DRN-3364261

The complaint

Mr C complains about the advice Portal Financial Services LLP ('Portal') gave to him in 2017 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

Prior to 2014 Mr C had been a deferred member of two separate DB schemes. In 2014 Portal gave Mr C advice concerning a pension transfer from one of those DB schemes. As a result Portal arranged for Mr C to transfer the funds from one of his DB schemes to a SIPP. And Portal continued to give him financial advice following that. Portal's involvement in that transfer is not the subject of this decision.

In 2017 Portal gave Mr C further advice around his pension and retirement needs and whether it was in his best interests to transfer out of a second DB pension scheme he had stopped paying into in 2009.

In April 2017 Portal completed a fact-find to gather information about Mr C's circumstances and objectives. It produced a pension transfer value analysis report and also carried out an assessment of his attitude to risk, which it deemed to be "*moderately cautious*".

Portal prepared a suitability report which advised Mr C to transfer his pension benefits into a SIPP. The report said Mr C was 59 years old, employed and earning approximately £31,000 a year, including a shift allowance. It noted Mr C was married, had a remaining mortgage on his home of £11,088 which he repaid at a cost of £308 a month. He also had a second mortgage of £15,660 which he repaid at £435 a month.

Regarding Mr C's DB scheme, the report recorded that:

- Mr C's fund had a cash equivalent transfer value ('CETV') of £173,350.
- By transferring Mr C could release tax free cash of £43,337
- The DB scheme would pay Mr C a pension of £3,519 a year after taking a lump sum of £23,460. The critical yield (the growth rate required to match his DB benefits) was 21.3%.
- Alternatively the DB scheme could pay an annual pension of £5,003, if Mr C did not take a lump sum; the critical yield to meet that figure was 44.1%.
- The required "growth rate" was 0.1%.

Portal said that the reason for its recommendation for Mr C to transfer his DB scheme benefits to a SIPP were because it would allow him to access his pension flexibly to pay for a holiday, repay debts and make home improvements. It added that it believed the recommended pension plan would deliver greater ongoing benefits than Mr C's DB scheme.

Mr C went ahead with the transfer which Portal completed in October 2017. At that time the CETV was £167,651 and Mr C received a lump sum TFC payment of £41,912.84

Mr C complained in October 2020 to Portal about the suitability of the transfer advice because, he said:

- Its advice was negligent.
- It didn't advise him he could lose benefits by transferring out of the DB scheme.
- It didn't follow the regulator's guidance.
- Mr C was less than a year away from being able to take the guaranteed benefits from his DB scheme but Portal didn't explore that with him.
- The suitability report contained incorrect figures as the final CETV was calculated after Portal produced its report.
- Mr C would lose guaranteed death benefits for his wife by transferring out of the DB scheme.
- It would be very difficult for the SIPP to achieve the critical yield of 21.3%.
- Owing to the accessibility of the SIPP Mr C was in danger of drawing down too much money from it leaving him without enough income in retirement.
- Mr C didn't have the required expertise or knowledge to fully appreciate the impact on him of transferring out of his DB scheme.
- Mr C would have to pay fees for the SIPP.
- Mr C's SIPP only had about £440 remaining.

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

- It had informed Mr C of the recalculated CETV in July 2017 and he had confirmed he wanted to go ahead with the transfer.
- Mr C had said that he didn't wish to buy an annuity, as such Portal had used the "*lifetime hurdle rate*" to calculate the growth rate required. It said the revised critical yield was 16.8% and the lifetime hurdle rate was 2.2%. It said that rate was achievable given that the recommended plan had a yearly return over the previous ten years of 7.12%
- Mr C had agreed with Portal that his attitude to risk was moderately cautious.
- Portal had set out the fees payable in its pension analysis report.

Mr C referred his complaint to our service. One of our investigators upheld the complaint and required Portal to pay compensation, including a redress payment of £300 to address Mr C's distress and inconvenience. The investigator said that Portal didn't explain that the hurdle rate had increased from 0.1% to 2.2% until it responded to Mr C's complaint. Portal didn't have enough information about Mr C's income requirements in retirement to make a recommendation to transfer. Portal didn't establish why Mr C wanted TFC or fully analyse how the DB transfer could meet his future pension needs. Also Portal didn't examine if Mr C could access further funds from the SIPP Portal arranged for him in 2014 and it didn't consider how Mr C had managed those funds. The investigator thought that Portal's advice wasn't in Mr C's best interests.

