

## **The complaint**

Mr M 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 M's DB scheme benefits to a personal pension so that he could take a tax-free cash lump sum and an income via an annuity on an 'insistent client' basis. Mr M says Portal provided him with negligent advice, which has resulted in a financial loss.

## **What happened**

Mr M approached Portal in 2014 in response to an advert to discuss his pension and retirement needs.

On 13 March 2014 Portal arranged to speak with Mr M by phone to carry out a fact-finding exercise to gather information about Mr M's circumstances and objectives. My understanding is that Portal would also have carried out an assessment of Mr M's attitude to risk. Unfortunately Portal hasn't provided a copy of the fact-find, so I don't know all of Mr M's circumstances at the time – but Portal says the assessment of Mr M's attitude to risk was 'cautious', which hasn't been disputed.

On 14 March 2014 – and again on 9 May 2014 - Portal sent Mr M a letter saying that it recommended he didn't transfer his DB pension scheme benefits because of the guarantees and benefits that he would be giving up. It said that the growth rate required to match his guaranteed benefits available from his DB scheme at age 65 – a pension of around £880 a year – was 20%. But Portal said it could still help Mr M if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

It is assumed that Mr M returned his insistent client form, although Portal hasn't provided a copy Mr M's signed form. But looking at the file copy, Mr M was asked to confirm that he acknowledged his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits.

On 16 May 2014 Portal sent Mr M a suitability report setting out its advice. The report outlined Mr M's circumstances at the time, which in summary said that he was 59; he was employed; he was renting his home; he had no assets or liabilities; and he had a disposable income of around £550 a month, which was used for general living costs.

The report went on to set out the details of Mr M's existing DB pension scheme, which included the transfer value and the amount of pension Mr M could expect from his scheme at age 65. It also said the critical yield required to match Mr M's existing scheme benefits was 20%.

The report said that Mr M's objective was to access his pension benefits to go on holiday.

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

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

Mr M signed the relevant application forms and the transfer went ahead. Mr M subsequently received his tax-free cash payment and an annuity was set up paying around £30 a month.

In 2021 Mr M complained to Portal, via a representative about the advice he received.

Portal considered the complaint and issued its final response to Mr M in June 2021. In summary it said that it had provided suitable advice and had acted in Mr M's best interests. It said that it had recommended Mr M 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 M was better off remaining in his DB scheme – it also said it discussed the alternative ways of generating cash. But it said that Mr M insisted on going ahead against the advice, so it treated him as an insistent client and facilitated the transfer.

Mr M 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 Portal hadn't acted fairly towards Mr M and they didn't think he was a true insistent client. They said Portal only provided Mr M with its suitability report and the reasons why he shouldn't transfer out of his DB pension scheme after he'd signed the insistent client form, so they didn't think Portal had given him enough information to make that decision. They said the insistent client form was a template – it wasn't in Mr M's own words. And they thought Mr M would've been confused by being told not to transfer at the same time as being given the opportunity to go ahead anyway. They also said this was contradictory. In conclusion they said Mr M had a cautious attitude to risk and they didn't think he would've risked his guaranteed pension for a holiday had the risks been properly explained or had the alternative ways of meeting his objective been properly considered.

Portal disagreed. In summary it said:

- It is incorrect to say that advice was given by phone – a telephone assessment was carried out to establish Mr M's circumstances and objectives, which was then passed to the adviser for their consideration.
- The regulator's guidelines around insistent clients, which the investigator referred to in their assessment, were not in place at the time of the advice.
- it advised against the transfer and clearly explained this to Mr M.
- Mr M made an informed decision to disregard the recommendation provided to him choosing to be an insistent client.
- The correct process was followed and Portal facilitated the transfer for Mr M.

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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at

the time. This includes the Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

### *The applicable rules, regulations and requirements*

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Portal's actions here.

*PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.*

*PRIN 7: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

*COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, 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 COBS 19.1.16 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 M's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

A key aspect in this case is Portal's categorisation of Mr M 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 – as Portal has pointed out. But the COBS rules in the regulator's Handbook 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 M had to have understood the consequences of going against the recommendation.

Portal says that it followed the correct process – it provided suitable advice which Mr M disregarded so it facilitated the transfer for Mr M on that basis. Mr M says that he didn't realise he was acting as an insistent client – this wasn't explained to him and he wasn't told what this would mean in terms of giving up any right or benefits.

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 M's best interests. And I think Mr M likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 14 March 2014, following the telephone discussion Portal had with

Mr M 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 M's guaranteed benefits from his DB scheme, and because he'd be giving up those guaranteed benefits, it recommended he should not transfer away from his DB scheme to access his pension benefits.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr M'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 M had little information to go off to decide if being an insistent client was truly in his best interests. The critical yield wasn't explained and there was nothing here about what retirement income Mr M could achieve by transferring.

Yet immediately underneath the brief summary of why Portal recommended Mr M 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 M 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.

As I referred to earlier on, Portal sent Mr M a second brief letter on 9 May 2014 – again setting out the outcome of its advice. It's not clear what prompted this, but it appears contradictory and I think is likely to have caused Mr M some confusion. I say this because, while the first page of the letter says the same thing as the March letter – that is its recommendation was not to transfer because of the growth rate required - underneath the brief summary it says that '*Our recommendation*' ('Option 1') is that Mr M take his benefits immediately by taking out an annuity. The second option, which Portal said would mean Mr M is treated as an insistent client, is for Mr M to take a tax-free cash sum and use the residual amount to purchase an annuity. The third option was to do nothing.

Mr M has told us he didn't understand that he was being treated as an insistent client. And based on the above, I can see why Mr M was likely to have been confused by Portal's communication – it's not clear to me whether at this stage Portal was recommending Mr M transfer or not. Either way it strikes me that Portal's process here was geared towards facilitating the transfer regardless.

