

The complaint

Mr D complains that Portal Financial Services LLP (Portal) gave him unsuitable advice to transfer his Personal Pension (PP) to a Self-Invested Personal Pension (SIPP).

What happened

In November 2012, Portal advised Mr D to transfer his PP to a SIPP. The fact find from the time said that Mr D was aged 46, single and self-employed earning £10,000 per year. It said he lived in a property he owned, worth around £400,000 and had no savings. And that he had outstanding debts/loans totalling around £14,000. The suitability report notes Mr D had a PP with a transfer value of £18,318 and that he wanted the option to access his benefits when he turned 55.

Portal carried out a risk-profiling exercise and said in the suitability report that Mr D had an 'adventurous' attitude to risk ('ATR'). It recommended he transfer his PP into a SIPP and that he invest in the following:

- Raithwaites Hypa Fund – 40%
- Cool Blue Samui Fund – 17.5%
- Venture Oil International – 22.5%
- EOS Solar Energy – 7.5%
- Cash Deposit – 12.5%

Mr D accepted Portal's advice, so the SIPP was established and the value of his PP was invested in line with its recommendations.

On 13 March 2021, Mr D complained to Portal, unhappy he hasn't been able to withdraw his pension upon turning 55 in the way he wanted to as he's been told it has no value, despite being advised it would grow by at least 10% per year.

Portal responded on 10 May 2021, saying that Mr D had made his complaint too late for our Service to consider it. It said he ought to have been aware he had cause for complaint from the letters it sent him between 2015 and 2017, which provided him with updates about his pension, its value and made him aware his investment in Raithwaite Hypa wasn't performing as expected. And when considering Mr D hasn't received any income from his investments since November 2013.

On 20 May 2021, Mr D brought his complaint to our service, adding that he didn't receive the letters Portal's said it sent him. One of our investigators thought Mr D's complaint had been made in time. He didn't think the correspondence was enough to trigger awareness that Mr D had cause to complain about the advice. He said Portal's letters reassured Mr D that he'd receive a return of all capital invested and interest. He said some fluctuations in the valuation was to be expected and that as Mr D wasn't retiring at the time he didn't require access to his funds. And that while the nil valuation from Mr D's SIPP provider could have caused him concern, Portal gave an explanation for this and further reassured Mr D.

Portal didn't agree. It said that despite any reassurances it gave Mr D ought to have been aware he had cause for complaint from his SIPP statement in October 2017, as this showed the value of his overall fund had dropped by around £6,400.

So Mr D's complaint's been referred to me for a decision. I sent Mr D and Portal a provisional decision, letting know I intend to say his complaint has been made in time, which means we can consider it, and that I intend to uphold, for largely the same reasons that I've detailed below. Neither Mr D nor Portal responded, so I see no reason to depart from these findings.

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.

Jurisdiction

The rules our service is bound by, known as the Dispute Resolution (DISP) Rules - found in the Financial Conduct Authority's handbook - say in DISP 2.8.2R that, unless the business consents (Portal hasn't), we can't consider a complaint if it's referred to us:

- More than six years after the event complained of; or (if later)
- more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) they had cause for complaint.

That is, unless the complainant referred the complaint to the business or our Service within that period and has a written acknowledgement or some other record of this having been received.

The event complained of – the advice Mr D was given to make high risk investments after being advised to switch his PP, which he says resulted in a loss – took place in 2012. And, as Mr D didn't raise this with Portal and then our service until 2021, it has been referred to us more than six years after the event occurred. This means I have to decide if Mr D was aware, or ought reasonably to have been aware, he had cause for complaint more than three years before he complained to Portal.

Mr D told us he made his complaint in early 2021 when he wasn't able to access his pension benefits at 55. While Mr D referred his complaint to us within three years of that, I've considered if he ought reasonably to have become aware he had cause for complaint sooner.

Turning to the letters Portal says it sent Mr D, it seems likely he would have successfully received these given I can see the letters were correctly addressed. In any case, having considered the content of the letters, I don't think Mr D ought to have felt overly concerned by these. I'll explain why.

Portal's letter dated 12 February 2015 says the value of Mr D's pension fund had dropped by 1.92% since June 2014, from just over £18,284.49 to around £18,070.79. But it also went on to show Mr D what his fund could be worth when he turns 65, giving examples using annualised growth rates, with no suggestion he could lose his investments.

In relation to Raithwaite Hypa in particular, while Portal said, for example, that this had only paid one of the annual interest payments which was lower than expected, I note that the expected investment return dates were 2018 and 2020, which hadn't yet been reached. Portal also said plans were being put in place which, if successful, would mean Mr D would

receive payment of outstanding interest, a penalty for late payment and return of capital. And that security against the properties would be enforced if necessary. So I think Portal made reassuring statements about how this might be resolved and the next steps. Portal then went on to explain that it may reassess funds and recommend changes based on performance, but I note that it didn't go on to make any changes to Mr D's pension fund for this reason. Instead it said Mr D was investing in the most suitable funds to meet his retirement objectives.

