DRN-3899417

The complaint

Mr S complains that Portal Financial Services LLP (Portal) gave him unsuitable advice to transfer a defined benefit occupational pension scheme (OPS) he held with his former employer and three Personal Pension plans (PP) to a Self-Invested Personal Pension (SIPP).

Mr S is being represented by a third party but for ease I'll refer to all representations as being made by him.

What happened

Mr S was introduced to Portal in 2015 after he'd been in contact with another business, which I'll refer to as 'Firm C'. At the time, Firm C was an appointed representative (AR) of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority (FCA) to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice. Portal had an established business arrangement with Firm C, whereby Portal would provide the pension transfer advice before referring the client back to Firm C for investment advice on the transferred funds, and this arrangement was followed for Mr S.

The fact find from the time said Mr S was aged 39, single and working full-time earning around £31,000 per year. It said he lived in a property he owned, worth around £100,000 with an outstanding mortgage of £65,000. It said he had no savings but he had life assurance to cover his mortgage. And that he had outstanding debts totalling £2,700 that he was repaying at around £100 per month. The suitability report notes Mr S had three PPs with respective transfer values of £7,914.74, £11,335.07 and £4,781.55. It also said he had a preserved final salary pension with a transfer value of £6,969.14, that was projected to pay a pension of £727 per year plus tax free cash of £1,913 from age 60. And that Mr S likely wanted to retire at age 67.

Portal carried out a risk-profiling exercise and said Mr S had a 'moderately adventurous' attitude to risk (ATR). At the end of May 2015 it recommended he transfer his OPS and PP into a SIPP to meet his objectives. The suitability report said he wanted to consolidate his funds, and he was seeking flexibility and improved death benefits. Mr S said the pension plan under review was important to his retirement. And Portal said that due to Mr S' ATR, stated retirement age and needs and objectives it would recommend he invest in certain fund asset classes, but the investment advice would be provided to him by Firm C.

Mr S accepted Portal's recommendation and his pension benefits were transferred to his SIPP a few months later and some of the investments made were as follows:

- Biomass Investments Plc - £1,900;
- Strategic Residential Dev - £1,900;
- Brisa Investments Plc - £1,900;
- Lakeview UK Invest - £1,900; and
- Motion Picture Global - £1,900.

In September 2020, Mr S complained to Portal, unhappy that he'd been advised to transfer his pensions to a SIPP and invest in high risk, unsuitable, investments. He said he had a low risk profile in light of his circumstances and lack of investment experience.

Portal responded on November 2020, saying that Mr S didn't voice any concerns over his established risk profile, that his complaint about the investments ought to be directed to Firm C and that he signed a form confirming it had explained the risks in transferring from his OPS.

In December 2020, Mr S brought his complaint to our service. One of our Investigators said he didn't think Portal had demonstrated that transferring Mr S' OPS and PPs into a SIPP was in his best interests. The Investigator also said he didn't believe it was possible for Portal to provide suitable advice without knowing where the funds were going to be invested. And that Portal should put Mr S back into the position he would've been in but for the unsuitable advice.

While Mr S accepted this, Portal didn't agree. It said, in summary, that it relied on the hurdle rate as a more accurate means of measuring the scheme benefits. It said Mr S preferred the flexibility of income and being able to nominate his death beneficiary. Portal said Mr S' investments were recommended by Firm C and so it wasn't responsible for any losses attributed to them, although it said it gave its advice in knowledge of the likely investment strategy Firm C would employ for Mr S. It added that it had undertaken due diligence on Firm C and provided a copy of the "Compliance Health Check" completed in 2012. Firm C said it didn't invest client funds in UCIS so Portal said it shouldn't be held responsible given Firm C had deviated from this.

Portal added that the regulator's alert of 2013 did not apply to Mr S' case, as it only covered instances where the other firm was unregulated. As Firm C was regulated, it said Mr S has recourse to the Financial Services Compensation Scheme (FSCS) and our service. It also believed that the redress methodology was unfair, as it didn't take into account that Mr S could claim compensation from the FSCS.

