DRN-3623585

The complaint

Mr M complains about the advice he received from Portal Financial Services LLP ('Portal') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme ('OPS') to a self-invested personal pension plan ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr M is being represented by a third party but for ease I'll refer to all their comments as those of Mr M.

What happened

Mr M engaged with Portal in 2016 to discuss his pension and retirement needs.

Portal completed a fact-find to gather information about Mr M's circumstances and objectives. At the time the advice was given by Portal, Mr M was 63 years old (almost 64), married and living in property he owned worth approximately £100,000 with an outstanding mortgage of £46,000 with six years left. He was self-employed but unable to work at the time of advice due to injury; he was expecting to return to work after an operation. Mr M was receiving a £60 monthly annuity payment and benefits of £475 every two weeks. He had savings of around £5,000 and a life assurance policy of £1,700 which he intended for funeral expenses. His monthly outgoings were exceeding his income by nearly £300 a month and he was using his savings to service his outgoings.

Mr M's desired retirement age was recorded as 70 in the fact-find. His attitude to risk ('ATR') was recorded as 'adventurous'.

Mr M held retained benefits in an OPS, which had offered a Cash Equivalent Transfer Value of £31,886 at the time of advice. This was projected to provide an annual pension of £1,591 from the age of 65. It also provided a 50% spouse's pension to Mr M's wife in the event of his death. No funds were accessible from this scheme until the age of 65.

Portal's suitability report noted that Mr M's primary aim was to release tax free cash ('TFC') to reduce his mortgage. It also noted that because he had a final salary pension scheme the following objectives were also important:

- Have greater flexibility about how you access your pension in the future;
- Maximising TFC verses your current scheme;
- Greater choice and flexibility when it comes to death benefits;
- Have ownership and control of your pension fund; and
- Willing to take an investment risk.

Portal recommended that Mr M transfer his OPS benefits into a new SIPP enabling him to take £7,971.50 TFC. It advised the remaining portfolio should include the following assets:

- Fixed interest: Dimensional Global Short Dated Bond Fund 5.28%
- Equity: Dimensional World Equity Fund 89.72%
- Cash 5%

Mr M accepted the recommendation and the transfer was made in line with Portal's advice in January 2017. Mr M then took a cash lump sum.

In October 2019 Mr M complained to Portal about the suitability of the transfer advice. He said that he'd lost out as a result of the transfer and that Portal ought to have known the recommended investments wouldn't match or improve on the return from the existing DB pension. Mr M also stressed that he was not adventurous with financial decisions and that his ATR was very conservative – that he was reserved and cautious.

Mr M didn't receive a response to his complaint and brought the matter to our Service. He told us Portal had recommended investments which had the characteristics of unregulated collective investment schemes (UCIS). He argued such investments were unsuitable as he was not a sophisticated investor or a high net worth individual.

Portal later provided a formal response to the complaint. It noted Mr M wanted to release funds earlier than the scheme retirement age and was unable to do this otherwise. It highlighted that the use of his savings to support his monthly outgoings was not sustainable in the long-term. It said Mr M required an immediate solution as he didn't want to deplete his savings in case these were needed for emergencies. Portal also noted that Mr M wanted to pay off his mortgage to reduce his monthly outgoings.

In addition, Mr M had indicated he wished to remain in drawdown rather than purchasing an annuity and so Portal had relied on the lifetime hurdle rate (LHR) when assessing whether Mr M was likely to match the DB scheme benefits. It felt the LHR of 1.9% was achievable with the plan it recommended. In support of this it noted the proposed portfolio had an average annualised return over the previous ten years of 9.62%.

Mr M remained unhappy and so our Investigator looked into things. They didn't uphold the complaint. They said the transfer didn't offer value for money but said the advice was still suitable given Mr M wanted to reduce his mortgage to bring down his monthly outgoings, which were not sustainable. They were satisfied there were no other suitable options and felt it was likely Mr M would have gone ahead with the transfer even if Portal had recommended otherwise. They noted that Mr M had continued to drawdown lump sums to pay off his mortgage in the years following the transfer, reducing the outstanding amount to £13,000 in 2021. Our Investigator acknowledged Mr M's concerns about UCIS, but was satisfied the recommended investments were mainstream, regulated funds. They felt these were in line with Mr M's ATR.

