

The complaint

Mr M complains about advice he received from Portal Financial Services LLP ('Portal') in relation to a defined benefit occupational pension scheme ('OPS'). Portal processed the transfer of Mr M's OPS benefits on an 'insistent client' basis to a Self-Invested Personal Pension ('SIPP'). Portal recommended the investments within the SIPP to Mr M, including investing in several unregulated collective investment schemes ('UCIS').

Mr M is being represented by a third party but for ease of reading this decision I'll refer to all representations as being made by Mr M.

What happened

Mr M has said he first contacted Portal, in 2012, after seeing an advert about potentially being able to access his pension earlier than his normal retirement age, as he wanted to see if this was right for him.

Portal gathered information about Mr M's existing pension and sent him a letter on 22 November 2012, inviting him to have a full review. The letter talked about the current issues affecting the pensions market, saying *"Right now traditional pensions are taking a hammering"* and that the majority of pensions are linked to the stock markets which the letter described as *"having been in turmoil for some time"*. The letter went on to say that *"...if the right investments are chosen they can still perform very well for you. As part of our conversation we can discuss how to make your existing policy work much harder"*. The letter also commented on annuity rates being low and said *"If you decide to release some tax free cash from your pension then one of the things we would do is set up your pension so that you don't have to purchase an annuity when you decide to retire"*.

The letter then went on to set out the transfer value of Mr M's pension and the critical yield, (the growth rate required to match his OPS benefits) but said this would be discussed in more detail when Mr M called to talk about his options. It then talked about some of Mr M's options, including releasing tax-free cash ('TFC') and set out how much he may have been able to take, £18,114.

A telephone conversation took place shortly after this in which Portal gathered further information about Mr M's circumstances and objectives. Portal has provided a copy of a fact find where this information was recorded – by its adviser – dated 28 November 2012. The fact find recorded that Mr M wanted to take maximum TFC to purchase a car for work, create an emergency fund and pay off debt. The fact find also included a section where answers to questions asked about attitude to risk ('ATR') were recorded.

Portal then sent Mr M another letter, also on 28 November 2012. This letter said;

You currently have a pension with [former employer] which has a Transfer Value of £72,459, from which you could release a total amount of £18,114 as a tax free lump sum. However, as the Critical Yield (growth rate required to match your guaranteed benefits with [former employer]) is 10.14% it would be against our recommendation to do this. Furthermore, you will be waiving your entitlement to a guaranteed pension of £4,866 per annum which is

payable at retirement age 65.

If you decide that you still wish to proceed, we can help you release money from your pension, but we would have to treat you as an insistent client, as this would be against our recommendation. We would, therefore, require you to complete the attached insistent client form confirming that you are aware of the benefits you would be relinquishing.

I enclose a form detailing the various options available to you. Please can you arrange to complete and return the forms to Portal Financial Services. Upon receipt, we will arrange to send out all the relevant application forms and Suitability Report detailing our advice.

The letter included a form Mr M could complete with a declaration, pre-drafted by Portal, saying he wanted to proceed as an insistent client.

I understand Mr M completed and returned the form. And on 3 December 2012 Portal sent Mr M a pension release report, or suitability report, setting out its advice.

The suitability report first listed Mr M's objectives. It said these were to use his existing pension to provide an income at a later date but to take his TFC entitlement immediately. It said he wanted to retain his residual fund which would be invested until he required a retirement income. And he wanted to ensure he had good awareness of investment opportunities, that the portfolio reflected his risk profile, be kept informed of the performance of the portfolio and have access to a system to allow him to monitor his investments.

It went on to discuss Mr M's circumstances. It said he was 55 and his highest priority was to *"preserve your fund for as long as possible, currently taking no income while retaining the flexibility of your pension fund and to take your Tax Free Cash"*. The report noted that Mr M was living in rented accommodation and didn't own a property, unemployed and claiming associated benefits. It said Mr M had outstanding debts of approximately £25,000 but didn't include details of how much the monthly repayments were – even though the fact find referenced this indicating payments were frozen with repayments of £60 agreed moving forward. Mr M's marital status and dependents were not noted, although again the fact find recorded that he was single and had no dependents. The report again said the reason for wanting TFC was to reduce debts, create an emergency fund and purchase a new car. The suitability report also said Portal had assessed that Mr M had a balanced ATR.

