

## **The complaint**

Mr S complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a deferred defined-benefit ('DB') occupational pension scheme that he held. Portal processed the transfer of Mr S' DB scheme benefits to a Personal Pension with a drawdown facility on an 'insistent client' basis. Mr S says Portal carried out a 'back covering' exercise rather than provide clear advice not to transfer and facilitated an unsuitable transfer, which he says has caused a loss.

## **What happened**

Mr S approached Portal in 2016 to discuss his pension and retirement needs because he was interested in accessing some cash from his pension.

In March 2016 during a phone call, 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 'balanced'.

On 29 March 2016 Portal sent Mr S a letter saying that it recommended he didn't transfer his DB pension scheme benefits because of the growth rate required by a new pension to match his scheme benefits. But Portal said it could still help Mr S if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 4 April 2016 Mr S returned the insistent client indicating that he wanted to go ahead with the transfer against Portal's recommendation. Portal hasn't been able to provide a copy of all of the returned form – but the example provided shows that, where asked Mr S had to indicate on the form that he acknowledged his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits. A section was provided for Mr S to say in his own words why he wanted to access his pension money early – but this isn't available, so I don't know what, if anything, Mr S said here.

On 15 April 2016 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; he was employed full-time; he was renting; he had a credit balance of around £4,000 he was paying £400 a month towards; he had no other assets or liabilities; and he had £400 disposable income each month.

The report went on to set out the details of Mr S' existing DB pension scheme, which included the transfer value and the amount of pension Mr S could expect from his scheme at age 65.

It also said the critical yield required to match Mr S' existing scheme benefits was 16.9% assuming he took a full pension (I note this was later revised down to 16.4%.)

The report said that Mr S' objective was to access his tax-free cash entitlement to go towards clearing his financial commitments and to put into savings. Portal noted that it had explored with Mr S other ways to generate the money required to meet his objective - but

said that he didn't have enough assets to raise the money required and he didn't want to take on additional borrowing.

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 a personal pension arrangement to enable him to meet his stated objective.

Mr S signed the relevant application forms and the transfer duly completed. Mr S received his tax-free cash payment and the proceeds were invested in a range of funds, which Portal deemed matched Mr S' attitude to risk.

In May 2021 Mr S complained to Portal, via a representative about the advice he received.

Portal considered the complaint and issued its final response to Mr S in July 2021. The response letter was 18 pages in length – but in summary it said that it had provided suitable advice and had acted in Mr S' best interests. It said that it had recommended Mr S not to transfer the benefits from his DB scheme because of the guaranteed benefits it provided. It said Mr S was intent on proceeding with the transfer to access the tax-free cash, so it treated him as an insistent client – the process for which it followed correctly. It said that it had provided Mr S with enough information for him to make an informed decision.

Mr S referred his complaint to our service. An investigator considered the matter and they concluded that his 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 that, while Portal's recommendation to Mr S was not to transfer his DB pension scheme benefits this was undermined by telling him in the same letter how he could still go ahead. They said Mr S was inexperienced and they didn't think Portal's balanced assessment of his attitude to risk was appropriate. They considered Mr S was reliant on the information Portal provided. And because that information wasn't clear, they didn't think Mr S was able to make an informed decision. They went on to say that Mr S' insistent client paperwork was templated – so they didn't think it was clear that Mr S understood the consequences of transferring. Finally they said there was no real need for Mr S to access his pension benefits early – his credit card balance was manageable and it wasn't a priority to clear it. So in conclusion they said they didn't think Mr S would've insisted on transferring out had Portal done things as it should have.

Portal disagreed. In summary it said:

- Its suitability report made it clear to Mr S that the recommendation was not to transfer out of his DB pension because of the benefits he'd be giving up.
- It was Mr S' choice to return the insistent client forms and inform Portal that he wanted to disregard its advice.
- It assessed Mr S' attitude to risk and it felt a balanced approach was appropriate.
- While it agrees that Mr S had no need to access his pension benefits, this is what he chose to do.
- Overall it believed the correct process was followed and that Portal facilitated the transfer for Mr S against its recommendation.

Because the investigator wasn't persuaded 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 Portal'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.

For the avoidance of doubt, I can see that some of the initial advice paperwork also refers to another pension Mr S held – a Defined Contribution pension - and that this too was under consideration for transfer. But I understand that this didn't happen – only Mr S' DB pension scheme was transferred. So this decision is only about Mr S' DB pension scheme.

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 were no regulatory rules in place in respect of insistent clients. But in February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There are three key steps, which it set out on its website as follows:

1. *You must provide advice that is suitable for the individual client, and this advice must*

*be clear to the client. This is the normal advice process.*

2. *You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
3. *It should be clear to the client that their actions are against your advice.*

The regulator said the advice should be set out clearly in the suitability report, and that it needed to be clear with its client about the risks of their chosen course of action and that he/she is acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this would normally be clear. The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

*“The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.*

*The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.*

*Robust warnings were given and documented.”*

Whilst this was guidance, and not rules, I would've expected Portal to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

Portal says that its advice was clear that it didn't recommend Mr S transfer out of his DB pension scheme – he went ahead as an insistent client despite the advice which was his own choice. Mr S says Portal carried out a 'back covering' exercise rather than provide clear advice not to transfer and facilitated an unsuitable transfer, which he says has caused a loss.

