

The complaint

Mr A complains about the advice Portal Financial Services LLP ('Portal') gave to him concerning transferring the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable and believes this has caused a financial loss.

Professional representatives have helped Mr A to bring this complaint. But, for ease of reading I'll refer to the representatives' comments as being his.

What happened

In 2011 Portal contacted Mr A and offered to give him advice about his pension and retirement needs. Portal then gathered information about the funds available in his DB scheme.

On 28 November 2011, Portal wrote to Mr A. It said that his DB scheme had a cash equivalent transfer value ('CETV') of £37,151 and a critical yield ((the growth rate required to match the benefits from is DB scheme) of 12%. It gave Mr A three options:

- Do nothing
- Pension Release. This would allow Mr A to take tax free cash ('TFC') of up to £9,287 and to reinvest the "*residual amount*".
- Take TFC of up to £9,287 and use the residual fund to produce a taxable income.

Portal asked Mr A to contact it to discuss his options. On 15 December 2011 Portal spoke with Mr A. It completed a fact-find to gather information about Mr A's circumstances and objectives. It found that:

- Mr A was aged 57, married with one child.
- He had a yearly income of £26,000 plus £150 a month pension income.
- He owned his home while still paying a mortgage on it of £110,000
- He had an outstanding interest free credit card balance of around £10,000 which he was repaying at around £50 a month..
- His chosen retirement age was 65.
- Mr A wanted access to his TFC but that he didn't need to take an income from his pension for seven or eight years so liquidity wasn't important to him.

Portal wrote to Mr A that day. It repeated that his DB scheme had a CETV of £37,151 from which Mr A could release £9,278 in TFC. It said that as the critical yield was 12% it would be against its recommendation for Mr A to transfer out of the scheme. It said that by doing so, Mr A would be giving up a guaranteed pension of £2,716 a year payable at age 65. It added that if Mr A still wished to proceed he could do so on an "*insistent client*" basis. It also said that if he wished to proceed he should reply "*immediately*" as the DB scheme may have a time-limit to guarantee the CETV.

Portal included a form for Mr A to sign in order to proceed if he wished. It also enclosed an "*insistent client form*" for him to sign. That said he understood that the critical yield of 12%

was unlikely to be matched; he would be giving up guaranteed benefits; that he'd be worse off in retirement; and that he wanted to proceed.

A week later, on 22 December 2011, Portal sent Mr A its suitability report, which it called a pension release report. The report repeated that as Mr A would be giving up guaranteed benefits by transferring out of the DB scheme, and as the critical yield was unlikely to be met, it was treating Mr A as an insistent client.

The suitability report summarised Mr A's objectives as follows, to:

- Use his existing pension plans to take TFC immediately.
- Keep funds invested until he needed a retirement income.
- Ensure he had *"a good awareness of investment opportunities available"*.
- Ensure his investment portfolio reflected his *"Risk & Reward profile"*.
- Have access to a system which would monitor the performance of investments.
- Be kept informed of the performance of his portfolio.

The report went on to say:

"You have stated that the highest priority for your retirement is 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. You have also stated that maximising your pension income by remaining invested is very important too..."

You would like to cash in the maximum amount available from your pension as you would like [to] help your family out."

The suitability report gave Mr A's attitude to risk as *"moderately adventurous"*, which it described like this:

"Moderately Adventurous investors typically have moderate to high levels of financial knowledge and will usually keep up to date on financial issues. They will usually be fairly experienced investors, who have used a range of investment products in the past. In general, Moderately Adventurous investors are willing to take on investment risk and understand that this is crucial in terms of generating long-term return. They are willing to take risk with a substantial proportion of their available assets."

Moderately Adventurous investors will usually take gambles where they see the potential rewards as being attractive. They will usually be able to make up their minds on financial matters quite quickly. While they can suffer from regret when their decisions turn out badly, they are usually able to accept that occasional poor outcomes are a necessary part of long-term investment."

