DRN-3360786

The complaint

Mr E complains that Portal Financial Services LLP gave him unsuitable advice to go into income drawdown and to invest in high-risk investments.

What happened

I issued a provisional decision on 9 March 2022. I said I was intending to uphold the complaint but I had amended the redress recommended by the investigator. Mr E said he accepted the decision. The business hasn't responded.

The background to this complaint was set out in my provisional decision as follows:

Since July 1989 Mr E had a Personal Pension Plan ('PPP'). This pension was a with-profits pension scheme and was invested in various funds including the following:

- Gilts 18%
- Corporate Bond 31%
- UK Shares 16%
- Alternative Investments 4%
- Overseas Shares 16%
- Property 12%
- Other 3%

In July 2011 Portal reviewed Mr E's existing PPP arrangement. This was with a view to advising him on whether switching to another pension plan while receiving a 25% tax-free cash lump sum ('TFC'), would be in his best interests. Following the review, Portal's adviser (the 'adviser') produced a suitability report for Mr E. In summary, Mr E's circumstances were recorded as follows:

- He was 57 years old and was married.
- He was employed earning around £450 a week.
- He had one pension with a transfer value of £23,709.
- He owned his own home which had an outstanding mortgage balance of £123,000.
- He had a credit card balance of £2,000.
- He expected to retire at age of 65.

Mr E's main objective was to take his TFC entitlement immediately whilst leaving his pension funds invested. He wanted the TFC to help fund buying a property abroad where he intended to live with his wife. And he just wanted to access his TFC without needing to take an immediate income.

The adviser recorded Mr E as having a 'balanced attitude to risk' which he said meant:

- Someone with a moderate level of knowledge about financial matters.
- Someone with a level of experience of investments including in assets such as equities and bonds.

- Someone willing to take risks with at least part of their available assets.
- Someone who is willing to give up a certain outcome for a *"gamble"* provided the potential rewards were high enough.
- Someone who feels regret when their decisions turn out badly.

The adviser noted that (bold the adviser's emphasis) ***"You are aware that by transferring your benefits away from the [previous pension provider's name] you will be losing the Guaranteed Annuity rate (sic) at age 60 or 65."*** Whilst the adviser noted Mr E's pension would be losing his Guaranteed Annuity Rates ('GAR') by transferring to a Self Invested Personal Pension ('SIPP'), he (the adviser) recommended that in order to meet his objectives he (Mr E) should:

- Transfer his existing pension fund to a Portal Financial Personal Pension which would be managed by Transact. Mr E's statements with Transact since the transfer show that the pension plan he held on this platform was a Self-Invested Personal Pension ('SIPP') and this is how it will be referred to throughout this decision.
- Take the full 25% TFC entitlement.
- Leave his residual fund invested until it was required as an income.

The adviser ruled out a number of other options such as a 'Pension Switch', a 'Phased Income Withdrawal' and a 'Stakeholder Pension'. The adviser said this was because Mr E wanted to have access to the TFC with no income being drawn at that time. But in relation to the 'Pension Fund Drawdown (Unsecured Income)' option, the adviser said he was recommending this because: *"…this will release your full Tax-Free Cash and leave the residual amount invested, as you have no requirement for an income."*

The adviser said Mr E pension funds would be invested as follows:

- 53% Raithwaites Hypa Fund
- 10% Hypa Asia Fund
- 17% Venture Oil International
- 15% EOS Solar Energy
- 5% Cash Deposit

The adviser noted the following about what type of investments these were:

- The Raithwaites Hypa Fund and Hypa Asia Fund were unregulated collective investment schemes ('UCIS'). The Raithwaites Hypa Fund was a specialist investment in a five star hotel development and was designed to yield 8% per annum.
- Hypa Asia Fund invested in *"Off-Plan"* villas and Hotel Rooms which would be resold at higher prices once buildings were completed. The developments were all financed by local banks and the fund was designed to run over a three year period and return between 50%-100% on the original investment.
- Venture Oil International and Solar Energy funds were also specialised investments. Venture Oil pre-purchased Oklahoma crude oil. This was supplied on a monthly basis to the fund over a seven year period and resold on the open market. And the EOS Solar Energy fund invested in a solar power development in Cyprus where the fund had contracted to sell electricity at a fixed price over a twenty five year period to the Cypriot government. The initial yield was 8% per annum for three years and 10% per annum thereafter denominated in Euro's.

