

## The complaint

Mr N complains about the advice given by Portal Financial Services LLP to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. Portal processed the transfer of Mr N's scheme benefits to the personal pension on an 'insistent client' basis. Mr N says Portal badly advised him and has caused him a financial loss.

## What happened

In or around late April 2015, Mr N was approaching his 55<sup>th</sup> birthday and was employed on a zero hour's contract with an agency earning between £15,000 and £16,000 a year. Mr N was also in receipt of benefits in the form of jobseekers' allowance at £72 per week. Mr N wasn't intending to retire for the foreseeable future, had no savings or investments and lived in a property worth £185,000 subject to a repayment mortgage with an outstanding balance of £125,000 costing £700. His only retirement provision (other than his state pension) was his former employer's DB occupational pension scheme which, in 2015 was calculated to give him an income at his normal retirement date ('NRD') at age 65 of £7,925 per year and a tax-free lump sum of £52,833.

Mr N was carrying out an internet search when he located some information about Portal where it offered to assist with releasing money from pensions. Mr N was interested as he had some personal debt of around £20,000 (costing him between £400-£500 per month) so he contacted Portal. He completed a pension review information form in early May 2015 which he returned to Portal. Portal then obtained details of Mr N's DB scheme and conducted a telephone appointment with him in late June 2015

Portal completed a fact-find during the call to gather information about Mr N's circumstances and objectives. It noted on the fact-find that Mr N's objectives were to take maximum tax-free cash (TFC) in order to reduce his debts and make some home improvements. No other objectives were noted.

Portal noted that it had discussed with Mr N the loss his guaranteed DB scheme benefits along with the critical yield his personal pension would need to achieve to match the benefits he was giving up. Portal also carried out an assessment of Mr N's attitude to risk, which it deemed to be 'balanced'.

Portal sent a letter to Mr N two days later on 26 June 2015 in which it said Mr N's pension had a transfer value of £145,796 from which he could release a total of £36,449 as tax free cash ('TFC') but as the critical yield was 12.6% it strongly recommended that he didn't transfer his DB pension scheme because of the guaranteed benefits he would be giving up. The letter immediately went on to say that if he did still want to effect the transfer then it could help him do so that but it would need to treat him as an 'insistent client'. The letter included an options form and asked Mr N to tick the box on the form that was right for him.

Mr N signed the form the following day and ticked the box that to say he was taking the TFC, investing the rest and was being treated as an insistent client. He then went on to tick a further box acknowledging the critical yield for the new plan was going to be 12.6%, that his

new plan was unlikely to achieve such growth and that he understood that he was giving up a guaranteed (full) pension £11,447 at his NRD. Finally Mr N ticked another box to acknowledge he was transferring his DB scheme against Portal's advice and that he would be worse off in retirement.

Portal sent Mr N its suitability report on 7 July 2015 together with a covering letter. The covering letter said it was pleased to enclose a copy of Mr N's suitability report which included Portal's recommendation. It went on to say that if Mr N followed the recommendation he would transfer his DB scheme benefits to a personal pension plan with 'M', that he would receive TFC of £36,449. The letter also went on to say that Portal believed the recommendation it made was suitable for his situation and, if he decided to follow it, he should sign the enclosed forms.

The suitability report said Portal had already recommended to Mr N that he didn't transfer his DB scheme so was now treating him as an insistent client. It went on to say that it was recommending Mr N transfer his DB scheme to a flexi-access income drawdown personal pension investing in M's managed wealth portfolio.

Mr N signed the transfer forms on 8 July 2015 and the transfer took place in late August 2015.

Mr N complained to Portal in June 2021 about the suitability of the transfer advice. He said Portal had conducted an inadequate fact-find which failed to discover highly relevant information about his actual circumstances. He also said Portal had failed to analyse the suitability of the transfer for him or provide him with clear and understandable advice. Finally he said that the investments his pension had been placed in were unsuitable and had performed poorly since the transfer so that it fell well below Portal's projections and meant he was now entitled to significantly lower benefits than if he had remained in his DB scheme. Mr N said he wanted compensation to put him in the position he would have been in had he received suitable advice from Portal.

Portal looked into Mr N's complaint but didn't think it had done anything wrong. It said it had clearly communicated to Mr N on numerous occasions that it wasn't in his best interests to proceed with the transfer but that he had insisted on proceeding regardless. Portal said it had conducted a full fact-find with Mr N and had adequately analysed the suitability of the transfer including that the personal pension with M was unlikely to achieve the growth rate required to match the benefits he was giving up. It said too that it had made him aware of the guaranteed benefits he was giving up and provided him with a transfer analysis report ('TVAS') and a suitability report. Portal said there were no identifiable reasonable objectives mentioned because it wasn't in Mr N's best interests to transfer.