Portal disagreed, saying that it had acted in Mr C's best interests. It felt that the recommended transfer in 2017 would improve Mr C's investment position. It said his preference was for a drawdown pension rather than an annuity style income and its advice was tailored to Mr C's preference. That would allow Mr C to access his funds flexibly and also to pay for home improvements, a holiday and pay off his mortgage. It noted that Mr C had income from other sources including state pension for himself and his wife, from a potential inheritance, from his current employers pension scheme and from his other pension plan. It said the revised critical yield was 16.8% but the hurdle rate was 1.3%. Portal used the hurdle rate as Mr C preferred a drawdown pension rather than an annuity and this figure was achievable. It said that it wasn't its fault that Mr C had chosen to spend most of his pension funds and most of Mr C's withdrawals bypassed Portal's advice process. It added that it couldn't predict that Mr C would spend his pension as he had. It believed its advice was suitable.

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.

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

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

The regulator, the Financial Conduct Authority ('FCA'), 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 the transfer was in Mr C's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was in Mr C's best interests. I'll explain why.

Financial viability

Portal gave its advice after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

The critical yield required to match Mr C's benefits at age 60 was 44.1% if he took a full pension and 16.8% if he took TFC and a reduced pension. The relevant discount rate was 2.3% per year for less than a year to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr C's moderately cautious attitude to risk and also the term to retirement. There would be little point in Mr C giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 16.8%, I think Mr C was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

Portal has provided cashflow models which it says show Mr C would have been able to meet his income needs despite the high critical yields. I've considered these, and I note that Portal has discounted the critical yield and instead looked at the "hurdle rate". But I don't think that's a fair comparison as the hurdle rate typically doesn't allow for fund or adviser charges, nor for increases in pension income over time, which is a guaranteed benefit from the DB scheme. The hurdle rate also doesn't consider the pension Mr C's wife would have been entitled to in the event of his death or the fact that the DB scheme's benefits were payable for the rest of Mr C's life, no matter how long that was.

Portal's also said that given the past performance of the SIPP it would expect the funds invested in it to comfortably match the growth rates required. But, as Portal will acknowledge, past performance is no guarantee for future performance. So I consider the discount rates and the regulator's standard projections to be more realistic in regard to the long-term likely growth, rather than projecting historic returns forward. In other words, the fact that the SIPP had performed well in the past didn't mean it would continue to do so in the future. The discount rate I've quoted above would seem potentially achievable, but that would only match the guaranteed benefits of the DB scheme. And given the high critical yield I find it unlikely that the SIPP would exceed those benefits.

Further, Portal's cashflow models and assumptions are all based on Mr C taking TFC initially and then only drawing down further funds equivalent to his DB scheme benefits. But, as I set out under the heading of "*Flexibility and income needs*" below that seemed unlikely to have happened and as such Portal's cash flow models weren't very likely to be representative of Mr C's situation.

It's also worth noting that at the time portal wrote its suitability report the CETV figure had already expired and so wasn't guaranteed. So the figures and cashflow models the suitability report contained weren't accurate. I'm aware that Portal notified Mr C in July 2017 that the CETV and critical yield figures had changed and that Mr C confirmed he still wanted to go ahead with the transfer. But I can't see that it prepared a second suitability report with the accurate updated figures. Nor did it advise Mr C that the hurdle rate had increased from 0.1% to 2.2%, a figure 22 times higher than the measure Portal was relying on. So Mr C didn't have all the information he needed in order to make a fully informed decision about whether or not the transfer was suitable for him.

It follows that for the above reasons a transfer out of the DB scheme wasn't in Mr C's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Portal has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

Portal's said that it used the hurdle rate rather than the critical yield as it was in line with Mr C's preference for a drawdown type pension rather than an annuity. That is, the SIPP would give Mr C the flexibility to take the cash from his pension pot as and when he wanted to. That might be the case 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 Mr C wanted without appropriate analysis and challenge of his motives for doing so with the implications of taking those actions with him. But Portal's' provided no evidence of such a challenge.