The adviser said the promotion and/ or advice on UCIS's were restricted under section 238 of the Financial Services and Markets Act ('FSMA') 2000. And that, amongst other things, this was on the grounds they may carry greater risks than regulated collective investment schemes, they weren't protected under the Financial Services Compensation Scheme and they usually require a *"sophisticated"* understanding of investments.

The adviser said he'd conducted full due diligence on the UCIS products to ensure these were suitable recommendation based on Mr E's stated objectives. And he noted Mr E wasn't exempt under FSMA in that he wasn't a high net worth individual and/ or a sophisticated investor. But the adviser said Mr E was:

"…a person for whom we as an Independent Advisory Firm qualified to advise on UCIS investments have taken reasonable steps to ensure that the investment in the particular collective investment scheme(s) is suitable following a full KYC (Know Your Customer Investigation) and ATR (Attitude to Risk Assessment), this therefore provides an exemption under COBS (Conduct of Business) regulations 4.12."

Mr E accepted the adviser's recommendation. A value of £23,709 was transferred from his PPP to the recommended SIPP on 23 August 2011 and he withdrew the TFC element of £5,927 on 25 August 2011.

In November 2015 Portal sent Mr E an 'annual pension review' for his SIPP. This showed that between October 2014 and November 2015 his pension fund had fallen from £16,752 to £16,452. As of 5 April 2016, his SIPP annual statement showed Mr E's total portfolio value was £16,379. And as of 5 April 2017 it was £14,042. As of 5 April 2018 Mr E's total portfolio value had fallen to £509. And by 5 April 2020 the total portfolio was worth £349, with the only investment with any value showing as Venture Oil with a nominal value of £0.45p. The remaining balance was in cash.

In May 2019, Mr E complained to Portal. He said he never fully understood the recommendations that were made to him by its adviser. He added the investments that were part of his pension portfolio when he transferred to a SIPP, were too complex for him to understand and he didn't believe they were medium to low risk. Mr E said he was relying on the advice given to him by Portal and if the recommendation to transfer to the SIPP hadn't been made he would not have transferred from his PPP.

Portal rejected Mr E's complaint. It initially said that the matter was out of time. So Mr E brought the complaint to our service. One of our investigator's reviewed the matter and didn't think the complaint had been made too late. And an ombudsman agreed with this view.

When considering the merits of the complaint, our investigator recommended it be upheld. In brief, he considered given Mr E's circumstances he was likely to have a cautious attitude to risk. And that the unregulated investments he was advised to invest in, weren't suitable for him when taking into account his attitude to risk and his capacity for loss. Our investigator thought the percentage of unregulated investments Mr E was recommended to invest in, was unsuitable as it was well above the level recommended by the Financial Conduct Authority (the 'regulator').

Our investigator set out how he thought Portal should put things right. In addition to carrying out a loss calculation based on a benchmark of the 'FTSE UK Private Investors Income Total Return Index', he said Portal should refund its fees to Mr E and make a payment of £400 for the trouble and upset it had caused.

Portal disagreed. In summary, it said:

- Mr E required access to his TFC which he couldn't obtain without going into drawdown and this could not be met through his existing arrangements. Under his

PPP if he wanted to be able to release his TFC early, this would've required him taking an income via an annuity.
- Mr E wanted to raise funds so he could move abroad and was keen to avoid taking out credit to do this.

Portal also disagreed with the investigator's proposed redress methodology. It said this was unreasonable considering Mr E's attitude to risk. Portal says that Mr E was correctly assessed as 'moderately cautious' investor. But the redress methodology proposed by the investigator didn't reflect this level of risk because it didn't contain any 'bond' element.

Our investigator conceded that Mr E would have had to transfer to access his TFC without having to enter an annuity. But he thought the recommendation was still unsuitable for all the other reasons, including the level of investments to be invested in UCIS's. He didn't think these were suitable for someone in Mr E's situation. He was satisfied the methodology he had recommended was a fair reflection of Mr E's attitude to risk.

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.

