

The complaint

Miss B complains that Portal Financial Services LLP (Portal) gave her unsuitable advice to transfer her Personal Pension (PP) to a Self-Invested Personal Pension (SIPP).

What happened

In 2011, Portal advised Miss B to transfer PP to a SIPP after she'd received a letter from it inviting her to get in touch with it. At the time Miss B was aged 57 and the fact-find, dated 23 September 2011, indicated she was employed earning £15,000 per year, living in rented accommodation and had no savings or assets. She had outstanding bills totalling around £1,000. And that she had around £120 disposable income per month that she spent on her granddaughter. The suitability report notes Miss B had a PP with a transfer value of £13,572. And that she had another pension with her current employer.

Portal carried out a risk-profiling exercise and determined Miss B had a 'balanced' attitude to risk ('ATR'). It wrote to Miss B in September 2011 recommending she transfer her PP into a SIPP. And it recommended she invest in the following:

- Raithwaites Hypa Fund – 57.5%
- Venture Oil International – 17.5%
- EOS Solar Energy – 10%
- Cash Deposit – 15%

The SIPP was established and the value of Miss B's PP, which had increased to £14,459.12, was transferred on 21 November 2011 and just under £8,000 of it (after Miss B had taken tax-free cash (TFC)) was invested as follows:

- Raithwaites Hypa Fund – £5,010
- Venture Oil International – £1,764.91
- EOS Solar Energy – £1,008.72

In September 2020, Miss B complained to Portal that the advice was unsuitable, as this was her only pension and advising her to invest in high risk funds was inconsistent with her cautious attitude to risk. Portal responded in November 2020, saying that Miss B had made her complaint too late. It said she ought to have been aware she had cause for complaint from calls, emails and a number of letters it sent her across 2015, 2016 and 2017 which outlined issues with her funds and the value.

Miss B brought her complaint to our service in February 2021, adding that she was unclear about Portal's reference to illiquid funds in its previous correspondence. And that while one of the reviews it carried out in November 2017 identified concerns, she wasn't worried as it expressed hope that her pension would grow by the targeted amount and recommended not making any changes to her funds.

One of our investigators initially said Miss B had made her complaint in time, as he didn't think the correspondence was enough to trigger awareness that Miss B had cause to complain about the advice. He also said he didn't think that advising Miss B to invest her

pension in high risk funds was appropriate in light of her circumstances and that he felt her attitude to risk was cautious rather than balanced, with her wanting to take no real risk. And he said Portal should pay Miss B £750 for the distress and inconvenience caused.

Portal didn't agree. It said Miss B approached it in 2015 asking to cash in her entire pension. And that she was sent a pension withdrawal report on 21 May 2015, which explained she was only able to withdraw 23% of her funds as the remainder was illiquid, which should have alerted her that her pension wasn't invested in mainstream funds and given her cause for concern. It said she also signed a declaration saying she understood this. It maintained that one of its letters, dated 15 September 2015, highlighted issues with the funds and it said that any reassurances it provided in this shouldn't nullify the time bar issue. It referred to a previous decision given by our Service in support of this, which said that time starts to run from the date of knowledge of the grounds for complaint and it continues to run despite any reassurances given, or other statements made, by the financial business. And that were it otherwise, complaints would hardly ever become time barred, because businesses are wont to hold out the prospect of improvements and/or to deny liability.

After considering the matter further, our investigator said Miss B's complaint has been made too late as she ought to have been aware she had cause for concern from the report Portal gave her in May 2015 and the declaration she signed.

As the parties didn't agree, Miss B's complaint's been referred to me for a decision. And I issued a provisional decision saying the following:

Jurisdiction

The rules our service is bound by, known as the Dispute Resolution (DISP) Rules - found in the Financial Conduct Authority's handbook - say in DISP 2.8.2R that, unless the business consents (Portal hasn't), we can't consider a complaint if it's referred to us:

- *More than six years after the event complained of; or (if later)*
- *more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) they had cause for complaint.*

That is, unless the complainant referred the complaint to the business or our Service within that period and has a written acknowledgement or some other record of this having been received.

The event complained of – the advice Miss B was given to transfer her PP and make high risk investments, which she says resulted in a loss – took place in 2011. And, as she didn't raise this with Portal until 2020 and then refer it to our service until 2021, it has been referred to us more than six years after the event occurred. This means I have to decide if Miss B was aware, or ought reasonably to have been aware, she had cause for complaint more than three years before she complained to Portal.

