DRN-3742661

The complaint

Mr M complains about the advice he received from Portal Financial Services LLP ('Portal') to transfer the benefits from his 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 may have caused him a financial loss.

Mr M is being represented by a third party but for ease I'll refer to all their comments as those of Mr M.

What happened

Mr M was introduced to Portal in 2014 by another business who I'll refer to as Firm P. Mr M has since told our Service that he was approached, although he couldn't recall how, and he hadn't sought out a pension review. Mr M has said he'd never considered transferring his pension prior to speaking with Portal.

Portal completed a fact-find to gather information about Mr M's circumstances and objectives. At the time the advice was given by Portal, Mr M was 49 years old, single and had a 14 year old dependent child. He was living in a rental property and was paying £100 towards his rent with housing benefits covering the rest. He was unemployed and in receipt of benefits totalling £1,595 a month. Portal conducted a review of Mr M's outgoings and concluded that he had £1,080 disposable monthly income. Mr M told Portal he wasn't sure how much he had in savings and identified no other assets. Mr M also said he had a £70 overdraft. Mr M has since told our service he held around £5,000 in savings. When asked about his plans and any funding for his retirement Mr M's recorded response in the fact find was 'not sure'.

Mr M held retained benefits in an OPS, which had offered a Cash Equivalent Transfer Value (CETV) of £57,280.57 at the time of advice. This was projected to provide an annual pension of £3,501 alongside a tax free cash (TFC) lump sum of £13,899 at the age of 65. It had death benefits of an annual spousal pension of 66.67%. If death occurred before retirement, a lump sum of £8,700 would also be payable.

Portal's suitability report recorded Mr M's main stated objectives as:

- Would like earlier retirement age to scheme normal retirement age
- Lifetime Hurdle Rate (LHR) is acceptable
- Projected future returns are acceptable
- Willing to take more risk
- Does not want an escalating annuity
- Death benefits (for his son)
- Future drawdown (TFC at age 55)
- Specific investment (move away from equity backed)

It also said that Mr M currently believed he was likely to retire at age 60 and that his attitude to risk ('ATR') was 'balanced'.

Portal recommended that Mr M transfer his OPS benefits into a new SIPP. It advised the portfolio should include the following assets:

- Dimensional Multi Factor Equity Fund 72.5%
- Dimensional Global Short-Dated Bond Fund 15%
- Henderson UK Property Unit Trust 7.5%
- Cash 5%

Mr M accepted the recommendation and says the transfer was made in line with Portal's advice in September 2015. By this time the CETV had increased to £81,791.93.

In May 2020 Mr M complained to Portal about the suitability of the transfer advice. He said that he'd lost out on guaranteed benefits as a result of the transfer. Mr M said he was an inexperienced investor who didn't understand the implications of the recommendation or the risks involved. He said he wouldn't have transferred had he understood this. Mr M also said the funds Portal invested in were too high risk for him.

Portal didn't uphold the complaint. It noted Mr M had told it's representative over the phone that maximising death benefits for his dependent child was important to him, and he'd rated this nine out of ten in importance. It highlighted that it was not possible for Mr M to leave his benefits within the DB scheme to anyone other than a spouse.

It said it had carried out the necessary analysis of Mr M's pension benefits. It explained that because Mr M was not looking to purchase an annuity at retirement age Portal had relied on the lifetime hurdle rate (LHR), rather than the critical yield, when assessing whether Mr M was likely to match the DB scheme benefits. It felt the LHR of 3.43% was achievable and could be improved on with the plan it recommended. In support of this it noted Mr M's fund had achieved a compound annual growth rate of 6.14% since inception which was higher than the LHR.

Portal said the implications of the recommendation were explained clearly to Mr M in a phone call in June 2014 and in the suitability report Mr M was later sent. Mr M had also signed a document summarising the benefits he'd be giving up. It said it hadn't recommended high risk funds and had recommended a portfolio in line with Mr M's ATR.

Mr M remained unhappy and so asked our Service to look into his concerns.

Our Investigator upheld the complaint. They said the advice to transfer wasn't suitable and they considered Mr M would likely have remained in his OPS but for the unsuitable advice. Their concerns included:

- That the opportunities to improve on Mr M's benefits was limited.
- That the critical yield shouldn't have been dismissed in favour of the hurdle rate. And the latter was not adequately explained to Mr M.
- That Mr M's ATR was not 'balanced' and he was an inexperienced retail investor.
- The suitability report did highlight the risks of the transfer but the overall recommendation was to proceed in spite of these.
- Whilst death benefits were listed as an important motivation for the transfer, the purpose of his pension was to provide for his retirement. And Mr M had no health issues such that it was likely he wouldn't benefit from his scheme. No alternative options for such provision appear to have been explored with Mr M.
- There is no reason recorded as to why Mr M needed flexibility to access TFC at aged 55 or wanted the flexibility to retire early.
- Many of the Mr M's listed objectives were not actually objectives.