Mr N referred his complaint to our service in September 2021. Our Investigator looked into the complaint and recommended it was upheld. He thought that Mr N couldn't be said to be a true insistent client. And he thought that Portal hadn't done enough to make it clear to Mr N that failing to match his DB benefits meant, in reality, that the value of his pension would be much lower when he did retire. Nor did it do enough to make sure Mr N understood the exact nature of the risk he was exposing himself to by transferring. Our Investigator also thought that Portal hadn't made it sufficiently clear to Mr N that by transferring, he was acting against its advice nor had it sufficiently explored with him other means to achieve his objectives. Our Investigator recommended that Portal pay compensation to Mr N.

Portal didn't respond to our so the complaint was referred to me to make 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*

What follows 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.

A key aspect in this case is Portal's categorisation of Mr N as an insistent client. An insistent client is one that wishes to take a different course of action from that being recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were Conduct of Business Sourcebook ('COBS') rules in the regulator's Handbook which required Portal to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Portal to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr N had to have understood the consequences of going against the recommendation.

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.

Portal says that it provided suitable advice and acted in Mr N's best interests. It says that it followed the correct insistent client process. Mr N says Portal's advice was negligent and he's suffered a loss as a result.

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 N's best interests. And I think Mr N likely understood, or believed overall, that Portal was recommending he should go ahead with the transfer.

I say this because on 26 June 2015 following the telephone discussion Portal had on 24 June 2015 with Mr N about his pension options, it sent him what I think can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate (12.6%) required to match Mr N'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. But I don't think this letter clearly set out the risks associated with the transfer.

Immediately underneath the letter's brief summary of why Portal recommended Mr N 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. No explanation of what 'insistent client' actually means was provided. And while Portal said proceeding on this basis would be against its recommendation, it enclosed the necessary forms Mr N 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 this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr N's best interests. But the information on the form enclosed with the letter, which Portal asked Mr N to complete and return, 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 N had little information to go off to decide if being an insistent client was truly in his best interests.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr N'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 N'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 N could ignore Portal's recommendation was unfair to him; it didn't include an explanation of the risks of proceeding on this basis and wasn't in his best interests.

I think it ought to have been clear to Portal that Mr N 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 to suggest Mr N was an experienced investor – in fact it appears he was completely inexperienced. I'm mindful too that Portal assessed Mr N's attitude to risk as being 'balanced'. This process involved Mr N giving answers to a series of questions – the answers to several of which indicated he was quite averse to taking financial risk.

I think this should've put Portal on notice that it had to be very careful if it was to take Mr N through the insistent client route.

I can see that Mr N's insistent client forms included a section where he put in his own words why he wanted to access his pension fund early. However, I don't think Mr N's response adequately demonstrates that he knew and understood the risks involved and the recommendation he was agreeing to. I say this not only because the majority of the form was pre-completed and Mr N simply had to tick a box to say that he understood what he was giving up by transferring, but also because the reasons he gave in his own words were related to his financial circumstances and difficulties – there is nothing in what Mr N wrote to indicate he understood the risks involved in accessing his pension and the recommendation he was agreeing to.

And crucially, as I indicated earlier on, Mr N hadn't yet received Portal's full suitability report and had time to read and digest it before having to decide if he wanted to go ahead anyway. So I'm not persuaded Mr N was able to make an informed choice here. And I don't think this document alone sufficiently showed Mr N was an insistent client.

It was only after receiving Mr N'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, it was followed by a positive recommendation, advising Mr N 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 N 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 N advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report *after* securing his confirmation to proceed on an insistent client basis.

By recommending that Mr N transfer his benefits to a particular scheme, I think this undermined the recommendation not to transfer; and I think Mr N could've believed Portal supported the 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 N's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. In my view it shouldn't have separated out the elements. For this reason, I think on receipt of the full suitability report Mr N could have believed Portal was recommending he transfer out of the DB scheme, and that it was reasonable for him to do so.

One of the two objectives Mr N cited for wanting to access his pension early was to enable him to generate a lump sum which he could use to clear his debts. There was little information captured by Portal on the fact-find about the loans. The only details relate to the loan balance which is recorded as being £20,000 and the monthly payments which are documented as being *between* £400-£500. There is no information on the type of loan, the name of the lender or the outstanding term. Nor is there any information about Mr N's wife's financial circumstances beyond the fact she had an annual income of £22,000 but that is the only information Portal recorded. And there is only a very limited amount of information recorded about Mr N's monthly expenditure – no such expenditure is recorded for Mrs N. So I can't verify, because Portal hasn't documented what their actual joint income and expenditure was each month, whether there really was no joint disposable income left over at all or whether only Mr N had no disposable income left over.

So whilst it is clear to me that Mr N's loan repayments were likely a substantial portion of his net income it appears he was managing to afford them each month. There is no information about why the loans needed to be repaid early. In the suitability report Portal said that it had talked with Mr N about other ways of raising money instead of taking the TFC. It notes that he didn't want to take on any further lending or pay interest and that he didn't have enough disposable income to service his needs.

