

## The complaint

Miss M complains about the suitability of the advice she received from Portal Financial Services LLP (Portal) to transfer a defined-benefit occupational pension scheme (OPS) she held with a former employer to a Personal Pension (PP).

Miss M is being represented by a third party, but for ease I'll refer to all representations as being made by her.

## What happened

In early 2013 Miss M engaged Portal to provide her with advice on her pension. On 6 February 2013 Portal wrote to Miss M noting she had an OPS with a transfer value of £106,651. It set out the critical yield and identified some options available to Miss M, including doing nothing or transferring the benefits to access TFC with different options for her remaining fund.

On 26 February 2013, Portal gathered information about Miss M's circumstances and objectives and carried out an assessment of Miss M's attitude to risk, which it deemed to be 'moderately adventurous'. At the time, Miss M was 55 years old and employed, earning £37,000 per year and she also earned other income by being self-employed, but she had no savings. She told Portal she lived in a property she owned worth around £148,000, with an outstanding interest only mortgage of £125,000. Miss M had a loan totalling around £2,000 with repayments of £100 per month. It noted that she had £600 per month disposable income and that she was just starting to save, having finished paying for her car. It also said she wanted to buy a house abroad at some point, which she planned to move to in retirement.

The following day, Portal sent Miss M a letter summarising some of her OPS benefits and it recommended she didn't transfer out of this due to the critical yield and because she'd be giving up guaranteed retirement benefits that were payable from age 60. However, Portal said it could still help Miss M if she wanted to go ahead and asked her to return the enclosed options and insistent client form, which asked her to choose between:

- Option 1: Income Drawdown – After taking the maximum TFC the residual fund would be reinvested until she required an income. It said she would be treated as an insistent client in that case.
- Option 2: Leave her fund where it was. It said this was its recommendation.

Miss M says she signed and returned the forms, selecting Option 1, and then Portal sent her its suitability report and covering letter, dated 5 March 2013. This said her aims were to take TFC immediately, leave her residual fund invested and take an income at a later date, ensure she had good awareness of available investment opportunities, access to a system which monitors the performance of her investments and be kept informed about these and ensure her portfolio reflects her risk profile.

The suitability report then said:

*“Due to the guaranteed benefits that you will be relinquishing with [Miss M’s OPS], it is against my recommendation to transfer your benefits... You have decided that you still wish to proceed with the Pension Release. On this basis, although we can help you release money from your pension, we are treating you as an insistent client.*

*You are aware that by taking this amount now, you will not have a guaranteed pension benefit, which you do currently have through your defined benefit (otherwise known as final salary) pension scheme. You stated that you are aware of the benefits that you are giving up, and that you wish to proceed on this basis, even though I have advised that it is extremely unlikely that we will be able to match the required annual return (the critical yield of 20.86%).”*

Portal went on to explain this again in a section entitled ‘Our recommendations’, saying:

*“You have decided that you still wish to proceed with Pension Release despite us advising you not to. We will assist you with this, and have treated you as an ‘Insistent Client’.*

*Having considered all of the information available to us including the charging structures of the transfers, available underlying fund choice, your personal circumstances and other factors, I have come to the following conclusions:*

*My recommendation is that:*

- *You transfer your [OPS benefits] to a [PP].*

*The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider.*

*By following this recommendation you will:*

- *Meet your stated objectives and purchase a house abroad.*
- *Be able to take up to 25% of your pension as a Tax Free Cash Lump Sum to meet your needs; you have elected to take £26,662.”*

Portal went on to provide advice regarding the investments within the PP, recommending a lifestyle fund it said was designed to reduce the amount of risk her pension was exposed to as her retirement gets closer.

Portal also said it doesn’t recommend Miss M transfer her OPS benefits, as *“I do not believe a growth rate of 20.86% will be achieved with your [Miss M’s] new [PP]. However, you have insisted that you still wish to proceed with the pension release.”* And it asked Miss M to sign a declaration saying she understood the benefits she’d be giving up.