So Mr S' complaint has been passed to me for a decision. I let Mr S and Portal know I don't currently think Portal's advice for Mr S to switch his PPs to the SIPP was unsuitable in light of his consolidation objective, the lower SIPP charges and the wider range of funds available to him as a result. But that I still think its advice was unsuitable overall, for largely the same reasons as the Investigator. I also said I currently think Portal should compensate Mr S for his full loss, despite receiving compensation from the FSCS.

Mr S responded, with no further comments, but clarified the amount of compensation he received from the FSCS. And we received an automatic reply from Portal, which said in summary that its emails are no longer being read and there's no one left at the company to 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 advised Mr S to transfer his OPS and PPs to a SIPP but says it didn't provide any recommendation about the investments held within the SIPP, as Firm C was meant to provide this. Although the intention was for another regulated firm to advise on and arrange Mr S's underlying SIPP investments, I don't think that meant Portal's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. I believe that as Mr S's financial adviser, Portal still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved. And suitable advice couldn't, in my view, be given without thinking about the intended investment.

The applicable rules, regulations and requirements

Having thought carefully about what happened here, I don't think Portal's advice to transfer was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time, the regulator had made clear that it considered in order to suitably advise on pension transfers and switches, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

"*Financial advisers (…) are under the mistaken impression (…) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…) If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."

A further alert from the regulator in April 2014 said:

"*Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.*

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6)."

Portal says this alert was specific to situations where the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. It believes this distinguishes the circumstances of Mr S' transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. While I've given that possibility careful thought, I don't agree the alert was limited to those very specific circumstances.

I can see the 2013 alert makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Mr S' case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension switch and transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these standards have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. And I think the 2014 alert makes it clear that this applies to all firms when providing pension switch or transfer advice. So, I think these alerts are relevant to firms in the position of Portal in this case.

Portal appears to have been under the impression that, as it told Mr S it wasn't providing advice on the underlying investments, this enabled it to provide advice on a restricted basis. But this wasn't right. It couldn't separate out the two elements. Its advice on the suitability of the transfer had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portal was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Under COBS 2.1.2 Portal also couldn't seek to exclude or restrict its duty or liability to Mr S under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mr S' funds would be invested.

COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr S. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr S to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction. COBS 9.2.2R included the following wording:

"(…) *The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment*."

So as part of the fact-finding process Portal had to understand Mr S' objectives and the related risks. It wasn't free to ignore how Mr S' funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr S would invest in within the wrapper, doesn't in my mind seem reasonably possible.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portal's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above, I've considered Portal's advice with these in mind.

As Portal didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Mr S' transferred funds would ultimately be invested. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, it says it saw no issue with this.

I accept that as a result of its AR agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portal's duty to do the same. As Mr S' appointed financial adviser, it had a significant responsibility to provide suitable advice and act in his best interests. And as I've said, this had to include an awareness of where Mr S' funds would be invested.

Portal has stated that they undertook due diligence on Firm S and provided a copy of the 'Compliance Health Check' for Firm S completed by a third party on 12 May 2012. This document was over two years old by the time the transfer actually took place. So, I don't think it should have been relied on in perpetuity.

Furthermore, Portal chose to rely on a general statement, given over two years previously, that said recommendations of broad categories of investments, with potentially broad gradings of risk, might or might not be made in any given case and that UCIS would not be recommended. I don't think that was a reasonable basis on which Portal should have assessed the suitability of the pension transfer for Mr S. In my opinion, Portal needed to understand the nature of the investments envisaged for Mr S specifically, rather than rely on a general statement about Firm C's investment philosophy.

This doesn't mean that I'm holding Portal responsible for the failings of another regulated firm. I've focused on Portal's own responsibilities as the business involved with the capacity to 'unlock' the funds held in Mr S' OPS and PPs. There's no dispute that Portal gave that advice and in my view it incorrectly thought it could limit its advice to the transfer without seeking information about the investments Firm C intended and eventually arranged for Mr S.

It is clear to me that Firm C and Portal had come to an agreement about their working relationship. Firm C didn't have the required regulatory authorisations to give pension transfer advice whereas Portal did, and an agreement to work together for pension release clients came about. Portal has stressed it had never before agreed to work with another authorised firm, as the processes and controls required to set up the relationship would be disproportionate to the level of business it might bring about. However, an exception was made for Firm C, as it had proposed to send significant levels of business to Portal.

