DRN-3687527

## The complaint

Mr L complains that the advice he was given in 2014 by Portal Financial Services LLP to transfer his personal pension plan (PPP) into a Self-Invested Personal Pension (SIPP) was unsuitable, and he has suffered a financial loss as a result.

## What happened

In 2014 Mr L met with Portal to discuss his retirement planning and review his pension arrangements. As a result, in December 2014 Portal advised him to transfer a PPP he held into a Novia SIPP.

In its suitability report it recorded his personal and financial circumstances as:

- He was 50 years old and married
- Lived in a mortgaged property, and owned a second investment property
- Was in full time employment, with a total annual income of £45,600.
- He had an occupational pension scheme which provided life assurance and death in service cover through his employer.
- He had a second PPP
- He had a monthly disposable income of £800.

Mr L's attitude to risk (ATR) was recorded as 'Balanced', and his stated objectives were:

- Improved performance
- Move away from equity backed funds
- To have the opportunity to take tax free cash at age 55, and then take income at (his) desired retirement age (65).

Portal noted the PPP it was advising him to transfer away from had a 1% administration charge, and its average growth over five years was 10.86% per year.

Portal recommended Mr L hold the following investments within the SIPP:

| Holding | Overall Portfolio (%) |
|---|---|
| [redacted] | 5.80 |
| [redacted] | 15.00 |
| [redacted] | 45.00 |
| [redacted] | 14.25 |

| | |
|---|---|
| [redacted] | 11.40 |
| [redacted] | 8.55 |

The PPP was transferred on 3 February 2015 with a total value of £15,881.32. Portal took a initial advice fee of 5% of the fund value and an on-going 1% annual review fee. Novia also had a management charge of 0.5%.

On 5 August 2021 Mr L complained to Portal that it hadn't notified him of the collapse of the Real Estate USA fund. He also thought that Portal had mis-informed him of the nature of the investments in his SIPP and he'd been poorly advised in 2014.

In its final response to his complaint, Portal said it had decided not to investigate it. It said it believed the complaint fell outside of the regulator's time limits for raising a complaint.

Mr L didn't agree with this so referred his complaint to our service. As Portal objected to us considering it, our service's jurisdiction over the complaint was the subject of an ombudsman's decision. This concluded that Mr L's complaint was made within the time-limits and was one our service could consider.

Having considered the merits of Mr L's complaint, our investigator thought it should be upheld. In summary, he thought neither the advice to transfer, nor the investment funds selected were suitable for Mr L. And he set out the methodology he thought Portal should use to establish if Mr L had suffered a financial loss as a result of its unsuitable advice. And if a loss was identified, he told Portal how he thought Mr L should be compensated for this.

Mr L accepted the investigator's view, but Portal didn't respond. So the complaint has come to me to consider and 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.

First, I have reconsidered whether this complaint is within the jurisdiction of our service, and I have reviewed all the evidence and arguments surrounding this. Having done so I see no reason to depart from the decision previously reached, so I'm satisfied this complaint is one this service has the power to consider.

In respect of the merits of Mr L's complaint, I agree with the investigator that it should be upheld, for broadly the same reasons. I also agree with the redress methodology the investigator set out. I'll explain.

When assessing the suitability of the advice given to Mr L by Portal, I have to consider it in light of the information available when the advice was given, and not by using hindsight. I've also looked at it in the context of the rules and guidance in existence at the time.

Within the Financial Conduct Authority (FCA) handbook, COBS 2.1.1R required a regulated business to "*act honestly, fairly and professionally in accordance with the best interests of its client".*

The FCA's suitability rules and guidance that applied at the time Portal advised Mr L were set out in COBS 9. The purpose of the rules and guidance was to ensure that regulated businesses, like Portal, took reasonable steps to provide advice that was suitable for their clients' needs and to ensure they weren't inappropriately exposed to a level of risk beyond their investment objectives and risk profile.

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I consider at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

In 2009 the then regulator, the Financial Services Authority (FSA), published a checklist for pension switching that I think is still helpful today. It highlighted four key issues it thought should be focussed on:

- Charges - has the consumer been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?
- Existing benefits - has the consumer lost benefits in the switch without good reason? This could include the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits early.
- Risk - has the consumer switched into a pension that doesn't match their recorded attitude to risk (ATR) and personal circumstances?
- Ongoing fund management - has the consumer switched into a pension with a need for ongoing investment reviews but this was not explained, offered or put in place.

And in 2014, following a previous alert in 2013, the FCA issued an alert outlining its specific stance on advice provided about SIPPs. This wasn't new guidance, it was the regulator re-stating its position, and was relevant to the advice Portal gave to Mr L:

> "Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable…"

Overall, I'm not satisfied Portal met the regulatory requirements placed on it. I'll explain why.

**The advice to switch**

When considering a case where someone has switched their pension funds, the consumer's circumstances at the time must be considered. And in order to make the advice to switch suitable, the switch would need to be in the person's best interests.

The SIPP, by Portal's own admission, was more expensive, in terms of fees and charges, than Mr L's current scheme. So there needed to be other compelling reasons why it was in Mr L's best interests to switch at the point he did. And I'm not satisfied that there were.

