

The complaint

Mr D complains about the advice given by Portafina Investment Management Limited ('Portafina') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP').

Portafina processed the transfer of Mr D's DB scheme benefits to a Self-Invested Personal Pension ('SIPP') on an 'insistent client' basis. Mr D says Portafina should have clearly recommended that he didn't transfer instead of providing him with insistent client documentation. Mr D says he's suffered a loss because of Portafina's actions.

What happened

Mr D approached Portafina in early 2019 to discuss his pension and retirement needs. I understand this was following an advertisement that he saw.

In March 2019 Portafina completed a telephone fact-find to gather information about Mr D's circumstances and objectives. This showed that:

- He was 55 years old, widowed and had a non-dependent child.
- He was a self-employed taxi driver.
- He was living in rented accommodation.
- Had had one unsecured loan but no other assets or liabilities.

He had a deferred DB scheme pension that had a transfer value of £86,538. And at age 60 he would receive benefits of an income of £4,333 and a tax-free lump sum of £12,937. Or a reduced income of £3,479 and a tax-free lump sum of £23,192.

Portafina also carried out an assessment of Mr D's attitude to risk, which it said was 'moderately adventurous'.

On 20 March 2019 Portafina sent Mr D 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 were his main retirement provision. But Portafina said it could still help Mr D if he wanted to go ahead and it asked him to complete and return the enclosed 'insistent client form'.

On 26 March 2019 Mr D returned the insistent client form. Where asked, Mr D 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.

I understand that after it received the insistent client form Portafina spoke with Mr D to ensure that he understood what he had signed.

On 3 April 2019 Portafina sent Mr D a suitability report setting out its advice. The report outlined Mr D's objectives at the time, which it said were:

'I would like to make my daughter happy, and let her live her life. I also have some work to

be done at home and fund a couple of holidays in the future.

You have stated that you will need £21,634 to achieve this. Specifically:

- *Help with your daughter's wedding (£9,000)*
- *Make home improvements (£8,000)*
- *Go on holiday (£4,634)*

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

The report also set out the details of Mr D's existing DB pension scheme, which included the transfer value and the amount of pension Mr D could expect from his scheme at age 60. It also said the critical yield required to match Mr D's existing scheme benefits was 21.2% or put another way he'd need an extra £120,810 or so on top of the transfer value to achieve a comparable level of income from an insurer.

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

Mr D complained in 2021 to Portafina about the suitability of the transfer advice because the transfer came from a low-risk DB scheme and he shouldn't have been advised to transfer it away, given his lower attitude to risk.

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

Mr D referred his complaint to our service. An investigator upheld the complaint and recommended that Portafina compensate Mr D. In summary he said that Portafina hadn't acted fairly towards Mr D and they didn't think he was a true insistent client. They said Portafina shouldn't have told Mr D how to disregard its advice at the same time as giving its advice. And they said Portafina only provided Mr D 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. Overall, they didn't think Mr D would've gone ahead and transferred had things happened as they should have.

Portafina disagreed. In summary it said:

- It advised against the transfer and clearly explained this to Mr D including the benefits he would be giving up.
- It checked Mr D's understanding of the insistent client process before proceeding.
- Mr D wrote in his own words why he wanted to proceed with the transfer in accordance with regulatory guidance.

- It believes the evidence suggests Mr D 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.
- Portafina gave no advice to Mr D to transfer his DB scheme but it did advise on the destination of the funds. It could have said this in clearer terms.
- Mr D 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.

The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make 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 Portafina'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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G 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 D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

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

Mr D says that he thought the advice wasn't right for him, particularly the high charges. And had he not been provided with insistent client paperwork and been clearly recommended to transfer his DB pension scheme benefits, he would have stayed in the 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 D's best interests. And I think Mr D likely understood or believed overall that Portafina was recommending he should go ahead with the transfer.

I say this because on 26 March 2019 following the telephone discussion Portafina had with Mr D about his pension options, it sent him a letter with a brief overview of its advice. It recommended he should not transfer away from his DB scheme to access a tax-free cash lump sum. This was because the growth rate required to match Mr D's guaranteed benefits from his DB scheme was too high; he shouldn't give up the DB schemes 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.

