

The complaint

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

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

What happened

It seems Mr O's dealings with Portal extended over quite a few months. Mr O approached Portal to discuss his pension and retirement needs in late 2015. Portal completed a 'fact-find' on 11 April 2016 to gather information about Mr O's circumstances and objectives. A suitability report was produced on 18 July 2016 and the transfer out of his OPS eventually took place in 2017.

The information Portal gathered about Mr O in 2016 was broadly as follows:

- Mr O was 52 years old and living in a rented house. He was married and had one dependent child.
- Mr O had worked in the transport sector for 15 years and was earning approximately £28,000 (gross) per year. He had acquired debts of around £26,000 which were in an individual voluntary arrangement (IVA). He was paying £130 per month towards this.
- Mr O was an active member of his OPS. The cash equivalent transfer value (CETV) of this scheme was around £51,000 at that time, with a normal retirement age of 60.
- Mr O had no further assets or liabilities I'm aware of, although he did have a very small amount in an existing SIPP which does not form part of this complaint.
- Mr O told Portal he had an aspiration to retire or semi-retire at 55 years old.

Portal advised Mr O in the suitability report to transfer his OPS to a SIPP, which it recommended. The transfer-out eventually took place in July 2017.

Mr O says he was given unsuitable advice by Portal. The complaint has been referred to our Service.

I issued a provisional decision (PD) about this case in July 2022 saying I was minded to uphold the complaint. However, I gave both parties a month to reply with any further information or evidence they wanted me to consider. This final decision should be read in conjunction with the PD.

I have received no reply from Portal. Mr O's representatives say they agreed with my PD findings, so I'm now ready 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'). 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 19.1.16 that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr O's best interests.

Having considered these things, I am upholding the complaint.

Financial viability

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The suitability report of 18 July 2016 said the critical yield required to match Mr O's benefits at age 60 was 14.3%. The report said this figure was based on a full pension being paid by Mr O's DB scheme. The report also said the critical yield would be 12.5% if he took a tax-free cash element and a reduced pension. Of course, we know Mr O's aspiration at the time was to try to retire or semi-retire at 55 if possible, rather than 60 as quoted in Portal's suitability report. I've therefore kept this in mind and I've also noted the critical yield figures for retiring at the age of 55 were much higher in certain circumstances - as shown in the transfer value analysis Portal commissioned. So, these critical yield figures, in my view, indicate it was highly unlikely that a transfer out could match the benefits Mr O already had within his current DB scheme.

Portal also quoted a 'growth rate' of 4.8% which it said was a more appropriate figure to use in Mr O's situation. In my view, this was a poor comparison to use and poorly explained. In my experience this would have been comparing a pension with inferior benefits and guarantees to Mr O's DB scheme and I don't think he would have understood what this growth rate actually meant - I think the explanation of it in the suitability report was poor.

I have also noted that the relevant discount rate was 3.4% per year for 7 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've therefore taken all this information into account, along with the composition of assets in the discount rate, Mr O's 'balanced' attitude to risk (as assessed by Portal) and also the term to retirement. There would be little point in Mr O giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the critical yield rates I've set out above, I think Mr O was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

I've also considered some cash flow models which Portal showed in a transfer analysis document. It's not entirely clear if Mr O saw these but I've considered them nonetheless. Portal implied these help to show Mr O could have met his retirement needs by transferring out of his DB scheme to a SIPP. However, I disagree. These were not like-for-like comparisons with the scheme Mr O was in and I've noted certain assumptions were made, including the returns of the recommended investment portfolios being based on historic returns. In any event these models show the funds completely depleted in Mr O's 70's. Portal's case for transferring out used high historic return rates. But past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be much more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

For these reasons a transfer out of the DB scheme certainly wasn't in Mr O's best interests. By transferring out, Mr O was giving up a guaranteed index-linked income with a number of useful and long-term benefits. Of course, financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

In the suitability report of 18 July 2016, Portal said Mr O had a number of objectives which I have summarised as follows:

- Greater pension flexibility, ownership of his pension, control of death benefits

- Maximising more tax-free cash than in his current scheme
- Willing to take more investment risks / achieve higher performance
- A cheaper scheme

I have thought about these and carefully considered the likelihood of them coming from the Portal adviser, rather than Mr O himself. The evidence tends to suggest Mr O had limited investment experience and I consider the objectives listed above as somewhat generic and certainly not specific to Mr O's circumstances. I therefore think Portal's advisor is much more likely to have been the source of these objectives, and not Mr O.

