DRN-3645576

The complaint

Mr G has complained about advice he received from Portal Financial Services LLP ('Portal') in relation to a defined benefit occupational pension scheme ('OPS'). Portal processed the transfer of Mr G's OPS benefits alongside another smaller pension fund on an 'insistent client' basis to a self-invested personal pension (SIPP).

Mr G is being represented by a third party but for ease of reading this decision I'll refer to all representations as being made by Mr G.

What happened

In my provisional decision sent in July 2022 I said:

"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.

Suitability of advice

Portal has said that the advice it gave was suitable because it did not recommend to Mr G that he should transfer his pension. Instead he insisted on doing so. After he insisted, it recommended a provider and investments which it felt were right for him.

But I disagree. I don't think Portal's actions were appropriate or fair.

COBS 2.1.1R required Portal to "act honestly, fairly and professionally in accordance with the best interests of its client". And, as part of that, COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr G. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr G to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives, and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

In addition, there were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:
"A firm must:
1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme;
2) ensure that that comparison includes enough information for the client to be able to

make an informed decision;
3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and
4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."

Under the heading 'Suitability', COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits 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, conversion 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."

So, Portal needed to begin by assuming a transfer from Mr G's OPS was not suitable, then consider Mr G's specific circumstances and objectives. It needed to assess the options available and look at what was in his best interests. It needed to provide a comparison of what the situation would be if he opted to transfer his pension from his OPS and what it would be if he didn't, making clear the differences and risks. And it needed to make sure that Mr G understood all of this information so that he could make an informed decision. All while ensuring it acted honestly, fairly and professionally.

A letter was sent to Mr G on 15 May 2015 titled "Reviewing your pension- here are your options". The letter explains that Portal has gathered all of the information it needs to start giving him pension advice. The letter briefly mentions the transfer value of his OPS as £12,428 and the critical yield of 12.8% but says these figures will be explained at the "paraplanner appointment". The letter then goes on to outline three options available to Mr G. Option 1 is to do nothing, option 2 is for a pension release and option 3 is to take full benefits and retire with an income. Option 1 does not include any detail of the benefit to Mr G of staying in his current plan, while both of the other options include the benefit of taking TFC.

I accept there had been some contact prior to this letter – with an initial enquiry having been registered prior to Portal gathering information about Mr G's existing pension schemes and Mr G also signed a form that allowed Portal to gather information about his existing provisions. But I think the letter indicates, before a meaningful fact find had been completed, the discussion being skewed towards a particular outcome, especially as it only talks about the benefits of leaving the OPS.

Portal carried out a fact find on 19 June 2015. But there doesn't appear to have been any information gathered about Mr G's income needs in retirement. The question around this on the form has simply not been answered. I think it would be difficult, without an attempt having been made to understand this, for any recommendation to be entirely suitable for Mr G's circumstances, bearing in mind the primary aim of a pension is to provide income in retirement. There is also nothing in the fact find to indicate that Mr G had any other retirement provisions in place – so it's likely he had limited capacity for loss with his OPS. But this isn't reflected in the risk assessment.

The 'requirement' noted for Mr G needing TFC was to pay off some credit card debt. But it appears this would have been a "nice to have" rather than an urgent need. The credit card debt appears to be Mr G's only debt at the time and there is nothing to suggest he was unable to keep up with his payments. He also still had monthly disposable income. So, I'm sure Mr G would have liked to pay off his credit card, but I don't think the information *collected shows Mr G had an urgent need to access TFC.*

In my opinion, the discussions around TFC seemed to be about how Mr G would spend the money if it was available, rather than what he needed and whether giving up guaranteed lifelong benefits, and opting out his OPS was in his best interests. And again, this followed the earlier correspondence that had already been skewed toward the outcome of taking TFC.

Portal recorded Mr G's attitude to risk as balanced, based on the information recorded in the fact find. But I don't think some of the answers given support this.

To the statement "people who know me would describe me as a cautious person" Mr G answered, "Strongly agree".

To the statement "I feel comfortable about investing in the stock market" Mr G answered "disagree".

To the statement "I generally look for safer investments, even if it means lower returns" Mr G answered "Agree".

To the statement "I generally prefer bank deposits to riskier investments" Mr G answered "Agree".

To the statement "I find investment matters easy to understand" Mr G answered, "no strong opinion".

To the statement "I am willing to take substantial risk to earn substantial returns" Mr G answered "Disagree".

To the statement "I have little experience of investing in stocks and shares" Mr G answered, "Strongly agree".

To the statement "I'd rather take my chances with high risk investments than increase the amount I'm saving" Mr G answered, "Disagree".

