DRN-3781685

The complaint

Mr H has complained about the advice he received from Portal Financial Services LLP ('Portal') to switch a personal pension plan ('PPP') to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ('UCIS').

Mr H is being represented by a Claims Management Company (CMC), but for ease of reading the decision I'll refer to all representations as being made by Mr H.

What happened

Mr H met with Portal in 2012. Portal carried out a review with Mr H. It noted he was 55 years old, employed and was earning approximately £1,300 per month. He was single and owned his home valued at around £150,000 with an outstanding repayment mortgage of £75,000. It noted Mr H had debt of around £35,000, and no monthly disposable income. Mr H had another Group Pension Plan (GPP) from a former employer but didn't want to review this because of guarantees attached to it.

Portal noted Mr H's PPP had a transfer value of £44,431 at the time of the advice. Portal stated Mr H's objectives were to release tax free cash (TFC) immediately and keep the remaining fund to provide an income at a later date, to ensure the portfolio reflected Mr H's attitude to risk (ATR) and to have a greater investment fund choice.

The risk assessment Portal carried out suggested he was a "moderately cautious" investor. Portal recommended that Mr H switch his PPP to a SIPP to meet his objectives.

Portal's suitability report noted that it would charge an initial advice fee of 5% and an ongoing management charge of 1%. The SIPP had an initial set up fee of 0.2% and an annual management charge (AMC) of 0.5% plus £80 per annum.

The SIPP was established in November 2012. Mr H took 25% of the fund value as TFC. The remaining balance was allocated as follows:

- Cool Blue Samui– £2,328
- EOS Solar – £2,329
- Hypa Raithwaite – £15,000
- Venture Oil – £6,195

The remainder of the funds were allocated to cash funds.

In June 2020, with the assistance of a CMC, Mr H complained to Portal about the advice he received to switch his PPP to the SIPP. He said the advice was negligent and unsuitable for someone with no investment experience and a cautious ATR.

Portal rejected his complaint, saying it had been referred too late. Unhappy with Portal's response, Mr H referred the matter to our service.

An Investigator considered the matter. They first explained that they thought the complaint had been referred in time under our rules. Portal didn't respond so our Investigator proceeded to consider the merits of the complaint. She concluded that Mr H's complaint should be upheld. The Investigator didn't think the advice to switch Mr H's PPP to the SIPP was suitable; this was because Mr H's existing arrangements could potentially have been met by remaining in his existing PPP. She noted the cost of the advice and the SIPP were likely to be more expensive. And she thought the SIPP and the underlying funds were higher risk than someone with Mr H's experience and ATR should've been advised to invest in. Our Investigator thought Portal should compensate Mr H for his loss.

Portal didn't provide any comments in response to our Investigator's opinions, so the complaint has been passed to me to review 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.

Having done so, I think Mr H's complaint has been referred to us in time, and should be upheld. I'll explain why.

Has the complaint been referred to us in time?

Portal didn't respond to our Investigator's opinion that the complaint had been referred to us in time. But for completeness, I've thought about this, and I agree with our Investigator that the complaint was referred to us in time.

The rules under which we operate are known as the DISP rules and can be found within the FCA handbook.

The relevant rule here is DISP 2.8.2 which says:

> *The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

DISP 2.8.2 goes on to state a number of exceptions to the above rule, including cases in which the Ombudsman agrees that the failure to meet the deadline was "a result of exceptional circumstances".

The advice to switch his pension that Mr H is complaining about happened in March 2012. Mr H first contacted us in September 2020. This is clearly more than six years after the event being complained about. So, it's been referred to us too late under the first part of this rule. I've therefore gone on to consider whether Mr H referred the complaint to us within three years of the date he became aware, or ought to have reasonably become aware, that he had cause for complaint.

Portal, in its final response to Mr H, pointed to a letter dated September 2015 which explained that one of the funds he'd invested in was not performing as expected.

I've considered the review letters Portal has referred to. And I think the overriding tone of this letter was one of reassurance.

