

The complaint

Mr C complains about the advice given by Portal Financial Services LLP ('Portal') in relation to a defined-benefit ('DB') occupational pension scheme that he held with his former employer. Portal processed the transfer of Mr C's DB scheme benefits to a personal pension with an income drawdown facility on an 'insistent client' basis. Mr C says Portal should have clearly recommended that he didn't transfer instead of providing him with insistent client documentation. Mr C says he's suffered a loss as a result of Portal's actions.

What happened

Mr C approached Portal in May 2016 to discuss his pension and retirement needs as he says he had turned 55 and understood that he may have some pension options available to him.

Portal completed a fact-find to gather information about Mr C's circumstances and objectives. It also carried out an assessment of Mr C's attitude to risk, which it deemed to be 'balanced'. On 13 June 2016 Portal sent Mr C a letter saying that it recommended he didn't transfer his DB pension scheme benefits because the growth rate required to match his guaranteed benefits was too high at 5.7% and because he'd be giving up a guaranteed pension of just under £2,800 a year from age 62. But Portal said it could still help Mr C if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 20 June 2016 Mr C returned the insistent client form. Where asked, Mr C indicated on the form that he acknowledged his new pension was unlikely to achieve the required growth rate and that he was giving up guaranteed benefits.

On 24 June 2016 Portal sent Mr C a suitability report setting out its advice. The report outlined Mr C's circumstances at the time, which in summary said that he was employed, he was renting his home, he had around £1,000 in savings, he was paying a small amount each month towards a repayment plan and he had more than £500 a month disposable income.

The report went on to set out the details of Mr C's existing DB pension scheme, which included the transfer value and the amount of pension Mr C could expect from his scheme at age 62. It also said the critical yield required to match Mr C's existing scheme benefits was 19%.

The report said that Mr C's objective was to access his tax-free cash entitlement to purchase a 'trike' or motorbike.

Portal noted that it had explored with Mr C other ways to generate the money required to meet his objective - but said that he didn't have sufficient assets to raise the cash required, or enough disposable income, and he didn't want to take on further lending.

The report then set out Portal's recommendation. It said that it had already recommended that Mr C shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up - but it said that Mr C had decided to disregard the advice and that it would be

treating him as an insistent client. It went on to propose that Mr C transfer his pension to enable him to meet his objective and it set out which pension provider and product it recommended.

Mr C signed the relevant application forms in July 2016 and the transfer went ahead. Mr C received his tax-free cash payment and the proceeds were invested in a range of funds, which Portal deemed matched Mr C's attitude to risk.

In 2020 Mr C complained, via a representative to Portal about the advice he received.

Portal considered the complaint and issued its final response to Mr C in October 2020. In summary it said that it had provided suitable advice and had acted in Mr C's best interests. It said that it had recommended Mr C not to transfer the benefits from his DB scheme because of the guaranteed benefits it provided. It said Mr C was intent on proceeding with the transfer to access the tax-free cash so it treated him as an insistent client – the process for which it followed correctly. It said that it had provided Mr C with enough information for him to make an informed decision. Finally it said that because Mr C has now withdrawn all the funds from his pension shows that he was intent on releasing funds early regardless of its advice.

Mr C referred his complaint to our service. An investigator considered the matter and they concluded that his complaint should be upheld. In summary they said that Portal hadn't acted fairly towards Mr C and they didn't think he was a true insistent client. They said Portal only provided Mr C with its suitability report and the reasons why he shouldn't transfer out of his DB pension scheme after he'd been asked and given his decision to go against Portal's advice. They said they didn't think this paid due regard to Mr C's information needs. They noted that the reason Mr C gave for going against Portal's advice was different to the objective noted on the advice paperwork. They went on to say that Portal didn't properly explore the alternatives available to Mr C to meet his objective and that overall they didn't think Mr C would've gone ahead and transferred had Mr C been properly advised and informed.

