DRN-3361707

The complaint

Mr A complains about the advice given by Portal Financial Services LLP ('Portal') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

In 2017 Mr A approached Portal to discuss his pension and retirement needs. Mr A says he approached Portal in response to a promotional leaflet he received.

Portal completed a fact-find during a telephone-based appointment to gather information about Mr A's circumstances and objectives. Portal also carried out an assessment of Mr A's attitude to risk, which it deemed to be 'moderately cautious'.

On 5 October 2017, Portal advised Mr A to transfer his pension benefits into a SIPP and invest the proceeds in an investment portfolio comprising three funds, including a cash-based fund, which Portal deemed matched Mr A's attitude to risk. The suitability report set out the reasons for the recommendation, which can be summarised as:

- To provide Mr A with flexibility and a pension that could adapt to his changing needs and circumstances in the future;
- To maximise tax-free cash to meet Mr A's objective;
- To offer greater choice and flexibility of death benefits;
- To provide Mr A with ownership and control of his pension; and
- To recognise Mr A's willingness to take on investment risk.

Mr A accepted the recommendation and the transfer duly went ahead. Mr A received his tax-free cash sum of around £21,000 and the remaining balance of around £62,000 was invested into his new SIPP.

In 2020 Mr A complained to Portal, through a representative, about the suitability of the transfer advice. Mr A said that he was reliant on his DB pension for his future retirement income having no other pension provision and he had no pressing need to release funds.

Portal acknowledged the complaint but I can't see it issued a final response to it.

Mr A then referred his complaint to our service and an investigator upheld it and required Portal to pay compensation.
In summary they said because of the critical yield or growth rate required to match Mr A's DB scheme benefits, Mr A's attitude to risk and the relevant discount rate at the time, they thought Mr A was likely to receive benefits of a substantially lower overall value than his DB scheme if he transferred. They also said Mr A has little capacity for loss, so they didn't think the transfer was financially viable. They also didn't think there were any other particular reasons to justify a transfer to outweigh this. They didn't think Mr A had a pressing need to access his tax-free cash because the things Mr A wanted to use it for were not essential.

Portal disagreed. In summary it said the advice was suitable because it met Mr A’s objectives and by paying of his debts he was able to increase his security approaching retirement. It said it felt there was a good chance of improving Mr A’s benefits. It said Portal based its recommendation on the growth rate or lifetime hurdle rate, which it said was achievable. It also said it was a more accurate comparison rather than the critical yield given Mr A’s desire for flexibility of income withdrawal. It said the alternative options for raising the funds were considered but it was deemed they weren’t appropriate. Overall it said it explained the risks and gave a balanced view of things, so Mr A was in a position to make an informed decision.

Because the investigator wasn’t persuaded to change their opinion, the complaint was referred 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.

I’ve taken into account relevant law and regulations, regulator’s rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business (‘PRIN’) and the Conduct of Business Sourcebook (‘COBS’). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Portal's actions here.

PRIN 6 : *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Having considered all of this and the evidence in this case, 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 COBS 19.1.6 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 A’s best interests. And having looked at all the evidence available, I’m not satisfied it was in his best interests.

Financial 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, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Mr A was 56 at the time of the advice and the advice paperwork said his intended retirement age was 65. The critical yield required to match Mr A’s benefits at age 65 was 14% if he took a full pension. And if Mr A opted for a tax-free cash lump sum and a reduced pension, perhaps the most likely option, the critical yield was 12%.

The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017, and was 3.5% per year for 8 years to retirement. I’ve kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.

I've taken this into account, along with the composition of assets in the discount rate, Mr A's ‘moderately cautious’ attitude to risk and also the term to retirement. In my view there would be little point in Mr A giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme.

