

## The complaint

Mr W 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 personal pension plan ('PPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

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

## What happened

Mr W approached Portal in late 2017 after he'd seen an advert offering to unlock his pension from the age of 55. Sadly, Mr W's son had passed away and he wanted to release funds to *'fulfil some of his wishes and dreams'*.

Portal gathered information about Mr W's circumstances and objectives as part of its review. At the time the advice was given by Portal, Mr W was 55 years old and lived with family. He earned £9,800 per annum and had £700 in savings. He had two life assurance policies which he was paying a total of £15 a month towards. He had a £7,500 unsecured loan which he was paying £200 a month towards. Mr W was recorded as having no disposable income each month.

At the time of the advice in 2018, Mr W held an OPS which he'd made additional voluntary contributions ('AVC') towards. The main plan had a Cash Equivalent Transfer Value ('CETV') of £85,509. This was projected to provide an annual pension of £5,712 from the age of 65, or a reduced pension of £3,955 if he took tax-free cash ('TFC') of £26,365. A guaranteed minimum pension applied to the plan. The AVC part of the plan had a CETV of around £4,923 and a guaranteed growth rate of 4%.

After discussing Mr W's circumstances and requirements and completing a pension transfer value analysis, Portal sent Mr W a post-sale options letter in May 2018. This summarised the benefits of Mr W's DB scheme and outlined his options moving forward. Within this Portal said its recommendation was that Mr W didn't transfer out of his DB scheme to draw down his pension funds as a lump sum. However, with the letter it included a number of forms for Mr W to complete if he wished to proceed with the transfer.

The following day Mr W returned a signed letter which indicated he wished to go against Portal's advice. He said his reason for this was:

*"I have some personal things to do in memory of my son and wish to forfill [sic] some of his wishes & dreams."*

Later that month, Mr W was sent a suitability report by Portal. This noted that Mr W's primary aims were to tackle his debt and to go on holiday. The suitability report stated that Portal didn't recommend Mr W access his OPS benefits, but instead leave his pension funds where they were because of the benefits he'd be giving up if he were to transfer. However, it said it was treating Mr W as an insistent client and, on this basis, it recommended he transfer his

DB scheme into a new PPP, investing the funds in 100% cash. This enabled him to take the entire proceeds as a gross lump sum, of which £22,608 would be TFC.

Mr W accepted the insistent client recommendation and the transfer was made shortly afterwards. Mr W then withdrew the entire pension.

In June 2020 Mr W complained to Portal about the suitability of the transfer advice. He said that the transfer was not in his best interests and that he'd lost out as a result. He noted that taking cash from a pension was a preference not an objective and that he shouldn't have been advised to proceed on this basis. He outlined that the insistent client declaration form was typed up by Portal and given to him to sign. As such he said he was unaware he was being treated as an insistent client and didn't understand what the term meant. He thought Portal had simply changed its mind and gone ahead with the transfer after initially advising against it. Mr W noted that if Portal really felt the transfer was not in his interests it shouldn't have allowed him to proceed.

Portal didn't uphold the complaint. It said Mr W had made it very clear he wished to disregard its recommendations and identified his need to access TFC as 'very important'. It said it couldn't have denied him access to his funds in line with the Financial Conduct Authority (FCA) guidelines on the insistent clients process and noted he'd been provided with documentation outlining Portal's recommendation. Portal advised it had explained the term insistent client to Mr W via calls and in letters it had sent. It also highlighted that he had personally signed several forms identifying himself as an insistent client and acknowledging the risks of proceeding.