The reasons for my decision were set out in my provisional decision. As no further evidence has been submitted by either party, my findings remain the same. So, my reasons for upholding this complaint are as follows:

Our service has already considered the issue of jurisdiction and this has been communicated to both parties. I note Portal's continued objection to our service considering this complaint. But it can be assured that I have considered the issue of jurisdiction and I'm satisfied the decision previously made on this issue is correct. Therefore, I'm satisfied our service does have the power to look at this complaint.

The 'fact find' completed by the Portal adviser, states Mr E wanted to use the TFC so he could fund buying a property abroad where he was planning on relocating with his wife. The suitability report said the only other significant asset Mr E had was his home that he owned, financed with a mortgage. But Mr E says this is incorrect because he didn't (and still doesn't) own a property with or without a mortgage. He says he lived in rental property with his wife.

Whatever the situation is on Mr E's home ownership, I don't think this affects the decision. From what I can see if Mr E wanted to achieve his objective of moving abroad and keeping his pension funds invested rather than drawing an immediate income, I think the recommendation to transfer away from his previous PPP was a reasonable one to make. Even if Portal had made a mistake about the ownership status of Mr E's home, it doesn't seem to me that he had many other assets from which to fund his move abroad. So, Mr E was largely reliant on the TFC in order to meet this objective.

During the advice process, Portal, having identified Mr E's PPP contained GARs, explained that transferring would mean the loss of the GAR. Whilst I would normally question whether it was appropriate for the adviser to recommend transferring a PPP which would incur the loss of valuable guarantees, I think there were compelling reasons for this transfer to be recommended. And indeed Mr E's main complaint isn't that the transfer in itself was unsuitable. Rather, he considers the investments he was recommended to transfer into were not suitable for him given his experience of such products.

Mr E's previous pension provider has confirmed that if he wanted to access his TFC, which he could do at age 55, he would've had to take an annuity at the same time. I can see in several places in the suitability report, that Mr E confirmed he didn't want to take an income at that point but just wanted to take the TFC benefits. So, on balance, I think the recommendation to transfer away to another pension provider to meet his objectives, was a suitable one to make. However, looking at what funds were recommended to Mr E, which were mostly unregulated investments, I think these were unsuitable for him based on his attitude to risk and also his capacity for loss.

As set out above, the recommendation was to invest in a number of unregulated schemes. The regulator's 2010 UCIS findings said as well as UCIS only being eligible for promotion to certain customers which were generally sophisticated, high net worth investors. As an example, the regulator said that 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 Mr E's case, 95% of his SIPP was invested in unregulated, specialised products.

Portal's report said only two of Mr E's investments were 'UCIS' products. But both Solar Energy and Venture Oil were also very specialised unregulated investments. The former was a Special Purpose Vehicle ('SPV') for a project that sought to use a new technology in Cyprus. Similarly, Venture Oil was a highly specialised product investing in barrels of crude oil which had a currency risk and exposure to losses if the price of oil fell. The regulator has noted about these types of investments in its June 2013 'Policy Statement PS13/3' that:

"Pooled investments or 'funds' characterised by unusual, speculative or complex assets, product structures, investment strategies and/or terms and features. They are units in unregulated collective investment schemes (UCIS); securities issued by certain special purpose vehicles (SPVs); units in qualified investor schemes (QIS); and traded life policy investments (TLPIs)."

So, I think the investments recommended to Mr E were only suitable for a more sophisticated, experienced investor. Mr E's total asset allocation in unregulated products was 95%. I don't think any part of the investments recommended to Mr E were suitable for him. And certainly not in the proportion he was recommended to invest.

Mr E was classified as a 'balanced' investor. I've set out above how Portal defined this type of investor. But I can't see any evidence to support that Mr E was as experienced as the Portal definition of a balanced investor would suggest. His only investment experience up until that point was in his previous PPP which was a traditional with-profits investment, investing a large proportion of the funds in gilts and bonds.

I do not consider the risks associated with the recommended unregulated investment schemes were consistent with Mr E's attitude to risk. Or that they would have been fully understood by him. On grounds of risk alone, I see no reasonable justification for the recommendation to invest in these unregulated schemes. As Portal itself said, they were illiquid and came with significant risks. In this context, I'm not persuaded that the recommendation to invest almost all of Mr E's pension fund into these schemes can be reasonably justified.

