DRN-3633888

Financial Ombudsman Service

The complaint

Mr M complains that Portal Financial Services LLP gave him unsuitable advice to transfer two pension schemes to a Self-Invested Personal Pension.

What happened

Mr M's complaint was considered by one of our investigators. He sent his assessment of it to both parties in November 2021. The background and circumstances to the complaint were set out in that assessment. But in summary, the advice Mr M received was documented in a suitability letter dated 22 September 2011. The suitability letter said, amongst other things, that Mr M:

- Was in his mid-fifties, married and employed earning approximately £10,000 per annum.
- Had a retirement age of 65.
- Owned his own home with a mortgage balance of around £50,000. He had a small credit card balance of £700.
- Had a defined benefits pension scheme with a transfer value of £25,637. And a defined contribution scheme valued at £14,839.
- Wanted to access his tax-free cash in order to conduct home improvements.

In addition, Mr M's objectives were recorded as being to:

- *"Use your existing pension plans to provide an income at a later date and to take your Tax-Free Cash entitlement immediately.*
- *Retain a residual fund that remains invested until such a time that you require an income in your retirement.*
- *Ensure that you have a good awareness of investment opportunities available to you.*
- *Ensure your portfolio reflects your current Risk & Reward profile.*
- *Have access to a system which will monitor the performance of your investments.*
- *Be kept informed of the performance of your portfolio.*
- *Have your portfolio rebalanced in line with your Risk & Reward profile.*
- *Consolidate your investments, as far as reasonable, to facilitate clearer and simpler reporting on investment performance."*

Mr M's attitude to risk was recorded as being Moderately Cautious. This was described as:

"Moderately Cautious investors typically have low to moderate levels of knowledge about financial matters and quite limited interest in keeping up to date with financial issues."

The letter said the critical yield – the rate at which the transferred funds would have to grow in order to provide the same returns as those being given up by transferring – was high (15.8%) and extremely unlikely to be met. The recommendations section of the letter said that the transfer was still being recommended as:

"…during our telephone conversation you advised me that you are aware of the downfalls in taking your benefits now but due to your current circumstances you would like to take your benefits immediately; in accordance to your wishes, I recommend:

- *That you transfer your existing pension fund to a …Self Invested Personal Pension (SIPP).*
- *That you take your full 25% Tax Free Cash entitlement from your arrangement.*
- *You leave the residual fund invested until such a time when you require an income"*

The funds recommended for investment were:

49% Raithwaites Hypa Fund
5% Hypa Asia Fund
16% Venture Oil International
15% EOS Solar Energy
15% Cash Deposit

The suitability letter said whilst some of the investments were Unregulated Collective Investment Schemes (UCISs) and Mr M didn't meet the definition of a person who was exempt under the relevant regulations, they could still be recommended as advice had been given by a qualified firm to ensure that they were suitable.

The letter went on to explain the fees and costs involved in the transfer. 5% of the transfer value was payable as an initial charge. There was an ongoing adviser charge of 1% per annum. There was a setup fee of 0.2% of the fund after tax free cash had been paid. And an annual admin fee of 0.55% (reducing to 0.5%) of the fund value plus £80.

The investigator also asked Mr M to provide further information: He said:

- He had no dependents
- Was employed with monthly expenditure of about £700/800
- Had a repayment mortgage on a property worth £70,000 costing £180-£200 per month
- His partner's information and circumstances were not considered at the time
- Without the advice received he would have left the existing plans in place.

The funds from the defined contribution and defined benefit schemes were transferred in October 2011. Tax free cash of £10,168 was paid to Mr M, with the remaining funds invested as outlined above.

Our investigator thought that Mr M's complaint should be upheld, as he didn't think that the advice given by Portal had been suitable.

He referred to COBS 19.1.6 which provided:

When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.

COBS 19.1.7 said:

When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.

And COBS 19.1.8 said:

When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information.

The investigator said the contemporaneous evidence was limited. But he said the suitability letter had explained that the critical yield figure was high, and as such the transferred funds were *"extremely unlikely*" to grow at a rate that would allow the funds to provide benefits equal to those lost upon transfer.

The investigator said 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. He said whilst businesses weren't required to refer to these rates when giving advice on pension transfers, he considered they provided a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The suitability letter said the investment return (critical yield) required to match the defined benefits scheme at retirement date was 15% per year. This compared with the discount rate of 5.5% per year.