Portal has shown that Mr L's current PPP was growing by an average of 10.86% over the previous five years. So, with the higher charges associated with the SIPP and the fees for the advice Portal were giving, the investment growth would need to be significantly more than that being achieved by his PPP. But in its recommendation section Portal said:

> "*The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider."*

But it would have been important for Mr L to understand the potential growth that the investments in the proposed SIPP might achieve, so he could make an informed decision. Other than the general statement above, I haven't seen any evidence to suggest that Portal gave Mr L any comparison to show him whether the investments within the recommended SIPP were likely to provide a greater return at retirement. So I can't see how Mr L could have made a fully informed decision and formed the view that he'd be better off at retirement by investing in the SIPP.

Portal, in its suitability report, recorded Mr L's ATR as 'Balanced'. It explained this in the following way:

- Balanced investors typically have moderate levels of knowledge about financial matters and will pay some attention to keeping up to date with financial matters. They may have some experience of investment, including investing in products containing risky assets such as equities and bonds.
- In general, balanced investors understand that they have to take investment risk in order to be able to meet their long-term goals. They are likely to be willing to take risk with at least part of their available assets.
- Balanced investors will usually be prepared to give up a certain outcome for a gamble provided that the potential rewards from the gamble are high enough. They will usually be able to make up their minds on financial matters relatively quickly, but do still suffer from some feelings of regret when their decisions turn out badly.

I've not seen anything which leads me to think that the funds Mr L had within his existing PPP were unsuitable or didn't match his ATR, circumstances or objectives. And there is also nothing to indicate he would've been unable to take tax-free cash at 55 years old had he remained in his PPP, which he had specifically given as one of his objectives.

So, given the higher fees and charges associated with the SIPP, and that I can't see that the funds Mr L was already invested in were unsuitable, I'm not persuaded that Portal's recommendation for him to switch his existing pension funds into a SIPP was suitable advice. Had Portal more thoroughly explored his aims and considered his circumstances, I think it, and Mr L, would have determined it would be better if he stayed in his existing PPP. And, at the very least, it could have explored the fund switches that were available to him within his existing scheme without incurring the same level of fees associated with the SIPP.

**The suitability of the underlying investments**

When considering the type of investments Mr L could make, Portal had a duty of care to make sure the investment advice was suited to Mr L's ATR and his experience of investments.

Over 34% of the investment funds Portal advised Mr L to hold in his SIPP were classed as Unregulated Collective Investment Schemes (UCIS). In July 2010 the FSA issued guidance about unregulated investments in a 'Good and Poor Practice report'. This contained examples of good practice in relation to unregulated investments, for example where a firm had robust controls in place and limited client exposure to 3% to 5% of their portfolios, where those clients had been assessed as being suitable for unregulated investments. An example of bad practice given by the FSA was where up to 100% of a client's holdings were invested in a single UCIS. And contrary to what the regulator said, Portal recommended that over 34% of Mr L's pension was invested across three UCIS funds. This is highly relevant to my consideration.

UCIS are generally considered to be high risk investments. This is because they are unregulated, have liquidity risks, and have a high degree of volatility. They also have little or no track record, so it is difficult to value them accurately. I'm not persuaded that Mr L, having a balanced ATR, had the risk appetite or the experience to match the investments Portal recommended for him. And I cannot see he'd have fully understood the nature, and the associated risks, of the investments he entered into. Whilst I accept Portal set out various risk warnings, this alone isn't enough to make unsuitable investments become suitable.

The Financial Conduct Authority (formerly the FSA) also said that UCIS was only eligible for promotion to a certain type of customer – usually sophisticated, high net worth investors, or one of the eight categories detailed in COBS 4.12. I've seen nothing to suggest that Mr L was the type of investor who might be deemed suitable to invest in such funds.

Having taken everything into account, I agree that Portal's recommendation to switch Mr L's PPP into a SIPP was unsuitable. I'm also satisfied that Portal's advice to invest Mr L's pension provision into the UCIS funds was unsuitable. So Portal is responsible for any losses to the value of Mr L's pension plan.

**Putting things right**

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

I take the view that Mr L would have remained with his previous provider in the PPP. However I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr L's circumstances and objectives when he invested.

**What must Portal do?**

To compensate Mr L fairly, Portal must:

- Compare the performance of Mr L's pension with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- Portal should add interest as set out below.
- Portal should pay into Mr L's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If Portal is unable to pay the total amount into Mr L's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr L won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr L's actual or expected marginal rate of tax at his selected retirement age.
- For example, if Mr L is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr L would

have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

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

| Portfolio name | Status | Benchmark | From ("start date") | To ("end date") | Additional interest |
|---|---|---|---|---|---|
| Novia SIPP | Some liquid/some illiquid | 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 28 days of the business receiving the complainant's acceptance) |

***Actual value***

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Portal should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Portal pays should be included in the actual value before compensation is calculated.

If Portal is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Portal may require that Mr L provides an undertaking to pay Portal any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal will need to meet any costs in drawing up the undertaking.

***Notional Value***

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

If the previous provider is unable to calculate a notional value, Portal will need to determine a fair value for Mr L's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The Novia SIPP only exists because of illiquid assets. In order for the Novia SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by Portal taking over the illiquid assets, or this is something that Mr L can discuss with the 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. If Portal is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair that it pays Mr L an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the Novia SIPP to be closed.

**Why is this remedy suitable?**

I've decided on this method of compensation because Mr L wanted Capital growth with a small risk to his capital.

But If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr L's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr L into that position. It does not mean that Mr L would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr L could have obtained from investments suited to his objective and risk attitude.

**My final decision**

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 October 2022.

Chris Riggs
**Ombudsman**