Mr M didn't agree and argued that if the advice to transfer was unsuitable then it shouldn't matter whether he would have proceeded with the transfer in any event. Mr M still felt Portal failed to ensure he fully understood the risks of proceeding with the transfer.

As the parties couldn't agree, this complaint was passed to me to decide.

After reviewing the evidence, I was thinking about partially upholding the complaint. So, I shared my provisional findings with both parties, so they had the opportunity to make any comments or provide further evidence. In brief, my provisional findings were that the transfer out of the DB scheme was appropriate in the circumstances and that a SIPP was a suitable product. However, I felt the recommended investment portfolio wasn't suitable for Mr M and he should have been invested into funds in line with a low ATR.

Mr M accepted my provisional findings and Portal didn't make any further comments in response. Given this, I see no reason to depart from my provisional findings and I'm now in a position to issue a final decision on this complaint.

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.

When considering what is 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, I've decided to uphold the complaint in part.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') 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 M's best interests (COBS 19.1.6).

Financial viability

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The critical yield required to match Mr M's benefits at age 65 was quoted as 9.2% if he took a full pension.

The relevant discount rate was 2.5% per year for one year to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mr M's reported adventurous ATR and also the term to retirement. There would be little point in Mr M giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield was 9.2%, I think Mr M was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that ATR.

I note Mr M has said his ATR was lower and I have considered this further below. Here I'm satisfied that isn't relevant to my assessment of whether Mr M was likely to receive comparable benefits, as investments in line with a lower ATR would have further decreased the likelihood of his investments achieving the critical yield.

If I consider this factor alone, then I don't think a transfer out of the DB scheme was in Mr M's best interests. Of course, financial viability isn't the only consideration when giving transfer advice; there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and Enhanced TFC

Mr M had a significantly reduced income because he was out of work. This was causing financial difficulty as he was not able to meet his monthly outgoings – there was a monthly shortfall of around £300 which he was supplementing with savings. Mr M had £5,000 worth of savings left at the time of advice, which would have lasted approximately 16 months if

Mr M continued to serve only his essential monthly commitments and remained out of work. The fact find noted Mr M intended to return to work following treatment on his shoulder, but it was not stated when this would occur. Mr M has since told us the operation didn't happen until 2019 and he was still unable to return to work thereafter.

The suitability report also noted Mr M wanted to keep his savings for emergencies so it would seem he wasn't prepared to further deplete these funds and was seeking an immediate alternative solution to his financial difficulties. I note Mr M was the sole earner and was entirely responsible for meeting his and his wife's monthly commitments. He had no other savings or assets he could've used to ease the financial pressure he was under at that time and was not in a position to take on more debt given he couldn't service his existing financial commitments.

If Mr M had continued to use his savings to subsidise his income, these would have likely lasted until Mr M's DB scheme retirement age, but he would still have had a substantial amount remaining on his mortgage. I note his wife started to receive her state pension of £511 a month in August 2017 (something Portal doesn't seem to have explored with Mr M at the time). And I've thought about how this changed their financial position. It's clear this would have covered their overspend from this point onwards, leaving them some of their savings for emergencies. That being said, given the projected DB pension Mr M would be set to receive was £1,591 before tax, it seems Mr M and his wife still wouldn't have been able to continue to meet their monthly commitments at retirement if Mr M remained unable to work. I say this taking into account both their state pensions and the fact there is no suggestion Mr M had any other pension provision in place at that time aside from his £60 monthly annuity. It seems Mr M was conscious of this shortfall which is why his primary stated objective in the pension advice was to release TFC to reduce his mortgage. This would serve to reduce his monthly expenses, easing the immediate financial pressure he was under as well as reducing his liabilities into retirement.