Mr G is noted as having strongly agreed that he had little experience in investing, people would describe him as cautious and he generally looked for safer investments. Overall Mr G appears to be more comfortable saving than taking risks. Not to mention the limited capacity for loss I've already noted. I think Mr G is more likely to have had a low/cautious ATR, his pension seems to be his only available provision at retirement.

So, I don' think the focus of the initial correspondence and the fact find was what was in Mr G's best interests. It seems to have been largely around how much TFC could potentially be taken and what this might be used for – not whether that was appropriate. And I think that could very well have misled Mr G into thinking that releasing TFC was what Portal thought was best.

On 26 June 2015, following the fact find, Portal wrote to Mr G in a letter titled "Important information about accessing your pension early".

The letter briefly mentioned the critical yield required from a private pension to meet the benefits under his existing OPS to be 12.8% and that he would be giving up a guaranteed pension of £899 per annum and TFC of £2,497. The letter also commented on the small transfer value of Mr G's other pension being £633 and that he could release TFC of £158 from this. But besides this this limited information there were no comparisons in the letter for

Mr G to consider. Instead the letter immediately explained Mr G's option of having Portal help him release TFC, albeit as an insistent client.

The document included an insistent client form with boxes for Mr G to tick to signify he understood the critical yield figures and that, if he went ahead with the transfer he would be giving up a guaranteed pension of £899 and TFC at age 65, he might expect to receive £276 per annum at age 66 after taking immediate TFC.

Mr G was also required to tick a box confirming that transferring his current scheme was against the advice of Portal and had to complete a small section explaining why he wanted to access TFC early.

Mr G wrote "I need cover my debts". He also ticked the required boxes before returning the form to Portal.

The letter and attached form gave no consideration to any other ways Mr G could potentially raise the funds to meet his objectives, if indeed he did have a genuine need to do so, other than directing him to third party organisations like citizens advice for help with debt management. For example, I've not seen anything to suggest any information was gathered about whether Mr G could've potentially taken benefits from his OPS scheme early – given he was already over the age of 55 at the time of the advice. Portal may argue that Mr G would have declined this option but based on what I've seen it doesn't appear to have even been considered, discussed, or outlined.

I think Portal's conclusion that the critical yield made the transfer unsuitable was correct. But given the lack of any significant comparison or information for Mr G to consider, I don't think Portal provided full and clear advice to Mr G, such that it left him in a position to make an informed decision about the transfer or about being an insistent client.

Immediately after saying that transferring would be against its recommendation, Portal promoted the option of still releasing money from Mr G's pension – the focus being that this was something it could help with provided he signed an enclosed form to proceed on an insistent client basis. It also encouraged this form to be returned, at which point it said it would send out application forms and a suitability report detailing its advice.

I don't think it was reasonable to ask Mr G to complete and return this form accepting he was to be treated as an insistent client and having made the decision to transfer out of his OPS before a suitability report and advice based on the report was even produced.

At the point Mr G was required to complete and return the form it appears to be a pre-drawn conclusion that he would be going ahead with the transfer.

A suitability report was issued on 8 July 2015. The report repeated that the transfer was against Portal's recommendations. And it included some further risk warnings that, amongst other things, releasing funds early could reduce Mr G's income in retirement, taking TFC at this stage would mean no further TFC could be taken later, and by transferring away from the OPS Mr G would most likely be unable to reverse this decision.

But it didn't give any context to the transfer not being recommended – particularly in relation to Mr G's specific circumstances. There was no additional comparison of the benefits that Mr G would be entitled to under his OPS in comparison to those potentially available under a personal pension – indeed other than the value of the OPS pension and the guaranteed pension per annum, the OPS benefits were not summarised at all within the suitability report.

The report also said if Mr G continued to pay his debt through monthly contributions, rather *than taking TFC he "will have a total repayment of £3,910.89 calculated at a market average rate of 10.55% APR on the debt, with a pension value of £20,635 based on 5% growth at retirement." But if he took TFC and used that to pay off his debt and paid the money he would've been putting towards the debt into his pension "you will have total contributions into your pension of £4,693.06 (this has been grossed up due to tax relief) and a pension value of £21,116 based on 5% growth at retirement." This indicated to Mr G that he'd potentially be better off in broad terms by transferring – which undermined previous statements by Portal to the contrary. So, I think generally these statements are misleading.*

Portal has made assumptions about the interest rate when it could have requested the actual rates giving a more accurate assessment. Which I think further shows that Mr G was not given clear enough information to enable him to make an informed decision.