Portal disagreed. In summary it said:

- it advised against the transfer, which was clear from its letter of 13 June 2016 in which it explained the benefits Mr C would be giving up.
- Mr C clearly selected the option to go against Portal's recommendation and did so in his own time without any pressure.
- it disagreed with the investigator that the different reason Mr C gave for going against its advice in his insistent client paperwork versus the fact-find document was an example of not correctly following the insistent client process – it says it simply outlines that another objective could've been recorded. It says this would've made no difference to its recommendation not to proceed.
- it believes it followed the correct insistent client process and says that its postal correspondence process demonstrates best practice for insistent client transactions.
- It believes Mr C was a genuine insistent client and that the evidence suggests he would have transferred his DB pension scheme benefits with or without Portal's involvement because of his language throughout and his strong objective to release funds early.

Because the investigator wasn't persuaded to change their mind, the case was passed to me for a final 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by the investigator. My reasons are set out below.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr C's best interests (COBS 19.1.6).

A key aspect in this case is Portal's categorisation of Mr C as an insistent client - this is a client that wishes to take a different course of action from the one recommended and wants the business to facilitate the transaction against its advice.

At the time of the advice there were no regulatory rules in place in respect of insistent clients. But in February 2016 the regulator provided guidance on its website about what steps it expected businesses to take when advising an insistent client. There are three key steps, which it set out on its website as follows.

1. *You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.*
2. *You should be clear with the client about the risks of their chosen course of action. If the advice includes a pension transfer, conversion or opt-out, there may be additional requirements. These may include ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable (see COBS 19.1).*
3. *It should be clear to the client that their actions are against your advice.*

The regulator said the advice should be set out clearly in the suitability report, and that it needed to be clear with its client about the risks of their chosen course of action and that he/she is acting against its advice. It also added that if the client used their own words to indicate that they want to act against its advice, this would normally be clear.

The regulator also published additional guidance on its website giving examples of good and poor practice. It gave the following example of good practice relating to suitability reports:

"The adviser gave a personal recommendation in clear and unambiguous terms regarding both the advice on whether or not to transfer and, if the client chose to transfer, the receiving product and the funds into which the client was advised to invest.

The adviser discussed the client's reasons and the risks of not accepting the personal recommendation. The adviser documented the reasons, the discussion and its outcome in a separate document to the original personal recommendation.

Robust warnings were given and documented."

Whilst this was guidance, and not rules, I would've expected Portal to have been aware of this and ensured that the advice and process it followed was consistent with the regulator's expectations.

Portal says that it provided suitable advice and acted in Mr C's best interests. It says that it followed the correct insistent client process and that its postal correspondence process demonstrates best practice for insistent client transactions. Mr C says that he believed his DB scheme pension wasn't making any money and didn't have much value to it. So when he was repeatedly told by Portal that he could access money from his pension, he says he expressed an interest in buying a new motorbike. He says that this was an optional purchase and it wasn't something he would've knowingly jeopardised his financial security in retirement for.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portal's advice process, which meant it didn't act in Mr C's best interests. And I think Mr C likely understood or believed overall that Portal was recommending he should go ahead with the transfer.

I say this because on 13 June 2016 following the telephone discussion Portal had with Mr C about his pension options now that he'd turned 55, it sent him what can only be described as a brief letter with the outcome of its advice. It said that because of the growth rate required to match Mr C's guaranteed benefits from his DB scheme and because he'd be giving up a guaranteed pension of around £2,000 a year from age 65, it recommended Mr C should not transfer away from his DB scheme to access a tax-free cash lump sum. In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr C's best interests. But the information on this form was limited to the loss of guarantees and the growth required to match his existing benefits. While Portal later sent a more detailed suitability report, which I will refer to later on, at this stage Mr C had little information to go off to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portal recommended Mr C should not transfer away from his DB scheme, it said that he could go about doing it regardless, by effecting his right to transfer on an insistent client basis. And while it said this would be against Portal's recommendation, it enclosed the necessary forms Mr C needed to complete and return to pursue this option. And 'option 1' he was presented with was to go against Portal's advice – the second option was to do nothing as per its recommendation. It strikes me that Portal's process here was geared towards facilitating the transfer.

