

The complaint

Mr P complains about advice he received from Portal Financial Services LLP ('Portal') in relation to a defined benefit occupational pension scheme ('OPS'). Portal processed the transfer of Mr P's OPS benefits on an 'insistent client' basis to a Self-Invested Personal Pension ('SIPP'). Portal recommended the investments within the SIPP to Mr P, including investing in several unregulated collective investment schemes ('UCIS').

Mr P is being represented by a third party but for ease of reading this decision I'll largely refer to representations as being made by Mr P.

What happened

Mr P says he was thinking about accessing money from his pension to provide a lump sum to his son to help start a new business venture. And when looking into this, he spoke to Portal. I can see he completed a letter of authority so that Portal could gather information about his DB scheme.

After doing this, Portal sent Mr P a letter on, 15 October 2012. This letter was headed *"Releasing Tax Free Cash from your Pension"* and invited Mr P to arrange an appointment at which Portal would *"talk through your Pension release options"*. The letter talked about the current issues affecting the pensions market, saying *"Right now traditional pensions are taking a hammering..."* and that the majority of pensions are linked to the stock markets which the letter described as *"having been in turmoil for some time"*. The letter went on to say that *"...if the right investments are chosen they can still perform very well for you. As part of our conversation we can discuss how to make your existing policy work much harder"*. The letter also commented on annuity rates being low and said *"If you decide to release some tax free cash from your pension then one of the things we would do is set up your pension so that you don't have to purchase an annuity when you decide to retire"*.

The letter then went on to set out the transfer value of Mr P's pension, £35,567, and the critical yield, 12.62% - which is the rate at which a new pension arrangement would need to grow by each year to allow Mr P to purchase equivalent benefits to those provided by his DB scheme at retirement. The letter said though that this would be discussed in more detail when Mr P called to talk about his options. It then talked about what Mr P's options were at that time. And said these were either to do nothing, release tax-free cash ('TFC') and leave the remainder invested or release TFC and draw an income. The references to the latter two also set out how much TFC Mr P could take by transferring, which Portal said was £8,891.

I understand a discussion then took place. During that conversation Portal completed a fact find document – which I've seen a copy of. This was dated 29 October 2012. The fact find recorded that Mr P was 56, in good health, divorced and had three children, one of whom was still financially dependent on him. Portal noted he wanted to take the maximum TFC to 'set up a new business'. The fact find went on to say that Mr P was employed full time with his income exceeding his regular outgoings by approximately £300 per month and he didn't intend to retire until age 65. He was living with his mother so didn't own a property and had no other assets, but he also had no liabilities. Also included was a section where answers to questions asked about Mr P's attitude to risk ('ATR') were recorded.

Portal then sent Mr P another letter, also dated 29 October 2012. This letter said;

You currently have a pension with [former employer] which has a Transfer Value of £35,567, from which you could release a total amount of £8,891 as a tax free lump sum. However, as the Critical Yield (growth rate required to match your guaranteed benefits with [former employer]) is 12.62% it would be against our recommendation to do this. Furthermore, you will be waiving your entitlement to a guaranteed pension of £2,451 per annum which is payable at retirement age 65.

If you decide that you still wish to proceed, we can help you release money from your pension, but we would have to treat you as an insistent client, as this would be against our recommendation. We would, therefore, require you to complete the attached insistent client form confirming that you are aware of the benefits you would be relinquishing.

I enclose a form detailing the various options available to you. Please can you arrange to complete and return the forms to Portal Financial Services. Upon receipt, we will arrange to send out all the relevant application forms and Suitability Report detailing our advice.

The letter included an 'option form' for Mr P to complete. The first option being to take the maximum available TFC and invest the remainder of the pension until he needed an income. The second being to leave his pension funds where they were. There was also a declaration, pre-drafted by Portal, for him to sign, saying he wanted to proceed as an insistent client.

We haven't been provided with a copy of these completed forms but I understand they are likely to have been completed shortly after this letter was provided to Mr P as, on 31 October 2012, Portal sent Mr P a pension release report, or suitability report, setting out its advice along with a covering letter.