They recommended Portal, in so far as is possible, put Mr M back into the position he would have been in had suitable advice been given.

Portal didn't accept these findings and believed the advice to recommend was justified as Mr M had confirmed he preferred the idea of a drawdown pension and so it had tailored its investment advice to his likely situation in retirement. This is why it had focused on the LHR and it noted that the likely investment return it had calculated was 6.13%. So, it felt there was a good change of improving the benefits Mr M would receive. It said Mr M had sufficient capacity for loss for the investment risk level it recommended.

As the parties couldn't agree, this complaint has now been passed to me to decide.

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'). And 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.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator.

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 M's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

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.

Mr M was 49 at the time of the advice and Portal said he was likely to retire at 60. It’s not clear where Portal got this retirement age from as the fact find notes that Mr M was ‘not sure’ when he wanted to retire. Regardless, the critical yield required to match Mr M’s benefits at age 60 wasn’t recorded on either of the two Transfer Value Analysis (TVAS) reports that Portal has provided our service (one was completed before the advice and one before the transfer). The TVAS completed before the advice, which the suitability report referred to, only recorded the figures in relation to retiring at age 65. This is despite Portal’s suitability report telling Mr M the advice was centred around him retiring at age 60. I think this seriously undermines the credibility of the advice it gave Mr M as it’s likely the critical yield Mr M would need to have achieved at age 60 would have been higher as his fund would have had to pay an income for longer. Something I think Portal ought to have known and considered as part of the advice it gave. So I think this would have been misleading for Mr M.

And even when I do take into account the critical yield required to match Mr M’s benefit at age 65, at the time of advice this was recorded at 7.4% if he took a full pension. When the transfer value was recalculated this brought the critical yield down to 6.2% for a full pension or 5.8% if he took TFC and a reduced pension.

The relevant discount rate at the time of advice was 5.5% per year for 15 years to retirement. The relevant discount rate closest to when the transfer happened was 4.5% per year for 14 years until 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.

Taking this into account, along with the composition of assets in the discount rate and Mr M’s reported balanced ATR there would be little point in Mr M giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. I appreciate the revised critical yield with TFC in the second TVAS was broadly in line with the relevant discount rate, but I still don’t think it would have been worth Mr M giving up guaranteed benefits for the same level of returns. And I’d also note that these figures relate to Mr M retiring at age 65, when the advice was based around Mr M retiring at age 60. The discount rate at the time of the transfer was 4.1% for 9 years to retirement, which, along with the regulator’s middle projection rate, was likely to be significantly less than the critical yield at age 60. So, I think the information available to Portal at that time was that Mr M 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 note Mr M has said his ATR was actually lower. However, I’m satisfied that isn’t relevant to my assessment of whether Mr M was likely to receive comparable benefits, as investments in line with a lower ATR would have further decreased the likelihood of his investments achieving the critical yield.

Portal based its recommendation was based on the lifetime hurdle rate of 4.6% instead of the critical yield, saying this was appropriate for Mr M as he’d agreed that for planning purposes it could assume his fund would remain in a drawdown plan. Having reviewed the two TVAS reports Portal has sent our service, I'd note none appear to provide the LHR figure Portal relied on when it gave its advice. However, I don't think this is of relevance here as I don't think the LHR was the appropriate figure to rely on in any event. I say this noting that it's the critical yield that provides a like for like benefits comparison.

In addition, Portal has not offered any reason as to why Mr M did not want to secure a guaranteed income in retirement. I don't think Mr M's preferences here were explored in any meaningful sense. The suitability report said *'You agreed with us that for planning purposes we would assume your pension fund would remain invested in an income drawdown plan, although we explained that you could of course convert to an annuity if this becomes a more suitable option.'* So, it seems Mr M hadn't discounted an annuity. Given this, it ought to have known that basing its advice on LHRs could have led Mr M to understand he could gain greater returns from the transfer than if he had opted for a guaranteed income instead.

Portal has also said that it felt projected returns of 6.13% were likely under the scheme it recommended. The suitability report said this was based on performance data over a 10 year period. Whilst I haven't been provided with supporting evidence for this, even if I had, Portal knows past performance is no guarantee for future performance and so I consider the discount rates and the regulator's standard projections to be more realistic in this regard in the long term rather than projecting historic returns forward, particularly over such a long period of time.

If I consider financial viability alone, then I don't think a transfer out of the DB scheme was in Mr M's best interests. 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 this below.

Death Benefits

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. I haven't actually been provided with evidence that a death benefit wasn't payable to Mr M's son within Mr M's DB scheme and I'd note most plans have discretion to pay a dependant's pension in lieu of a spousal pension. So, I'm not convinced on the evidence available that the death benefits Mr M already had in place weren't suitable. But even if I were, I still don't think this benefit was sufficient to justify a transfer.

