

The complaint

Mrs A complains about advice she was given to transfer the benefits of a defined-benefit (DB) occupational pension scheme (OPS) to a personal pension plan in 2017. She says the advice was unsuitable for her and believes this has caused a financial loss.

Portal Financial Services LLP is responsible for answering this complaint. To keep things simple I'll refer to "Portal".

What happened

Mrs A paid Portal for advice in relation to her pension and retirement needs. Portal ultimately facilitated Mrs A transferring away from her OPS, a local authority scheme, to a personal pension plan. It said she could access a tax-free cash element and use the remainder to buy certain things she'd said she wanted.

The information gathered by Portal about Mrs A at the time was broadly as follows:

- Mrs A was around 55 years old living with her husband who was then aged 49. They currently had no-one financially dependent on them. Mr and Mrs A earned around £1,100 and £1,500 per month (net) respectively.
- Mr and Mrs A owned their home valued at £195,000 with an eight-year mortgage left to run, costing around £850 per month. They had no other apparent assets and a small car loan which was being paid down.
- Mrs A had accrued these pension benefits in two periods of previous employment. The (total) cash equivalent transfer value (CETV) of the OPS in 2017 was around £29,246 (this was later revalued £30,285) with a normal retirement age of 65.

Mrs A complained to Portal in 2021 that she was given unsuitable advice to transfer her pension to a type of personal plan. However, Portal says that in its dealings with Mrs A, it first told her that it didn't think she ought to transfer away from her DB scheme. It said it told her its advice was *not* to transfer out.

However, Portal says Mrs A became an 'insistent client' – a term used within the industry when a client wants to go against what was recommended to them by their adviser. Portal says that only when Mrs A insisted, did it then go on to make a second recommendation: that she transfer to a personal pension plan, take a 25% tax-free lump sum, and eventually take the rest as a taxable sum. She had immediate plans for the money.

The complaint has been referred to our Service. One of our investigators looked into it and said we should uphold it. They thought Portal hadn't treated Mrs A correctly when categorising her as an 'insistent client' and that the advice to transfer the OPS was unsuitable.

As the complaint couldn't be resolved informally, it's come to me for 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.

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'). 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.

I have further considered that the regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6 that the starting assumption for a transfer from a DB scheme is that it is unsuitable.

Having considered all the circumstances in this case, I've decided to uphold Mrs A's complaint.

Introduction

I would normally begin by assessing whether the transfer of the pension was financially viable. For instance, I'd look at whether there was evidence Mrs A's pension could potentially grow outside her OPS, to an extent where transferring to a type of personal pension was worthwhile. And I'd compare these types of projections against the valuable benefits and guarantees Mrs A would be giving up by leaving a DB scheme.

However, in this case, Portal itself has said its initial advice was not to transfer. It referred to 'critical yield' rates. The critical yield is essentially the average annual investment return that would be required on the transfer value - from the time of advice until retirement - to provide the same annuity benefits as the DB scheme. The critical yield is therefore part of a range of different things which help show how likely it is that a personal pension could achieve the necessary investment growth for a transfer-out to become financially viable. The critical yield in this case was very high and they showed that if Mrs A had intended to retire at her NRA of 65, then transferring out would see her getting much lower retirement benefits. However, the evidence here is that Mrs A wanted to access money quite soon.

As I say, Portal is adamant it told her transferring wasn't suitable in her case. So, having said in 2017 – and again in 2021, following the complaint - that transferring *wasn't* suitable, from a financial perspective, it would obviously be very hard for Portal now to argue that it *was*.

For the record, I agree that transferring wasn't suitable from a financial comparison perspective. Everything I've seen shows Mrs A's funds would have had to grow outside the scheme at very substantial rates year-on-year, to make transferring worthwhile. I don't think she would have had a high tolerance for investment risk and she had no relevant experience. Her tolerance for loss was also low. Mrs A had other pensions, but everything suggests these were very modest, as were the one(s) related to this case. So, transferring simply wasn't suitable from a financial comparison perspective and the evidence is very strong in this regard.

