

## **The complaint**

Mr A complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a defined-benefit ('DB') occupational pension scheme that he held. Portal processed the transfer of Mr A's DB scheme benefits to a personal pension with an income drawdown facility on an 'insistent client' basis. Mr A says Portal should have clearly recommended that he didn't transfer and take early retirement from his scheme instead. Mr A says he's suffered a loss as a result of Portal's actions.

## **What happened**

Mr A approached Portal in late 2014 in response to an advert, which he says was about withdrawing money from a pension after the age of 55. He says he wasn't working at this time and he'd incurred some debts that he wanted to clear.

Mr A says he put things on hold for a few months while he discussed matters with his mortgage lender – so in August 2015 Portal completed a fact-find to gather information about Mr A's circumstances and objectives. It also carried out an assessment of Mr A's attitude to risk, which it deemed to be 'balanced'. On 4 September 2015 Portal sent Mr A a letter saying that it recommended he didn't transfer his DB pension scheme benefits because the growth rate required to match his guaranteed benefits was too high at 11.4% and because he'd be giving up a guaranteed pension of just under £7,000 a year from age 65 and a cash lump sum of over £14,000. But Portal said it could still help Mr A if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 16 September 2015 Mr A returned the insistent client form. Where asked, Mr A 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.

On 19 September 2015 Portal sent Mr A its suitability report setting out the advice. The report outlined Mr A's circumstances at the time, which in summary said that he was 58; currently unemployed and in receipt of state benefits; he owned his own home with an outstanding mortgage, which included arrears of £6,000; he had no other assets or liabilities; and he had no disposable income.

The report went on to set out the details of Mr A's existing DB pension scheme, which included the transfer value and the amount of pension Mr A could expect from his scheme at age 65. It also said the critical yield required to match Mr A's existing scheme benefits was 11.4%.

The report said that Mr A's objective was to access his tax-free cash entitlement to pay off his mortgage arrears and to settle an outstanding funeral bill.

Portal noted that it had explored with Mr A other ways to generate the money required to meet his objective - but said that he didn't have sufficient assets to raise the cash required, or enough disposable income, and he didn't want to take on further lending.

The report then set out Portal's recommendation. It said that it had already recommended

that Mr A shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr A had decided to disregard the advice and that it would be treating him as an insistent client. It went on to propose that Mr A transfer his pension to enable him to meet his objective and it set out which pension provider and product it recommended.

Mr A signed the relevant application forms in December 2015 – he also signed a declaration to say that he understood the critical yield was now higher at 13% - and the transfer went ahead. Mr A received his tax-free cash payment and the proceeds were invested in a range of funds, which Portal deemed matched Mr A's attitude to risk.

In 2016 Mr A appears to have sought further advice from Portal and he accessed a further tax-free cash lump sum.

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

It doesn't appear that Portal provided Mr A with a final response letter to his complaint – so he referred his complaint to our service.

An investigator considered the matter and they concluded that Mr A's complaint should be upheld. In summary they said Portal didn't explicitly set out in detail what its advice was – they also said Mr A signed the insistent client forms before the advice was formally presented to him. They went on to say that not all the alternatives available to Mr A to meet his objective were considered – importantly that he could've taken early retirement from his existing scheme. They said this should've formed the basis of the suitable advice he was given. They concluded by saying that they weren't persuaded Mr A's attitude to risk was balanced – they thought the process in determining this was flawed in Mr A's case.

Portal disagreed. In summary it said:

- it acted fair and reasonably with Mr A's best interests in mind.
- It advised against the transfer and explained the benefits Mr A would be giving up – but he clearly selected the option to go against its recommendation.
- its telephone and correspondence led business model meant clients had time to digest information without any pressure.
- it did explore all options available to Mr A including the early retirement option – but it said that during the fact-find appointment Mr A indicated he didn't require an income so the option wasn't presented to him by the adviser.
- it believes the evidence suggests Mr A would have transferred out of his DB scheme with or without its involvement because of his language throughout the process and his strong objective to release funds early.
- overall it believes it obtained and provided sufficient material to Mr A to enable him to make a well-informed decision.

Because the investigator wasn't persuaded to change their mind, the case was passed 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.

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 A's best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr A 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.

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

Portal says that it acted fairly and reasonably and in Mr A's best interests. Mr A says that he should have been advised to take early retirement from his existing scheme, which would have provided him with the cash he needed to pay off his debts yet still provided him with valuable defined benefit rights instead of being given insistent client documents to sign.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr A's best interests. And I think Mr A likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 4 September 2015 following the telephone discussion Portal had with Mr A about his pension options, it sent him what I think can only reasonably be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match Mr A's guaranteed benefits from his DB scheme and because he'd be giving up a guaranteed pension of around £7,000 a year from age 65, it recommended Mr A 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 A's best interests. But the information on this form was limited to the loss of guarantees and the growth required to match his existing benefits. While Portal later sent a more detailed suitability report, which I will refer to later on, at this stage Mr A 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 A 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 A 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 A'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 A'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 A could ignore Portal's recommendation was unfair to Mr A and wasn't in his best interests.

I don't think it was in Mr A'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 A 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 A had very little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr A was an experienced investor – in fact it appears he was completely inexperienced.

I'm mindful too that in carrying out the assessment of Mr A's attitude to risk, which it deemed to be 'balanced' – albeit I don't think this accurately reflects Mr A's true attitude to risk - it asked him a number of questions, the answers to which I think should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route. For example Mr A agreed that he would be described by others as a cautious person; he didn't find investment matters easy to understand; and most importantly in my view, he indicated that he tended to be anxious about the investment decisions he made.

