

The complaint

Mr S has complained about advice he was given by one of Portal Financial Services LLP's advisors to switch his personal pension to a self-invested personal pension ("SIPP").

Mr S is represented in this matter by a third party – who I will refer to as "E".

What happened

Portal has provided us with very little information and documentation in respect of the advice it gave to Mr S. My outline of the circumstances leading up to this complaint is therefore based on what Ms S has told us and on what I can glean from the documentation that we have received.

Mr S was contacted by Portal about reviewing his pension. In January 2014 Portal prepared a suitability report which outlined its advice/recommendation. I haven't seen a copy of the report, but other documents in the file suggest that Mr S was advised to switch his existing personal pension to a SIPP. The switch was made in February 2014. According to the SIPP transaction summary, £68,985.82 was transferred to the SIPP. Mr S then withdrew £17,249.12 as tax-free cash and the remainder was invested.

E wrote to Portal on 2 March 2021 outlining Mr S's complaint. It essentially said that Portal acted negligently in advising Mr S, which resulted in him suffering a loss of around £15,000. Points it raised included that Portal:

- hadn't shown that it adequately assessed Mr S's expertise, experience, knowledge, financial situation or capacity for loss
- didn't ensure the recommendations were suitable for Mr S's attitude to risk ("ATR"), needs, objectives or circumstances
- didn't explain the risks or costs
- recommended that Mr S invest around 90% of his pension into a high risk, unregulated overseas property investment.

Portal chose not to respond to the complaint or any of the allegations so Mr S referred the matter to us. We received the complaint on 26 April 2021.

Our investigator concluded that the complaint should be upheld – essentially because Portal hadn't provided any reasons for why the switch was recommended or anything to show that its advice was suitable. Portal didn't accept our investigator's assessment. It disapproved of E's involvement in the matter as it didn't accept their authority to act on Mr S's behalf and didn't recognise them as an authorised body in respect of complaints submitted to us. It also felt Mr S's complaint fell outside of our jurisdiction because he'd referred it to us too late.

Our investigator issued a further opinion on Mr S's complaint, concluding that it was in our jurisdiction. Portal replied, referring back to its original response.

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.

Jurisdiction

I can only decide a complaint if it falls within our jurisdiction. There are numerous rules that relate to our jurisdiction but I'm only going to address the ones in respect to the issues that Portal has raised. I nevertheless confirm that I've considered all the other rules and I'm satisfied that Mr S fits within the criteria.

The first issue relates to Mr S's choice of representative. I'm aware that Portal has refused to respond to complaints where the consumer is represented by E because it feels they aren't authorised by the regulator. That's of course Portal's prerogative and commercial decision. However, how Portal chooses to respond to complaints has no bearing on a consumer being able to bring a complaint to us.

The rules pertaining to parties bringing a complaint to us say:

- a complaint can only be brought to us by or on behalf of an eligible complainant
- a complaint may be brought on behalf of an eligible complainant by a person authorised by the eligible complainant.

An eligible complainant must be a person that is a consumer – which is defined as any natural person (ie human being) acting for purposes outside of their trade, business or profession. They must also have a complaint which arises from matters relevant to a specific listed relationship with the financial business. The listed relationships include that the complainant is/was a customer of the financial business.

Mr S is an eligible complainant because (a) he's a consumer ie he's a person and in receiving the advice he was acting in a personal capacity, and (b) he was Portal's customer in respect of the advice he received. E, in bringing the complaint to us, was authorised to do so by Mr S – his signed complaint form is evidence of that. And the complaint has been brought to us by and on behalf of Mr S.

Accordingly, I conclude that Mr S meets the eligibility criteria for bringing a complaint to us ie he's an 'eligible complainant'.

The second issue relates to the time limits Mr S has to refer a complaint to us. We can't consider a complaint if he referred it to us:

- more than six years after the event complained about happened; or
- if six years have passed, more than three years from the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint.

The event Mr S is complaining about is the advice he received to switch his pension. That was in January 2014, which means that he had until January 2020 to refer a complaint to us. We received Mr S's complaint on 26 April 2021 ie after the six year time limit expired. The six year time limit doesn't apply if Mr S complained to Portal within the six years. But E didn't complain to Portal on Mr S's behalf until March 2021 ie outside of the six years.

Portal has referred to annual reviews it sent to Mr S in July 2015, March 2016 and March 2017. It feels the content in these updates provided Mr S with information regarding the

issues with some of the funds he was invested in, which it feels should have given him cause for concern and complaint.

At the time of the 2015 review Mr S's pension fund was worth £50,979. The review letter said the fund had grown by 3.79% per year since the switch and that it would be worth £55,780 (if it grew by 1% each year until Mr S turned 66), £66,604 (if it grew by 3%) or £79,257 (if it grew by 5%).

