

## The complaint

Mr Q complains about the advice given by Portafina Investment Management Limited ('Portafina') in relation to a deferred defined-benefit ('DB') occupational pension scheme that he held. Portafina processed the transfer of Mr Q's DB scheme benefits to a Self-Invested Personal Pension ('SIPP') on an 'insistent client' basis. Mr Q says Portafina should have clearly recommended that he didn't transfer instead of providing him with insistent client documentation. Mr Q says he's suffered a loss as a result of Portafina's actions.

## What happened

Mr Q approached Portafina in 2018 in response to an advert to discuss his pension and retirement needs.

In November 2018 Portafina completed a fact-find – albeit this hasn't been provided by Portafina despite requests to do so – to gather information about Mr Q's circumstances and objectives. I also understand it carried out an assessment of Mr Q's attitude to risk, which it deemed to be 'moderately cautious'. On 6 December 2018 Portafina sent Mr Q 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 high and because he'd be giving up valuable guaranteed benefits, which constituted his main retirement provision. But Portafina said it could still help Mr Q if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

As part of its recommendation not to transfer, Portafina recommended Mr Q should transfer his existing personal pension instead to release a lump sum to meet his objective. I can see that this part of the advice has not been complained about – but I will make reference to it for the sake of completeness.

On 12 December 2018 Mr Q returned the insistent client form. Where asked, Mr Q 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 19 December 2018 Portafina sent Mr Q a suitability report setting out its advice. The report outlined Mr Q's objectives at the time, which it recorded as: *'This money would make life more comfortable for myself, may not reach 65 years of age, due to lifestyle and health.'* Specifically it said Mr Q wanted to repay a debt, make some home improvements, buy a car, and put money into savings.

The report then set out Portafina's recommendation. It said that it had already recommended that Mr Q shouldn't transfer out of his DB pension scheme because of the benefits he would be giving up – but it said that Mr Q had decided to disregard the advice and that it would be treating him as an insistent client. It went on to propose that Mr Q transfer his pension to a flexible arrangement to enable him to meet his objective.

The report also set out the details of Mr Q's existing DB pension scheme, which

included the transfer value and the amount of pension Mr Q could expect from his scheme at age 65. It also said the critical yield required to match Mr Q's existing scheme benefits was 9.5% or put another way he'd need an extra £34,000 or so on top of the transfer value to achieve a comparable level of income from an insurer.

Mr Q signed the relevant application forms and the transfer went ahead. In June 2019 Mr Q received his tax-free cash payment and the remaining funds were invested in a portfolio which Portafina deemed matched Mr Q's attitude to risk.

In 2020 Mr Q complained, via a representative to Portafina about the advice he received.

Portafina considered the complaint and issued its final response letter on 4 February 2021 not upholding Mr Q's complaint. In summary it said that it had provided suitable advice and had acted in Mr Q's best interests. It said that it had recommended Mr Q not to transfer the benefits from his DB scheme because of the guaranteed benefits it provided. It said Mr Q confirmed he wished to disregard the advice by returning the insistent client forms. It said it carried out the transfer and in doing so complied with the necessary regulatory rules and guidance – but it was ultimately Mr Q's decision to go ahead having been fully informed of the consequences.

Mr Q 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 Portafina hadn't acted fairly towards Mr Q and they didn't think he was a true insistent client. They said Portafina shouldn't have told Mr Q how to disregard its advice at the same time as giving its advice. And they said Portafina only provided Mr Q with its detailed suitability report and the reasons why he shouldn't transfer out of his DB pension scheme after he'd signed the insistent client form, so they didn't think he was in a fully informed position. They went on to say that Mr Q's objectives could all have reasonably been met by only transferring his existing personal pension. Overall they didn't think Mr Q would've gone ahead and transferred had things happened as they should have.

Portafina disagreed. In summary it said:

- it believes it acted fairly and reasonably and with Mr Q's best interest in mind.
- it advised against the transfer and clearly explained this to Mr Q including the benefits he would be giving up.
- Mr Q was not obliged to sign the insistent client paperwork – the telephone and correspondence led business model allows clients to digest information without the pressure of a face-to-face meeting
- It doubled checked Mr Q's understanding of the insistent client process before proceeding.
- Mr Q wrote in his own words why he wanted to proceed with the transfer in accordance with regulatory guidance.
- It believes the evidence suggests Mr Q would've transferred his DB pension benefits with or without Portafina's involvement because of the language he used throughout the process and his strong objective to release monies 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, Portafina should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr Q's best interests (COBS 19.1.6).

A key aspect in this case is Portafina's categorisation of Mr Q 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.

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It sets out three key steps for advisers to take.

1) Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).

2) The information which the firm should communicate to the insistent client is:

- a. that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;
- b. the reasons why the transaction will not be in accordance with the firm's personal recommendation;
- c. the risks of the transaction proposed by the insistent client; and
- d. the reasons why the firm did not recommend that transaction to the client.

