DRN-3364146

The complaint

Mr C complains about the advice Portal Financial Services LLP ('Portal') gave to him in 2014 to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused him a financial loss.

Mr C has been helped by professional representatives to bring his complaint. But, for ease of reading, I'll refer to the representatives' comments as being Mr C's.

What happened

After receiving a letter from Portal, Mr C contacted it around August 2013 in order to discuss his pension and retirement needs.

Portal completed a fact-find to gather information about Mr C's circumstances and objectives. Portal also carried out an assessment of his attitude to risk, which it deemed to be "*balanced*". Portal conducted a telephone review with Mr C on 12 March 2014. The next day (13 March) it sent him a letter explaining that it didn't recommend he transfer his DB benefits because the critical yield (the growth rate required to match his DB benefits) was too high at 18.7%. But, Portal said it could still help Mr C if he wanted to go ahead and asked him to return the enclosed options form. The options form was to let Portal know whether or not Mr C wanted to go ahead with "*accessing your pension fund early even though this goes against our recommendation*". It gave him two choices:

- "*Income drawdown*"; after taking tax free cash (TFC) of £50,885 and reinvesting the remaining £152,656.
- Accept Portal's recommendation to leave his funds where they were.

It said that if Mr C chose the first option, as that was against Portal's advice, he should also sign the enclosed *insistent client* form. That form set out that a new plan would need to grow at a rate of 18.7% in order to match the benefits from the DB scheme. It also said that Mr C would be giving up an annual pension of £10,265. It went on to say that, in comparison Mr C could take a tax free sum of £50,885 immediately and might expect to receive an annual pension of £7,410 at age 60 by transferring out of the scheme. Mr C returned the insistent client form on 17 March 2014 confirming he wanted to go ahead with the transfer.

Portal sent Mr C a suitability report setting out its advice on 25 March 2014. The report said Mr C was 55 years old, employed and earning approximately £2,000 a month. It noted Mr C was married, had a mortgage on his home of around £20,000 which he repaid at a cost of £309 a month. He had other debts of £40,000 for which he paid total repayments of £841. Portal recorded that Mr C was two months behind with one of his repayments, which meant he had arrears of around £960. It said he had disposable income of £300 a month and another pension with his current employer.

Regarding Mr C's DB scheme, the report recorded it had a cash equivalent transfer value ('CETV') of £203,541 and a scheme retirement age of 60. The DB scheme would pay Mr C a pension of £10,265 a year without taking any TFC.

The report said that Mr C's objective was to release cash from his pension to be able to make home improvements and pay off debts. Portal said it had looked into other ways for Mr C to generate the money required to meet his objectives, but said he didn't have any other assets he could use and didn't want to take out any further borrowing or pay interest.

It said:

"*Due to the guaranteed benefits that you will be relinquishing* with [Mr C's DB scheme], *it is against my recommendation to transfer your benefits. You have decided that you still wish to proceed with the Pension Release. On this basis, although we can help you release money from your pension, we are treating you as an insistent client.*

You are aware that by taking this amount now, you will not have a guaranteed pension benefit, which you do currently have through your defined benefit (otherwise known as final salary) pension scheme. You stated that you are aware of the benefits that you are giving up, and that you wish to proceed on this basis, even though I have advised that it is extremely unlikely that we will be able to match the required annual return (the critical yield of 18.7%)."

Later in the report, under a heading of "*our recommendation*" Portal repeated that it was treating Mr C as an insistent client when it said:

"*You have decided that you still wish to proceed with Pension Release despite us advising you not to. We will assist you with this, and have treated you as an 'Insistent Client'.*"

It went on to say that it was recommending that Mr C invest in a SIPP provided by a company I'll call L. It said the reason for this was because:

"*The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider.*"

It said that by following this recommendation Mr C could:

- "*Meet your stated objectives and make home improvements and reduce your debt.*
- *Crystallise £120,000 of your fund in order to release the Tax Free Cash sum of £30,000 from your arrangement.*
- *Leave £83,541 un-crystallised* [sic], *of which you are entitled to release 25% of the fund as a Tax Free Cash lump sum at a later date.*"

In May 2014 L confirmed the transfer had gone through. It had received £203,541 from Mr C's DB scheme. It had paid Mr C £30,022 in TFC from crystallised funds of £120,089, It had also invested an uncrystallised sum of £83,452. It said it had paid Portal £10,177 and would continue to pay it 1% of the fund value each year being the fees Mr C had agreed to pay.