In terms of Mr M's existing pension, the suitability report again said it had a cash equivalent transfer value ('CETV') of £72,459. It also talked again about a critical yield of 10.14% and said that Mr M had a guaranteed minimum pension through his existing scheme but did not list how much this was. The covering letter accompanying the suitability report suggested that under the existing scheme Mr M would be entitled to an annual income of £5,485 and TFC of £13,426 at age 65. Again, this information was not referenced in the suitability report itself, and differed from the information Portal gave in its letter of 28 November 2012.

In the section of the report titled 'Your situation' Portal said *"it is against my recommendation to transfer your benefits"*. But that Mr M had decided he still wanted to proceed and on that basis it could still help him *"release money from his pension"*.

In the 'Recommendation' section of the report, Portal went on to say it recommend that Mr M transfer to a SIPP, take the maximum available TFC and then invest in a portfolio Portal recommended. It said doing so would allow Mr M to receive TFC, use that for the purposes it had previously listed, structure the portfolio to match his risk and reward profile and have greater long term flexibility.

The portfolio Portal recommended that Mr M invest in consisted of:

- 45% Raithwaites Hypa Fund
- 10% Cool Blue Fractional Plus Fund (also known as the Cool Blue Samui Fund)
- 20% Venture Oil International
- 12.5% EOS Solar Energy
- 12.5% Cash Deposit

the first four of which being unregulated collective investment schemes.

The transfer went ahead on the basis of this recommendation.

I understand that since then a number of the recommended funds have not performed in line with the initial outlined projections and have since been given a nominal value of £0.0001 per unit by the SIPP provider.

Mr M complained to Portal in January 2020. Mr M argued he was not an insistent client and Portal had directed him down this route. He felt the transfer from his existing pension and the portfolio Portal recommended were both unsuitable, taking into account his attitude to risk. And he felt Portal was aware of this but used the insistent client process in order to progress the transaction and receive commission.

Portal initially said that it believed the complaint had been made outside of the time limits set by the regulator. But it did say, without admission of liability, *“if the issues with interest payments from the funds have not been resolved by Mr M’s state retirement age, they (Portal) will personally pay Mr M a retirement income, based upon the originally expected performance of his funds and the prevailing annuity rates. They will continue to pay this to Mr M until the fund’s situation is resolved and Mr M can take his income directly from them. Mr M will not need to reimburse (Portal) for these payments at any future date”*.

The matter was referred to our service. An ombudsman colleague decided that we did have jurisdiction to consider the matter as, although the complaint was brought more than six years after the events complained about, Mr M only reasonably would’ve been aware of having reason to complain more recently. And the complaint was raised within three years of that knowledge.

One of our Investigator’s then gave an opinion on the merits of the complaint. They felt the complaint should be upheld, that Portal should be required to pay compensation and £250 for the distress and inconvenience caused. This was because the Investigator didn’t think, from the evidence they’d seen, that Mr M had sufficient knowledge and understanding of the risks involved with the transaction – because Portal had not made this clear enough. So, they didn’t think Mr M should’ve been classed as an insistent client. And they didn’t think the recommendation made, including that a large portion of Mr M’s funds be invested in high risk unregulated collective investment schemes (UCIS), was suitable.

Portal disagreed with the Investigator’s opinion. It said it felt it hadn’t done anything wrong by classing Mr M as an insistent client. It said it had explained its recommendation and reasons why in the letter of 28 November 2012 and Mr M had taken the decision to proceed, fully aware of the risks. And it said it felt Mr M would always have gone ahead with the transfer, as he wanted to release the maximum available tax-free cash.

Our Investigator said they weren’t inclined to alter their opinion. They noted Mr M had no investment experience at the time of approaching Portal and was reliant on the advice

provided. And they still felt Mr M was not provided clear enough information to understand enough about the transaction and its risks to be considered an insistent client.

Portal continued to disagree with the Investigator's opinion, so the complaint has been passed to me to decide.

What I've decided – and why

I think it should be noted that I've reviewed the previous Ombudsman's decision on whether our service has powers to investigate this complaint and I've seen nothing which makes me disagree with the outcome they reached. So, with that in mind, 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.

Suitability of advice

Portal has argued that the advice it gave was suitable. This is because it says it did not recommend that Mr M transfer his pension, but that he insisted on doing so. And so, after he insisted, it recommended a provider and investments which it feels were right for him. But for the reasons I'll explain, which are largely the same as those explained by our Investigator, I don't agree that Portal's actions were appropriate or fair.

