

## The complaint

Mrs N has complained about advice she received from Portal Financial Services LLP ('Portal') to switch a Group Personal Pension ('GPP') to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ('UCIS').

Mrs N is being represented by a third party but for ease of reading the decision I'll refer to all representations as being made by Mrs N.

## What happened

Mrs N met with Portal in 2015. Portal was to give advice on switching Mrs N's GPP to a SIPP. Following this, another company (who I'll refer to as Firm C) would provide advice on how the funds in the SIPP should be invested.

At the time, Firm C was an appointed representative ('AR') of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority ('FCA') to provide investment advice, but neither it, nor Firm C were permitted to provide pension switch or transfer advice. Portal had an established business arrangement with Firm C, whereby Portal would provide the pension switch and/or transfer advice before referring the client back to Firm C for investment advice, and this arrangement was followed for Mrs N.

Portal carried out a review with Mrs N. It noted she was 54 years old, employed and was earning approximately £37,800 a year. She was married and owned her home valued at £380,000 with an outstanding mortgage of £141,750. She had monthly disposable income of £100. It noted Mrs N was in good health and believed she was likely to retire at age 67. She had £2,318 of savings held in a deposit account.

Portal recorded that Mrs N had a GPP which had a transfer value of approximately £28,699 and was invested in a with-profits ('WP') fund.

Portal noted Mrs N's objectives were to:

- provide death benefits;
- be able to take drawdown in the future;
- have access to a greater investment fund choice;
- benefit from a potentially higher investment performance;
- move to a cheaper scheme;
- control flexibility of her plan; and
- be able to access her benefits earlier than normal retirement age.

The risk assessment Portal carried out suggested she was a "moderately adventurous" investor. Based on Mrs N's circumstances, Portal recommended that she switch her GPP to a SIPP to meet her objectives. Portal said it wouldn't be providing any advice in relation to where Mrs N's funds would be invested after the switch, as this would be given by Firm C.

Portal's Suitability Report ('SR') noted that it would charge an initial advice fee of 5%, of which 2% would be paid to Firm C as an introducer fee. The Annual Management Charge ('AMC') for the recommended SIPP would be 0.5% plus an initial charge of £180. Once the transfer was completed, Firm C would provide their investment advice and discuss the cost of their ongoing advice service.

The SIPP was established in early 2016 and funds totalling £29,162.37 were transferred into it in February 2016. Portal took its 5% initial charge, Firm C were then appointed as the servicing agent and Firm C then gave advice on how the SIPP should be invested.

In August 2019, with the assistance of a Claims Management Company ('CMC'), Mrs N complained to Portal about the advice she received to switch. She said the advice was negligent and unsuitable for someone with no investment experience, a low attitude to risk ('ATR') and low capacity for loss. She also said that Portal couldn't make its switch recommendation without taking responsibility for assessing the underlying SIPP investments.

Portal rejected her complaint, saying Firm C was responsible for the investment advice. Unhappy with Portal's response, Mrs N referred the matter to our Service.

One of our Investigators looked into the complaint. He thought Mrs N's complaint should be upheld. He didn't think Portal's advice was suitable. The Investigator didn't think Mrs N should've been advised to switch her plan as Portal had recommended a more expensive arrangement. He noted that Mrs N had given up guaranteed growth which was a feature of her GPP. The Investigator also said that Mrs N's ATR had been incorrectly categorised as "moderately adventurous" and that even if this was the case, she could've switched funds with her current provider. The Investigator thought Portal should compensate Mrs N for her loss, pay £500 plus VAT towards the cost of any financial advice she may wish to take now and pay an additional £200 for the trouble and upset caused.

Portal disagreed with the Investigator's findings, saying its advice was suitable and in line with Mrs N's circumstances, needs and objectives. It said Mrs N's SIPP allowed her to invest in mainstream products at a competitive cost. It said Mrs N would've been able to take tax free cash ('TFC') from age 55 in this plan. Portal maintained Firm C was responsible for any investment advice and it had carried out significant due diligence on Firm C before partnering with it. It disagreed with the suggested method of redress, saying that it was illogical.