Looking at the correspondence Portal had with Miss B in May 2015, I don't agree that this ought reasonably to have made her aware she had cause for complaint. I appreciate Portal told Miss B she couldn't cash in her entire pension in the way she'd approached it do – it said she could only take around a quarter as the rest was in illiquid funds. But she already knew from the 2011 suitability report the funds she was invested in were illiquid. So, I don't think she would have understood from being told her funds were illiquid again in 2015 that this meant that her investments were performing badly or that she was at risk of not getting money back, which could lead her to question the advice. And the declaration she signed following this doesn't explain this or confirm she'd been told anything to that effect.

I've looked at the other letters Portal sent Miss B and, overall, I don't think she ought to have felt concerned by these. While the letter dated 17 September 2015 says, for example, that the Raithwaite Fund hadn't performed as anticipated and had only paid one dividend payment to date that was lower than expected, the expected investment return dates were 2018 and 2023, which hadn't yet been reached. And it went on to say that security was in place for this, which was doing its job. So I think Miss B would've felt reassured. And while Portal's letter dated 21 February 2017 said that due to the illiquid nature of Miss B's funds Portal was waiving its advice fee, it also said there had been a gain in fund value and that it was happy with the growth and it was hopeful. So I think it was positive overall, along with its earlier letter dated 4 January 2016, which I think contained very similar information.

I note Portal has referred to what we've said about reassurances given by businesses in a previous decision. But I have to consider the circumstances individual to Miss B's complaint. Portal clearly wasn't concerned, and reassured Miss B as a result in its letters, so I don't think it's reasonable to say these ought to have given her cause for concern so as to make her think she should complain.

I haven't seen anything that makes me think Miss B ought reasonably to have been alerted to a problem with the advice until 10 November 2017, when Portal sent her a letter making her aware her investments had been valued at £0 in advance of being sent her 2018 statement by her SIPP provider. I think this drop ought to have given her cause for concern that the advice might not have been suitable. There's no evidence her funds experienced a drop in value that I think ought to have given her cause for concern before this point.

While Miss B referred her complaint to our service more than three years after the letter dated 10 November 2017, I've seen evidence she raised it with Portal within three years of that. So I currently think Miss B's complaint has been made in time, which means our Service can consider it.

The advice

Having considered all the information, I think Miss B's complaint should be upheld for largely the same reasons our investigator previously gave.

I've taken account of relevant laws and regulations; regulators' rules, guidance and standards, and what I consider to be relevant industry practice at the relevant time. These include the overarching Principles for Businesses ('PRIN'). Principles 1 (integrity), 2 (skill, care and diligence), 6 (customers' interests) and 9 (reasonable care) are of particular relevance here.

The Conduct of Business Sourcebook ('COBS') in the regulator's handbook, set out the rules regulated businesses have to follow. At the relevant time, COBS 9.2.1R required Portal to take reasonable steps to ensure a personal recommendation was suitable for Miss B. It had to obtain information as to Miss B's knowledge and experience (relevant to the specific type of designated investment), her financial situation and investment objectives.

COBS 9.2.2R required Portal to gather sufficient information from Miss B to ensure the recommendation met his objectives, that she could bear the risks involved and had the necessary experience and knowledge to understand the risks involved in the transaction. And COBS 2.1.1R required Portal to act, "honestly, fairly and professionally in accordance with the best interests of its client."

In 2009 the regulator, the Financial Services Authority (FSA), also published a checklist for pension switching. And one of the key issues it thought should be focussed on was whether the consumer had been switched to a pension that's more expensive than their existing

one(s) or a stakeholder pension, without good reason.

I recognise Miss B's SIPP wasn't particularly expensive – it had an initial AMC of 0.55%, reducing to 0.5% after 2012, which was lower than her existing scheme at 1%. But, as well as the 5% initial fee charged by Portal, there would also be other product or fund charges. Some of these could offset the charges of the existing plan. But it's clear there would be a cost to switching, which Portal recognised in the suitability report when it said:

“Overall, this strategy will cost more than your existing arrangement, but will offer potential growth which is not available to you at present.”

While I think it's likely the switch would have been more costly to Miss B overall, the fact find notes her main objective was to access TFC to pay off bills and to have an emergency fund. And she's since told us that she needed to transfer to access TFC to raise funds. So I haven't considered this any further as it appears to have been a genuine objective. And I don't think it would have been possible for her to get this through her current PP at the time without also taking her retirement income, which she didn't need.

