

The complaint

Miss C has complained that Portal Financial Services LLP gave her unsuitable advice to transfer her personal pension to a SIPP (Self Invested Personal Pension).

What happened

Miss C's complaint was considered by one of our investigators. He sent his assessment of it to both parties in August 2022. The background and circumstances to the complaint were set out in that assessment. But in summary, Miss C was advised to transfer (technically known as a switch) her pension in December 2013. Portal had completed a fact-find recording Miss C's circumstances and objectives at the time. This said Miss C was in excellent health, single, self-employed, and she had a personal pension plan valued at £14,577. She was contributing £47.29 per month to it.

It was recorded that Miss C's existing pension plan had guarantees; one fund had a guaranteed growth rate of 4%, and another was guaranteed never to fall below 0% growth. The suitability report said the fund had averaged 2.79% growth over the previous five years (which I think was the combined performance of the two funds). It was noted that Miss C was happy to forgo the guarantees in return for greater returns.

The suitability report said Miss C's objectives were:

- To have the opportunity to take tax-free cash at age 55, and then take an income at her desired retirement age
- Performance
- Greater fund choice
- Death benefits
- Begin making contributions of £37.73 (net)

Miss C's risk profile was recorded as balanced.

Portal recommended Miss C transfer her pension to a SIPP and open a separate stakeholder pension to make regular contributions of £37.73 per month to it.

The investments recommended for the SIPP included:

- Lakeview UK Investments PLC - 9.50% (£1,385)
- Marbella Resort and Spa PLC - 12.00% (£1,749)
- Real Estate Investments USA PLC - 13.00% (£1,895)
- Motion Picture Global Investments PLC - 6.00% (875)
- Strategic Residential Developments PLC - 9.50% (£1,385)

The Lakeview investment was a property development in Cornwall holiday villas. This was a five-year bond with an annual return of 11%. Real Estate Investments financed the purchase and refurbishing of property bought from banks, and paid an annual return of 15%. Marbella Resort and Spa was also a fixed interest bond that ran for seven years with a fixed

interest payment of 7%. Funds were being used to develop a resort in Marbella. The Motion Picture Global Investments fund was concerned with financing films and paid 30% interest in year 3 and 10% thereafter.

A warning highlighted liquidity issues, said:

Please note that while the bonds invested in via the [pension platform] can be considered relatively illiquid investments they do produce returns that can be used to meet your income requirements and as such are considered suitable by Portal Financial.

The investigator said Portal charged an upfront fee of 5% for its advice. There was also a 1% charge per year for ongoing advice, and the SIPP provider charged 0.5%

Miss C accepted the advice, and £14,840 was transferred to the SIPP in January 2014.

In 2019 Miss C was notified that some funds were illiquid. Miss C complained to Portal through a representative in 2021. Portal said it thought the complaint hadn't been made within the relevant time limits.

Our investigator thought the complaint had been referred within time. He said the relevant rules setting out our jurisdiction were outlined in the Financial Conduct Authority's Handbook under DISP Rule 2.8. He said although the 2021 complaint had been made to the firm more than six years after the event complained about (the advice given to Miss C to transfer in December 2013), he thought it had been made within three years of Miss C becoming aware that she had cause to complain.

The investigator said the value of the pension in July 2020 – the year prior to Miss C making her complaint - was £16,800. He said the value of the illiquid investment funds had the same or very similar values as when Miss C had originally invested in them. And although Miss C had been alerted that some of the funds were illiquid in 2019, Miss C had complained in 2021 - so this was within the three-year period.

The investigator said he hadn't seen anything to suggest that Miss C should have become aware that the advice she'd been given was unsuitable more than three years before she complained to the firm. So he didn't think that the complaint was brought too late.

The investigator went on to consider whether it was in Miss C's best interests to transfer her pension to the SIPP, and if so, whether the investments were suitable.

The investigator noted the reasons why Portal recommended the transfer were so Miss C could benefit from increased flexibility and draw an income at a later date to taking her tax-free cash. However the investigator said looking at the fact-find, he could see no obvious reason as to why Miss C needed the extra flexibility of drawing her tax-free cash before her pension. He said there was nothing to say that she needed the money in stages. And if this need did arise there was nothing to stop her transferring at that time. The investigator thought that although the flexibility was a useful feature, it wasn't a reason to transfer at that time.

The investigator said costs was an important consideration. He referred to the regulator's 2014 report (the FSA at the time), which highlighting good and poor practice in the area of pension switches. The investigator said this was a restatement of existing principles, and so it would have still applied here.