The Investigator didn't change his mind, so the complaint was referred to an Ombudsman for a final decision.

I reviewed the complaint and issued a provisional decision on 29 May 2022. In this, I set out why I thought the complaint should be upheld and what Portal ought to do to put things right. I invited all parties to provide any further submissions before 13 June 2022. Mrs N agreed with my provisional decision. Portal didn't provide any further submissions.

The complaint has now been passed back to me to issue 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.

Mrs N accepted my provisional decision, and Portal didn't provide any further submission. Therefore, I see no reason to depart from the findings I made in the provisional decision. I'll

repeat these findings below.

Portal advised Mrs N to switch her existing GPP to a SIPP but says it didn't provide any recommendation regarding the investments to be held in the SIPP as Firm C was providing advice on this.

I've thought about this carefully. But even if it wasn't specifically intending to advise on the investments, I think Portal needed to have an awareness of the intended investments in order to give suitable advice. This remains the case even if Firm C was actually providing that advice. It is, in my view, reasonable to expect a firm that is assessing the suitability of a pension switch to make an assessment of their client's ATR and consider the overall investment strategy that applies to that proposed switch. This would include a broad understanding of the proposed investments, before it could determine whether the switch was in Mrs N's best interest. I believe that as Mrs N's financial adviser, Portal still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved.

### *The regulator's position*

I have taken account of relevant laws and regulations; regulators' rules, guidance and standards, and what I consider to be relevant industry practice at the relevant time. These include the overarching Principles for Businesses ('PRIN'). Principles 1 (integrity), 2 (skill, care and diligence), 6 (customers' interests) and 9 (reasonable care) are of particular relevance here.

The Conduct of Business Sourcebook ('COBS') in the regulator's handbook, sets out the rules regulated businesses have to follow. At the relevant time, COBS 9.2.1R required Portal to take reasonable steps to ensure that a personal recommendation was suitable for Mrs N. It had to obtain information as to Mrs N's knowledge and experience (relevant to the specific type of designated investment), her financial situation and investment objectives.

COBS 9.2.2R required Portal to gather sufficient information from Mrs N to ensure the recommendation met her objectives, that she could bear the risks involved and that she had the necessary experience and knowledge to understand the risks involved in the transaction. And under COBS 2.1.1R Portal had to act, *"honestly, fairly and professionally in accordance with the best interests of its client."*

At the time of the advice the regulator had made its view clear that it considered, in order to suitably advise on pension transfers or switches, a firm needed to consider the suitability of the underlying investments to be held in it. The regulator's position was evident in its 2013 alert where it said:

*"Financial advisers (...) are under the mistaken impression (...) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect."*

*The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (...)*

*If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."*

I acknowledge that in the scenario set out in the alert, the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. Whereas in Mrs N's case, Firm C was authorised to conduct investment business under its AR agreement with Firm S, and in turn Firm C could itself be pursued for compensation by a consumer within the financial services' regulatory regime.

Portal may believe that this in turn distinguished the circumstances of Mrs N's transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. It might say that was particularly the case as it had said to Mrs N that it wouldn't be providing any advice on the underlying investments as Firm C was doing that. Whilst I've given that possibility careful thought, I don't agree that the alert was limited to those very specific circumstances.

I can see that the alert makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Mrs N's case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension switch and transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these are standards that have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. So, I think the alert is relevant to firms in the position of Portal in this case. This is further demonstrated by an alert from the regulator in 2014 which stated:

*"Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (...), then the overall advice is not suitable."*

*If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (...) at all as it will not be able to assess suitability of the transaction as a whole."*

Both alerts specifically referred to PRIN and COBS, which Portal was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these precepts if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

I acknowledge that the regulators' statement in the alert is not 'guidance' or 'rules' or 'standards' in the sense that such requirements are specified by the regulator in its Handbook. Nonetheless, I regard it as a relevant consideration when determining this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

Portal appears to have been under the impression that, as it told Mrs N it wasn't providing any advice on the underlying investments, this enabled it to provide advice on a restricted

basis. But this wasn't right. Under COBS 2.1.2 Portal couldn't seek to exclude or restrict its duty or liability to Mrs N under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mrs N's funds would be invested. I don't think there was any ambiguity regarding the regulator's position on the matter.

