

## **The complaint**

Mr H complains about advice he was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan in 2015. He says the advice was unsuitable for him and believes this has caused a financial loss.

Portal Financial Services LLP is responsible for answering this complaint. To keep things simple I'll refer to "Portal".

## **What happened**

Mr H paid Portal for advice in relation to his pension and retirement needs. Portal ultimately facilitated Mr H transferring away from his OPS, to a personal pension plan. It said he could access a tax-free cash element and invest the remainder in various funds within a new personal pension plan it recommended.

The information gathered by Portal about Mr H at the time was broadly as follows:

- Mr H was 56 years old living with his wife who was then aged 57. They had one child who was not financially dependent on them. Mr and Mrs H earned around £1,600 and £1,100 per month (net) respectively.
- Mr and Mrs H owned their home valued at £130,000 with a nine-year mortgage left to run, costing around £300 per month. They had no other apparent assets and a small car loan which was being paid down.
- Mr H was a current and contributing member of his employer's OPS, having joined the scheme in the 1990s. The cash equivalent transfer value (CETV) of the OPS in 2015 was £119,553 (later recalculated as £122,487) with a normal retirement age of 66.

Mr H complained to Portal in 2021 that he was given unsuitable advice. However, Portal says that in its dealings with Mr H, it first told him that it didn't think he ought to transfer away from his DB scheme. It said it told him its advice was *not* to transfer out.

However, Portal says Mr H became an 'insistent client' – a term used within the industry when a client wants to go against what was recommended to them by their adviser. Portal says that only when Mr H insisted, did it then go on to make a second recommendation: that he transfer to a personal pension plan, take a 25% tax-free lump sum, and invest the rest in various money market funds. It says when he agreed to this course of action, it then facilitated the transfer from the OPS to a personal plan.

The complaint has been referred to our Service. One of our investigators looked into it and said we should uphold it. They thought Portal hadn't treated Mr H correctly when categorising him as an 'insistent client' and that the advice to transfer the OPS was unsuitable.

As the complaint couldn't be resolved informally, it's come to me for a final decision.

## What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

### The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Portal's actions here.

- PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
- COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*
- The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability and the provisions in COBS 19 which specifically relate to a DB pension transfer.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable.

Having considered all the circumstances in this case, I've decided to uphold Mr H's complaint.

### Introduction

I would normally begin by assessing whether the transfer of the pension was financially viable. For instance, I'd look at whether there was evidence Mr H's DB pension could potentially grow outside his OPS, to an extent where transferring to a type of money market scheme in a personal pension was worthwhile. And I'd compare these types of projections against the valuable benefits and guarantees Mr H would be giving up by leaving a DB scheme.

However, in this case, Portal itself has said its initial advice was not to transfer. So, having said in 2015 – and again in 2021, following the complaint - that transferring *wasn't* suitable, it would obviously be very hard for Portal now to argue that it *was*.

For the record, I agree that transferring wasn't suitable. Everything I've seen shows Mr H's OPS would have had to grow outside the scheme at very substantial rates year-on-year, to make transferring worthwhile. So, transferring simply wasn't suitable, from a financial comparison perspective and the evidence is very strong in this regard.

There were also other significant reasons why transferring wasn't suitable which in the main related to the benefits and guarantees within the current scheme Mr H would be giving up by transferring away.

However, as there's no dispute that transferring wasn't suitable, I don't need to spend any more time explaining why.

#### What was Portal required to do?

Portal says Mr H ultimately went against its advice. It says that he was advised that he ought to stay in the DB scheme, and it was Mr H himself that insisted he wanted to transfer out. Portal says this meant he became an 'insistent client' and that accordingly, it followed a process to transfer Mr H's OPS to a personal pension plan, as per his wishes.

At the time when Portal met with Mr H and was advising him, there was no specific regulatory advice or guidance in place in respect of 'insistent clients'. However, as I've pointed out above, there were a number of important general rules in the regulator's Handbook. These included but were not limited to a requirement upon Portal to '*act honestly, fairly and professionally in accordance with the best interests of its client*'. In addition to this, COBS required Portal to provide information that was clear, fair and not misleading.

Everything I've said above therefore demonstrates that firms, like Portal, had a number of important responsibilities when providing this type of financial advice. For example, despite what Mr H might have thought he wanted at the time, Portal's job here, as a regulated adviser, was to provide advice that was clear and in his best interests. In particular, Portal should have been clear that if it was not recommending a particular transaction or course of action, then the risks of what Mr H was apparently interested in were clearly pointed out during the course of the advice.

I don't think Portal adequately did this.

#### Initial contacts between the parties

The evidence I've seen strongly suggests Portal's intention from the outset was always to facilitate the transfer from Mr H's OPS, to a personal pension plan.