Acknowledgement from the insistent client - COBS 9.5A.4

(1) The firm should obtain from the insistent client an acknowledgement that:

- (i) the transaction is not in accordance with the firm's personal recommendation; and
- (ii) the transaction is being carried out at the request of the client.

(2) Where possible, the acknowledgment should be in the client's own words.

Portafina says that it followed the regulatory rules and guidance – it provided suitable advice, acted in Mr Q's best interests and followed the correct insistent client process.

Mr Q says that he didn't really need the money and had he not been provided with insistent client paperwork and been clearly recommended not to transfer his DB pension scheme benefits, he would have stayed in the scheme and limited any transfer to his existing personal pension scheme.

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

I say this because on 6 December 2018 following the telephone discussion Portafina had with Mr Q about his pension options, it sent him a letter with a brief overview of its advice. It said that due to the growth rate required to match Mr Q's guaranteed benefits from his DB scheme; the fact that he'd be giving up those guaranteed benefits; because his income needs in retirement wouldn't be met and he could suffer as a result; and because his DB scheme represented his main retirement provision, it recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum.

In this situation I'd expect to see greater emphasis placed and more detail given on the reasons why the transfer was not in Mr Q's best interests and how his needs could be met by transferring just his existing personal pension. But the information in this letter was in my view limited. While Portafina later sent a more detailed suitability report, which I will refer to later on, at this stage Mr Q 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 Portafina recommended Mr Q should not transfer away from his DB scheme, it said that he could go about doing it regardless, under the heading *'What happens if you still want to go ahead?'* by effecting his right to transfer on an insistent client basis. And while it said this would be against Portafina's advice, it enclosed the necessary forms Mr Q needed to complete and return to pursue this option. It strikes me that by introducing the concept of an insistent client at this stage, Portafina's process here was geared towards facilitating the transfer.

I think if Portafina firmly believed in its advice and recommendation and it was acting in Mr Q'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 Q'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 Q could ignore Portafina's recommendation was unfair to him and wasn't in his best interests.

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

Despite repeated requests, Portafina hasn't provided a copy of the fact-find it used to capture Mr Q's personal details and circumstances at the time. But nothing I've seen suggests Mr Q was knowledgeable or had prior experience of financial matters. I'm mindful too that Portafina categorised Mr Q's attitude to risk as 'moderately cautious'. In addition Mr Q was also unemployed at the time and he says his health was poor and was taking medication. This suggests to me Mr Q was likely in a vulnerable position. All of these things I think should've put Portafina on notice that it had to be careful if it was to take matters through the insistent client route.

I can see that Mr Q'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 Q'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 Q simply had to tick a box to say that he understood, but crucially as I indicated earlier on, he hadn't yet received Portafina's full suitability report and had time to digest it before deciding to go ahead anyway. So I'm not persuaded Mr Q was able to make an informed choice here. I'd add here that it strikes me as somewhat odd that the reasons Mr Q gave for deciding to go against Portafina's advice, don't quite match the specific objectives recorded in the advice paperwork. I'll come back to this later on.

It was only after receiving Mr Q's confirmation that he wanted to proceed with the transfer that Portafina sent him its full suitability report. And while this repeated the recommendation not to transfer out of the DB scheme, this was immediately undermined because it was followed by a positive recommendation, advising Mr Q to transfer his benefits to release the tax-free cash. And this was all set out under a heading titled '*Our recommendation*'.

In order to fulfil the regulator's requirements under COBS 9.2, Portafina needed to give Mr Q 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 Q advice on the advice to transfer, and only considered the suitability of the proposed solution in the full suitability report after securing Mr Q's confirmation to proceed on an insistent client basis.

So, by recommending that Mr Q transfer his benefits to a particular scheme, not only did this completely undermine the recommendation not to transfer, I think Portafina has effectively recommended that he transfer out of his DB scheme. If Portafina didn't think that transferring out of the DB scheme to a personal pension arrangement was in Mr Q'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 Q more likely than not believed Portafina was recommending he transfer out of the DB scheme, and it was reasonable for him to do so.

Mr Q's overarching objective was recorded as wanting to make life more comfortable. On the advice paperwork, it said specifically he wanted access to a lump sum to tackle a debt, make home improvements, buy a car and put some money into savings. But interestingly in Mr Q's insistent client form where he used his own words to say why he wanted to transfer against Portafina's recommendation, he made no mention of repaying debt. Home improvements appears to have changed or been clarified perhaps to mean replacing some household goods. He said he '*maybe*' wanted to buy a car and wanted some clothing.