As part of the fact-finding process Portal had to understand Mrs N's objectives – two of which were recorded as to have greater fund choice and improved performance – and the related risks. It wasn't free to ignore how Mrs N's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a switch without knowing what Mrs N would invest in within the wrapper, doesn't in my mind seem reasonably possible.

As Portal didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Mrs N's transferred funds would ultimately be invested. And it didn't set out in its suitability report what it thought would be a suitable portfolio of investments for Mrs N. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, Portal says it saw no issue with this.

I recognise that the FCA allows for two advisers to work together to provide suitable advice to their mutual client. However, the alerts make it clear that a firm that is asked to advise on a pension switch needs to be aware of the intended investments before it advises on the switch, in order to provide suitable advice. So, it should've requested this information from Firm C *before* providing advice. And, as confirmed in the 2014 alert, if it didn't *'fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all...'* So, in the absence of Portal knowing the investments Firm C intended for Mrs N, it couldn't provide her with suitable advice to switch her pension benefits.

I also accept that as a result of its AR agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portal's duty to do the same. As Mrs N's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Mrs N's best interests. And as I've said, this had to include an awareness of where Mrs N's funds would be invested.

I haven't seen anything to suggest that Portal, at any point, checked to see how Firm C broadly proposed to invest Mrs N's funds. And I believe it should have, given the unavoidable connection this had to the switch it was proposing. As part of its duty of care to Mrs N, I consider that Portal should've at the very least asked Firm C at the outset for details of the model portfolios it adopted for various risk categories. And in doing so it ought to have checked these lined up with what it considered to suit each risk group. Further to this Portal should've also asked for the details of the portfolio intended for Mrs N and the proposed investments. I don't think Portal could've reasonably assessed the suitability of the transaction it was recommending without doing so.

Notwithstanding what I've said above, I don't think the suitability of Portal's advice turns solely on where Mrs N's funds were ultimately invested.

Portal's recommendation that she switch to a SIPP in the first place is an important consideration. And were it not for the switch and Portal's incomplete and, in my view, flawed advice regarding this, I'm not persuaded Mrs N would've ultimately gone on to invest as she did.

### *The advice to switch*

I've considered whether the advice to switch Mrs N's existing pension plan was suitable, but I don't think it was.

At the time of Portal's advice Mrs N was 54 years old, employed and in good health. She was a standard retail investor with 13 years until she intended to retire. The plans being switched formed all of the retirement provisions that Portal were aware of. We've since found out that Mrs N had an occupational pension scheme, but this wasn't known or taken into account by Portal from what I can see. Other than her pension there was no record of Mrs N having any other investments. And she had just over £2,000 in cash deposits. Although she was a homeowner, she had a significant outstanding amount on her mortgage.

Mrs N's objectives as recorded by Portal were to provide death benefits, be able to take drawdown in the future, have access to a greater investment fund choice therefore possibly benefiting from a potentially higher investment performance, move to a cheaper scheme, have flexibility and to be able to access benefits earlier than normal retirement age.

These objectives are quite generic and don't appear to be tied to any specific aims that were recorded as priorities for Mrs N. These objectives seem to be more features that the SIPP offered rather than what Mrs N wanted or needed. For example, being able to access benefits early is listed as an objective, but Mrs N has also recorded her expected retirement age as 67. And while I understand being able to take TFC at age 55 may have appeared attractive, there isn't anything within the documents Portal completed that explains why she needed to take TFC at that time. From the brief notes contained in the fact find, there seems to be no immediate intention of Mrs N retiring or needing to use her funds, meaning Mrs N could've revisited this when she did wish to start drawing benefits or had a specific need to access her TFC. So, I think switching Mrs N's GPP for this reason was premature, particularly when it involved Mrs N giving up the guaranteed returns her GPP provided.