I'm aware that Mr M said he intended not to retire from work until the age of 70 and so he was unlikely to have had a shortfall in his income if he returned to work. However, the evidence indicates this return to work wasn't guaranteed and in the end wasn't possible. Reducing his mortgage was Mr M's primary stated aim. The fact find showed Mr M wished to drawdown on his pension annually as he could repay an extra 10% on his mortgage each year without incurring penalties. Mr M couldn't have achieved this by staying in the DB scheme. This is because he wasn't entitled to drawdown his pension in this way and he didn't have any other savings or pensions he could've used to meet this need. So, I think transferring out of the DB scheme met this objective.

For these reasons, I think Mr M had a genuine need to access TFC earlier than the normal scheme retirement age. By accessing his TFC, and later drawing down on his pension in a flexible way, Mr M would've been able to pay off some of his mortgage. I note that this is exactly what Mr M told our Investigator he had since done, reducing the outstanding amount to 13,000 by 2021. And in response to our Investigator's view, Mr M didn't dispute that he would have made the transfer or provide any further information about how else he might have been able to meet these pressing objectives.

Although this transfer meant Mr M wouldn't be able to take as much income from his pension at 65 as he would've been entitled to through the DB scheme, I'm satisfied this was necessary in the circumstances.

Investment strategy

Having established that it was most likely suitable for Mr M to transfer from his OPS, I've looked at the recommendation about where and how the funds were to be invested.

I don’t think a SIPP on its own was an unsuitable product as it allowed Mr M to access his TFC and gave him the ability to invest the remainder until such time as it was needed. He could also access a wide range of investments within a SIPP plan.

I have then thought about what would have been a suitable investment strategy for Mr M. As part of his complaint, Mr M has stated that he was a low risk investor, whereas the riskprofiling tool which Portal used classed him as having an adventurous ATR, which is a higher risk profile. So, there is a conflict about what level of risk was suitable for him.

Portal’s suitability report states that adventurous investors focus exclusively on growth and are prepared to take significant risks, feeling they can afford to ride out declines in value in the expectation of recovery.

Mr M’s answers to the risk profile questionnaire he completed with Portal support this assessment. The responses that showed a higher risk appetite towards investment were listed as follows:

- *People who know me would describe me as a cautious person – disagree*
- *Usually it takes me a long time to make up my mind on investment matters – disagree*
- *I associate the word ‘risk’ with the idea of ‘opportunity’ – agree*
- *I generally prefer bank deposits to riskier investments – disagree*
- *I find investment matters easy to understand – strongly agree*
- *I am willing to take substantial financial risk to earn substantial returns - agree*
- *I’ve little experience of investing in stocks and shares - disagree*
- *I tend to be anxious about the investment decisions I’ve made – disagree*
- *I’d rather take my chances with high risk investments than increase the amount I’m saving – agree*

Whilst the only answers which showed a potentially lower risk appetite were:

- *I generally look for safer investments, even if that means lower returns – agree*
- *I’m concerned by the volatility of stockmarket investments – agree*
- *I feel comfortable investing in the stockmarket – no strong opinion*

The risk profile questionnaire itself also considered that his answers amounted to an adventurous ATR.

That being said, the FCA has made numerous comments over the years, including in guidance issued in March 2011 about assessing suitability, about how firms shouldn’t rely solely on risk profiling tools to establish their client’s ATR. The FCA said that firms should have a robust process for assessing the risk a customer is willing and able to take, which includes assessing their capacity for loss; appropriately interpreting customer responses to questions and not attributing inappropriate weight to certain answers; and ensuring that tools are fit for purpose with any limitations recognised and mitigated. For these reasons, I don’t think simply relying on the questionnaire result would be in line with the FCA’s guidance.

Portal said its assessment of Mr M’s ATR was based on the outcome of this tool and Mr M’s intended retirement age. Mr M did still have another six years before he intended to retire, so he may have had some time to tolerate some fluxes and recoup any losses. But while Mr M was hopeful that he would continue to work to age 70, I’m mindful that he wasn’t working at the time of the advice due to an injury. And he also had other health conditions that might have forced him to retire earlier than planned. So, in reality, he may not have had any time to recoup investment losses. Overall, I’m not persuaded this was sufficient time to tolerate the sorts of losses potentially associated with a more adventurous investment portfolio.