I recognise that the lump sum death benefits on offer through a SIPP was likely an attractive feature to Mr M. But whilst I appreciate death benefits are important to consumers, and Mr M might have thought it was a good idea to transfer his DB scheme to a SIPP because of this, the priority here was to advise Mr M about what was best for his retirement provision. So however important it was for Mr M to maximise death benefits at that time, a pension is primarily designed to provide income in retirement. And I don't think Portal sufficiently explored to what extent Mr M was prepared to accept a lower retirement income in exchange for higher death benefits, aside from asking him a yes or no question about whether he'd reduce his own benefits for this purpose. Furthermore, while transferring the pension potentially provided higher death benefits, this was wholly dependent on investment returns. And if Mr M lived a long life, there may have been very little to pass on in the event of his death.

Ultimately, if Mr M genuinely wanted to leave a legacy for his child, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Portal should've instead explored life insurance. But there's no evidence that it did this.

Overall, I don't think different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr M. I say this noting Mr M had no other retirement provision in place aside from his state pension. I also don't think that insurance was properly explored as an alternative. So, I don't think Portal should have encouraged Mr M to prioritise the potential for higher death benefits through a SIPP over his security in retirement.

Flexibility

I've seen no evidence to persuade me that Mr M required flexibility in retirement - I don't think he had a genuine need to access his TFC at 55 or retire earlier than the normal scheme retirement age. I'll explain why.

Mr M was only 49 at the time of the advice, and it would appear he didn't have any concrete retirement plans. The fact find shows Mr M was asked about his chosen retirement age and his plans/funding for retirement and his response to both questions was *'not sure'*. It is also Mr M's account that he was approached by the introductory business and hadn't sought out pension advice. So, it would seem retirement planning wasn't something Mr M had given much consideration to at the time of advice.

Whilst the report said Mr M would likely retire at age 60, it's not clear where Portal got this information from, so I don't find this persuasive. The suitability report also said: *'you expressed an opinion that being able to draw income from age 60 onwards would be a useful benefit and the flexibility to do so was important to you.'* Whilst many consumers might think it would be 'useful' to be able to retire at aged 60 rather than 65, this doesn't persuade me Mr M had a genuine need to do so. There's also no evidence Portal explored Mr M's plans for retirement or what his income needs would be at that time. I can see no justification within the evidence as to why Portal said flexibility in retirement was important to Mr M.

Mr M had six years before he could think about accessing his pension. So, in these circumstances, I don't think it was a suitable recommendation for Mr M to give up his guaranteed benefits now when he didn't know what his needs in retirement were going to be. If Mr M later had reason to transfer out of their DB scheme he could have done so closer to retirement.

Investment control

Portal's suitability report also recorded that Mr M wanted to move away from equity backed investments. It said Mr M would prefer to have ownership and personal control of his pension benefits.

However, there is no further evidence indicating where this objective came from or why moving into a SIPP with 72.5% of the portfolio being invested in an equity fund would achieve this.

Mr M has said he was an inexperienced investor and I've seen no evidence to the contrary aside from the suitability report itself. I think it's of relevance Portal hasn't disputed Mr M's account of his investment experience in response to his complaint. And I also haven't seen any evidence Mr M took personal control of his investments following the transfer as Portal suggested he wanted to do. So, I'm not persuaded this was a genuine aim of Mr M in the circumstances. Rather, it appears to have been a consequence of transferring his pension.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a SIPP would have sounded like attractive features to Mr M. But Portal wasn't there to just transact what Mr M might have thought he wanted. The adviser's role was to really understand what Mr M needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr M was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr M was very likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. Mr M shouldn't have been advised to transfer out of the scheme as the potential increase in death benefits weren't worth giving up the guarantees associated with his DB scheme.

So, I think Portal should've advised Mr M to remain in his DB scheme.

Of course, I have to consider whether Mr M would've gone ahead anyway, against Portal's advice. But having done so I'm not persuaded that Mr M would've insisted on transferring out of the DB scheme, against advice. I say this because Mr M appears to have been an inexperienced investor with either a low or medium ATR (this isn't agreed upon by the parties) and this pension accounted for the majority of his retirement provision. So, if Portal had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr M's concerns about his death benefits were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he was paying for, didn't think it was suitable for him or in his best interests. If Portal had explored the option of life assurance and had explained that Mr M could meet this objective without risking his guaranteed pension, I think that would've carried significant weight. So, I don't think Mr M would have insisted on transferring out of the DB scheme.

In light of the above, I think Portal should compensate Mr M 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 M, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr M 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 M whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published.

Mr M has chosen not to wait for any new guidance to come into effect to settle his complaint.

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 M.

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 M has not yet retired but he has told us he plans to do so at aged 60 and plans to take his benefits then. So, compensation should be based on him retiring at age 60.

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 M's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr M'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 M 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 M within 90 days of the date Portal receives notification of her 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 M.

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 Portal pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr M 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 M any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Portal to pay Mr M 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 M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr M.

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

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 16 November 2022.

Hannah Wise
Ombudsman