In those circumstances it seems to me that Portal needed to do more to ensure that the two firms worked together to give suitable pension transfer advice to clients. Aside from the initial due diligence checks carried out at the outset of the relationship, I haven't seen any evidence that further checks were made by Portal to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was, as I say, a necessary part of the suitability assessment carried out by Portal on a case by case basis for individual clients. But it was also, in my view, a reasonable due diligence requirement brought about by the ongoing relationship itself, so that any patterns of unsuitable or unaligned advice could be identified and addressed.

I don't think this required Portal to 'police' the activities of Firm C, but it did require Portal to take reasonable steps to ensure that both firms were acting, together, in their clients' best interests.

In reality, having followed Portal's transfer advice, a significant proportion of the funds remaining in Mr S' SIPP (after fees were deducted) were invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here. It said that as well as UCIS only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), as an 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 any case, I don't think UCIS was suitable for Mr S at all. There's nothing to indicate Mr S had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

In my view, if Portal had requested information about the proposed investments and been advised that Firm C intended to invest Mr S' funds in UCIS, it could've queried this, given this was at odds with what it had told Portal about its investment philosophy.

I don't agree with Portal's assessment of Mr S' risk rating as 'moderately adventurous' and will explain why later. However, I think that had appropriate enquiries been made, it would've become apparent something was wrong with Firm's C's proposal and that the OPS transfer and PP switches were therefore unsuitable and would likely to lead to Mr S being exposed to more risk than Portal considered appropriate. I think it's likely that, having realised how significantly the investments Firm C intended to make differed from those that were likely to be suitable for Mr S, Portal could've taken preventative action or at the very least made Mr S aware of the situation so he could, if servicing rights had already been transferred to Firm C, have sought to take corrective action himself.

Overall, I think Portal needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Mr S. It should've asked Firm C for the specifics of this or, as a minimum, an outline of the proposition. Had it done so, and Firm C had given it a clear framework of the proposition, then I would've expected Portal to have advised Mr S that it couldn't recommend he transfer away from his OPS and PPs in those circumstances. If Portal had warned Mr S against investing in line with Firm C's proposal, I think it's more likely than not that Mr S would've listened to it and not gone ahead with those.

Notwithstanding what I've said above, I don't think the suitability of Portal's advice turns solely on where Mr S's funds were ultimately invested. Portal's recommendation that he transfer his OPS and switch his PPs to a SIPP in the first place is an important consideration, which I've considered below.

The advice to transfer

OPS' typically have significant benefits and guarantees. Giving up the benefits and guarantees available under an OPS and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6) at the time of the advice, stated:

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

Given what the regulator says, my starting point is that a transfer won't usually be suitable. There'll need to be good reasons why a transfer will be in the consumer's best interests. And generally, a transfer will only likely be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

At the time of Portal's advice, Mr S was 39 years old and employed. Based on a risk profile Mr S completed, Portal said it believed he had a 'moderately adventurous' ATR. But, while I think Mr S was likely willing to take some risk with his pension given he had around 20 years until his OPS benefits became payable and longer until he expected to retire, and one of the fact finds mentions the possibility of an inheritance 'at some point' in future, I don't think he could be classed as a moderately adventurous investor.

I say this because, in the risk profiling questionnaires Mr S said he doesn't find investment matters easy to understand and that he hasn't had any investments before. It also said he generally prefers bank deposits to riskier investments and that he isn't willing to take substantial risk to earn such rewards. Mr S had no savings and, while he had three PPs, he didn't have significant overall pension provision for his retirement. And this OPS provided a guaranteed income at retirement. So it seems to me Mr S' OPS was one of his most valuable assets. And, based on this, I think Portal should have recognised the significance of Mr S' OPS and proceeded with caution.

Portal's advice was given at a time 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 discount rate was 5.1% per year for twenty years to retirement. For comparison, the regulator's assumed future growth rates for personal pension illustrations were 2% (low); 5% (intermediate); and 8% (high).

