers recorded in the attitude to risk questionnaire Portal has provided indicate that Mr M might've been willing to take some risk. But I'm also conscious he said that he had no investment experience and wanted to aim for a stable reliable return.

I'm also conscious this only related to his attitude to investment risk, rather than his capacity for loss. Portal says Mr M's capacity for loss was considered and as he would have a state pension and held another pension scheme, he had sufficient capacity for loss. The other pension scheme was smaller than the one he transferred however (roughly 30% of the value). So, this DB scheme did make up the majority of his retirement provisions, outside of the state pension. And I'm not convinced therefore that he was in a position to put this fund at significant risk.

Taking all of this into account, I'm not sure Mr M did have a 'balanced' attitude to risk. And I think he could in fact have been more cautious than this. But overall, I don't think this makes a difference to the outcome here.

I've considered the discount rate, regulators projections and critical yield, along with the composition of assets in the discount rate, Mr M's attitude to risk, which Portal recorded as being 'balanced' and also the term to retirement. There would be little point in Mr M 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 15.4%, I think Mr M was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

Portal says Mr M indicated he didn't intend to purchase an annuity, so the critical yield wasn't relevant here and it instead relied on a growth rate, or hurdle rate, of 4.2% - the rate it says the fund would've needed to grow at each year if Mr M had kept his money invested in the personal pension for his lifetime, using his assumed life expectancy, taking income as a flexible drawdown. And in the suitability report Portal talked about the average annual return on the investment it was recommending being 7.79% for the past ten years and 9.9% for the previous five years. And so, it said *"we believe that your new plan may match the critical yield and growth rate required"*.

I think this statement was mis-leading. Given the past growth figures quoted were less than 10% and the lowest critical yield was 15.4% the statement that the plan may match the critical yield doesn't appear to be supported. And in any event, as Portal in fact noted in the suitability report, past performance is no guarantee for future performance. And so, I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward. So, the statement that the growth rate would be matched is also questionable.

I'm also not sure that the growth rate quoted is entirely accurate as it doesn't appear to account for the actual level of ongoing charges Mr M would pay under the new plan. The TVAS report doesn't suggest that ongoing charges are factored into the growth rate projections at all. It does note in the 'data used' section a charge of 1% is assumed – but not that this was factored into the modelling. In any event though the suitability report suggests the provider charges and Portal's ongoing management charge amount to at least 1.45%. So even if the 1% mentioned in the TVAS has been used, this is less than Mr M would have paid. So, the required growth rate appears to have potentially been inaccurate.

But regardless of this, I don't agree with Portal that the critical yield was not relevant here. The benefits under the DB scheme were guaranteed and would continue to escalate in retirement. The critical yield is the return required to purchase guaranteed equivalent benefits - which was what the regulator wanted businesses to do when comparing schemes. And the 'growth rate' doesn't do that, because the benefits it outlines remain subject to investment risk throughout retirement and aren't guaranteed. 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.

And taking everything into account, from a financial viability perspective the transfer doesn't appear to have been in Mr M'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

Portal said Mr M wanted more flexibility in terms of how he could take his pension benefits – as he didn't want to take an income yet but needed TFC to take a holiday, pay for a new car and increase his savings to assist his daughter with her wedding.

Like our Investigator, I don't think Mr M *needed* TFC. I accept he may've had a list of things in mind that he might do if money became available to him – which he may've thought about previously or may've begun thinking about after the initial letter from Portal emphasised the level of TFC that could be available. But I think when presented with the potential opportunity to receive a lump sum, most people would be able to say what they might do with the money. I don't think though that this means any of the things Mr M listed were *needs.* And Portal's role wasn't simply to transact what Mr M might've thought he wanted.

I also can't see evidence that Mr M had a strong need for variable income throughout his retirement. The fact find recorded that Mr M expected to need approximately £250 per week from age 65 onwards, when he intended to retire. Until then, he intended to continue working to meet his income needs.

