

## The complaint

Mr T complains about the advice given by Portal Financial Services LLP ('Portal') in relation to his defined-benefit ('DB') occupational pension scheme. Portal processed the transfer of Mr T's DB scheme benefits to a personal pension with an income drawdown facility on an 'insistent client' basis. Mr T says he received negligent advice from Portal, which has resulted in him suffering a loss.

## What happened

In January 2018 Mr T approached Portal in response to a promotional letter to discuss his pension and retirement needs.

In a telephone call on 31 January 2018, Portal completed a fact-find to gather information about Mr T's circumstances and objectives. It also carried out an assessment of Mr T's attitude to risk, which it deemed to be 'balanced'. On 12 February 2018 Portal sent Mr T a letter saying that it recommended he didn't transfer his DB pension scheme benefits because of the guarantees / benefits he'd be giving up. But Portal said it could still help Mr T if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 15 February 2018 Mr T returned the insistent client form. Where asked, Mr T indicated on the form that he acknowledged his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits. Mr T indicated that he wanted to access his pension money early because he wanted to do so "*while I am fit and healthy..*" He also said that he'd paid his National Insurance contributions all of his working life and wanted the state to look after him in retirement. He also said that his mortgage was due to end shortly.

On 24 February 2018 Portal sent Mr T a suitability report setting out its advice. The report outlined Mr T's circumstances at the time, which in summary said that he was employed full-time; he was married; he owned his own home which was mortgaged; he had around £10,000 in savings in assets; he may receive an inheritance in the future; and jointly with his wife, they had a disposable income of £400 each month.

The report went on to set out the details of Mr T's existing DB pension scheme, which included the transfer value and the amount of pension Mr T could expect from his scheme at age 65. It also said the critical yield required to match Mr T's existing scheme benefits was 9.8% (assuming a reduced pension and tax-free sum being paid.)

The report said that Mr T's objective was to access his tax-free cash entitlement to put into savings and create an emergency fund.

Portal noted that it had explored with Mr T other ways to generate the money required to meet his objective - but said that he didn't want to take on further lending or pay the resulting interest and he didn't have enough disposable income to cover what he needed.

The report then set out Portal's recommendation. It said that it had already recommended that Mr T shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr T had decided to disregard the advice and that it would be treating him as an insistent client. It went on to recommend that Mr T transfer his pension to a flexi-access drawdown pension to enable him to meet his objective.

Mr T signed the relevant application forms in February 2018 and the transfer went ahead. Mr T received his tax-free cash payment and the proceeds were invested in a range of funds, which Portal deemed matched Mr T's attitude to risk.

In 2020 Mr T complained, via a representative to Portal about the advice he received.

Portal considered the complaint and issued its final response to Mr T in November 2020. In summary it said that it had provided suitable advice. It said that it had recommended Mr T not to transfer the benefits from his DB scheme because of the guaranteed benefits it provided. It said that it fully explained the risks involved and that Mr T was better off remaining in his DB scheme, which Mr T signed to say he understood. But it said that Mr T insisted on going ahead against the advice, so it treated him as an insistent client and facilitated the transfer.

Mr T referred his complaint to our service. An investigator considered the matter and they concluded that his complaint should be upheld. In summary they said that the transfer wasn't in Mr T's best interests and they didn't think Portal had followed the insistent process appropriately. They said that while Mr T completed the insistent client forms, which made reference to the guarantees he was giving up by transferring, this was all done before he received the suitability report setting out the advice. They didn't think Mr T had a real need to access his pension monies and that Portal should have questioned things given all Mr T wanted to do was to add to his emergency cash savings. They went on to question Portal's assessment of Mr T's attitude to risk as 'balanced' given his lack of investment experience – but said that because Mr T shouldn't have transferred out of his DB scheme they didn't need to consider this point any further.

Portal disagreed. In summary it said:

- it believes it acted fairly and reasonably and with Mr T's best interest in mind.
- it advised against the transfer and clearly explained this to Mr T.
- Mr T clearly chose the option to go against Portal's recommendation and he confirmed that he was aware of the risks and the benefits he would be giving up by transferring.
- It disagrees with the investigator that it classified Mr T as an insistent client before he received the advice – it says its letter of 12 February 2018 was a written recommendation.
- it believes it followed the correct insistent client process and says that its postal correspondence process demonstrates best practice for insistent client transactions.
- it believes the evidence suggests that Mr T would have transferred his DB pension benefits regardless of its involvement because of his strong objective to access monies early.

