

The complaint

Mr D complains about the advice given by Portal Financial Services LLP to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). Portal processed the transfer of Mr D's scheme benefits to the SIPP on an 'insistent client' basis. Mr D says Portal badly advised him and has caused him a financial loss.

What happened

In or around 2016, Mr D was approaching his 55th birthday and was employed earning around £38,000 a year. He wasn't intending to retire for the foreseeable future. Mr D had no savings, assets or investments and lived in rented accommodation. His only retirement provision (other than his state pension) was his employer's DB occupational pension scheme which, in 2017 was calculated to give him an income of £12,694 per year and a tax-free lump sum of £84,627 at his normal retirement age of 65.

Mr D was worried that there might be a change in his job, or even redundancy, which could lead to a reduction in his wages. He had unsecured loans of £27,000 and a credit card debt of £2,000 which he was worried about servicing should his employment conditions change. In 2016, Mr D came into contact with Portal which introduced him to the possibility of releasing cash from his pension.

In mid-July 2017, Portal took some details from Mr D over the phone, including that he was in good health, that he didn't want to take an income from his pension and was still working. During the call Portal told Mr D that it was possible for him to take a maximum lump sum from his pension of £50,887 if he transferred out of his DB scheme.

Portal completed a fact-find during the call to gather information about Mr D's circumstances and objectives. It noted on the fact-find that Mr D's main objective was to take maximum tax-free cash (TFC) in order to clear down debts and take a holiday to America. Other objectives noted were flexibility of income drawdown, death benefits and the option to take early retirement at age 60.

Mr D also ticked the box on the fact-find that stated that he had an immediate need for TFC and would want to proceed even if this risked a shortfall in his long-term retirement provision and/or if there were associated costs. Mr D's income was noted at being £37,000 per year (including overtime). Portal noted that it had discussed with Mr D the loss or reduction of his guaranteed DB scheme benefits and that if he took TFC now, then he could not take any TFC at a later date. Portal also carried out an assessment of Mr D's attitude to risk, which it deemed to be 'cautious'.

Portal sent a letter to Mr D on 3 August 2017 in which it said it strongly recommended that he didn't transfer his DB pension scheme because of the guaranteed benefits he would be giving up. The letter immediately went on to say that if he did still want to effect the transfer then it could help him do so that but it would need to treat him as an 'insistent client'. The letter included an options form and asked Mr D to tick the box on the form that was right for him.

Mr D signed the form on 9 August 2017 and ticked the box that said he understood Portal's recommendation to leave his DB scheme pension where it was but that he wanted it to continue to review his pension and set up a flexi-access drawdown plan so he could release TFC of £50,887 and invest the balance of £152,663. Mr D also ticked a box acknowledging the critical yield for the new plan was going to be 10.4% and that he was giving up guaranteed benefits.

Portal sent Mr D its suitability report on 21 August 2017 together with a covering letter. The covering letter said it was 'delighted' to recommend that Mr D transfer his pension to a SIPP and that in so doing he would receive the TFC previously identified and that it would manage the remaining pension fund to maximise performance and keep it under review. The letter also asked that if Mr D agreed with its recommendation then he should sign the enclosed forms. The suitability report said Portal had already recommended to Mr D that he didn't transfer his DB scheme so was now treating him as an insistent client. It went on to say that it was recommending Mr D transfer his DB scheme to a flexi-access income drawdown SIPP splitting the fund between fixed interest at 53.4%, equities at 41.6% and 5% in cash.

Mr D signed the transfer forms on 4 September 2017 and the transfer took place a few days later.

Mr D complained in November 2020 to Portal about the suitability of the transfer advice. He said Portal had failed to provide clear and understandable advice about the comparison of pension benefits between the DB scheme and the proposed SIPP. Mr D said the suitability report referred briefly to his stated objective to clear down debts but otherwise provided only generic objectives. He said there wasn't any consideration about whether his only stated objective could have been met without transferring away from the scheme. Mr D said that had he been clearly warned about the specific benefits he was giving up he would've accepted that advice.