Portal also said in the suitability report: "*if a spouse or other family member has the potential to provide financial support you have more scope to cope with investment losses*". The implication here being that Mr N could afford to take on the risk associated with the personal pension. If Portal thought such scope existed however, then it is unclear to me why it didn't give full and proper consideration to Mrs N's income when advising Mr N on the transfer. Mr N was managing enough work each year to just about cover all his expenses (mortgage, loans, life cover etc). His wife however was earning more than he was and, according to the

fact-find in any event, had no outgoings. So I can't reasonably accept that Mr N had no option but to transfer his pension, take the TFC and clear his debt. It appears there was possibly some disposable income that could have allowed his debts to be restructured so they were more affordable to him thereby negating the 'requirement' to transfer his pension and lose his valuable retirement benefits.

Whilst Mr N might very well on the face of it not wanted to take on any more debt, it was Portal's duty to fully interrogate that assertion, explain the other options open to him and demonstrate that paying interest on a loan was financially better than taking money out of a guaranteed pension plan and reducing the benefits available to him in retirement. Portal should not merely have accepted his viewpoint without challenge. So whilst Portal claims to have considered alternative ways for Mr N to meet his needs it seems to me it overlooked what I consider to be an obvious and easy solution which was to explore whether his wife's income could be used to help. And I can't see that Portal assessed what income Mr N would need in retirement or how he'd fund it if he transferred out. In my view, that was a key failing.

And I can't agree that advising Mr N to transfer his guaranteed pension benefits in order to access TFC so he could undertake home improvements was in his best interests. I'm sure that being able to make home improvements would have seemed attractive to Mr N (and I understand that he did indeed use £22,000 of the TFC for an extension of his house) but I cannot agree that it was suitable to advise Mr N to transfer his DB scheme in order to access TFC and for which there potentially existed other means, unexplored by Portal, to raise it.

I know that Portal stated in the suitability report that Mr N didn't want to take on any more lending but it doesn't seem to me that it explored the possibility of restructuring Mr N's personal debts, perhaps to take any repayment terms out a bit, or by re-mortgaging, so he could borrow a little bit more if the home improvements were a significant priority for him. Doing so would also potentially have lowered his monthly outgoings. But I've seen no evidence such alternatives were explored with Mr N. And whilst the home extension was no doubt a 'nice to have' I don't think it can be said to be time critical such that the TFC had to be taken right away so it could be done. There is no evidence that it was. It could well have been the case that Mr N could have waited to receive the tax-free pension commencement lump sum from his DB scheme before undertaking the extension.

I acknowledge there were no specific insistent client rules at the time. But I consider the regulatory rules and guidance that were in place at the time were clear that Portal had to 'act honestly, fairly and professionally in accordance with the best interests of its client' and to provide information that was clear, fair and not misleading. So, Portal's recommendation had to be clear and Mr N had to have understood the consequences of going against the recommendation. By not explaining the risks to Mr N of his supposed preferred course of action, and by not seeking to properly understand Mr N's objectives, financial circumstances and what he was really trying to achieve before carrying things out, I'm not persuaded Portal can be said to have been acting in his best interests.

Ultimately I don't think Mr N 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 objectives. Portal failed to properly understand Mr N's overall position and overlooked or ignored his wife's income and whether it could provide a solution to his needs as I described above. Furthermore, I think the way Portal presented its recommendation to Mr N could've led him to believe it was giving him a positive recommendation to transfer out of the scheme. And I think this would've given Mr N the impression that Portal agreed with his approach.

Portal recommended that Mr N invest in a managed wealth portfolio. Mr N says his personal pension has since performed poorly. As I'm upholding the complaint on the grounds that Mr N would not have transferred out of his DB scheme if Portal had followed a fair process, it follows that I don't need to consider the suitability of his investments. This is because Mr N would have remained in the DB scheme and so the investments in the personal pension wouldn't have arisen if suitable advice had been given.

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 N can truly be regarded as an insistent client - I think Portal made it altogether too easy for Mr N to agree that he was an insistent client. Portal's overall communication with Mr N wasn't clear or fair and it didn't act in Mr D's best interests by providing information that was clear, fair and not misleading.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr N would've still gone ahead. If Portal had acted in Mr N's best interests by providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, by fully exploring alternative means of achieving his objectives and by addressing Mr N's true objectives at the time, I don't think he would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr N to be an experienced investor who possessed the requisite knowledge, skill or had the confidence to go against the advice and recommendation he was given. I think he relied solely on the advice and process Portal employed.

So if things had happened as they should have, taking everything into account, I don't think it likely Mr N would have insisted on going ahead with the transfer.

In light of the above, I think Portal should compensate Mr N for its failings 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 set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#).

In this consultation, the FCA said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/9](#) (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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr N whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect.

Mr N didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

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 N.

A fair and reasonable outcome would be for the business to put Mr N, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr N 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, Mr N has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 N's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr N'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 N 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/her/their 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 N 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 N.

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

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.

### **My final decision**

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr N 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 to Portal Financial Services LLP pay Mr N 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 N 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 N the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr N.

If Mr N 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 N can accept my decision and go to court to ask for the balance. Mr N 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 N to accept or reject my decision before 1 February 2023.

Claire Woollerson  
**Ombudsman**