DRN-3361283

The complaint

Mrs E complains that Portal Financial Services LLP gave her unsuitable advice to transfer her pension, go into income drawdown and to invest in high-risk investments.

What happened

I said in my provisional decision dated 11 February 2022, that I was intending to uphold this complaint but that I was amending the recommended redress. Mrs E accepted my provisional findings but didn't add any further comments. Portal hasn't responded.

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

Mrs E had two Personal Pension Plans ('PPP') with the same provider Legal & General. In October 2011 Portal reviewed Mrs E's existing PPP arrangements. This was with a view to advising her on whether switching to another pension plan while receiving a 25% tax-free cash lump sum ('TFC'), would be in her best interests.

Following the review, Portal's adviser (the 'adviser') produced a suitability report for Mrs E. In summary, Mrs E's circumstances were recorded as follows:

- *She was 55 years old and was married.*
- *She was employed earning around £100 a week.*
- *She had two PPPs with a total transfer value of £52,780.*
- *She lived in rented property with her husband.*
- *She had an outstanding credit card balance of £2,500.*
- *Her expected retirement age was 60.*

Mrs E main objective was to take her TFC entitlement immediately whilst leaving her pension funds invested. She wanted the TFC to help finance visiting her family abroad.

The adviser recorded Mrs E's as having a 'moderately cautious attitude to risk' which he said meant:

- *Moderately Cautious investors typically have low to moderate levels of knowledge about financial matters and quite limited interest in keeping up to date with financial issues. They may have some experience of investment products, but will be more familiar with bank and building society accounts than other types of investments.*

- *In general, moderately cautious investors are uncomfortable taking risks with their investments, but would be willing to do so to a limited extent. They realise that risky investments are likely to be better for longer-term returns.*

- *Moderately Cautious investors typically prefer certain outcomes to gambles. They can take a relatively long time to make up their mind on financial matters and may suffer from regret when decisions turn out badly.*

The adviser went on to recommend that Mrs E transfer her PPP to a Transact Self Invested Personal Pension ('SIPP'). He said that he'd normally recommend that Mrs E leave her pension benefits where they were as this was most beneficial in her retirement. But that during their telephone conversation, Mrs E advised she was "…aware of the downfalls in taking your benefits now but due to your current circumstances you would like to take your benefits immediately; in accord to your wishes, I recommend…". The adviser recommended the following:

- *Transfer her existing pension fund to a Transact SIPP.*
- *Take the full 25% TFC entitlement.*
- *Leave her residual fund invested until it was required as an income.*

The adviser said that the reason he was recommending this transfer to the selected provider was because the "…potential benefits available at retirement with them look likely to exceed the benefits with other possible providers once you have taken your tax free cash lump sum from your pension."

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

- *49% Raithwaites Hypa Fund*
- *5% Hypa Asia Fund*
- *16% Venture Oil International*
- *15% EOS Solar Energy*
- *15% Cash Deposit*

The adviser noted the following about the 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 Sweet crude oil. This was supplied on a monthly basis to the fund over a seven year period and resold on the open market. And 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 UCISs were restricted under section 238 of the Financial Services and Markets Act ('FSMA') 2000. And that, amongst other things, this was on the grounds that 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 that he'd conducted full due diligence on the UCIS products to ensure these were suitable recommendations based on Mrs E's stated objectives. And he noted that Mrs E wasn't exempt under FSMA in that she wasn't a high net worth individual and/ or a sophisticated investor. But the adviser said Mrs 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."

Mrs E accepted the adviser's recommendation. A value of £54,967 was transferred from her PPP to the recommended SIPP on 15 November 2011 and she withdrew her TFC element of £13,741 on 7 December 2011.

On 1 May 2012 Mrs E's 'annual reporting' statement from Transact showed that her pension was worth £38,102 after the TFC was withdrawn. And allocations had been made to the recommended investments. But by May 2020 Mrs E's SIPP was valued at £704.

