DRN-3518850

The complaint

Mr H complains that Portal Financial Services LLP (Portal) provided unsuitable advice regarding the transfer of: deferred benefits he held in a defined benefits occupational pension scheme (OPS); and two personal pensions into a new personal pension plan.

What happened

In March 2016 Portal provided Mr H with advice regarding his pension plans. It conducted a fact-find with Mr H and established the following:

- He was 57 years of age;
- He was in poor health;
- He was unable to work and receiving Personal Independence Payment benefit of £218.60 a month;
- He received a Motability payment that paid for his car;
- He was married;
- He and his wife owned their home with no outstanding mortgage;
- Their monthly expenditure of £947 was met by their combined monthly earnings of £1,748.

Portal established that Mr H had access to certain savings. The fact-find indicated that Mr H had £70,000 invested in fixed term investments. Mr H explains that this money was from inheritance his wife had received. He was also shown to have £10,000 in premium bonds, £3,000 in building society deposits and £9,000 in a cash ISA. His wife was recorded as having a further £16,000 in an ISA and £10,000 in premium bonds.

Mr H had three different pensions at the time.

Pension 1 had defined benefits (DB). It provided a pension of £1,373 a year at age 65 and had a cash equivalent transfer value (CETV) of £18,059. Pension 2 was a defined contribution (DC) personal pension with a fund value of £8,120 and pension 3 was also a DC personal pension with a fund value of £8,670.

Portal recommended that Mr H transfer Pension 1 to a new flexi-access income drawdown personal pension (pension 4), and also to switch pension 2 and pension 3 to that new scheme. Leaving Mr H with a single consolidated pension fund around £34,840. From which, it recommended he take an immediate 25% pension commencement lump sum (PCLS), leaving the remainder invested.

Mr H followed Portal's recommendation and transferred his pensions.

Mr H later complained, via a claims management company (CMC) about the suitability of the advice he'd been given. Although the complaint has been brought by a representative, for simplicity, I'll just refer to Mr H in this decision. The basis of the complaint was that the defined benefits in pension 1 were valuable and weren't likely to be improved on by the transfer.

Portal looked into Mr H's complaint and didn't uphold it. It explained that it considered that its recommendation delivered Mr H's objective of releasing the amount of tax-free cash that he needed. It didn't think that other options of raising the money were as suitable. It said that it had made Mr H aware of the guaranteed benefits that he was giving up in transferring the benefits held in pension 1.

Our investigator considered Mr H's complaint and thought it should be upheld. In summary, he didn't think that transferring pension 1 could realistically provide more valuable benefits overall than were already guaranteed. He didn't think that Mr H's need for tax-free cash was a good enough reason to give up the guaranteed benefits. He didn't think that it was suitable to switch pension 2 and pension 3 to a new pension that had higher overall charges.

Portal didn't agree with our investigators view. So this case was referred for an ombudsman's decision. I issued a provisional decision to both parties, explaining the reasons that I was of the same opinion as our investigator. I gave both parties the opportunity to comment or provide further evidence that may change my mind.

Mr H responded confirming that he had no further comments to make. Portal acknowledged receipt of my provisional decision. But has offered no further comment or evidence that it's asked me to consider.

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.

I've reconsidered all of the evidence, but in the absence of being presented anything further to consider, my final decision remains the same as the provisional decision I've already shared with both parties. I'll explain why I'm upholding Mr H's complaint.

When considering what is fair and reasonable, I take into account relevant laws and regulations as well as the regulator's rules, guidance and standards. The Financial Conduct Authority (FCA) publish high level principles for the conduct of regulated businesses. These are explained in the FCA handbook under section PRIN 2.1. Of most relevance in this case are:

- Principle 2 - A firm must conduct its business with due skill, care, and diligence.
- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly.
- Principle 9 – A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgement.

Mr H's complaint relates to the transfer of three different pension schemes. There are inherent differences in the way that a DB scheme, like pension 1 works, compared with the DC schemes like pensions 2 and 3. This means that the things I've considered in assessing the suitability of Portal's recommendation are different in each case. So I'll explain my thoughts on each as follows.

Pension 1

The FCA states in its Conduct of Business Sourcebook ('COBS') that a firm's starting assumption for a transfer from a DB scheme should be that it is unsuitable. So, Portal should have only considered a transfer for pension 1 if it could clearly demonstrate that the transfer was in Mr H's best interests (COBS 19.1.6G). And having looked at all the evidence available, I’m not satisfied that it was.