In terms of the investment risk Mr S would be taking on by transferring, Portal produced a Transfer Value Analysis (TVAS) report which showed the critical yield required to match benefits from the OPS at age 60 was 9%. So, the funds transferred needed to consistently grow at this rate for Mr S not to be financially worse off by transferring. This was much higher than the discount rate of 5.1% and the regulator's projection rates. So I think Mr S was likely to receive benefits of a lower value at retirement if investing in line with his attitude to risk.

Portal says the hurdle rate of 5.92% demonstrates that the transfer was financially viable, given it projected returns of 7.16%. I recognise Portal's model projected returns of 7.16% a year before charges, which was slightly closer to the critical yield. But Portal didn't know how Firm C was going to be investing Mr S' funds so I don't think this figure could reasonably be relied upon. And, in any event, I don't think it was reasonable to base the advice to transfer on the hurdle rate.

COBS 19.1.7 says:

"*When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up*."

Portal's reliance on the hurdle rate in Mr S' case ignores the importance of the critical yield in demonstrating the value of the benefits being given up and is essentially saying that it was suitable to give up a guaranteed income without gaining anything, because he could get by without it.

But using the hurdle rate is not supported by the customer's own responses to the risk questions, as when asked how important it was as part of his overall retirement plans, he stated that it was important to him. This doesn't indicate that the consumer was happy to give up a secure income in retirement. I am therefore satisfied that it is appropriate to use the critical yield to measure the value of the benefits being given up and not the hurdle rate.

A consumer may still have wanted to transfer from an OPS to a PP if doing so offered opportunities or alternatives which were not available within the ceding scheme and fulfilled a genuine need. The "Key Financial Objectives" on page eight of the suitability report listed objectives which would be met by transferring the pension plans to the SIPP. But having considered these carefully, I don't believe any of these justified Portal's recommendation to transfer.

The suitability report says being able to draw income flexibly would be a useful benefit to Mr S and that flexibility to do so was important, but I note he considered it useful, rather than a significant objective. And, as explained above, his answers to the risk questions don't support that he was happy to give up a secure income in retirement.

The suitability report also said enhanced death benefits were important to Mr S, as he wanted to provide for his brother should he predecease him in retirement. And I agree that transferring did provide a higher lump sum death benefit for Mr S' beneficiaries at the outset, but in my view, this didn't outweigh the loss of guaranteed income in retirement while he was living. While I appreciate Mr S may have wanted to pass on as much money as possible to his beneficiaries in the event of his death, I'm conscious that the main purpose of a pension is to provide an income in retirement. Other considerations, like death benefits, are secondary, particularly where there was nothing to suggest Mr S was in ill health, such that it wasn't expected that his pension fund would need to support him for a long time. Furthermore, Mr S had life insurance and I would've expected the adviser to explore the possibility of increasing his level of cover if providing a further legacy for his family was genuinely important to him. Given Mr S' age, I think this would likely have been affordable.

Regarding the risks associated with its recommendation, I do accept that Portal covered some of these. However, disclosure isn't the same as suitability and in my view Portal shouldn't have gone on to recommend the transfer at all.

I've thought about whether, if he'd been correctly advised by Portal not to transfer, Mr S would have gone ahead with the transfer anyway. Having carefully considered all the circumstances in this case, I don't believe he would have. There's nothing to suggest that he was seriously considering transferring out of his OPS prior to speaking with Portal. And I think it's more likely Mr S would have chosen to stay with his OPS. As a professional adviser which, unlike Firm C, was authorised to provide transfer advice, Portal's recommendation would've carried significant weight and could, I believe, have dissuaded Mr S from proceeding with the transfer and subsequent investments. I accept it's possible Mr S may still have wanted to go ahead anyway but, for the reasons I've given above, I think that's very unlikely.

The advice to switch

Mr S was advised to switch three of his PPs, so I've considered whether this was suitable for him.

In 2009 the regulator, the Financial Services Authority (FSA) published a checklist for pension switching. And some of the key issues it thought should be focussed on was whether the consumer had been switched to a pension that doesn't match their ATR and personal circumstances and/or was more expensive than their existing one(s) or a stakeholder pension, without good reason.

