DRN-3302156

The complaint

Mr S complains about advice he was given to transfer the benefits from two defined-benefit (DB) occupational pension schemes (OPS) to a personal pension plan. He says the advice was unsuitable for him and believes this has caused him a financial loss.

Portal Financial Services LLP is responsible for answering this complaint. To keep things simple I'll refer to "Portal". I'll also refer to the two pensions as "OPS 1" and "OPS 2".

What happened

Mr S approached Portal in 2017 to discuss his pensions. I can see there were some administration issues which meant OPS 1 was the subject of advice from Portal first; this was in June 2017. OPS 2 was the subject of later advice, in December 2017. Mr S's circumstances didn't really change much in this short time. The information gathered by Portal about Mr S was broadly as follows:

- Mr S was 55 years old, working in the local authority sector, married and earning around £18,200 per year (gross). Mr and Mrs S had one dependent child at home, and they rented a council property. Mrs S wasn't currently employed.

- Mr S's only other assets at the time seem to have been his pensions. He said he had no disposable income from his salary after outgoings, no savings and he had some debt. This was described as loans totaling around £2,700 (which had risen by around £1,000 by the second advice session). There was also some credit card balance(s) which looks like he was paying a monthly amount of £59 towards.

- Portal said the Cash Equivalent Transfer Value of Mr S's two pensions were £75,797 for OPS 1; and £3,856 for OPS 2.

- In the light of recently changed rules - 'pension freedoms' - Mr S had an aspiration to access his pensions as he was aged 55, although he said he didn't intend to actually retire until aged 67.

Portal went on to recommend in two suitability reports that Mr S should transfer out of his DB schemes – both OPS 1 and OPS 2.

For OPS 1, Portal noted Mr S's intention to access the pension at 55, take a tax-free lump sum and to invest the rest. Portal highlighted Mr S's wish to access these funds more flexibly, take more control of his pension matters, take investment risks and pass on money after his death in a way that better suited his circumstances. For OPS 2, which came from advice in December 2017, Portal's suitability report pointed out he'd be able to repay debt and buy a motorhome.

Mr S acted on the advice by transferring out of both schemes. For OPS 1 he drew a maximum 25% tax-free lump sum and put the remainder into a personal pension plan using funds recommended to him by Portal. For OPS 2 the recommendation was basically that he should ‘cash-in’ the whole pension, taking a tax-free element and a taxed element.

Mr S is now represented by a company acting on his behalf which says Mr S was given advice by Portal that was unsuitable and has caused him losses. The complaint has been referred to our Service. One of our investigators looked into the complaint and said we should uphold it. They thought Mr S would not have transferred out if Portal had given him suitable advice. Portal didn’t agree with our investigator and I have considered everything that it said about the investigator’s view with care. As the complaint couldn’t be resolved informally, it’s come 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.

Having done so, I’ve decided to uphold the complaint.

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. This means Portal should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr S’s best interests (COBS 19.1.6).

Having looked at all the evidence available, I’m not satisfied the advice to transfer out of these schemes was in Mr S’s best interests for either OPS 1 or OPS 2.

Financial comparisons and viability

The advice was given after the regulator gave instructions in Final Guidance FG17/9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld. Prior to October 2017 similar rates were published by the Financial Ombudsman Service on our website. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor. The advice here was provided in June and December 2017 respectively.

Portal said the critical yield required to match Mr S’s OPS 1 benefits at age 65 was 9.8% if he took a full estimated pension of £3,394 per year and a tax-free cash element of £22,628. It said the critical yield was 11.1% when compared against an estimated pension of £4,311 per year and a tax-free cash element of £11,530. For OPS 2, the critical yield figures were even higher: 15.9% if taking a pension of £276 per year and a tax-free element of £829.

I’ve also noted the relevant discount rate closest to when the June 2017 advice was given which I can refer to was published by the Financial Ombudsman Service for the period before October 2017 and was 3.7% per year for 9 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I have kept in mind that Mr S’s aspiration at the time was to start accessing his pension savings at around the age of 55, rather than 65. In this case, I have seen that the critical yield figures for earlier retirement were much higher. In my view, these yields were an indication of just how much Mr S was giving up by transferring out, as buying similar benefits elsewhere would require the funds to grow substantially outside his current schemes.

