DRN-3368006

The complaint

Mr P complains about the advice he received from Portal Financial Services LLP (Portal) to transfer his pension into a Self Invested Personal Pension (SIPP) and to invest in high risk, unregulated investments.

He says he's lost out financially as a result.

What happened

After reaching aged 55, Mr P took advice from Portal about withdrawing cash from his personal pension because he'd seen an advert about being able to withdraw your pension from this age. He was interested as he had credit card debts he wanted to clear.

Mr P followed up on the advert and was put in touch with Portal. All discussions took place over the phone, including a fact find interview in April 2014. Following that interview, he was sent a suitability report, dated 16 April 2014, by Portal. This set out the adviser's recommendations based on Mr P's objective, which was recorded as – 'You wish to clear your outstanding debts'.

Mr P was advised by Portal that he would be able to access up to £3,957.25 as tax free cash from his personal pension, which was 25% of his estimated transfer value of £15,829. His personal pension was his main retirement provision.

Portal asked Mr P to complete an attitude to risk assessment. He was assessed as having a 'balanced' attitude to risk ('ATR'). The report said Mr P had 'a suitable level of Capacity for Loss for the recommendation'.

The suitability report gave Mr P's circumstances at the time of advice as:

- aged 55;
- owned own home worth approximately £125,000;
- worked full time, earning approximately £500 (gross) per week;
- outstanding debts of £4,000, which he was repaying at £280 per month;
- no other assets or liabilities;
- disposable income of just over £600 per month, which was used on holidays.

Portal recommended he transfer his personal pension to a Novia SIPP and take the maximum 25% tax free cash. It also made the following investment recommendations for the balance of his pension funds.

Lakeview	7.27%
Real Estate USA	14.54%

Strategic Residential	7.27%
UK Hotels Fund	7.27%
Tambaba	10.91%
Invesco Perpetual Distribution	10.55%
Kames Ethical Cautious	10.55%
Aviva Distribution	10.55%
Standard Life Dynamic	10.55%
Cash	10.54%

Mr P was charged an adviser fee of 5% and was to be charged an annual review fee of 1% by Portal.

Mr P accepted the recommendation and his personal pension was transferred to Novia in May 2014. The transfer value was around £23,811.

After deducting the tax-free cash and adviser fees, Mr P's Novia SIPP was opened with a balance of around £16,666.

Since opening the SIPP, Mr P has withdrawn a total of around £10,232 as a taxable lump sum to make home improvements.

As at June 2016, Mr P's SIPP was worth around £7,244 but his fund is illiquid and cannot be accessed.

In September 2020, Mr P complained to Portal through a representative about the advice he had received. In November 2020, Portal responded and said that Mr P had brought his complaint too late.

Our investigator considered whether we could deal with Mr P's complaint and concluded that we could. She reminded Portal of this service's stance on jurisdiction regarding complaints of this type.

She concluded that Mr P's complaint had been made in time, and in line with our general approach to dealing with cases of this type. She went on to deal with the merits of Mr P's complaint.

Our investigator recommended upholding Mr P's complaint on the merits and set out a methodology for providing redress. Through his representative, Mr P accepted our investigator's view. Portal did not. It said, in summary:

- Portal explained the difference between annuity and drawdown options to Mr P. The recommendation to transfer to a SIPP was suitable.
- Mr P was paying a loan debt of £4,000 and a credit card debt of £1,800 paying in total £380 per month to clear these. It was important to him to repay these debts as he was nearing retirement.
- Mr P would have had to transfer out of his existing personal pension plan to take tax free cash as the only option available within his existing plan was to take tax free cash with an annuity. Mr P didn't want the income from an annuity at that time.

- The Novia plan was low cost and stakeholder friendly SIPP. Mr P's fund could have been invested in mainstream pooled funds for a base-cost of 0.8% per annum. This was very competitive at the time and well below the pricing-cap for stakeholder pension products. The charges were fully disclosed to Mr P.
- The proposed redress methodology is not fair taking into account Mr P's ATR as a balanced investor as it does not contain any bond element. The appropriate benchmark would be one using 50% fixed rate bonds and 50% FTSE Private Investor Income, which is more suited to a moderately cautious investor.

Mr P's complaint now comes 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.