The SIPP wasn't particularly expensive – the AMC was 0.5%. I appreciate there would be a cost to switching his existing plans into it, including the 5% initial fee charged by Portal charges associated with Firm C's ongoing investment advice, plus other product or fund charges depending on the investments selected by it. Portal also didn't know of the additional charges to be made by Firm C. But Mr S' existing three PPs had an average cost of around 1.23%, which I consider to be higher than what he could achieve elsewhere. And it appears one of his PPs had a low average rate of return at 0.92% per year over 5 years but an AMC of 1.7%. In which case, I don't think Portal's advice to switch Mr S' PPs to the SIPP was unreasonable in light of his consolidation objective – the SIPP has a lower overall charge, it provides Mr S with ease of administration and the availability of a wider range of funds.

While Portal's recommendation that Mr S switch his PPs to a SIPP might not have been unsuitable in that case, as noted previously the 2013 and 2014 alerts applied to pension switches and not just transfers, so Portal had to consider the suitability of the underlying UCIS funds Mr S' PPs were to be invested in. And, for the reasons already given, I think these were likely to lead to Mr S being exposed to far more risk than appropriate given I think he should have been classed as wanting to take some risk rather than a moderately adventurous investor.

Instead, I think suitable advice would have been for Mr S to invest in regulated mainstream funds. I think Mr S went ahead because he trusted Portal's advice. And had it recommended he invest in this way within the SIPP, I think he'd have done so for that same reason.

Overall, I consider that the losses suffered by Mr S are as a result of the inappropriate advice provided by Portal. Had it not been for this, I don't believe Mr S would have invested a large share of his fund in UCIS. So, I think Portal is responsible for his losses.

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

Is Portal wholly responsible for Mr S' loss?

Overall, I consider that the losses suffered by Mr S are as a result of the unsuitable advice provided by Portal. Had it not been for this unsuitable advice, I don't believe Mr S would have gone ahead with the transfer of his OPS to the SIPP or invested such a large share of his fund in UCIS. So, I think Portal is fully responsible for his losses.

I recognise that it can be argued Firm C may have also separately caused some of Mr S' losses. So, I've considered whether I should apportion only part of the responsibility for compensating the loss to Portal. In the circumstances, though, I think holding Portal fully responsible for the whole of the loss represents fair compensation. I don't accept that anything Firm C did was an intervening act which absolves Portal of its responsibility for Mr S' losses.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension-release advice and investment. Because Firm C wasn't authorised to provide pension transfer advice, it referred Mr S to Portal. Portal advised Mr S to transfer to a SIPP, it set up the SIPP and arranged for his existing pension benefits to be transferred to it. I acknowledge that Firm C advised Mr S to invest a significant share of his SIPP funds in UCIS. But, as I've explained, Portal's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mr S on the investments. It was only as a result of Portal's involvement that Mr S transferred the funds held in his existing pensions to the SIPP. Portal's role was pivotal, since the eventual investments were fully reliant on the funds being transferred first; if that hadn't happened, Mr S couldn't have invested as he did.

Portal argues that Firm C is responsible for the investment advice and as Firm C is in default Mr S should avail himself of any compensation he may be entitled to by making a claim to the FSCS. It also says that the amount of any award made against Portal should be limited by taking that payment into account. In ordinary circumstances, as the FSCS describes itself as a fund of last resort, it is my understanding that it is unlikely it will pay out on claims where it is aware that another firm was involved in the transaction, and where it considers there is a reasonable prospect of the consumer making a recovery against that firm for the loss suffered.

Nonetheless, whether to postpone payment of compensation (to enable the consumer to recover compensation from a third party) is a matter entirely for the FSCS.

In this case, it seems the FSCS decided to award Mr S £5,716.35 before the determination of Mr S' complaint with this service. In those circumstances, I'm aware that as a condition of accepting compensation from the FSCS, Mr S was asked to give to the FSCS an assignment of his rights to make a claim against third parties. This would have enabled the FSCS to make a claim in recovery of that compensation against those third parties and the PI insurer of Firm C.