Portal's suitability report acknowledged the associated risks and restrictions that applied to the promotion of UCIS. And it did say Mr E wasn't a high net worth individual and/ or sophisticated investor. But it went on to say its adviser was qualified to advise on UCIS investments because of the COBS 4.12 exemption. At the time of the advice COBS 4.12.1 stated the following:

"(1) A firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238

of the Act if the promotion falls within an exemption in the table in (4), as explained further in the Notes.

(2) Where the left-hand column in the table in (4) refers to promotion to a category of person, this means that the invitation or inducement:

(a) is made only to recipients who the firm has taken reasonable steps to establish are persons in that category; or

(b) is directed at recipients in a way that may reasonably be regarded as designed to reduce, so far as possible, the risk of participation in the collective investment scheme by persons who are not in that category."

Even though a summary of this COBS statement appears in Mr E's suitability report, given his level of understanding and experience of investments, I don't think it's likely he would've understood what this exemption meant. I also don't think it was made clear to him why these investments weren't suitable for most retail investors, and/ or why an exception was being applied in his case.

So, despite what Portal says, I consider if Mr E had been correctly advised, I don't think he would have invested his pension funds as he did. I do, however, think he still would have transferred his PPP to enable him to meet his objectives of accessing his TFC without having to enter into an annuity.

In terms of the redress, I note our investigator refunded the initial advice fees separately. But I don't think this should have been done. This is because the redress calculations replace the actual growth Mr E would've achieved with a benchmark that doesn't allow for these same fees to be deducted. However, I don't propose making a deduction for these fees for two reasons. Firstly, I think it's likely that Mr E will now need to seek, and pay for, advice about how to invest his lump sum. And secondly, I don't think it would be fair for Portal to profit from the unsuitable advice it gave Mr E.

Fair compensation

My aim is that Mr E should be put as closely as possible into the position he would probably now be in if he had been given suitable advice. I think Mr E would have invested differently. It's not possible to say *precisely* what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr E's circumstances and objectives when he invested.

What must Portal Financial Services LLP do?

To compensate Mr E fairly, Portal Financial Services LLP must:

- Compare the performance of Mr E's investment with that of the benchmark shown below.
- If the *actual value* is greater than the *fair value*, no compensation is payable. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable.
- Portal Financial Services LLP should add interest as set out below.

- If there is a loss, Portal Financial Services LLP should pay into Mr E's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Portal Financial Services LLP is unable to pay the compensation into Mr E's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr E won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr E's actual or expected marginal rate of tax at his selected retirement age. As set out in my provisional decision, I think it's reasonable to assume that Mr E was likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%.

- Pay Mr E £400 for distress and inconvenience cause to his retirement planning.

Income tax may be payable on any interest paid. If Portal Financial Services LLP deducts income tax from the interest, it should tell Mr E how much has been taken off. Portal Financial Services LLP should give Mr E a tax deduction certificate in respect of interest if Mr E asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Transact SIPP	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual* value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Portal Financial Services LLP should take ownership of the illiquid assets by paying a commercial value acceptable to the pension provider. The amount Portal Financial Services LLP pays should be included in the actual value before compensation is calculated.

If Portal Financial Services LLP is unable to purchase the portfolio the *actual value* should be assumed to be nil for the purpose of calculation. Portal Financial Services LLP may require that Mr E provides an undertaking to pay Portal Financial Services LLP any Amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal Financial Services LLP will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Portal Financial Services LLP should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any withdrawal from the Transact SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Portal Financial Services LLP totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

The Transact SIPP only exists because of illiquid assets. In order for the Transact SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Portal Financial Services LLP taking over the investment, or this is something that Mr E can discuss with the 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. If Portal Financial Services LLP is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr E an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the Transact SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr E wanted Capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider Mr E's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr E into that position. It does not mean that Mr E would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that

broadly reflects the sort of return Mr E could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold the complaint. My decision is that Portal Financial Services LLP should pay the amount calculated as set out above.

Portal Financial Services LLP should provide details of its calculation to Mr E in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr E to accept or reject my decision before 14 April 2022.

Yolande Mcleod
Ombudsman