Jurisdiction

As explained by our investigator, the rules under which we operate are set out in the Dispute Resolution (DISP) rules in the Financial Conduct Authority's handbook. The relevant part of DISP 2.8.2 states:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or
(2) more than:
(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

It is not in dispute that Mr P brought his complaint to this service within six months of receiving a final response from Portal.

Mr P clearly brought his complaint to this service more than six years after the event complained of, the advice he received to transfer and invest in unregulated investments received in 2014.

So, what I need to go on to consider is DISP 2.8.2(b) - when Mr P likely became aware, or ought reasonably to have become aware, that he had cause to complain. I then need to look at whether he complained within three years of this date.

Like our investigator, I've looked carefully at the correspondence Portal says shows that Mr P was aware he had cause to complain more than three years before he did.

I can see his annual statements from 2015 and 2016 show that some of Mr P's funds were illiquid. But they also gave some comfort that Portal was monitoring his investments and it was confident he would get the promised returns.

The 2015 annual pension review letter states the following about Mr P's SIPP growth:

'This is equivalent to 1.36% per year'

It then goes onto confirm the annual target returns of the capital secured bonds are between ten and fifteen percent.

The 2016 annual pension review letter states:

'This represents a growth of 3.45% after charges for the remainder of your pension fund over the past year.' 'We are pleased to say that we are happy with the growth of these investments at this time'.

'Even though the current performance of these investments raises some concerns we are not unduly worried. We are in touch with the managers of these investments and are currently confident that this element of your pension will grow by the targeted amount by the end of the specified investment period.'

I don't think that this correspondence would've led Mr P to be aware that he had been given unsuitable advice by Portal. The SIPP valuations from 2015 and 2016 didn't show any significant losses. The letters didn't tell Mr P he should have cause for alarm or concern. Portal informed him it was not *"unduly worried"* and was *"confident*" his pension would grow by the targeted amount.

If Mr P's experienced and paid adviser was not concerned, I think it unfair of Portal to suggest that Mr P, who was neither an experienced nor sophisticated investor, ought reasonably to have been aware of cause for concern. Like our investigator concluded, I don't think it was unreasonable for him to rely upon and accept what he was told by a professional appointed to advise him.

I also don't see that when Mr P asked Portal to remove it as his adviser in April 2017, this was indicative of him having concerns about the advice he had received from Portal. I think he did this as a cost cutting exercise, so that he didn't have to pay Portal's ongoing review fee from what was a modest SIPP fund.

I can't say exactly when Mr P became aware he had cause for complaint. He complained in September 2020 and based on what I have been told, I think it likely that awareness came within three years of complaining.

I am satisfied this complaint has been made in time and this service can consider the merits of it.

Merits

What I need to decide is whether the advice to transfer Mr P's pension into a SIPP, draw the maximum tax-free cash, and invest into the underlying investments, were suitable recommendations.

<u>Transfer to take tax free cash (TFC)</u>

The suitability report noted that Mr P's objective was to access tax free cash to repay his debts.

Mr P said he had a disposable income of just over £600 per month. He also mentioned his partner having an income. He received just less than £6,000 in TFC which equated to around10 months' worth of his disposable income. He had debts of around £4,000, which he was paying at around £280 month. There was nothing in the fact find notes to show that Mr P appeared to be in any financial difficulty.

The suitability report did set out other methods of raising money - such as taking a loan or remortgage – these were apparently discounted.

Our investigator said there was no evidence of Mr P's existing pension provider being contacted to see if there was a way he could be permitted to take TFC without transferring to the SIPP. Portal say that Mr P could only have taken TFC with an annuity, which he didn't want to take. If Mr P didn't want to take an immediate income, this would tend to suggest that he wasn't in any financial difficulty.

I can't see that Mr P had any obvious or compelling need to take tax free cash given his financial circumstances and I can't see that Portal gave him suitable advice taking his wider circumstances into account.

Attitude to risk

Mr P was recorded as having a 'balanced' attitude to risk and the fact find notes show he wanted to invest in 'stable funds preferred to equity backed investments'. Given the risks involved, Unregulated Collective Investment Schemes (UCIS) and unregulated investments can't fairly be described as 'stable' funds. Unregulated investments can be prone to lack of regulation, longevity risks, potential insolvency, liquidity issues and other factors which can prevent investors from accessing their funds. Some of Mr P's investments also carried currency risks. What was recommended didn't appear to match with Mr P's investment objectives.

