

The complaint

Mr C is represented. He says Portal Financial Services LLP ('Portal') gave him unsuitable advice in 2017 to switch from the Defined Contributions Pension (the 'pension') he had to a Self-Invested Personal Pension (the 'SIPP'). His representative says Portal conducted itself in breach of regulations and that the switch was unsuitable mainly because:

- Portal failed to conduct adequate assessments of Mr C's investor and risk profiles, and failed to properly assess the suitability of its recommendation to him.
- The recommendation mismatched Mr C's investment inexperience, his inability and unwillingness to risk the loss of capital in his pension arrangements, his lack of capacity for such loss, his financial circumstances at the time and his objectives.

Mr C seeks compensation for financial loss. Portal disputes his claim. It says he sought a pension review at the time; that there is evidence of its fact-finding on him, his profile and objectives being properly conducted at the time; that the SIPP matched his objective for tax free cash and flexibility in/control over his pension investments; that the SIPP and the underlying investments recommended for it also matched his overall investor profile; that the SIPP's costs (and cost of advice and of the switch) and its risks were disclosed to him at the time of advice; that he was repeatedly informed he was under no obligation to make the switch; and that it did not breach regulations.

What happened

One of our investigators looked into the matter and agreed with Mr C's claim.

In terms of his personal profile, she noted that Mr C was around 12 years from retirement at the time of advice; that he was married with non-dependent children; that he was employed but was without disposable income and was without savings; that he owned his home jointly with his wife but had an outstanding mortgage of around £70,000 and an outstanding debt(s) of around £4,300; and that he had life cover and an occupational pension, but details of the latter were not documented at the time of advice.

The investigator also noted that Mr C's objective to access tax free cash was confirmed at the time, however it was expressly qualified as not being a vital objective for him and not being 'that important', because he did not really need the money and he was prepared to proceed only in the interest of his long term needs and if the costs were moderate. She did not find any record that gaining flexibility in and control over his pension's investments were parts of his objective at the time.

For the following main reasons, the investigator found that the switch was unsuitable:

- Mr C had a protected tax-free cash feature in the pension, which allowed him to withdraw more than the usual 25% cash value (and, instead, up to 32.15%) from the pension tax free. This was a valuable feature that was lost in the switch and not matched in the SIPP.

- Based on available evidence, it is unclear how Portal assessed Mr C's risk profile and capacity for loss. However, the same evidence suggests that the moderately cautious risk profile he was given was correct, but in terms of his financial capacity Portal did not address the need he would have for income in retirement especially because he had no savings or disposable income and details of his occupational pension were missing.
- The cost of the switch is another unsuitable factor. The cost of advice was over £5,000 and the Annual Management Charge ('AMC') for the SIPP's funds was between 0.44% and 0.4%, which was more than the AMC of 0.35% for the pension's funds. Furthermore, there were a 1% ongoing advice fee and additional charges (not disclosed in the recommendation) associated with the SIPP's funds. Overall, the SIPP was more expensive for Mr C.
- The increase in costs does not appear to have been matched or offset by the SIPP's potential for growth. Portal failed to conduct a performance comparison between the SIPP and the pension, which it ought to have done. However, there is evidence that the average performance of the pension's funds over the preceding three years was 10.8% and that the average performance of the SIPP's funds over the preceding five years was 9.90%. These are not direct comparisons and past performances do not guarantee future performances, but this evidence suggests that performance potential was similar between both, so the higher costs in the SIPP were not justified by better potential performance from it.

The investigator also found that Mr C was an inexperienced investor who relied on Portal for advice, so it is unlikely that he would have conducted the switch but for Portal's unsuitable recommendation. She concluded that the complaint should be upheld, that redress for financial loss should be calculated and paid to Mr C, and that he should also be paid £250 for the distress and inconvenience the matter has caused him. Mr C's representative acknowledged receipt of the investigator's view. Portal does not appear to have responded to the view. The matter was then referred to an ombudsman.

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.

Mr C's complaint alleges unsuitability of pension investment advice. Portal will be aware of its regulatory obligation – presently and as it was in 2017 – to ensure that, in the course of conducting the regulated activity of advising on investments (which includes pensions and pension based investments), its advice was/is suitable for the client. This is not in dispute. Portal's complaint response acknowledges this responsibility, but it rejects the claim that it gave unsuitable advice to Mr C. Instead, it says its recommendation to him to switch from the pension to the SIPP was suitable.