Mr D went on to say that he was reliant on the DB scheme as his only pension provision. And he said he was asked to sign an insistent client form facilitating the transfer before any suitability report was produced. Finally he said that the investments his pension had been placed in were unsuitable and had performed poorly.

Mr D said he wanted compensation to put him in the position he would have been in had he received suitable advice from Portal. Portal looked into Mr D's complaint but didn't think it had done anything wrong. It said it had clearly communicated to Mr D that it wasn't in his best interests to proceed with the transaction. And it said it had made him aware of the guaranteed benefits he was giving up. Portal said it had followed the correct regulatory procedures and had provided Mr D with all the information he needed to make an informed decision but that he had wished to proceed as an insistent client.

Mr D referred his complaint to our service in June 2021. Our investigator looked into the complaint and recommended it was upheld. He thought that Mr D couldn't be said to be a true insistent client. He thought that Mr D wasn't sufficiently experienced or qualified to decide he was an insistent client. And he thought that Portal hadn't done enough to dissuade him from insisting on the transfer given the DB scheme was his only pension provision, that he lived in rented accommodation and wanted to clear his debts and take a holiday. Our investigator recommended that Portal pay compensation to Mr D.

Portal disagreed with our investigator's findings stating that it had complied with all the regulator's requirements for the insistent client process and that it was satisfied that Mr D understood the risk he was taking by proceeding.

Our investigator wasn't persuaded to change his mind 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. I've explained my reasons below.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr D best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr D as an insistent client. An insistent client is one that wishes to take a different course of action from that being recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there were no regulatory rules in place in respect of insistent clients. But in February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There are three key steps, which it set out on its website as follows:

- 1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*
- 2. You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
- 3. It should be clear to the client that their actions are against your advice.*

The regulator said the advice should be set out clearly in the suitability report, and that it needed to be clear with its client about the risks of their chosen course of action and that he/she is acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this would normally be clear. The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

"The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.

The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a

separate document to the original personal recommendation. Robust warnings were given and documented.”

Whilst this was guidance, and not rules, I would've expected Portal to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

Portal says that it provided suitable advice and acted in Mr D's best interests. It says that it followed the correct insistent client process. Mr D says Portal's advice was negligent and he's suffered a loss as a result.

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

I say this because on 3 August 2017 following the telephone discussion Portal had on 19 July 2017 with Mr D about his pension options, it sent him what I think can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match Mr D's guaranteed benefits from his DB scheme, and because he'd be giving up those guaranteed benefits, it recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum. But I don't think this letter clearly set out the risks associated with the transfer.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr D's best interests. But the information on this form was limited to the loss of guarantees and the growth required to match his existing benefits. While Portal later sent a more detailed suitability report, which I will refer to later on, at this stage Mr D had little information to go off to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portal recommended Mr D should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Portal's recommendation, it enclosed the necessary forms Mr D needed to complete and return to pursue this option. And 'option 1' he was presented with was to go against Portal's advice – the second option was to do nothing as per its recommendation. It strikes me that Portal's process here was geared towards facilitating the transfer.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr D's best interests, not only would it have given more detail upfront and placed greater emphasis on the reasons why the transfer wasn't in Mr D's best interests, it also wouldn't have told him at the same time as delivering its recommendation - albeit briefly - how he could put it aside and bypass it. I think the wording and the emphasis placed on how Mr D could ignore Portal's recommendation was unfair to him and wasn't in his best interests.

I don't think it was in Mr D's best interest to go against Portal's recommendation – yet Portal made it very easy for him to do so. I also think, given the context and the emphasis placed on this, that Mr D could reasonably have interpreted that overall Portal was recommending he go ahead and transfer.

I think it ought to have been clear to Portal that Mr D had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find to suggest Mr D was an

experienced investor – in fact it appears he was completely inexperienced. It is documented that Mr D didn't even have a mortgage. I'm mindful too that Portal assessed Mr D's attitude to risk as being 'cautious'. This process involved Mr D giving answers to a series of questions – one of which was about his understanding of investments to which he replied, "*I think I struggle with understanding investment basics even when an adviser explains things to me.*"

I think this should've put Portal on notice that it had to be very careful if it was to take Mr D through the insistent client route.