The report went on to recommend a specific provider and specific funds that Mr G's pension should be invested in. The covering letter sent with the suitability report also stated: "Please read - my pension recommendation is enclosed", and that following the recommendation would mean Mr G would have access to TFC. The letter further stated, "I believe I have made a recommendation suitable for your situation". I think these statements suggest Portal thought it was a good idea that Mr G should transfer his existing pension.

The covering letter included a further declaration for Mr G to complete which repeated the acknowledgements in the insistent client declaration that he had previously returned. But this document had a pre-typed statement requiring Mr G to simply sign to show he was fully aware of all the risk he would be taking transferring his pension. This statement was not in Mr G's own words and I don't think it demonstrates he was fully aware of all the risks involved.

Even with the content of this form in mind I think there was significant enough doubt and contradiction in the correspondence Mr G was sent for him to believe that Portal was in fact recommending a transfer.

The suitability report did touch on alternative methods of raising the funds Mr G needed to meet his objectives, namely taking a loan, or using his existing disposable income. But this section of the report, as explained above also appeared to favour the option of TFC as it also said that by redirecting the payments Mr G was currently making against his debt would "result in Mr G receiving a higher pension value at retirement".

The report says that Mr G did not have enough disposable income to service his needs, although this was not expanded upon. Mr G was only paying the interest off his debts so the capital sum would not have been reducing. He had disposable income of around £200 each month and a low amount of debt, so it is possible a loan could have been serviced by his disposable income. This would have allowed Mr G to start paying off his actual debt rather than just the interest. This option would also have allowed Mr G to keep the benefits offered by his OPS. There was also no meaningful comparison between using the alternative methods and taking the risk of transferring Mr G's pension provisions.

I don't think the suitability report was sufficient as a recommendation not to proceed, and I don't think Mr G's objective was robustly tested by Portal. Mr G's only objective appears to be for him to pay off a relatively small credit card debt and I think it may have been possible to meet Mr G's objectives in other more suitable ways. I think the correspondence in general muddied the waters, which I think on balance likely led Mr G to believe Portal felt the transfer was appropriate.

I don't think the investments recommended to Mr G were appropriate. As I've said previously, I don't think the answers Mr G gave in his fact find support the view that he had a *balanced ATR, which was the basis his investments were selected on.*

Taking everything into account I don't think the advice given by Portal was suitable.

Insistent Client

Portal treated Mr G as an insistent client. I've already detailed a number of flaws with the process that Portal followed. And overall, I have concerns with the process used and whether Mr G was in fact an insistent client.

In the final response letter Portal sent to Mr G in answer to his complaint, it said it had complied FCA's COBS 19.2.1. It said that it:

"fully investigated and analysed your pension plans as their gathered findings were shown in your post sale options letter and suitability report – this made it clear to you that a pension transfer was not suitable for you and you were better off staying with your existing pension providers."

Portal said that when Mr G received the "post-sale options letter" dated 26 June 2015 he decided to go against Portal's advice and proceeded on the basis that he would be treated as an insistent client.

But the letter Portal has referred to was sent to Mr G before he received Portal's full suitability report, and it promoted the opportunity for Mr G to proceed on an insistent client basis. The letter included an insistent client form, and while it's not in dispute that Mr G signed the form, the options Mr G was asked to agree to only required him to place a tick in a box to confirm his understanding. The section Mr G was asked to write himself only asked why he wanted to access funds early against the advice that had been given. I don't think enough importance was given to the fact Mr G was going against professional advice despite it not being in his best interests. In any event, Mr G simply wrote what he would be spending the funds on "I need cover me debts".

Although this declaration was in Mr G's own words his response did not cover why he wanted to ignore professional advice and proceed with an unsuitable transfer above any other alternative that could be explored, or why it was so important for him to clear his small credit card debt at the time. I can't see that Portal asked Mr G to confirm the reasons behind transferring his pension being so important, which after receiving his limited response seems appropriate.

So, Mr G didn't have all of the information he needed to make an informed decision – the form did highlight the critical yield figures and that Mr G would be giving up a guaranteed pension. It also gave limited information about what he might achieve should he proceed with the transfer. But I think it was unreasonable to ask Mr G whether he wanted to be treated as an insistent client or not before providing the suitability report.

Only after receiving Mr G's confirmation that he wished to proceed did Portal send Mr G the formal suitability report. And while the report stated that transferring would be against Portal's recommendation, this was followed by the recommendation to transfer out of the OPS to a personal pension in the same report. Which, as I've said above, I think undermined the recommendation not to transfer.

I don't think the process was geared towards Mr G making an informed, considered assessment of the reasons why he shouldn't be transferring – as if it was, I feel that would have involved Portal providing the full recommendation to Mr G, allowing him to consider this on his own, and then revert to Portal if he still wished to proceed.

