DRN-3506053

Financial Ombudsman Service

The complaint

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

What happened

Mr A approached Portal in April 2016 having been referred by another company to discuss his pension and retirement needs. Advising Mr A over the phone, Portal completed a fact-find to gather information about his circumstances and objectives. It established the following:

- That Mr A was 55 years old, married with no financial dependents and hoped to retire at 60;
- That Mr A was a homeowner with a mortgage with an outstanding balance of £30,000;
- That apart from his DB scheme and a further personal pension he had, Mr A had no other assets, savings or provisions for retirement;
- Mr A had one credit card with an outstanding balance of £3,500;
- Mr A's attitude to risk (ATR) was noted as balanced and his capacity for loss as suitable;
- Mr A had no previous investment experience and confirmed he found investment matters difficult to understand.

Mr A had the following pension arrangements:

- A DB scheme with a former employer for which Mr A had 4 years of membership, stopping contributions when he left in 1998. The scheme had a normal retirement age of 65. The transfer value analysis ('TVAS') report for the scheme stated the transfer value was £47,159 and estimated that at age 65 Mr A would be paid an annual pension of £2,319. The scheme would also pay a spouse's pension at 50%.
- A personal pension which at the time of the advice had a transfer value of £35,487. The pension was subject to regular bonuses, a terminal bonus and had 61.58% protected TFC which would be lost on any transfer.

On 11 May 2016 Portal sent Mr A its letter of recommendation and its suitability report in which it advised Mr A to transfer both his DB scheme and the personal pension plan he had into a SIPP and investing the proceeds in fixed interest, equity, property and cash funds. The suitability report said Portal was making the recommendation so that Mr A could access flexi drawdown of his fund. It also noted Mr A had the following objectives which formed the basis of its reasons to recommending the transfer from his DB scheme:

- To have greater flexibility about how he accessed his pension in the future because Mr A wasn't sure he needed an income from his pensions;
- To release cash to pay his credit card bill of approximately £3,500;
- To maximise his tax-free cash (TFC) versus his current scheme;
- Greater choice and flexibility when it came to death benefits;

- To have ownership and control of his pension fund;
- A willingness to take an investment risk.

The TVAS report assessed the critical yield (for the DB scheme) if Mr A retired at 60 to be 24.9% if taking an annuity only or 20.2% if taking the full amount of TFC and a reduced annuity (both based on a joint life basis). No projections exist for the personal pension plan.

Portal's charges for arranging the transfer were 5% of the fund (cited as £3,729.30) along with an annual management charge of £75 plus 0.48% of the fund value per year.

Mr A proceeded with Portal's recommendation and the transfer of his personal pension took place on 29 June 2016 followed by the transfer of his DB scheme on 1 October 2016. In total, £82,932.96 was transferred with Mr A taking £20,733.51 in TFC following the transfers.

Mr A complained in May 2021 to Portal about the suitability of the transfer advice he'd received. He said the guaranteed benefits he was giving up by transferring out of his DB scheme hadn't been properly explained to him. Mr A said that, as a consequence, he'd been left with significantly lower benefits in retirement. Mr A also said that Portal hadn't discussed any alternative ways he could have met his objectives. He said that Portal should only have considered taking TFC from his personal pension plan. And, had he remained within the DB scheme he would've been entitled to a significantly higher level of benefits at retirement than he now would have. So, he said he'd suffered a significant financial loss as a result of the unsuitable advice to transfer that he'd received.

Portal looked into Mr A's complaint but didn't uphold it. It said it had prioritised Mr A's need for flexibility and met his objectives by facilitating access to his TFC which was enough to pay off his credit card bill and give him peace of mind. Portal also said that Mr A didn't want an income from his pension in retirement so access to a drawdown account for flexibility was suitable for him.

Unhappy with the outcome of Portal's investigation, Mr A referred his complaint to our service. Our investigator looked into it and recommended that it was upheld. He said the DB scheme offered a guaranteed income for life and formed a significant part of Mr A's total pension provision. He said the evidence gathered on the fact find indicated Mr A had a low capacity for loss which would've meant the security of the guaranteed benefits were very important to him. Our investigator thought that Portal had been wrong to base its recommendation to Mr A on the growth rate for the plan rather than the critical yield. He also thought that the transfer was not financially viable and that the objective of accessing TFC to pay off the credit card bill could've been achieved by other means. Our investigator also thought Portal had overstated the importance of flexibility to Mr A and had given Mr A unsuitable advice to transfer his personal pension plan. Our investigator required Portal to compensate Mr A for the unsuitable advice it'd given him.

