DRN-3820248

The complaint

Mrs W 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 2014. She says the advice was unsuitable for her and believes this has caused her 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 W approached Portal to discuss her pension and retirement needs. Portal ultimately recommended that she transfer away from her OPS, to a personal pension plan. It said she could access a tax-free cash element and invest the remainder in various funds within the plan.

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

- Mrs W was 55 years old living with her husband who was 58. They had one child still financially dependent on them.

- Mrs W didn't work, and she received state benefits. Mr W was on a 'nil-hours' contract. They lived in local authority housing.

- Mrs W owed £17,000 on credit cards which was being paid in an arranged plan at £1 per month due to her financial circumstances. She had used up her maximum allowed bank overdraft and their joint monthly income was around £1,300, with no meaningful disposable income. They had no financial assets.

- Mrs W was a deferred member of an OPS, having joined the scheme in the early 1990s and accrued 12 years of benefits. The cash equivalent transfer value (CETV) of the OPS in 2014 was £38,456 with a normal retirement age of 65.

Mrs W complained to Portal in 2021 that she was given unsuitable advice. However, Portal says that in its dealings with Mrs W, it first told her that it didn't think she ought to transfer away from her DB scheme. It said it told her that the pension outside the scheme would be unlikely to grow to an extent that made transferring out worthwhile.

However, Portal says Mrs W 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. It says that only when Mrs W 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 invest the rest in various money market funds. It says when she agreed to this course of action, it then facilitated the transfer from the OPS to a personal pension.

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 W 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. So, TWML should have only considered a transfer if it could clearly demonstrate that the transfer was in Mrs W's best interests.

Having considered all these things, I've decided to uphold the complaint.

Financial viability

As required by the regulator, to demonstrate the financial comparisons between her OPS and transferring out to a personal pension, Portal referred in its transfer analysis to a 'critical yield' rate.

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 income as the DB scheme. It 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.

I’ve noted in this case that Mrs W’s hope was to access the money in her pension more or less straight away, rather than wait until her scheme’s normal retirement age of 65. She apparently said that she wanted to pay off debts with the money and use part of it for day-to-day living expenses. Nevertheless, in my view, the critical yield here gives a good indication of the overall financial value of Mrs W’s pension and what she would be giving up by transferring out. Portal said, for example, that the critical yield required to match Mrs W’s full benefits at the age of 65 was 10.4%. This figure alone suggest a growth rate that is likely to be unachievable.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The relevant discount rate published by the Financial Ombudsman Service for the period before 1 October 2017 was 4.8% per year for 9 years to retirement (calculated to age 65) which I think showed that achieving anywhere near the critical yield growth rate was highly unlikely. I’ve also kept in mind that the regulator's upper projection rate was 9%, the middle projection rate was 7%, and the lower projection rate was 5%.

At the time, Portal assessed Mrs W’s attitude to risk (ATR) as moderately adventurous which our investigator said was too high. I agree with this as Mrs W appears to have had no investment experience whatsoever and no capacity for loss. I’ve also seen some references elsewhere in the documents from the time which suggest Mrs W’s ATR to be low-medium. So, I think a potential growth figure around the lower range of these projections, around 5%, was most relevant; again this was well below the critical yield rate and most likely unachievable.

So, taking all these projected growth figures and the critical yield into account I think there’s a clear indication that by transferring out of her DB scheme at the time, Mrs W would be likely to obtain pension benefits of a much lower overall value than the scheme she was in, over the longer term.

Of course, Portal itself went onto say that it initially recommended that she shouldn’t transfer. Portal also said Mrs W had other reasons to transfer away, mainly related to her debt. So I’ve thought about all the other considerations which might have meant a transfer was suitable for her, despite providing the overall lower benefits mentioned above.

The circumstances of the advice

Portal says Mrs W ultimately went against its advice. It says that she was first advised that she ought to stay in the DB scheme, and it was Mrs W 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 W’s pension to a personal pension as per her wishes.

At the time when Portal met with Mrs W and was advising her, there was no specific regulatory advice or guidance in place in respect of ‘insistent clients’. However, there were a number of important COBS rules in the regulator’s Handbook. These included but were not limited to a requirement upon Portal to *‘act honestly, fairly and professionally in accordance with the best interests of its client’*. In addition to this, COBS required Portal to provide information that was clear, fair and not misleading.