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 investment return (critical yield) required to match the occupational pension at retirement age of 65 was quoted as 11.7% per year. This compares with the discount rate of 3.8% per year for 7 years to retirement in this case. Obviously, it was highly likely that Mr H would be unable to achieve a return in excess of 11.7%, regardless of the amount of investment risk he was prepared to take. For further comparison, the industry projection for investment returns were 2%/5%/8% for low/medium/high respectively. For this reason I think that the recommended transfer meant Mr H receiving benefits that were, overall, less valuable.

Whilst critical yield provides a measure of whether or not pension benefits can be matched or bettered following a transfer, it’s not the only reason a transfer may be suitable. So I’ve considered the objectives that Portal identified for Mr H and whether they made this transfer suitable, in spite of the likelihood that the overall value of pension benefits would be lower.

The main reason that Portal seem to recommend a transfer was to enable Mr H to meet his objective of accessing the maximum tax-free cash from his pensions. Mr H said he wanted to access around £8,000 to replace a conservatory roof. Transferring this pension only generated a PCLS around £4,500.

Mr H and his wife already had access to the means to raise this sum from their savings though. Each had £10,000 in premium bonds according to Portal’s fact-find. As well as sufficient savings in ISA’s. I understand that Mr H was reluctant to use their savings, as much of that money had been accumulated from inheritance his wife had recently received. But I don’t think Mr H understood the significance of what he was giving up with pension 1. If he had, he would most likely have understood that using existing savings outside of his pension was more suitable. So, whilst Mr and Mrs H had ready access to the means to raise the £8,000 they wanted, it wasn’t suitable to transfer pension 1. It should have been a last resort to raise a cash lump sum.

I’ve listened to the phone call that Mr H had with Portal when it conducted its fact-find. He was aware that he could take tax free cash from his pension. And was enticed by the idea of taking advantage of that. But Mr H wasn’t paying tax. So had his full personal tax allowance. Even if he hadn’t had other available savings, the amount of money he needed to raise, even if it was taken from his pensions, didn’t need to be taken as a part of a maximum PCLS.

Pension 2 and Pension 3 were both of a size that they could be taken as ‘small-pot’ pensions. One of these could have been taken in full. Although 75% of that would have been taxable, it would have most likely been within Mr H’s personal allowance. It would all have ended up being tax free. Portal identified this option in the appendix of the suitability report but dismissed it without much regard. That isn’t to say that I think Mr H would have done this. He really didn’t need to. But it provides further evidence of the options that were available for Mr H to meet his indicated objective without transferring pension 1.

I’ve considered whether the objective of greater flexibility over how he accessed his pension in the future was important to Mr H. And I don’t think it was. Portal didn’t establish what income Mr H may have needed from his pensions in the future. But it was clear that no recommendation was made about how to draw benefits other than the PCLS. So I don't think that, at that time, Mr H had any specific plans regarding taking income from his pensions.

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 personal pension was likely an attractive feature to Mr H. But whilst I appreciate death benefits are important to consumers, and Mr H might have thought it was a good idea to transfer pension 1 to a personal pension because of this, the priority here was to advise Mr H about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Portal explored to what extent Mr H 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 H was married and so the spouse's pension provided by pension 1 would've been useful to his wife if Mr H predeceased her. I don't think Portal made the value of this benefit clear enough to Mr H. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Portal should not have encouraged Mr H to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

I acknowledge that Mr H had a health condition and may have had concerns about his life expectancy. But Mr H not reaching his life expectancy was only a possibility and it was also possible that he would exceed this, in which case he would need his pension to last longer. If Mr H transferred out of pension 1 he'd be relying on investment returns to ensure sufficient capital remained in the personal pension to provide the death benefits, whereas the spouse's pension was guaranteed and escalated.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr H.

Portal listed objectives of having greater ownership and control of his pension fund and being willing to take investment risk. But I agree with our investigator, who explained that these aren't objectives that Mr H genuinely had. As far as the evidence shows, Mr H had little understanding of investing and expressed no interest in taking any active control over investments in his phone call with Portal. And a willingness to take investment risk wasn't an objective but rather a tolerance. Both of these 'objectives' were actually consequences of the recommendation to transfer. I don't think either offered a reason to support the recommendation.

For the above reasons, I think that Portal's recommendation to transfer pension 1 was unsuitable. Although it explained the FCA 'presumption of unsuitability' in its recommendation, I don't think the conclusion it reached heeded this position. It simply wasn't reasonable to recommend this pension transfer, and Portal should have made it clear to Mr H that he didn't need to transfer to raise the money he needed.