I also think Mr A was in a vulnerable position at the time of the advice – he was unemployed having recently stopped working because of ill health and a close relative had recently died. I think this only adds weight to my view that Portal should have been on notice that it had to be careful if it was to take matters through the insistent client route.

I can see that Mr A's insistent client forms included a section where he put in his own words why he wanted to access his pension monies early. And while I think this was good practice, I don't think what Mr A wrote 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 A simply had to tick a box to say that he understood, 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 A was able to make an informed choice here.

It was only after receiving Mr A's confirmation that he wanted to proceed with the transfer that Portal sent Mr A 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 A 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 A 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 A advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report after securing Mr A's confirmation to proceed on an insistent client basis.

So, by recommending that Mr A transfer his benefits to a particular scheme, not only did this completely 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 A'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 A likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Mr A's objective was to clear some mortgage arrears and pay off an outstanding funeral expenses bill. Because Mr A didn't have any savings at his immediate disposal and given the nature of the debts I accept that he had a pressing need for access to a cash lump sum. But it strikes me that Mr A's objective could have been reasonably met by an alternative that was already available to him and which should have formed part of Portal's advice before it continued to facilitate an irreversible transaction to transfer his pension.

The alternatives that were explored by Portal were in my view inappropriate given Mr A's current circumstances. For example, further borrowing or re-mortgaging was recorded as being discussed – yet Mr A had mortgage arrears and he was out of work. Neither of these were plausible nor realistic options for Mr A. But what was available and in my view should have been properly considered was Mr A taking early retirement from his existing scheme. Despite what Portal says, it seems to me that Mr A's objective could have been met this way. I don't think it was necessary for Mr A to transfer his pension benefits away to achieve things.

Portal says early retirement from Mr A's existing scheme was considered at the time, but it says it wasn't presented as an option by the adviser because Mr A had indicated in the fact-find meeting that he didn't need an income. But it was Portal's role to discern what Mr A's wants and needs were. And I think it should have been abundantly clear to Portal that alongside the need for a cash lump sum Mr A also had a need for income. I say this because it's recorded that Mr A wasn't working and that he was in receipt of benefits, which were barely covering his recorded expenditure. Mr A has told us that it was ill health, which caused him to stop working in 2014 and effectively retire early. So it doesn't appear there was any reasonable prospect of Mr A returning to paid work.

Because Mr A was over the age of 55, his existing scheme would have allowed early retirement (I also think his poor health would've been a good reason in any event to have allowed it.) And according to the research carried out by Portal at the time in the transfer analysis report, Mr A's existing scheme would have provided him with a sufficient tax-free lump sum of approximately £12,500 to meet his objective of clearing his debts, as well as providing him with a guaranteed and increasing income – approximately £4,900 at the outset. I accept these benefits were lower than Mr A could expect at his normal scheme retirement age of 65 due to him taking his benefits early. But as I've already said, the lump sum was enough to meet Mr A's needs and the income was higher than he was currently receiving in benefits - so I think it was sufficient to have reasonably met his expenditure needs.

I accept there were no specific insistent client rules at the time. But I consider the rules and guidance that were in place at the time were clear that Portal had to act with due care and skill and in Mr A's best interests. And by not seeking to properly address Mr A's objectives and fully consider and provide him with the option of him taking early retirement from his existing scheme, I'm not persuaded this was acting in Mr A's best interest.

Ultimately I don't think Mr A was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer because, in the absence of being clearly told about his early retirement option, he believed this was the only way to meet his objective.

Furthermore I can't ignore that I think Portal actually gave Mr A a positive recommendation to transfer out of the 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 A 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 A wasn't clear or fair, it didn't allow him time to think carefully about the advice not to go ahead with the transfer and it didn't provide him with the suitable option of taking early retirement from his existing scheme. It didn't act in Mr A's best interests. And it failed to act with due care and skill.

I now need to consider if things had happened as they should have, whether Mr A would've still gone ahead. Portal says that Mr A would have transferred out of his scheme with or without its involvement because of the language he's used throughout and his strong objective. But I disagree. I think if Portal has acted in Mr A's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr A's true needs at the time by clearly advising him of his early retirement option, I don't think Mr A would've insisted on going ahead with the transfer. As I've said above, I don't consider Mr A was an experienced investor such that he had the requisite knowledge, skill, or confidence to against the advice he was given. I think given this and his vulnerable position he relied solely on the advice and process Portal employed.

So if things had happened as they should have, I think Mr A would've remained in his DB scheme and taken early retirement from it to meet his objective.

In closing - as I indicated above I have concerns about the manner in which Portal arrived at Mr A's attitude to risk of 'balanced'. It seems to me that because Mr A answered a number of the assessment questions as 'no strong opinion' this impacted the score and appears to have increased his risk profile. I can see that the risk profile tool refers to this potential and suggests the adviser might want to discuss this with their client because it might indicate a lack of understanding of the questions being asked of them. I think this was relevant in Mr A's case - but I've not seen any evidence Portal discussed this further with Mr A. Had it done so, I think Mr A's attitude to risk would have been deemed to be lower and more towards the cautious end of the scale.

But in any event, because I don't think the transfer would have taken place had things happened as they should have, this doesn't affect my decision.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr A, as far as possible, into the position he would now be in but for Portal's failings. I consider Mr A 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.

Because I think Mr A would have taken early retirement from his DB scheme if things had happened as they should have, I think compensation should be based on him accessing his benefits at age 58.

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 A's acceptance of the decision.

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

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

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 4 August 2022.

Paul Featherstone

**Ombudsman**