So, firms like Portal had a number of important responsibilities when providing advice. Despite what Mrs W might have thought she wanted at the time, I think her overall expectation in paying for regulated financial advice was that she would be clearly guided on the basis of her circumstances and means. And Portal's responsibility was to provide advice that was in her best interests. In particular, it should have been made clear whether it was – or wasn't - recommending the transfer. Ann the risks of the transfer-out Mrs W was apparently interested in should have been pointed out.

I don't think Portal adequately did any of this.

On 30 January 2014, Portal wrote to Mrs W to summarise the discussions it had had with her about her pension and her wider financial circumstances. This should have been an opportunity for Portal to clearly and formally set out what its recommendations to Mrs W were for her OPS, based on the information it had collected thus far. Portal began the letter by saying that it didn't recommend that she transfer away from her pension, but it then immediately said that if she wanted to, it could still help arrange this by treating her as an 'insistent client'. Portal even included the form for her to do this. Portal said that after this it would arrange to send out all the relevant transfer application forms and a suitability report detailing its advice.

Mrs W duly signed the 'insistent client' form on 1 February 2014 and returned it to Portal which then started the transfer process.

However, I think any reasonable assessment of Mrs W's situation of that time would have shown she was in a vulnerable financial position. She and Mr W were in local authority housing and they had no apparent assets whatsoever to call upon. Their income was very low and fully accounted for each month, and we know they had a lot of credit card debt. It's reasonable to point out that other than her state pension, this OPS was Mrs W's only source of retirement income. I think it's also fair to say that the evidence pointed – very strongly – to Mrs W not being experienced or knowledgeable of pensions and / or the investments associated with personal pension plans.

I've also noted that at the point of her signing the 'insistent client' form, Portal hadn't yet provided her with what I would say was a formal recommendation where she could make an informed choice. I say this because even though she'd been sent a brief letter as I've outlined above, the full suitability report on which the eventual recommendation to transfer was based, was dated 5 February 2014. This was *after* Mrs W had already signed and returned the form which instigated the transfer.

Portal said in its suitability report that by:

> *"following this recommendation, you will:*
>
> - *Meet your stated objectives and repay your debts and provide a financial cushion.*
> - *Be able to take up to 25% of your pension as a Tax-Free Cash Lump Sum to meet your needs, you have selected to take £9,614."*

In my view, these points were no more than general comments about her pension and designed to encourage Mrs W to transfer out of her DB scheme. We also know the suitability report itself was probably not even with Mrs W when she was deciding what she wanted to do. And even if I were to consider that she might have had an opportunity to 'think again' before the irreversible transfer took place, I still think Portal's failures fell substantially short of what I'd expect from a regulated financial adviser.

In my view, Portal's letter of 30 January 2014 was pre-disposed to encouraging Mrs W to transfer out of her OPS from the outset. I also think everything that followed from Portal was along the same lines. Its transfer recommendation - whether set out briefly in the letter, or more fully, in the suitability report - did no more than pay lip service to the important benefits and guarantees Mrs W would be giving up in the process. And while on first look, the suitability report did say that its initial recommendation for her was *not* to transfer out, I think this was seriously undermined by Portal's statements and actions it made elsewhere.

There should have been a more comprehensive explanation of the benefits she'd be giving up and a demonstration that her funds, if transferred out of the scheme, would be highly unlikely to grow in a way that would match the benefits of leaving them inside the scheme. It also ought to have explained the impact of transferring on Mrs W's retirement plans, including whether she'd have enough income to live on at her desired retirement age if she transferred out. Portal also promoted the idea that by moving to a personal pension, Mrs W would be able to achieve a higher tax-free cash element than by remaining in the OPS. But of course, it should also have been carefully explaining that this wasn't without consequences and that taking more money out in tax-free cash meant less money for her retirement.

I also haven't seen evidence that Mrs W needed access to the pension funds so urgently or desperately as to necessitate her transferring away from her OPS. I accept this could have been a difficult balance in Mrs W's case and I'm sensitive to the financial challenges she no doubt faced. But the adviser's job here was to fully explain the trade-off between accessing cash 'now' and the whole purpose of a pension: an income in retirement. There's no doubt Mrs W had an extremely tight financial situation and I'm sure the prospect of cash would have been very appealing to her. But whilst she had credit card debt, this appeared to be in an agreeable payment plan, and one accepted by her creditors at the time. I note Mrs W had also spoken about potentially returning to work soon, which would have meant an increase in income. All these things were supporting reasons to stay inside the scheme whereupon at the age of 65, Portal said Mrs W's pension was estimated at £2,435 per year and a tax-free lump sum of £7,306. I think Mrs W would have required this income in her retirement.