Mr C complained to Portal in October 2020 about the suitability of the advice it gave to him in 2014 because he said, amongst other things, that Portal:

- Provided negligent advice, which was confusing, contradictory and misleading.
- Didn't fully explain what it meant by treating Mr C as an insistent client.
- Didn't look into cash raising alternatives to transferring from the DB scheme.
- Ignored the regulator's guidance.

- Didn't explore the possibility of Mr C taking funds from his DB scheme early.
- Incorrectly said the benefits for the new plan would exceed the benefits from the DB scheme.
- Didn't make clear what benefits Mr C would be losing, including death benefits.
- Didn't explain the advantages and disadvantages of the proposed new scheme including its costs and charges.

Portal didn't uphold Mr C's complaint. It said, amongst other things, that:

- It had clearly advised Mr C not to transfer out of his DB scheme outlining the risks of doing so.
- It assisted Mr C by processing the transfer on an insistent client basis.
- Portal had advised that it was extremely unlikely that the new scheme would match the required annual return.
- It had clearly warned Mr C about the guarantees and benefits he would be losing and acted in Mr C's best interest by recommending that he should not transfer out of the DB scheme.
- It had explained the new scheme charges in its suitability report.

Mr C brought his complaint to our service. One of our investigators upheld the complaint and required Portal to pay compensation including a sum of £300 to address Mr C's distress and inconvenience arising from Portal's actions. He said that Portal should have given Mr C its suitability report before classifying him as an insistent client. The manner in which Portal presented its advice seemed to encourage Mr C to transfer out of his DB scheme. Some of Portal's advice, particularly that Mr C would be better off in retirement by transferring out of the DB scheme, was misleading. Mr C didn't fully understand what it meant to be considered an insistent client. As a result of Portal's advice he lost valuable benefits by transferring into a scheme that was likely to provide lower benefits.

Portal disagreed. In summary, it said:

- It acted in Mr C's best interests.
- Mr C understood what the figures meant and by how much the new scheme would need to grow to match the existing DB scheme.
- Portal advised against the transfer from Mr C's DB scheme and made it very clear to him what benefits he'd be giving up.
- It was entitled to rely on Mr C's understanding and he was not obliged to sign to agree to the insistent client process.
- Portal had followed the regulator's guidance that was in place at the time.
- It disclosed all of the risks of proceeding clearly and Mr C was in a fully informed position to make his decision.
- Owing to Mr C's financial position at the time it believed he would have gone ahead with the transfer with or without its involvement.
- It was satisfied that Mr C had understood the risks he was taking and that if he'd shown a clear lack of understanding it wouldn't have gone ahead with the insistent client process.

The investigator wasn't persuaded to change his opinion, so 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.

Both Mr C and Portal have made many points in bringing the complaint and in replying to it. And I've considered carefully everything on file. But in this decision I don't intend to address each and every issue or point raised. Instead I will focus on the issues that are at the heart of Mr C's complaint and the reasons for my decision.

Our approach

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's position

The regulator, the Financial Conduct Authority ('FCA'), says 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 it was in Mr C's best interests (COBS 19.1.6).

Did Portal fairly decide to treat Mr C as an insistent client?

Portal's position is that, in line with the regulator's guidance, its recommendation was that Mr C should *not* transfer out of his DB scheme. And that it only arranged the transfer for him on the basis that he was insistent it did so. As such it said that it followed the appropriate process for treating Mr C as an insistent client. So I've looked very carefully at the process Portal went through and the advice it gave to Mr C.

At the time of Portal's advice there was no specific regulatory advice or guidance in place in respect of insistent clients. But there were COBS rules in the regulator's Handbook which required Portal to "*act honestly, fairly and professionally in accordance with the best interests of its client*". In addition, COBS required Portal to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr C had to have understood the consequences of going against it.