COBS 2.1.1R required Portal to "*act honestly, fairly and professionally in accordance with the best interests of its client*". And, as part of that, COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr M. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr M to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

- 1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme;*
- 2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
- 3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*
- 4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading 'Suitability', COBS 19.1.6 set out the following:

“When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.”

In short, Portal needed to begin by assuming a transfer from Mr M's OPS was not suitable, then consider Mr M's specific circumstances and objectives. It needed to assess the options available and look at what was in his *best* interests. It needed to provide a comparison of what the situation would be if he opted to transfer his pension from his OPS and what it would be if he didn't, making clear the differences and risks. And it needed to make sure that Mr M understood all of this information so that he could make an informed decision. All while ensuring it acted honestly, fairly and professionally.

The letter Portal sent to Mr M on 22 November 2012 was headed “*Re: Releasing Tax Free Cash from your Pension. We have now received the information we needed.*” So, the first thing mentioned was releasing money from the pension. Not a review or more general service but making a specific change to the current position of Mr M's pension. This was before a detailed fact find had been completed to understand Mr M's circumstances or needs. As I explained earlier, the letter also went on to talk, in quite negative terms, about both the pension and stock market – particularly traditional pension arrangements. And it made specific reference to Mr M being able to take tax free cash of £18,114. I accept there had been some contact prior to this letter – with an initial enquiry having been registered and an authority form signed by Mr M to allow Portal to contact his existing pension scheme. But I still think the letter indicates, before a meaningful fact find had been completed, the discussion being skewed towards a particular outcome.

Portal did complete a fact find with Mr M over the phone several days later. And they did gather some information about his circumstances, attitude to risk and his apparent requirements. But I have concerns about some of this information.

There doesn't appear to have been any information gathered about Mr M's income needs in retirement. The answer to a question around this was simply listed as ‘unknown’. And I think it would be difficult, without an attempt having been made to understand this, for any recommendation to be entirely suitable for Mr M's circumstances, bearing in mind the primary aim of a pension is to provide income in retirement. There is also nothing in the fact find to indicate that he had any other retirement provisions – suggesting he had limited capacity for risk with his OPS. But this isn't reflected in the risk profiling.

The fact find noted Mr M was in receipt of benefits, some of which were likely to be means tested. There is a note at the end of the fact that it would be left to Mr M to contact the relevant agency and look at what impact releasing funds would have on his benefit entitlement. But Mr M did not complete this fact find in person, so I can't say with certainty that this was discussed. And in any event, while I agree that only Mr M would've been able to obtain this information from the relevant benefit agencies, the answers received should've formed part of the considerations when giving professional advice. Rather than it being left to Mr M to decide, on receipt of this info, whether any advice was still appropriate.

The ‘requirement’ noted was for maximum TFC to be used for a new car for work, to pay off some debts and to create an emergency fund. But Mr M was unemployed according to the fact find. And although he was hoping to return to work, this wasn't guaranteed. So nor was the ‘need’ for a car. The debts that were listed in the fact find exceeded the amount of TFC available. So, would not have been paid off in full. The fact find also indicated there was an arrangement in place with the creditors to make fixed repayments, indicating clearing these

debts partially was not a priority. So, in my opinion, the discussions around TFC seemed to be on how Mr M would spend the money if it was available, rather than what he needed and whether giving up guaranteed lifelong benefits and opting out his OPS was in his best interests. And again, this followed the earlier correspondence already suggesting this as the option that would be explored.

Portal recorded Mr M as having a balanced attitude to risk, based on the information recorded in the fact find. I think an argument could be made that some of the answers given do not support this – in particular Mr M is noted as having strongly agreed that he had little experience in investing, people would describe him as cautious and that he generally looked for safer investments and agreed to the statement that he preferred bank deposits to riskier investments. Not to mention the limited capacity for loss I've already noted. I also feel, given he was an inexperienced investor, Mr M's answers to some questions – particularly being concerned about the volatility of stock markets – may've been influenced by the earlier correspondence sent by Portal which specifically referenced turmoil and recent poor performance.

So, I'm not sure that the focus of the initial correspondence and the fact finding was what was in Mr M's best interests. It seems to have been largely around how much TFC could potentially be taken and what this might be used for – not whether that was appropriate. And I think that could very well have misled Mr M into thinking that releasing TFC was what Portal thought was best. But on top of this, what Portal then sent to Mr M contained no meaningful comparison relating to transferring his OPS.