However, it was only later in the suitability report that references were made to what Mrs W would be giving up and, in my view, these dangers were substantially underplayed. The majority of the remaining part of the suitability report was devoted to the personal pension fund recommendations, many of which were inappropriate for an investor like Mrs W who preferred safe investments.

In summary then, in this situation, what I would have expected to see a meaningful emphasis in the documentation showing the reasons why the transfer was not in Mrs W's best interests.

Suitability of investments

Portal recommended that Mrs W invest her funds in a personal pension. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mrs W and I don't think she would've insisted on transferring out of the scheme if clear advice had been given to her, it follows that I don't need to consider the suitability of the investment recommendation. This is because she should have been advised to remain in the DB scheme and so the investment in the new funds wouldn't have arisen if suitable advice had been given.

Summary

Given Portal itself has said it initially advised against a transfer, it would be hard for it to now argue that the transfer was in fact suitable. I also agree that transferring out was not suitable.

In my view, there were a number of shortcomings in this case preventing Mrs W from making a fully informed decision. I also think it's more likely than not that the provision of full information and better analysis would have influenced Mrs W's decision making. So, if Portal had followed a better process, I don't think Mrs W would have insisted on going ahead with the transfer. I say this for the following reasons:

- It would have been clear to Mrs W what she would be losing out by transferring her deferred benefits.
- There's no evidence that Mrs W, an inexperienced investor, desired any input or control over the investment choices of her pension funds.
- Mrs W 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.

I have therefore set out in this decision why I don't think Mrs W 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 W may have thought she wanted to achieve at the time – to transfer her pension out to another provider so she could access some cash.

Portal failed substantially in its duty to Mrs W, so I'm upholding her complaint.

Putting things right

A fair and reasonable outcome would be for Portal to put Mrs W, as far as possible, into the position she would now be in but for its unsuitable advice. I consider Mrs W would have most likely remained in her DB scheme if suitable advice had been given.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.** The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/19 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mrs W whether she preferred any redress to be calculated now in line with current guidance or wait for the any new guidance /rules to be published. She didn't make a choice, so as set out previously I've assumed in this case she doesn't want to wait for any new guidance. I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mrs W.

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.

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 W's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs W's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs W's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs W's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to 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 W 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 W.

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 current understanding is that some elements of Mrs W's investments in the personal pension may be illiquid, meaning they can't be readily sold on the open market. If this is the case it can be complicated to establish its value. To calculate the compensation in this event, Portal should agree an amount with the personal pension provider as a commercial value, then pay the sum agreed to the personal pension plus any costs, and take ownership of the investments.

If Portal is genuinely unable to buy the investments, it should give the illiquid investments a nil value for the purposes of calculating compensation. The value of the personal pension used in the calculations should include anything Portal has paid into the personal pension and any outstanding charges yet to be applied to the personal pension should be deducted.

In return for this, Portal may ask Mrs W to provide an undertaking to account to it for the net amount of any payment she may receive from the investment in future. That undertaking should allow for the effect of any tax and charges on what she receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mrs W to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If the circumstances are that the personal pension only really exists because of the illiquid investments, then:

In order for the personal pension to be closed (should Mrs W wish to move her investment portfolio) and further personal pension fees to be prevented, the investments need to be removed from the personal pension. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mrs W can discuss with her personal pension 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 pays Mrs W an upfront lump sum equivalent to five years' worth of personal pension fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the personal pension to be closed.

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 Portal pays the balance.

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.

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mrs W the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Portal Financial Services LLP to pay Mrs W 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 Mrs W any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portal Financial Services LLP pays Mrs W the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs W.

If Mrs W accepts this decision, the money award becomes binding on Portal Financial Services LLP. My recommendation would not be binding of she doesn't accept. Further, it's unlikely that Mrs W can accept my decision and go to court to ask for the balance. Mrs W 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 W to accept or reject my decision before 23 December 2022.

Michael Campbell
Ombudsman