Because the investigator wasn't persuaded to change their mind, the case was passed to me for a final decision.

I asked Portal for some more information around the telephone calls Mr T had with it leading up to the advice he received. Because Portal hasn't responded, I've reached my decision on the information that is available.

## 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.

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. My reasons are set out below.

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. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr T's best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr T as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It sets out three key steps for advisers to take.

- 1) Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).
- 2) The information which the firm should communicate to the insistent client is:
  - a) that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;
  - b) the reasons why the transaction will not be in accordance with the firm's personal recommendation;
  - c) the risks of the transaction proposed by the insistent client; and
  - d) the reasons why the firm did not recommend that transaction to the client.

Acknowledgement from the insistent client - COBS 9.5A.4

(1) The firm should obtain from the insistent client an acknowledgement that:

- (i) the transaction is not in accordance with the firm's personal recommendation; and
- (ii) the transaction is being carried out at the request of the client.

(2) Where possible, the acknowledgment should be in the client's own words.

Portal says that it followed the rules – it provided suitable advice and acted in Mr T's best interests. It says that it followed the correct insistent client process and that its postal correspondence process demonstrates best practice for insistent client transactions. Mr T says that he received negligent advice and as a result he's suffered a loss for which he wants compensating for.

Having carefully considered all of the evidence presented, while Portal's initial written communication with Mr T did set out that its recommendation for him was *not* to proceed with the transfer, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr T's best interests. And I think Mr T likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 12 February 2018 following the telephone discussions Portal had with Mr T about his pension options, it sent him what Portal says was a written recommendation, but what I think can only be described as a brief letter with the outcome of its advice. It said that because Mr T would be giving up guaranteed benefits provided by his DB scheme, it recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr T's best interests. But the information on this form was limited to the loss of guarantees. While Portal subsequently sent a more detailed suitability report, which I will refer to later on, at this stage Mr T had little information to go off to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portal recommended Mr T should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Portal's recommendation, it enclosed the necessary forms Mr T needed to complete and return to pursue this option. And 'option 1' he was presented with was to go against Portal's advice – the second option was to do nothing as per its recommendation. It strikes me that Portal's process here was geared towards facilitating the transfer.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr T's best interests, not only would it have given more detail upfront and placed greater emphasis on the reasons why the transfer wasn't in Mr T's best interests, it also wouldn't have told him at the same time as delivering its recommendation - albeit a brief one - how he could put it aside and bypass it. I think the wording and the emphasis placed on how Mr T could ignore Portal's recommendation was unfair to him and wasn't in his best interests.

I don't think it was in Mr T's best interest to go against Portal's recommendation – yet Portal made it very easy for him to do so. I also think, given the context and the emphasis placed on this, that Mr T could reasonably have interpreted this overall that Portal was recommending he go ahead and transfer.

I think it ought to have been clear to Portal that Mr T had limited knowledge or experience of financial matters based on the information available at the time of the advice. While the fact-find records in the assessment of Mr T's attitude to risk that he'd had '*pensions, endowments and/or other investments before*' there's nothing recorded on the assets section of the fact-find, which suggests Mr T was an experienced investor. At the time it's recorded he held nothing other than cash deposits. I can also see that in answer to one of the questions Portal asked Mr T in assessing his attitude to risk, he said ticked the option which said that "*I am likely to rely on an adviser but understand the fundamentals when they are explained to me.*" This answer in my view doesn't reflect someone who was experienced in financial matters.

I think this should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route.

I can see that Mr T's insistent client forms included a section where he put in his own words why he wanted to access his pension fund early. And while this was something the FCA guidance pointed to as being good practice, I don't think Mr T's response adequately

demonstrates that he knew and understood the risks involved and the recommendation being made.

I say this not only because the majority of the form was pre-completed and Mr T simply had to tick a box to say that he understood what he was giving up by transferring, but crucially as I indicated earlier on, he hadn't yet received Portal's full suitability report and had time to digest it before deciding to go ahead anyway. So I'm not persuaded Mr T was able to make an informed choice here. And I don't think this document alone sufficiently showed Mr T was an insistent client.

It was only after receiving Mr T's confirmation that he wanted to proceed with the transfer that Portal sent him its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, this was followed by a positive recommendation, advising Mr T to transfer his benefits to facilitate a flexible drawdown pension. And this was all set out under a heading titled '*Our recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr T advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr T advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report after securing Mr T's confirmation to proceed on an insistent client basis.