Two of the objectives, potentially higher investment performance and improved death benefits, may or may not have been achieved by switching, but this was purely speculative, especially when Portal did not know how the funds were to be invested. Any improved investment performance, leading to an increase in the fund value and a higher death benefit, was entirely dependent upon how the funds performed over the term to Mrs N's retirement. In any event, Mrs N's GPP had a guaranteed growth rate of 4% before charges, and historically it had achieved a return of around 5% per year. It's difficult to see how Mrs N could expect to exceed this growth, given her ATR (which I think was much lower than Portal assessed, as I will explain below) and the impact of the new ongoing charges.

Portal assessed Mrs N as having a moderately adventurous ATR. However, I don't think this was the case. Portal says this was based on answers given in response to an industry recognised tool for assessing ATR. But the answers Mrs N gave in response to those questions should only have formed part of Portal's assessment of her ATR. And I note that some of the answers Mrs N gave were contradictory and should've prompted Portal to ask further questions. For example, Mrs N said she felt comfortable investing in the stock market, but she also said she had little experience of investing in stocks and shares.

Portal should therefore have taken into account Mrs N's investment experience and knowledge, as well as her capacity for loss to determine what her real risk tolerance was. Mrs N had just over £2,000 in cash savings and no other investments or experience of investing in stocks and shares. And whilst she had another pension, Portal didn't know this and therefore it wasn't able to take any meaningful view on what provisions she was able to rely on in retirement. So, it couldn't accurately assess whether Mrs N could afford to take

any risk with her GPP. Having considered all of this carefully, I don't think she could afford to take the level of risk associated with the ATR that Portal assessed her as having.

I note that Mrs N still had 13 years until her expected retirement age, but overall, in light of her low capacity for loss and lack of experience, I think Mrs N would've had a more cautious ATR than assessed. And based on this, I think it's likely that the fund she was invested in with her GPP – which had a guaranteed rate of return – would've still been suitable for her. However, even if she did want to take slightly more risk for better returns, she would've likely been able to find a fund within the GPP which met her needs.

I can't see that Portal explored switching funds within the GPP. And there wasn't any explanation as to why Mrs N wanted a greater fund choice, or what investments she wanted to make that were not available with her existing providers. Furthermore, the value of the pension was relatively low, meaning that she was unlikely to be able to spread her investment across a significantly greater range of funds than the funds her existing scheme already employed. And I don't think Portal could reasonably conclude that Mrs N wanted or needed access to non-standard or unregulated investments, which the SIPP would provide. Whilst the SIPP would allow Mrs N to invest in mainstream funds, the added charges, taking into account the need for ongoing advice, would likely have made this more expensive. And, as I've said, Mrs N was already in a fund which I think suited her ATR, and had a guaranteed growth which I think would've been a benefit to her.

I have also seen nothing to persuade me that Mrs N was seeking a sophisticated investment proposition or evidence why she wanted access to a wide range of investments. I think that greater investment fund choice was of limited benefit when Mrs N had little experience of investing in stocks and shares. The GPP she had was invested in a with-profits fund offering 4% minimum worth per year. By switching her pension, she was losing this benefit.

I can see that the suitability report noted that Mrs N wanted a cheaper scheme and I acknowledge that the SIPP recommended was not particularly expensive – it had an AMC of 0.5%. But there was a clear cost to switching her existing pension plan into a SIPP in the 5% initial fee charged by Portal. There would also be charges associated with Firm C's ongoing investment advice, plus other product or fund charges depending on the investments selected by Firm C. Of course, some of these could offset the charges of the existing plan. But it's clear that there would be a significant cost to switching and I don't think Portal was able to justify this, particularly in view of the fact that it didn't know of the additional charges to be made by Firm C or the funds it would be advising Mrs N to invest in.

