The complaint

Mr R complains about the suitability of the advice he received from Portal Financial Services LLP (Portal) to transfer a defined-benefit occupational pension scheme (OPS) he held with a former employer to a Self-Invested Personal Pension (SIPP).

What happened

Mr R sought advice from Portal about his OPS. On 14 January 2014, after first speaking with Mr R, Portal wrote to him noting his OPS had a transfer value of £57,942. It set out the critical yield and identified some options available to Mr R, including doing nothing or transferring the benefits to access tax free cash (TFC) with different options for his remaining fund.

On 3 February 2014, Portal gathered information about Mr R's circumstances and objectives. At the time, Mr R was 55 years old and living with his wife. He was employed, earning £19,500 per year and he had no savings. He told Portal he lived in a property he owned worth around £150,000, with an outstanding mortgage of £110,000. Mr R had debts totalling £10,000 in a debt management plan that he was repaying at £340 per month. It also notes that Mr R told Portal he was regularly overdrawn, incurring bank charges. And Portal said Mr R had a 'moderately cautious' attitude to risk.

On 5 February 2014, Portal wrote to him summarising some of his OPS benefits and it recommended he didn't transfer out of this. It said that if he still wished to go ahead with the transfer then it could help him. And included was an options form and an insistent client form. The option form asked him to choose between:

- Option 1: Income drawdown – Taking TFC of £14,485.50, with the remainder being reinvested until he required an income. He would be treated as an insistent client.
- Option 2: Do Nothing – Our recommendation.

On 17 February 2014, after Mr R had signed and returned the forms, Portal sent him a suitability report which said his aims were to take TFC to clear debt and put towards living costs and an emergency fund. It said Mr R also had an overdraft of £1,300. And that despite the fact find noting he had a disposable household income of £500 per month, Mr R told it he's regularly overdrawn, incurring bank charges. It went on to say that, although it recommended Mr R leave his OPS where it was, it was treating him as an insistent client and recommended he transfer his benefits into a new SIPP to take TFC. It also recommended he invest some of his fund in the following:

- Lakeview – 9.19%
- Real Estate – 12.17%
- Strategic Residential – 9.19%
- Tambaba – 9.19%

Mr R accepted the insistent client recommendation. The SIPP was established shortly after and the value of his OPS, which had increased to £61,245.40, was invested (after he'd taken TFC). Mr R then went on to take a further taxable lump sum in 2015.

In 2021, Mr R complained to Portal, in summary, that it advised him to invest in unsuitable funds, which caused him a financial loss and meant he couldn't access all his funds when he wanted to. Mr R said Portal didn't tell him some of his investments were illiquid. He also complained that he didn't meet Portal face to face, receive ongoing reviews or advice from it or performance updates, despite paying it a fee for this.

In response, Portal said Mr R had made his complaint too late for our Service to consider it. Unhappy with this, Mr R brought his complaint to us, adding that he used the TFC to repay debts, as he had no other funds to do this.

We decided we could consider Mr R's complaint about the suitability of the advice and the service he received from it, as it had been made in time.

One of our Investigators looked into Mr R's complaint and said that while his circumstances may explain why he sought TFC, she didn't think that advising Mr R to invest in high risk funds was appropriate. So, she thought Mr R should be compensated for the unsuitable advice and that Portal should pay Mr R £250 for the distress and inconvenience caused.

Portal didn't agree. In summary, it said the SIPP was low cost and Mr R's pension could be invested in mainstream funds within it. It said the transfer allowed Mr R to take TFC without having to commit to taking an annual income. And that the SIPP it recommended is suitable for pensions the size of Mr R's.

So the complaint's been passed to me for a 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.

Portal said Mr R's complaint was brought to our Service too late for us to consider it. I don't intend to revisit that, given an Ombudsman has already given a decision explaining why he's satisfied Mr R brought this complaint about the suitability of the investments in time and that it's one I can consider.

When considering what's 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, while I appreciate Mr R will be disappointed, I'm not upholding his complaint for largely the same reasons as the investigator. I'll explain why.

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

Portal doesn't dispute that Mr R would be worse off in retirement by transferring out of his OPS. For this reason, it advised Mr R against transferring out of the scheme and instead treated Mr R as an insistent client. And while there might have been some flaws in its insistent client process, I've thought about whether Mr R would've gone ahead anyway even if the process had been delivered more fairly and Mr R had been able to make an informed choice.

The documentation shows Mr R wanted TFC to clear his debts and put towards living costs and an emergency fund. I've taken into account that the fact find shows most of Mr R's debt was in a debt management plan and that he still had a disposable income, suggesting he didn't have a pressing need to repay his debts or to access TFC to do so. But both it and the suitability report go on to show that Mr R didn't agree he had a disposable income, as he was using his overdraft to live and incurring bank charges.