But here, taking the most likely option of Mr A taking tax-free cash and a reduced pension, the critical yield was 12%. This figure was significantly higher than both the regulator’s middle and upper projection rates – it was also more than three times higher than the discount rate. Because of this, I think it was clear Mr A was likely to receive benefits of a substantially lower overall value than his DB scheme at retirement, as a result of investing in line with that attitude to risk and transferring his pension to a personal arrangement.

Because the required sustained growth rate was significantly above the regulator’s upper projection rate, I think it is clear the transfer was not compatible with Mr A’s attitude to risk. I also don’t think Mr A had the capacity for loss – at this time his DB scheme represented the bulk of his future retirement income. To have come close to achieving the level of growth required, in my view would have required Mr A to take significant investment risk, which was far greater than his recorded appetite. And even then I think it’s more likely than not that Mr A would have been worse off financially at retirement if he transferred out. I think the term to retirement was also a limiting factor here.

I can see that Portal says the lifetime hurdle or growth rate is more appropriate figure to use as a comparison in this case, which is what the adviser based their recommendation on. This is because Mr A said he preferred the idea of a flexible drawdown as opposed to an annuity to generate his pension income, which is what the critical yield figure assumes. It seems to me that Portal is implying the relevance of the critical yield figure was limited in this case.

But I don’t think the importance of the critical yield figures should have been downplayed by the adviser, which I think is what happened here. I still consider it gives a good indication of the value of benefits Mr A was considering giving up. It’s also the case that the regulator required Portal to provide it and so deems it a necessary and important part of the decision-making process. So, telling Mr A it wasn’t really relevant to him undermined the analysis the regulator required it to undertake.

Furthermore I think it was relevant in this case because I don't think Mr A was reasonably in a position to say with any degree of certainty whether he wanted to take a regular income at retirement or not. It's recorded that Mr A didn't know the income he needed in retirement. So with no firm plans, I think it's possible that Mr A might want or indeed need some guaranteed income in retirement. And Mr A's DB scheme would provide this.

Overall, given the high critical yield figure in Mr A's case, this should've acted as a clear sign that he would be worse off financially if he transferred out. So I think Portal ought to have told Mr A to retain his DB scheme and that transferring out was not likely to be in his best interests. And for this reason alone, I don't think the advice to transfer out was suitable.

Of course I accept that financial viability isn't the only consideration when giving transfer advice, something Portal has argued in this case. I accept there might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility – access to tax-free cash and income needs

Mr A's objective and the reason for the recommendation to transfer out of his DB scheme was to access his tax-free cash to tackle a debt, make home improvements and to buy a car.

But I don't think this was a suitable reason to recommend the transfer. I say this because firstly and crucially in my view, the adviser did not establish how much money Mr A truly needed to achieve his plans – it was simply based on him accessing the maximum tax-free cash based on the transfer value. I'm not persuaded Mr A really needed this amount of money - I think he was likely seduced by the amount he was told he could get access to.

Mr A had both a loan and an outstanding credit card debt. Portal did record the balances of these – they amounted to around £10,000. But it's not clear to me why Mr A needed to repay these at this stage. Just because Mr A thought it was a good idea didn't mean Portal had to execute what he thought he needed – it was Portal's role to decide what was in Mr A's best interests. I've not seen anything to suggest Mr A couldn't manage his debt repayments. Mr A wasn't planning on retiring any time soon – so he could've continued to service the debt from his earned income. The loan only had two years remaining anyway, so this would've been cleared in full at this time. At this point he could direct more money towards paying off his credit card debt. Given this, I'm not persuaded there was a need for Mr A to repay his debts at this stage and certainly no pressing need to access his tax-free cash earlier than his scheme's normal retirement age to achieve it. I think Mr A had plenty of time to repay his debts before his retirement using his earned income. But I see no reason why Mr A couldn't have waited and used his tax-free cash from his DB scheme at his normal retirement age if a balance remained outstanding at this time.

