

complaint

Mr C complains that the advice Portafina LLP gave to him in 2011 to transfer his occupational pension scheme (OPS) benefits to a self-invested personal pension (SIPP) was unsuitable.

background

I sent out my provisional decision on this complaint on 25 June 2018. The background and circumstances to the complaint, and the reasons for my provisional finding which was to uphold it were set out in that decision. A copy is attached and it forms part of this final decision.

I asked both parties to provide any more evidence or arguments that they wanted me to consider before I made my final decision.

Neither Mr C nor Portafina provided any further material evidence for me to consider.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I've seen no reason to depart from the findings in my provisional decision.

my final decision

Accordingly, for the reasons outlined in my provisional decision my final decision is that I uphold Mr C's complaint.

I order Portafina LLP to calculate and pay any compensation due to Mr C in accordance with the methodology I outlined in that provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 1 September 2018.

David Ashley
ombudsman

Copy of provisional decision

complaint

Mr C complains that the advice Portafina LLP gave to him in 2011 to transfer his occupational pension scheme (OPS) benefits to a self-invested personal pension (SIPP) was unsuitable.

background

My understanding is that Mr C was in his mid-fifties at the time the advice to transfer was given. He was in employment and earning about £1,200 net of tax per month; had a mortgage of £59,000; an outstanding loan of about £40,000 and had no other assets or liabilities.

After obtaining information from M C's former OPS Portafina sent him a letter dated 16 November 2011 setting out the benefits that would be payable from the scheme. It said as the critical yield was 10.1% it would be against its recommendation to transfer. Portafina said if he still wanted to transfer it could help but it would have to treat Mr C as an insistent customer. And that Mr C would need to complete an insistent customer form which it included with its letter. And then it would send him a copy of its reason why report detailing its advice.

Mr C returned a form saying he still wanted to transfer. And he signed the insistent customer form. This said:

I fully understand what the Critical Yield is and I am aware that it is unlikely that my new policy is going to achieve a growth rate of 10.1% per year to match the guaranteed benefits held with the [OPS].

I am aware that transferring my guaranteed [OPS] is against the advice of [the firm] and I understand that I will be worse off in retirement, I still wish to proceed with taking my benefits now.

Mr C signed the form on 17 November 2011.

A Pension Release Report was sent to Mr C dated 22 November 2011 which said:

You would like to cash in the maximum amount available from your pension as you would like to make home improvements and create an emergency fund.

Due to the guaranteed benefits that you will be relinquishing with [the 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.

The report then went onto say that it would outline the different options that were available in respect of income and tax free cash. It listed a number of options including:

Scheme Pension

I have not recommended a Scheme Pension because you wish to have access to your tax free cash entitlement, with no income being withdrawn.

The transfer value was about £63,000 and the critical yield required on the transfer value to match the benefits from the former scheme was 10.1%. It was recorded that Mr C had a moderately cautious attitude to risk. The report said this broadly meant:

In general, moderately cautious investors:

- are uncomfortable taking risk with their investments, but would be willing to do so to a limited extent. They realise that risky investments are likely to be better for longer-term returns.

- typically prefer certain outcomes to gambles.

Under the Recommendations section it said:

You have decided that you still wish to proceed with Pension Release. We will assist you with this and have treated you as an insistent client.

I would normally recommend that you leave your pension benefits where they are as this will be most beneficial to you in retirement. However, during our telephone conversation you advised me that you are aware of the down falls in taking your benefits now but due to your current circumstances you would like to take your benefits immediately.

Mr C was recommended to transfer his pension to a SIPP and invest in the following funds:

- 49% in Raithwaites Hypa Fund,
- 5% in Hypa Asia Fund,
- 16% in Venture Oil International,
- 15% in EOS Solar Energy,
- 15% in a cash deposit.

Mr C, through his representative, subsequently complained to Portafina. The representative said that the advice to transfer was unsuitable. Portafina didn't uphold the complaint and it was subsequently referred to us. One of our adjudicators investigated it. He recommended that it be upheld. He noted that the regulator's Conduct of Business Rules said that firms should start on the assumption that advice to transfer will not be suitable. The adjudicator didn't think the advice was suitable given Mr C's particular circumstances. And he didn't think the firm had complied with the regulator's Principles for Business in treating Mr C as an insistent customer and arranging the transfer – he thought they should have refused to accept the business.