While Portal's recommendation to switch might not have been unsuitable in that case, that doesn't mean its advice was suitable overall. And I don't think it was in light of the investments it recommended Miss B invest in within her SIPP. I'll explain why.

Portal said Miss B was a balanced risk investor, but she says she had a cautious attitude to risk. And I think this is supported by many of the answers Miss B gave in the risk attitude profiling questionnaire. For example, Miss B said that people who know her would describe her as cautious, she generally looks for the safest type of investment even if that means lower returns, she doesn't associate the word 'risk' with the idea of opportunity, she has little experience of investment in stocks and shares and she wasn't willing to take any financial risk. And, while Miss B had eight years until her expected retirement age, she was a standard retail investor, with no investment experience or savings. Miss B's said this PP is her main retirement provision, so it's one of her biggest assets. So I think her capacity for loss in respect of it was low. In light of this, I don't think Portal's assessment was correct – I think a fairer assessment of Miss B's attitude to risk in the circumstances was 'cautious'.

Yet, based on Portal's advice, a significant part of the funds in Miss B's SIPP was invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here, when it said that as well as these only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), for example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. In Miss B's case, more than 50% were invested in this. I don't think UCIS was suitable for Miss B at all, and certainly not in the proportion invested, given there's nothing to indicate she had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

As already mentioned, I can see Miss B was made aware some of the investments were illiquid in the suitability report. And that it said the Raithwaites Fund was an UCIS which may, for example, carry higher risks and that it usually requires a sophisticated understanding of investments. But it then said that it was recommending this investment in any event under an exemption under COBS regulations 4.12, as it had taken reasonable steps to ensure the investment was suitable for her. And it went on to focus on the rewards this investment would produce. So I think Miss B went ahead because she trusted Portal's advice. And had it recommended she invest in mainstream, regulated funds, which I think would have been suitable advice, I think she'd have done so for that same reason.

In summary, I currently think the investments Portal recommended were unsuitable, given

these were likely to lead to Miss B being exposed to far more risk than appropriate. And I don't think she had the capacity for loss that investments like this carry. Instead, I think suitable advice would have been for her to invest in regulated mainstream funds. Had Portal given suitable advice, I think Miss B's likely to have invested in that way.

Therefore, I think a fair and reasonable way to compensate Miss B for the unsuitable advice is to use a benchmark based on an investment strategy in line with her circumstances and attitude to risk.

This matter will also have caused distress, as she's been prevented from taking her retirement funds when she wanted to. So Portal should pay Miss B £750 compensation. I think this is a fair and reasonable amount to make up for this in the circumstances.

While Miss B said she accepts my provisional decision, Portal didn't respond.

What I've decided – and why

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

Having done so, as neither party have provided any further comments or submissions for me to consider, I see no reason to depart from my provisional findings. So, for the reasons given in my provisional decision, I think we can consider Miss B's complaint and I'm upholding it.

Putting things right

My aim in awarding fair compensation is to put Miss B back into the position she would likely have been in, had it not been for Portal's unsuitable advice.

I think Miss B would have invested differently. It isn't possible to say precisely what she would have done, but I'm satisfied that what I've set out below is fair and reasonable given Miss B's circumstances and objectives when she invested.

- Compare the performance of Miss B's investment with the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable. If the fair 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 Miss B'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 Miss B's pension plan, it should pay that amount direct to her. 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 Miss B won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Miss B's actual or expected marginal rate of tax at her selected retirement age.

- For example, if Miss B 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 Miss B would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.
- If either Portal Miss B dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified and Miss B receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.
- Pay to Miss B £750 for the distress and inconvenience caused by the unsuitable advice, which has led to a loss.

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

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists	Average rate from fixed rate bonds	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 Miss B 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.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the fair value when using the fixed rate bonds as the benchmark, Portal should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution out of the investment should be deducted from the fair value 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.

Given there's evidence Miss B would've withdrawn her whole pension in 2015 if she could have, the SIPP only exists because of illiquid investments. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Miss B can discuss with the SIPP provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Portal is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Miss B an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Miss B wanted to achieve a reasonable return without risking any of her capital.
- The average rate for the fixed rate bonds would be a fair measure given Miss B's circumstances and objectives. It doesn't mean that Miss B would have invested only in a fixed rate bond. It's the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

For the reasons explained in my provisional findings, I'm upholding this complaint and I direct Portal Financial Services LLP to pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 7 October 2022.

Holly Jackson
Ombudsman