Portal disagreed with our investigator's findings. It said in response that it had explained the critical yield and growth rates to Mr A and gave him an explanation about why the two figures were different. It said the comparisons it carried out indicated it believed the SIPP may match the investment growth identified. Portal disagreed that Mr A had no capacity for loss. And it said it had discussed alternative means of raising money to clear the credit card balance with Mr A as noted on the fact find and in the suitability report. Portal said it'd advised Mr A of all the charges associated with the transfer and ongoing management of the SIPP.

Our investigator thought about what Portal had said but wasn't persuaded to change her 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.

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 A's best interests (COBS 19.1.6). And having looked at all the evidence available, I'm not satisfied it was.

Financial viability

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The critical yield required to match Mr A's benefits at age 60 was 24.9% if he took a full pension and 20.2% if he took TFC and a reduced pension. This compares with the discount rate of 3% per year for 4 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr A's 'balanced' attitude to risk and also the term to retirement. There would be little point in Mr A giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 20.2%, I think Mr B was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk. But crucially, I don't think that was made at all clear to Mr B in the suitability report.

Portal has provided cashflow models which it says shows Mr A would've been able to meet his needs after the transfer of the DB scheme despite the high critical yields identified as necessary to do so. I've considered the cashflow models, which are based on a net annual return rate of between 5.66% and 5.94% over the last 10 years against a predicted required growth rate of 5.4%. Whilst Portal has said that the critical yield needed for the DB scheme was 24.9% it has based its recommendation that Mr A transfer on the growth rate required figure (5.4%) it identified. But the growth rate is based on the assumption that Mr A is open to greater flexibility when taking an income from his pension and to taking additional investment risk. Unfortunately for Portal however, I don't think Mr A's personal circumstances can reasonably be said to justify such assumptions. In addition Portal doesn't appear to have made any mention of inflation. And Mr A's pension will be subject to an ongoing annual charge of £75 per year and 0.48% per year, plus an ongoing advice charge of 1%, meaning he would need to achieve higher growth to offset the extra charges.

The DB scheme was a significant component of Mr A's retirement income, an income that looked like it would be modest. Whilst I note Portal's point that Mr A told it he didn't need to take an income in retirement I don't think it was reasonable for it to take such a statement at face value without exploring with Mr A *why* he thought that to be the case. I can't see any exploration of how Mr A intended to live after retirement at age 60 if he didn't take an income from his pensions. Nor can I see any basis for why someone like Mr A, who had no previous investment experience and had stated he found investment matters difficult to understand was classed as having a balanced ATR and a willingness to take on additional investment risk. I don't think the information from the fact-find supports such an assessment. Moreover, if Mr A was deemed as willing to take a risk then I would expect to have seen that explored further by Portal; but it wasn't.

In addition, Mr A had no significant assets or anticipated sources of income in retirement (other than any state pension) which supports Portal's conclusion that he had suitable capacity for loss. I can't agree that Mr A had any capacity to absorb a loss on his pension transfer.

Furthermore, Portal's models show that the fund would run out before Mr A reached 80 based on the regulator's lower projection rate and before 95 using the mid projection rate. Portal has said that it made its recommendation based on a predicted growth rate of 5.4% which, it said, compared favourably to past performance of the funds in the previous 10-year period. But, as Portal will know, past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be a more realistic indicator of expected fund growth in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time. So, if returns were lower than Portal predicted, I think its clear Mr A's funds were at risk of running out before he reached the average age of life expectancy (86). Whereas the DB scheme would've continued to pay him an escalating income for the entire remainder of his life however, long that is.

For this reason alone a transfer out of the DB scheme wasn't in Mr A's best interests. Of course financial viability isn't the only consideration when giving transfer advice, as Portal has argued in this case. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

I don't think Mr A required flexibility in retirement. This is because based on the evidence I've seen, I don't think he had a genuine need to access his TFC earlier than the normal scheme retirement age so he could leave his funds invested until a later date. I say this because one of Mr A's stated objectives is to clear his credit card balance of £3,500. But Mr A was already paying that down at the rate of £150 per month which was, for him, affordable. He also had £200 per month left over after his usual expenses. Mr A is noted as telling Portal during the fact-find process that he didn't wish to take on any further lending or pay interest, nor to re-mortgage. Portal also noted that Mr A didn't have enough disposable income to service his needs or sufficient assets to raise the cash he required to clear the loan.