I can see that Mr D's insistent client forms included a section where he put in his own words why he wanted to access his pension fund early. And while this was something the FCA guidance pointed to as being good practice, I don't think Mr D's response adequately demonstrates that he knew and understood the risks involved and the recommendation he was agreeing to. I say this not only because the majority of the form was pre-completed and Mr D simply had to tick a box to say that he understood what he was giving up by transferring, but also because the reasons he gave in his words were speculative. Mr D mentions there was 'talk of redundancy' at his place of work, of 'freezing' his OPS and giving him a new contract and pension. But in July/August 2017 it was by no means certain that these things would definitely happen to Mr D in October 2018 or if he would be affected.

And crucially, as I indicated earlier on, he hadn't yet received Portal's full suitability report and had time to read and digest it before having to decide if he wanted to go ahead anyway. So I'm not persuaded Mr D was able to make an informed choice here. And I don't think this document alone sufficiently showed Mr D was an insistent client.

It was only after receiving Mr D's confirmation that he wanted to proceed with the transfer that Portal sent him its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, it was followed by a positive recommendation, advising Mr D to transfer his benefits to facilitate access to his tax-free cash. And this was all set out under a heading titled '*Our recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr D advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr D advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report *after* securing his confirmation to proceed on an insistent client basis.

So, by recommending that Mr D transfer his benefits to a particular scheme, not only did this undermine the recommendation not to transfer, I think Portal has effectively given him a recommendation to transfer out of his DB scheme. If Portal didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr D's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. In my view it shouldn't have separated out the elements. For this reason, I think on receipt of the full suitability report Mr D likely believed Portal was recommending he transfer out of the DB scheme, and that it was reasonable for him to do so.

Mr D's objective for accessing his pension early was to enable him to generate a lump sum which he could use to clear his debts. I can see that Mr D had two unsecured loans. The first was noted by Portal on the fact-find as having an outstanding balance of £16,000 to pay at monthly rate of £472 with three years remaining. The second had an outstanding balance of £10,848, cost £452 a month in repayments and had two years left to run. It was also noted

that Mr D had an outstanding credit card debt of £2,000 towards which he was repaying £50 a month. So, in total, Mr D was making monthly payments of £974 towards his debts.

Mr D was recorded as having monthly take home pay (including overtime) of £2,300 and his wife as having take home pay of £281. Portal noted that after all of their outgoings they had a monthly surplus income of £281.

So it is clear to me that whilst Mr D's loan repayments were a substantial portion of his net income he was managing to afford them each month and had surplus income left over. As I've said above, the loans had 2 years and 3 years each yet to run and there was, at the time the advice was given, no certainty about any redundancy or what it would even look like for Mr D if it did happen. So any need to repay them early seems, at the very least, premature. In the suitability report Portal said that it had talked with Mr D about other ways of raising money instead of taking the TFC. It notes that he didn't want to take on any further lending or pay interest and that he didn't have enough disposable income to service his needs. But on the fact-find Portal noted that Mr D did have surplus income left over each month so I don't think this statement can be correct. And whilst Portal says Mr D didn't want to take on further lending, why that was, and what options were discussed (if any) isn't documented.

All in all it seems to me that Mr D's need for extra money to pay off his debt was relatively short term – two to three years at most. By August 2019 Mr D would have cleared one of the loans and be £472 per month better off. So whilst Portal claims to have considered alternative ways for Mr D to meet his need it seems to me it overlooked what I consider to be an obvious and easy solution which was to continue to meet the loan repayments until the balances were cleared down. And I can't see that Portal assessed what income Mr D would need in retirement or how he'd fund it if he transferred out.