Furthermore, Portal's argument that the transfer would result in lower charges in the long run was also undermined by its own statement in the suitability report:

*“Overall, this strategy will cost more than your existing arrangement. Whilst the intention is that this will be more than compensated for by the increased growth of your pension fund this cannot be guaranteed.”*

Any additional charge to a consumer would provide a strong reason not to proceed with a course of action. So, the benefits of switching would need to outweigh the cost to Mrs N's pension, as she was unlikely to be able to recoup these charges through improved fund performance over the short to medium term. But as I've said, I don't think there were any other compelling reasons to switch Mrs N's GPP.

Overall, I think the advice to switch the GPP to the SIPP was unsuitable because Mrs N was not an experienced investor and so did not need the wider investment choice the SIPP would provide. It would also be a more costly arrangement, once the SIPP provider, fund and adviser charges were taken into account. By switching, Mrs N also lost the benefit of a

guaranteed growth rate. If Mrs N had wanted better performance an internal fund switch ought to have been considered in the first instance.

I've thought about whether, if she'd been correctly advised by Portal not to switch, Mrs N would have gone ahead with it anyway. Having carefully considered all the circumstances in this case, I don't believe she would have. There's nothing to suggest that Mrs N was seriously considering moving her existing plans prior to being speaking to Portal for a pension review. And I don't think she had any immediate objectives that could've only been met by switching her pension.

### *Is Portal wholly responsible for Mrs N's loss?*

I recognise it can be argued that Firm C is also liable to Mrs N and that in turn I should apportion only part of the responsibility to Portal. I've given this careful thought, but in the circumstances, I think it is fair to find that Portal is wholly responsible and, in turn, to direct it to compensate Mrs N for the whole of her loss.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension release and investment. Because Firm C wasn't authorised to provide pension switch or transfer advice, it referred Mrs N to Portal. Portal advised Mrs N to switch her benefits to a SIPP, it set up the SIPP and arranged for her existing pension benefits to be switched over. I acknowledge that Firm C advised Mrs N where to invest her funds within the SIPP. But, as I've explained, Portal's understanding that it could reasonably limit its advice to just the switch and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mrs N on them. It was only as a result of Portal's involvement that Mrs N switched the funds held in her existing plans to the SIPP. And given that I think she ought to have been advised to remain in her existing pension, I think it is Portal's advice that has caused Mrs N's loss.

Portal argues that Firm C is responsible for the investment advice. So, it says the amount of any award made against Portal should be limited by taking into account any payment that Mrs N may be able to recover through the FSCS.

In ordinary circumstances, because the FSCS describes itself as a fund of last resort, it is my understanding that it is unlikely it will pay out on claims where it is aware that another firm was involved in the transaction, and where it considers there is a reasonable prospect of the consumer making a recovery against that firm for the loss suffered. This means that apportionment of only part of the loss to Portal could risk leaving Mrs N out of pocket. But I think it's important to point out that I'm not saying Portal is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portal gave unsuitable advice and it is responsible for the losses Mrs H suffered in transferring her GPP to the SIPP and investing as she did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position.

So, overall, I think holding Portal fully responsible for the whole of Mrs N's loss represents fair compensation in this case.

### **Putting things right**

My aim in awarding fair compensation is to put Mrs N back into the position she would likely have been in, had it not been for Portal's unsuitable advice. I think this would have meant she kept her existing GPP and remained invested in the with-profits fund.



Any loss Mrs N has suffered should be determined by obtaining the notional value of the GPP on the basis that it had remained invested in the with-profits fund, including the applicable guarantees and bonuses and subtracting the current value of the SIPP from this notional value. If the answer is negative, there's a gain and no redress is payable.

The compensation amount should if possible be paid into Mrs N'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 Mrs N as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.

If Mrs N hasn't yet taken any TFC from her plan, 25% of the loss would be tax-free and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional reduction of 15% overall from the loss adequately reflects this.

Portal should also pay Mrs N £300 for the distress and inconvenience caused by the unsuitable advice, which has led to losses.

### **My final decision**

I uphold this complaint and direct Portal Financial Services LLP to settle this complaint as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 12 July 2022.

Rob Deadman  
**Ombudsman**