

The complaint

Miss S complains that advice given by Portafina Investment Management Limited (“Portafina”) to transfer the deferred benefits of her local government defined benefit occupational pension scheme into a self-invested personal pension wasn’t in her best interests.

Miss S is represented in this complaint by a claims management company (CMC).

What happened

In 2018 Miss S was aged 54, single with no dependents, (but one adult son) and had deferred benefits in an occupational pension scheme (OPS) with her local authority, from employment she left in 2015.

Miss S consulted Portafina about her pension arrangements, having been given their details by a union representative. She authorised Portafina to approach the OPS for details about her entitlement.

The transfer value of Miss S’s OPS was £29,415. The scheme had a normal retirement age of 65, but benefits could be taken from 60, with a 24% reduction in income and 14% reduction in the tax-free lump sum. Portafina’s transfer analysis concluded that in order to provide the same benefits as Miss S’s OPS, a personal pension would need to grow by around 21.9%. And that the cost of the benefits she would be giving up was around £90,000. But by transferring she could access the tax-free lump sum at age 55.

Portafina sent a letter with a summary of her OPS benefits to Miss S and invited her to book a telephone appointment, which took place with a Portafina paraplanner on 8 January 2019. During this meeting Miss S provided some information about her circumstances, and a budget planner and risk assessment questionnaire were completed. This recorded that Miss S rented a council property, with the rent covered by housing benefit, but she was in £900 of rent arrears, which she was paying off. She told Portafina her only income was Universal Credit payments, she’d been unemployed for over a year and was finding it hard to find work due to being deaf in one ear. Although she later told our investigator she worked around 12 hours a week as a carer on a minimal wage. But either way, her income was inadequate to cover her living expenses. Her attitude to risk (ATR) was assessed as “moderately cautious”.

The adviser explained the guaranteed OPS benefits she’d be giving up if she transferred. And that the rate her pension would need to grow to pay the same benefits was highly unlikely to be achieved, so she might be worse off. If she went ahead, Portafina’s fee would be deducted from the fund after the TFC was released, which Miss S was told couldn’t be before she turned 55 in April. Miss S was told the information gathered would be passed to the qualified pensions adviser for analysis. Portafina sent Miss S a suitability report dated 5 February 2019 prepared by one of its advisers. This recommended she transfer her OPS to a self-invested personal pension (SIPP) with provider “A”, release the maximum tax-free cash to alleviate her immediate income shortfall, and invest the balance

to provide an income in retirement. A further call took place on 15 February 2019 to discuss the recommendation.

Miss S accepted the advice and signed the relevant forms. In early March 2019 the SIPP with A was opened and in April 2019 Miss S received a tax-free lump sum of just over £7,423. The remainder, after deducting Portafina's 7% fee of just over £2,080, was invested in a drawdown fund, in line with her moderately cautious ATR. Miss S took four taxable withdrawals totalling around £15,830 throughout 2019, which significantly depleted the fund in a year.

Miss S's CMC complained to Portafina in March 2020. It didn't uphold the complaint saying Miss S had been made aware of the guaranteed benefits in her OPS she'd be giving up, But by carrying out a "trade-off" exercise the adviser decided as Miss S was in financial difficulties, accessing the tax-free lump sum to address her income shortfall was more important than the pension benefits in the future. The paraplanner had ensured Miss S was aware of the potential impact on her benefit entitlement, and she was informed about the risks involved. Miss S had no other way or raising the money needed to address her immediate financial needs, so on that basis the transfer was in her best interests.

The CMC referred her complaint to this service, and one of our investigators considered it. He could see why Miss S may have wanted access to her tax-free lump sum due to her income shortfall. He noted that as the transfer value was under £30,000 there was no requirement for regulated financial advice. But as Miss S had sought advice from Portafina it had to take responsibility for it. Which on balance he didn't think was suitable, as that's the starting point for any transfer from a defined benefit pension scheme. He said there was no evidence Portafina had explored the prospect of Miss S improving her financial situation by finding work. Or that proper consideration had been given to how the lump sum would address Miss S's financial needs over the longer term, as based on her stated income deficit the TFC would last for less than four years. Her OPS was Miss S's only pension provision until she became eligible for the state pension at 67, and would've provided a guaranteed income for life, increasing in line with inflation.

So he upheld the complaint and went on to explain how he thought things should be put right.