Portafina didn't agree with the adjudicator's assessment. It said, in summary, that Portafina hadn't recommended the transfer. It said it had told Mr C his new pension would unlikely match the benefits from the OPS. Following discussions with Mr C it understood that Mr C had no other alternatives to meet his needs at that time. Mr C was adamant that he wished to proceed with the transfer, and he was aware that in doing so he was proceeding against the advice of Portafina.

It said that Mr C would have had a significant reduction in his benefits if he had taken them from his former OPS before age 65. And he wouldn't have been able to access the full 25% tax free entitlement – the lump sum would have been significantly reduced and he needed it at the time. Therefore, to meet Mr C's needs it had to treat him as an insistent client and assist him with the transfer. Given that the transfer met his requirements, the adjudicator's recommendation to calculate redress in line with the regulator's pension review guidance wasn't appropriate.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr C was recorded as a moderately cautious investor. It doesn't appear that he had any other pension provision at the time and therefore would have been relying on this pension to provide an income to live on in retirement. He had limited capacity for risk.

The critical yield on the transfer was 10.1%. It was therefore highly likely that the benefits he would get from the SIPP would be less than if he had stayed in his OPS. So I don't think a transfer was suitable in the circumstances.

The firm has said that it recommended against the transfer and treated Mr C as an insistent customer. However, in order to arrange the transaction on this basis it firstly had to provide Mr C with a suitability

report that explained his options and the associated advantages and disadvantages of those options. This would put Mr C into a position to make an informed decision to go against the adviser's recommendation and insist on the transfer.

I note that page 8 of the suitability report listed the different income options available to Mr C. However the report didn't go into any particular detail about the occupational pension scheme. The actual position at the time the report was given in November 2011 was that Mr C wasn't able to access the benefits from his OPS. He would have needed to wait until December 2012. In December 2012 the amount of tax free cash available from the OPS was limited – it was only £178 with a pension of £2,379. If Mr C waited until his normal retirement date the OPS could have provided a tax free lump sum of £22,173 and a pension of £3,326 per year. But clearly this wasn't available to Mr C in 2011. It seems that Mr C would have needed to wait a few years before the lump sum from his OPS would have been to such a level to be worthwhile taking.

So I don't think the firm fully set out the options available to Mr C through his OPS in an understandable manner. Ultimately therefore, I need to decide whether it's more likely than not that Mr C would still have insisted on the transfer had he been fully apprised of all his options and been in a position to make an informed decision.

Ordinarily, if Mr C had a real need for the tax free cash, given his age, his limited capacity for risk and that he was only willing to accept a moderately cautious degree of risk, my view is that suitable advice would have been to take the benefits from the OPS. This would have given him access to the tax free cash and a guaranteed income for life.

However, in this case Mr C wasn't able to take his OPS benefits for about another year. And even then the tax free cash available from the OPS would have been minimal. So taking benefits from the OPS in 2011 wasn't an option. And Mr C already had significant loans so I think it's unlikely he would have wanted to add to those liabilities given he was getting closer to retirement.

Therefore, was Mr C's need for tax free cash so urgent that he would likely have transferred in order to gain access to it, despite knowing that in doing so he would receive lower benefits than if he had remained in his OPS?

The firm did alert Mr C that the OPS would be more beneficial and that by transferring he would be *worse off in retirement*. But I don't think the degree to which his benefits could be affected was set out in understandable terms. The adviser should have fully explained how the benefits from the SIPP could ultimately be significantly lower than OPS.

I think once an investor is alerted to the possibility of taking tax free cash from their pension it's very tempting to do so – £15,000 tax free would have been a very attractive sum for Mr C despite the downside of accessing it. However it was recorded that the tax free cash was required for home improvements (my understanding is that it was largely used to buy a new conservatory) and to build up an emergency fund. So it doesn't appear to be the case that Mr C was in desperate need of the money and wanted to access it at all costs.