On 7 March 2013, Miss M accepted the insistent client recommendation and her OPS benefits were transferred. She then took TFC and by 2017 she’d taken her entire pension fund as a taxable lump sums.

In 2020, Miss M complained to Portal via a representative about its transfer advice saying, in summary, that she wasn’t truly an insistent client – it was a ‘papering’ exercise and the documents were pre-drafted. She said Portal focused on the amount of TFC she could release by transferring, when she had no pressing need to access this.

Portal responded saying Miss M had made her complaint too late for our Service to consider it.

Unhappy with this, Miss M came to our Service. And we decided we could consider her complaint about the suitability of the advice, as it had been made in time.

One of our Investigators looked into Miss M's complaint and said it should be upheld. The Investigator didn't think Portal's 'insistent client' process was fair, as it directed Miss M down this route before it had even provided its advice. And they didn't think Portal had demonstrated that transferring Miss M's OPS to a PP was in her best interests, as she was likely to be worse off in retirement. They weren't persuaded Miss M had any genuine retirement objectives that needed to be addressed at the time rather than nearer to retirement. So our Investigator recommended that Portal compensate Miss M for the losses she'd incurred by transferring her OPS.

Portal didn't respond, so the complaint's been passed to me for a decision.

I let Portal and Miss M know that I intended to say it should also pay her £250 compensation to make up for the distress and inconvenience caused to her by this matter. Miss M replied letting me know she had no further comments to add. Portal didn't respond.

### **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.

Portal said Miss M's complaint was brought to our Service too late for us to consider it. I don't intend to revisit that, given an Ombudsman has already given a decision explaining why he's satisfied Miss M brought this complaint in time and that it's one I can consider.

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'). And 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.

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, Portal should

have only considered a transfer if it could clearly demonstrate that the transfer was in Miss M's best interests.

Portal maintains its advice was suitable, as it advised Miss M against transferring out of her DB scheme and gave her sufficient warnings about the consequences of going against the advice. And it said that Miss M insisted on transferring, which meant she became an 'insistent client'.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But there were the above rules. So, Portal's recommendation had to be clear and Miss M had to have understood the consequences of going against it. I also need to think about whether the 'insistent client' process in this case was simply used by Portal to transact what Miss M thought she wanted to achieve.

Having considered all of this and the evidence in this case, I've decided to uphold Miss M's complaint for largely the same reasons as the investigator.

#### *Insistent client*

Portal's role was to discern what Miss M's wants and needs were and why she wanted to transfer her pension. Its role wasn't simply to facilitate what Miss M wanted. It had to act in her best interests.

In Portal's letter, dated 6 February 2013, it told Miss M she could take TFC and set her remaining pension up so that she didn't have to purchase an annuity, in light of rates being at a historic low, giving her more flexibility of choice at the time. This letter was sent before a fact-finding conversation had been completed or any details of Miss M's aims or objectives had been obtained. Yet Portal was already emphasising the release of TFC involving a change to Miss M's current pension arrangements and how much could be released. I think this suggests the approach was already being skewed to a particular outcome. I don't think this was in line with the requirement to start by assuming the transfer was unsuitable. And I don't think the emphasis placed on this outcome, before any fact finding had taken place, was fair to Miss M or could be said to demonstrate Portal was acting in her best interests. And I think the content of this letter was likely to affect Miss M's thinking and reasonably lead her to believe at that stage Portal was suggesting this option.

In Portal's letter dated 27 February 2013, after gathering information about Miss M's circumstances but before giving its suitability report, it said:

*"You currently have a pension with [former employer] which has a transfer value of £106,651, from which you could release a total amount of £26,662 as a tax free lump sum. However, as the critical yield (growth rate required to match your guaranteed benefits with [former employer]) is 20.86% it would be against our recommendation to do this. Furthermore, you will be waiving your entitlement to a guaranteed pension £6,183 per annum and a lump sum of £18,551 which is payable at retirement age 60.*

*If you decide that you still wish to proceed then we can help you with this, 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 and return the insistent client form confirming 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 both forms to us at.... Upon receipt, I will arrange to send out all the relevant application forms and Suitability Report detailing our advice."*

So, before Portal had even provided a formal suitability report, I think it paved the way for Miss M to proceed on an insistent client basis. The letter included the pre-typed insistent client form. While it isn't in dispute that Miss M signed this form, it was a template. It wasn't in her own words, thereby removing the opportunity for her to express why she wished to ignore professional advice and proceed with the transfer. I appreciate that it wasn't a regulatory requirement at the time of the advice for Miss M to provide such a letter in her own words. But regardless, Portal was required to ensure it treated Miss M fairly and that it acted in her best interests.