On the contrary, I would go as far as to say that Portal's process was designed to facilitate the transfer, with significant emphasis placed on the release of funds and how this could be achieved from the outset. I don't think that providing Mr G with a means of proceeding against the advice, without establishing why he wanted to go against it, why the apparent requirements were truly necessary and why alternatives weren't truly more appropriate, demonstrates that Portal had his best interests in mind.

Overall, I think this shows that Portal made it altogether far too easy for Mr G to agree that he was an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer.

Would Mr G have acted differently?

Mr G said he wanted to access TFC to clear credit card debt. But again, I believe the discussions were around what he would have liked to use this money for rather than him needing to release funds. As mentioned previously, Mr G had a disposable income and there is no evidence to suggest Mr G wasn't managing his small credit card balance affectively. I don't think Mr G had a true need for the funds, or that he would always have transferred his OPS and taken TFC if Portal had used a more appropriate process.

Taking this into account, I think, as an inexperienced investor, had Mr G been provided with more appropriate and robust advice around why the transfer was not suitable, I don't think he'd have gone ahead. I know Portal says the transfer was against its recommendation – which overall was in my view correct. But the process Portal used, including the suitability report ultimately issued after Mr G had been directed to the 'insistent client' route, lacked sufficient clarity, reasoning and rigour – for all the reasons set out above. And, in my view, meant Mr G wasn't able to make an informed decision. If he had been provided with more appropriate information and reasoning, so that he fully understood the risks and long-term implications involved in transferring his OPS and investing as he did, and hadn't been directed towards the 'insistent client' route, I think he would have acted differently and retained his deferred benefits. As a result, I think Mr G's complaint should be upheld.

On balance, if the transfer hadn't taken place, I think Mr G would've retained his OPS benefits until drawing them at age 65, and had Mr G retained his benefits in his OPS I don't think he would have transferred the benefits of his smaller pension either just to release the small sum of £158 in TFC. Had it not been for Portal's failings I don't think Mr G would have gone ahead with the transfer. So, the funds wouldn't have been invested as they were. So, I think it is appropriate to hold Portal responsible for the losses Mr G has incurred.

Portal should put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice".

To put things right I said:

"Putting things right

My aim in awarding redress is to put Mr G as far as possible in the position he would be in now if Portal had given him suitable advice. I think Mr G would have remained in the OPS. I also think he would have retained his other existing personal pension arrangements. Portal has only briefly mentioned this smaller fund and it appears to have only been included as Mr G transferred his OPS at the time.

What should Portal do?

To compensate Mr G fairly, Portal must determine the fair value of his transferred pension benefits as outlined in Step One and Step Two below. If the actual value is greater than the fair value, no compensation is payable.

actual value

This means the actual amount payable from the current SIPP at the date of the calculation.

fair value – step one

If Mr G had been given suitable advice, I think he would have remained in the OPS scheme. Portal must therefore calculate the value of the benefits Mr G lost as a result of transferring out of his OPS in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable OPS pension transfers.

The calculation should be carried out as at the date of my final decision, 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 G's acceptance of the decision.

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

fair value – step two

Portal must calculate the notional value of Mr G's personal pension if he had remained invested there. This should be calculated from the date of investment in the SIPP until the date of my final decision.

Portfolio name	*Status*	*Benchmark*	*From ("start date")*	*To ("end date")*	*Additional interest*
Novia SIPP	*Still exists and liquid*	*Notional value from previous provider*	*Date of investment*	*Date of my final decision*	*8% simple per year from final decision to settlement (if not settled within 90 days of the business receiving the complainant's acceptance)*

Notional Value

This is the value of Mr G's investment had it remained with the previous provider until the end date. Portal should request that the previous provider calculate this value.

Any additional sum paid into the Novia SIPP should be added to the notional value *calculation from the point in time when it was actually paid in.*

Any withdrawal from the Novia SIPP should be deducted from the notional 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 instead of deducting periodically.

*The combined value of the sums produced by the above two steps is the **fair value**.*
If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mr G'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 G 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'. The compensation amount must, where possible, be paid to Mr G 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 G.

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."

I gave both Mr G and Portal time to respond to my provisional decision, but no further information was 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.

Neither Mr G, nor Portal provided anything further for me to consider. So, I see no reason to make a finding different to that I made in my provisional decision.

My final decision

I uphold this complaint as follows.

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

Where the compensation amount already exceeds £160,000, I only require Portal Financial Services LLP to pay Mr G 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 G the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 16 September 2022.

Terry Woodham
Ombudsman