Looking at the other available evidence to help assess Mr M's ATR, it seems to me that based on his financial circumstances Mr M had virtually no capacity for loss. He had limited assets and income relative to his spending need, and could not further reduce his outgoings. He was supporting his spouse and so didn't have the same scope to cope with investment losses. His other pension provision was the £60 monthly annuity and his state pension, which means this pension served as one of his most valuable assets. There also isn't any evidence to suggest that Mr M had any investment experience, which sheds considerable doubt on the answers he gave in the risk profiling questionnaire.

Taking everything into account, I therefore think an appropriate assessment of Mr M's ATR would have been 'low'. I say this despite his questionnaire answers, as the evidence indicates he had no capacity for loss and limited time until his retirement. This isn't in line with the assessment reached by Portal. But Portal's suitability report doesn't explicitly comment on Mr M's capacity for loss, simply stating *'we believe you have a suitable level of capacity for loss for the recommendation we have made.'* Portal seems to have considered Mr M's ATR to risk as separate from his capacity for loss which isn't in line with the FCA guidance.

I'd note the suitability report indicates that having considered the capacity for loss and ATR, Portal still felt its suggested investments were suited to Mr M's needs. But having looked at the funds Mr M was invested into, I disagree.

Before I comment on the relative risk of the funds, I'd like to confirm that having looked into both of the funds, I'm satisfied they were regulated, mainstream funds. So I don't think Mr M was invested into UCIS type funds as he's suggested.

The funds themselves are categorised in terms of risk on a scale of 1-7, with one being a low risk option. Portal has explained the Dimensional Global Short Dated Bond Fund was a category two fund. And having looked into the fund and the nature of the investments, I'm satisfied this was a lower risk fund which was suitable for Mr M's low ATR.

However, the Dimensional World Equity Fund was where Portal recommended the majority of Mr M's funds, 89.72%, be invested. Portal said this was category five mainstream fund, so it carried a high amount of risk. Having looked at the nature of this fund, I'd agree it was a higher risk fund which I don't think was appropriate for Mr M in the circumstances for the reasons I've explained above.

This means I don't think Portal's recommendation was suitable. It seems to me that Mr M was an inexperienced investor who trusted in and relied on the investment advice he received. So had Portal given investment advice more in line with Mr M's ATR and needs at that time, I'm of the view that Mr M would have accepted this. Given what I know of Mr M's intentions and circumstances, I think a lower risk portfolio in line with his cautious ATR should have been recommended.

In summary, my decision is that whilst the transfer itself was not financially viable, Mr M's need to access his TFC was sufficient to conclude that it was necessary. But I don't think Portal's assessment of Mr M's ATR was appropriate and didn't take full account of Mr M's circumstances. As I've set out above, I don't think it was suitable for Portal to recommend a portfolio which carried such a high level of risk. In my view, mainstream regulated investment funds in line with a low ATR would've met his needs. I think Portal failed in its duty to ensure its recommendations were appropriate and I think these failings may have led to Mr M experiencing a loss.

Fair compensation

My aim is that Mr M should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr M would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr M's circumstances and objectives when he invested.

What must Portal do?

To compensate Mr M fairly, Portal must:

- Compare the performance of Mr M's investment with that of 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.

- If there is a loss, Portal should pay into Mr M'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 M'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 M won't be able to reclaim any of the reduction after compensation is paid.

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

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

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists and liquid	For half the investment: FTSE UK Private	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if

		Investors Income Total Return Index; for the other half: average rate from fixed rate bonds			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.

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 from the SIPP 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 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 to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr M wanted Income with some 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 M'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 M into that position. It does not mean that Mr M 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 M could have obtained from investments

suited to his objective and risk attitude.

My final decision

I partially uphold the complaint. My final decision is that Portal Financial Services LLP should pay the amount calculated as set out above.

Portal Financial Services LLP should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 23 September 2022.

Jade Cunningham
Ombudsman