Our adjudicator asked Mr C what he would have done had everything been explained to him in understandable terms. Mr C has said he wouldn't have made the same decision to transfer. Clearly, I need to treat his evidence with some caution given it's said with the benefit of hindsight. But I think, ultimately, it came down to a choice of having a guaranteed income in retirement or a new conservatory.

The adviser sent the letter dated 16 November 2011 which explained that its recommendation was not to transfer. But then it went on to say that if Mr C wanted to transfer anyway it would help him release his money and send the relevant application form and reason why letter. I accept that Mr C would likely have thought a new conservatory might have been nice to have. But it doesn't appear that the adviser discussed Mr C's reasons for not accepting the recommendations and advised that it just wasn't a financially sensible decision to transfer given his circumstances and the risks of a significantly lower pension. I think if he had explained all this, particularly in light of the use of the tax free cash and that although Mr C would get some

benefit from a conservatory it wasn't a necessity, it seems unlikely to me he would have insisted on transferring despite a professional adviser recommending that he didn't do so.

For completeness, I should also add that I agree with the adjudicator that the funds selected following the transfer presented a higher degree of risk than the moderately cautious risk that Mr C had agreed to take.

Accordingly, I'm not persuaded that the transfer was suitable given Mr C's circumstances, his moderately cautious attitude to risk and the critical yield required on the transfer value. And neither am I persuaded that Mr C would have insisted on the transfer if the adviser had discussed his reasons for insisting on it, explained his options in full and still recommended against it. I think Mr C would more likely than not have remained a member of his OPS at the time that the advice was given in 2011.

However, it does appear that Mr C's circumstances subsequently changed and he had a real need to take his pension around the time he reached aged 60 (so prior to the OPS' normal retirement age of 65). So I think the calculation of compensation should be based on an assumption that Mr C took his benefits on the date he reached his 60th birthday.

my provisional decision

My provisional decision is that I uphold this complaint and that a fair and reasonable outcome would be for Portafina LLP to put Mr C, as far as possible, into the position he would now be in if he hadn't transferred.

I intend to order that Portafina LLP undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017. It should assume that Mr C accessed his benefits at age 60.

This calculation should be carried out as at the date of my final decision using the most recent financial assumptions published (at the date of the final 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 C's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation in respect of any past loss (i.e. extra net income or tax-free cash Mr C would already have received from the occupational scheme) should be paid to him as a lump sum.

The compensation in respect of any future loss should if possible be paid into Mr C'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 the future loss payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for future income tax that would otherwise have been paid.

It's likely that Mr C would be a basic rate taxpayer in retirement. So allowance should be made for any tax free cash that Mr C may have been able to take above what he actually took and the remainder taxed at 20%.

The compensation resulting from the loss assessment must where possible be paid to Mr C within 90 days of the date Portafina 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 a final decision to the date of settlement for any time, in excess of 90 days, that it takes Portafina to pay Mr C this compensation.

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.

In addition, Portafina should pay Mr C £400 for the distress and inconvenience caused as Mr C wanted to take income from his pension but is unable to access it.

My aim is to return Mr C to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as may be the case here. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Portafina LLP should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr C and the balance be paid as I set out above.

If Portafina is unwilling or unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Portafina may wish to require that Mr C provides an undertaking to pay it any amount he may receive from the investment in the future.

Mr C has wanted to take benefits from his pension. However that's currently not possible because of the fund's illiquidity. I don't think it's fair that Mr C continues to have to pay annual SIPP fees if there are illiquid holdings preventing him taking an income from it. Ideally, Portafina would take over any illiquid holdings, thus allowing Mr C to decide what he wants to do with his SIPP. But third parties are involved and I can't tell them what to do.

So if there are illiquid holdings and Portafina is unable to buy them all from the SIPP, then it's fair that Portafina pay Mr C an upfront lump sum equivalent to five years of SIPP fees (calculated using the previous year's fees). This gives a reasonable period to arrange for the SIPP to be closed.

David Ashley
ombudsman