It follows that for Mr S to make a complaint to this service about Portal, he needed to ask the FSCS for a re-assignment of those rights. I can see Mr S has now obtained that which contains, as a condition, the following requirement:

"*The Claimant agrees that in respect of the Reassigned Rights the proceeds of the claim shall first be applied to repay an amount equal to the Compensation Sum to FSCS together with interest on the Compensation Sum from the date of receipt of the proceeds by the Claimant to the date of payment by the Claimant to FSCS at a daily rate equivalent to the Bank of England base rate from time to time (subject to a minimum rate of 0.1%), such payment to be made to FSCS within 14 days of receipt. The payment to FSCS shall be made after the deduction from the proceeds of the Claimant's reasonable legal costs incurred in pursuing a claim in respect of the Reassigned Rights.*"

Portal may argue that because Mr S has already recovered £5,716.35 from the FSCS, it should not have to account to him for that portion of his loss. However, as per the reassignment of rights agreement Mr S entered into with the FSCS, I can see he has agreed to repay the compensation he received from the FSCS if he receives compensation from a third party relating to the same claim.

From this, I think that:

1. There is no real risk of Mr S benefiting from double recovery, as he's contractually required to pay back to FSCS the full amount of the compensation it paid to him;
2. I have seen nothing to suggest Mr S is unlikely to comply with that requirement in accordance with the deed of reassignment; and

3. If I didn’t direct Portal to pay compensation to Mr S for the full amount of his loss (in circumstances where I have determined it is responsible for 100% of that loss), he would nonetheless still be required to account to FSCS from the compensation he receives from Portal and would, in turn, be left out of pocket.

All in all, I maintain my view that the fair and reasonable outcome is for Portal to pay Mr S compensation for the full amount of his loss.

Putting things right

My aim in awarding redress is to put Mr S as far as possible in the position he would be in now if Portal had given him suitable advice. I think Mr S would have remained in the OPS. And while I think he would have switched his PPs to the SIPP, I think he would have invested in mainstream, regulated, funds in line with his circumstances and attitude to risk.

What should Portal do?

To compensate Mr S fairly, Portal must determine the **combined fair value** of his transferred pension benefits as outlined in Step One and Step Two below. If the **actual value** is greater than the **combined fair value**, no compensation is payable.

actual value

This means the actual amount payable from the SIPP at the date of the calculation. My aim is to return Mr S to the position he would have been in but for the actions of Portal. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market), as their value can’t be determined. That appears to be the case here.

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

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

fair value – step one

If Mr S had been given suitable advice, I think he would have remained in the OPS. Portal must therefore calculate the value of the benefits Mr S lost as a result of transferring out of his DB scheme in line with the regulator’s pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document
https://www.fca.org.uk/publication/consultation/cp22-15.pdf

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr S whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect.

Mr S has chosen not to wait for any new guidance to come into effect to settle his complaint. I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr S.

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, Mr S has not yet retired, and he has no plans to do so at present. So, compensation should be based on his normal scheme retirement age of 60, as per the usual assumptions in the FCA's guidance.

The calculation should be carried out as at the date of my final decision, 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 S' acceptance of the decision.

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

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.

fair value – step two

Portal must compare the total value of the three PPs switched to Mr S' SIPP with that of the benchmark shown below to determine the fair value of Mr S' PPs if suitable advice had been given.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists	FTSE UK	Date of	Date of my	8% simple per

		Private Investors Income Total Return Index	investment	final decision	year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Any additional sums paid into the SIPP should be added to the fair value calculation from the point in time when they were actually paid in. Any withdrawal, income or other payment out of the SIPP 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 are a large number of regular payments, to keep calculations simpler, I will accept if Portal totals all those payments and deducts that figure at the end instead of deducting periodically.

The combined value of the sums produced by the above two steps is the **combined fair value**.

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mr 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 Mr S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. The compensation amount must, where possible, be paid to Mr S within 90 days of the date Portal receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr S.

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.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr S wanted capital growth and was willing to accept some investment risk.
- 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.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr S' circumstances and risk attitude.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 10 February 2023.

Holly Jackson
Ombudsman