DRN-4222041

The complaint

Mr B's representative has complained, on his behalf, to Portfolio Financial Consultancy Limited, which has since been acquired by Capital Professional Limited, trading as Ascot Lloyd, about what it considers to be unsuitable advice to access the benefits within his Self Invested Personal Pension (SIPP) policy.

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

Mr B met with an adviser from Portfolio and an existing fact find was updated on 20 February 2020 that noted the following:

- Mr B was co-habiting, in good health and employed as a manager, earning around £61,000 pa
- He had £90,000 on deposit
- His main residence was valued at around £140,000 with no mortgage attached
- He had £18,000 in premium bonds
- He had an Aviva Group Personal Pension (GPP) valued at around £20,000
- His retirement age was 57
- His net monthly income was £2,800 and total monthly outgoing was £3,000

A financial planning report was then issued on 2 March 2020 which detailed that Mr B would:

- Withdraw a tax-free lump of £66,000 from the SIPP he held with LV (this had been the recipient of a defined benefits transfer, valued at around £880,000).
- Withdraw his maximum tax-free cash entitlement (25%) from his Aviva Group Personal Pension plan, followed by a monthly taxable income of £1,040 per month.
- His Aviva funds would be accessed from April 2020 after he finished working
- His income would be tax free as long as he was receiving no other income, as it fell within his personal allowance.

A P45 detailed Mr B's date of leaving employment as 31 March 2020 with £61,501 pay to date.

On 25 January 2021, an email trail between Mr B and his adviser recorded Mr B's preference for monthly statements, and the potential for rebalancing and a transfer for transparency. The e-mail trail also set out that Mr B had been sending in a withdrawal form every three months to take income manually.

On 6 July 2021, an internal Portfolio e-mail recorded that Mr B had been in touch as he was expecting his quarterly income payment from his LV SIPP and wanted to know why it hadn't been paid.

A further internal e-mail then detailed the manual income payments were only made until December 2020/January 2021. Another e-mail said that *'He wants to get the income payment missed backdated, paid, and then set up going forward. Please could you look into doing this. Could you get the form sorted for me today and I'll let him know what we are doing and what the income payment will be. He wants the same amount paid as was done in January.'*

Mr B's representative complained to Portfolio on 10 February 2023, raising concerns that the advice was unsuitable, for the following reasons:

- It didn't consider that he should have been advised to access his pension in March 2020 as he didn't need to access his pension benefits to meet his immediate income needs in retirement.

- On the date he retired, he was comfortable financially. He owned his own home worth approximately £140,000, mortgage-free, and he had over £95,000 invested in a variety of deposit accounts and ISAs.

- These assets were not mentioned in Portfolio's report and included an Aviva pension fund worth £48,000, a Virgin Money Stocks and Shares ISA worth around £60,000, a Lloyds Bank Classic Savings Account worth around £5,000 and a West Bromwich savings account worth around £30,000.

- The absence of any information about his non-pension assets within the suitability report indicated that Portfolio didn't consider Mr B's circumstances as a whole. It didn't think that Portfolio had properly explored whether there might be other ways to meet his immediate and on-going financial needs before advising him to take tax-free cash from his pension.

Portfolio declined to uphold the complaint, however, saying that Mr B contacted Portfolio in November 2019 as he had given four months' notice to his employer and wanted to take a lump sum withdrawal from his pension and commence regular income. Portfolio also said Mr Bennet had very strong pension knowledge, citing his decision to forego four months' salary - via salary sacrifice - without advice, as an example.

Portfolio also said that Mr B accessed his pension in order to replace lost income from work and this evidenced that Mr B's funds on deposit were to be used for other purposes, as had been Portfolio's understanding.

Portfolio also said that Mr B was considering using the funds on deposit for a house purchase.

Mr B's representative didn't accept Portfolio's response and said that he had no plans to relocate or use his savings for a property purchase, adding there was no mention of the relocation or property purchase in the adviser's file.

It further said that Portfolio ought to have mentioned that his savings were earmarked for a house purchase, but it didn't. It added that, even if Mr B was thinking of relocating, he owned his existing home mortgage-free and had a significant level of savings, and therefore Portfolio ought to have discussed the possibility of using his non-pension assets to fund the move.

If Mr B disagreed, it should have discussed his reasoning, and added this to the adviser's recommendation report. But Mr B had said that this never happened as he was never thinking of using his savings in the way Portfolio had said. And no discussion on this occurred.

The complaint was referred to this service, and one of our investigators considered it. He didn't think it should be upheld, saying the following in summary:

- COBS 9.2.1 set out that:

  (1) A firm must:

  (a) take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client

- Mr B's recorded objective was to access a £66,000 lump sum and an initial two months' worth of income (at total of £6,000), and the recommendation achieved this.