The review noted the most common causes of poor practice in pension switching:

A pension incurring extra product costs without good reason (this outcome involved assessing cases where, for example, the reason for the switch was for investment flexibility, but this was not likely to be used; the reason was fund performance, but there was no evidence the new scheme was likely to be better; or the reason was flexibility of a drawdown option, but there was no evidence that this option was needed).

The investigator said the transfer (switch) to the new plan added significant extra charges to the transferred pension, with a 5% initial charge, product fees, and ongoing advice fees.

He said Miss C's original personal pension was invested in a with profits fund. It had no explicit charges, though in these cases usually a guide of 1% was given. The investigator said looking at the costs, he thought it was fair to say the new pension was more expensive than the original. The investigator said this suggested it wasn't in Miss C's best interests to transfer, as any new investment in the SIPP would have to outperform the original investment funds to achieve the same result.

The investigator noted Portal had said the transfer would allow Miss C to make regular contributions. However she didn't require a new plan to do that; she was already making contributions to her old plan. And for death benefits, Miss C could have completed an expression of wish form for the original pension provider to ensure that the benefits were paid in accordance with her wishes if she passed away.

The investigator said he thought the transfer had been completed merely to facilitate the investments which would not have been available through the original pension. And he didn't think the investment recommendation was suitable.

He said the majority of the funds recommended were highly specialised in new, untested growth areas. The property investments were poorly diversified, and each had a significant chance of complete failure if a resort/single development was involved. He said the Motion Picture investment was highly speculative given that so much of its success was dependent upon a few projects in a niche industry.

The investigator said he thought Portal understood the high-risk nature of these investments at the time. The suitability report warned that the investments were illiquid, as once invested in a project of a long-term nature it would be difficult for Miss C to withdraw her funds. Portal had said that the income payments provided by the investments negated this. However the investigator said it became a problem if the income payments stopped, which they did.

The investigator said he thought Portal had enough information at the time it gave advice to know that the investments were unsuitable for Miss C's circumstances.

The investigator said he thought Miss C was an inexperienced investor with a modest income, and her existing pension represented her entire retirement savings. He said the with-profits funds had some valuable guarantees in the form of guaranteed growth rates which were given up.

The investigator said the funds the SIPP had been invested into as outlined above were all inappropriate for someone with Miss C's risk profile. However, that there was no justification for Miss C to transfer in the first instance in any event. So the investigator thought Miss C's complaint should be upheld.

The investigator asked Portal to let him know if it agreed with his assessment by 13 September 2022. He also sent a copy of it to Miss C's representative.

We didn't receive a response from Portal.

Miss C's representative said she was happy with the assessment.

The investigator contacted both parties explaining that as he hadn't received a response from Portal he would refer the complaint to an ombudsman to make a decision.

No further evidence or arguments were provided by either party. The complaint was therefore passed to me to decide.

What I've decided – and why

Our jurisdiction is open to consideration until a final determination has been made. I've therefore firstly considered whether the complaint has been referred to us in time. For the reasons set out by the investigator, I'm satisfied Miss C's complaint was referred to us within the relevant time limits. Although it was referred outside of the six-year time limit, I've seen no persuasive evidence that Miss C was aware or ought reasonably to have become aware that she had cause for complaint more than three years before she complained to the firm in 2021. So I'm satisfied this is a complaint we can consider.

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, I've come to the same conclusion as the investigator that the complaint should be upheld, and largely for the same reasons.

The fact-find completed at the time that the advice was given recorded that Miss C's salary was £10,000, and that her outgoings each month equalled her income. This was consistent with what was said in the suitability report which confirmed Miss C had minimal disposable income per month. Miss C had a repayment mortgage, and no savings or investments were recorded on the fact-find or mentioned in the suitability report.

The suitability report referred to "Capacity for Loss" saying, amongst other things:

"...it is essential that we also consider your Capacity for Loss which is described as "your capacity to take risk and the potential implications of any investment losses"."

In my view, given Miss C's circumstances, she had very limited capacity for loss. Yet the investments she was recommended to make following the transfer presented significant investment risk to her pension. I don't think Miss C had the capacity to accept the significant risks the funds recommended were exposed to, and the potential losses that could result from those risks. In my view the degree of investment risk was clearly greater than Miss C had the capacity to accept.

There were significant costs involved in the transfer. And for the reasons outlined by the investigator, I think the potential 'benefits' of a transfer were limited in Miss C's circumstances, and didn't outweigh both the additional costs of transferring as well the loss of the guarantees provided by the existing plan.