I recognise Portal's letter dated 17 September 2015 did say, for example, that the investment experience wasn't what it anticipated in every case. But it also said most funds are making efforts to return Mr D's capital, along with the growth he was entitled to, sooner than originally anticipated. In relation to Raithwaite Hypa, it also included an update that one of the properties had an administrator appointed who was looking to sell it and use it to pay creditors, including Mr D. And Portal said it thinks security measures such as this are doing the job and will generate enough to pay all outstanding interest, as well as returning Mr D's capital.

So, overall, I think Mr D would've felt reassured by the content of the above letters rather than concerned about the advice he'd been given in relation to the nature and performance of his investments.

Portal's letter dated 20 January 2016 said that, while Mr D's pension fund value had fallen by 1.95% since February 2015 from just over £18,070.79 to around £17,730.99, the market had suffered a downturn, this was nothing to worry about and is something to be expected when investing in any type of fund. It also said investments should be viewed as long term, five years plus, to see the potential long term gains it expects. In relation to Raithwaite Hypa, it contained similar information to its earlier letters. And Portal again went on to explain that it may reassess funds and recommend changes based on performance, but it didn't go on to make any changes for this reason – it only recommended Mr D invest some of the surplus cash he was holding in his SIPP. So, I don't think this letter ought to have given Mr D cause for concern about the advice, as it was positive overall.

Looking at the SIPP valuations Mr D was sent, while he says Portal told him he could expect 10% growth, I don't think his pension fund value having dropped by around £600 in total between June 2014 and January 2016 was enough to give him cause for concern. I say this because it was a small drop in value and Mr D was reassured by Portal as to the performance of his investments, as explained above. On 23 October 2017 though, Mr D was sent a SIPP valuation report showing the value of his pension fund had dropped by approximately a third, to just under £12,000, as the value of two of his investments within it had reduced to nearly £0. And, while Mr D might have been willing to take a small risk with his pension, when taking into account his lack of investment experience and that this appears to be his main pension provision, I don't think he was willing to risk losing a third of his overall fund.

However I can see that a few weeks later, on 6 November 2017, Portal sent Mr D a letter which explained that, while it looked alarming that his illiquid investments are being valued at £1, nothing material had changed. And that this only meant his SIPP provider didn't know exactly what his investments were currently worth, rather than because they were worthless. Towards the end of the letter it told Mr D that pensions are complex and not to worry, as nothing material had changed since its last contact with him.

In which case, Portal didn't just say that Mr D's investments were still on track despite the £1 valuation. Instead, I think it went further by giving an explanation for the valuation, reassuring him that his investments weren't in fact worthless and that there had been no material changes. And as Portal's letter followed so closely after the SIPP valuation report, I think

Mr E would have felt reassured that he should not worry about the two illiquid investments which had caused the value of his pension to reduce as Portal was telling him that his SIPP provider simply didn't know how to value them. Especially when considering Mr D's lack of investment experience and that he trusted Portal, I think he would have felt reassured rather than being alerted to something having gone wrong with the advice. Portal doesn't seem to have been concerned, and reassured Mr D as a result, so I don't think it's reasonable to say he ought to have had cause for concern so as to make him think he should complain, even in light of the 23 October 2017 SIPP valuation.

Mr D's SIPP provider has confirmed the next valuation it sent him wasn't until 5 May 2018. And I can see this showed that most of Mr D's investments within his SIPP were now valued at £0 and it doesn't appear to have been followed by further letters from Portal with reassurances. In which case, I think this ought to have alerted Mr D to something having gone wrong to make him think he should complain about the advice. And, while Mr D referred his complaint to our service more than three years after the SIPP valuation dated 5 May 2018, I've seen evidence he raised it with Portal within three years of that. So I think Mr D's complaint has been made in time, which means our Service can consider it.

The advice

I've taken account of relevant laws and regulations; regulators' rules, guidance and standards, and what I consider to be relevant industry practice at the relevant time. These include the overarching Principles for Businesses ('PRIN'). Principles 1 (integrity), 2 (skill, care and diligence), 6 (customers' interests) and 9 (reasonable care) are of particular relevance here.

The Conduct of Business Sourcebook ('COBS') in the regulator's handbook, set out the rules regulated businesses have to follow. At the relevant time, COBS 9.2.1R required Portal to take reasonable steps to ensure a personal recommendation was suitable for Mr D. It had to obtain information as to Mr D's knowledge and experience (relevant to the specific type of designated investment), his financial situation and investment objectives.

COBS 9.2.2R required Portal to gather sufficient information from Mr D to ensure the recommendation met his objectives, that he could bear the risks involved and had the necessary experience and knowledge to understand the risks involved in the transaction. And COBS 2.1.1R required Portal to act, "honestly, fairly and professionally in accordance with the best interests of its client."