Portal's role was to discern what Mr C's wants and needs were and why he wanted to transfer his pension. Its role wasn't simply to facilitate what Mr C wanted. And overall, it had to act in his best interests.

Portal's recommendation, both in its letter of 13 March 2014 and in its later suitability report was that Mr C should not transfer out of his DB scheme. But I think that recommendation was undermined by the manner in which Portal presented it. Portal's 13 March letter clearly made the point that Mr C's DB scheme had a transfer value of £203,541 from which he could release £50,885 immediately in a lump sum. The letter only later said that because of the high critical yield its recommendation was that he shouldn't transfer. So Portal had already dangled the prospect of £50,885 in instant cash in front of Mr C before telling him it didn't think he should take that cash.

Then in the next paragraph Portal told Mr C that if he wanted to go ahead with the transfer out of the scheme it could help him to do that, if he completed the enclosed options and insistent client forms. Further, the letter encouraged Mr C to return the enclosed forms as soon as he could so it could get on with making the transfer. In other words the letter was written in such a way as to presume that transferring was something of a foregone conclusion. Otherwise why would there be any need for Mr C to return the forms with haste, rather than giving him time to consider what could be a life-changing decision? So I don't think Portal's approach was appropriate given that it had already determined it wasn't in Mr C's best interests to transfer out of the scheme.

Portal presented the possibility of transferring out of the scheme on an insistent client basis, alongside the recommendation not to make the transfer. I think this made it far too easy for Mr C to simply decide that transferring his funds was a suitable alternative to staying in the scheme. But Portal was aware that a decision to transfer out of the DB scheme was not in Mr C's best interests. Had it not given Mr C the option and the means to go ahead with the transfer at that time then Mr C would have had to instigate that process himself. That is, it would have placed the onus on Mr C to contact Portal again to find out what he needed to do if he genuinely insisted on transferring out of the scheme. But Portal didn't do that, instead it gave him the ways and the means to act in a manner Portal knew wasn't in Mr C's best interests, but would see it earn a significant fee.

Also I don't think Portal's letter and the options and insistent client forms gave appropriate emphasis to why its recommendation was not to transfer out of the DB scheme. In this situation I'd expect the emphasis to be the reasons why the transfer was not in Mr C's best interests and consideration of the alternative options available to Mr C. But the information on the insistent client form was limited to the loss of guarantees because of the critical yield required to match the benefits. So, at that time, Mr C had little information to go off to decide if being an insistent client was truly in his best interests at that point. And Portal didn't highlight other risks involved in the transfer – for example the risk of funds running out in drawdown.

Further, Portal didn't produce its suitability report until after Mr C had signed the form to say it should treat him as an insistent client. But its letter of 13 March 2014 told him that by transferring out of the scheme he could enjoy a TFC sum of £ £50,885 (and he could reinvest the remaining pension pot of £152,656). Similarly, the enclosed insistent client form summarised both the benefits he could expect to lose but also what he could possibly gain from transferring out of the DB scheme. But it presented that information to him in a raw state, that is without the analysis contained within Portal's suitability report. I find this undermines the process. That's because I don't see how Portal could expect Mr C to make an informed decision about going against its recommendation not to transfer when it hadn't given him all the information he needed in order to make that decision. That is, it gave him some bare-bones information and expected him to make a determination that would start him down the road of the insistent client process without giving him enough detail to reasonably make that decision.

Also, when Portal did send Mr C its suitability report, I find that it was confusing. I think it included mixed messages and some of its advice was misleading. For example the report says that its recommendation was that Mr C should not transfer out of his DB scheme. But then immediately says that as he is an insistent client Portal's recommendation was that he should transfer out of his DB scheme. It said that by doing so he could fulfil his objectives of making home improvements and paying off debts by releasing TFC in his chosen sum of £30,000. So this clearly gives the impression that transferring out of the scheme would be in Mr C's best interests.