The same day as the fact find was completed, Portal sent Mr M a short letter. It again listed a transfer value and the amount of TFC that could be taken. But simply said it would be against Portal's recommendation to transfer based on the critical yield alone. The letter did say Mr M would be giving up a guaranteed pension of £4,866 per annum at age 65. But besides this passing mention of the potential pension due under the OPS and the TFC – which had already to that point been the emphasis of the correspondence – there was no comparison for Mr M to consider. There was also nothing recorded about Mr M's requirements in that letter – despite Portal having noted these during the fact find. And it appears there had been no consideration given to any other ways that Mr M could potentially have met those requirements, if indeed he had a genuine need to do so. For example, I've not seen anything to suggest any information was gathered about whether Mr M could've potentially taken benefits from his OPS scheme early – given he was already aged 55 at the time of the advice. Portal may argue that Mr M would have declined this option, but based on what I've seen it doesn't appear to have even been considered, discussed or outlined.

I think Portal's conclusion that the critical yield was likely to make the transfer unsuitable was correct. But given the lack of any further significant comparison or information for Mr M to consider, I don't think Portal provided full and clear advice to Mr M, such that it left him in a position to make an informed decision – about the transfer or about being an insistent client. And I think the summary advice itself was then undermined.

Immediately after saying transferring would be against its recommendation, Portal promoted the option of still releasing money from Mr M's pension – the focus of the majority of the correspondence I've seen – as being something it could assist with, provided he signed an enclosed form to proceed on an insistent client basis. It also encouraged these to be returned, at which point it said it would send out application forms and a suitability report detailing its advice – which I think should really have accompanied the letter itself and explained why Portal was not recommending the transfer, if this was its advice.

A suitability report was issued on 3 December 2012 (so five days after the initial letter recommending against the transfer) as Mr M had returned his insistent client form in the

meantime. This is quite a fast turnaround time for the insistent client form to be returned and then a full further assessment of Mr M's circumstances to be carried out to determine a suitable investment strategy – which is what Portal recommended.

I acknowledge this suitability report repeated that the transfer was against Portal's recommendations. And it included some further risk warnings that, amongst other things, releasing funds early could reduce Mr M's income in retirement, taking TFC at this stage would mean no further TFC could be taken later and by transferring away from the OPS Mr M would most likely be unable to reverse this decision. But it didn't give any context to the transfer not being recommended – particularly in relation to Mr M's specific circumstances. There was no additional comparison of the benefits that Mr M would be entitled to under his OPS in comparison to those potentially available under a personal pension or SIPP – indeed the OPS benefits were not summarised at all within the suitability report itself. And it made no further reference to why potential alternatives to achieve Mr M's apparent requirements had not been considered.

The report also said if Mr M continued to pay his debt through monthly contributions, rather than taking TFC he *“will have a total repayment of £30,035.53 calculated at a market average rate of 10.55% APR on the debt, with a pension value of £122,355 based on 5% growth at retirement.”* But if he took TFC and used that to pay off his debt and paid the money he would've been putting towards the debt into his pension *“you will have total contributions into your pension of £36,042.64 (this has been grossed up due to tax relief) and a pension value of £132,679 based on 5% growth at retirement.”* This indicated to Mr M that he'd potentially be better off in broad terms by transferring – which undermined previous statements by Portal to the contrary. So, I think generally these statements are misleading.

They also contain omissions and unclear and unexplained assumptions that add to them, in my view, being misleading. To start with this section of the report doesn't make it clear how much debt being repaid the calculations are based on. Given Mr M's debt exceeded the maximum TFC, and part of the TFC was apparently to be used for other purposes – so he clearly wouldn't have been able to clear the debt in full - I think this is important information that has been omitted.

Portal has assumed an interest rate on the debt – when it could've obtained this information. And I'm not sure the average market rate was appropriate as the fact find mentions repayments being frozen and then set at £60 per month suggesting an arrangement could already have been agreed with creditors. Which based on the limited information recorded, I think would likely have included concessions regarding interest rates.

The statements made in the suitability report also make no reference to how much the assumed regular repayments towards the debt are. Those being the amount that would theoretically be saved to create total contributions Mr M could make to his pension in excess of £36,000. And, given the fact find indicates agreed payments of £60 in respect of the debt and Mr M's age, the total additional contribution the report suggests Mr M could make to his pension seems unlikely to be correct given his time to retirement.