However, I've also considered in detail what Portal has argued about the critical yield; it effectively says that this comparison has no real relevance because Mr S never intended to take out an annuity, the product which critical yield is said to be comparing with. Portal's argument rests instead with what it calls a 'growth rate' which it implied to be much lower and therefore, more achievable.

Nevertheless, I don't think this difference was well explained in the suitability reports or evidenced for Mr S. Firstly, I don't think Mr S would have understood what was being compared here. I think it's highly unlikely the growth rate took account of the significant benefits being given up in the OPS schemes, such as index-linking, certain guarantees and spouse's death benefits. It made no mention of charges either. Portal's recommendation also introduced an investment risk to his pensions. This risk would be sustained throughout the years ahead and the funds were exposed to the possibility that the pension would be depleted early if the hoped-for performance wasn't delivered. And, as Portal's recommendation for OPS 2 was to take both taxed and untaxed cash elements, this would mean there were no funds in this pension element to grow at all.

I've therefore taken all the above information and figures into account, along with the composition of assets in the discount rate and Mr S's attitude to risk which Portal said was 'moderately cautious'. There would be little point in Mr S giving up the guarantees available to him through his schemes only to achieve, at best, the same level of benefits outside. But here, given what I've pointed out above, I think that by transferring out, Mr S was likely to receive benefits of a lower amount, whether his retirement plans came sooner or later. I think all these things indicate it was likely that Mr S would end up with less valuable benefits overall by transferring.

Of course, I accept financial viability isn't the only consideration when giving transfer advice; there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've therefore considered these below to see if the transfer was suitable in spite of the probable lower benefits.

Flexibility and income needs

I mentioned above what Portal's first suitability report said about what Mr S wanted to achieve when he was asking for advice about OPS 1. In my view, the objectives Portal said were mentioned by Mr S imply a good knowledge of pensions, linked financial products, and what could be achieved by transferring from a DB scheme to a personal pension. The listed objectives included - although were not limited to – Mr S's apparent desire to have pension flexibility, ownership and control over his schemes and to take more risks with the funds.

I've considered these apparent objectives, said to originate from Mr S, with the other evidence I've seen in this case about Mr S himself. Everything else I've seen shows that he was certainly not experienced in these matters. There's no evidence he had an investment history to call upon and his main aspiration seemed very much only to access funds. When asked how much he'd need for his retirement Mr S said he was unsure.

I also think Mr S's apparent desire for control over his pension benefits needed to be considered with everything else that was known. As an inexperienced investor, I cannot see that he had an interest in or the knowledge to be able to effectively manage his pension funds. I don't think that control was a genuine objective for Mr S – it was simply a consequence of transferring him away from the DB schemes.

To me, the whole tone of both suitability reports was based simply on a requirement for cash as soon as possible; there was no real consideration of the downsides for his retirement. For example, the rationale for the transfer recommendation in the first report is solely based on accessing cash and I've noted elsewhere in the file that the amount of money Mr S thinks he needs to help deal with his ongoing financial challenges in 2017, is exactly the same as the 25% tax-free element he could access there and then from OPS 1. The listed objectives for OPS 2 are just as succinct, listing only debt repayment and buying a motorhome. So, in my view, on each occasion, Portal took what Mr S wanted on face value and just recommended transferring out to achieve those goals.

I think Portal failed in its duty. It wasn't there to just transact what Mr S might have *thought* he wanted. The adviser's role was to really understand what he needed and recommend what was in his best interests. And, as Mr S had paid a substantial sum for financial advice, I think he would have had a reasonable expectation that the advice would be comprehensive and would consider his situation in detail.

I also don't think Mr S required the flexibility Portal inferred. Mr S had only modest financial means and I think it's also fair to say he was probably being faced with some money challenges when he sought the advice. So, I can certainly see how the prospect of a lump sum from his pension at the age of 55, and a subsequent income or drawdown, might have seemed very useful to him. I think in his situation, the amounts from both OPS 1 and 2 would have represented a lot of money to Mr S.

However, based on the evidence I've seen, I don't think these challenges necessarily meant Mr S was faced with an urgent financial need or a situation which made out a genuine case to access his pensions earlier than the normal scheme retirement ages. Whilst obviously an attractive prospect, taking out tax-free (or taxed) cash needed to be considered very carefully in Mr S's somewhat vulnerable financial situation and balanced against other aspects of his overall circumstances.