- The recommendation report also recorded in some detail Mr B's retirement timeline and the income shortfall between February and April 2020 (as a result of Mr B relinquishing salary in favour of enhancing his tax relievable pension contributions) which would need to be produced from a source other than salary.

- The accessing of tax free cash and taking income below the personal allowance in the next tax year also produced further tax benefits.

- Whilst he'd noted the assertion that Mr B could have accessed other savings instead of his pension benefits, he didn't consider that this is what should have happened.

- He also thought that Portfolio's points about Mr B no longer being in possession of the deposit funds, or having these earmarked for a deposit so that he could move closer to his parents, seemed plausible. This was especially the case given the context provided by emails between Mr B and Portfolio relating to his parents.

- He understood the point relating to the loss of tax efficient growth on the funds withdrawn from the pension, but as Mr B was retiring, removing assets from environments where they were exposed to investment risk may not have been unsuitable.

- Mr B also capitalised on the increase in interest rates by retaining his funds on deposit. This would have enhanced his overall security in retirement.

- Although Mr B could have exhausted his funds on deposit before accessing his pension funds, this wouldn't have run to the six years suggested by Mr B's representative, but to around four years. And this would then have meant that Mr B had no instantly accessible emergency fund to rely upon and would have lost his ISA tax efficiency.

- One of the assets cited as being one upon which Mr B could otherwise have drawn was the Aviva pension fund, but this would have had the same effect. As it was, by using some of his pension assets, he had security and diversification.

- If Mr B hadn't withdrawn any pension income, he would have lost the use of his personal allowance over the time it took to exhaust his funds. Over six years, this would have amounted to around £75,000 of lost allowance. And there was evidence that Mr B was aware of tax efficiency issues, as demonstrated by his decision to sacrifice salary in favour of the pension contribution.

- The investigator further noted that it was likely that Mr B was himself aware that he could access his funds on deposit if he wished, instead of accessing his pension funds. And given that Mr B was submitting forms on a quarterly basis to receive his pension income, and then chased the missing income in 2021, it seemed that Mr B was quite comfortable with receiving the income from his pension fund.

- He added that there was nothing fundamentally wrong with a consumer who had reached retirement deciding to access tax free lump sums and then beginning to draw income from pension funds, whist retaining other funds on deposit.

Mr B's representative disagreed, however, providing statements showing Mr B's total accessible savings at the time to be around £95,000, and saying the following in summary:

- Mr B maintained that his savings were never earmarked for property purchase, and, given that it hadn't been recorded in the adviser's recommendation report, didn't know whence this notion had arisen. The savings had in fact been completely ignored in that report.

- Mr B was advised to take the tax free cash from his pension to do whatever he wished with it, but there was no need to do so, as identified in Portfolio's own paperwork, and he's lost out on tax fax efficient growth as a result.

- Mr B should have delayed accessing his pension benefits. By taking them when he did, in March 2020, he locked in losses caused by the emerging Covid pandemic.

- The FCA had specifically warned against the unnecessary accessing of pension benefits in its guidance note published in April 2020. This contained a specific section relating to risk factors in the current climate, and that, if individuals had access to other assets, there may be fewer long term risks if they accessed those first. Although this note was published a month after the advice was given, it ought to have been clear to Portfolio that it should be considering Mr B's wider circumstances and the pandemic when giving advice.

- Portfolio overestimated Mr B's income needs – they were lower than £3,000 net per month. It simply assumed that his take home pay whilst working would reflect his income needs in retirement. But no in depth analysis of his planned expenditure and how this might change in retirement was undertaken. Mr B considered that his income needs between 2020-2022 were in fact closer to £2,000 per month due to the pandemic. It also wished to noted that Mr B had ceased taking tax free cash from his pension funds each quarter, and had been supporting himself using savings.

- Since 2022, Mr B's income needs had risen to around £2,500 per month, and this meant that his savings could have lasted him for around five years before needing to start accessing his pension benefits. It wasn't necessarily the case that Mr B would have needed to exhaust his savings before doing so, but he could have revisited Portfolio and reassessed his position. It was, however, wrong to have advised Mr B to access his pension benefits as early as he did.

- Although the representative acknowledged the point about Mr B being able to use his personal allowance by accessing his pension early, this ignored the compounded investment growth which could have been enjoyed by Mr B had he not accessed his pension.

- From an inheritance tax (IHT) perspective, Mr B would have been better off delaying access to his pension, as Mr B and his partner weren't married and so didn't benefit from the spousal IHT exemptions on transfers. As soon as Mr B removed money from his pension, any unused sums became part of his taxable estate.

