

## **The complaint**

Mr S complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a defined-benefit ('DB') occupational pension scheme that he held with his former employer. Portal processed the transfer of Mr S' DB scheme benefits to a Self-Invested Personal Pension ('SIPP') on an 'insistent client' basis. Mr S says Portal advised him to purchase various shares, which now have no value despite Portal saying they were low risk and he wouldn't lose any capital.

## **What happened**

Mr S approached Portal around April 2012 to discuss his pension and retirement needs.

On 10 April 2012 Portal completed a fact-find to gather information about Mr S' circumstances and objectives. It also carried out an assessment of Mr S' attitude to risk, which it deemed to be 'moderately cautious'. On the same day Portal sent Mr S a letter saying that it recommended he didn't transfer his DB pension scheme benefits because the growth rate required to match his guaranteed benefits was too high at 26.8% and because he'd be giving up a guaranteed pension of just under £8,000 a year from age 60. But Portal said it could still help Mr CS if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

Portal says that Mr S returned the insistent client form although it no longer has a copy it can provide. Based on my understanding, this form required Mr S to acknowledge that his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits.

On 16 April 2012 Portal sent Mr S a suitability report setting out its advice. The report outlined Mr S' circumstances at the time, which in summary said that he was 56 years old, married, owned his own home with an outstanding mortgage of around £60,000, he was unemployed and in receipt of jobseekers allowance and he had a credit card balance of around £1,000.

The report went on to set out the details of Mr S' existing DB pension scheme. It also said the critical yield required to match Mr S' existing scheme benefits was 26.8%.

The report said that Mr S' objective was to access his maximum tax-free cash entitlement to make some home improvements and to create an emergency fund.

The report then set out Portal's recommendation. It said that it had already recommended that Mr S shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr S had decided to disregard the advice and that it would be treating him as an insistent client. It went on to propose that Mr S transfer his pension to enable him to meet his objective and it set out which pension provider it recommended and how his money should be invested.

Mr S signed the relevant application forms and the transfer went ahead. Mr S received his tax-free cash payment and the proceeds were invested in four Unregulated Collective Investment Schemes ('UCIS') which Portal deemed Mr S' attitude to risk.

In 2021 Mr S complained to Portal about the advice he received.

Portal considered the complaint and issued its final response to Mr S in July 2021. In summary it said that it hadn't investigated the merits or substance of Mr S' complaint because it believed he'd complained too late. It said Mr S had received annual review statements since 2013 which it said should've prompted him to make a complaint more than three years before he did – so he's out of time.

Mr S referred his complaint to our service. An investigator considered the matter and they concluded that his complaint hadn't been brought too late – it was one we could consider. They said they weren't persuaded the annual review statements Portal referred to would have reasonably triggered Mr S into believing he had cause for complaint.

Because Portal disagreed and ombudsman considered the matter and they decided the complaint was not out of time for broadly the same reasons as the investigator.

An investigator then considered the merits of the complaint and they concluded that Mr S' complaint should be upheld. In summary they said that Portal hadn't acted fairly towards Mr S and they didn't think he was a true insistent client. They said Portal's advice not to transfer was undermined because it told him how to go ahead regardless in the same letter. They said Mr S was an inexperienced investor, so it should have been on notice that it had to be careful if it was to conduct matters on an insistent client basis. They noted that Portal hadn't provided us with a signed copy of Mr S' insistent client form – but the example showed it was a template so they weren't persuaded Mr S' would have fully understood the risks involved in going ahead against advice. Overall they said because Mr S didn't have an important reason to transfer – or that his reasons couldn't have been met another way – they thought it unlikely Mr S would have gone ahead if things had happened as they should have.

Portal disagreed. In doing so it repeated its argument that the complaint had been brought out of time citing the same reasons as it gave in its final response letter to Mr S.

The investigator clarified that the time limit matter had already been decided by an ombudsman. And because there was nothing to persuade the investigator to change their mind, the case was passed to me for 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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business (PRIN) and the Conduct of Business Sourcebook ('COBS').

And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

### *The applicable rules, regulations and requirements*

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice - but provides useful context for my assessment of BUSINESS's actions here.

*PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.*

*PRIN 7: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

*COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.16 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 S' best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

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

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were COBS rules in the regulator's Handbook, which required Portal to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Portal to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr S had to have understood the consequences of going against the recommendation.

Firstly I can see that Portal has maintained its stance on Mr S' complaint – it believes his complaint was brought out of time. But an ombudsman has already decided that the complaint is not out of time and it is one we can consider. So I don't need to consider the issue of jurisdiction – my decision is about the merits or substance of Mr S' complaint.

Mr S says that the shares Portal recommended he should invest his transferred pension monies into were low risk and he wouldn't lose capital. But Mr S says the shares now have no value. He says he is now worried about old age and wants his money reimbursed so he can feel comfortable and not have to struggle.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr S' best interests.

And I think Mr S likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 10 April 2012 following the telephone discussion Portal had with Mr S about his pension options, it sent him what I think can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match

Mr S' guaranteed benefits from his DB scheme, and because he'd be giving up those guaranteed benefits, it recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum.