In 2019, Mrs E complained to Portal. She said that she never fully understood the recommendations that were made to her by its adviser. She added the investments that were part of her pension portfolio when she transferred to a SIPP were too complex for her to understand and she didn't believe they met with her risk profile. Mrs E said she was relying on the advice given to her by Portal and if the recommendation to transfer to the SIPP hadn't been made, she would not have transferred from her PPP.

Portal rejected Mrs E's complaint. It initially said that the matter was out of time. So Mrs 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 should be upheld. In brief, he considered that given Mrs E's circumstances she was likely to have a cautious attitude to risk. And that the unregulated investments she was advised to invest in weren't suitable for her when taking this and her capacity for loss into account. He thought the percentage of unregulated investments Mrs E were 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 Mrs E and make a payment of £400 for the trouble and upset it had caused.

Portal disagreed. In summary, it said:

- *Mrs E required access to her TFC which she couldn't obtain without going into drawdown even if this was with Legal & General itself. As such, Mrs E may have been able to take a TFC early but this would have required her taking an annuity. The TFC required a drawdown facility and the SIPP met this requirement.*
- *The pension funds were the main way for meeting her objective of moving abroad as she had no other available assets.*
- *The Transact SIPP was chosen due to its flexibility, greater access of funds and online functionality.*
- *The redress methodology is unreasonable considering Mrs E attitude to risk of 'moderately cautious', as it contains no bond element.*

As no agreement could be reached, the matter has been passed to me for a 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.

As no further evidence has been submitted by either party, my decision remains that I am upholding this complaint. The reasons for this were set out in my provisional decision – these reasons 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 that 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 suitability report completed by the Portal adviser, states that Mrs E wanted to use the TFC so she could fund visiting family based abroad. Portal says that it was, in fact, so that Mrs E could move abroad with her husband. The suitability report said that the only significant asset Mrs E had was her pensions held with Legal & General.

From what I can see if Mrs E wanted to achieve her objective of visiting her family abroad, or even moving abroad, and keeping her pension funds invested rather than drawing an immediate income, I've seen no persuasive evidence that she could not do this with her pension plan with Legal & General (now Reassure). Legal & General has confirmed that Mrs E could have entered into a drawdown with her pension and by its own admittance, Portal has said that a drawdown facility was possible with Legal & General but Mrs E might have needed to move within the latter business to enter into this.

So, I don't think Portal has provided sufficiently compelling reasons to justify a transfer from a PPP to a SIPP. Mrs E's PPP allowed her to enter into a drawdown. The only other reason for transferring was to invest in funds that would give her a better return. But I've not seen any evidence that Mrs E was provided with a reasonable comparison which might have shown her whether the SIPP would provide a greater return at retirement. I think this meant that she wasn't put in a fully informed position to make such a decision. And I don't see how Mrs E could have formed the view that she might be better off in retirement by investing into the SIPP.

There are other reasons for concluding that the advice wasn't suitable. Portal agreed that the new strategy would cost Mrs E more than her existing arrangements. The suitability report listed the charges Mrs E would be subject to. The adviser said Portal's initial fee was 5% of the transfer amount and it charged an ongoing adviser fee of 1% of the fund. On top of this the SIPP charges with an initial set-up fee of 0.2% of the fund after the TFC applied. As did a 0.5% plus £80 per year after 2012. The adviser went on to say that "Overall, this strategy will cost more than your existing arrangement, but will offer potential growth which is not available to you at present".

I haven't been provided with the Legal & General PPP charges, but I think on balance, from Portal's statement about the new strategy being more expensive, that this was likely to be the case. So, in order to be better off in retirement, the performance of the SIPP needed to be much greater in order to offset the effect of the higher charges. Overall, I don't think the recommendation to transfer was suitable for Mrs E. I think her key objectives could have been achieved through her current PPP with Legal & General without incurring increased fees.