Also, under a heading of "*Ways to Generate Cash*", where Portal considered other options for raising funds outside of transferring away from the scheme, Portal said this:

"*Should you decide to continue paying off your debt through monthly contributions rather than using the Tax Free Cash lump sum from your pension, you will have a total repayment* *of £48,854.03 calculated at a market average rate of 10.55% APR on the debt, with a pension value of £336,631 based on 5% growth at retirement.*

If however, you decide to take your Tax Free Cash lump sum from your pension and use this to pay off your debt upfront, while refocusing your debt contributions into your pension; you will have total contributions into your pension of £58,624.84 (this has been grossed up due to tax relief) and a pension value of £334,933 based on 5% growth at retirement.

As you can see, by taking the Tax Free Cash amount you are entitled to, this will result in you receiving a higher pension value at retirement as it allows you to redirect your contributions that would have been focused on repaying your debt back into your pension whereby you will receive tax relief."

So that is clear advice that by transferring out of his DB scheme and taking his TFC then that *would* result in Mr C being better off in the long run. But that advice was based on the assumption that Mr C would take all his TFC and instantly use it to pay off his debts. And then use the funds that he was saving by not making debt repayments and investing those straight back into an alternative pension fund. But, as far as I'm aware, Mr C hadn't given any indication he intended to do either of those things. Mr C had said he wanted to pay off some debts, although Portal's report doesn't say which debts and what that would cost. But, at that time, Mr C had debts (including his mortgage) of around £60,000. But he only wanted £30,000 TFC. So that sum wasn't ever going to pay off all his debts, rendering Portal's advice on this point largely irrelevant.

Also, Mr C said he wanted to use some of his TFC to make home improvements. But Portal didn't examine what those home improvements were or how much they would cost. And as the money for those home improvements was coming from the TFC lump sum it certainly wouldn't be used for paying off the existing debt, further weakening the strength of Portal's advice.

Similarly, I can't see anywhere where Mr C indicated that his intention was to divert any funds currently used for debt repayments straight back into an alternative pension fund. So it seems to me that Portal's comments, that Mr C could be better off in retirement by taking his TFC rather than staying in is DB scheme were based on an extremely unlikely scenario, unsupported by evidence. As such that advice was of little actual value to Mr C in terms of him making an informed and balanced decision about what the likely outcomes of his options were. So I don't think it was reasonable for Portal to give Mr C the false impression that by taking his TFC his pension would be in a better position. It follows that I think Portal's advice here was unclear and misleading.

Portal repeated its assertion that Mr C would be better off in retirement by transferring out of his DB scheme later in its suitability report. Under a heading of "*Our Recommendation*" Portal repeated that it was treating Mr C as an insistent client but then said it was recommending he transfer out of his DB scheme, saying:

"*The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider*."

So, in the above Portal said that it *did* recommend a transfer. And that the reasons for such a recommendation was not just that Mr C could achieve his objectives but also that his new pension would "*exceed*" the pension available from his DB Scheme. But, while that was an outside possibility, Portal's own analysis showed that to be an "*extremely unlikely*" outcome. It also entirely contradicts the reason it purportedly wasn't recommending the transfer in the first place. I think Portal's advice here was misleading. And this approach was a pattern throughout its process. As a result, I think Mr C could've misunderstood or believed that overall, Portal was recommending he should go ahead with the transfer and that it was simply paying lip-service to the insistent client process.

In contrast Portal's said that Mr C didn't have to sign the insistent client form and didn't give it any impression that he didn't understand the process. Mr C doesn't dispute that he did sign the form, though he's said he didn't really understand the process and that he thought Portal wanted him to go ahead with the transfer. But even if Mr C did fully understand what it meant to be an insistent client I don't think Portal did enough to establish his motives for going down that route.

Portal's suitability report says Mr C's objectives were to make home improvements and pay off debts. But I've seen nothing which shows that Portal found out what home improvements Mr C wanted to make or why he considered those so important that it was worth giving up the guaranteed benefits from his DB scheme for. Nor have I seen evidence that Portal explained to Mr C why that wouldn't be in his best interests. I note Portal recorded that Mr C said he didn't want to take on any further borrowing or pay interest. That might be the case, but I don't think Portal fully examined Mr C's options here. While Portal had recorded that Mr C told it he was two months – around £960 – in arrears with one of his repayments, there's no evidence it fully discussed with him ways to manage his debts. For example it didn't appear to discuss consolidation or restructuring of his debts to make those more affordable. Nor is there evidence it compared the likely costs of doing so against what he would be losing by transferring out of the scheme. Instead, Portal painted an entirely unrealistic picture, as I've described above, about what would happen if Mr C paid off all his debts with his TFC and redirected the saved funds towards a pension pot, when there was no prospect of that happening. Instead, it simply accepted that Mr C would like to have a tax free lump sum and went ahead and arranged that.