There were also other significant reasons why transferring wasn't suitable which in the main related to the benefits and guarantees within the current scheme Mrs A would be giving up by transferring away. There were also death benefits which Mrs A's spouse might have benefited from if she'd predeceased him.

However, as there's no dispute that transferring wasn't suitable for Mrs A, I don't need to spend any more time explaining why.

What was Portal required to do?

Portal says Mrs A ultimately went against its advice. It says that she was advised that she ought to stay in the DB scheme, and it was Mrs A herself that insisted she wanted to transfer out. Portal says this meant she became an 'insistent client' and that accordingly, it followed a process to transfer Mrs A's OPS to a personal pension plan, as per her wishes.

I've set out above that the regulator places important general obligations on firms like Portal when giving financial advice to clients. At the time of the advice there were no regulatory rules in place specifically in respect of 'insistent clients'. But in February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There were three key steps, which it set out on its website as follows.

1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.
2. You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).
3. It should be clear to the client that their actions are against your advice.

The regulator said the advice should be set out clearly in the suitability report, and that it needed to be clear with its client about the risks of their chosen course of action and that he/she is acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this should normally be clear.

The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

“The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.

The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.

Robust warnings were given and documented.”

Whilst this was guidance, rather than rules, I would have expected Portal to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

However, I should also point out that there is no rule to prevent advisers transacting business against their advice, if the client insists. So, I need to think here about whether enough was done by Portal to try and find alternative ways of meeting Mrs A's objectives. I have also considered whether the 'insistent client' process in this case was merely, in the words of the regulator, a 'papering exercise'.

Initial contacts between the parties

The evidence I've seen strongly suggests Portal's intention from the outset was always to facilitate the transfer from Mrs A's OPS, to a personal pension plan.

Portal established this approach by writing an initial letter to Mrs A, on 9 June 2017, basically saying it had collected enough information about her existing scheme and that she'd be able to access a tax-free lump sum of £7,311. Portal knew that Mrs A was interested in generating some money for an important family event and to make some home improvements. And the wording of this initial letter, in my view, encouraged her to immediately access her pension funds straightaway, by moving to a personal plan.

For example, no assessment appears to have been carried out by Portal as to the amount Mrs A might have needed to pay for this event and / or the home improvements she'd mentioned. I also think the letter was misleading. This is because the amount of tax-free cash quoted by Portal in the letter was, in fact, based on 25% of Mrs A's CETV and it could only be accessed in the way Portal was suggesting by transferring out to a personal pension plan.

In effect, the only way Mrs A could access the specific amount of tax-free cash being quoted was by transferring out of her OPS. Accessing early retirement under her existing scheme was not mentioned at this point and it's almost certain she'd have been able to access a lower amount of tax-free cash under the rules of her DB scheme. This doesn't mean her OPS wasn't worth staying in, it merely reflects the differences in how different pensions work. Mrs A could have remained in her scheme, and probably accessed tax-free cash earlier than the NRA of 65. And she'd have had a guaranteed pension and associated benefits for the rest of her life.

So, this initial letter didn't highlight these issues. Instead, it promoted the amount of money she could get only by transferring away. It also poorly explained the critical yield issue and conflated it with what it called the 'growth rate'. Furthermore, I think it's enlightening that Portal was also promoting this type of action *before* it had even collected sufficient

information about Mrs A's circumstances and needs: Portal's 'fact-find' wasn't completed until 14 June 2017 and it hadn't yet issued the suitability report.

It's therefore my conclusion that this letter was already paving the way for a transfer-out to take place.

On 26 June 2017 Portal wrote to Mrs A again. Here, it said it wouldn't be minded to recommend a transfer-out. However, this letter was short and in my view, it followed the same approach as before by promoting transferring away as being a viable and simple option for Mrs A. It contained several substantial shortcomings and I've noted Mrs A still hadn't yet been sent the suitability report.