Again, I think this evidences Mr M not being given clear and full information, in order to make an informed decision.

The report also went on to recommend a transfer; to a specific provider, to set up a SIPP and invest in specific funds. And detailed extensive reasoning why Portal felt that option, and the specific investments – particularly the UCIS – were appropriate for Mr M.

The covering letter accompanying the suitability report was also clear that the suitability report outlined Portal's 'recommendation'. And that following the recommendation would

mean Mr M released tax-free cash – suggesting it in fact thought the transfer was appropriate. And it said it believed the recommendation made was suitable for Mr M – the course of action that facilitated the release of TFC, the transfer.

The covering letter included a further declaration for Mr M to complete which repeated the acknowledgements in the insistent client declaration. But this notwithstanding, I think there was significant enough doubt and contradiction in the correspondence Mr M was sent over the course of less than two weeks for him to believe that Portal was in fact recommending a transfer.

I note the declaration in the letter of 3 December 2012 referred to the benefits that Mr M would be giving up as the option of taking £13,426 in TFC at age 65 and a pension of £5,485 per annum. These figures were markedly different to those in the letter Portal had sent five days earlier. Which I think made it even more difficult for Mr M to make an informed decision due to the lack of consistency.

As a result, I don't think the suitability report was sufficient as a recommendation not to proceed. It didn't explore Mr M's objectives, and robustly test them, nor did it look into alternative ways of meeting those requirements, without releasing money from his OPS. It didn't provide any real meaningful comparison for Mr M to consider. And the correspondence in general muddled the waters, which I think on balance likely led Mr M to believe that Portal felt the transfer was appropriate.

I should also add that I don't think the investments recommended to Mr M were appropriate. As I've said I feel the categorisation of Mr M as a balanced investor was questionable given some of the answers he gave in the risk profiling section of the fact find and his circumstances at the time. But even if I agree he should've been considered a balanced investor, I don't think the recommendation that 87.5% of his pension fund be placed in UCIS was suitable. Portal has said it recommended these investments because Mr M had indicated a concern with the risks associated with stock market based investments. But as I've said, I feel that may've been driven by some of the early correspondence Portal sent him. And even if not, I've seen nothing to indicate he had the requisite knowledge or experience to accept or understand the risks associated with these UCIS investments.

Taking all of this into account, I don't think the advice given by Portal was suitable here.

Insistent client

Portal argues that it was correct to class Mr M as an insistent client. I've already detailed a number of flaws with the process that Portal followed. And overall, I have serious concerns with the process used and whether Mr M was in fact an insistent client.

Before Portal had even provided a formal suitability report, it promoted the opportunity for Mr M to proceed on an insistent client basis. The letter it sent him on 28 November 2012 included an insistent client form. It's not in dispute that Mr M signed the form. But it was pre-completed, meaning Mr M wasn't asked or given the opportunity to explain in his own words why he wished to ignore professional advice and proceed with an unsuitable transfer.

This declaration was also provided to Mr M before he received Portal's full suitability report, so he didn't have all of the information he needed to make an informed decision – all that was highlighted was the critical yield being unachievable, and the pension Mr M would be giving up (although it is unclear if that figure is even correct given later inconsistencies). Only after receiving Mr M's confirmation that he wished to proceed did Portal send Mr M the formal suitability report. And even then, although the statement that transferring would be against Portal's recommendation was repeated, there was no additional context provided.

And this was followed by the recommendation to transfer out of the OPS to a SIPP in the same report. Which, as I've said above, I think seriously undermined the recommendation not to transfer.

I appreciate that it was not a regulatory requirement at the time the advice was given for Mr M to provide a letter in his own words explaining why he wished to proceed against Portal's advice. But regardless of this, Portal was required to ensure that it treated Mr M fairly and that it acted in his best interests. And I'm not persuaded that it did treat Mr M fairly when it went to such lengths to assist Mr M to identify as an 'insistent client'.

I don't think the process was geared towards Mr M making an informed, considered assessment of the reasons why he shouldn't be transferring – as if it was I feel that would have involved Portal providing the full recommendation to Mr M, allowing him to consider this on his own and then revert to Portal if he still wished to proceed.

On the contrary, I would go as far as to say that Portal's process was designed to facilitate the transfer, with significant emphasis placed on the release of funds and how this could be achieved from the outset. I don't think that providing Mr M with a means of proceeding against the advice, without establishing why he wanted to go against it, why the apparent requirements were truly necessary and why alternatives weren't appropriate demonstrates that Portal had his best interests in mind.