There are key elements to consider in terms of the suitability (or otherwise) of a recommended investment. An investor's overall profile at the time of the recommendation is one, and this mainly relates to his/her objective(s), attitude to risk ('ATR'), investment experience, financial circumstances and affordability status (including capacity for loss); then, it is important to assess whether (or not), on balance, the investor's profile was properly determined between the investor and the adviser; then is the question of whether (or not), on balance, the adviser's recommendation matched, or was suitable for, the investor's profile; and then an important concluding consideration is whether (or not), on balance, the investor was properly informed about the nature of the recommended

investment (including and/or especially its costs and risks) and about the reasons why the adviser considered it to be suitable.

It is common for documents from around the time of advice, such as fact-finds, illustrations, suitability assessment reports, correspondence and application forms, to serve as evidence that helps to determine the elements mentioned above.

In the present case, there is a fact-find and ATR document that was completed for Mr C on 11 April 2017. It confirms that Portal was conducting its first business with him and it includes details of his personal profile – as summarised by the investigator and as I reflected above. It also includes other personal information about him, which I will not mention in this decision, in order to avoid breaching his anonymity when this decision is published. Nevertheless, I assure both parties that I have taken on board all personal information shared in this document.

Income was not part of his objective, but releasing tax-free cash was of some interest to him. However, the qualification that the investigator highlighted is indeed shown in this document. In other words, it does not appear that Mr C was determined to release tax free cash from his pension arrangement, instead it appears to have been an option he was prepared to explore so long as the cost was not unduly detrimental and so long as the long term interest of his pension arrangement was not unduly compromised. The document essentially confirms this and it refers to what he would use the cash for, but none of those purposes appear to have been imminent, serious or urgent.

As noted by the investigator, there is no evidence in this document that control over and flexibility in his pension's investments were objectives for Mr C. I address Portal's suitability report below, but it is worth mentioning now that the same applies to report and that the report also refers, only, to releasing tax free cash as Mr C's interest. For the reasons given above, accessing such cash appears to have been more of an optional *interest* for him than an *objective*.

The fact-find confirms Mr C's financial circumstances as summarised by the investigator. It shows that he had no disposable income and no savings, and there is a section in which he confirmed the unlikelihood that his income and expenditure will change and that it will be difficult to reduce the latter. The document acknowledges the loss of the pension's enhanced tax-free cash feature in the event of a switch, but it says **Mr C was prepared to forego it** in the switch in order to gain access to the tax free cash and to reinvest the residual into a drawdown (a facility that the pension did not have). The document then concludes with the ATR assessment, which said Mr C was moderately cautious ('3 to 6' between a scale of 0 to 14) and that he agreed with this assessment.

On balance, I do not consider that Mr C was prepared to forego the pension's enhanced tax-free feature on the basis presented in this document. Portal's claim is that he was determined to access the tax-free cash, but I have already noted evidence that such was not quite the case. He was interested in the option of doing so if the circumstances were right (if it could be done without undue impact on his pension and detrimental costs), but it is expressly stated in the document that he did not need the money and the expenditure he contemplated allocating the money to was not imminent, serious or urgent. Furthermore, the idea that a drawdown facility played any role in his considerations appears to be baseless, given that the fact-find document says he had no imminent desire or need for income from the pension. Overall, it must also be said that even if he said he was prepared to forego the enhanced tax-free cash feature for such reasons – which, I consider, he probably did not say – the responsibility remained with Portal to advise him on whether (or not) that was suitable for him and in his best interests.

Foregoing such a valuable feature in order to access tax free cash that he did not need at the time and/or in order to have a drawdown facility that was not imminently necessary at the time was neither suitable for Mr C nor in his best interest. Portal's suitability report did not advise him of this, instead it did the opposite and recommended the switch for these same reasons. Portal has also referred to better flexibility in and control over investments in the SIPP, but as I said above there is no evidence that Mr C had such objectives at the time of advice.

The suitability report includes information about the SIPP, about its funds, risk warnings and information about costs associated with Portal's advice, the switch and the SIPP/its funds. However, Portal will be aware that such disclosures alone did not discharge its overall responsibility to ensure its advice was suitable for Mr C. In other words, despite these disclosures it still had to properly assess, and advise on, whether (or not) the switch and SIPP were suitable for him – and it still had to make a recommendation in this respect.

In addition to the unjustified and unsuitable loss of the pension's enhanced tax-free cash feature, Portal's recommendation also meant Mr C had a SIPP that was unsuitably more expensive (than the pension) for him without any co-related increased prospects of better performance. I endorse and echo the investigator's findings and reasoning in this respect. The SIPP's funds' AMC was higher than that for the pension, there were additional associated costs in the SIPP and there was no evidence at the time to show that its funds had the potential for better performance than those in the pension.