Portal's recorded that Mr C wanted access to TFC as he intended to pay for a holiday, pay off debts and to make home improvements. But Portal hasn't established in its suitability report why any of those things was so important to Mr C that he could chance giving up the guaranteed benefits of his DB scheme for. Portal had carried out an assessment of Mr C's spending and – from the answers he gave – noted that, after deducting his regular outgoings Mr C had a surplus of around £600 a month. And Mr C had recorded that he was "*not struggling*" to manage his finances. Further, Portal recorded that Mr C was due to have paid off his mortgage in three years' time. And I can't see that Portal explored with Mr C why he felt he needed to give up the benefits of his DB scheme in order to release funds when he was meeting his financial obligations with some funds left over.

Similarly, Portal's recorded that Mr C wanted to make home improvements. But I've seen no record it looked into what those home improvements were, what they would cost or why it was so important for Mr C to make them straightaway. At the time of Portal's advice Mr C was 59 and had less than a year to go before he could have accessed the funds from his DB scheme. And, at that time, he could have taken TFC from his DB scheme of £23,460 while also receiving a guaranteed income that would increase each year for the rest of his life. But I can't see that Portal fully explored whether Mr C could defer making home improvements or paying off debts until he could access his full DB scheme benefits.

Similarly, as Portal was aware, Mr C had funds invested in a SIPP since 2014. But Portal didn't refer to the funds available from that and whether those could have funded Mr C's desire to pay off his mortgage and other objectives. Mr C gave us copies of his pension statements from the SIPP following the 2014 transfer. And those show that, at the time that Portal provided its suitability report in April 2017, Mr C still had over £28,300 in his SIPP. So Mr C might have been able to use those funds for his short-term goals of repaying his mortgage etc. But there's simply no evidence that Portal discussed that possibility with Mr C.

So while having flexible access to his pension might have been desirable to Mr C I don't think he genuinely required flexibility to access the funds from his remaining deferred DB scheme. This is because I don't think he had a genuine need to access his TFC earlier than the normal scheme retirement age and leave his funds invested until a later date. In my view, he had alternative suitable means of meeting his immediate objectives either by taking his benefits from the DB scheme at its normal retirement age of 60 or accessing the remaining funds in his SIPP.

Further a brief look at Mr C's existing SIPP statements show that he was regularly accessing the funds from it. In fact, he'd started with an opening balance of over £203,000 in April 2014. But, by the time Portal produced its suitability report in 2017 that fund value had fallen to around £28,000, as Mr C regularly drew down income from it. Indeed in the six months from November 2016 up to and including April 2017, when Portal produced its suitability report, Mr C withdrew a total of £36,000 (gross) from his SIPP. That is an average of £6,000 a month. And, since arranging the original DB transfer in 2014, Mr C had depleted that pension fund by somewhere in the region of £175,000. It's notable that Portal recorded in 2014 that Mr C 's objectives from transferring out of his DB scheme was to pay off debts and make home improvements. But, despite having spent £175,000 from his transferred pension fund, it appeared he'd only managed to reduce his debt burden by around £35,000 and still didn't have enough to do all the required home improvements without accessing funds from another pension scheme. But I can't see that Portal asked Mr C why that was.

At the time Portal gave advice in 2017 it had been providing Mr C with an ongoing financial advice service, in order to manage the investments in his SIPP. So Portal should have been in a position to establish what the state of that fund was and how Mr C was accessing it. But there's no evidence that it considered this when it provided its advice and recommended Mr C to transfer funds from his second DB scheme to another SIPP. But I think Mr C's level of withdrawals from his existing SIPP should have rung alarm bells for Portal. Portal should have realised that, if it advised Mr C to transfer his remaining DB benefits to a SIPP, then there was a possibility that Mr C would access those benefits in the same way that he had the funds from his previous transfer in 2014.

So, at the very least, I would have expected Portal to establish why precisely, Mr C wanted to access the benefits from his remaining DB scheme in a similar manner. I would also have expected to see very clear advice from Portal that, if Mr C accessed funds from this DB scheme in the same way he was continuing to access funds from his existing pension plan, then it was extremely likely that Mr C would deplete his pension funds, from both DB schemes, long before he reached retirement age. And that meant that a recommendation to transfer out of the scheme was clearly *not* in Mr C's best interests. But there's no evidence Portal made these risks apparent to Mr C.