But I can't see that Portal fully explored alternative options with Mr A for dealing with the principal objective of the transfer namely to clear his credit card balance. And one of those options was to do nothing – to maintain the status quo by continuing to pay £150 off the balance every month. Afterall, he was already paying interest on the balance and wasn't mis- managing the account nor was he in arrears. And Mr A had a surplus income of £200 left over (so I don't accept this demonstrates Portal's statement that Mr A didn't have enough disposable income). And if he'd continued to pay off the balance at the rate he was doing then it would've been completely cleared in just over 2 years' time without giving up his valuable DB benefits. He also could have cleared it sooner if he had allocated any funds that remained each month to repaying this bill. However, I can't see that this option was explored by Portal with Mr A. And I think it ought to have been, given how important Mr A's DB scheme was to his retirement – transferring it simply to access a relatively small sum ought to have been a last resort. And the TFC Mr A took was considerably higher than the credit card bill Mr A needed to clear.

I also can't see evidence that Mr A had a strong need for variable income throughout his retirement. Portal noted one of Mr A's objectives was greater flexibility about how he accessed his pension in the future because he wasn't sure he needed an income from his pensions. But Portal didn't explore with Mr A what he was going to live on if he didn't take an income from his pension. Portal's recommendation could arguably be said to be reasonable if Mr A had other significant provision put aside for retirement but he didn't. Portal should have acknowledged Mr A's lack of financial experience and knowledge and explained to him how important his DB pension benefits were.

In addition, given Mr A's circumstances and limited financial and investment knowledge it is very unlikely the he would remain capable of managing his investments into old age or be prepared to pay for ongoing advice given his limited retirement provision. It's reasonable to think that Mr A didn't understand the ongoing cost of having pension flexibility.

So, I'm satisfied Mr A could have met his income needs in retirement through his DB scheme at 60. It is not documented on the fact-find what income Mr A needed per year in retirement. But under the DB scheme, Mr A was entitled to an annual income of £2,319 from the scheme at 60, which met his recorded objectives. He also had the personal pension plan I've mentioned above.

Death benefits

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a SIPP were likely an attractive feature to Mr A. But whilst I appreciate death benefits are important to consumers, and Mr A might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise Mr A about what was best for his retirement provision. A pension is primarily designed to provide income in retirement. And I don't think Portal explored to what extent Mr A was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr A was married and so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr A predeceased her. I don't think Portal made the value of this benefit clear enough to Mr A. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. And as the cashflow analysis shows, there may not have been a large sum left as the fund may have been depleted particularly if Mr A lived a long life. In any event, Portal should not have encouraged Mr A to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

Furthermore, if Mr A genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Portal should've instead explored the option of life insurance; but it didn't.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr A. And I don't think that insurance was properly explored as an alternative.

Control or concerns over financial stability of the DB scheme

I think Mr A's stated desire for control over his pension benefits was both overstated and a generic objective. Mr A was by no means an experienced investor and I cannot see that he had an interest in, or the knowledge to be able to manage his pension fund on his own. Indeed Portal's letter of recommendation states that the SIPP will need to be regularly reviewed. So, I don't think that this was a genuine objective for Mr A – it was simply a consequence of transferring away from his DB scheme.

Nor was the funding of Mr A's DB scheme in a position such that he should have genuinely been concerned about the security of his pension. Furthermore, should the scheme ever end up moving to the Pension Protection Fund (PPF), I think Portal should have explained that this was not as concerning as Mr A thought. As I've explained above, Mr A was still unlikely to match, let alone exceed the benefits available to him through the PPF if he transferred out to a personal pension.

Suitability of investments

I don't agree with how Portal defined Mr A's ATR and I think it should have been lower. So the funds it recommended for him to invest weren't, I think, suitable for someone with no investment experience. But 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 Mr A should have been advised to remain in the DB scheme and so investments in unsuitable funds wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mr A. But Portal wasn't there to just transact what Mr A might have thought he wanted. The adviser's role was to really understand what Mr A needed and recommend what was in his best interests.

It follows that I don't think the advice given to Mr A was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr A was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr A shouldn't have been advised to transfer out of the scheme just to repay a debt that was affordable, and the potential for higher death benefits wasn't worth giving up the guarantees associated with his DB scheme for.

So, I think Portal should've advised Mr A to remain in his DB scheme.

