

## **The complaint**

Mr Y 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 Y approached Portal in 2018 to discuss his pension and retirement needs. The information gathered by Portal about Mr Y at around the time was broadly as follows:

- Mr Y was 55 years old living with a partner in a housing association property rented for £356 a month. He did not own a property.
- He earned approximately £55,000 (gross) a year and was said to have disposable income after expenses of £2,000 per month.
- Mr Y was a deferred member of this OPS, having left the scheme in the 1990s. The cash equivalent transfer value (CETV) was £68,848 with a normal retirement age of 65. He was a member of a current employer's pension scheme.
- Mr Y had unsecured debt with monthly repayments of £320. He had no further assets or liabilities other than those outlined above.
- In the light of recently changed rules - 'pension freedoms' - Mr Y told Portal he wanted to access his OPS to take the tax-free cash available, although he said he didn't have any current plans to retire or stop working. He said he wanted cash to pay for some home improvements and an extension.

A suitability report was issued by Portal, on 1 May 2018. The report started by saying it recommended Mr Y should not transfer his pension at all but leave it where it was instead. Nevertheless, in the same report, Portal said that because Mr Y was adamant he wanted to transfer out of his OPS, it would help him do this. It said it could treat him as an 'insistent client', a term used in the industry to describe a situation where a client goes against the advice of a professional financial adviser.

Portal therefore went on to give Mr Y a second recommendation - to transfer his OPS to a flexi-access drawdown product in order to release tax free cash and leave the remaining funds invested. It says this was on an 'insistent client' basis.

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

The regulator, the Financial Conduct Authority ('FCA') places important general obligations on firms like Portal when giving financial advice to clients. These include the overarching principles such as: Principle 1 – Integrity; Principle 2 - skill, care and diligence; Principle 6 - customers interests; Principle 9 - reasonable care.

There was also more specific guidance available at the time when Portal provided this advice to Mr Y. In 2018, the FCA had provided guidance about what businesses responsibilities were with regards to 'insistent' clients'. In its Conduct of Business Sourcebook ('COBS'), under COBS 9.5A, it set out three key steps for advisers to take when faced with these situations.

- 1) *Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).*
- 2) *The information which the firm should communicate to the insistent client is:*
  - a) *that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;*
  - b) *the reasons why the transaction will not be in accordance with the firm's personal recommendation;*
  - c) *the risks of the transaction proposed by the insistent client; and*
  - d) *the reasons why the firm did not recommend that transaction to the client.*

COBS 9.5A.4 went on to say the following about any acknowledgement from the insistent client:

- (1) *The firm should obtain from the insistent client an acknowledgement that:*
  - (i) *the transaction is not in accordance with the firm's personal recommendation; and*
  - (ii) *the transaction is being carried out at the request of the client.*
- (2) *Where possible, the acknowledgment should be in the client's own words.*

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 and find alternative ways of meeting Mr Y's objectives. I have also considered whether the 'insistent client' process in this case was merely, in the words of the regulator, a 'papering exercise'.

### Was Mr Y 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 Y 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 Portal had not recommended the transaction and the risks, of the transfer Mr Y was interested in, ought to have been pointed out.

I don't think Portal adequately did this.

While, on first look, Portal's communications with Mr Y did set out that its initial recommendation for him was *not* to proceed with the transfer of his DB pension, I think this was seriously undermined by statements and actions it made elsewhere.

Portal said, for example, that its suitability report of 1 May 2018 was substantially based on a form Mr Y had signed the previous week about being an 'insistent client'. Portal said this form showed Mr Y had wanted to disregard Portal's advice not to transfer his pension, and that he wanted to go ahead with the transfer so he could access some cash.

However, I've looked at this form and note it was heavily templated. The first part involved Mr Y selecting from one of two 'tick-box' pre-determined options about his OPS which had been set out for him by Portal. The first option was to access cash from his pension by transferring out, and the second was to 'do nothing' and leave his pension where it was. In my view, these were not the only options available to Mr Y in his situation and Portal's advice ought to have fairly reflected this.

The second part of the form was also substantially flawed. I say this because the explanation from Mr Y in his 'own words' about why he wanted to access his pension early was very short indeed. I think what he wrote was demonstrative of someone who may not have understood the situation he may be getting into. Mr Y's statement about transferring out of his OPS contained very little information as to why he was prepared to discount the apparent 'advice' from Portal not to transfer out of his DB scheme and only said Mr Y wanted to undertake an extension and home improvements. In my view, this does not show, nor does it even imply, Mr Y was made aware of the longer-term consequences of giving up his pension benefits and / or his retirement security. I also note the reasons he apparently wanted to access his pension early seem inconsistent with him owning no property of his own and currently living in a housing association rental.

