

The complaint

Mr K complains Portal Financial Services LLP, incorrectly advised him to transfer his defined benefit pension plan to a personal pension causing him financial loss.

Mr K is being represented by a Claims Management Company (CMC). For ease, all references to Mr K will include communications from the CMC.

What happened

In late 2013 Mr K said he was cold called by Portal, a claim it denies. It says Mr K approached it for advice. In any event, a discussion took place between Portal and Mr K about his pension arrangements. At that time Mr K had two Defined Benefit (DB) Occupational Pension Schemes (OPS).

On 18 October 2013 Mr K was sent an 'options letter'. This letter was headed *"Releasing Tax Free Cash from your Pension"*. Amongst other things, the letter said: *"These days purchasing an annuity is not the only option open to those about to retire. 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. This gives you much more flexibility in your choices at the time."*

The options letter listed both Mr K's OPS, which I'll refer to as 'OPS1' and 'OPS2'. The value of each OPS was as follows: OPS1 had a transfer value of £79,451 with a critical yield of 12.46%; and OPS2 had a transfer value of £29,808 with a critical yield of 61.1%. The letter explained the critical yield by saying *"The critical yield figure above is broadly designed to show how much a new pension fund would need to grow by every year in order to match the benefits you would be giving up from your existing scheme."*

Under the heading *'What Are Your Options Right Now?'*, Portal told Mr K there were three basic options open to him which it said were as follows:

Option 1: Do Nothing

You could leave your pension benefits with your current pension providers.

Option 2: Pension Release

You could transfer your benefits and release a tax free cash lump sum of up to £27,314 from your pension fund, leaving the residual amount invested until you need to take a regular income from your pension.

Option 3: Take Full Benefits and Retire with an Income

You could take up to £27,314 as a tax free cash lump sum and use the remaining fund to produce an income, which may or may not be from an annuity. We would use the open market option to get the best possible deal for you."

A telephone consultation followed with a Portal adviser, after which a second options letter dated 20 November 2013 was sent to Mr K. Amongst other things, this said:

“You currently have a pension with [OPS1] which has a Transfer Value of £79,451, from which you could release a total amount of £19,862 as a tax free lump sum. However, as the Critical Yield (growth rate required to match your guaranteed benefits with [OPS provider] is 18.67% it would be against our recommendation to do this. Furthermore, you will be waiving your entitlement to a guaranteed pension of £3,250 per annum plus a lump sum of £21,672 which is payable at retirement age 60.” This letter didn’t refer transferring the OPS2.

In this letter, the adviser told Mr K that if he (Mr K) decided to proceed with the transfer, in spite of the recommendation not to do so, Portal could help with this. However, the adviser said Mr K would need to be treated as an ‘insistent client’. To choose this option, Mr K was required to complete an insistent client form which was enclosed with the second options letter. Portal has been unable to provide a copy of this completed form, but said it asked Mr K to confirm he was aware of the benefits he would be relinquishing.

A suitability report (‘suitability report’ or ‘report’) dated 11 December 2013 was prepared by the adviser. This set out Mr K’s circumstances as follows:

- He was 55 years old and married.
- He lived in rented accommodation paying rent of £200 per month.
- He was unemployed but was a registered carer for a family member and received total monthly state benefits of £420.
- He had two OPS plans.
- His disposable income each month was £46.

Portal’s adviser noted in the report he wasn’t looking into the OPS2 plan because of the high critical yield and guaranteed minimum pension attached to the policy. In terms of OPS2, under the heading ‘My Recommendation’ the adviser said he was recommending Mr K leave his OPS1 where it was. But he went on to say Mr K was being treated as an insistent client and said under the heading ‘My recommendation is that you’: *“Transfer your [OPS1] policy to a [name of provider] Personal Pension.”* The adviser said the recommendation would meet Mr K’s objectives which were to go on holiday and to cover general living costs.

Whilst the adviser noted in the earlier sections of the report he was not recommending a transfer, later in the report at page 15 he said: *“The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider.”*

The transfer value of OPS1 and critical yield was the same as that set out in the second options letter. The adviser reiterated that if Mr K was to go ahead with this transfer, he (Mr K) would be giving up access to a pension (OPS1) of £3,250 plus a lump sum of £21,672 per year upon reaching 60.

The report set out some alternative ways for Mr K to ‘generate cash’ to meet his objectives. This included taking out a loan, which the adviser said Mr K did not want to do. Under ‘Disposable Income’ the report said: *“You [Mr K] wish to use your tax free cash to supplement your disposable income”*. And under ‘Assets’ the adviser noted Mr K didn’t have sufficient assets to raise the cash required. The adviser concluded: *“We were unable to determine other methods of raising capital for you beyond those listed above.”*

The suitability report went on to describe other types of pensions Mr K could consider. But these were mainly ruled out because they would not allow him access to his tax-free cash allowance and/ or he was not entitled to transfer into those schemes.