Under a heading of *"Recommendations"* the report repeated that Portal was treating Mr A as an insistent client. But it also said that as he understood the risks of transferring from his DB scheme it was making a recommendation that he transfer his pension funds into a named SIPP. It said the reason for this recommendation was because the potential benefits in retirement with that SIPP provider seemed likely to exceed the benefits with other providers after Mr A had taken TFC. It added that:

"By following this recommendation, you will:

- *Receive your Tax Free Cash lump sum of circa £9,288.*
- *To help your family out.*
- *Structure your portfolio to match your current Risk & Reward profile.*

- *Have greater long-term flexibility to maintain your pension in line with your risk/reward profile.”*

The investment portfolio Portal recommended to Mr A – apart from 10% held in cash – was made up of five unregulated collective investment schemes (‘UCIS’). These are investment schemes in which funds don’t follow the regulator’s rules on the type and spread of investments.

In January 2012 Mr A signed the appropriate forms to transfer his DB scheme funds to the named SIPP. Although, for reasons that aren’t clear, the transfer didn’t take place until August 2012. At that time the DB scheme transferred £39,836 into Mr A’s SIPP. Mr A subsequently took £9,959 TFC.

Portal sent Mr A an investment update in September 2015. In summary it explained that some of the investments hadn’t performed as initially expected. But, it also referred to the “*strenuous efforts*” the schemes were making to return Mr A’s capital together with the growth he was entitled to, earlier than expected.

In July 2018 the SIPP provider wrote to Mr A. It said that his SIPP would produce an income of zero. It also said that the total value of his SIPP was £7, including a sum of £1.20 still remaining in the UCIS investments .

In August 2019 Portal wrote again to Mr A. It said that because of the illiquid nature of some of the funds it had advised him to invest in, Portal would pay him the income he could have expected to receive from those, while Portal was still trying to recover his capital. Portal’s statement showed that the remaining value of Mr A’s UCIS investments was £0.76.

In December 2020 Mr B complained to Portal about the suitability of the advice to transfer his pension, as far as I’m aware Portal didn’t reply to that complaint. In January 2021 he brought his complaint to us. He said, amongst other things that:

- Given the valuable benefits available from his DB scheme Portal shouldn’t have advised him to transfer out of it.
- Mr A had a cautious attitude to risk but Portal recommended he invest in high-risk products.
- He had lost out financially as a result.

One of our investigators looked into it. She initially didn’t think that Portal had done anything wrong. But, after reviewing Mr A’s appeal against her view, she changed her assessment. She said she didn’t think Portal had followed a fair insistent client process and recommended that it pay Mr A compensation.

Portal disagreed, it said that the regulator’s rules our investigator had referred to weren’t in place at the time it gave advice to Mr A. Our investigator wasn’t persuaded to change her opinion, so the complaint was referred to me to make 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.

The regulator's position

The FCA says in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. In this case, it seems that Portal considered a transfer value analysis system (TVAS) report. Portal hasn't provided us with a copy of that TVAS, but it has recorded that Mr A was unlikely to be better off than if he remained in the scheme. And it advised Mr A against making the transfer. But it noted that as he wanted to go ahead anyway it could arrange that but would treat him as an insistent client. It might help if I explain that where a consumer decides to proceed with an investment against a financial adviser's advice then the consumer is known as an "*insistent client*".

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were COBS 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.

Was Portal's advice presented fairly?

While Portal's communication with Mr A did set out that its recommendation for him was *not* to proceed with the transfer, I think this was seriously undermined by the process it followed in offering advice and also in the statements it made.

For example, when it wrote to Mr A on 28 November 2011, two of the three options it put to him involved him taking TFC of almost £9,300. So it likely raised his expectations at that point that he could have entitlement to a significant lump sum. But that was before it gathered any real knowledge of Mr A's situation and whether or not it might be in Mr A's best interests to have such a large sum dangled in front of him. Similarly, after speaking with Mr A on 15 December 2011 Portal wrote to him. It again said it thought he shouldn't transfer out of the DB scheme but then in the next paragraph said that if he wanted to do so it could help him, while treating him as an insistent client.