Mr W remained unhappy and brought his complaint to our Service. One of our Investigators looked into things and upheld the complaint. They were of the view Mr W was not a truly insistent client. They didn't feel Portal had followed the insistent client process fairly and that this had led to Mr W proceeding with a transfer when he otherwise wouldn't have. In particular they said:

- Portal had failed to provide Mr W with an appropriate report/sufficient information highlighting its recommendation not to transfer within the post-sale options letter (prior to Mr W agreeing to the transfer).
- That the risks of the transfer were mentioned in the post-sale options letter, but as part of a declaration to be signed in order to access the funds, which they didn't think was fair.
- That the post-sale options letter would have been confusing and left it to Mr W to decide how to proceed - they noted the letter advised Mr W not to transfer but then gave him four options to choose from, only one of which wasn't a transfer option.
- Portal had pre-written some of the declaration to transfer out, which was leading.

They recommended Portal put Mr W back into the position he would have been in had the transfer not occurred, in so far as possible. They also recommended Portal pay Mr W £300 compensation for the distress and inconvenience caused by its mistake.

Portal didn't agree and raised a number of further points. It said Mr W was a genuine insistent client who had the opportunity to stop the process at any time and did not. It said all of the relevant information Mr W needed was included in the documentation he was sent before he completed the final paperwork to agree to the transfer. It said it had adhered to the relevant guidance regarding insistent clients and didn't feel the options it had given Mr W were confusing.

As the parties didn't agree, the complaint was referred for a final decision.

The complaint was passed to an Ombudsman, who sought more information about Mr W's circumstances and requirements at the time of advice. Mr W said he did not have any debt at the time, so the reference to this in Portal's suitability report was an error. Mr W also said he was trying to fulfil his wishes, not his son's. Mr W confirmed his entire fund had since been withdrawn and spent - he took his family on holiday, purchased a car and gave some money to his children. Mr W said he realised there may have been an issue with the advice when he saw an advert online in 2020. Mr W stressed again he was vulnerable at the time of advice and Portal didn't treat him as such.

Portal provided the fact find and budget planner that was completed with Mr W prior to advice being given. This also showed Mr W had an unsecured loan with a £200 monthly repayment and that Mr W was able to cover his expenses but had no disposable income left at the end of the month. In the comments attached to the fact find the advisor had recorded that Mr W's son had passed away and he wanted the money to complete his sons bucket list with his own family and his son's family – including going on holiday. There was also mention of incorporating his son's ashes into some jewellery. Portal didn't think Mr W was vulnerable as he had thought about things in full and was, "*adamant this is what he wants to do.*"

The Ombudsman issued a provisional decision. In summary, her provisional findings were that the transfer out of the DB scheme was not suitable for Mr W, but that compensation for distress and inconvenience was not warranted in the circumstances.

Neither Portal nor Mr W made any further comments in response to the Ombudsman's provisional decision. However, the Ombudsman was unable to issue a final decision on the matter so it was passed to me to decide.

I considered the evidence afresh and informed both Portal and Mr W that I intended to uphold the complaint, along the same lines as the Ombudsman's provisional decision and for largely the same reasons. Neither side had any further comments, so I'm now providing a final decision on the matter

### **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.

All parties accept that it wasn't financially viable for Mr W to transfer out of his occupational pension because he was likely to be worse off in retirement as a result. So, my decision is going to focus on what I consider to be the key issue, which is whether it was fair for Portal to treat Mr W as an insistent client.

#### *Insistent clients*

Since January 2018, COBS 9.5A includes additional guidance on insistent clients. It sets out key steps for advisers to take:

#### *'Information to be communicated to an insistent client*

- 1) *Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).*

- 2) *The information which the firm should communicate to the insistent client is:*
- a) *that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;*
  - b) *the reasons why the transaction will not be in accordance with the firm's personal recommendation;*
  - c) *the risks of the transaction proposed by the insistent client; and*
  - d) *the reasons why the firm did not recommend that transaction to the client.*

*Acknowledgement from the insistent client*

- 1) *The firm should obtain from the insistent client an acknowledgement that:*
- i. *the transaction is not in accordance with the firm's personal recommendation; and*
  - ii. *the transaction is being carried out at the request of the client.*
- 2) *Where possible, the acknowledgment should be in the client's own words.*