I also have to consider whether Mr A would've gone ahead anyway, against Portal's advice. I've considered this carefully, but I'm not persuaded that Mr A would've insisted on transferring out of the DB scheme, if Portal had advised him it wasn't in his best interests to do so. I say this because Mr A was an inexperienced investor with a balanced attitude to risk and, aside from his state pension (presumably at age 67), his DB pension accounted for a significant portion of his retirement provision. So, if Portal had provided Mr A with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice. It is also worth stating that I've seen no evidence that Mr A would've insisted on going against such advice had it been given.

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.

Personal pension transfer

Portal also advised Mr A to transfer his personal pension into the SIPP alongside his DB scheme giving the same reasons for making the transfer. Portal hasn't provided any information to suggest it carried out financial comparisons of the benefits attached to Mr A's personal pension. But it's not unreasonable to conclude that it is very unlikely that the benefits would be matched. That's because Mr A's personal pension was subject to regular bonuses, a terminal bonus and had a protected tax-free cash allowance of 61.58%. These benefits were lost when the pension was transferred, and due to the projected growth rate of the SIPP, advisor charges and short time until Mr A's desired retirement, I think it's very unlikely that the amount lost from these benefits would be recovered. In particular, Mr A would've lost the very significant higher protected TFC amount, and this couldn't have been replaced through the SIPP.

I therefore think that Mr A's personal pension would be less valuable on retirement after the transfer and he therefore should have been advised to leave his personal pension where it was.

Mr A's representative has suggested that he should have only been advised to transfer the personal pension, instead of both his pensions, to meet his objectives but I'm unable to agree. Mr A's objectives were not a priority and could have been met by other means. Again Mr A was advised to transfer on the basis that he could access tax free cash that was significantly higher than the debt he wished to pay off, reducing his income during retirement that I simply don't think Mr A could afford. It's for this reason that I think the advice to transfer the personal pension alongside the DB pension was unsuitable. Mr A should have been advised to leave both pensions with their existing providers. And as a result of not being advised to do this, I believe his retirement provisions have been financially impacted.

Putting things right

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

What should Portal do?

To compensate Mr A fairly, Portal must determine the ***combined fair value*** of his transferred pension benefits as outlined in Step One and Step Two below. If the ***actual value*** is greater than the ***combined fair value***, no compensation is payable.

fair value – step one

If Mr A had been given suitable advice, I think he would have remained in the DB scheme. Portal must therefore calculate the value of the benefits Mr A lost as a result of transferring out of his DB scheme in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

The calculation should be carried out as at the date of my final decision, 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.

fair value – step two

Portal must compare the value of Mr A's personal pension transferred to his SIPP with that of the notional value from the previous provider shown below to determine the fair value of Mr A's personal pension if suitable advice had been given. I consider that there was no reason for Mr A to have moved his personal pension. It was invested in a with profits fund which met with this ATR.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Value of the personal pension fund transferred	Still exists and liquid	Notional value from previous provider	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 90 days of the business receiving the complainant's acceptance)

Notional Value

This is the value of Mr A's investment had it remained with the previous provider until the end date. Portal should request that the previous provider calculate this value.

If the previous provider is unable to calculate a notional value, Portal will need to determine a fair value for Mr A's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Any additional sums paid into the SIPP should be added to the fair value calculation from the point in time when they were actually paid in. Any withdrawal, income or other payment out of the SIPP should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Portal totals all those payments and deducts that figure at the end instead of deducting periodically.

The combined value of the sums produced by the above two steps is the ***combined fair value***.

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.

In addition, the loss of the protected TFC Mr A had available to him under the personal pension should be quantified by valuing, at the date of calculation, the amount of Mr A's personal pension fund in excess of 25% which would not have been subject to income tax had he not transferred. Portal should establish the marginal rate of income tax the extra taxed funds will suffer in future. As above, I think an assumption of basic rate income tax is reasonable based on Mr A's financial circumstances. This should be factored into the sum ultimately paid to Mr M as compensation.

The payment resulting from all the steps above is the 'compensation amount'. The compensation 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.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr A wanted capital growth with a small risk to his capital.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr A's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr A into that position. It does not mean that Mr A would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr A could have obtained from investments suited to his objective and risk attitude.

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 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 to pay Mr A any interest as set out above on the sum of £160,000.

<u>Recommendation:</u> If the compensation amount exceeds £160,000, I also recommend that Portal 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.

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 11 August 2022.

Claire Woollerson
Ombudsman