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

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

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

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

I think it ought to have been clear to Portal that Mr S had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr S was an experienced investor – in fact it appears he was completely inexperienced. I'm mindful too that Portal had deemed Mr M's attitude to risk to be 'moderately cautious'. And in reaching this assessment, Mr S agreed that others would describe him as a cautious person; he didn't find investment matter easy to understand; he had little knowledge of investing; and it usually takes him a long time make up his mind on financial matters. I think this should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route.

Portal hasn't been able to provide signed copies of Mr S' returned insistent client forms – but it has provided an example. And based on this, I don't think this demonstrates that Mr S likely knew and understood the risks involved and the recommendation being made. I say this not only because the form was pre-completed and Mr S simply had to sign underneath of a templated letter that he understood what he was giving up by transferring, but crucially as I indicated earlier on, he hadn't yet received Portal's full suitability report and had time to read and digest it before deciding to go ahead anyway. And Mr S indicated in the assessment of his attitude to risk that he typically took time to make up his mind on financial matters. So I'm not persuaded Mr S was able to make an informed choice here.

It was only after receiving Mr S' confirmation that he wanted to proceed with the transfer (I've assumed Mr S did likely return his signed insistent forms as Portal says) that Portal sent him its full suitability report. And while this repeated the recommendation not to transfer out

of the DB scheme, this was followed by a positive recommendation, advising Mr S to transfer his benefits to a SIPP. And this was all set out under a heading titled '*Our recommendation*'.

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

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

Mr S' objective for accessing his pension early was to carry out some home improvements and to create an emergency fund. I understand Mr S used the money solely for home improvements. But I can't see that Portal discussed with Mr S how much money he actually needed and to what extent Mr S needed the money – for example whether Mr S' objective was a 'nice to have' or he had a real need for the money because his home required emergency repairs. Mr S has explained the home improvements he made, but there's nothing to indicate he needed *all* his tax-free cash entitlement immediately or that things couldn't have waited – for example Mr S could've done things in stages or waited a few years until he reached his DB scheme's normal retirement age.

It strikes me that Mr S was likely seduced by the sum of money he was told he could gain access to. But I don't think it was necessary for Mr S to gain access to his pension monies early to achieve his objective at this stage.

Portal recorded that it discussed with Mr S the alternative of him borrowing the money he needed to meet his objective – but the fact-find says, "*Can't afford credit.*" I'm mindful that Mr S wasn't working at the time – albeit Portal didn't establish whether Mr S was seeking work and whether his employment status was likely to change in the near future – but Mr S' wife was working. And Portal's completion of the budget planner in the fact-find was so poorly completed that, not only does it appear the adviser paid little attention to this area – the expenditure simply says "*Various Bills*" without any amounts or a breakdown – there's no supporting evidence that affordability prohibited Mr S, and or his wife, from obtaining some form of credit to help meet their need.

I acknowledge there were no specific insistent client rules at the time. But I consider the rules and guidance that were in place at the time were clear that Portal had to act with due care and skill and in Mr S' best interests. And by not seeking to properly understand Mr S' objectives, how much he needed to achieve them or understanding the importance to him of meeting them at this stage, I'm not persuaded this was acting in Mr S' best interests.

Ultimately I don't think Mr S was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objective. Crucially I also think Portal ultimately gave Mr S a positive recommendation to transfer out of his DB scheme, which in the circumstances I think would've given him the impression that Portal agreed with his approach.

Overall and on balance, given these failings, I don't think it would be reasonable for me to

conclude the process Portal followed meant that Mr S can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr S wasn't clear. It didn't act in Mr S' best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr S would've still gone ahead. Having done so, if Portal had acted in Mr S' best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset properly addressed Mr S' objectives at the time and emphasised the importance of his DB scheme for his future retirement income, I don't think he would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr S was an experienced investor such that he possessed the requisite skill, knowledge or confidence to go against the professional advice he was given.

So taking everything into account, I'm not persuaded Mr S would have still gone ahead and transferred had everything happened as it should have.

I can see that Portal recommended Mr S invest his pension monies in UCIS, which it said matched his attitude to risk. I wholly disagree with Portal's assessment here – I think the investments recommended were of significantly greater risk than it had assessed Mr S was willing to take. But because I think Mr S would have most likely remained in his DB scheme had things happened as they should have, it's not necessary for me to consider this particular matter any further.

### **Putting things right**

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#). The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/19](#) (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr S whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published.

Mr S has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr S.

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

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

For clarity, my understanding is that Mr S could've taken his DB pension benefits without reduction at age 60, and I think it's likely that he would've done so had he remained in his DB scheme. So, compensation should be based on a normal retirement age of 60.

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 S' acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr 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 S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his/her/their likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr S 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 S.

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.

As I said above, my aim is to return Mr S to the position he would've been in but for the actions of Portal. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

To calculate the compensation, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portal is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should

include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr S to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives.

Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr S to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mr S wish to move his investment portfolio) and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr S can discuss with his 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.

To provide certainty to all parties, I think it's fair that Portal pay Mr S an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

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

To clarify - if the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Portal to carry out a calculation in line with the updated rules and/or guidance in any event.

### **My final decision**

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

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

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

If Mr S accepts this decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 10 November 2022.

Paul Featherstone

**Ombudsman**