The covering letter said that the suitability report included Portal's recommendation. And said that, by following that recommendation, Mr P would receive £8,891 in TFC, have greater long-term flexibility and would receive further advice when he decided to access his funds. It also said Portal believed its recommendation was suitable for Mr P's situation.

The suitability report first listed Mr P's objectives. It said these were to use his existing pension to provide an income at a later date but to take his TFC entitlement immediately. It said he wanted to retain his residual fund which would be invested until he required a retirement income. And he wanted to ensure he had good awareness of investment opportunities, that the portfolio reflected his risk profile, be kept informed of the performance of the portfolio and have access to a system to allow him to monitor his investments.

It went on to discuss Mr P's circumstances. It said his highest priority was to "*preserve your fund for as long as possible, currently taking no income while retaining the flexibility of your pension fund and to take your Tax Free Cash*". The report briefly recapped Mr P's circumstances – although only his age, living arrangement, wage and that he had no assets or liabilities. And it again said the reason for wanting TFC was to 'set up a new business'.

In the section of the report titled 'Your situation' Portal said "*it is against my recommendation to transfer your benefits*". But that Mr P had decided he still wanted to proceed and on that basis it could still help him "*release money from his pension*" and it would treat him as an insistent client.

The suitability report also said Portal had assessed that Mr P had a 'balanced' ATR.

In terms of Mr P's existing pension, the transfer value and critical yield were again listed. And it was stated that Mr P was giving up a guaranteed pension – although how much this

was for was not mentioned at any point within the report itself.

In the 'Recommendation' section of the report, Portal went on to say it recommend that Mr P transfer to a SIPP, take the maximum available TFC and then invest in a portfolio Portal recommended. It said doing so would allow Mr P to receive TFC, use that for the purposes it had previously listed, structure the portfolio to match his risk and reward profile and have greater long-term flexibility.

The portfolio Portal recommended that Mr P invest in consisted of:

- 45% Raithwaites Hypa Fund
- 10% Cool Blue Fractional Plus Fund (also known as the Cool Blue Samui Fund)
- 20% Venture Oil International
- 12.5% EOS Solar Energy
- 12.5% Cash Deposit

The first four of which being unregulated collective investment schemes.

Portal said advice on these types of funds was restricted and Mr P was not exempt from that restriction. But he was someone that Portal had taken steps to ensure that investments in those funds was suitable for. It also said it had conducted due diligence on the investment schemes. It noted that the funds would be considered relatively illiquid, but as Mr P was not looking to draw an income for nine years it didn't consider this made the funds unsuitable.

The transfer went ahead on the basis of this recommendation.

I understand that since then a number of the recommended funds have not performed in line with the initial outlined projections and have since been given a nominal value of £0.0001 per unit by the SIPP provider.

Mr P complained to Portal in May 2021. He said he felt transferring, and the investments Portal recommended, were unsuitable as he wanted his pension to be secure. Mr P said Portal had only focussed on transferring his DB scheme and releasing TFC and has placed emphasis on this outcome from the outset. It hadn't considered other alternatives, such as another pension that he could've accessed, and hadn't ask any questions about his income needs in retirement. He said the advice process Portal used was unfair and that he'd been directed down the insistent client route without being given sufficient information to understand what that meant or make an informed decision.

Portal declined to look into Mr P's complaint as it said it felt it had been made outside of the time limits set for raising a complaint. Specifically, more than six years after the event complained about and more than three years after Portal believed Mr P should've been aware of having reason to complain.

It said it believed Mr P had reasonable cause for concern in:

- February 2014 when he was provided an annual review confirming the SIPP contained illiquid elements.
- September 2015 when he was sent a letter providing an update on the illiquid funds.
- June 2016 where an update call took place and he expressed concerns about the pension not making money.
- August 2016 when he was told money could not be released from the fund due to its illiquidity.
- November 2017 when it sent Mr P a letter explaining that the SIPP provider had placed nominal values on some of the investments, and why this had happened.

The complaint was referred to our service. One of our Investigator's considered matters. He said he thought the complaint was one we could consider because, while he agreed it had been referred more than six years after the advice was given, he didn't think Mr P ought to have been aware of having reason to complain more than three years before he did.