So, by recommending that Mr T transfer his benefits to a particular scheme, not only did this undermine the recommendation not to transfer, I think Portal has effectively recommended that he transfer out of his DB scheme. If Portal didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr T's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. It couldn't separate out the elements. For this reason, I think on receipt of the full suitability report Mr T likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Turning to Mr T's objective and the reason he wanted to access his pension early – it's recorded on the advice paperwork that he wanted to add to his savings to create an emergency fund. Interestingly this is not what Mr T said in his insistent client form. Here he said that he wanted to access his money while he was fit and healthy and that because he'd paid his national insurance contributions for almost 50 years, he said it was about time the state looked after him.

In my view this lacks clarity about why Mr T wanted to access his pension early. I also think this is evidence that Mr T's objective was somewhat vague and ill-defined. I think in acting in Mr T's best interests, this should've reasonably prompted Portal to ask more questions of him at this stage before continuing to facilitate an irreversible transaction to transfer his pension.

Assuming it was Mr T's objective to create an emergency fund, I don't think it was necessary for him to gain access to his pension monies early to achieve this. I say this because Mr T had existing cash savings of around £10,000 – so it appears he already had a reasonable emergency fund to fall back on. I've not seen any evidence that Portal ascertained how much extra Mr T was looking to build up or importantly why.

If Mr T was seeking to build further funds, I think there were reasonable alternatives available to him, which Portal could've explored with him. I can see that Portal's recommendation says that it did discuss alternative courses of action with Mr T to meet his objective and the reasons these were discounted. But I don't think enough consideration was given to what should have been an important part of Portal's advice process.

Two of the alternatives discussed involved Mr T borrowing money, which I don't think was appropriate in the circumstances. And the other – Mr T's disposable income – was recorded as being insufficient to cover what he needed. But in my view Portal didn't really ascertain what Mr T needed or over what timeframe to discount the alternative of him using surplus income to generate additional cash funds. It's recorded that Mr T had surplus income of at least £400 each month - so given he intended to keep working, this could've been used to build up his savings. I'm also mindful that the budget planner Portal completed recorded Mr T as having 'miscellaneous' monthly expenditure of over £2,000. In my view I think it's likely that better and more detailed interrogation and advice of this element of Mr T's budget would've uncovered that at least some of this sum could've also been directed towards building his savings.

Furthermore it was also the case that Mr T's mortgage was due to end within 15 months, freeing up around £1,000 a month, which could've also been directed to his savings. I'm mindful too that Mr T told Portal he was likely to receive an inheritance in the future – but no further questions about this were asked to see if this could've provided a solution to Mr T's objective.

I consider the rules that were in place at the time were clear that Portal had to act with due care and skill and act in Mr T's best interests. And by not seeking to fully understand and address Mr T's objective, I'm not persuaded this was acting in Mr T's best interest. And ultimately I don't think Mr T was able to make an informed choice here - it seems to me that he most likely went ahead with the transfer because he was seduced by the sum of money he was told by Portal he could gain access to. And because he believed this was the only way to achieve his goal given Portal's failure to fully explore and place greater weight and emphasis on the alternative solutions available to him. I also cannot ignore the fact that I think Portal ultimately gave Mr T a positive recommendation to transfer out of his DB scheme, which in the circumstances I think would've given him the impression that Portal agreed with his approach.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant that Mr T can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr T wasn't clear or fair. It didn't act in Mr T's best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr T would've still gone ahead. Portal says he would have done so because of his strong objective to access monies early. But I disagree – I think if Portal had acted in Mr T's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr T's objective at the time, I don't think he would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr T was an experienced investor such that he possessed the requisite knowledge or had the confidence to go against the advice he was given. I think he relied solely on the advice and process Portal employed. I don't consider Mr T's objective was clearly defined or that he was wedded to it.

I also think there were reasonable alternatives at his disposal to meet his objective, which had these been clearly and fully discussed with Mr T at the time, he would've likely accepted.

So if things had happened as they should have, taking everything into account I'm not persuaded Mr T would have insisted on going ahead with the transfer.

## Putting things right

A fair and reasonable outcome would be for the business to put Mr T, as far as possible, into the position he would now be in but for Portal's failings. I consider Mr T would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

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.

My understanding is that Mr T could've taken his DB pension benefits at age 65 without reduction. So, compensation should be based on his normal retirement age of 65, 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 T's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Mr T'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 T's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr T'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 T 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 T 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 any final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr T.

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

If Mr T 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 T can accept my decision and go to court to ask for the balance. Mr T may want to consider getting independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 28 July 2022.

Paul Featherstone

**Ombudsman**