In this situation I'd expect to see a significant emphasis on the reasons why the transfer was not in Mr D's best interests and how his needs could be met by not transferring. But the information in this letter was in my view limited and generic. While Portafina later sent a more detailed suitability report at this stage Mr D had little information to go on, and almost nothing that related to his personal circumstances, to decide if being an insistent client was truly in his best interests.

Yet immediately underneath the brief summary of why Portafina recommended Mr D 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 D needed to complete and return to pursue this option. I think 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 D'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 D'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 D could ignore Portafina's recommendation was unfair to him and wasn't in his best interests.

I don't think it was in Mr D'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 D could reasonably have interpreted this overall that Portafina was recommending he go ahead and transfer.

And nothing I've seen suggests Mr D was knowledgeable or had prior experience of financial matters. I'm mindful too that Portafina categorised Mr D's attitude to risk as 'moderately adventurous'. But he seems to have no other investments, or experience of investments. I don't think he was particularly knowledgeable about financial matters, and a DB transfer is a complex transaction with far reaching consequences. 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 D'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 D'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 D 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 D was able to make an informed choice here.

It was only after receiving Mr D'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 D 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 D 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 D advice to transfer, and only considered the suitability of the proposed solution in the full suitability report after securing Mr D's confirmation to proceed on an insistent client basis. Portafina was clearly giving advice on the whole transfer rather than just the investment link, even if it says it's advice was not to transfer.

So, by recommending that Mr D 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 D'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 D 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 D's overarching objective was recorded as wanting to fund his daughter's wedding, making some home improvements and going on holiday. But these objectives don't seem well defined and conflict with his personal situation and some of what is recorded on the fact find.

The fact find documents that Mr D did want to the cash free lump sum. He said this was very important to him and that he would take a risk to achieve these aims. But he was also living in rented accommodation and so his scope for changing his house would be limited. For example, it's not clear how or why he would replace a kitchen himself in council owned accommodation.

And one of the objectives on the suitability letter was a holiday. But on the fact find this was described as having a couple of 'lads' holidays in the future. Mr D did have surplus income of around £700 a month so I'm not sure why he couldn't have used this to fund his holidays. I don't think this was a real financial objective for Mr D at all. And it shouldn't have formed part of the discussions around his pension planning.

Lastly, I understand that Mr D had borrowed from a family member and he did use the tax free cash to partly repay this. His situation seems more complex than Portafina recorded. In any event Portafina gave advice on a different basis and it's this that I'm considering

But overall I think these factors bring into doubt that Mr D's insistence to access his pension was for set or firm objectives as Portafina says was the case. None of the reasons Mr D gave suggest he had a critical or an immediate pressing need to access a lump sum for. And he did have a reasonable disposable income and so there was scope for other means to meet his capital requirements.

It's also striking that the advice paperwork documents that Mr D had a need for a lump sum that precisely matched that of the maximum amount of tax-free cash he could take. If Mr D did want to improve his accommodation and go on a modest holiday, I think it's likely here these reasons only came about after he was told the amount he could access tax-free from his existing pension. I think he was likely attracted by the sum of money on offer. Without realising the effect this may have on his future income.

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

I think the rules and guidance that were in place at the time were clear that Portafina had to act with due care and skill and in Mr D's best interests. And by not seeking to properly address and consider Mr D's true objectives, I'm not persuaded this was acting in his best interests.

Ultimately I don't think Mr D 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 a straightforward way to meet his wants. And because importantly, I also think Portafina ultimately gave Mr D 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 D 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 D wasn't clear. It didn't act in Mr D'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 D would've still gone ahead.

Having done so, if Portafina had acted in Mr D's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, and addressing Mr D's true objective at the time, including making it clear that he should look at other methods of funding these, 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 D 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 D 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

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

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 D 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. He has chosen not to wait for any new guidance 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 D.

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

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.

For clarity, Mr D has not yet retired, and he has no plans to do so at present. 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 D's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D'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 D 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 D within 90 days of the date Portafina 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 Portafina to pay Mr D.

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 any new guidance or rules come into effect, I'd expect Portafina to carry out a calculation in line with the updated rules and/or guidance 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

Determination and money award: I uphold this complaint and require Portafina Investment Management Limited to pay Mr D 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 Portafina Investment Management Limited to pay Mr D 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 D 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 D the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D 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 D can accept my decision and go to court to ask for the balance. Mr D 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 D to accept or reject my decision before 28 April 2023.

Andy Burlinson
Ombudsman