In 2009 the regulator, the Financial Services Authority (FSA), also published a checklist for pension switching. And one of the key issues it thought should be focussed on was whether the consumer had been switched to a pension where the investments don't match their attitude to risk and personal circumstances.

As Mr D hasn't suggested Portal's advice for him to switch his PP to a SIPP was unsuitable, I've focused on whether the investments it recommended Mr D invest in within his SIPP were suitable. And, having done so, I don't think they were. I'll explain why.

Portal determined Mr D had an 'adventurous' risk profile. I appreciate that most of Mr D's responses on the attitude to risk questionnaire support that he wanted to take that level of risk. But Portal shouldn't have simply relied on the answers given in a questionnaire to determine Mr D's attitude to risk. It also had to consider Mr D's experience and understanding of investments, as well as his capacity for loss. Mr D was a standard retail investor, with no investment experience or savings. And, while he owned his property outright, it appears this PP was Mr D's main retirement provision, so it was one of his biggest assets. And, while Mr D had nine years until his expected retirement age of 55, his earnings

were low, so I don't think he had the ability to build significant additional pension funds before then. So I think Mr D's capacity for loss in respect of his pension was low and that Portal should've classified his ATR as cautious.

Yet, based on Portal's advice, a significant part of the funds in Mr D's SIPP was invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here, when it said that as well as these only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), for example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. In Mr D's case, 87.5% of it was invested in this. I don't think UCIS was suitable for Mr D at all, and certainly not in the proportion invested, given there's nothing to indicate he had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

I can see Mr D was made aware some of the investments were illiquid in the suitability report. And that it said the Raithwaites Hypa Fund was an UCIS which may, for example, carry higher risks and that it usually requires a sophisticated understanding of investments. But Portal then said that it was recommending this investment in any event under an exemption under COBS regulations 4.12, as it had taken reasonable steps to ensure the investment was suitable for Mr D. And it went on to focus on the rewards this investment would produce. So I think Mr D went ahead because he trusted Portal's advice. And had it recommended he invest in mainstream, regulated funds, which I think would have been suitable advice, I think Mr D would have done so for that same reason.

In summary, I think the investments Portal recommended were unsuitable, given these were likely to lead to Mr D being exposed to far more risk than appropriate. And I don't think he had the capacity for loss that investments like this carry. Instead, I think suitable advice would have been for him to invest in regulated mainstream funds. Had Portal given that advice, I think Mr D would most likely have invested in that way.

Therefore, I think that a fair and reasonable way to compensate Mr D for the unsuitable advice is to use a benchmark based on an investment strategy in line with his circumstances and attitude to risk.

This matter will also have Mr D caused distress and inconvenience given he's been prevented from taking his fund when he wanted as a result of the advice. So Portal should also pay Mr D £500 in compensation. I think this is a fair amount to make up for this in the circumstances.

Putting things right

My aim in awarding fair compensation is to put Mr D back into the position he would likely have been in, had it not been for Portal's unsuitable advice.

I think Mr D would have invested differently. It isn't possible to say *precisely* what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr D's circumstances and objectives when he invested.

- Compare the performance of Mr D's investment with the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value, there is a loss and compensation is payable.
- Portal should add interest as set out below.

- Portal should pay into Mr D's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If Portal is unable to pay the total amount into Mr D's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr D won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mr D's actual or expected marginal rate of tax at his selected retirement age.
- For example, if Mr D is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr D would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.
- If either Portal or Mr D dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified and Mr D receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.
- Pay to Mr D £500 for the distress and inconvenience caused by the unsuitable advice, which has led to a loss.

Income tax may be payable on any interest paid. If Portal deducts income tax from the interest it should tell Mr D how much has been taken off. Portal should give Mr D a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

| Investment name | Status | Benchmark | From ("start date") | To ("end date") | Additional interest |
|-----------------|--------------|--|---------------------|---------------------------|---|
| SIPP | Still exists | for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds | Date of investment | Date of my final decision | 8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance) |

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the actual value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Portal should take ownership of any illiquid assets by paying a commercial value

acceptable to the pension provider. The amount Portal pays should be included in the actual value before compensation is calculated.

If Portal is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the actual value. Portal may require that Mr D provides an undertaking to pay Portal any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portal will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the fair value when using the fixed rate bonds as the benchmark, Portal should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution out of the investment should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Portal totals all those payments and deducts that figure at the end instead of deducting periodically.

Given Mr D has said he would have accessed his pension upon turning 55 if he could have and that he's since said he'd like to withdraw it all, this means the SIPP only exists now because of the illiquid investments. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Portal taking over the investment, or this is something that Mr D can discuss with the 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. If Portal is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr D wanted capital growth with a small risk to his capital.
- 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 (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices

with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr D's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr D into that position. It does not mean that Mr D would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr D could have obtained from investments suited to his objective and risk attitude.

My final decision

For the reasons explained, I'm upholding Mr D's complaint and direct Portal Financial Service LLP to pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 11 January 2023.

Holly Jackson
Ombudsman