Further, Portal said in its suitability report that it "*strongly*" believed that its recommendation to transfer was right for Mr C given his "*current situation*" and what he wanted to achieve in the future. But Portal should have been aware of – or found out that – Mr C's current situation involved him depleting his pension fund by thousands of pounds most months. And that this could possibly have been a pattern of behaviour that would continue if Portal recommended another DB transfer. As such in order to give suitable advice, Portal needed to establish the essential facts about Mr C's drawdown behaviour. And I think that process required Portal to have a frank discussion with Mr C about precisely what he wanted his DB pension funds for and to then give advice based on that knowledge. But Portal didn't do that. And without knowing the actual facts about what Mr C wanted the funds for and why his drawdown behaviour had continued as it had, I don't think it was in a position to provide advice that was clear, fair and not misleading. I certainly don't think that Portal's advice to transfer the funds from his remaining DB scheme was in Mr C's best interests.

As I've said above Portal needed to do more than just transact what Mr C asked it to do. It should have analysed and challenged his motives for transferring out of his DB scheme, clearly setting out the implications of that action. But I've seen no evidence of such a challenge even though that was in Mr C's best interests. And I don't think Portal met its obligations to challenge his objectives in light of what he would be giving up and of his drawdown behaviour with his existing fund. But there's simply no evidence it explored with Mr C why he'd accessed his previous pension pot in the way that he had. Neither had it found out if that was what he intended to do if he released further funds from his other DB scheme. Nor had it advised Mr C of the implications of his behaviour should it carry on in that manner.

I acknowledge that Mr C is an adult and is entitled to withdraw his pension funds and spend them in whatever manner he deems fit. So, Portal isn't responsible for what Mr C did with his funds once they became available to him. But the regulator's rules prevented Mr C from accessing DB scheme funds of over £30,000 without receiving regulated advice. And Portal's role, as described above, in giving that advice was to determine what was in Mr C's best interests.

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 valuable pension pots like Mr C's DB scheme were paid into with the intention of providing for retirement. But Mr C's chosen path was to give up that guaranteed income in retirement for the chance of having flexible access to the funds. But Portal didn't challenge Mr C's requirements for that flexible access, nor did it question him on his drawdown behaviour and the implications of that. It simply accepted what he said about wanting to pay off debts – again – and wanting to make home improvements - again – rather than impressing on him the need for long-term planning. And without fully exploring and challenging Mr C's objectives I don't think that Portal was in a position to make a recommendation to transfer out of his DB scheme. So I don't think Portal treated Mr C fairly.

Summary

Portal wasn't there to just transact what Mr C might have thought he wanted. The adviser's role was to really understand what Mr C needed and recommend what was in his best interests.

Ultimately, I don't think Portal's advice to Mr C was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr C was very likely to be left without the funds he needed to be comfortable in retirement. So I think Portal should've advised Mr C to remain in his DB scheme and access his benefits at age 60, which was less than a year away.

Of course, I have to consider whether Mr C would've gone ahead anyway, against Portal's advice. And having considered this very carefully, I'm not persuaded he would have done so. That's because, over the previous three years Mr C had severely depleted the pension funds from the 2014 transfer. So, advice not to transfer should have included an explanation that, if that pattern continued, he was likely to be left in a very precarious financial position at the time he reached pension age. Portal could also have explained to Mr C that, rather than his funds being reinvested and so giving him an income in retirement, they were likely to be exhausted long before he reached his scheduled retirement age of 66.

Clear, fair and not misleading advice would have demonstrated to Mr C that transferring from the DB scheme would likely leave him with a limited retirement income. An income that in all probability could see him with very little left over to cover off unexpected outgoings or anything in the way of "luxuries". And I think advice of that nature, that painted a picture of a rather stark future, presented to him in a robust and unequivocal manner by professional financial advisers, would have been enough for him to think twice about his preferred course of action. It follows that I'm satisfied that If Portal had given Mr C clear and robust advice not to transfer from his DB scheme he wouldn't have done so.

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 pays 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 Portal had given suitable advice.

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 largely used up all of the transferred funds he has not yet retired. I understand that his DB scheme's normal retirement age would have been age 60, so, compensation should be based on Mr C having taken his TFC and income from the scheme at that age.

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