So, I think this 'insistent client' form and the processes around it fell considerably 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 form – which was mainly pre-populated – was used to facilitate this. It was presented to Mr Y who clearly wanted to access some cash at the time and he was required to do very little to get it. Portal failed to ask reasonable questions when the information provided by Mr Y quite obviously appeared to be inconsistent with his circumstances. Portal should have reiterated the risks this course of action would cause and explained why it wouldn't be in his best interests.

As for the suitability report itself, sent out to him the week after, despite Portal saying its advice was against transferring out of the scheme, there was a clear underlying bias in the report in favour of actually transferring out anyway. I note that the actual title of the report on the front page was *"Flexi - Access Drawdown"*. To me, this shows Portal was pre-disposed to enabling Mr Y to access his pension by transferring out to another provider. Also, directly under the report's first recommendation it said Mr Y had told Portal he wanted to transfer out and 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 Y would be treated as an 'insistent client' and that Portal would carry on with the transfer process. The report said, *"we propose that you transfer your [pension] plan to a [personal pension]"*. This recommendation went on to say that by accepting this Mr Y could release £17,212 in tax-free cash and enter a flexible drawdown fund with the remainder.

Overall, I think this report was unclear on what it was really saying. And despite what Portal says, I think it was merely setting the scene for Mr Y to transfer out anyway.

I've noted Mr Y was also asked to sign a Declaration Form and return it to Portal. This contained 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 definition of a 'papering exercise'. Mr Y says he didn't fully understand the process. And by acting as it did, Portal offered Mr Y a very easy option to go ahead anyway.

I don't believe the evidence is plausible that Mr Y even was an 'insistent client'. He wasn't experienced in these matters and so was heavily influenced by his advisor. Portal produced mainly templated forms and statements which I think offered Mr Y what he thought was an easy way to achieve his objectives. These forms failed to highlight the risks and issues of him giving up his pension.

### Suitability of advice

Given Portal itself has said it 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.

In my view, there were a number of shortcomings in the information Portal both obtained and provided in this case, to enable Mr Y to make a fully informed decision. Portal failed, for example, to establish whether it might be suitable for him to have accessed his DB scheme early or to otherwise have met his objectives for cash. I therefore don't think Mr Y was able to make an informed choice – I think he believed the only way to meet what he thought was his objective was to transfer out and thus lose the significant benefits he had.

I also think it's more likely than not that the provision of full information and better analysis would have influenced Mr Y's decision making. So, if Portal had followed the insistent client process correctly, I don't think Mr Y would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mr Y what he would be losing out by transferring his deferred benefits.
- I'm unconvinced that Mr Y had a pressing or genuine enough need to access his tax-free cash to warrant the loss of his guaranteed pension.
- There's no evidence that Mr Y, an inexperienced investor, desired any input or control over the investment choices of his pension funds.

- Mr Y was paying for independent financial advice, and if that advice had been persuasive about the suitability of remaining in his OPS, I think it's more likely that he'd have followed that advice, rather than being pushed immediately down an 'insistent client' route.

Mr Y was also 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.

I don't think Portal explained these issues to Mr Y or why it wasn't suitable for him to give up all the guaranteed benefits the DB scheme came with when he didn't really yet know what his needs in later life would be. There was no evidence that he had such an urgent need for cash or a variable 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. Portal didn't explain any of this to Mr Y.

### Summary

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

I think it's fair to say that from the outset Portal was merely setting the scene for Mr Y to transfer out of his OPS anyway. Its initial recommendation not to transfer was not comprehensive, meaningful, or easy to understand. It did not adequately explain why transferring out was not in Mr Y's best interests, in a way that was personal to him. Portal then simply offered Mr Y a very easy route to accessing his pension early anyway, via a series of templated and pre-populated forms. Mr Y's explanation in his 'own words' about transferring out clearly showed he didn't understand the risks and Portal failed to clarify the obvious anomalies in what he said the money was for.

Finally, I went on to think about whether, if Mr Y 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 history, Mr Y went to Portal seeking advice, which he paid for. I think it's much more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

### **Putting things right**

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

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

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

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 Y's pension and the knock-on effect and emotional impact of the unsuitable advice, Portal should pay £250 for distress and inconvenience.

### **My final decision**

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

If Mr Y 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 Y can accept my decision and go to court to ask for the balance. Mr Y 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 Y to accept or reject my decision before 12 August 2022.

Michael Campbell  
**Ombudsman**