I say this because Mr H has provided plausible testimony that it was Portal that drove the idea of transferring away, following either an advert or 'cold call'. Similarly, Mr H says it was Portal, rather than him, which suggested a reason why he might want to access some cash and that his pension might be a vehicle to release it, particularly as he had an important family event to pay for in the near future.

Portal built on this approach by then writing an initial letter to Mr H, on 5 November 2015, basically saying it had collected enough information about his existing scheme and that he'd be able to access a tax-free lump sum of almost £30,000. Portal knew that Mr H was interested in generating money for the family event. And the wording of this initial letter, in my view, encouraged him to immediately access his pension funds straightaway, by moving to a personal plan. No assessment appears to have been carried out by Portal as to the amount Mr H might have needed to pay for this event and the evidence showed he already had disposable income and probably various other ways of paying for what he wanted to do.

I think the letter of 5 November was misleading. The amount of tax-free cash quoted by Portal in the letter was, in fact, based on 25% of Mr H's CETV and it could only be accessed in the way Portal was suggesting by transferring out to a personal pension plan. I also think it's enlightening that Portal was also promoting this type of action *before* it had even

collected sufficient information about Mr H's circumstances and needs: Portal's 'fact-find' wasn't completed until 17 November 2015.

It's therefore my conclusion that this letter was already paving the way for a transfer-out to take place.

On 23 November 2015 Portal wrote to Mr H again. Here, it said it wouldn't be minded to recommend a transfer-out. However, this letter was barely one page long and in my view, it contained several substantial shortcomings.

Firstly, I don't think Mr H would have been able to really understand what was being said in the letter, particularly as to the reasons why transferring out evidently wasn't being recommended. For example, Portal focussed its 'advice' at that point, on the issue of the critical yield. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity income as the DB scheme. So, it is part of a range of different things which can help show how likely it is that a personal pension plan could achieve the necessary investment growth for a transfer-out to become financially viable.

In this letter, Portal was implying the critical yields were high, thus making a transfer-out to a personal plan not worthwhile in Mr H's case. However, in my view, Portal did a very poor job at explaining all this. It also made errors in explaining which critical yield figures actually applied in Mr H's case and it failed to explain what these yields really meant. So, I don't think Mr H would have understood the issues being raised, why they mattered and what he ought to do as regards his pension.

Secondly, as I've mentioned briefly above, Mr H was a current and contributing member of his OPS at the time Portal was advising him on these matters. This means that both he and his then employer were therefore making contributions towards his OPS and that his pension benefits were continuing to grow each month as a consequence of these contributions. As a current member of the scheme, Mr H also enjoyed a variety of benefits such as life cover and certain financial guarantees relating to his spouse, Mrs H.

Overall, Portal did a very poor job indeed at highlighting the significance of him being a current member of his OPS. By leaving to transfer to a personal plan, Mr H was giving up these benefits and guarantees, but Portal made only scant reference to this in its dealings with Mr H: it was briefly mentioned on the 'fact-find' and no mention of was made of it at all in the letter of 23 November 2015. Portal therefore failed to comprehensively address, what was, a major reason for not transferring away from his OPS.

What Portal should have been doing here was genuinely promoting to Mr H, the value of remaining where he was with his pension and explaining to him why. In my view, remaining in the DB scheme was by far much more in his best interests, and if he needed to raise some cash for a specific reason, Mr H should have been advised of the many other ways of doing this rather than irreversibly transferring out of his DB scheme.

A third failing in the letter of 23 November 2015 was the contradictory message it was giving. Mr H was paying a considerable amount of money for this advice and I think his expectation would have been that it would be clear. However, despite initially saying in the letter that a transfer wasn't being recommended, Portal immediately undermined this by saying it could facilitate the transfer in any event. It enclosed a pre-populated form and invited Mr H to self-declare himself as an 'insistent client'. There followed two options for Mr H - the first of these was actually to transfer, despite Portal having said this wasn't recommended; whilst the second option was to "do nothing".

So, in summarising Portal's dealings with Mr H up to this point, I think it's reasonable to say that its communications lacked in both clarity and objectivity. If Portal really was to have effectively communicated to Mr H that its advice was *not* to transfer out of the DB scheme at all, I would have expected the "do nothing" option to be the only one available at this point together with a clear set of explanations of what this was based on.

### The suitability report

Whilst up to this point Mr H had received some short letters from Portal, I can see he would have also undergone a telephone consultation to talk about his personal circumstances and financial objectives. An initial transfer analysis was commissioned at the beginning of November 2015 – this contained errors and was redone on 10 December 2015. However, it is common in pension transfer advice cases to see the business's formal recommendation about what to do set out in a suitability report. This was produced on 11 December 2015.

However, as I've described above, the suitability report in this case was issued *after* Mr H had already been invited to self-declare himself as an 'insistent client'.