So Portal had already discussed with Mr A what his options were before it gave him its suitability report. And, it's on the basis of that discussion that Portal says Mr A decided he wanted to go ahead with the transfer on an insistent client basis. But at that point Portal hadn't yet produced its suitability report. So any information it gave to Mr A, could only have been presented in a raw state, that is without the analysis contained within the suitability report. It's for this reason that I think the advice process it employed was flawed. That's because I don't see how Portal could expect Mr A to make an informed decision about going against its recommendation when it hadn't given him all the information he needed in order to make that decision. That is, it gave him some limited information relating to the critical yield and expected him to make a determination that started him down the road of the insistent client process without giving him enough detail to reasonably make that decision.

A much clearer process would have been for Portal to provide its advice and recommendations as a whole, taking into account Mr A's objectives and attitude to risk. That advice should have considered the overall picture – both of transferring out of the DB scheme *together with* the choice of pension and Mr A's desire to take TFC immediately. Only then should Portal have clearly set out in one document why transferring out of the scheme wasn't in Mr A's best interests. Instead, it's apparent that it first discussed the matter with him and while it recorded that its advice was not to transfer, it also told Mr A that it could

arrange the transfer for him anyway. So, alongside its recommendation not to transfer, it also told Mr A that he could take a lump sum immediately. It was only later that it gave Mr A written information about the proposed alternatives in its suitability report, which was after Mr A had already said he wanted to transfer out of the DB scheme.

Also, Portal's recorded that Mr A's first objective was to have access to TFC. It noted that Mr A would like it to help out family. But I've seen little evidence it discussed with Mr A in detail why he wanted to give up guaranteed pension benefits in order to access TFC at that time. That is I've seen no compelling evidence it got to the bottom of what Mr A wanted to achieve by taking cash then. And while Portal's written that Mr A wanted to help family out, it hasn't made any record of who those family members were or why they so desperately needed access to cash from Mr A's pension funds. And while Portal's recorded that Mr A wasn't keen on taking on extra borrowing, there's no evidence that it explored with him why that might have been a more advantageous strategy for him and his family to follow in order to access funds.

Further, I haven't seen any evidence that Portal explored whether Mr A could remain in his DB scheme and take funds from it once he reached 60, which was less than three years away. Despite requests Portal hasn't provided us with any of the information that the DB scheme gave to it about Mr A's pension entitlement. So I can't make any assumptions about what benefits Mr A may have been able to take from the DB scheme at age 60. But it's certainly possible that Mr A could have taken TFC and an income from the scheme at that time. But there's no evidence that Portal explored this with him to see if this was in his best interests.

Portal said the critical yield was too high to be realistically achieved. So it was extremely unlikely that an alternative arrangement would match the DB scheme benefits in monetary terms. And that made it all the more important that the other reasons for transferring were sufficiently compelling. But Portal didn't apparently explore with Mr A why those objectives, such as taking TFC straightaway, was worth giving up his guaranteed benefits from his DB scheme for. I don't see how Portal could actually give Mr A suitable advice in respect of his objectives without knowing the basic facts about what he wanted the cash for. And I've seen no evidence that Portal effectively advised Mr A about the long-term nature of pension planning. That is the need for a pot of funds to provide an income for many years ahead.

In fact I've seen no evidence that Portal sought to find out what Mr A's income needs in retirement would be or how he intended to achieve those. And without finding out what his needs in retirement were Portal wasn't in a position to reasonably challenge Mr A's understanding of why he thought it was reasonable to go against its recommendation. So, in order to advise Mr A, clearly, fairly and without misleading him Portal needed to do an analysis of what Mr A's likely income in retirement actually would be and then compare that with his needs. But I've seen no evidence that Portal did the appropriate analysis and advised Mr A accordingly. I think that was something it needed to do in order to ensure it was providing suitable advice. Instead it recommended that Mr A should not transfer out of his DB scheme, then later in the same report said that it would recommend he transfer to a specific SIPP.