The fact-find recorded that Miss C wanted *"To improve average yearly growth"* but then said *"Stable growth preferred over volatility."* Part of her existing plan had a 4% guaranteed growth rate. And the other part a guarantee not to fall below 0% growth. If Miss C was unhappy with the current performance but at the same time wanted stable growth, she could have explored switching the part of the plan not subject to the 4% guaranteed rate with the exiting provider, and retaining the part of the plan with the 4% guaranteed growth.

So for the reasons outlined above and by the investigator, in my view Portal failed in its regulatory obligations to ensure the suitability of its advice to Miss C, and therefore I think her complaint should succeed.

Putting things right

Fair compensation

In assessing what would be fair compensation, my aim is to put Miss C as close as possible to the position she would probably now be in if she had been given suitable advice.

I think Miss C would have remained with her previous provider. And I think the pension plan to receive regular contributions was only setup because the transfer took place. Therefore this should be included in any redress calculation, with the calculation being that the regular contributions should have been paid into the original plan.

What should Portal Financial Services LLP do?

To compensate Miss C fairly Portal Financial Services LLP should:

- Compare the performance of Miss C's SIPP and stakeholder plan with the notional value if Miss C 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.
- The calculation should take into account the value of the regular contributions made to the new stakeholder plan, against what they would have been worth had they been paid to the original pension plan and invested in the same way.
- Portal Financial Services LLP should also pay any interest as set out below.
- If there is a loss, Portal should pay into Miss C's pension plan to increase its value by the amount of the compensation and any interest. Its payment should allow for the effect of charges and any available tax relief. Portal shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If Portal is unable to pay the compensation into Miss C'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.
- The *notional* allowance should be calculated using Miss C's actual or expected marginal rate of tax at her selected retirement age. I think it's likely that Miss C will be a basic rate taxpayer at the selected retirement age, so the reduction should equal 20%. However, if Miss C would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.
- In addition, Portal Financial Services LLP should pay Miss C £500 for the distress and inconvenience caused by the loss of a significant part of her pension and the disruption to her retirement plans.
- Portal should also provide details of the calculation to Miss C in a clear, simple format.

- Income tax may be payable on any interest paid. If Portal considers it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss C how much it's taken off. It should also give Miss C a tax deduction certificate in respect of interest if Miss C asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

The start date of the calculation should be the date of transfer. The end date should be the date of this final decision. Interest at the rate of 8% simple per annum should be added to any loss calculated, from the date of this decision to the date of settlement, if settlement isn't made within 28 days of us notifying Portal of Miss C's acceptance of the decision.

Actual value

This means the actual amount payable from the pensions (the SIPP and the stakeholder) at the end date.

If, at the end date, any of the investments in the pensions are illiquid (meaning they cannot be readily sold on the open market), it may be difficult to find an *actual value* for them.

So, the *actual value* should be assumed to be nil to arrive at fair compensation. Portal should take ownership of the illiquid investments by paying a commercial value acceptable to the pension provider. This amount it pays should be included in the actual value before compensation is calculated.

If Portal is unable to purchase the investments their *actual value* should be assumed to be nil for the purpose of calculation. Portal may wish to require that Miss C provides an undertaking to pay it any amount she may receive from the investments 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 Miss C's original pension would have been worth had she not transferred and also continued to make regular contributions to it. Portal should request that the previous provider calculate the notional value.

Any additional sum paid into the SIPP or Stakeholder should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP or Stakeholder should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I'll accept if Portal total all those payments and deduct that figure at the end to determine the notional value instead of deducting periodically.

Miss C may not be able to take the benefits from her SIPP at retirement because of illiquid assets. I've explained above that this issue might be resolved if Portal can buy the illiquid assets. However third parties are involved, and we don't have the power to tell them what to do. So if Portal is unable to purchase the illiquid investments, to provide certainty to all parties, I think it's fair that Portal pays Miss C 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 assets to be sold.

Why is this remedy suitable?

I've chosen this method of compensation because in my view with suitable advice Miss C would have remained invested in her original personal pension. And the stakeholder plan only exists because of the unsuitable advice to transfer, so those contributions made to it would also have been paid into Miss C's original personal pension but for the unsuitable advice to transfer.

My final decision

My final decision is that I uphold Miss C's complaint.

Portal Financial Services LLP should calculate and pay compensation to Miss C as I have outlined above under "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 14 November 2022.

David Ashley
Ombudsman