In reference to the points at which Portal said it thought Mr P should've been aware of a potential issue, in summary the Investigator said:

- The February 2014 letter recommended Mr P make investments into additional funds but reassured him that this didn't mean there was anything wrong with the recommendations made previously.
- While the September 2015 letter said investment experiences in the funds had not been as anticipated it went to lengths to reassure Mr P that the plans now in place for returns to be paid, in Portal's view, were sound.
- A discussion about returns and performance in August 2016 wouldn't necessarily have prompted Mr P to think the advice given to him in 2012 was unsuitable.
- And being told in September 2016 that releasing funds at that time wasn't possible due to fund liquidity also wouldn't in the Investigator's view, have meant Mr P had reason to question the original advice.
- The letter from Portal in November 2017 did talk about the SIPP provider placing nominal valuations of £1 on some of the investments. But it went on to say that this action *"does not mean that your investments are worthless"* and said, *"please don't worry"*. So, he felt this letter was likely to reassure Mr P.

Our Investigator then gave his opinion on the merits of the complaint – and said they thought it should be upheld and that Portal should be required to pay compensation and £300 for the distress and inconvenience caused. He didn't think Portal had given Mr P clear enough information and felt the process if followed made its recommendation unclear. He also felt Mr P hadn't been in a position to make an informed choice regarding whether to be an insistent client. Overall, he didn't think transferring his pension was in Mr P's best interests – as he didn't think Mr P had a genuine need to do so or that Portal had done enough to explore this. And if this had been clearly explained, he didn't think Mr P would've gone ahead.

Portal did not agree with the Investigator's opinion, so the complaint has 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.

Can our service consider the complaint?

Portal said it did not agree with our Investigator's opinion that the complaint was one that we could consider. Although it did not offer any additional evidence or arguments to support this. Nevertheless, I've looked at whether we have jurisdiction to consider the matter.

The rules under which the Financial Ombudsman Service operate are set out by the Financial Conduct Authority ('FCA'). These are known as the DISP rules. These rules set out the limits to what our service can and can't consider.

One of the things these rules cover is whether the complaint has been brought in time for us to consider. The rules say our service can't consider a complaint if it's been brought more than six years after the event complained of; or, if later, more than three years after the

person bringing the complaint knew – or ought reasonably to have been aware – they had cause to complain. If it is brought outside of these time limits, and the business doesn't consent to us looking at the complaint, we can't consider it, unless there are exceptional circumstances that explain why the person bringing the complaint didn't do so within the time limits.

Portal has said it doesn't consent to us considering Mr P's complaint as it believes it has been made out of time.

The subject of the complaint is the advice given in October 2012 and whether this was suitable. Mr P did not complain about this until May 2021 – more than six years after the event complained about. So, I'm satisfied the complaint has been made too late in regard to the six-year rule.

As a result, I've thought about when Mr P ought reasonably to have been aware of having reason to complain, and whether this gives him more time under the three-year rule.

I've considered what Portal has said about the various different times it thinks Mr P should've been aware of having cause for complain. But having done so, I've reached the same conclusion as our Investigator – that I don't think the correspondence referred to ought to have given Mr P cause to complain.

- *The letter of February 2014*

The letter is an annual review of the SIPP. In it, Portal recommended additional investments, using a part of the cash holdings within the SIPP. There was a section providing an update on how the existing funds were performing. And a general commentary on the economic climate. While it was recommending changes the letter reassured Mr P by saying "*The fact that we are now recommending changes does not mean that your existing funds were not appropriate for you...*" and that the changes were being suggested because of changes in market conditions. I don't think from that I'd have expected Mr P to question what he was told in 2012. And I don't think there was anything else in this letter that ought to have made Mr P question the advice he was provided by Portal.

- *The letter of September 2015*

This letter gave Mr P an 'investment update' in respect of his SIPP. This was broken down into an update in respect of each of the funds Portal originally recommended. The letter acknowledged that investment experiences had not been as Portal had originally anticipated. But in respect of each fund, Portal set out information indicating that payment of the agreed returns was expected to be completed, because each of the fund had put contingency plans in place for this. So, the overall message of the letter was, in my view, that while plans had changed, Mr P could expect to receive the returns he was told he would. Based on this, and because from the information I've seen Mr P was an inexperienced investor, I wouldn't have expected him to believe there was cause for concern about the advice Portal provided him, from this letter.