Firstly I think in acting in Mr Q's best interests these apparent differences in reasons for wanting to go against its advice ought to have prompted Portafina to have queried things with Mr Q and to have asked him questions to better understand things before continuing to facilitate an irreversible transaction to transfer his pension. I accept these different reasons might appear small or subtle. But at the very least, if Portafina understood or realised that Mr Q's objectives had changed – even slightly - then this should've been documented in the advice paperwork, so that when it delivered its recommendation to Mr Q it was clear that Portafina didn't think it was suitable advice to transfer from his DB scheme to a personal arrangement for these purposes.

Secondly I think this issue brings into doubt that Mr Q's insistence to access his pension was for set or firm objectives as Portafina says was the case. None of the reasons Mr Q gave suggest he had a critical or an immediate pressing need to access a lump sum for. Indeed I can see Mr Q has said these things weren't necessary and that the income he was receiving from his benefits met his everyday needs.

It's also striking that the advice paperwork documents that Mr Q had a need for a lump sum that precisely matched that of the maximum amount of tax-free cash he could take. If Mr Q

did only need to replace a few household goods and buy some clothes for example, he didn't need access to over £11,000. I think it's likely here these reasons only came about after he was told the amount he could access tax-free from both of his existing pensions. I think he was likely seduced by the sum of money on offer.

But given Mr Q's circumstances, I think it's likely he did have a need for a lump sum to repay a debt. While Portafina hasn't provided a copy of the fact-find, which should've recorded the details of the debt, I think it's likely that given Mr Q wasn't working, repayment of that debt and the resulting decrease in his monthly expenditure would've gone towards making his life better as he wanted to do. It strikes me that this was Mr Q's primary objective and possibly this was the only thing he needed a lump sum for.

But either way, and on the basis that Mr Q didn't have any other means at his disposal such as savings, it seems to me that Mr Q's objectives could have been addressed by only transferring his existing personal pension and with a clearer focus on the actual lump sum he really needed. I don't think it was necessary for Mr Q to gain access to his guaranteed DB scheme pension monies early to achieve his objectives. And I think in acting in Mr Q's best interests, Portafina should've made this clearer to Mr Q.

I think the rules and guidance that in were in place at the time were clear that Portafina had to act with due care and skill and in Mr Q's best interests. And by not seeking to properly address and consider Mr Q's true objectives and be clearer that his objective could be fully met by transferring only his existing personal pension to release what he needed, I'm not persuaded this was acting in his best interests.

Ultimately I don't think Mr Q 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 because of the amount of money available and because this was the only way to meet his objective. And because importantly, I also think Portafina ultimately gave Mr Q a positive recommendation to transfer out of his DB scheme, which in the circumstances I think would've given him the impression that Portafina 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 Portafina followed meant that Mr Q can truly be regarded as an insistent client - I think Portafina made it altogether too easy to agree that he was an insistent client. Portafina's overall communication with Mr Q wasn't clear. It didn't act in Mr Q's best interests. And it failed to act with due care and skill.

I now need to consider if things had happened as they should have and had Portafina followed the insistent client process correctly, whether Mr Q would've still gone ahead.

Having done so, if Portafina had acted in Mr Q's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr Q's true objective at the time, including making it clear that it could be met by only considering his existing personal pension, I don't think he would've insisted on going ahead with the DB pension transfer. As I've outlined above, I don't consider Mr Q was an experienced investor such that he possessed the requisite skill, knowledge or had the confidence to go against the advice he was given.

So if things had happened as they should have, taking everything into account, I'm not persuaded Mr Q would have insisted on going ahead with the transfer of his DB pension scheme and would most likely have followed the advice to only transfer his existing personal pension.

## Putting things right

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

Portafina 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 Q could've taken his DB pension benefits without reduction at age 65. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

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 Q's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr Q'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 Q 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 Q 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 any final decision to the date of settlement for any time, in excess of 90 days, that it takes Portafina to pay Mr Q.

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.

I can see the investigator also recommended an award of £300 for the distress and inconvenience the matter has caused Mr Q. And taking everything into account, including that I consider Mr Q is now at the age when his retirement provision is likely of increasing importance to him, I think the unsuitable advice has caused him distress. So I think an award of £300 is fair in all the circumstances.

### **My final decision**

Determination and money award: I uphold this complaint and require Portafina Investment Management Limited Financial to pay Mr Q the compensation amount as set out in the steps above, up to a maximum of £160,000.

Portafina Investment Management Limited should also pay Mr Q £300 for the distress and inconvenience this matter has caused.

Where the compensation amount does not exceed £160,000, I would additionally require Portafina Investment Management Limited to pay Mr Q any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Portafina Investment Management Limited to pay Mr Q any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portafina Investment Management Limited pays Mr Q the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr Q.

If Mr Q accepts this decision, the money award becomes binding on Portafina Investment Management Limited.

My recommendation would not be binding. Further, it's unlikely that Mr Q can accept my decision and go to court to ask for the balance. Mr Q 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 Q to accept or reject my decision before 15 August 2022.

Paul Featherstone

**Ombudsman**