*Further personal recommendations given to an insistent client*

*Where a firm gives a further personal recommendation in relation to the transaction proposed by the insistent client, the firm should make clear to the client that this personal recommendation is distinct from, but does not affect the conclusions of, the initial personal recommendation.'*

In considering whether Portal acted fairly here, the documentation that I consider to be key is the post-sale options letter. Whilst Portal has highlighted there was further information contained within the suitability report, by the time Mr W received this he'd already received Portal's advice and had been asked to make a decision on whether to transfer. For this reason, I don't think the suitability report can be fairly relied on when deciding if Portal gave clear, fair and misleading information at the point of advice as per the requirements of the Regulator. Whilst it is true that Mr W could have withdrawn from the process at any time, it's reasonable for a retail investor, such as Mr W, to trust that they are being given fair advice which takes into account the relevant information. So, I don't think it's fair for Portal to suggest Mr W should have reconsidered his decision in light of the further information it provided after it had already asked him to choose how to proceed; particularly when there's no suggestion his circumstances had changed in the interim.

Having carefully considered the post-sale options letter and attached paperwork, I don't think this information was clear or fair and I think it was misleading. I think it failed to provide sufficient information to enable Mr W to make a fully informed choice and it contained contradictory statements and recommendations throughout.

For example, the cover letter contained the main recommendation which stated that Portal: ***'strongly recommend that you do not transfer...so that you can access your pension savings early by taking more than the recommended sustainable withdrawal amount and instead leave them where they are because of the guarantees/benefits that you will be giving up.'***

However, the next few paragraphs, which were a lot longer, discussed the tax implications of drawing down the pension early – which could only have been done following a transfer.

I also think it's significant that Portal didn't highlight its recommendation that Mr W stay within the DB scheme within this initial paragraph by placing this in bold (despite doing this with the rest of its recommendation). This gave the impression that its recommendation here was that transferring AND withdrawing the entire pension as a lump sum was what it was advising against.

I think this lack of clarity can also be seen elsewhere in the post-sale options letter. For example, the options form itself includes the following list for Mr W to choose from:

- Option 1: Disregard our recommendation and continue as an insistent client  
Take my entire pension as a lump sum
- Option 2: Accept our recommendation  
Take tax free cash and take lump sum up to 4% withdrawal amount
- Option 3: Accept our recommendation  
Take tax free cash only from my [DB transfer] schemes
- Option 4: Accept our recommendation  
Do nothing

From reading this form it appears Portal said it was recommending three different options, two of which involved Mr W transferring out of his DB scheme. If Portal were to have effectively communicated to Mr W that its advice was not to transfer out of the scheme at all, I would have expected 'do nothing' to be the only option it labelled as 'accept our recommendation'. Yet this wasn't the case. So, based on this letter alone, I think Portal was recommending Mr W should transfer out of his DB scheme, but it didn't recommend he withdrew the full sum.

The insistent client form had declarations which stated that:

*'[Portal's] recommendation is not to transfer my [DB] Schemes'*

...and

*'Please state in your own words (as fully as possible) why you want to go ahead and access your...pension savings early by taking more than the recommended sustainable withdrawal amount, even though this is against our recommendation.'*

I think this would've left Mr W unsure about what Portal was advising against – it is certainly not a clear recommendation.

So, I don't think it would be sufficiently clear to Mr W, as a retail investor reading this letter, that Portal was recommending he should stay within his DB scheme. Instead, it seems to me that the only action Portal was advising Mr W against was withdrawing the entire funds as a lump sum because of the tax implications.

I also think the weight of options in favour of a transfer were potentially leading for a retail client in these circumstances, as was the order of the options on the form - it seems odd to me that Portal would put what it reportedly saw as the least suitable option first and the most suitable last.

I also agree with our Investigator that the letter didn't clearly set out the information I'd expect it to. Whilst it gave an overview of the benefits of the existing DB scheme, there was

missing information. For example, it only quoted the guaranteed income if a tax free lump sum was taken; it didn't look into Mr W's reasons for wanting access to the funds or how else he might meet these needs; nor did it consider what his requirements in retirement would be and how this transfer and any draw down would impact this.