- *Conversations in June and August 2016*

Portal has said calls took place in which Mr P was provided updates on his SIPP and its performance and told that withdrawals from the fund were not possible at that time. It also says in the first call, Mr P indicated he was concerned that his SIPP had not grown very much.

We haven't seen full notes of these calls – the only information Portal has provided is the brief summaries from its final response. And, although our Investigator requested these, we also haven't been provided recordings of these calls. So, it is difficult to make conclusions about the content of these calls. That being said, given the content and tone of the letters I've seen predating these calls – specifically that they largely reassured Mr P he had no cause for concern – on balance I think the conversations were likely to be along similar lines. And that he was likely to have been reminded, if he did raise concerns about the performance of the SIPP to that point, about the long-term nature of the investments recommended. So, I think he likely left those calls with the impression, once again, that there was not cause for concern and so I don't think he ought to have reason to question the advice from 2012.

– *The letter of November 2017*

This letter once again seems to have been aimed primarily at reassuring Mr P. It did say that the SIPP provider had placed a nominal value of £1 on some of the illiquid investments, which the letter acknowledged could look alarming. But it went on to explain why this had been done when *"in fact nothing material has changed"*. And it proceeded to once more try to alleviate any concerns Mr P might've had, including by stating he still owned a portion of the physical assets used to secure the investments. And the letter concluded by repeating the message *"please do not worry, nothing material has changed..."*

But in any event, Mr P has provided a summary of his address history and confirmed he left the address to which this letter was sent in 2016. I haven't been given any reason to dispute that. So, on balance of probabilities, I think this letter was likely not received by Mr P. And so couldn't have caused him to question the advice Portal had previously provided.

Based on the information I've been provided, I haven't seen anything that makes me think Mr P ought reasonably to have been aware of having cause to complain more than three years before he did so, with the help of his professional adviser. So, I think this complaint has been brought in time for our service to consider.

I've also thought about whether what Portal recorded as the purpose for accessing TFC 'to start a new business' impacted Mr P's status as a consumer, and subsequently whether we could consider this complaint. Because a consumer is someone acting outside of their trade, business or profession. And drawing TFC to contribute to a new business venture may have meant he didn't fall within that definition in respect of this transaction. But Mr P has been clear that the reason for considering accessing TFC was to help his son with the start-up costs of a new business venture his son was considering. So, the purpose was actually providing a loan or gift to a member of his family. While the fact find Portal completed at the time didn't mention Mr P's son in the context of the new business, as I'll go on to explain, I think there were issues with the information gathered by Portal not being as detailed as I'd have expected here. So, I don't think Portal omitting to record this detail is enough for me to question what Mr P has now said. And as a result, based on the information available to me, I'm satisfied that Mr P was a consumer in respect of this transaction.

Suitability of advice

Portal has argued that the advice it gave was suitable. This is because it says it didn't recommend that Mr P transfer his pension and advised against it. But it says Mr P insisted on doing so and, after he insisted, it recommended a provider and investments which it feels were right for him. But for the reasons I'll explain I don't agree that Portal's actions were appropriate or fair.

COBS 2.1.1R required Portal to “*act honestly, fairly and professionally in accordance with the best interests of its client*”. And, as part of that, COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr P. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr P to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

“A firm must:

- 1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme;*
- 2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
- 3) give the client a copy of the comparison, drawing the client’s attention to the factors that do and do not support the firm’s advice, in good time, and in any case no later than when the key features document is provided; and*
- 4) take reasonable steps to ensure that the client understands the firm’s comparison and its advice.”*

Under the heading ‘Suitability’, COBS 19.1.6 set out the following:

“When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client’s best interests.”