I can see that in its response to the investigator's assessment, Portal said that by paying off his debt he was able to increase his security approaching retirement. I can't see that this was specifically stated as a reason for recommending the transfer in the suitability report. But in any event, for the reasons I've given above I'm not persuaded Mr A's circumstances dictated that he had a pressing need to clear his debts at this time.

Furthermore, in my view, by transferring his pension he was actually undermining the security he had approaching retirement by giving up the guaranteed income it would provide him with.

The other reason Mr A gave for wanting funds was to make repairs to his roof (I understand he told Portal his roof was leaking.) But Portal didn't understand how much Mr A needed to complete the repairs. And secondly this takes me to the alternative options for raising the money that Portal said it considered at the time. Portal recorded that Mr A had around £5,000 savings as an emergency fund but that Mr A didn't want to use this. Portal said in its response to the investigator that it *was 'prudent for him to keep this small nest egg available for emergencies'*.

But it strikes me that a leaking roof is the very thing that an emergency fund is designed to cater for. And because Portal didn't know how much Mr A needed to carry this out, I think it's possible this could've gone some, if not all of the way to providing what Mr A needed. If Mr A needed more, then I think a realistic possibility was for him to look at borrowing the money. And while I can see the suitability report says lending was discussed but discounted by Mr A because he didn't want to take on further lending or pay any interest, I'm not persuaded this was fully considered given the lack of consideration for the amount of money I think Mr A truly needed and from what he told Portal at the time.

Portal told us that in the fact-find call at the start of its advice process Mr A said: *"...the roof has started leaking, so I need to get a loan to fix that"* And..."*...the car has just broken and it's going to cost more to repair."*

This suggests to me that Mr A was not averse to taking out a loan – far from it, it appears this was his first thought. Furthermore it also suggests to me that that Mr A didn't necessarily need funds for a new car – simply that his existing car was going to cost more to repair. So I think greater emphasis should have been placed on borrowing as a means to achieve Mr A's goal given that I think it's clear he needed substantially less than the £20,000 tax-free cash he was told he could get access to from his pension.

While Mr A already had a loan, I don't think this meant his couldn't borrow further. It was at a time when interest rates were low and given the poorly completed budget planner and lack of meaningful detail, I'm not persuaded that it was reasonable for Portal to conclude that Mr A didn't have any disposable income he could've used to service further borrowing. It was recorded that Mr A had a household income of around £2,500 a month with expenditure of less than £1,000. So even allowing for household bills and food costs, in my view it was likely Mr A did have disposable income. Mr A had managed to save £5,000 and it was recorded that it would be easy for him to reduce expenditure if he needed to. I also think this means Mr A had the potential to replace his emergency fund from excess income if he utilised this towards meeting his need.

Overall I'm not persuaded that Mr A's objective couldn't have reasonably been met this way rather than recommending he make an irreversible decision to transfer his DB scheme to a personal arrangement to help achieve it. I think Portal skirted over the reasonable alternatives and paid little regard for the other options available to Mr A for meeting his need for funds.

The other reason Portal gave for the recommendation to transfer was to provide greater flexibility in how Mr A took his retirement income – he didn't want to buy an annuity. But I can't see that Mr A had a strong, if any need for variable income through his retirement. Mr A's future income needs weren't known at the time – he had no plans to retire any time soon - so I don't know how he could've decided this.
Furthermore, if Mr A did in fact have a need for flexibility in retirement, I think this could've been explored closer to his intended retirement age, which was still several years away. Overall I'm not persuaded Mr A's need for flexibility was a real objective – I think it was simply a consequence of transferring out to a different arrangement to meet Mr A's need for access to cash.

Death benefits

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 arrangement was likely an attractive feature to Mr A. But whilst I appreciate death benefits are important to consumers, and Mr A might have thought it was a good idea to transfer his DB scheme to a personal pension arrangement because of this, the priority here was to advise Mr A about what was best for his retirement provisions.