I think it ought to have been clear to Portal that Miss M had little knowledge or experience of financial matters based on the information available at the time of the advice. I say this because she doesn't appear to have any previous investment experience. And because of the inconsistent responses in the risk profiling questionnaire. For example, Miss M strongly agreed that those who know her would describe her as cautious and she said she has little experience investing in stocks and shares, but then said she's willing to take substantial financial risk to earn substantial returns. I think this should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route. I think it would've been important for Portal to ensure Miss M understood what she was getting into, and a good way to have done this would've been to see in her own words that she understood the recommendation being made and why she wanted to proceed. In the absence of this, I'm not persuaded Miss M was able to make an informed choice here.

And I'm not persuaded Portal treated Miss M fairly when it went to such lengths to assist her to identify as an 'insistent client'. To my mind, the process wasn't geared towards Miss M making a considered assessment of why she shouldn't be transferring – I think that would have involved Portal providing the full recommendation to Miss M, allowing her to consider this on his own and then revert to Portal if she still wished to proceed. Instead I think Portal's process was designed to facilitate the transfer. I don't think that providing Miss M with a means of proceeding against the advice, without fully establishing why she wanted to go against it, demonstrates that Portal had her best interests in mind.

As the insistent client form was provided to Miss M before she received Portal's suitability report she didn't have all of the information she needed to make an informed decision. And I don't think the wording and emphasis of the letter and forms Miss M was given – including that the first option given to her was to ignore Portal's recommendation – was fair to Miss M or in her best interest. I say this because I don't think it was in Miss M's best interest to go against Portal's recommendation. But the documents she was sent made it very easy for her to do so.

In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Miss M's best interests. But the information on this form was limited to the loss of guarantees and critical yield required to match the benefits.

It seems it was only after receiving Miss M's confirmation that she wished to proceed that Portal sent her the formal suitability report. And while the suitability report contained a recommendation not to transfer out of the OPS, the recommendation that she transfer out of the OPS to a PP was in the same report, which I think seriously undermined the recommendation *not* to transfer out. Not least because the suitability report said under '*Our recommendations*', as set out above in the background, that while it was unlikely the critical yield would be achieved and it was treating Miss M as an insistent client, it was recommending she transfer to a PP due to the possibility the benefits would exceed those available through her existing OPS and because this would meet her stated objectives. In which case, I think Miss M could've misunderstood or believed that, overall, Portal was recommending she should go ahead with the transfer.

Furthermore, the covering letter to the suitability report said:

*"If you follow my recommendation you will:*

- *Receive your Tax Free Cash lump sum of circa £26,662.*
- *Have greater long-term flexibility to maintain your pension in line with your risk and reward profile.*
- *Receive further advice when you decide to take an income from these funds."*

The covering letter also included a declaration in which the recommendation not to transfer was repeated and that she would be treated as an insistent client. But given what Portal stated at the start of the letter, I think Miss M could've believed that Portal was actually recommending that she transfer to access her TFC. Either way, I don't think the information provided by Portal here was clear, fair and not misleading.