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 29 March 2016 following the telephone discussion Portal had with Mr S about his pension options, it sent him what I think can only be reasonably 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 in any event.

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 briefly – 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. And this was something the assessment of Mr S' attitude to risk confirmed when he answered, '*strongly agree*' to the question "*I've little experience of investing in stocks and shares.*" I think this should've put Portal on notice that it had to be very careful if it was to take matters through the insistent client route.

I can see from the example copy of the insistent client form Portal has provided that this included a section where a consumer could put in their own words why they wanted to access their pension fund early. And this was something the FCA guidance pointed to as being good practice. Regrettably this part of Mr S' form isn't available, so I can't see what, if anything, he wrote here. But based on what I have seen, I'm not persuaded Mr S knew and understood the risks involved and the recommendation being made. I say this not only because the majority of the form was pre-completed and Mr S simply had to tick a box to say that he understood what he was giving up by transferring. But crucially as I indicated earlier on, Mr S hadn't yet received Portal's full suitability report and had time to read and digest it before deciding to go ahead anyway. So I'm not persuaded Mr S was able to make an informed choice here. And I don't think this document alone sufficiently showed Mr S was an insistent client.

It was only after receiving Mr S' confirmation that he wanted to proceed with the transfer 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 facilitate access to his tax-free cash. 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 completely undermine the recommendation not to transfer, I think Portal effectively recommended that Mr S 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 clear his financial commitments and to add to his savings. But I don't think Mr S needed to access his pension benefits early by transferring out of his DB pension scheme to achieve things – in fact I don't think Mr S needed a lump sum at all.

It strikes me in this case that Mr S was likely seduced by the sum of money he was told he could gain access to at the start of the process and thought accessing a lump sum was the right thing to do.

Firstly - Mr S' financial commitments amounted to a credit card balance of around £4,000. But Portal also recorded in the fact-find that Mr S was making monthly payments towards the debt of £400. I've not seen any evidence to show or suggest that Mr S was in arrears, or that the debt was unaffordable, which would mean that immediate repayment was in his best interests. Indeed Portal recorded that Mr S' surplus monthly income was around £400. And nothing Portal documented about Mr S' circumstances indicated that his income and/or expenditure was likely to change in the foreseeable future. So I think the evidence supports that the debt was easily affordable.

Furthermore I think Mr S' monthly payment was significantly above the minimum payment he was required to make each month towards the balance. So, not only is this further evidence that Mr S was able to easily service the debt, it was likely reducing at a rate which would suggest it could be repaid within a relatively short period of time.

Portal says that it considered the alternatives open to Mr S to meet his objective – but all it had to do was to tell Mr S to maintain his payments, or increase them using his surplus income, which would result in the debt being cleared without the need for him to access a lump sum to repay it. But Portal overlooked this simple solution and went ahead and facilitated Mr S making an irreversible decision to transfer out of his DB scheme to access his benefits when he didn't need to do so. Yet I think Mr S most likely went ahead with the transfer because he believed this was the only option open to him.

Mr S' second objective was to add to his savings. It's not clear to me why Mr S had a pressing need to do this. And Portal didn't seek to understand and document why. But on the assumption that it was to build up some kind of buffer or emergency fund, as I said above Portal recorded that Mr S had a £400 monthly surplus income. So it seems this could've easily been directed to a savings account to achieve this. And given the monthly amount Mr S could've saved, I think he would've established a reasonable amount of savings in a relatively short space of time – certainly enough which I think could reasonably be considered an emergency fund. I've not seen anything to persuade me that Mr S needed immediate access to a lump sum to achieve things – and certainly not from his pension. Again, Portal overlooked this simple alternative solution available to Mr S to meet his objective.

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 and what he was really trying to achieve before carrying things out, I'm not

persuaded this was acting in Mr S' best interest.

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. I think Portal failed to properly understand Mr S' objective and it overlooked what I consider were the obvious and simply solutions available to him to meet his needs. Furthermore I cannot overlook the fact that I think Portal actually gave Mr S a positive recommendation to transfer out of the 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 or fair. 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, I think 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, and addressing Mr S' true objectives at the time, I don't think Mr S 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 knowledge, skill or had the confidence to go against the advice he was given. I think he relied solely on the advice and process Portal employed.

So if things had happened as they should have and Portal had emphasised the importance of these funds to Mr S' retirement, and been clear with him that he didn't need access to a lump sum to satisfy his objective, I don't think he would've insisted on accessing them and gone ahead with the transfer.

In light of the above, I think Portal should compensate Mr S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

### **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 didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for any new guidance.

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 the business 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 65. So I think if Mr S had remained in his DB scheme he would've most likely accessed them at this point. So, compensation should be based on his scheme's normal retirement age of 65.

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 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.

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 note - 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 15 November 2022.

Paul Featherstone

**Ombudsman**