It starts by setting out that the schemes are making "*strenuous efforts to return your capital together with the growth you are entitled to, sooner than they originally indicated".*

With regards to the Raithwaite Investment, it says *"it is our view that the security measures put in place with Skelwith Ltd will generate enough money to pay all the outstanding interest and to return investor's capital."*

The update on EOS Solar says *"EOS Solar tells investors to expect a return in January 2016 based on the rental income received in 2015. It also tells us to expect periodic redemptions (ie our money back in instalments) as the properties are sold on to other owners.*

The updates on the other investments are similarly reassuring. The letters certainly didn't expressly tell Mr H he should have cause for alarm or concern. Furthermore, Mr H was a lay person who had relied on Portal as his professional advisors when it provided advice in 2012. And I don't think anything within these letters would've made him question this initial advice.

Mr H raised his complaint in 2020 when contacted by the CMC. I've not seen anything to suggest anything prior to this should've alerted him to the fact that the investments he had been advised to take were unsuitable. Based on this, I'm satisfied the complaint has been raised in time.

The advice to switch

What I need to decide is whether the advice to transfer Mr H's pension into a SIPP, draw the maximum TFC, and invest into the underlying investments, were suitable recommendations.

At the time of Portal's advice Mr H was 55 years old, employed and in good health. He was a standard retail investor and he didn't intend to retire until age 65. According to the information gathered by Portal, the PPP being switched contained the majority of his retirement provisions. He had another, much smaller pension fund from a previous employer. Other than his pension there was no record of Mr H having any investments or savings. Although he was a homeowner, he had an outstanding amount of £75,000 on his mortgage and he also had other debt of £35,000.

The suitability report noted that one of Mr H's objectives was to access tax free cash to refurnish his house. However, Mr H has told us he had no pressing need for TFC and hadn't been thinking about taking this until Portal suggested it. Mr H received just over £11,000 TFC. Whilst I've no doubt this would've been enough to be able to cosmetically update his house, it doesn't seem like this was going to be enough substantially alter or improve the house overall. And Portal didn't record any details of any major works or improvements that were either required or Mr H intended to carry out. Although Mr H has told us he did use the money for home improvements, I'm not persuaded that this was a priority for Mr H at the time.

There was no evidence of Mr H's existing pension provider being contacted to see if there was a way he could be permitted to take TFC without transferring to the SIPP. Mr H didn't want to take an immediate income, and this would tend to suggest that he wasn't in any financial difficulty. Although he had some debt, and no disposable income, there was nothing to suggest the situation was worsening. It's possible Mr H could've used the TFC to reduce his debt, but it's clear that wasn't noted to be his objective and it is evident Mr H didn't use the funds for that reason. So, overall, I can't see that Mr H had any obvious or compelling need to take TFC given his financial circumstances.

Furthermore, I can't see that Portal investigated or explained to Mr H the impact that taking TFC cash would have in his retirement overall. By taking the TFC, Mr H was instantly reducing the funds available to him in retirement. And I can't see that Portal made him aware of the impact of this on his future pension income.

So, while I think the TFC was appealing to Mr H, he had no pressing need for it and had he been correctly advised, he wouldn't have transferred his pension to access the TFC. Considering all of this, I don't think the advice to switch in order to access TFC was suitable for Mr H.

Attitude to risk

Mr H's ATR was established as moderately cautious. Mr H wasn't an experienced investor, having considered his overall circumstances I think this was reasonable.

However, around 85% of Mr H's investments were placed into Unregulated Collective Investment Schemes (UCIS) and unregulated investments. Given the risks involved, these types of investments can't fairly be described as 'stable' funds. Unregulated investments can be prone to lack of regulation, longevity risks, potential insolvency, liquidity issues and other factors which can prevent investors from accessing their funds.

What was recommended didn't appear to match with Mr H's ATR. And Mr H did not have any savings or investments to fall back on. He had just the one other small pension and his state pension. His capacity for loss, was in my view, minimal and therefore inconsistent with the investment recommendations made, which were high risk.

SIPPs provide a wider range of investment options and added flexibility and choice. I can't see that Mr H had any obvious need for the flexibility offered by the SIPP. I've explained above why transferring to access the TFC alone wasn't suitable for Mr H. Whilst one of Mr H's objectives was recorded as ensuring his pension matched his ATR and that he had a good awareness of investment opportunities, I see no reason why this couldn't have been completed by staying with his existing PPP. I haven't been provided with anything by Portal that shows it ever looked into how his existing pension was invested. Nor that it explored whether there were suitable funds that he could've switched to by remaining in the PPP.