I think most people would find the prospect of a tax free lump sum enticing. But Portal's role was to find out what Mr C's wants and needs were and why. Its role wasn't simply to do what he wanted without appropriate analysis and challenge of his motives for doing so with the implications of taking those actions with him. But I've seen no evidence of such a challenge even though that was in Mr C's best interests. So, while Portal recommended Mr C shouldn't transfer out of his DB scheme, I don't think Portal's shown that it met its obligations to challenge Mr C's objectives in light of what he would be giving up.

Also, Mr C's DB scheme would have allowed him to take benefits from it at age 55 although that would no doubt be at a reduced income. Portal hasn't retained any transfer analysis reports so I don't know if this was something that it ever considered. But there's no evidence elsewhere that it looked into what those benefits were and if those could have helped to meet Mr C's objectives at that time. So it appears that Mr C was unlikely to be aware of that option. But, had that been something that was in his best interests, that would have meant that he would have preserved some of the benefits from his DB scheme, albeit at a reduced sum, but still allowed him access to others. One such benefit would have been an increasing, risk free, annual income that he would receive from age 55 for the rest of his life. But I've seen no evidence that, while saying that Mr C was an insistent client, Portal considered or put this alternative position to him. And I think exploring these alternatives was an important part of the advice process, which Portal failed to carry out.

Further, as set out above, there were flaws in Portal's advice process which meant it didn't fully and accurately inform Mr C about his position. On balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant that it's fair to truly regard Mr C as an insistent client.

Portal was in a good position to have analysed, tested, challenged and advised Mr C about what was in his best interests for retirement planning. It knows pension pots like Mr C's DB scheme were paid into over many years with the intention of providing for retirement. But Mr C's chosen path was to give up that income in retirement for a shorter-term solution, rather than long-term planning. And I don't think that applying an insistent client label to someone when they express that their preference is not to follow advice, is the same as applying a fair process of arriving at a reasonable determination of who an insistent client really is.

It follows that I don't think Portal did enough to establish that Mr C was a genuine insistent client. So I don't think it treated him fairly. And, if it had done so and provided the level of advice that I think it should have, I think it's unlikely that Mr C would have transferred out of his DB scheme at that time.

Portal argues that Mr C would have transferred out of the scheme regardless of what it told him. I've considered this carefully, but I'm not persuaded that Mr C would've insisted on transferring out of the DB scheme, against Portal's advice in 2014. I say this because Mr C was an inexperienced investor with a balanced attitude to risk. He could have found other ways to manage his debts by, for example, restructuring or consolidating those. And Portal sent him misleading messages that he would be better off by transferring out of the scheme. Had it not done so and been clearer about what Mr C stood to lose, clearly explaining why it wasn't in his best interests, I think he'd have heeded Portal's advice not to transfer.

In light of the above, I think Portal should compensate Mr C for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology. Further, as Portal's actions have clearly been a source of distress and inconvenience for Mr C, I think it's fair and reasonable that Portal pay him £300 in redress for that.

Putting things right

A fair and reasonable outcome would be for Portal Financial Services LLP to put Mr C, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr C 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, while Mr C has taken his TFC and drawn down funds from his SIPP, as far as I'm aware he has not yet retired, and has no plans to do so at present. But I understand that he would have been entitled to take the benefits from his DB scheme at age 60, and I think that's what he's likely to have done. So, compensation should be based on his normal scheme retirement age of 60, as per the usual assumptions in the FCA's guidance.

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 C's acceptance of the decision.

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

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

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 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 C 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 C 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 C 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 C the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr C.

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

Joe Scott
Ombudsman