I think if Portal firmly believed in its advice and recommendation and it was acting in Mr C's best interests, not only would it have given more detail upfront and placed greater emphasis on the reasons why the transfer wasn't in Mr C's best interests, it also wouldn't have told him at the same time as delivering its recommendation - albeit a brief one - how he could put it aside and bypass it. I think the wording and the emphasis placed on how Mr C could ignore Portal's recommendation was unfair to Mr C and wasn't in his best interests.

I don't think it was in Mr C's best interest to go against Portal's recommendation – yet Portal made it very easy for him to do so. I also think, given the context and the emphasis placed on this, that Mr C could reasonably have interpreted this overall that Portal was recommending he go ahead and transfer.

I think it ought to have been clear to Portal that Mr C had little knowledge or experience of financial matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find, which suggests Mr C was an experienced investor – in fact it appears he was completely inexperienced.

I'm mindful too that in carrying out the assessment of Mr C's attitude to risk, which it deemed to be 'balanced', it asked him a number of questions, the answers to which I think should've put Portal on notice that it had to be careful if it was to take matters through the insistent client route. For example Mr C agreed that he would be described by others as a cautious person; he wasn't comfortable investing in the stockmarket; he didn't find investment matters easy to understand; and most importantly in my view, he indicated that it usually took him a long time to make up his mind about financial matters.

I can see that Mr C's insistent client forms included a section where he put in his own words why he wanted to access his pension fund early. And while this was something the FCA guidance pointed to as being good practice, I don't think Mr C's response adequately demonstrates that he knew and understood the risks involved and the recommendation being made. I say this not only because the majority of the form was pre-completed and Mr C simply had to tick a box to say that he understood, but crucially as I indicated earlier on, he hadn't yet received Portal's full suitability report and had time to digest it before deciding to go ahead anyway. So I'm not persuaded Mr C was able to make an informed choice here. I also have concerns about the reasons Mr C gave for deciding to go against Portal's advice, which doesn't reflect his objective in the advice paperwork. I'll discuss this later on.

It was only after receiving Mr C's confirmation that he wanted to proceed with the transfer that Portal sent Mr C its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, this was followed by a positive recommendation, advising Mr C to transfer his benefits to facilitate a flexible drawdown pension. And this was all set out under a heading titled '*Our recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portal needed to give Mr C advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr C advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report after securing Mr C's confirmation to proceed on an insistent client basis.

So, by recommending that Mr C transfer his benefits to a particular scheme, not only did this undermine the recommendation not to transfer, I think Portal has effectively recommended that he transfer out of his DB scheme. If Portal didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr C's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. It couldn't separate out the elements. For this reason, I think on receipt of the full suitability report Mr C likely believed Portal was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Turning back to the different reasons Mr C gave for wanting to access his pension early - in his insistent client forms Mr C said that he wanted to be in control of his finances by accessing money when he needed to. He said that he wanted to access money for rent and bills if he had to - for example if he had an accident or was ill and his work benefits stopped. But on the advice paperwork Mr C said he wanted to buy a motorbike.

I can see Portal says this difference wasn't an example of it not correctly following the insistent client process. It says it simply shows that another objective could've been recorded - albeit it says this wouldn't have made a difference to its recommendation not to proceed.

But I think this highlights serious failings on Portal's part. Firstly I think in acting in Mr C's best interests this apparent difference in objective and reason for wanting to go against its advice ought to have prompted it to have queried things with Mr C and to have asked him questions to better understand things before continuing to facilitate an irreversible

transaction to transfer his pension. It strikes me that from what Mr C describes in his insistent client form, his objective could be met by building up his emergency fund – something his recorded disposable income would have allowed – and by addressing Mr C's protection needs through an insurance policy such as income protection. I don't think it was necessary for Mr C to gain access to his pension monies early to achieve this.

But Portal didn't consider these alternatives to address his needs - instead it appears to have ignored or overlooked what Mr C said and proceeded to send him its full recommendation based on his original objective. If Portal understood Mr C's objective had changed or he had an additional objective, then this should've been documented in the advice paperwork, so that when it delivered its recommendation to Mr C it was clear that Portal didn't think it was suitable advice to transfer from his DB scheme to a personal arrangement for this purpose.