Although Portal sent a suitability report, Miss M still had little information to go off to decide if being an insistent client was truly in her best interests. The difference between the critical yields and growth rates weren't explained. And it doesn't appear that Portal did any analysis of the income Miss M required in retirement, and how transferring and accessing TFC at this point would affect her retirement income. It wasn't demonstrated what income in retirement Miss M was likely to achieve by transferring. Other risks involved in the transfer weren't considered either, such as the risk of funds running out in drawdown. And Portal doesn't seem to have considered if Miss M could've accessed her DB scheme benefits early, when it seems that she could have done so, taking reduced benefits as a result, given she was over 50 and had left the scheme on or after 31 March 2000.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant Miss M can truly be regarded as an insistent client. Portal's communications weren't clear or fair. It didn't act in Miss M's best interests. And it failed to act with due care and skill.

And, if Portal had followed the insistent client process correctly, I don't think Miss M would've insisted on going ahead with the transfer. I'll explain why.

I've taken into account that shortly after the transfer Miss M did go on to buy a home abroad using the TFC, costing her around £27,000, as well as drawing down further lump sums from her PP to carry out renovations on it. And that she's recognised she wouldn't have been able to do this at the time without transferring from her OPS. But Miss M has also said that if she'd been made aware of what she'd be giving up by transferring from her DB scheme to access the TFC then she would have postponed her plans. I find this explanation to be credible, given Miss M's plan to move abroad weren't fully formed at the time of the advice.

I note Miss M planned to sell her current property to move to a new home abroad in retirement, which would give her equity of around £25,000 after her mortgage was repaid. She had significant disposable income of around £600 per month, which I note she was intending to save having just repaid a car loan. And Miss M could also access the full amount of TFC available from her OPS at age 60, which was £18,551. Taking this into account, I think Miss M could still have achieved her plans to move abroad, but at a later date, without transferring out of her DB scheme. I think this would have been enough to purchase a property, as well as carrying out some renovations.

While transferring to access her benefits sooner for the above reasons might have been an attractive prospect for Miss M, accessing her pension early needed to be considered very carefully in her circumstances and balanced against other aspects of her overall situation and longer-term retirement security. And I don't think Miss M had a genuine need to transfer

out of her DB scheme to access TFC to the exclusion of everything else – I’m persuaded her plans to buy her home abroad when she did were a desire rather than a need. Especially given she intended to continue living and working in the UK until she retired at age 60.

I also think Miss M had a cautious attitude to risk and low capacity for loss given it seems she had little investment experience, she didn’t have long until retirement and that this pension was her main retirement provision. Given Miss M’s circumstances and lack of investment experience, she went to Portal seeking advice. So, I think it’s more likely that Miss M would have followed Portal’s advice to remain in the OPS had it been delivered with the skill, care and diligence required and shown to be in her interests.

For these reasons, I’m upholding Miss M’s complaint. And, in light of this, I think Portal should compensate Miss M for the unsuitable advice, using the regulator’s defined benefits pension transfer redress methodology.

Portal should also pay Miss M £250 compensation to make up for the distress and inconvenience caused to her by the unsuitable advice. I think this is a fair and reasonable amount in the circumstances because, while the advice was unsuitable and I think it’s likely Miss M would’ve remained in her OPS had it been otherwise, Miss M’s only found this out more recently and she’s still had the benefit of using her fund.

### **Putting things right**

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

On 2 August 2022, the FCA launched a consultation on new defined benefit 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 \(FG\) 17/9](#) (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.

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 previously asked Miss M 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.

Miss M has chosen not to wait for any new guidance to come into effect to settle her complaint. And I’m satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Miss M.

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, compensation should be based on Miss M's normal retirement age of 60, 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 T's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Miss M'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 T's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss M'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 Miss M 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 Miss M 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 Miss M.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Portal to carry out a calculation in line with the updated rules and/or guidance in any event.

Portal should also pay Miss M £250 compensation to make up for the distress and inconvenience caused to her by the unsuitable advice.

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.

## **My final decision**

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Miss M 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 Miss M 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 Miss M 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 Miss M the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Miss M.

If Miss M accepts this decision, the money award becomes binding on Portal Financial Services LLP.

My recommendation would not be binding. Further, it's unlikely that Miss M can accept my decision and go to court to ask for the balance. Miss M 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 Miss M to accept or reject my decision before 28 December 2022.

Holly Jackson  
**Ombudsman**