Whilst the letter did start by saying its advice was not to transfer away from her DB scheme, it then immediately explained how she could do the opposite. It said, *"everyone's circumstances are different and if you decide you still want to transfer to access your pension early then this is something we can help you with. In this instance we would need to treat you as an insistent client throughout your pension review."*

Portal did mention some retirement figures in relation to the OPS Mrs A was currently in. But these only related to a retirement and taking cash at 65. What Portal should have been doing here was genuinely promoting to Mrs A, the value of remaining where she was with her pension and explaining to her why. In my view, remaining in the DB scheme was by far much more in her best interests, and if she needed to raise some cash for a specific reason in 2017, there should have been a discussion about what she thought she needed at the time; Mrs A could then have been advised of the many other ways of doing this rather than irreversibly transferring out of her DB scheme and leaving her with an uncertain retirement.

A major theme - and failing - in the letter of 26 June 2017 was therefore not only that the suitability report hadn't yet been issued, there was a contradictory message which it was giving. Mrs A was paying a considerable amount of money for this advice and I think her expectation would have been that it would be clear and in her best interests. However, despite initially saying in the letter that a transfer wasn't being recommended, Portal immediately undermined this by saying it could facilitate the transfer in any event. It enclosed a pre-populated form and invited Mrs A to self-declare herself as an 'insistent client'. There followed three options for Mrs A - the first two of these were actually to transfer away, despite Portal having said this wasn't recommended; whilst the third option was to "do nothing" and stay in the OPS.

So, in summarising Portal's dealings with Mrs A up to this point, I think it's reasonable to say that its communications lacked in both clarity and objectivity. If Portal really was to have effectively communicated to Mrs A that its advice was *not* to transfer out of the DB scheme at all, I would have expected the "do nothing" option to be the only one available at this point together with a clear set of explanations of what this was based on. And if Mrs A really wanted to go against that advice, then further discussions could have taken place later, when she'd had time to digest all the reasons for the advice not to transfer. Portal could then have set out clearly the risks of not accepting its advice.

Mrs A returned her 'insistent client' form on 3 July 2017. She signed a declaration which was pre-populated by Portal. But in my view, this was no more than an attempt by Portal to abrogate itself of responsibility. This statement is of little value, in my view, containing as it did pre-prepared and generic statements that were not personal to Mrs A's situation.

Further down the form, I've noted Mrs A was asked to write - in her own hand - why she wanted to transfer. She basically set out that her intention was to spend the proceeds more or less straight away. However, given the things she mentioned, I think there was plenty of

scope for Portal to point out that these could have been paid for using other methods, rather than irreversibly transferring away from her DB scheme.

The suitability report

It is common in pension transfer advice cases to see the business's formal recommendation about what to do, set out in a suitability report. This was produced on 12 July 2017.

However, as I've described above, the suitability report in this case was issued *after* Mrs A had already been invited to self-declare herself as an 'insistent client'. In my view, this substantiates Portal's overall approach which was simply to transact what Mrs A thought she wanted, rather than to give her advice that was in her best interests.

So, I think the actions of Portal here fell substantially short of what I'd expect to see from a regulated financial adviser. Not only was the suitability report issued, several weeks after important decisions had evidently been made, like the letters preceding it, it was saying one thing, but really facilitating another. Whilst on first look the report did set out that its initial recommendation for her was *not* to transfer out, I think this was seriously undermined by statements and actions it made directly after this. This approach was therefore identical to the preceding letter. In my view, Portal's report was completely pre-disposed to enabling Mrs A to transfer out of her OPS from the outset. And so, its initial recommendation did no more than pay lip service to the important benefits and guarantees Mrs A would be giving up in the process.

I say all this because although there was a recommendation not to transfer out of her DB scheme, this was set out only briefly at the beginning of the report. Here would have been an appropriate point at which Portal could have clearly told Mrs A why she shouldn't transfer. There should have been an explanation of the benefits she'd be giving up and a demonstration that her funds, if transferred out of the scheme and she'd decided to invest them, would be highly unlikely to grow in a way that would match the benefits of leaving them inside the scheme.