In short, Portal needed to start with the assumption a transfer would be unsuitable. It needed to consider Mr P’s specific circumstances and objectives, assess the options available and look at what was in his *best* interests. It needed to provide a comparison of what the situation would be if he opted to transfer his pension from his OPS and what it would be if he didn’t, making clear the differences and risks. And it needed to make sure that Mr P understood all of this information so that he could make an informed decision. All while ensuring it acted honestly, fairly and professionally.

Mr P has said that he was interested in potentially releasing money from his pension before speaking to Portal. But while he might have already thought about doing this, Portal’s role wasn’t just to facilitate this. It was to provide unbiased advice about what was in his best interests. And again, from the starting assumption that a transfer would not be suitable.

The letter Portal sent to Mr P on 15 October 2012 was headed “*Re: Releasing Tax Free Cash from your Pension. We have now received the information we needed.*” So, the first thing mentioned wasn’t a review or more general pension advice. Rather it was making a specific change to the situation as it was through releasing money from the pension. And a detailed fact-find hadn’t been completed at that stage in order for Portal to understand Mr P’s circumstances or needs.

The letter went on to talk, in negative terms, about traditional pension arrangements and said that the performance of these was typically dictated by the stock market. Which the letter also described as being in turmoil. But Mr P's DB scheme meant he wasn't really exposed to market risks. His pension provided a guaranteed income, and the market risks were borne by the pension provider. So, this commentary, as well as being arguably unbalanced, didn't reflect important information relevant to his circumstances.

The letter also said "*As part of our conversation we can discuss how to make your existing policy work much harder to grow your remaining fund before you retire*". This, when coupled with the negative summary of pension arrangements, in my view would've suggested to Mr P that the existing pension and leaving his funds invested in it was a potentially negative outcome.

The letter talked briefly about three options. The first of which was to do nothing and leave the pension benefits with Mr P's current provider. But it said nothing more about this option. It didn't say that by doing this Mr P would be due a guaranteed pension. Or that he'd also still be able to take TFC on retirement under that scheme if he'd wanted to. And I think at least some additional context should've been included – particularly given Portal had obtained information from Mr P's pension provider at that stage and the other options it listed set out specific monetary amounts available to Mr P.

The other two options Portal talked about mentioned the immediate release of TFC and specifically how much Mr P could take. One option talked about was "pension release" and said Mr P could transfer benefits and release a TFC sum of £8,891 then leave the remainder invested. And the other was to "take full benefits and retire with an income" which again said Mr P could take £8,891 as TFC and could then use the remainder to produce an income, which Portal said it would get the best possible deal for. I'm not sure emphasising a TFC amount was appropriate without knowing Mr P's circumstances – as there was no way to know if this was in his interests. And I also don't think it was balanced to do this without any further context being given to the option of remaining in his current scheme.

I appreciate that the letter didn't indicate that Mr P should choose one of the options it talked about. But I think the information given and the way the options were presented emphasised the release of TFC by transferring. And again, this was before a meaningful fact find had been completed. And I don't think this was in line with the requirement, set by the regulator, to start by assuming the transfer was unsuitable.

Portal did complete a fact find with Mr P over the phone a couple of weeks later. But I think the information gathered wasn't as in depth as it should've been and doesn't indicate to me that Portal did enough to understand Mr P's circumstances and needs.

There was no meaningful information gathered about Mr P's income needs in retirement. There was only one question in the fact find relating to this which said "*What annual income will you require when you retire?*" The answer to which was recorded as "unknown". The primary purpose of a pension is to provide benefits in retirement. But there seems to have been no real consideration of what benefits Mr P needed. Which I think means it's difficult to say that enough essential information was obtained to make a suitable recommendation.

The section regarding other pension provisions was left blank. So, the information Portal was basing its advice on indicated this DB scheme was Mr P's only real pension provisions. Suggesting he had no real capacity for loss. But this doesn't appear to have been reflected in the attitude to risk evaluation. Mr P has said he in fact had a defined contribution pension worth approximately £14,000. But Portal's failure to gather or record that information again indicates a lack of understanding of Mr P's circumstances.