Secondly I think this issue brings into doubt that Mr C's insistence to access his pension to buy a motorbike was set in stone or a firm objective as Portal appears to believe. If it was, then I would've expected Mr C to have said so in his insistent client form. But he made no mention of it here. I think this supports what Mr C says that it was an optional purchase and that the idea only likely came about after he was told he could get access to his pension monies early.

I acknowledge there were no specific insistent client rules at the time. But I consider the rules and guidance that were in place at the time were clear that Portal had to act with due care and skill and in Mr C's best interests. And by not seeking to properly understand Mr C's objectives and what he was really trying to achieve before carrying things out, I'm not persuaded this was acting in Mr C's best interest.

Ultimately I don't think Mr C was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objective(s). No assessment of his income needs into retirement and how his DB scheme income fitted into this was carried out. And no alternatives were discussed for his objective of wanting to access money to help pay his rent and bills if he was off work sick as I said above. I also think Portal paid little attention to and easily disregarded the reasonable and apparently affordable alternative of Mr C borrowing money to buy a motorbike. Furthermore I think Portal gave Mr C a positive recommendation to transfer out of the scheme, which in the circumstances I think would've given him the impression that Portal agreed with his approach.

Overall and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Portal followed meant that Mr C can truly be regarded as an insistent client - I think Portal made it altogether too easy to agree that he was an insistent client. Portal's overall communication with Mr C wasn't clear or fair and it didn't allow him time to think carefully about the advice not to go ahead with the transfer. It didn't act in Mr C's best interests. And it failed to act with due care and skill.

I now need to consider if Portal had followed the insistent client process correctly, whether Mr C would've still gone ahead. Portal says that because Mr C has subsequently withdrawn all of the money from his pension, this shows that he wanted access to his pension early and he would have done this regardless of Portal's involvement.

But if Portal had acted in Mr C's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr C's true objectives at the time, I don't think Mr C would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr C was an experienced investor such that he

possessed the requisite knowledge or had the confidence to go against the advice he was given. I think he relied solely on the advice and process Portal employed.

I can see that Mr C went on to make further withdrawals from his pension in addition to the initial tax-free cash he took at the time. Mr C has told us the monies were used to help his daughters – to pay for an operation and to help out with a property. But I'm not persuaded this demonstrates, as Portal argues, that this means Mr C always intended to access his pension early and would have done so regardless.

As I said above, I think it was Portal that planted the seed in Mr C's head that he could access his pension benefits early – I've not seen any evidence that Mr C set out with the intention of doing so. I also don't think the subsequent withdrawals Mr C made were planned at the time of the advice. It seems to me that Mr C withdrew further funds because he could, by virtue of Portal having made the funds available to him through the transfer. I think the further withdrawals flow directly from Portal's failure to act in Mr C's best interests by not providing with him with suitable advice and failing to communicate with him in a clear, fair and not misleading way as I have set out above. Had Portal emphasised the importance of these funds to Mr C's retirement, I think it's unlikely he would've insisted on accessing them.

Putting things right

A fair and reasonable outcome would be for the business to put Mr C, as far as possible, into the position he would now be in but for Portal's failings. I consider Mr C would have most likely remained in his DB scheme if suitable advice had been given and the correct process followed.

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.

My understanding is that Mr C could've taken his DB pension benefits without reduction at age 62. So, I think compensation should be based on Mr C accessing his benefits at age 62.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr C's acceptance of the decision.

Portal 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 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 a 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 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'. This amount must where possible be paid to Mr C 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 C.

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.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr C the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Portal Financial Services LLP to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Portal Financial Services LLP to pay Mr C any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portal Financial Services LLP pays Mr C the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr C.

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

My recommendation would not be binding. Further, it's unlikely that Mr C can accept my decision and go to court to ask for the balance. Mr C may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 19 July 2022.

Paul Featherstone
Ombudsman