Under the DB scheme Mr M was entitled to take benefits at age 60. And Portal has recorded that he could've either taken an income of £4,981 per year and £14,756 in TFC or a reduced pension of £3,998 per year and TFC of £26,651 – several thousand pounds more than he got as a result of Portal's advice. The annual pension amount in either scenario was guaranteed and would have continued to escalate in retirement. And so, when combined with his state pension entitlement this would appear likely to have met his recorded income needs. So, I don't think Mr M had a need to transfer and take significant additional risk to increase his pension fund.

I accept the DB scheme benefits would've begun before Mr M intended to retire. But this would've provided him with an additional income in the interim. And I haven't seen anything to suggest that this would've been unwelcome.

Death benefits

Portal said in its suitability report that Mr M was interested in greater flexibility with regard to the death benefits the policy provided – as he wanted the pension to benefit his daughter in the event of his death.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was likely an attractive feature to Mr M. But whilst I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr M about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Portal explored to what extent Mr M was prepared to accept the significant additional risk and likely lower retirement income in exchange for alternative death benefits.

In addition, the sum remaining on death under the personal pension was dependent on investment performance and would be reduced by any income Mr M drew. And as the cashflow analysis shows, there may not have been a large sum left, particularly if Mr M lived a long life. I understand that Mr M now has health conditions that might impact his life expectancy. But these appear to have arisen more recently as, at the time of the advice, he was recorded as being in good health. So, there was nothing to suggest at that time that his life expectancy was likely to be lower than normal. And in any event, Portal should not have encouraged Mr M to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr M genuinely wanted to leave a legacy for his daughter, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Portal should've instead explored life insurance. But I can't see that this was discussed at the time of the advice to transfer.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr M. And I don't think that insurance was properly explored as an alternative.

Control

Portal said one of Mr M's other objectives was to have ownership and control over the pension. But I think Mr M's desire for control over his pension benefits was overstated. Mr M was not an experienced investor and I cannot see that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr M – it was simply a consequence of transferring away from his DB scheme.

Suitability of investments

Portal recommended that Mr M invest in a specific portfolio. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr M, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr M should have been advised to remain in the DB scheme and so the investments wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr M. And I accept the prospect of a cash lump sum may've been appealing and that Mr M may've thought of uses for this. But again, Portal wasn't there to just transact what Mr M might have thought he wanted. The adviser's role was to really understand what Mr M needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr M was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr M shouldn't have been advised to transfer out of the DB scheme to release TFC for the purposes that were listed, as none of these, in my view, represented a genuine need.

So, I think Portal should've advised Mr M to remain in their DB scheme.

Of course, I have to consider whether Mr M would've gone ahead anyway, against Portal's advice.

Portal has said that Mr M has drawn benefits from the personal pension, since its advice. So, it thinks this indicates Mr M would always have transferred as he had a need to access pension benefits.

I've considered this carefully, but I don't think Mr M making flexible drawdowns after this facility had been made available means he would always have transferred in 2017. According to the information recorded at the time by Portal, Mr M didn't want an income from his pension. He was only looking to take TFC. So, this didn't seem to be one of his objectives at the time and doesn't appear to have been a need. And so, I don't think him now using the facility – given that circumstances change, most notably in this case Mr M's health – means that with hindsight Mr M would always have insisted on transferring.

Overall, I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against Portal's advice. Mr M was an inexperienced investor and this pension accounted for the majority of his retirement provision. I'm not persuaded that he had a genuine need for TFC, or that his preferences for death benefits were so great, such that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. So, if Portal had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think this would've carried significant weight and I think Mr M would've accepted that advice.

In light of the above, I think Portal should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Our Investigator recommended that Portal also pay Mr M £250 for the distress caused by the unsuitable advice. I don't doubt that Mr M has been caused distress and concern in relation to his retirement planning. And this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr M 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.

For clarity, I think Mr M would've remained invested in the DB scheme and taken benefits at the normal scheme retirement age. So, this should be the basis for the calculations.

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 M's acceptance of the decision.

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

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

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 Mr M £250 for the distress caused by the disruption to his retirement planning.

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.

My final decision

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

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

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 14 September 2022.

Ben Stoker
Ombudsman