By seeing this Mrs A would have been able to know that by transferring, her pension benefits would likely be considerably lower in the longer term. This could have been done with much clearer references to the critical yield or other growth-related comparisons, together with accompanying explanations. Portal also ought to have explained the impact of transferring on Mrs A's wider retirement plans, including whether she'd have enough income to live on at her desired retirement age if she transferred out and spent most of her money.

However, it was only later in the report that references were made to what Mrs A would be giving up and, in my view, these dangers were substantially underplayed. Mrs A retirement provisions were already modest and by giving these two elements of her OPS up, there appeared no other plan for her retirement. Portal also failed to investigate and record Mr A's circumstances, which could have been relevant here. In my view, this was an example of Portal's poor overall service and attention to detail.

However, I reiterate that by the time of the suitability report, important decisions had already been made – so what did or didn't follow in the report could be said to be moot points. It is my view that Portal's actions and inactions here fitted the regulator's later definition of a 'papering exercise' designed to quickly complete the transfer-out process at all costs. Portal's recommendation simply wasn't clear,, or indeed genuine and it comprehensively failed to set out its advice with due care and skill.

Was Mrs A really an 'insistent client'?

I don't believe the evidence is plausible that Mrs A even was an 'insistent client'. The evidence I've seen is strongly suggestive of her not being experienced in these types of financial matters and so was heavily influenced by her advisor.

Portal's explanations were poor and its communications about what it was really recommending for Mrs A were unclear. It produced templated forms and statements which I think offered Mrs A what she thought was an easy way to achieve her short-term financial objectives at the time. These forms failed to highlight the risks and issues of her giving up her pension and it failed to make it clear that transferring her pension was directly opposed to what was in Mrs A's overall best interests.

If Portal had followed a much better process, I don't think Mrs A would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mrs A what she would be losing out by transferring her deferred benefits.
- There's no evidence that Mrs A, an inexperienced investor, desired any input or control over pension funds.
- Mrs A was paying for independent financial advice, and if that advice had been persuasive about the suitability of remaining in her OPS, I think it's more likely that she'd have followed that advice, rather than being pushed immediately down an 'insistent client' route.

Summary

In this decision I have set out why I don't think Mrs A met the definition of an 'insistent client'. I think there is substantial and verifiable evidence that this process was used by Portal simply to transact what Mrs A may have thought she wanted to achieve at the time – to transfer her pension away from her DB scheme.

Portal's initial recommendation not to transfer was not comprehensive, meaningful, or easy to understand. It did not adequately explain why transferring out was not in Mrs A's best interests, in a way that was personal to her or with reference to her objectives. Portal then immediately offered Mrs A a very easy route to transferring her pension anyway, via a series of choices / signatures on pre-populated forms. In this respect, the advice did not meet the standard I mentioned at the beginning of this decision about being clear, fair and not misleading.

If Mrs A had been given clear and persuasive reasons why transferring wasn't in her best interests, she would have followed advice to remain inside the DB scheme. Mrs A went to Portal seeking advice. I think it's much more likely that she would have followed that advice had it been delivered with the skill, care and diligence required and shown to be in her interests.

Portal failed in its duty, so I'm upholding Mrs A's complaint.

Putting things right

A fair and reasonable outcome would be for the business to put Mrs A, as far as possible, into the position she would now be in but for Portal's unsuitable advice. Compensation should be based on her normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#).

In this consultation, the FCA 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.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

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 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mrs A, through her representative, whether she preferred any redress to be calculated now, in line with current guidance, or wait for any new guidance/rules to be published. I am satisfied that a calculation in line with current FG17/9 guidelines remains appropriate and, if a loss is identified, will provide fair redress for Mrs A.

Compensation should be based on her normal retirement age of 65, 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 Mrs A's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs A'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 Mrs A 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 her 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 Mrs A 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 Mrs A.

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 am upholding this complaint and I now direct Portal Financial Services LLP to pay Mrs A 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 Mrs A any interest on that amount in full, as set out above.

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

If Mrs A accepts my final decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding. Further, it's unlikely that Mrs A can accept my decision and go to court to ask for the balance. Mrs A 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 Mrs A to accept or reject my decision before 17 February 2023.

Michael Campbell
Ombudsman