Portafina disagreed and responded to his view in detail. It said in summary

- It had considered Miss S's circumstances carefully and acted in line with all regulatory requirements;
- Miss S had an urgent need to address her income shortfall which couldn't be met by taking benefits from her OPS, which she couldn't access until 60;
- At the time of the advice she was 12 years away from her normal retirement age which is a realistic investment horizon;
- An annuity had been considered, but Miss S needed more flexibility, and the health conditions she'd disclosed didn't make her eligible for an enhanced annuity;

The investigator considered Portafina's comments, but they didn't change his mind. He'd now listened to the call recording of the fact-finding meeting on 8 January 2019 between the paraplanner and Miss S. Having done so he didn't think Miss S had fully understood the implications of the decision she made. So he still thought the complaint should be upheld. As Portafina didn't agree it's been passed to me to issue a decision.

What I've decided – and why

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

Having done so I'm going to uphold it for broadly the same reasons as the investigator.

It's not in dispute Miss S told Portafina she was in strained financial circumstances, with an income shortfall of around £163 per month. I can see why she may have been tempted to see accessing her pension to release the tax-free lump sum was the solution to her immediate need. But I don't think that is sufficient justification to make the advice to transfer and the loss of valuable guaranteed benefits suitable.

As the investigator has explained, the approach of this service when considering transfers from defined benefit pension schemes aligns with the FCA guidance (COBS 19.1.6G), which is the assumption they will generally not be suitable.

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

The primary purpose of a pension is to provide income in retirement. At the time of the advice Miss S was 54, with around 12 years until state pension age. Portafina recommended the transfer on the basis that Miss S could release tax-free cash of just under £7,429 to address her income shortfall and reinvest the remainder to provide an income for her retirement. On the basis her short-term needs were more pressing than retirement income later.

The CMC says Portafina didn't warn Miss S about the guaranteed benefits she'd be giving up, but I don't agree. I can see Portafina's transfer comparator suggested replacing those benefits could cost an additional £60,454. And the amount the fund would need to grow (the critical yield) would be 21.9% per year. The suitability report warned that if Miss S withdrew from her pension she'd have less to live on in the future, and that she may receive less from a transferred pension than the benefits she'd be giving up. The risks involved in transferring were explained to Miss S during a telephone call with the paraplanner in January 2019, and Miss S had to confirm her understanding.

I've listened to the call, and Miss S was told the earliest she could access her OPS was 60, and that the scheme offered two options. One was a small amount of TFC of £220 and an annual pension of £2,221 or TFC of £9,600 and a reduced annual pension of £1,447. Miss S was told if she transferred her fund would need to grow by either 27.9% or 21.9% to provide the same benefits as her OPS and that this was very unlikely. She was also told about the £60,454 funding gap. But when asked if she understood what she'd been told, she said "no, not really". Miss S said she found it difficult to hear and asked the adviser to speak to her son who was with her. The Portafina adviser went through the same points with Miss S's son, who conveyed them to Miss S. He asked how soon Miss S could receive the TFC, and whether Portafina's fee of around £2,000 would be deducted from the TFC. The adviser said for regulatory reasons she had to complete the remainder of the call with Miss S rather than her son, even though she'd mentioned she found it difficult to hear. Miss S said she'd hoped to get the money on her 55th birthday. When she found out that wasn't

possible the adviser agreed to “*get the ball rolling*” without delay, before the fact finding and risk assessment element of the call.

I can't fairly say Miss S wasn't warned about the risks inherent in transferring. But I'm not satisfied she fully understood the implications of what she was being told, as her focus was on the opportunity to access the TFC as soon after her 55th birthday as possible. I'm concerned that given what Portafina had been told about Miss S's hearing problems, more emphasis wasn't placed on Miss S reading the written material carefully before proceeding. Miss S had recently changed address, which Portafina knew as the adviser had to ask for Miss S's previous address to complete security. Miss S said she hadn't received the options letter dated 7 January 2019 which she should've had access to, prior to call with the paraplanner, as I can see had been sent to her previous address. This letter gives her the critical yield of 21.9% per year and the growth rate of 7.9% and says her plan comes with guaranteed benefits. It also warns that Miss S could be left with less to live on than she needs, and that taking money from her pension “*shouldn't be seen as an easy way to raise money*”.