At the time of the 2016 review Mr S's pension fund was worth £51,793. The review letter said the fund had grown by 2.59% since the last review and that it would be worth £56,222 (if it grew by 1% each year until Mr S turned 66), £66,440 (if it grew by 3%) or £78,128 (if it grew by 5%).

Both the 2015 and 2016 review letters briefly detailed how Mr S's funds were invested and commented on how some of the investments worked and their targeted returns. But they didn't comment on how they'd performed so far or how they were expected to perform going forward; and they didn't outline any specific problems with any of the investments. The letters also outlined Portal's recommendation to change how Mr S's pension should be invested – which it said was to reflect his attitude to risk and his plans for the future (as opposed to, for example, any problems with the existing investments). The letters also provided brief general information on the economic backdrop and the market.

At the time of the 2017 review Mr S's pension fund was worth £57,614. The review letter said this represented growth of 10.8% since the last review. It also provided brief general information on the market. The reviewed also alerted Mr S to the fact that the current performance of the investments under the structured element of his pension raised some concerns. But Portal said it wasn't "unduly worried" and it was "confident this element of the pension would grow by the targeted amount by the end of the specified investment period". The letter again outlined Portal's recommendation, so that the percentage invested in each investment rebalanced to the proportions previously recommended. It again said this was to ensure the portfolio continued to reflect the level of investment risk Mr S was prepared to take.

As I haven't seen any documentation from the time of the advice, I don't know how the actual or expected growth compared to what Mr S was told at the outset he could expect. However, even if the actual growth didn't strictly meet the expected growth, given that the pension was a long-term investment I'm not persuaded on the face of it that Mr S ought reasonably to have become aware that he had cause for complaint about the advice he received having been told that his pension had grown by 3.79%, 2.59% and 10.8%. Further, as I've said above, the 2015 and 2016 review letters didn't say anything about the performance of Mr S's investments or, importantly, detail any particular problems or issues with them. I'm not therefore persuaded that the 2015 or 2016 review letters provided sufficiently clear information that ought to have made Mr S think that something had gone wrong and that he had cause for complaint.

The 2017 review letter did mention concerns with the current performance of some investments – which might reasonably have led to Mr S thinking that something had gone wrong. But I think any thoughts Mr S might/should have had in this respect would have been quashed by Portal's confidence in the investments. If Portal wasn't unduly worried about the investment why should Mr S have been? And if Portal was confident the investment would grow by the targeted amount why should Mr S have thought anything different.

Ultimately, I don't think there is anything in the review letters that should reasonably have prompted Mr S into thinking that he had a cause for complaint about the advice he'd received. For completeness, I haven't seen anything else from before 26 April 2018 (ie three

years before the complaint was referred to us) that ought to have prompted Mr S into thinking he had a cause for complaint.

I therefore conclude that Mr S didn't refer his complaint to us late.

So, for the above reasons, I conclude that Mr S's complaint falls within our jurisdiction. Having reached this conclusion, I turn to my consideration to whether the complaint has any merit.

Portal's responsibilities

There were various *Conduct of Business* rules Portal had to adhere to when it advised Mr S, including:

- it had to take reasonable steps to ensure its recommendation was suitable for Mr S (COBS 9.2.1(1))
- it had to get information regarding Mr S's knowledge and experience, financial situation and objectives (COBS 9.2.1(2))
- it had to get sufficient information to ensure the recommendation met Mr S's objectives, he was able to bear the associated investment risks, and he had the necessary experience and knowledge to understand the risks (COBS 9.2.2)
- if it didn't get the necessary information to assess suitability it mustn't make a recommendation (COBS 9.2.6)
- it needed to act honestly, fairly and professionally in accordance with Mr S's best interests (COBS 2.1.1).

In essence, there was an overarching responsibility on Portal to treat Mr S fairly and to ensure that its recommendation was suitable for him.

In 2009 the regulator published a report and checklist which identified four main areas where consumers had lost out when switching their pension:

- they'd been switched to a pension that was more expensive without good reason
- they'd lost benefits in the pension switch without good reason
- they'd switched to a pension that didn't match their recorded ATR and personal circumstances
- they'd switched to a pension where there was a need for ongoing investment reviews but this hadn't been explained, offered or put in place.

Was the advice suitable/did Portal treat Mr S fairly?

I can only decide this complaint based on the evidence presented the parties. By not responding to the initial complaint and by not providing us with its file Portal has effectively chosen to not engage with the complaint process. I therefore think that in reaching my decision it's fair for me to rely on what Mr S has told me happened (which itself is direct testimony – which Portal hasn't disproven) and/or to draw adverse inferences from Portal's lack of engagement.

