DRN-3365679

The complaint

Mr B complains about advice he was given to transfer the benefits of two defined-benefit (DB) occupational pension schemes (OPS) to a personal pension plan. Mr B says the advice was unsuitable for him and believes this has caused him a financial loss.

Portal Financial Services LLP is responsible for answering this complaint so to keep things simple I'll refer to "Portal". I'll also refer to these two pensions as "OPS1" (the larger pension) and "OPS2" (the smaller pension) respectively.

What happened

Mr B approached Portal in 2015 to discuss his pension and retirement needs. A 'fact-find' was produced by Portal as a result of a telephone call with Mr B. The information gathered by Portal about Mr B was broadly as follows:

- Mr B was 55 at the time and divorced with no dependents. He had some health conditions but was mainly in good health overall.

- Mr B had a main income earning £1,900 per month (net). He had a car loan, said to be around £6,000 which was being paid down monthly, and £5,000 in savings. He appeared to have no other assets or liabilities. Mr B was in rented accommodation and paying £280 per month. He had disposable monthly income after expenses of around £900.

- Mr B's two pension schemes had a combined cash equivalent transfer value (CETV) of around £150,000. OPS1 had a CETV of around £98,000. OPS2 was a pension Portal said Mr B was currently still an active member of. Its estimated CETV at the time was around £52,000.

- In the light of recently changed rules - 'pension freedoms' - Mr B had an aspiration as of 2015 to access his pensions more or less immediately, although he said he didn't intend to actually stop working until the age of 60.

Portal issued a suitability report on 19 June 2015. The report recommended he should *not* transfer his pensions but leave them where they were instead. Nevertheless, in the same report, Portal said that because Mr B was adamant he wanted to transfer out of his two OPSs, it would help him do this. It said it could treat him as an 'insistent client', a term used in the industry to describe a situation where a client goes against the advice of a professional financial adviser.

Mr B says he was given unsuitable advice by Portal. His complaint has been referred to our Service. One of our investigators looked into the complaint and said we should uphold it. As the complaint couldn't be resolved informally, it's come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've decided to uphold the complaint.

What was Portal required to do?

Portal says Mr B ultimately went against its advice of 19 June 2015. It says that he was advised in the suitability report of that date that he ought to stay inside the DB schemes, and it was Mr B himself that insisted he wanted to transfer out to access cash. It says this meant he became an 'insistent client'. I've therefore considered this point first.

There was limited guidance available specifically about 'insistent clients' at the time of this advice, but nonetheless, the regulator placed important general obligations on firms like Portal. These included the overarching principles such as: Principle 1 – Integrity; Principle 2 - skill, care and diligence; Principle 6 - customers interests; Principle 9 - reasonable care.

I have also taken account that the regulator had expressed concerns and expectations about how businesses should execute 'insistent client' business in connection with defined benefit transfers. It did this in July 2014 when it published 'TR14/12 Enhanced transfer value pension transfers'.

However, I should also point out that there is no rule to prevent advisers transacting business against their advice, if the client insists. So, I need to think here about whether enough was done by Portal to try and find alternative ways of meeting Mr B's objectives. I have also considered whether the 'insistent client' process in this case was simply used by quickly and easily Portal to transact what Mr B thought he wanted to achieve.

Was Mr B an insistent client?

Everything I've said above demonstrates that firms, like Portal, had a number of important responsibilities when providing advice. Despite what Mr B thought he wanted, I think his expectation in paying for regulated financial advice was that he would be clearly guided on the basis of his circumstances and means. The information ought to have been clear, fair and not misleading. In particular, it should be clear that the business has not recommended the transaction and the risks of the proposed transfer ought to have been pointed out.

I don't think Portal adequately did this.

On first look, the suitability report of 19 June 2015 appeared to be cautioning against transferring out of Mr B's DB schemes. However, the report said Mr B had wanted to be treated as an 'insistent client' and had indicated this on a form he'd signed the previous week. I've looked at this form and note the first part involved Mr B selecting from one of two 'tick-box' pre-determined options which had been set out by Portal. In my view, these were not the only options available to Mr B and Portal's advice ought to have fairly reflected this. The second part of the form showed Mr B had signed a type of disclaimer, again this had information on it about why he wanted to transfer out. These statements came from Portal, as opposed to Mr B himself. I therefore don't think there's any evidence showing the idea to go against 'the advice' came from Mr B; it was directly presented to him by Portal.

Also, despite Portal saying its advice was against transferring out of the scheme, there was a clear underlying bias in the suitability report in favour of actually transferring out anyway. Directly under the report's recommendation it said Mr B had told Portal he wanted to transfer out and so Portal made another recommendation just a few lines down from the first. This second recommendation was directly at odds with the first; it said Mr B would be treated as an 'insistent client' and that Portal would carry on with the transfer process. The report said, *"my recommendation is therefore that you transfer the pensions summarised in the next section to a … personal pension. By following this recommendation you will:*

- *Meet your stated objectives.*
- *Be able to take up to 25% of your pension as a tax-free cash lump sum to meet your needs; you have elected to take £37,701.*

Overall, I think all this was merely setting the scene for Mr B to transfer out anyway and the Declaration Form Portal had previously got Mr B to sign was intended basically to indemnify Portal from any responsibility.

So, Portal's actions and inactions here fitted what the regulator later described as a 'papering exercise'. Mr B says he never actually met anyone from Portal and I don't believe the evidence is plausible that Mr B even was an 'insistent client'. Mr B wasn't experienced in these matters and so was likely to be heavily influenced by his advisor. Portal produced mainly templated forms and statements which failed to highlight the risks and issues of him giving up his pensions, in a way that was personal to him. Other options for accessing cash, such as taking out a loan, bore no real relevance to Mr B's situation in my view. So I don't think any alternatives were genuinely sought to Mr B's apparent objectives.