This means I haven't seen anything showing that – however modest Mr S's financial means were at that time – he needed money to such an extent as to make all other considerations, such as his longer-term retirement security much less important. There's no suggestion, for instance, that his housing situation was at risk at that time or that his debts were in default or weren't being addressed. The debts quoted at the time seem manageable, although I note a slight increase between suitability reports 1 and 2. But as they appear to be being paid off monthly with quite large sums, the evidence tends to show they would be paid off in the near future. I've also seen nothing showing his life expectancy was considered so short as to make transferring out suitable.

By being advised to transfer and access his pensions at a comparatively young age, Mr S was being exposed to the risk of having less income and guarantees later in life. I think his circumstances were such that he would have needed an income in the years ahead, particularly as he had no other savings. I think Portal seriously underestimated this and it left Mr S facing an uncertain retirement future. Furthermore, because Mr S was only 55 at the time of the advice, and based on what I've seen, he didn't have any concrete retirement plans. He even said his likely retirement would be at 67, some 12 years off. I think this just added to the fact that it was simply too soon to make any kind of decision about transferring out of the DB schemes – after all, OPS 1 was his major retirement provision, and OPS 2 was disappearing completely if he followed Portal's advice.

Accordingly, I don't think it was a suitable recommendation for Mr S to give up all the guaranteed benefits either OPS came with when he didn't really yet know what his needs in later life would be. If Mr S later had reason to transfer out of his OPS he could have done so closer to retirement age. I also can't see evidence that Portal pointed out that certain large purchases might only compromise funds needed for later life.

<u>Death benefits</u>

This issue was cited by Portal as of importance to Mr S but it was poorly explained why this was. Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through a personal pension plan was most likely an attractive feature to Mr S. But whilst I appreciate death benefits are important to consumers, and they might have thought it was a good idea to transfer a DB scheme to a personal pension because of this, the priority here was to advise Mr S about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement.

However, Mr S's schemes already had good death benefits which I think would have been of use had he pre-deceased Mrs S. And, whether the death benefits in the personal pension were improved following a transfer depended on how much remained in the fund at the point of Mr S's passing. Given average life expectancy, and the size of the fund, it was always likely that this fund would be entirely depleted prior to Mr S's death providing no death benefits. I don't think that Portal made this clear.

Overall, I don't think different death benefits available through a transfer to a personal pension justified the likely decrease of retirement benefits for Mr S. I can't see any evidence which shows he placed passing on wealth at or near the top of his objectives for his pensions.

Suitability of investments

Portal recommended that Mr S invest his funds in a personal pension plan. As I'm upholding the complaint on the grounds that a transfer out of the DB schemes wasn't suitable for Mr S, it follows that I don't need to consider the suitability of the investment recommendation. This is because he should have been advised to remain in the DB schemes and so the investment in the new fund wouldn't have arisen if suitable advice had been given.

Summary

I don't think the advice given to Mr S was suitable. What Mr S was advised to do was to give up a guaranteed, risk-free and increasing income provided by his two OPS. By transferring out of these, he was very likely to obtain much lower retirement benefits and in my view there were no other particular reasons which would justify a transfer or outweigh this. As a result of Portal's recommendation, he faced an uncertain future.

I've explained why Mr S shouldn't have been advised to transfer out of the schemes just to repay debts that were moderate, affordable and which already appeared to be within a formulated repayment plan. I have also found the potential for so-called flexible death benefits wasn't worth giving up the guarantees associated with his two schemes.

From the outset of the relationship, I think Portal focussed on the possibility to release cash, rather than acting with objectivity.

So, to be clear, I think Portal should compensate Mr S for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Portal to put Mr S, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr S would have most likely remained both his DB schemes, OPS 1 and OPS 2, if suitable advice had been given.

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.

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 S's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr S's pension plans. 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 pensions isn't possible or has protection or allowance implications, it should be paid directly to Mr S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

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

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

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 Portal pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Portal Financial Services LLP to pay Mr S 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 S 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 S 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 S the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

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

My recommendation would not be binding if he doesn't accept my decision. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 19 July 2022.

Michael Campbell
Ombudsman