Mr K's attitude to risk was assessed as 'balanced', which, amongst other things, the adviser said meant he (Mr K) had a 'moderate level' of knowledge about financial matters. Mr K was recommended to transfer to an income drawdown pension plan whereby he could receive his tax-free cash lump sum of £5,000. And based on his attitude to risk, the adviser recommended Mr K invest the residual £74,451 into a Life Strategy 60% Equity Fund.

The report set out the fees which applied which included an initial adviser fee of 5% and an ongoing annual fee of 1%. The pension provider charges were also listed.

To accept the adviser's recommendations, Mr K was asked to complete a declaration form, which amongst other things confirmed:

- He had understood the advice he had been given particularly about the critical yield.
- He was aware of the guaranteed benefits he would be giving up.
- He was aware the advice was not to transfer.
- He wanted to proceed on the basis that his priority was to go on holiday and have funds to cover his general living expenses over his retirement planning.
- He was aware of all the charges that applied.

The transfer was completed on 10 January 2014 and the tax-free cash of £5,000 was paid to Mr K. His remaining pension savings were invested in line with the advice set out in the suitability report. Between April 2015 and November 2021, Mr K made several withdrawals from his pension plan totalling £60,771.

In October 2020 Mr K complained to Portal. Mr K's complaint was that he had been induced to transfer following a promise from Portal that the value of his personal pension plan would grow in excess of his OPS1. He considered Portal's advice was negligent. He estimated he has lost out on around £40,000 as a result of Portal's advice.

Our investigator recommended upholding the complaint. In brief, he didn't think it had been reasonable for Portal to treat Mr K as an insistent client. So, he didn't think Mr K should have been assisted in transferring his pension savings from the OPS to the personal pension. As well as recommending financial redress, our investigator recommended Portal pay Mr K £300 for the distress and inconvenience it had caused to him.

Portal disagreed. It said it had carefully followed the regulator's requirements for dealing with insistent clients. It thought Mr K had been given clear information about the risks of the transfer, and he'd decided to proceed regardless of its advice. Portal said it had assessed Mr K's attitude to risk and so, given it had treated him as an insistent client, it had implemented an appropriate investment approach. Portal added Mr K's decision to take further withdrawals validated its assessment of his need for flexible access to his pension. Portal asked for an Ombudsman's decision on the matter.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr K and by Portal. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities.

The first matter to consider is what relevant regulations were in place at the time of the advice in 2013/ 2014.

The starting point is the Conduct of Business Sourcebook's (COBS) 2.1.1R requirement that a regulated firm should: "...act honestly, fairly and professionally in accordance with the best interests of its client...". And in line with the requirements of COBS 9.2.2R, Portal needed to gather the necessary information for it to be confident its advice met Mr K's objectives and that it was suitable. In essence, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process so the consumer can be appropriately advised.

There were also specific requirements and guidance relating to transfers from defined benefit schemes. COBS 19.1.2 required firms to:

- (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 or other pension scheme with safeguarded benefits;*
- 2) ensure 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, convert or opt-out, a firm should start by assuming that a transfer, conversion 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, conversion or opt-out is in the client's best interests."*

I'll turn now to the particular circumstances of Mr K's case in light of these rules.

Whilst I've not seen the fact find used by Portal, it's clear from looking at the suitability report, that it gathered the necessary information from him and the administrator of his OPS before preparing the suitability report. It used this information to calculate what is known as the critical yield. This was set out to Mr K firstly in the options letters and then the suitability report. As noted in the option letters, the critical yield, in simple terms, is the rate at which Mr K's pension investments would need to grow after any transfer in order to replicate the benefits he was giving up from the OPS.

The second options letter sent to Mr K in November 2013, said Portal was of the view that the figure of just over 18% for the OPS1 was unattainable. And this was the reason its adviser was not recommending the transfer. I think Portal's recommendation was the correct one to make. Mr K held valuable DB guaranteed benefits with the OPS. And it seems he had only one other, relatively modest, pension which was valued at just under £30,000 at the date of the advice. So, I don't think it would've been appropriate to recommend that Mr K give up his guaranteed benefits and transfer his pension savings to a personal pension which didn't carry the same guarantees. This is clearly in line with the presumption the regulator set out in COBS 19.1.6.

Portal says once it had delivered its advice to Mr K to not transfer his OPS1, he asked to be treated as an insistent client. That would mean Mr K was effectively disregarding Portal's advice and asking that the transfer proceed in spite of it.

But, in my view, the regulatory process, as I've outlined above, wasn't just that Portal needed to advise Mr K that he shouldn't transfer out of a DB scheme, which was mainly focused on the critical yield aspect of its advice. I think the regulatory duties placed a number of obligations on Portal to ensure it had provided Mr K with sufficient information about the risks he was taking.