Based on the evidence I've seen I don't think Mr O had a genuine need for flexibility in retirement. My stance on this differs to that of our investigator; they still found Portal's advice to transfer out early to be unsuitable but said that Mr O may have eventually accessed his pension after he'd reached 55, to pay down debt. However, I don't think he had a genuine need to access tax-free (or taxed) cash earlier than the normal scheme retirement age. I do note that Mr O had some debts, but these were not discussed in the suitability report as a specific objective. They were also already in a structured repayment plan and I've seen no evidence they weren't being addressed. So, I consider it unlikely that Mr O would have wanted to use his retirement funds to pay these debts if he had been suitably advised. I think he'd have realised using his pension like this wasn't a good idea.

Nor do I think Mr O genuinely wanted to exercise personal control of his pension. Mr O was already in a pension scheme managed on his behalf and his membership required very little, if any, effort from him. So, I don't think there's anything in this case showing that Mr O had either the capacity or desire to manage his pension; I think this was just an outcome or consequence of Portal's recommendation to transfer him out to a different scheme.

Mr O was also only aged 52 years old at the time of the advice, and although he may well have wanted to either retire or semi-retire at 55, I don't think he yet had concrete retirement plans at that point, or indeed the financial resources to support retirement. I think this was only an aspiration at that point. At the point of the advice Mr O had 3 more years before he could access his pension if he transferred out, so I think in his circumstances it was too soon to make any kind of decision about coming out of the DB scheme. Indeed, given his somewhat vulnerable financial situation, there may also have been an opportunity for Portal to explain to Mr O that there simply was no suitable course of action at that time which would fulfil his early retirement aspirations with the resources he currently had. And if this was the case, this should have been pointed out clearly by the adviser.

However, a particular additional factor in this case is that aged 52 Mr O was still an active member of the OPS and so transferring out could also lose him valuable employer contributions which would have helped his modest pension continue to grow. In my view, this was a benefit Mr O could ill afford to give up easily. Portal substantially underplayed the significance of this and even suggested he leave the scheme and then investigate re-joining at some point. I don't think this was good advice and my understanding is that re-joining the scheme was at best, uncertain. The adviser ought to have clarified these issues.

Overall, I therefore don't think this was a suitable recommendation for Mr O to give up the scheme benefits and employer contributions at that point when he didn't know what his needs in retirement could be.

I've considered whether there were other reasons Mr O needed to transfer out of his OPS. This could have included seeking immediate access to cash when he reached the age of 55.

I've noted Mr O told us, for example, that Mrs O's immigration status was an issue at around the time and she had no income. Clearly, these issues would have caused further uncertainty for Mr O and I acknowledge that his finances would have been tight.

However, as I've explained above, there is no evidence his debts weren't being addressed. Nevertheless, I do accept the prospect of extra cash earlier than his normal retirement age might have seemed a tempting prospect in Mr O's position, and this may have played a factor in him transferring out. But even if this were the case, Portal should have explained however, that accessing more tax-free cash early also came with consequences for his longer-term retirement needs.

So, all these issues needed to be considered against Mr O's long-term retirement security as this was his only meaningful retirement income until he reached state pension age, if applicable. If Mr O later had reason to transfer out of his DB scheme he could have done so closer to retirement and when his plans were much clearer. In short, I've seen nothing that would have made transferring out of his DB scheme so urgent at the time as to make Portal's recommendation to transfer out suitable.