When all of the above is viewed in the context of the switch taking place because of an alleged objective that was probably not *really* an objective – for the reasons I have addressed – and on the basis of accessing tax-free cash that Mr C expressly confirmed he did not need at the time, the unsuitability of Portal's advice is sufficiently established. There is evidence to suggest that the SIPP's funds were somewhat riskier than those in the pension and that he did not have the capacity to cope with a higher risk of losses, both of which would compound the unsuitability of the recommended switch.

Overall, on balance and for all the above reasons, I find that Mr C should not have been advised to switch away from the pension he previously had, that Portal's recommendation of the switch and SIPP was unsuitable and that Mr C's complaint is upheld. Like the investigator said, available evidence supports the conclusion that Mr C relied on Portal's advice and would probably not have switched from the pension if Portal did not advise him to. He is entitled to redress for financial loss, if any, he has incurred as a result, and in the next section I order Portal to calculate and pay such redress. In addition, I also agree with the investigator's finding that Mr C should receive from Portal £250 in compensation for the trouble, distress and inconvenience the complaint matter has caused him.

Putting things right

Fair compensation

My aim is to put Mr C as close as possible to the position he would now be in if he had not switched from his pension to the SIPP. On balance, and for the reasons addressed above, I consider that he would probably have retained the pension he previously had, but for Portal's advice. My orders to Portal are below and they represent a fair compromise on which Mr C can be compensated. Mr C is ordered to engage meaningfully and co-operatively with Portal to provide it with all information and documentation, relevant to its calculation of redress, which it does not already have.

What must Portal do?

To compensate Mr C fairly, Portal must:

- Calculate the notional loss Mr C has suffered as a result of making the switch to the SIPP. Portal should obtain, from the pension's provider, the notional value of his previous pension, as of the date of settlement and as if the pension had not been switched to the SIPP. If that is obtainable it must regard that notional value as *fair value*. If the previous provider is unable to calculate or provide that notional value, Portal must determine a *fair value* for Mr C's pension investments, but for the switch, using a benchmark. That benchmark is as follows – for half the investments the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index); and for the other half the average rate from fixed rate bonds. 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 is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It is a fair measure for someone who was prepared to take some risk to get a higher return. I consider that Mr C's moderately cautious ATR was in between these measures, in the sense that he was prepared to take a small level of risk to attain his investment objectives. As such, the 50/50 combination would reasonably put him into that position. It does not mean he would've invested 50% of his money in a fixed rate bond and 50% in a kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return he could have obtained from pension investments suited to his profile.
- Portal must then calculate the current value, as of the date of settlement, of Mr C's SIPP, including investments and any cash held. This is *actual value*.
- If the *fair value* is greater than the *actual value* the difference is a loss and it must be paid to Mr C in compensation. If the *actual value* is greater than the *fair value*, no compensation is payable.
- In addition, Portal must take into account and reflect in its calculations the tax-free cash Mr C has received and any other relevant cash withdrawal from the SIPP, and subtract this within its calculation of loss. Portal's calculation of redress must also reflect Mr C's loss of the protected enhanced tax-free cash feature he had in the pension. The investigator recommended that Portal should arrange payment to Mr C, withdrawn from the SIPP, of a sum amounting to 7.15% of the transfer value in April 2017 – this being the difference between the tax-free cash he was able to withdraw from the switch and the protected enhanced tax-free cash he would have been entitled to withdraw from the pension – and to refund him any tax charges he incurs from the SIPP withdrawal. If Mr C agrees to this, I order Portal to do the same and effect the arrangement. Otherwise, I order Portal to calculate the value of the tax refund it would have paid to him under the arrangement and to pay that value to him in settlement of this aspect.
- Portal must pay all compensation into Mr C's SIPP, to increase its value by the total amount of the compensation. The payment should allow for the effect of charges and any available tax relief. The compensation should not be paid into his SIPP if it would conflict with any existing protection or allowance. If the compensation cannot be paid into his SIPP, pay it directly to him. Had it been possible to pay it into the plan, it would have provided a taxable income, so the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

- Portal must pay Mr C £250 compensation for the trouble, distress and inconvenience the complaint matter has caused him.
- Portal must provide Mr C with a calculation of all the above in a clear and simple format.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000 or £375,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr C's case, the complaint event occurred before 1 April 2019 (it happened in 2017) and the complaint was referred to us after 1 April 2020 (it was referred to us in 2021), so the applicable compensation limit would be £160,000.

My final decision

For the reasons given above, I uphold Mr C's complaint. I order Portal Financial Services LLP to calculate and pay redress and compensation to him as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 2 February 2023.

Roy Kuku
Ombudsman