And I can't agree that advising Mr D to transfer his guaranteed pension benefits in order to access TFC so he could take a holiday was in his best interests. I'm sure that being able to take a holiday would have seemed attractive to Mr D but I cannot agree that it was suitable to advise Mr D to transfer his DB scheme in order to access what would have been a relatively small proportion of the TFC and for which there existed other means, unexplored by Portal, to raise it. I know that Portal stated in the suitability report that Mr D didn't want to take on any more lending but it doesn't seem to me that it explored the possibility of restructuring the personal loans, perhaps to take their repayment term out a bit, so he could borrow a little bit more if the holiday was a significant priority for him. Doing so would also potentially have lowered his monthly outgoings. But I've seen no evidence such alternatives were explored with Mr D.

Portal noted that one of the reasons Mr D gave for transferring his benefits was that he was concerned about potential redundancy and that that might mean the freezing of the DB scheme. But I can't see that Portal advised him that his DB scheme was protected by the PPF (Pension Protection Fund) nor that, if his worst fears were realised and he was made redundant then he could've explored his options in relation to the scheme at that point in time. And I understand in any event that Mr D remains employed.

I acknowledge there were no specific insistent client rules at the time. But I consider the regulatory rules and guidance that were in place at the time were clear that Portal had to act with due care and skill and in Mr D's best interests. And by not seeking to properly understand Mr D's objectives, actual employment circumstances and what he was really trying to achieve before carrying things out, I'm not persuaded it can be said to have been acting in Mr D's best interests.

Ultimately I don't think Mr D was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objectives. Portal failed to properly understand Mr D's overall position and overlooked or ignored what I consider was the clear and obvious solution to his short-term need as I described above: in other words it failed to recommend to him that it was in his best interests to do nothing . Furthermore, I think the way Portal presented its recommendation to Mr D would've led him to believe it was giving him a positive recommendation to transfer out of the scheme. And I think this would've given Mr D the impression that Portal agreed with his approach.

Portal recommended that Mr D invest in three funds (5% in cash, 41.6% in equity and 53.4% in fixed interest). Mr D says the funds he has been invested in have performed poorly. As I'm upholding the complaint on the grounds that Mr D cannot be truly regarded as an insistent client therefore making the transfer out of his DB scheme unsuitable, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr D should have been advised to remain in the DB scheme and so the investments in the SIPP wouldn't have arisen if suitable advice had been given.

Overall, and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant that Mr D can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr D wasn't clear or fair. It didn't act in Mrs D's best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr D would've still gone ahead. Portal says that because Mr D used his own language and it followed the regulator's guidance to ensure Mr D understood the insistent client process then that is evidence that he would've accessed his DB pension benefits early regardless of Portal's involvement.

But I disagree. If Portal had acted in Mr D's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr D's true objectives at the time, I don't think Mr D would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr D to be an experienced investor who possessed the requisite knowledge, skill or had the confidence to go against the advice and recommendation he was given. I think he relied solely on the advice and process Portal employed.

So if things had happened as they should have, taking everything into account, I don't think it likely Mr D would have insisted on going ahead with the transfer.

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

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr D. So I've also thought about whether it's fair to award compensation for distress and inconvenience. Such awards aren't intended to fine or punish Portal but rather to recognise the emotional and practical impact its actions have had on Mr D. And taking everything into account, including that I consider Mr D is now at the age when his retirement provision is of greater importance to him, I think the unsuitable advice has caused him distress. So I think an award of £300 is fair in all the circumstances.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr D, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr B would have most likely remained in his DB scheme if suitable advice had been given.

Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

My understanding is that Mr D could have taken his pension benefits without reduction at age 67 and he has told our investigator that that is the age at which he intends to retire. So I think, had Mr D remained in his DB scheme, then he would have most likely accessed it at this point. Consequently Portal should base the compensation payment on Mr D's scheme's normal retirement age of 67.

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 D's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D'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 D 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/her/their 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 D 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 D.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

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

Where the compensation amount already exceeds £160,000, I would only require Portal to pay Mr D any interest as set out above on the sum of £160,000.

Portal should also pay Mr D compensation of £300 for the distress and inconvenience its unsuitable advice caused him.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portal pays Mr D the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts this decision, the money award becomes binding on Portal.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 9 September 2022.

Claire Woollerson
Ombudsman