The 'requirement' noted was for maximum TFC, £8,891, to set up a business. But there was no other meaningful detail recorded about the expected costs of doing so, why that specific sum was needed or whether setting up said business would actually be achievable with the sum or if other financing would be required and how this would be funded. And again, Mr P has said, and has been consistent in explaining, that it was in fact his son that was setting up a business, rather than him. I don't doubt Mr P indicated that providing assistance to his son was what he had in mind. But I don't think Portal did anything to establish that this was a genuine 'need' or that he'd even be able to achieve this apparent goal. So again, it is hard to see how an assessment could reasonably be made as to whether pursuing this was in Mr P's best interests.

Overall, I don't think the focus of the initial correspondence and the fact finding was what was in Mr P's best interests. It seems to have been largely around how much TFC could potentially be taken and what this might be used for – not whether that was appropriate. And I think that could very well have misled Mr P into thinking that releasing TFC was what Portal thought was best. Which I think was subsequently made worse by the process Portal then followed.

The same day as the fact find was completed, Portal sent Mr P a short letter. It again listed a transfer value and the amount of TFC that could be taken. But simply said it would be against Portal's recommendation to transfer based on the critical yield alone. So, this letter gave Portal's recommendation. As such it was the document which was supposed to summarise Portal's advice and reasons for this to Mr P. Firstly, it is interesting that Portal felt it was able to provide a personal recommendation on the same day the fact find was completed – or that an appropriate analysis of all of the circumstances could've been undertaken in that time. But the short turnaround time notwithstanding, I don't think this letter went nearly far enough to provide a reasoned recommendation.

The letter said Mr P would be giving up a guaranteed pension of £2,451 per year at age 65. But there was no further comparison for Mr P to consider. There was no information about what level of pension income might reasonably be achievable from his fund after a transfer. There was nothing recorded about Mr P's circumstances or requirements in the letter. And there was nothing to suggest there had been any consideration to alternate ways Mr P could potentially have met those requirements, if indeed he had a genuine need to do so.

The fact find said Mr P could not obtain a loan. But Mr P says it was his son that couldn't obtain a loan. And him obtaining one wasn't discussed. And, based on the failings I've already identified in the fact finding, I think it's unlikely this was discussed in any great detail.

As I've mentioned Mr P has said he had a small defined contribution pension, valued at around £14,000. He could've taken 25% of that as a tax-free sum and drawn down additional sums flexibly, albeit these would've been subject to taxation. But based on his salary and the fact he was a basic rate taxpayer, it appears this could've provided him an equivalent amount to that which was released by transferring his DB pension – if indeed that amount was actually required, which I don't think Portal did enough to establish. And this wouldn't have involved giving up Mr P's guaranteed pension income or exposing his fund to significant risk. But there was no consideration of this recorded or outlined.

The letter instead simply said Portal didn't recommend a transfer because of the critical yield – which wasn't even explained with any real additional context. I think Portal was correct that the required critical yield was unlikely to be achievable. And this meant that a transfer was not financially viable. But this isn't the only thing I'd have expected Portal to take into account before making a personal recommendation. The critical yield is important, and a strong indicator of whether retirement benefits are likely to be better or not by transferring. But this isn't the only consideration for whether advice is suitable. And given the lack of any

further explanation or analysis, I don't think Portal provided full and clear advice to Mr P, such that it left him in a position to make an informed decision – about the transfer or about being an insistent client. And I think the summary advice itself was then significantly undermined.

Immediately after saying transferring would be against its recommendation, Portal promoted the option of still releasing money from Mr P's if he signed forms that it enclosed, agreeing to proceed as an insistent client. One of the forms included a summary of his options as they were – with proceeding against the advice listed as the first option.

The letter also encouraged these forms to be returned immediately as the transfer value provided "may expire" and Mr P may incur a cost to have this recalculated. But given that the transfer value seems to have been provided at the start of October 2012 and in my experience such quotes tend to last for several months, I don't think a decision needed to be made as quickly as Portal suggested. The letter also said, only when these forms were returned would Portal send out application forms and a suitability report detailing its advice – which should have already been provided given this letter purported to be Portal's recommendation.

A suitability report and covering letter were issued on 31 October 2012 (two days after the initial letter recommending against the transfer) as Mr P had apparently returned his insistent client form in the meantime. This is quite a fast turnaround time for the insistent client form to be returned and then a full further assessment of Mr P's circumstances to be carried out to determine a suitable investment strategy – which is what Portal says it did.