So, I think the actions of Portal here fell substantially short of what I'd expect to see from a regulated financial adviser. Not only was the suitability report issued several weeks after important decisions had evidently been made, like the letters preceding it, it was saying one thing, but really facilitating another. For example, while on first look the report did set out that its initial recommendation for him was *not* to transfer out, I think this was seriously undermined by statements and actions it made directly after this. This approach was therefore identical to the preceding letter - Portal's report was completely pre-disposed to enabling Mr H to transfer out of his OPS from the outset. And so, its initial recommendation did no more than pay lip service to the important benefits and guarantees Mr H would be giving up in the process.

I say all this because although there was a recommendation not to transfer out of his DB scheme, this was set out only briefly at the beginning of the report. Here would have been an appropriate point at which Portal could have clearly told Mr H why he shouldn't transfer. There should have been an explanation of the benefits he'd be giving up and a demonstration that his funds, if transferred out of the scheme, would be highly unlikely to grow in a way that would match the benefits of leaving them inside the scheme.

By seeing this, Mr H would have been able to judge that by transferring, his pension benefits would be considerably lower in the longer term. This could have been done with much clearer references to the critical yield or other growth-related comparisons, together with accompanying explanations. Portal also ought to have explained the impact of transferring on Mr H's wider retirement plans, including whether he'd have enough income to live on at his desired retirement age if he transferred out and spent most of his tax-free lump sum. Furthermore, Portal should have addressed the issue of Mr H's current membership of his OPS.

However, it was only later in the report that minor references were made to what Mr H would be giving up and, in my view, these dangers were substantially underplayed. The majority of the remaining part of the suitability report was devoted to the personal plan fund recommendations. What I would expect to see here was a meaningful emphasis in the documentation showing the reasons why the transfer was not in Mr H's best interests.

However, I reiterate that by the time of the suitability report, important decisions had already been made – so what did or didn't follow in the report could be said to be moot points. It is my view that Portal's actions and inactions here fitted the regulator's later definition of a 'papering exercise' designed to quickly complete the transfer-out process at all costs.

Portal's recommendation simply wasn't clear, or indeed genuine, and it comprehensively failed to set out its advice with due care and skill.

### Was Mr H really an 'insistent client'?

I don't believe the evidence is plausible that Mr H even was an 'insistent client'. The evidence I've seen is strongly suggestive of him not being experienced in these types of financial matters and so was heavily influenced by his advisor.

Portal's explanations were poor and its communications about what it was really recommending for Mr H were unclear. It produced templated forms and statements which I think offered Mr H what he thought was an easy way to achieve his short-term financial objectives at the time. These forms failed to highlight the risks and issues of him giving up his pension and it failed to make it clear that transferring his pension was directly opposed to what was in Mr H's overall best interests.

If Portal had followed a much better process, I don't think Mr H would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mr H what he would be losing out by transferring his deferred benefits.
- There's no evidence that Mr H, an inexperienced investor, desired any input or control over the investment choices of his pension funds.
- Mr H was paying for independent financial advice, and if that advice had been persuasive about the suitability of remaining in his OPS, I think it's more likely that he'd have followed that advice, rather than being pushed immediately down an 'insistent client' route.

### Suitability of investments

Portal recommended that Mr H invest his funds in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr H and I don't think he would've insisted on transferring out of the scheme if clear advice had been given to him, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

### Summary

In this decision I have set out why I don't think Mr H met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by Portal simply to transact what Mr H may have thought he wanted to achieve at the time – to transfer his pension out to another provider.

Portal's initial recommendation not to transfer was not comprehensive, meaningful, or easy to understand. It did not adequately explain why transferring out was not in Mr H's best interests, in a way that was personal to him or with reference to his objectives. Portal then immediately offered Mr H a very easy route to transferring his pension anyway, via a series of choices / signatures on pre-populated forms. In this respect, the advice did not meet the standard I mentioned at the beginning of this decision about being clear, fair and not misleading.

If Mr H had been given clear and persuasive reasons why transferring wasn't in his best interests, I think he would have followed advice to remain inside the DB scheme. Mr H went to Portal seeking advice. I think it's much more likely that he would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in his interests.

Portal failed in its duty, so I'm upholding Mr H's complaint.

### **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 H, through his representative, whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. His representative didn't make a choice when we asked, 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 therefore satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr H.

Compensation should be based on his normal retirement age of 66, 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 H's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H'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 H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr H 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 H.

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 am upholding this complaint and I now direct Portal Financial Services LLP to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Portal Financial Services LLP to pay Mr H 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 H 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 H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

If Mr H accepts my final decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H 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 H to accept or



reject my decision before 31 January 2023.

Michael Campbell  
**Ombudsman**