Overall, I think this shows that Portal made it altogether far too easy for Mr M to agree that he was an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer.

Would Mr M have acted differently?

Mr M has confirmed that he did use a portion of the TFC to purchase a car and clear some debt – in line with the intentions noted. But again, I believe the discussions around how he would use this money were more what he might do if funds were available – something which Portal prominently emphasised as an outcome from the outset – rather than something he needed. And just because he used the funds in the way that he had discussed with Portal, I don't think confirms that this was truly a *need* or that he would always have transferred his OPS and taken TFC even if Portal had used a more appropriate process. I'll explain why.

Mr M has confirmed that he didn't manage to find employment shortly after the advice was given, as Portal had suggested was expected. So, the car wasn't required for work purposes. And this also meant he didn't receive an increased income to meet the associated costs such as insurance or fuel. So, while purchasing a new car was a benefit of the TFC being released I still don't think it was a true need, based on his circumstances at the time

And while Mr M did reduce his debts, his position didn't drastically improve, and he's said he later had to enter into an IVA. I've thought about whether ultimately entering into an IVA suggested a significant need, at the time of the advice, to clear debts. Which may in turn have led Mr M to go ahead even if advised more clearly. But the IVA came several years after the advice – after Mr M's employment position hadn't improved. So, seems to have been because of his circumstances not changing as he'd hoped in the intervening period. And as I've said the fact find indicated a payment agreement with creditors being in place at the time of the advice. So again, while Mr M may've been pleased to partially reduce his debts using some of the TFC, I don't think it was a genuine need.

Mr M has also said that he ended up having to live off a portion of the TFC as taking it impacted his benefits (which as I've noted I'd have expected to have been thought about by

Portal in greater detail as part of the advice process). So, he wasn't able to establish the emergency fund that Portal had emphasised, and he was in fact negatively impacted.

Taking this into account, I think, as an inexperienced investor, had Mr M been provided with more appropriate and robust advice around why the transfer was not suitable, I don't think he'd have gone ahead. I know Portal maintains that it said the transfer was against its recommendation – which overall was in my view correct. But the process Portal used, including the suitability report ultimately issued after Mr M had been directed to the 'insistent client' route, lacked sufficient clarity, reasoning and rigour – for all the reasons set out above. And, in my view, meant Mr M wasn't able to make an informed decision. If he had been provided with more appropriate information and reasoning, so that he fully understood the risks and long-term implications involved in transferring his OPS and investing as he did, and hadn't been directed towards the 'insistent client' route, I think he would have acted differently and retained his deferred benefits. As a result, I think Mr M's complaint should be upheld.

I've seen evidence that, following the transfer, Mr M drew some income from his SIPP in 2014 and 2015. Which he has said was to cover some living expenses. So, I've thought about whether this suggests he'd have always needed to access his pension funds before age 65. But I think Mr M only utilised funds from the SIPP because this option had become available to him as a result of the transfer. I haven't seen anything to suggest that, if he had been provided with a more appropriate service, and the transfer hadn't taken place, that he'd have been required to access his OPS benefits in 2014 or 2015. So, on balance, if the transfer hadn't taken place, I think Mr M would've retained his OPS benefits until drawing them at age 65.

As I noted earlier, there have been significant issues with the performance of the funds into which Mr M's pension was invested. But I think without Portal's failings, Mr M wouldn't have gone ahead with the transfer. So, the funds wouldn't have been invested as they were. So, I think it is appropriate to hold Portal responsible for all of the losses Mr M has incurred.

Our Investigator recommended that Portal also pay Mr M £250 for the distress caused by the unsuitable advice. I don't doubt that Mr M has been caused distress and concern in relation to his retirement planning – particularly more recently where his fund was revalued to a nominal amount. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

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 the unsuitable advice. I consider Mr M would have most likely remained in the OPS. 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.

For clarity, for the reasons set out above, 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 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 compensation amount must where possible be paid to Mr M 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 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.

In addition, Portal should pay Mr M £250 for the distress caused by the disruption to Mr M's retirement planning.

My aim is to return Mr M to the position he would have been in but for the actions of Portal. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portal is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr M to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr M to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The wrapper only exists because of illiquid investments. In order for the wrapper to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr M can discuss with the wrapper provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Portal is

unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr M an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the wrapper to be closed.

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 July 2022.

Ben Stoker
Ombudsman