Given that I don't think Mr B met the definition of an 'insistent client' I went on to consider whether I thought this made a difference to the outcome of the complaint. In particular, I've given a great deal of thought to whether transferring out could be said to be suitable.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. This means Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr B's best interests (COBS 19.1.6).

Financial comparisons

There's no real dispute in this case that Mr B could be losing out in the longer term by transferring out of his DB scheme. After all, Portal itself says its recommendation of 19 June 2015 originally said he shouldn't be transferring out.

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, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The suitability report quotes a critical yield of 13.5% to match the benefits of OPS1 at age 60. For OPS2, the critical yield of 11.1% was quoted for benefits at the age of 65. I've noted the different retirement ages being provided here and I've also noted Mr B's aspiration was to access his pension much earlier anyway, at the age of around 55. However, the point here is that by Portal's own admission, the amount Mr B's pensions would need to grow outside these schemes to even match leaving them inside, was very high.

On the same basis as the figures and ages above, the relevant discount rates were 3.8% per year for 4 years to retirement and 4.4% for 9 years 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.

So, I've taken all these things into account, along with the composition of assets in the discount rate. I have also considered what Portal said about Mr B's attitude to risk being 'moderately adventurous'. However, based on his financial circumstances and lack of any investment knowledge or experience I think this categorisation was too high. And there would be little point in Mr B giving up the guarantees available to him through his DB schemes only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 11.1%, I think he was highly likely to receive benefits of a substantially lower overall value than the DB schemes at retirement, as a result of investing in line with his realistic attitude to risk.

For these reasons a transfer out of the DB scheme wasn't in Mr B's best interests. Of course, financial viability isn't the only consideration when giving transfer advice. 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 described Mr B's main objectives as being to access his pension early to pay off debts and buy his council house. However, I've seen no persuasive evidence that these were real objectives. I note, for example, that Mr B appeared only to have a car loan, set out as it was on Portal's own 'fact-find'. Everything I've seen suggests this was properly being paid off and well within his means. I haven't seen any supporting evidence he was actively looking or even able to buy the property he was in. Portal also said the amount he 'needed' in cash was £37,701. There's no indication why he needed this much. I note, however, that this was exactly the same amount he'd be able to access by way of his 25% tax-free element for both pensions.

Portal also recommended a flexible access drawdown for the remaining funds. However, based on the evidence I've seen Mr B didn't have the need for either the tax-free cash or drawdown. He had a disposable income to use each month and modest savings. So, whilst obviously an attractive prospect for Mr B in some respects, accessing his pension needed to be considered very carefully in his circumstances and balanced against other aspects of his overall situation and longer-term retirement security. I don't think it's clear that Mr B had a genuine need to transfer out of his two DB schemes to access cash to the exclusion of everything else.

Mr B was only around 55 at the time of the advice and based on both what I've seen and been told by Portal, he didn't have concrete retirement plans. I think this just added to the fact that it was simply too soon to make any kind of decision about transferring out of the DB schemes.

Accordingly, I don't think it was suitable for Mr B to give up all the guaranteed benefits the DB schemes came with when he didn't really yet know what his needs in later life would be. I can't see evidence that he had such an urgent need for cash at this point. Accessing the pension at 55 was therefore to the exclusion of other priorities, especially when considering what he'd have to forgo to get at them. These pensions represented his retirement provision and I don't think Portal explained any of this to Mr B in a meaningful way.

Death benefits

I don't think these types of benefits featured much in Mr B's case but in any event whether the death benefits were improved following a transfer depended on how much remained in the pension funds at the point of Mr B's passing. Given average life expectancy, and the size of the funds, it was always likely that the funds would be entirely depleted prior to Mr B's death, providing no death benefits at all.

Suitability of investments

Portal recommended that Mr B invest his funds in a personal pension plan. As I'm upholding the complaint on the grounds that a transfer out of the DB schemes wasn't suitable for Mr B, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB schemes in a far clearer and more persuasive way. And so the investment in the new fund wouldn't have arisen if suitable advice had been given.

Summary

I have set out in this decision why I don't think Mr B met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by Portal simply to transact what Mr B had said he wanted to achieve – access to his pension early.

As a result of this finding, I went on to consider whether the transfer out was suitable. Portal facilitated the transfer and recommended a course of action which was not in Mr B's best interests. As regards suitability, given Portal itself has said it advised against a transfer, it would be hard for it to argue that the transfer was in fact suitable. And I agree that it was not. The financial comparisons showed he'd be worse off transferring and there was no coherent assessment of Mr B's retirement needs. I've also noted Portal said Mr B was still an active member of OPS2.

Mr B's existing DB scheme contained a number of valuable guarantees and benefits which made transferring out something that needed a great deal of consideration. Portal's job wasn't to simply transact what Mr B thought he wanted – it was required to understand his needs and provide him with suitable advice, relevant to his particular circumstances.

Finally, I've gone on to think about whether, if Mr B had been given clear and persuasive reasons why transferring wasn't in his best interests, he would have followed advice to remain inside the DB scheme. My view is that I think he would. With his circumstances and lack of investment experience, Mr B went to Portal seeking advice, which he paid for. I think it's more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr B, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr B would have most likely remained in his DB schemes if suitable advice had been given.

Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr B’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 pensions isn’t possible or has protection or allowance implications, it should be paid directly to Mr B 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 B 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 B.

It’s possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won’t apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that Portal pays the balance.

In acknowledgement of the importance of Mr B’s pensions and the knock-on effect and emotional impact of the unsuitable advice, Portal should pay £250 for distress and inconvenience.

My final decision

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

If Mr B accepts this decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding if he doesn't accept my decision. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 9 August 2022.

Michael Campbell
Ombudsman