A pension is primarily designed to provide income in retirement. And I don't think Portal established the extent to which Mr A was prepared to accept a lower retirement income in exchange for higher death benefits. I also think the existing death benefits attached to the DB scheme were underplayed. Mr A was married - so the spouse's pension provided by the DB scheme would've been useful to his spouse if Mr A predeceased her. I don't think Portal made the value of this benefit clear enough to Mr A. This was guaranteed and it escalated – it was not dependent on investment performance, whereas the sum remaining on death in a personal pension was. In any event, Portal should not have encouraged Mr A to prioritise the potential for higher death benefits through a personal pension over his security in retirement.

While I'm mindful that Mr A was 56 at the time, if he genuinely wanted to leave a legacy for his spouse, which didn't depend on investment returns or how much of his pension fund remained on his death, I think Portal should've instead explored life insurance. This didn't have to be a whole of life policy with a sum assured for the full transfer value, which given Mr A's age might have been costly. The starting point ought to have been to ask Mr A how much he wanted to leave to his family, and this could've been explored on a whole of life or term assurance basis, which I consider was likely to be cheaper to provide.

Overall, I don't think different death benefits available through a transfer to a personal pension arrangement justified the likely decrease of retirement benefits for Mr A. And I don't Portal did enough to explore or highlight the alternatives available to Mr A to meet this objective.

Ownership and control

I think Mr A's documented desire for ownership and control over his pension benefits was overstated. Mr A was not an experienced investor and I've seen nothing to show or suggest that he had an interest in or the knowledge to be able to manage his pension funds on his own. So, I don't think that this was a genuine objective for Mr A – again it was simply a consequence of transferring away from his DB scheme.

Summary

I don't doubt that the immediate availability of tax-free cash, flexibility, control and the potential for higher death benefits on offer through a personal pension arrangement would have sounded like attractive features to Mr A. But Portal wasn't there to just transact what Mr A might have thought he wanted. The adviser's role was to really understand what Mr A needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr A was suitable. He was giving up a guaranteed, risk-free and increasing income to meet an objective that in my view with better advice and consideration could likely have been achieved through other means – whether utilising his existing savings and or a combination of a form of borrowing. And this would've been far preferable to Mr A giving up his only guaranteed retirement income. By transferring, Mr A was very likely to obtain lower retirement benefits and in my view, there were no compelling reasons which would justify a transfer and outweigh this.

So, I think Portal should've advised Mr A to remain in his DB scheme.

I now need to consider whether Mr A would've gone ahead anyway, against Portal's advice. Having done so, I don't think Mr A would've insisted on transferring out of his DB scheme and gone ahead in any event. I say this because Mr A was not in my view an experienced investor, or someone who possessed the requisite skill, knowledge of confidence to go against the advice their given in pension matter. So I think Mr A relied solely on the advice he was given. At the time this pension was the primary source of Mr A's guaranteed future retirement provision. So, if Portal had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't suitable for him, and if it had explained that Mr A should explore alternative sources of funding for his home improvement objective and not risk his guaranteed pension to do so, I think that would've carried significant weight. I think Mr A would've accepted that advice.

In light of the above, I think Portal should compensate Mr A for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.**

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr A whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

Mr A has chosen not to wait for the new rules to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr A.

A fair and reasonable outcome would be for the business to put Mr A, as far as possible, into the position he would now be in but for Portal's unsuitable advice. I consider Mr A would have most likely remained in his DB scheme 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.

For clarity, compensation should be based on a 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 A's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr A'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 A 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/her/their 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 A within 90 days of the date Portal receives notification of his/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 Portal to pay Mr A.

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.

If the complaint hasn't been settled in full and final settlement by the time the new rules come into effect, I'd expect Portal to carry out a calculation in line with the updated rules in any event.

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

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

If Mr A 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 A can accept my decision and go to court to ask for the balance. Mr A 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 A to accept or reject my decision before 30 December 2022.
Paul Featherstone
Ombudsman