It's difficult for me to conclude that Portal treated Mr S fairly or that its recommendation was suitable when it hasn't provided us with anything to show that it got information about his investment knowledge/experience, financial situation or objectives. Nor has it provided anything to show that its recommendation met Mr S's objectives, that he was able to bear the associated investment risks and that he understood the risks.

The fact the recommended switch/investment might not have grown as much as had been hoped isn't reason in itself for the complaint to be upheld. However, I need to be satisfied that the recommendation was suitable for Mr S when it was recommended in 2014. I think for the advice to be suitable it needs to be shown that there was reasonable potential for Mr S to be better off by switching. So, I'd expect Portal to be able to show that comparisons were made between the old personal pension and the SIPP. It should also be able to show that the reasons for switching were sound – the potential for Mr S to be better off needed to be enough to more than compensate for the risk that he might end up worse off. In general, I often look at the issues identified by the regulator in 2009 that I've mentioned above.

In respect of the cost of the SIPP, I haven't seen anything which shows me that Portal explained the charges (including penalties, exit fees or market value adjustments that might have been applied on leaving the old pension) to Mr S. I also haven't seen anything which shows that the projected growth of the SIPP was sufficient to offset the charges and the cost of the advice. And I haven't seen anything which shows me that Portal considered recommending that Mr S switch to a stakeholder pension (as the charges are capped) or that it explained why it didn't recommend this option.

In respect of Mr S's attitude to risk and the underlying investments held within the SIPP, Portal hasn't provided anything to show that it sufficiently assessed the level of risk Mr S was prepared to take with his pension and the capacity he had to suffer any losses. Accordingly, it hasn't shown that the investments it recommended were in line with that risk level and capacity for loss.

Mr S on the other hand has said Portal's recommendation didn't match his ATR, needs, objectives or circumstances and that it didn't explain the risks or costs. He also said the recommended investment was too high for the level of risk he was prepared to take.

Given the lack of evidence provided by Portal to counter Mr S's testimony and to show that its recommendation was suitable and that it treated Mr S fairly, I conclude it's more likely than not that Portal's advice was unsuitable.

Putting things right

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

Preferred option

Mr S has told us that if he hadn't transferred to the SIPP he would have stayed with his existing pension. I've no reason to disbelieve what Mr S has told us.

On that basis, any loss Mr S has suffered should be determined by obtaining the notional value of the original pension from the previous pension provider assuming that it would have continued to be invested in the same funds and subtracting the current value of the SIPP from this notional value. If the resulting answer is positive Mr S has suffered a loss and this is the compensation figure. If the answer is negative, Mr S hasn't suffered a loss so no compensation is payable.

Alternative option

I consider the 'Preferred option' outlined above to be the fairest way of resolving this complaint. However if Mr S's previous pension provider isn't able or willing to calculate a notional value, my aim is still to put Mr S as close to the position he would probably now be

in if he'd stayed with his original pension. I'm satisfied what I've set out below is fair and reasonable given what Mr S has told us about his low capacity for loss and ATR.

Any loss Mr S has suffered should be determined by comparing the performance of Mr S's SIPP with that of the benchmark shown below. If the actual value (which is the actual value of the SIPP at the end date) is greater than the fair value (which is what the SIPP would have been worth at the end date had it produced a return using the benchmark) no compensation is payable. If the fair value is greater than the actual value there is a loss and compensation is payable.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Novia SIPP	Still in force	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of switch	Date of my final decision	Nil

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 Mr S has 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 Mr S has made from the investment should be deducted from the fair 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 are 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 fair value instead of deducting periodically.

I've decided on this alternative method of compensation because:

- with Mr S's low capacity for loss and ATR I think he most likely 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 S'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 S into that position. It doesn't mean that he 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 he could have obtained from investments suited to his objective and risk attitude.

How to pay the compensation

The compensation amount should if possible be paid into Mr S's SIPP to increase its value. The amount paid should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance.

If Portal is unable to pay the compensation into Mr S's SIPP or there are protection or allowance implications, it should be paid directly to Mr S as a lump sum. But had it been possible to pay into the SIPP it would have provided a taxable income. So the total amount should be reduced *notionally* to allow for any future 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 S won't be able to reclaim any of the reduction after compensation is paid.

The *notional* reduction should be calculated using Mr S's actual or expected marginal rate of tax at his selected retirement age. I think it's reasonable to assume that Mr S is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr S would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Whichever, method is used to calculate the compensation, Portal must provide details of its calculations to Mr S in a clear, simple format.

Delay in paying the compensation

If payment of compensation is not made within 28 days of Portal receiving Mr S's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

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

My final decision

I uphold the complaint. I require Portal Financial Services LLP to pay compensation as set out under the 'Putting things right' heading above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 September 2022.

Paul Daniel
Ombudsman