In addition, looking at what funds were recommended to Mrs E, I think these were also unsuitable for her based on her attitude to risk and her capacity for loss. The regulator's 2010 UCIS findings said that as well as UCIS only being eligible for promotion to certain customers which were generally sophisticated, high net worth investors, as an example, it 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.

Mrs E's exposure to UCIS products was much higher than the regulator's recommended 3% to 5%. The two recommended UCISs accounted for 54% of Mrs E investment allocations. And whilst not UCIS's, 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 that the investments recommended to Mrs E were only suitable for a more sophisticated, experienced investor. Mrs E's total asset allocation in unregulated products was 85%. I don't think any part of the investments recommended to Mrs E were suitable for her. And certainly not in the proportion she was recommended to invest in.

Mrs E was classified as a 'moderately cautious' investor. I've set out above how Portal defined this type of investor. I can't see, by even Portal's own definition of a 'moderately cautious' risk investor, that these products met with Mrs E's recorded attitude to risk. Or that they would have been fully understood by her. On grounds of risk alone, therefore, I see no reasonable justification for the recommendation to invest in these unregulated schemes.

The descriptions of these schemes as I've set out above, make it clear that these were highly specialised and high risk investments. As Portal itself said, they were illiquid and came with significant risks that an unexperienced investor such as Mrs E would not fully appreciate. In that context, I'm not persuaded that the recommendation to invest almost all of Mrs 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 Mrs 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 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 the COBS statement as I've set out above, appeared in Mrs E's suitability report, given her level of understanding and experience of investments I don't think it's likely she would've understood what this exemption meant. I also don't think it was made clear to her why these investments weren't suitable for most retail investors, and/ or why an exception was being applied in her case.

So, despite what Portal says, I think if Mrs E had been correctly advised I don't think she would have transferred her PPP from her provider to a SIPP and/ or invested in the way that she did.

I note that our investigator refunded the initial fees separately. But I don't think this was necessary. This is because the redress calculations replace the actual growth Mrs E would've achieved with a benchmark that doesn't allow for these same fees to be deducted, so there was no need for the investigator to specify a refund of fees separately.

For all these reasons, I'm intending to uphold this complaint.

Fair compensation

My aim is that Mrs E should be put as closely as possible into the position she would probably now be in if she had been given suitable advice.

I think Mrs E would have remained with her previous provider, however, I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mrs E's circumstances and objectives when she invested.

What must Portal Financial Services LLP do?

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

- Compare the performance of Mrs E's investment with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional 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 Mrs 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 Mrs E's pension plan, it should pay that amount direct to her. 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 Mrs E won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mrs E's actual or expected marginal rate of tax at her selected retirement age.
- It's reasonable to assume that Mrs E is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%.
- Pay Mrs E £400 for the distress caused by the total loss of the investment and disruption to Mrs E's 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 Mrs E how much has been taken off. Portal Financial Services LLP should give Mrs E a tax deduction certificate in respect of interest if Mrs E asks for one, so she 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	Notional value from previous provider	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 Mrs E provides an undertaking to pay Portal Financial Services LLP any amount she 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.

Notional Value

This is the value of Mrs E's investment had it remained with the previous provider until the end date. Portal Financial Services LLP should request that the previous provider calculate this value.

Any withdrawal from the Transact SIPP should be deducted from the notional 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 notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, Portal Financial Services LLP will need to determine a fair value for Mrs E's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

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 Mrs 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 Mrs 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:

- Mrs E wanted Capital growth with a small risk to her capital.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- 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 her 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 that Mrs E's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs E into that position. It does not mean that Mrs E would have invested 50% of her 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 Mrs E could have obtained from investments suited to her objective and risk attitude.

My final decision

I uphold the complaint. Portal Financial Services LLP should pay Mrs E the amount calculated under 'Fair compensation' along with the distress and inconvenience payment of £400.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 16 April 2022.

Yolande Mcleod
Ombudsman