The covering letter accompanying the suitability report said it outlined Portal's 'recommendation'. And that following the recommendation would mean Mr P released tax-free cash – suggesting it in fact thought the transfer was appropriate. And it said it believed the recommendation made was suitable for Mr P – the course of action that facilitated the release of TFC, the transfer.

The covering letter included a further declaration for Mr P to say he understood he would be treated as an insistent client. But this notwithstanding, I think there was significant enough doubt and contradiction in the correspondence Mr P was sent for him to believe that Portal was in fact recommending a transfer.

I acknowledge this suitability report repeated that the transfer was against Portal's recommendations. And it included some general risk warnings. But it didn't give any further context to why the transfer was not being recommended – particularly in relation to Mr P's specific circumstances. There was no additional comparison of the benefits that Mr P would be entitled to under his DB scheme in comparison to those potentially available under the recommended SIPP. And it made no further reference to why potential alternatives to achieve Mr P's apparent requirements had not been considered.

As a result, I don't think the suitability report was sufficient as a recommendation not to proceed. It didn't explore Mr P's objectives, or robustly test them, nor did it look into alternative ways of meeting those requirements, without transferring his DB scheme benefits. It didn't provide any real meaningful comparison for Mr P to consider. And the correspondence in general muddled the waters, which I think on balance likely led Mr P to believe that Portal felt the transfer was appropriate.

I also don't think the investments recommended to Mr P were appropriate. Mr P may have had a balanced attitude to risk as Portal says – although I don't think the risk assessment accounted for his capacity for loss. But even so, I don't think the recommendation that 87.5% of his pension fund be placed in UCIS was suitable. Portal has said it recommended these

investments because Mr P had indicated a concern with the risks associated with stock market-based investments. But I don't think that justifies recommending that the majority of his SIPP be invested in funds which the regulator generally considered have a high degree of volatility, illiquidity or both and which are speculative and rarely regarded as suitable for more than a small part of a portfolio. And despite what Portal has said about having assessed these as being appropriate for Mr P I've seen nothing to indicate he had the requisite knowledge or experience to accept or understand the risks associated with these UCIS investments.

Taking all of this into account, I don't think the advice given by Portal was suitable here.

Insistent client

Despite the advice being, in my view, incomplete and unsuitable, I think Portal then also directed Mr P towards disregarding it anyway.

Before Portal had even provided a formal suitability report, it promoted the opportunity for Mr P to proceed against its advice - immediately after saying it didn't recommend transferring, in the next paragraph of the same letter. I don't think that was appropriate or in his best interests. And Portal also required him to identify as an insistent client in order for it to provide a suitability report – setting out the reasons for its recommendation.

And even then, although the statement that transferring would be against Portal's recommendation was repeated in the subsequent report, there was no additional context provided. And this was followed by the recommendation to transfer out of the DB scheme to a SIPP in the same report. Which, as I've said above, I think seriously undermined the recommendation not to transfer.

Portal was required to ensure that it treated Mr P fairly and that it acted in his best interests. And I'm not persuaded that it did treat Mr P fairly when it went to such lengths to assist Mr P to identify as an 'insistent client'. And overall, I have serious concerns with the process used and whether Mr P was in fact an insistent client.

I don't think the process was geared towards Mr P making an informed, considered assessment of the reasons why he shouldn't be transferring – as if it was I feel that would have involved Portal providing the full recommendation to Mr P, allowing him to consider this on his own and then revert to Portal if he still wished to proceed. Rather than disregarding the advice being actively promoted at the same time it was given.

I would go as far as to say that Portal's process was in fact designed to facilitate the transfer, with significant emphasis placed on the release of funds and how this could be achieved from the outset. I don't think that providing Mr P with a means of proceeding against the advice, without establishing why he wanted to go against it, why the apparent requirements were truly necessary and why alternatives weren't appropriate demonstrates that Portal had his best interests in mind.

Overall, I think this shows that Portal made it altogether far too easy for Mr P to agree that he was an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer.