I think the regulatory sections I've set out above, make it clear that the consumer should be left in a position where they can make an informed decision before deciding on what course of action to take. And as noted above, the starting position is that the transfer was unsuitable. Further, it was also important for Portal to ensure it didn't act in such a way that persuaded Mr K to follow its insistent client process.

So, in light of all that I've set out above, I'll consider whether it was right for Portal to treat Mr K as an insistent client and to facilitate the transfer of his OPS1 benefits.

From the paperwork provided to this service, I'm not persuaded Portal did enough to warn Mr K about the risks he was taking with his pension savings. In my view, from the outset Portal's documents very much gave the impression to Mr K that its processes would simply facilitate his wish to take his tax-free cash lump sum. I can't see the documents he was provided with clearly explained the regulator's assumption that generally transfers of this type wouldn't be considered to be in the best interests of a consumer.

Mr K's reasoning, as set out in these documents, suggests to me his focus was very much on the output of his decision – which was to access a proportion of his tax-free cash. It doesn't suggest to me Mr K had been sufficiently advised about the risks of going against the advice to transfer to meet his objectives. All of the documents he was provided with simply focused his mind on the access he could gain to his tax-free cash allowance.

I note Mr K was given other options but these were quickly ruled out. So, I can understand why Mr K thought the only way he could meet his objectives was to access his pension savings. But by Portal's own assessment, whilst Mr K's income was modest, he did have monthly surplus income. And there were no recorded debts which needed attention such that access to his pension savings was particularly urgent or necessary.

I also note that Mr K only wanted to access a small proportion of his tax-free cash and he didn't opt to transfer his other OPS2. This all suggests a very cautious approach to accessing his pension benefits. In my view, rather than comprehensively and convincingly advising Mr K against the transfer, Portal's actions simply served to endorse and encourage Mr K's decision to transfer rather than to challenge it. A pension is meant to provide income in retirement not to pay for non-urgent lifestyle purchases (like a holiday) and there didn't appear to have been any assessment by the adviser about Mr K's legitimate financial objectives on which to base advice, particular when doing so is likely to leave him worse off in retirement.

There are several instances of this but two of the most important are contained in the suitability report. The first is where the adviser said his recommendation was not to transfer. But immediately after this he went on to say: *"my recommendation is to invest in..."*. Second, in the report the adviser said: *"The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider."*

I think these statements didn't make it sufficiently clear to Mr K the level of risks he was taking with his pension benefits. In fact, I think they served as, at the very least, an endorsement of his decision to transfer. I consider the report together with the other documents sent to him, gave the message to Mr K that the transfer would be more beneficial to him than staying with his OPS1.

On balance, I don't think it is reasonable for Portal to say it only effected the transfer because Mr K requested it to do so as an insistent client. I don't think Portal could reasonably conclude, in line with its regulatory duties, that Mr K was fully aware from what its adviser told him, that his best option was to take no action at all. Instead, I think from the very outset of its relationship with Mr K, Portal led him to understand transferring his OPS1 which would enable him to access a tax-free cash lump sum, would be the most appropriate course of action to take.

I don't agree with Portal's argument that the further withdrawals made by Mr K meant it had been right to facilitate the transfer, as he needed access to the money. Firstly, this is with the benefit of hindsight. Secondly, whilst Mr K's income was low at the time of the advice, he still, according to Portal's own assessment, had a monthly surplus income. This may explain why it was more than a year before he made the first withdrawal. And finally, if anything, I think this shows the detrimental impact of Portal's willingness to facilitate the transfer without first providing proper advice in that it allowed Mr K unfettered access to funds which were intended to provide an income in his retirement.

Based on all the evidence and information, I don't think it was reasonable for Portal to treat Mr K as an insistent client. I don't consider he was given sufficient information to make an informed choice. And I consider if Mr K had been properly advised he would more likely than not have followed Portal's advice not to transfer. I think it was Portal's offer to facilitate the transfer and its, often contradictory advice, that persuaded Mr K to transfer against his best interests.

For all these reasons, I'm upholding the complaint.

Putting things right

A fair and reasonable outcome would be for Portal Financial Services LLP to put Mr K, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Portal Financial Services LLP 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.

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 K's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr K'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 K 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 K within 90 days of the date Portal Financial Services LLP 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 Financial Services LLP to pay Mr K.

Income tax may be payable on any interest paid. If Portal Financial Services LLP deducts income tax from the interest, it should tell Mr K how much has been taken off. Portal Financial Services LLP should give Mr K a tax deduction certificate in respect of interest if Mr K asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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.

Portal Financial Services LLP should also pay Mr K £300 for the distress and inconvenience arising from the disruption this has caused to his retirement planning.

My final decision

I uphold the complaint and order Portal Financial Services LLP to pay redress as I've set out under the heading 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 12 August 2022.

Yolande Mcleod
Ombudsman