While it appears Portal explored some alternative ways to generate cash to achieve Mr R's objectives, it doesn't seem to have explored whether he could have negotiated a more affordable repayment to his debt management plan. But, even if it had, I can't safely say Mr R would have been able to achieve this or that it would have resolved the problems he was experiencing meeting his expenses.

It doesn't seem that Mr R could have accessed his OPS benefits early and taken TFC from it instead. And, in any case, it looks like he wouldn't have been able to achieve nearly as much TFC as he needed by doing so, as the documentation says he may only have been entitled to £6,285.31.

I also note that Mr R hasn't disputed that he needed to access TFC to repay his debts. Instead he's told us he needed to do this and that he had no other means to do so. In which case, given the situation Mr R was in I think he had a strong need for TFC which could only be achieved by transferring his OPS benefits. And for this reason, overall, I don't think Mr R would've decided against transferring out of his DB scheme, despite the fact it would leave him worse off in retirement, if Portal had given him all the necessary information and properly considered the alternatives.

While I think Mr R's desire to access TFC means he would've proceeded with the transfer, that doesn't mean Portal's advice was suitable overall. And I don't think it was in light of the investments it recommended Mr R invest in within his SIPP. I'll explain why.

Portal said Mr R was a moderately cautious risk investor, which doesn't appear to be in dispute. I note Mr R was a standard retail investor, with no investment experience or savings. And Mr R's said this pension was his main retirement provision, which means it was one of his biggest assets. So I think his capacity for loss in respect of it was low.

Yet based on Portal's advice, a significant part of the funds in Mr R's SIPP was invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here, when it said that as well as these only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), for example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. I don't think UCIS was suitable for Mr R at all, and certainly not in the proportion invested, given there's nothing to indicate he had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

I can see Mr R was made aware some of the investments were illiquid in the suitability report. But it went on to focus on the rewards these would produce. And I think Mr R went ahead because he trusted Portal's advice. Had it recommended he invest in mainstream, regulated funds in line with his attitude to risk, which I think would have been suitable advice, I think he'd have done so for that same reason.

In summary, I think the investments Portal recommended were unsuitable, given these were likely to lead to Mr R being exposed to far more risk than appropriate. And I don't think he had the capacity for loss that investments like this carry. Instead, I think suitable advice would have been for him to invest in regulated mainstream funds. Had Portal given suitable advice, I think Mr R's likely to have invested in that way.

Therefore, I think a fair and reasonable way to compensate Mr R for the unsuitable advice is to use a benchmark based on an investment strategy in line with his circumstances and attitude to risk. Mr R also raised concerns that he didn't receive an ongoing service from Portal, despite paying it an ongoing adviser fee from his pension. And I think this redress fairly compensates him for this, as it gives Mr R the return he ought to have achieved when bearing in mind his circumstances and risk profile, while also taking into account that he would have been paying for ongoing advice.

I'm satisfied this matter has also caused Mr R distress – this is because he wanted to withdraw funds from his pension but couldn't do so because the investments were illiquid. So, Portal should pay him £250 compensation. I think this is a fair amount to make up for this in the circumstances.

Putting things right

My aim in awarding fair compensation is to put Mr R back into the position he would likely have been in, had it not been for Portal's unsuitable advice.

I think Mr R would have invested differently. It isn't possible to say precisely what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr R's circumstances and objectives when he invested.

- Compare the performance of Mr R's investment with the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value, there is a loss and compensation is payable.

- Portal should add interest as set out below.

- Portal should pay into Mr R's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Portal is unable to pay the total amount into Mr R's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr R won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr R's actual or expected marginal rate of tax at his selected retirement age.

- For example, if Mr R is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr R would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mr R £250 for the distress and inconvenience caused by the unsuitable advice, which has led to a significant loss.

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

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the actual value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Portal should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Portal pays should be included in the actual value before compensation is calculated.

If Portal is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the actual value. Portal may require that Mr R provides an undertaking to pay Portal any amount she may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Portal should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution out of the investment 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 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 instead of deducting periodically.

The SIPP only exists because of illiquid investments. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr C can discuss with the SIPP provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Portal is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr R wanted capital growth with a small risk to his capital.

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

My final decision

I uphold Mr R's complaint.

My decision is that Portal Financial Services LLP should pay the amount calculated as set out above. It should provide details of its calculation to Mr R in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 1 November 2022.

Holly Jackson
Ombudsman