Despite Miss S having not seen an important document prior to the call, being unable to clearly hear what she was being told, and admitting she didn't really understand, Portafina still felt able to recommend the transfer, which I think was likely to make Miss S take any warnings she was given less seriously. I think the entire process was conducted in such a way that there was an assumption from the outset that Miss S would transfer in order to release the tax-free lump sum. It wasn't really an impartial assessment of whether or not Miss S should transfer.

Portafina's welcome letter dated 20 November 2018, which I think she probably did receive, tells Miss S that once information has been received from her OPS they will contact her to “*confirm how much tax-free cash you can take from your pension*”. And that the next step will be a telephone interview to detail how her pension can be used to “*help you achieve your goals*”. I think this approach would've raised Miss S's expectations in terms of addressing her short term needs, without fully considering the impact on her long term financial future. Miss S told our investigator the reason she looked into accessing her pension was just because “*it's a lot of money*”.

The suitability report dated 5 February 2019 tells Miss S “*the recommendation within this report represents the best pension advice for you, based on your current situation and your stated objectives*”. Portafina recorded Miss S's objective as follows: “*I would like to take it out as I get very little money each month as it is. I'm finding it very hard to get a job as I am deaf in one ear and I need special food because of the medication I am on.*”. I think this is a description of why Miss S needed to improve her immediate financial situation, rather than a valid long-term financial objective. And although the report warned that “*Releasing pension cash early won't necessarily make sense for everyone*” Portafina still felt able to recommend the transfer because Miss S's “*current circumstances justify the loss of these valuable benefits at this time*” stating “*there was a clear and immediate need – the client is in financial difficulty*”. Portafina could have recommended against the transfer but explained the value of her pot meant she had the right to access her pension, without seeking advice.

It's not in dispute Miss S was finding it hard to manage financially. But the adviser didn't ask completely open questions for Miss S to answer in her own words. In the part of the call where other options to meet her financial needs are explored, the adviser didn't ask if Miss S had considered how she could address her income shortfall. Instead the paraplanner said she assumed borrowing money wouldn't be an option for Miss S, as she wouldn't be able to afford the repayments. But when Miss S was asked whether she intended to remain in employment until state pension age, she described herself as “*a worker*” and that as soon

as she found a job she intended to work “*round the clock*”. But her job prospects, or how soon she expected her financial situation to improve wasn’t explored.

In the 15 February 2019 call the adviser asked Miss S if she’d read and understood the section in the report relating to risks, and she said she did. But when asked to reflect it back she became a bit flustered and said “*I can’t really remember what [the paraplanner] said, I just want to move my pension, get my tax free money. I know what I’m giving up, I’ve got a lot on my mind*” The adviser did refer Miss S back to the relevant page in the report, but I think this conversation should have alerted Portafina that Miss S was being influenced by the thought of the TFC and wasn’t thinking carefully about the decision she was making. Miss S wasn’t asked to think about how long she thought the TFC would last or how she’d manage once it ran out.

In the January call Miss S said her only income was from universal credit, around £100 per fortnight, and she’d been unemployed since “*October last year*”. But when asked about how she managed given the income shortfall each month, Miss S said she budgeted carefully and would cut down in certain areas and was in no debt. So while it’s clear she was finding things difficult and would like more money to live on, I’m not satisfied there was sufficient urgent need which meant the transfer was essential.

Miss S told the paraplanner she’d been unemployed for over a year. But this doesn’t align with what she told our investigator, which is that she’d been working for 12 hours per week as a carer. Or with her bank statements which show she’d been receiving income from what appears to be two employers. This might have been casual work providing inadequate income to meet her needs, but it suggests Miss S was able to work. Miss S’s stated monthly shortfall would amount to £1,956 over a year. But this isn’t borne out by the bank statements I’ve seen either. She dipped into her overdraft facility but had no debts except for her £900 of rent arrears which were being managed by payments of £31 per month. At the time of the advice Miss S had just moved, hadn’t extended her rent arrears by moving, and wasn’t at risk of eviction. So while she would’ve benefitted from more income, she wasn’t in significant financial difficulty, The CMC has confirmed Miss S has since found work, so although that wouldn’t have been known at the time, Portafina could have recommended against the transfer and suggested Miss S take other steps to address her income shortfall such as finding better paid work, checking her benefits entitlement and reviewing her outgoings.

