

The complaint

Miss B's complaint concerns advice she received from Portal Financial Services LLP (Portal) to invest in high risk funds. She has reached retirement age and is now unable to access any of the funds within her pension.

What happened

The details of the complaint are well known to both parties, and therefore I have only summarised them below.

Miss B received advice from Portal in February 2012. At this time she was 57 and had a defined benefit (DB) pension worth approximately £105,000. It was recorded that Miss B had a moderately adventurous attitude to investment risk and was looking to access the maximum cash amount available from her DB pension.

Miss B's objectives at the time of advice were recorded as:

- to use her existing pension plans to provide an income at a later date and to take her tax-free cash entitlement immediately,
- to retain a residual fund that remains invested until such a time that she requires an income in her retirement,
- to ensure that she had a good awareness of investment opportunities available to her,
- to ensure her portfolio reflects her current Risk & Reward profile,
- to have access to a system which will monitor the performance of her investments; and
- to be kept informed of the performance of her portfolio.

Portal didn't recommend Miss B transfer. But it said she was adamant about transferring and so it treated her as an insistent client and advised on where she could transfer to on an insistent basis. It recommended that Miss B transfer her pension benefits into a Self-Invested Personal Pension (SIPP) and subsequently invest in a range of relatively illiquid funds as follows:

- 45% Raithwaites Hypa Fund
- 15% Cool Blue Samui Fund
- 20% Venture Oil International
- 7.5% EOS Solar Energy
- 12.5% Cash Deposit

At this time, Miss B agreed with this statement included with Portal's suitability letter:

I fully understand that the funds invested in the Transact SIPP are relatively illiquid and therefore may not produce an income in the first few years of starting the SIPP. This is acceptable to me as I do not wish to take an income for 7 years and therefore do not need to access the funds within my SIPP at this time.

Miss B proceeded with the recommendation and the application forms were signed on 29 February 2012.

In June 2021, Miss B complained to Portal that she was unable to withdraw any funds from her SIPP.

In its final response to her 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. Miss B didn't agree with this so referred her 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 Miss B's complaint was made within the time limits and was one our service could consider.

Having considered the merits of Miss B's complaint, our investigator thought it should be upheld. In summary, he thought Portal hadn't acted fairly. He said its treatment of Miss B as an insistent client wasn't correct and the investment funds selected weren't suitable for her. However, the investigator concluded that even if Portal had provided suitable advice, Miss B would have still transferred given her objectives. But he said she would have invested differently if advised appropriately. And he set out the methodology he thought Portal should use to establish if Miss B had suffered a financial loss as a result of its unsuitable advice. And if a loss was identified, he told Portal how he thought Miss B should be compensated for this.

Miss B 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.

As an initial matter, 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 Miss B'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 considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The purpose of this decision is not to address every point raised in detail, but to set out my findings and reasons for reaching them. No discourtesy is intended by this. If I don't comment on any specific point, it's not because I haven't considered it - I have carefully considered all of the submissions made in this complaint – but because I don't think I need to comment on it in order to reach the right outcome. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts.

It is also important to note that this service isn't intended to regulate or punish businesses for their conduct – that is the role of the industry regulator, the Financial Conduct Authority (FCA). Instead, the Financial Ombudsman looks to resolve individual complaints between a consumer and a business. In order to uphold a complaint I would need to find that something has gone wrong and that a consumer has lost out as a result. I would then ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

When assessing the suitability of the advice given to Miss B 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 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 Miss B 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.

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

Ordinarily, when considering advice to transfer from a DB scheme to a personal pension plan, I would first determine if the advice to transfer in the first place was suitable keeping in mind the regulatory requirements set out above. Our investigator thought the advice wasn't suitable and Miss B wasn't properly treated as an insistent client. Portal didn't provide a response to these findings. But I don't consider that this analysis is necessary here as I agree with the investigator that Miss B would have transferred from her occupational pension scheme regardless of the advice she received.