Mr H's PPP was with a large provider, and I think it's likely he would've had the choice of a number of different funds within this arrangement. But I don't think Portal explored this option at all. The SIPP had an AMC of 0.5%. There's no record of the cost of the PPP. But there was a clear cost to switching his existing pension into a SIPP. Portal charged him an 5% initial fee and there would also be charges associated with its ongoing investment advice, plus other fund charges depending on the investments selected. I don't think Portal was able to justify this, particularly in view of the fact that they didn't explore the cost of remaining within the PPP.

I've seen nothing to persuade me that Mr H was seeking a sophisticated investment proposition or why he wanted access to a wide range of investments. I think that greater investment fund choice was of limited benefit when Mr H had little experience of investing in stocks and shares. There wasn't any explanation as to why he wanted a greater fund choice, or what investments he wanted to make that were not available with his existing providers. And I don't think the adviser could reasonably conclude that Mr H wanted or needed access to non-standard or unregulated investments, which the SIPP would provide.

Portal recommended an investment strategy which, given that Mr H was neither an experienced nor a sophisticated investor, likely meant a higher need for ongoing advice and monitoring of the investments, which came at a cost. Portal recommended that Mr H invest around 85% of his modest pension fund into UCIS and unregulated funds. As I've said Mr H appeared not to be a sophisticated nor an experienced investor. Given the size of his fund and his other assets he clearly wasn't a high net worth investor with an obvious capacity to take on greater risk.

Overall, investing Mr H's SIPP into high risk, unregulated investments was inconsistent with Mr H's ATR to risk and capacity for loss. I don't therefore consider Portal's investment advice was suitable, in Mr H's individual circumstances. And given the issues with the investments over the years, Mr H has clearly lost out financially as a result of accepting Portal's advice.

Summary

For the reasons set out above, I think the advice to switch the PPP to the SIPP was unsuitable because Mr H didn't have a genuine requirement for the TFC he ended up taking. Additionally, Mr H was not an experienced investor and so did not need the wider investment choice the SIPP would provide. It would also potentially be a more costly arrangement, once the SIPP provider, fund and adviser charges were taken into account.

Overall, I think Mr H should've been advised to retain his PPP and review the underlying investments of that instead to ensure they were invested in line with his ATR. If necessary, Mr H could've switched funds within that arrangement. I don't think Mr H had a genuine need to take TFC, so I don't think he needed to switch to a SIPP for this reason.

I've thought about whether, if he'd been correctly advised by Portal not to switch, Mr H would have gone ahead with it anyway. Having carefully considered all the circumstances in this case, I don't believe he would have. There's nothing to suggest that Mr H was seriously considering moving his existing plan prior to being approached by Portal for a pension review. I think that the options of taking TFC was appealing once suggested by Portal, but I don't think this was something Mr H was looking at until it was presented to him as an option.

Overall, I don't think portal gave Mr H suitable advice.

Putting things right

Fair compensation

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

I take the view that Mr H would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr H's circumstances and objectives when he invested.

What must Portal do?

To compensate Mr H fairly, Portal must:

- Compare the performance of Mr H's investment with the notional value if it 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.

- Portal should add interest as set out below:

- Portal should pay into Mr H'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 Mr H's pension plan, it should pay that amount direct to him. 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 Mr H won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

- For example, if Mr H 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 Mr H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay £400 to Mr H for the distress and inconvenience caused to him by the impact its unsuitable advice has had on his retirement planning.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Some liquid/some illiquid	Notional value from previous provider	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 Mr H provides an undertaking to pay Portal any amount he 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.

Notional Value

This is the value of Mr H's investment had it remained with the previous provider until the end date. Portal should request that the previous provider calculate this value.

If the previous provider is unable to calculate a notional value, Portal will need to determine a fair value for Mr H's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The SIPP only exists because of illiquid assets. In order for the 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 Mr H 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 Mr H 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 SIPP to be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr H wanted Capital growth with a small risk to his capital.

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- 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 his 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 Mr H's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr H into that position. It does not mean that Mr H would have invested 50% of his 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 Mr H could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold the complaint. My decision is that Portal Financial Services LLP should pay the amount calculated as set out above.

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 13 December 2022.

Rob Deadman
Ombudsman