To be fair to the paraplanner, Miss S was reluctant to discuss her finances, as when being asked for information to complete the budget planner Miss S asked why she was being asked all these questions, which she found “*a bit personal*”. She also told our investigator it was her own business how she’d have managed financially, if she’d been unable to access her pension. I’ve no reason to dispute Miss S was struggling, but it doesn’t follow that the best way to resolve her difficulties was accessing her pension, sacrificing the valuable guaranteed benefits for her retirement when she had no other provision. Portafina should have explained it wasn’t able to properly assess the suitability without a full picture of Miss S’s financial circumstances.

While I don’t think Portafina’s advice was suitable, I can’t agree with the CMC that they took advantage of Miss S’s vulnerable state. She’s disclosed she’d been diagnosed with anxiety and depression about four years ago (so potentially around the time of the advice) and says Portafina was aware of this. But in the January 2019 call Miss S described her health as generally good. She gave her height and weight, said she was giving up smoking, restated her hearing impairment and the medication (painkillers and B12 injections) she took for osteoarthritis. She didn’t mention any mental health issues, or any medication for anxiety or depression. Miss S also completed a medical questionnaire to enable Portafina to determine eligibility for an enhanced annuity. But these questions

focus on life-limiting medical and lifestyle conditions, and don't ask about mental state. So I can't fairly say Portafina should've known she was mentally vulnerable. Although as I've said, I think more should've been done in respect of her hearing difficulty.

Portafina's report assumed that once Miss S had accessed the roughly £7,429 TFC she needed (to address her income shortfall) the remainder would be invested for the future, 27.94% in global short dated bonds, 67.06% in global equities and 5% cash. Portafina had assessed Miss S as being a "*moderately cautious*" investor but said that because she was "*many years from retirement*" "*the risks involved in having a greater proportion of your investments exposed to the markets are lower than they would be if you were closer to retirement*". I think this strategy weighted in equities exposed Miss S to an unacceptable level of investment risk, when she had only a small pot, and very low capacity for loss, even with an apparent 12 years investment horizon. Plus she was subject to no charges with her OPS, whereas her modest fund was reduced by Portafina's advice charge of 7%, which was only payable if she transferred. Plus the SIPP with A has an annual management charge of 0.48% plus an administration fee of £75 for each withdrawal. All of which increase the investment growth needed to provide the same benefits as the OPS.

Miss S took several sizeable withdrawals from her pension fund during 2019 - £5,842 in June, £2,076 in August, £3,780 in November and £4,130 in December 2019. These were taxable, as she'd already received the maximum tax-free cash. Miss S said the money was needed to live on, but she'd also put money towards a funeral and for private medical treatment for her stepson. Miss S told this service she's still in financial difficulties, so the transfer didn't resolve her problem long term, as the funds were exhausted within the year. This couldn't have happened if she'd remained in the OPS, where she'd receive guaranteed income for life. Miss S did say in the February 2019 call that she'd understood what the paraplanner had told her (in respect of the benefits she'd be giving up). But when asked to reflect it back she was clearly confused. I think Portafina should've had concerns about whether she did in fact understand. As at one point she says she was thinking she might take all the money out to put it in a savings account for her son. Which suggests she wasn't thinking clearly about her own financial requirements for the future.

The transfer value of Miss S's local authority pension was below the £30,000 threshold at which she was required to take regulated financial advice. And once she knew she could do so, Miss S might simply have gone ahead regardless of what Portafina recommended. But Miss S had little experience of financial matters, and as she had consulted Portafina I can't say she'd have disregarded what the adviser said. And she might have felt reassured about the transfer being in her best interests as it was recommended by Portafina. Had Portafina recommended against the transfer and Miss S said she wanted to go ahead regardless, it could then have decided whether to facilitate the transfer for her on an "insistent client" basis or not.

But I'm satisfied that despite Miss S's financial situation it wasn't suitable advice to recommend the transfer.

So I'm upholding the complaint as I don't think Portafina has acted in her best interests.

Putting things right

A fair and reasonable outcome would be for the business to put Miss S as far as possible, into the position she would now be in, but for the unsuitable advice. I consider Miss S would have remained in her occupational scheme. Portafina Investment Management Limited must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9:

Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. It will also reflect the withdrawals Miss S has had the benefit of. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Miss S's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss S'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 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 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 compensation amount must where possible be paid to Miss S within 90 days of the date Portafina 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 Portafina to pay Miss 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.

My final decision

I uphold this complaint. Portafina Investment Management Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 6 May 2022.

Sarah Milne
Ombudsman