The investigator also referred to the industry standard projection rates used at the time of the advice. These were 5%, 7% and 9% for the lower, mid and upper rate returns respectively.

The investigator said no transfer analysis report had been provided by Portal, so it wasn't possible to assess the accuracy of the critical yield figure referred to in the suitability report. However he said such a high critical yield figure almost certainly meant that the transferred funds were likely to provide reduced pension benefits when compared to the ceding scheme.

The investigator said Portal recommended the transfer to enable Mr M to access his tax-free cash for home improvements. He said he would have expected more details about what home improvements were required, their cost and likely timeframe. He said when Mr M complained his representative had said Mr M "…*has confirmed that no alternatives were discussed with him regarding other ways to generate cash such as a bank loan.* [Mr M] *has confirmed that he did not use the TFC to make home improvements nor was he desperate for the cash".*

The investigator noted that the suitability report had said both a loan and a re-mortgage had been discounted as ways of raising money as Mr M did not want to pay interest. However the investigator said these options were only discussed at a high level; there was no detail about the amount of capital required, the timeframe involved or likely interest rate costs. He said this would have allowed Mr M to make an informed comparison about the costs of borrowing the funds required to the costs of the pension transfers – both in terms of outright costs and the lost guarantees.

The investigator said it also wasn't recorded whether Mr M could have taken the benefits from his defined benefits scheme and accessed the tax-free cash available from it at the time he transferred. If so he could have retained the valuable guaranteed income from it for life. The investigator said although it was recorded that Mr M didn't need or want an income at the time of advice, without the relevant information about what those benefits looked like Mr M wasn't in a position to make an informed decision about it.

The investigator said there was very little discussion in the suitability letter as to why the defined contribution scheme should be transferred. Although the new pension scheme allowed access to tax-free cash with the remainder of the fund being left invested, it wasn't apparent why this wasn't available through the existing scheme. There was no discussion about the existing underlying investment funds, their performance or a cost comparison between the ceding and new schemes.

The investigator said he didn't think the evidence available supported the advice to transfer the defined contribution scheme being suitable. And he thought if Portal had advised Mr M to retain the defined benefits pension it was unlikely that Mr M would then have gone ahead with switching the defined contribution scheme.

The investigator also said he had concerns about the recommendation of complex UCIS investments given Mr M was an unsophisticated, lower risk investor. There was no information either in the suitability letter produced at the time of advice or the subsequent information provided by Mr M that suggested such high-risk investments could be considered appropriate. Mr M hadn't held this type of investments before. And he couldn't be considered a high net worth individual. The investigator said the investments didn't match Mr M's assessed attitude to risk in 2011 which was recorded as *"Moderately Cautious".*

Overall, the investigator thought the advice to transfer both pension schemes was unsuitable. He thought Mr M should have remained in his existing schemes.

Portal responded to say that it didn't think we had jurisdiction to consider the complaint as it hadn't been made within the relevant time limits.

I issued a decision on our jurisdiction to consider the complaint on 12 July 2022. My decision was that the complaint had been referred to us in time and we could consider it. I asked both parties to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

No further evidence or arguments were provided.

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.

Having done so, I've come to the same conclusions as the investigator that the complaint should be upheld, and largely for the same reasons.

I don't think the advice to transfer/switch the two pensions was suitable in the circumstances. Mr M was advised to switch to a SIPP and invest in non-standard, specialist investments. Like the investigator, I don't think the investments recommended for Mr M were aligned to his "Moderately Cautious" attitude to risk. The suitability letter described "Moderately Cautious" in the following manner:

• *Moderately Cautious investors typically have low to moderate levels of knowledge about financial matters and quite limited interest in keeping up to date with financial issues. They may have some experience of investment products, but will be more familiar with bank and building society accounts than other types of investments.*

• *In general, moderately cautious investors are uncomfortable taking risk with their investments, but would be willing to do so to a limited extent. They realise that risky investments are likely to be better for longer-term returns.*

• *Moderately Cautious investors typically prefer certain outcomes to gambles. They can take a relatively long time to make up their mind on financial matters and may suffer from regret when decisions turn out badly.*

The suitability letter said the Raithwaite and Hypa funds were Unregulated Collective Investment Schemes (UCIS) and their promotion was restricted. It said Mr M wasn't in the category of persons that these types of investment could be promoted to. But that it thought the investments were suitable for Mr M.