Mr P did not have any savings or investments to fall back on. He had no other retirement provision apart from his state pension. His capacity for loss, was in my view, therefore inconsistent with the investment recommendations made.

Recommended investments

SIPPs provide a wider range of investment options and typically have higher running costs in return for the added flexibility and choice. I can't see that Mr P had any obvious need for the flexibility offered by the SIPP. Investment choice is not something he identified in his objectives. In those circumstances the SIPP appeared not to be a cost-effective choice for someone like him, with a very modest fund. SIPPs are often considered more suitable choices for those with a much higher transfer value than Mr P's.

Portal said that the SIPP recommended for Mr P was a low -cost option, comparable in terms of costs to a stakeholder scheme. On top of the wrapper fee, Mr P also had to pay an annual review fee of 1%. Portal said that Mr P could have invested in mainstream pooled funds within the SIPP, however that was not what it recommended. It recommended a more complex investment strategy, which given that Mr P was neither an experienced nor a sophisticated investor likely meant a higher need for ongoing advice and monitoring of the investments, which came at a cost.

It's not in dispute that Portal recommended that Mr P invest just under half (47.26%) of his modest pension fund into UCIS and unregulated funds. As I've said Mr P appeared not to be a sophisticated nor an experienced investor. Given the size of his fund and his other assets he clearly wasn't a high net worth investor with an obvious capacity to take on greater risk.

In July 2010 – prior to the advice given here, the regulator issued a report entitled ("Unregulated Collective Investment Scheme: Good and poor practice report"). It cited as an example of good practice

‘The firm set up a maximum portfolio proportion for UCIS investments within their customer’s portfolio and monitored it on an on-going basis. This level was between 3%-5% and was backed up by the Firm’s robust and on-going due diligence and monitoring.’

The same document gave as an example of poor practice: *‘The firm had a strategy to put all of its customers and all their money into one UCIS.’* But this could only be promoted to sophisticated and experienced investors.

Portal’s advice seemed to run contrary to what would be regarded as good practice in this report.

Overall, Investing nearly half of the money in his SIPP in high risk, unregulated investments. I think was inconsistent with Mr P’s ATR to risk, capacity for loss and the good practice guidance issued by the regulator. I don’t therefore consider Portal’s investment advice was suitable, in Mr P’s individual circumstances.

Mr P has clearly lost out financially as a result of accepting Portal’s advice and he has also been caused some upset to his retirement planning.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr P as close as possible to the position he would probably now be in if he had been given suitable advice.

I think Mr P would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr P's circumstances, his attitude to risk and objectives when he invested.

To compensate Mr P fairly Portal should:

- Compare the performance of Mr P's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

- Pay any interest as set out below.

- If there is a loss, Portal should pay into Mr P's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Portal shouldn’t pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Portal is unable to pay the compensation into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

- The *notional* allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age.

- For example, if Mr P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- In addition, Portal should pay Mr P £250 for the trouble an upset caused by the disruption to his retirement plans.

- Portal should repay the adviser's fees together with simple interest at 8% a year, from the date the fees were paid to the date of settlement. If the above comparison shows that no compensation is payable, the difference between the *actual value* and the *fair value* can be offset against the fees with interest.

- Provide the details of the calculation to Mr P in a clear, simple format.

Income tax may be payable on any interest paid. If Portal consider that its required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr P how much it has taken off. It should also give Mr P a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
Novia SIPP	still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of transfer	date of settlement	not applicable

Actual value

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

If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Portal should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

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

Fair value

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

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* 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, Portal may total all those payments and deduct that figure at the end instead of deducting periodically.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr P wanted capital growth and was willing to accept some investment risk.
- 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.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr P's circumstances and attitude to risk.

Fees

The SIPP largely exists because of the investments. In order for the SIPP to be closed and further SIPP fees prevented, these investments need to be removed. But if Portal can't buy them, Mr P is faced with future SIPP fees. I think it is fair to assume five years' of future SIPP fees.

So, if Portal can't buy the investments, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

My final decision

I uphold this complaint and order Portal Financial Services LLP to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 20 October 2022.

Kim Parsons
Ombudsman