Would Mr P have acted differently?

As I've summarised, I think the advice was unsuitable and the process followed didn't allow Mr P to make an informed decision about whether to be an insistent client. But even so, I need to think whether he would always have gone ahead and transferred – if clear advice

had been provided and an appropriate process followed.

As I've said, Mr P has been clear that he was thinking about accessing funds from his pension. And he seems to have initiated enquiries about this. He also has been clear that he was intending to help his son by providing him access to the TFC. And he has said that this is what he ultimately did. But even though Mr P has used the funds for the purpose that he said he was going to, I don't think that means this was a genuine *need*.

I don't doubt he was interested in helping his son. And when he became aware it may be possible to access £8,891 from his DB scheme pension tax-free, this would've had significant appeal. But the main purpose of a pension is again to provide an income in retirement. And this DB scheme, which does appear to have represented the majority of Mr P's private pension arrangement, would've provided him with a guaranteed retirement income. Which I think would've been very important to him in retirement.

And, as I've mentioned, it appears that he had the ability to raise funds, of around the same amount, from his other defined contribution pension without giving up this guaranteed income. This would've resulted in him incurring some tax. But if a clear explanation had been provided, I think he would've come to the conclusion that the long term value of his guaranteed benefits outweighed this initial tax charge – particularly given he'd also be able to take TFC from his DB scheme when he did eventually retire.

Overall, I think, as an inexperienced investor, had Mr P been provided with more appropriate and robust advice around why the transfer was not suitable, I don't think he'd have gone ahead. I know Portal says it recommended Mr P not transfer – which overall I've found to be what should've happened. But the process Portal used lacked sufficient clarity, reasoning and rigour – for all the reasons set out above. And, in my view, meant Mr P wasn't able to make an informed decision.

If Mr P had been provided with more appropriate information and reasoning, so that he fully understood the risks and long-term implications involved in transferring his DB scheme benefits and investing as he did and hadn't been directed towards the 'insistent client' route, I think he would have acted differently and remained in the scheme until the normal scheme retirement age. As a result, I think Mr P's complaint should be upheld.

As I noted earlier, there have been significant issues with the performance of the funds into which Mr P's pension was invested. But I think without Portal's failings, Mr P wouldn't have gone ahead with the transfer. So, the funds wouldn't have been invested as they were. So, I think it is appropriate to hold Portal responsible for all of the losses Mr P has incurred.

Our Investigator recommended that Portal also pay Mr P £300 for the distress caused by the unsuitable advice. I don't doubt that Mr P has been caused distress and concern in relation to his retirement planning – particularly more recently where his fund was revalued to a nominal amount. And I'm conscious this wouldn't have happened but for the unsuitable advice. And so, in the circumstances, I think the award the Investigator recommended is fair.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P, as far as possible, into the position he would now be in but for the unsuitable advice. And I consider Mr P would have most likely remained in the DB scheme.

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 Mr P whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance / rules to come into effect. He didn't make a choice, so as set out at the time, I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

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 P.

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, for the reasons set out above, I think Mr P would've remained in his DB scheme until the normal scheme retirement age and compensation should be based on this 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 P's acceptance of the decision.

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

If the redress calculation demonstrates a loss, we'd usually say the compensation should if possible be paid into Mr P'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, appropriate or has protection or allowance implications, it should be paid directly to Mr P 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 P within 90 days of the date Portal receives notification of his 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 P.

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.

My aim is to return Mr P to the position he would've been in but for the actions of Portal. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

To calculate the compensation, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portal is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr P to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives.

Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr P to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed (should Mr P wish to move his investment portfolio) and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr P can discuss with his SIPP 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.

To provide certainty to all parties, I think it's fair that Portal pay Mr P an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed

In addition, Portal should pay Mr P £300 for the distress caused by the disruption to Mr P's retirement planning.

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 this complaint and require Portal Financial Services LLP to pay Mr P 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 P any interest on that amount in full, as set out above.

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

If Mr P 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 P can accept my decision and go to court to ask for the balance. Mr P 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 P to accept or reject my decision before 30 December 2022.

Ben Stoker
Ombudsman