The Raithwaite Hypia Fund was described as a "specialist investment". It invested in a hotel development and was designed to yield 8% per annum. It described it as being low to medium risk and it said it would provide an average compound return of 11% once capital growth and income were taken into account.

The Hypa Asia Fund invested in "offplan" villas and hotel rooms which, it was said would be resold at higher prices once the building was complete. It was designed to run over three years and return between 50-100% on the original investment. There was added currency risk and so it was described as being "medium to high risk".

The Venture Oil Investments Ltd Fund was said to pre-purchase crude oil at an agreed set price and then be sold this back the open market. The suitability letter said that oil was at that time selling for over $100 per barrel. It said it had conducted due diligence on the oil producers and it believed that over the investment period, the price of crude oil was likely to increase.

EOS Solar Investments Ltd Fund invested in a solar thermal power development in Cyprus. The fund had contracted to sell electricity at a fixed price over a 25-year period. It was designed to yield 8% per annum for three years and 10% per annum thereafter. It was denominated in Euros.

In my view all four funds presented significant risks to capital. And the combination of funds presented significant risks overall, and clearly a greater degree of risk than Mr M had agreed to take. So the investments recommended weren't suitable for Mr M.

Mr M had largely guaranteed benefits in his defined benefits scheme. This would appear to align to his moderately cautious attitude to risk. And was consistent with his circumstances; he was on a modest income, no other pension provision was recorded, and he had little capacity for loss. There would needed to have been good reason for him to be suitably advised to give up those guaranteed benefits.

Given the critical yield required on the defined benefit scheme there was little prospect of Mr M improving on the pension that would otherwise have been payable from it. In my view the benefits of a transfer didn't outweigh the risks given Mr M's clear preference for a moderately cautious degree of risk. And I've seen no persuasive evidence of any significant benefit gained from the switch of the defined contribution scheme.

So for the reasons outlined above and by the investigator, I don't think Portal Financial Services LLP met its obligations under the COBS rules; I'm not persuaded that the advice to transfer/switch was suitable in the circumstances.

Putting things right

My conclusion is that a fair outcome would be for the business to put Mr M back, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr M would have remained in the two original pension schemes but for Portal's unsuitable advice.

Fair compensation

Defined Benefits Scheme

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 M whether he preferred any redress to be calculated now in line with the current guidance or wait for the any new guidance /rules to be published.

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

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

Portal should 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.

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 M's acceptance of the decision.

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

If this demonstrates a loss, compensation is payable.

The compensation amount must where possible be paid to Mr M within 90 days of the date Portal Financial Services LLP receives notification of his/her 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 Financial Services LLP to pay Mr M.

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.

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 Financial Services LLP to carry out a calculation in line with the updated rules and/or guidance in any event.

Defined Contribution Scheme

Portal should contact the original pension provider to obtain a notional value for the benefits transferred assuming that Mr M hadn't transferred out of it.

This should be compared with the relevant proportion of the SIPP – i.e that value derived from the transfer from the defined contribution scheme.

If the notional value assuming the pension hadn't been transferred is greater than the actual value of the relevant part of the SIPP, a loss has occurred, and compensation is payable.

Both of the above calculations can be complicated where the investments held are illiquid. (meaning they cannot be readily sold on the open market), as their value might not be able to be determined. That 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 M 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 M to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

In my view the SIPP only exists because of the illiquid investments. In order for the SIPP to be closed 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 M can discuss with the SIPP provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. To provide certainty to all parties, if Mr M still has the SIPP I think it's fair that Portal pays Mr M 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.

If the redress calculations above demonstrate a loss, the compensation should if possible be paid into Mr M'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 M 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 Mr M's likely income tax rate in retirement – which is presumed to be 20% here**.** So making a notional deduction of 15% overall from the loss adequately reflects this.

Income tax may be payable on any interest paid. If Portal Financial Services LLP deducts income tax from the interest, it should tell Mr M how much has been taken off. Portal Financial Services LLP 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.

Portal Financial Services LLP should also pay Mr M £300 for the distress and inconvenience caused to Mr M by the loss of pension and disruption to his retirement planning.

My final decision

My final decision is that I uphold Mr M's complaint.

I order Portal Financial Services LLP to calculate and pay compensation to Mr M as I have set out above under "Putting things right"

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 2 December 2022.

David Ashley
Ombudsman