But on the basis that Portal's advice was not for Mr M to transfer, I think if Portal firmly believed in its advice and recommendation and it was acting in Mr M'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 M'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 M could ignore Portal's recommendation was unfair to him and wasn't in his best interests.

I don't think it was in Mr M'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, coupled with the confusing second letter I described above, that Mr M 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 M had little knowledge or experience of financial matters based on the information available at the time of the advice. For example

the suitability letter doesn't record that Mr M had any investment experience, so it appears he was a complete novice in this regard. I'm mindful too that Portal appears to have had deemed Mr M's attitude to risk to be 'cautious'. 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.

Portal hasn't provided a signed copy of Mr M's insistent client form - albeit I think it's reasonable to assume that he signed and returned the necessary paperwork to allow Portal to go ahead. But looking at Portal's file copy, the insistent client form Mr M likely signed was a template. It wasn't in his own words. Given Mr M's level of experience, I think it would've been important for Portal to ensure Mr M understood what he was getting into, and a good way to have done this would've been to see in his own words that he understood the recommendation being made and why he wanted to proceed. In the absence of this, and because Mr M hadn't yet received Portal's full suitability report and had time to read and digest it before deciding to go ahead anyway, I'm not persuaded Mr M was able to make an informed choice here. And I don't think this document alone is sufficient to show that Mr M was an insistent client.

It was only after receiving Mr M'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 immediately followed by a contradictory positive recommendation, advising Mr M to transfer his benefits to purchase an annuity. And this was all set out under a heading titled '*Mr recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr M 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 M advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report after securing Mr M's confirmation to proceed on an insistent client basis.

So, by recommending that Mr M transfer his benefits to a particular arrangement or 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 arrangement was in Mr M'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 M likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so; particularly given my finding earlier on about the confusing second summary letter Portal sent Mr M about its advice.

Mr M's objective for accessing his pension benefits early was to go on holiday. Mr M told us that he only spent around £800 on a holiday. He says the rest was spent on making home improvements because he had the money, not because the improvements were essential or had been planned. It strikes me that Mr M was therefore likely seduced by the sum of money he was told he could gain access to at the start of Portal's advice process – not because he really needed it.

So I think it appears that Mr M's real need was for a lump sum of £800 – not the £3,000 he ended up accessing. And because of the amount Mr M actually needed, I don't think his objective could only reasonably be met by transferring his benefits out of his DB scheme. Yet I think Mr M likely went ahead with the transfer because he believed this to be the case and that it seemed like a good idea.

I say this because Portal's recommendation letter says that it discussed alternative courses of action with Mr M to meet his objective and it gave the reasons why these were discounted. One of these alternatives was borrowing the money. Portal recorded that this

was rejected because Mr M didn't wish to take on further lending or pay any interest. But not only did Mr M not have any existing lending as documented earlier on in its suitability letter, I think it's likely Portal discussed this option in the context of him borrowing £3,000 not the £800 I think he really needed. Had it done so I think this was a realistic option that Portal should have explored with Mr M in more detail – particularly given it appears that Mr M had disposable income suggesting borrowing the money was likely affordable.

Portal also documented that it discussed with Mr M him using his disposable income, but that he didn't want to use it. Again, in the context of Mr M only needing £800 to fund a holiday, I think this too was a realistic alternative which Portals ought to have explored with him in greater detail before facilitating an irreversible transaction to transfer his pension.

I acknowledge 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 M's best interests. Portal's role was to discern what Mr M's wants and needs were and why he wanted to transfer his pension. Its role wasn't simply to facilitate what Mr M wanted. But by seeking not to understand Mr M's objective fully and what he was really trying to achieve before carrying things out, I'm not persuaded this was acting in Mr M's best interests.

Ultimately I don't think Mr M was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objective. Portal failed to properly understand what Mr M needed and in my view all too readily discounted the more suitable alternatives that were readily available to him to meet his need. Furthermore, and in my view crucially, I think Portal gave Mr M 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 M can truly be regarded as an insistent client. I think Portal made it altogether too easy to agree that Mr M was an insistent client. Portal's overall communication with Mr M wasn't clear or fair. It didn't act in Mr M'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 M would've still gone ahead.

Having done so, I think if Portal had acted in Mr M's best interests providing a recommendation on the suitability of the whole transaction envisaged at the outset, and addressing Mr M's true objective at the time, Mr M would not most likely have insisted on going ahead with the transfer. As I set out above, I don't consider Mr M was an experienced investor who possessed the requisite knowledge, skill and confidence to knowingly go against the advice he was given. I think Mr M relied solely on the advice and process Portal employed.

So if things had happened as they should have, and if Portal had emphasised the importance of these funds to Mr M's future retirement, I think it's unlikely he would've insisted on accessing them. I don't think Mr M would've gone ahead and transferred in any event.

In light of the above, I think Portal should compensate Mr M for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

## Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#). The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/19](#) (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr M whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance/rules to be published.

Mr M has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr M.

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr M would have most likely remained in his DB scheme 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.

My understanding is that Mr M could've taken his DB pension benefits without reduction at age 65. So I think if Mr M had remained in his DB scheme he would've most likely accessed them at this point. So, compensation should be based on his scheme's normal retirement age of 65.

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 M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 M within 90 days of the date BUSINESS 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 M.

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.

To note - if the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Portal to carry out a calculation in line with the updated rules and/or guidance in any event.

### **My final decision**

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr M the compensation amount as set out in the steps above. I additionally require Portal Financial Services LLP to pay Mr M any interest on that amount in full, as set out above.

If Mr M 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 M to accept or reject my decision before 15 November 2022.

Paul Featherstone  
**Ombudsman**