Pensions 2 and 3

Portal identified that neither of these DC pensions had any guaranteed benefits attached to them. So it was possible to switch both to a different pension without penalty or loss of guarantees. But for similar reasons to our investigator, I also think that this switch was unsuitable.

The fact that no guarantees were lost doesn't mean that it was suitable to switch the existing pensions. Just because a customer could switch didn't mean that they should. Portal's suitability report dealt, in the main, with the issues around pension 1. Which, given the defined benefits that would be lost in that scheme, was understandable. Portal's explanation as to why Mr H should switch pension 2 and pension 3 was very limited. No comparison was made with the funds he was already in compared to its recommended investments.

The only explanation that Portal gave to switch these pensions seems to have been that it enabled access to the 25% tax-free cash. Portal had identified that the terms and conditions for pension 1 or pension 2 did not enable Mr H to go into drawdown. So he couldn't have taken tax free cash whilst leaving the remaining pension funds invested in a flexible drawdown way.

But I explained above why I don't think that Mr H had a genuine need to take tax free cash from his pensions. He was interested in using it because it was there, but he just didn't need to. It wasn't a good reason by itself to recommend switching these pensions. Portal didn't offer any actual explanation to Mr H at the time why else he ought to transfer. But I've considered if there were other reasons that made the switch suitable.

I note that Portal's suitability report explained to Mr H what the charges were for the scheme it was recommending. It explained that Mr H would pay an annual management charge of 0.48% for the pension platform. The report also said that fund charges would also apply to the plan but didn't say what those were. It merely referred Mr H to the literature from the new provider.

Portal ought to have provided Mr H with a clear comparison of the new charges compared to those of his existing schemes. But it didn't. The report said, "*it is important to note that overall this strategy could cost more than your existing arrangement…".* Which I don't think was clear enough. His existing schemes had annual charges of 0.2% and 0.42%. I think that Portal clearly recommended a more expensive product. It gave Mr H little explanation about what type of pension it was. But it was an investment platform that was more likely to require ongoing monitoring, for which Portal were charging 1% a year. With the attitude to risk of moderately cautious, that Portal assigned Mr H, it was far from reasonable to suppose that Mr H was likely to enjoy increased benefits by making this switch.

For these reasons, I don't think that Portal's advice to switch pension 2 and pension 3 was suitable either. And Mr H would have been best advised to leave his pensions where they were.

Putting things right

A fair and reasonable outcome would be for the business to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he ought to have been advised not to transfer his pensions. I think it's likely he would have followed the advice and his pensions would have remained as they were.

Pension 1

For pension 1, Portal must 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 H's acceptance of the decision.

For clarity, this calculation will be comparing the proportional value of the benefits lost in transferring pension 1. In order to do so, Portal will need to calculate what proportion of pension 4 was made up from the original transfer value of pension 1. And should also proportionately account for any withdrawals made from the existing pension scheme.

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

If this redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H’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 H 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.

Pension 2 and Pension 3

Any loss Mr H has suffered should be determined by obtaining the notional values of pension 2 and pension 3 from the providers on the basis that they’d been invested in the same ways, and subtracting the proportion of the current value of the pension accounted for by the initial transfer value, from this notional value. If the answer is negative, there’s a gain and no redress is payable.

If the answer shows a loss, that amount is the compensation amount that should, if possible, be paid into Mr H’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.

Any withdrawal from Mr H’s existing pension should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I’ll accept if Portal totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

I consider the notional value outlined above is the fairest way of resolving this complaint. However if Portal is unable to obtain the notional values from the providers of pensions 2 and 3, my aim is to put Mr H as close to the position he would probably now be in if he’d invested similarly to those existing funds.

It’s not possible to say precisely where Mr H would’ve invested. But I think what I’ve set out below is a fair and reasonable alternative given his circumstances and objectives when he invested.

If the previous provider is unable to calculate a notional value, Portal will need to determine a fair value for the relevant proportion of Mr H'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.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr H as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid. Typically 25% of the loss would be tax-free and 75% would have been taxed according to their likely income tax rate in retirement – presumed to be 20%. So making a notional reduction of 15% overall from the loss adequately reflects this.

Why is this benchmark suitable?

I've chosen this method of compensation because:

- Mr H 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 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 1 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 H'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 H into that position. It does not mean that Mr H 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 H could have obtained from investments suited to his objective and risk attitude.

My final decision

For the above reasons, I uphold Mr H's complaint.

I direct Portal Financial Services LLP to compensate Mr H in the manner I've set out in '*Putting things right'* above.

The compensation amount must where possible be paid to Mr H 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 H.

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.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 11 July 2022.

Gary Lane
Ombudsman