The risks of transferring were included in the disclaimer form Mr W was asked to complete, but this form appeared at the end of the series of documents Mr W was sent. Indeed, the cover letter only asked Mr W to complete this form if he decided to go ahead with the transfer. So, I'm also not persuaded these risks were sufficiently prominent or that Mr W was encouraged to review these as part of the recommendation he received from Portal.

For all of these reasons, I don't think Portal followed the insistent client process fairly and I don't think the advice it provided Mr W was clear, fair and not misleading.

I've thought about what Mr W would have most likely done had he been given suitable advice. It's clear Mr W had been through a very difficult time personally at the point at which he approached Portal, and that his desire to access these funds was emotive. And I acknowledge that this makes assessing what he would have done following suitable advice more difficult. I note Mr W selected the one option that Portal didn't suggest it recommended, which could add weight to its suggestion Mr W was a truly insistent client.

That being said, I have seen no evidence to suggest that Mr W had any pressing need to access these funds. His stated reason on the suitability report and fact find was to fulfil his son's wishes and dreams. Whilst he had since told our Service this is incorrect, and it was his wishes he sought to fulfil, I don't think this discrepancy matters here. The evidence indicates these wishes surrounded taking his family on holiday. Either way, I haven't seen anything to suggest there was any time pressure here. And whilst Portal's documentation also suggests Mr W wanted to pay off debt (which I'm aware Mr W disputes), I'm not persuaded this would have been a need in any event as the income and expenditure exercise Portal completed shows Mr W was covering his costs at the time. Overall, Mr W's stated aims seem to me to have been desirable objectives rather than things Mr W needed to achieve at that time. So, if Portal had provided clear advice to Mr W that accessing his pension to pay for something like a holiday wasn't a good reason to transfer and that it recommended he shouldn't do this, I think that would have influenced Mr W's decision.

I also don't think the fact Mr W selected the only option Portal didn't 'recommend' carries much weight given how confusing, and limited, the entire post-sale options paperwork was. And as I've said above, Portal wasn't recommending that Mr W should remain in the DB scheme, it was simply recommending he didn't withdraw all the funds at once. So, Mr W's decision has to be considered in that context, that Portal had already given him the green light to transfer, albeit not to access the funds in the way he wanted.

If Portal had emphasised what Mr W would be giving up and looked holistically at his circumstances, including his retirement provisions and what this might mean for his future, I'm not persuaded he'd have gone ahead with the transfer. I say this keeping in mind that I've seen no evidence Mr W had any investment or financial experience. So, I think it's likely he would have been strongly influenced by the professional financial advisor he'd engaged. Whilst I acknowledge that Portal's fact find suggests Mr W was adamant he wanted to transfer, I think this was due to incomplete and misleading advice on its part.

For all of these reasons, I don't think Mr W should have been treated as an insistent client and I don't think he'd have transferred out of his occupational pension had he been given clear and suitable advice. So, I think Portal should compensate Mr W for his loss 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 W as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme.

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 W whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to be published.

Mr W 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 W.

Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, Mr W has not yet retired, but he is unable to work at present. He plans to retire at his normal retirement age, so this should be the basis for the calculations 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 W's acceptance of the decision.

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

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

The compensation amount must where possible be paid to Mr W within 90 days of the date Portal receives notification of his/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 W.

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

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 the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Portal Financial Services LLP should pay Mr W 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 additionally require Portal Financial Services LLP to pay Mr W any interest on that amount in full, as set out above.

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

If this decision is accepted by Mr W, the money award becomes binding on Portal Financial



Services LLP. My recommendation would not be binding. Further, it's unlikely that Mr W could accept my final decision and go to court to ask for the balance. Mr W may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 2 December 2022.

Hannah Wise  
**Ombudsman**