Portal did give Mr A advice not to transfer out of his DB scheme and did bring some of the risks of doing so to his attention. But I don't think it can fairly rely on its recommendation to Mr A not to transfer. That's because Mr A apparently made his initial decision to go against its advice before Portal had given him its suitability report. It then followed up its recommendation not to transfer with information about how he could do that anyway, together with a recommendation to transfer into the SIPP. I think that sent mixed messages about what Portal's genuine recommendation was.

Portal's role was to discern what Mr A's wants and needs were and why Mr A wanted to transfer his pension. Its role wasn't simply to do what Mr A wanted without appropriate analysis and challenge of his motives for doing so with the implications of taking those actions with him. But I've seen no evidence of such a challenge even though that was in Mr A's best interests. Indeed I've seen no evidence that Portal explored with Mr A exactly what he wished to do with his TFC and why. Instead, its suitability report says that Mr A's objective was to take the lump sum immediately without exploring what Mr A's wants and needs were. And I don't think Portal met its obligations to challenge his objectives in light of what he would be giving up. But there's simply no evidence it explored with Mr A what he intended to achieve by transferring his pension and if he could achieve that through another means without giving up the benefits from his DB scheme.

It follows that I don't think Portal did enough to fully advise Mr A of his options before it showed him down the insistent client road. And I think Mr A could have misunderstood or believed that overall, Portal was recommending that he might benefit from going ahead with the transfer. So I don't think it treated him fairly. And, if it had done so and provided the level of advice I think it should have, I think it's unlikely that Mr A would have transferred out of his DB scheme.

Portal might well argue that Mr A would have transferred out of the scheme regardless of what it told him. But I'm not persuaded that Mr A would've insisted on transferring out of the DB scheme, against Portal's advice if it had brought all of his options to his attention. I say this because Mr A had no real investment experience. But he was taking a significant risk of losing the guarantees from his DB scheme by transferring out of it. So I believe that if Portal had challenged Mr A about his need to take TFC immediately, it's likely Mr A would have been in a different position. So, if Portal had provided him with clearer advice against transferring out of the DB scheme, challenging his motives for doing so and explaining why it wasn't in his best interests, I think he would've accepted that advice and remained in the DB scheme.

Suitability of investments

Portal recommended that Mr A invest in UCIS within a SIPP. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr A, it follows that I don't need to consider the suitability of the investment recommendation. This is because if Portal's advice had been clearer from the outset I don't think Mr A would have decided to act as an insistent client. That means he would have remained within the DB scheme and so the investments in the UCIS wouldn't have arisen.

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

Putting things right

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

For clarity, I understand that Mr A did access some income from his SIPP before the funds became depleted. But I also understand he retired at 65, so this should be the basis for the calculations.

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.

My aim is to return Mr A to the position he would have been in but for Portal's actions. It seems likely that some or all of Mr A's investments in the SIPP are illiquid, meaning they can't be readily sold on the open market. If this is the case it can be complicated to establish their value.

To calculate the compensation in this event, 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 investments.

If Portal is unable to buy the investments, they 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 A to provide an undertaking to account to it for the net amount of any payment he may receive from the investment in future. 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 A to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

In order for the SIPP to be closed (should Mr A wish to move his investment portfolio) and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr A can discuss with his SIPP 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. To provide certainty to all parties, I think it's fair that Portal pay Mr A an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP 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 Portal 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 A 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.

My recommendation would not be binding. Further, it's unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A 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 A to accept or reject my decision before 24 August 2022.

Joe Scott
Ombudsman