With all this in mind, I think the advice should have been for Mr O to continue to contribute to and use the pension in the way it was originally designed. In reality, this pension was not large and was by far his main retirement provision. According to information from his OPS issued in March 2016 his pension was projected to pay an income of £3,455 per year from the age of 60, together with a lump sum of £8,578. This income could be increased to £4,170 per year if no lump sum was taken or reduced to £2,681 per year if the maximum lump sum of £17,874 was chosen. In my view, these options were much more suited to Mr O's circumstances and they demonstrate just how challenging Mr O's retirement aspirations might be, even at 60.

Death benefits

Portal implied the death benefits were better for him under the SIPP it was recommending to Mr O. However, I disagree.

Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension was possibly an attractive feature to Mr O. But whilst I appreciate death benefits were important to Mr O, and he might have thought it was a good idea to transfer his DB scheme to a personal pension because of this, the priority here was to advise him about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Portal explored to what extent he was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the DB scheme were underplayed. Mr O was married with a child and so the spouse's pension, in particular, provided by the DB scheme would have been useful if Mr O predeceased his wife. This pension had very good death benefits – it had a five times lump-sum payment of the annual salary upon death whilst still a member of the scheme, and it had an on-going 50% spouse's pension for life. I don't think Portal made the value of these benefits clear enough to Mr O. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. Portal should not have encouraged Mr O to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

In any event whether the death benefits were improved following a transfer depended on how much remained in the pension funds at the point of Mr O's passing. Given average life

expectancy, and the size of the funds, it was always likely that the funds would be entirely depleted prior to Mr O's death, providing no death benefits at all.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr O.

Suitability of investments

Portal recommended that Mr O invest his funds in a SIPP. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr O, 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. We now know Mr O withdrew all the funds in subsequent years.

Summary

In my decision I have explained why it wasn't in Mr O's best interests to transfer out of his OPS. I don't doubt that the issues raised by Portal, such as greater flexibility, control and higher tax-free cash on offer through a personal pension could have sounded like attractive features to Mr O at the time. I also considered his aspiration to retire earlier than his scheme's normal retirement age. However, Portal's job here wasn't just to transact what Mr O might have thought he wanted; the adviser's role was to really understand what Mr O needed and recommend what was in his best interests. Portal failed in this duty.

The advice given to Mr O was not suitable. He was giving up a guaranteed, risk-free and increasing income and transferring out of a scheme he was an active member of. There may also have been an option within his current scheme to retire early. But by transferring out of his OPS, Mr O was very likely to obtain lower retirement benefits overall.

I then explained that Mr O had some debts and no doubt some ongoing financial challenges. However, these were not listed as his objectives in transferring out of his DB scheme, and as I've explained, they did not justify him being advised to give up the guarantees and benefits associated with his DB scheme at that time. I also explained why there were no other particular reasons which would justify a transfer out.

Finally, I explained about the potential for more flexible death benefits. Like the other objectives listed in the suitability report, my view is that these were generic benefits most likely to have been put forward by Portal, rather than Mr O. And in any event, these things meant very little in Mr O's circumstances.

Accordingly, Portal should have advised Mr O to remain in his DB scheme.

In light of the above, I think Portal should compensate Mr O for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr O, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr O would have most likely remained in his DB scheme if suitable advice had been given.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - [CP22/15-calculating redress for](#)

non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has 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.

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 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr O whether he preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. He has chosen not to wait for any new guidance to come into effect to settle his complaint. So 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 O.

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 O has no plans at present to retire any earlier than age 65. 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 O's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr O'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 O 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 O 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 O.

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 O 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 O 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 O 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 O the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr O.

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

My recommendation would not be binding if he doesn't accept my decision. Further, it's unlikely that Mr O can accept my decision and go to court to ask for the balance. Mr O 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 O to accept or reject my decision before 24 November 2022.

Michael Campbell
Ombudsman