Miss B has explained that at the time of advice she was in financial difficulties. She also said that her brother, the sole carer of her elderly mother was also experiencing financial difficulties. Miss B said her health was suffering as a result of this situation and she hadn't been able to find alternative solutions to resolve things. And from what I've seen, it doesn't appear she had viable alternatives to accessing cash from her pension. I also note that Miss B said she did use the tax-free cash paid to her from her pension to resolve her and her brother's financial difficulties. In light of all of this, the investigator concluded that even if suitable advice had been given Miss B would have still transferred from her DB scheme to access tax-free cash. Miss B has not disputed this. And given her circumstances at the time, I agree. So in order to reach a fair outcome in this complaint, I need only to consider the investments Portal recommended as part of its advice and whether these were suitable for Miss B.

When considering the type of investments Miss B could make, Portal had a duty of care to make sure the investment advice was suited to her ATR and investment experience. Over 85% of the investment funds Portal advised Miss B to hold in her SIPP were classed as Unregulated Collective Investment Schemes (UCIS).

In July 2010 the then regulator, the Financial Services Authority (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 nearly 90% of Miss B's pension be invested across four UCIS funds.

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.

Portal have recorded Miss B as having a moderate to adventurous attitude to risk (ATR). And Portal explained that

Moderately Adventurous investors typically have moderate to high levels of financial knowledge and will usually keep up to date on financial issues. They will usually be fairly experienced investors, who have used a range of investment products in the past.

I'm not persuaded that this ATR was appropriate for Miss B. I say this because the pension being transferred was her only pension, I've seen no evidence that she had any other investments or significant savings or assets. From what was recorded at the time, I think Miss B had a low capacity for loss. It was also recorded that she said that her highest priority for retirement was "to preserve her fund for as long as possible." In light of this, I don't consider that Miss B had the risk appetite or the experience to match the investments Portal recommended for her. And I cannot see she'd have fully understood the nature, and the associated risks, of the investments she entered into.

Whilst I accept Portal set out various risk warnings, this alone isn't enough to make unsuitable investments become suitable. The FCA (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 Miss B 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 advice to invest Miss B's pension provision into the UCIS funds was unsuitable. So Portal is responsible for any losses to the value of her pension plan

Putting things right

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

I take the view that Miss B would have invested differently. It's not possible to say *precisely* what she would have done differently. 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.

What must Portal do?

To compensate Miss B fairly, Portal must:

- Compare the performance of Miss B's investment with that of 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 also add any interest set out below to the compensation payable.
- 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.

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 in respect of interest if Miss B asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Transact SIPP	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: 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 she 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 from the Transact SIPP should be deducted from the fair 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 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 to determine the fair value instead of deducting periodically.

The Transact SIPP only exists because of illiquid assets. In order for the Transact 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 Miss B 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 Miss B 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 Transact SIPP to be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Miss B wanted Capital growth with a small risk to her capital.
- 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 her 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 Miss B's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Miss B into that position. It does not mean that Miss B would have invested 50% of her 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 Miss B could have obtained from investments suited to her objective and risk attitude.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

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

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Portal Financial Services LLP should pay Miss B the amount produced by that calculation – up to a maximum of £160,000 plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Portal Financial Services LLP pays Miss B the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Portal Financial Services LLP. It is unlikely that Miss B can accept my decision and go to court to ask for the balance. Miss B may want to consider getting independent legal advice before deciding whether to accept this decision.

If Portal Financial Services LLP does not pay the recommended amount, then any portfolio currently illiquid should be retained by Miss B. This is until any future benefit that she may receive from the portfolio together with the compensation paid by Portal Financial Services LLP (excluding any interest) equates to the full fair compensation as set out above.

Portal Financial Services LLP may request an undertaking from Miss B that either she repays to Portal Financial Services LLP any amount Miss B may receive from the portfolio thereafter or if possible, transfers the portfolio to Portal at that point.

Miss B should be aware that any such amount would be paid into her pension plan so she may have to realise other assets in order to meet the undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 30 January 2023.

Jennifer Wood
Ombudsman