- Mr B's representative also set out what it considered to be factual inaccuracies relating to Mr B's case. It said that the value of Mr B's group personal pension plan with Aviva was £48,000, not £20,000, and Mr B didn't have any premium bonds at the time.

- Mr B didn't approach Portfolio in November 2019 and hadn't given four months' notice to his employer at that time. Mr B recalled a meeting to discuss investment performance with an adviser at Portfolio – and this would have been following the transfer of that adviser from a previous business.

- Mr B gave his notice in January 2020, but was able to shorten his notice period due to the accrual of a significant number of "lieu" days. And Mr B then discussed his pension with Portfolio after he'd handed in his notice.

- Mr B's decisions relating to family matters were after January 2020, at which point he assessed the additional level of care which would be needed to support his parents.

- Mr B hadn't relinquished four months' salary, as had been indicated in the investigator's view, and so this couldn't be taken as in indication of his pension knowledge. And it wasn't fair to suggest that any pension knowledge Mr B held absolved Portfolio of its responsibilities here.

- Mr B followed the advice he was given, having paid for that advice. Mr B had confirmed that he wasn't sophisticated in pensions maters and held his savings in ISAs and fixed rate accounts.

- Until recently, Mr B's pension affairs had been managed by his employer and he'd only made the decision to transfer to a personal pension plan after being given negligent advice by the adviser's previous firm. Mr B's pension knowledge came from "messroom" talk with colleagues and what he'd been told by professional advisers. And once he took subsequent independent financial advice, he stopped taking quarterly tax free cash from his pension.

As agreement couldn't be reached on the matter, the investigator confirmed to both parties it would be referred to an ombudsman for review.

Mr B's representative then submitted further comments as follows:

- Mr B had, as at August 2023, been taking income of £1,320 per month for the previous 18 months – and so this meant that his savings could have lasted at least five years before he needed to consider accessing his pension benefits.

- If Portfolio believed that Mr B was earmarking his savings towards property purchase, which Mr B refuted, this should have been discussed with him and documented in the recommendation report.

- But in any case, one solution to such an envisaged property purchase would have been to take out a mortgage (as base rate was 0.1% at the time) and to leave his savings and investments – which were generally performing well - alone.

- If Mr B wished to live nearer to his parents, Portfolio could have suggested that he rent. Mr B's and his partner's social network was in their local town and so it wouldn't have been attractive for them to move closer to his parents – which would have been for the short-medium term.

- Mr B had also confirmed that he owned his parents' home equally with is brother.

The representative also attached a letter from Portfolio to Mr B dated 2 April 2020, which it noted said the following:

"As discussed, at this stage it is still very difficult to say how markets will perform over the next few weeks and possibly months as the current crisis plays out. In any event, it remains important not to panic, keep to longer-term investment goals using sensible investment portfolios and not to try and time markets, as this is easier to get wrong than right.

It is important to note that when markets have experienced significant and rapid falls in previous times ***the main losers were those that moved to cash and consolidated losses, never to return or having the chance to recover them. It has always been our advice to remain invested during difficult markets conditions. Markets do ultimately normalise, and when they do, those who stay invested may benefit more than those who don't.***

Having discussed the volatility and fall in values currently experienced, we both agree that the best course of action is to remain invested and not make any changes at present.*"* (the representative's emphasis)

This, the representative said, conflicted with the advice given to Mr B to continue accessing his pension benefits throughout 2020 when he didn't need to. It considered that Mr B had suffered a loss due to accessing his pension at a time of falling markets.

The investigator considered the points made, but it didn't persuade him to change his view on the matter. He said the following in summary:

- He acknowledged that Mr B could have accessed is savings instead of his pension funds, but he maintained his position that it was reasonable to do the latter.

- He also noted the statements produced from the time of the advice, but said it wasn't clear as to whether Mr B had used the tax free cash and whether the savings from 2020 were still available to him. But he didn't in any case consider that either position would render the advice unsuitable – he didn't think there was anything wrong with Mr B having accessed his tax free cash.

- He also reiterated his view that Mr B could use his annual personal allowance by drawing income from his pension, and if this was lost over several years, he couldn't get it back.

- He noted the point relating to the possibility of Mr B having taken out a mortgage if he wished to buy a property closer to his parents, or rent one. But he also said that moving home in such circumstances wasn't an unusual step.

- And regarding the letter of April 2020, he said that this was clearly in response to concerns about pulling invested funds out of the market entirely. Many consumers, he noted, were concerned by the pandemic, and were choosing to withdraw invested funds and place them in cash.

As agreement couldn't be reached on the matter, the matter has now been referred to me for review.

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'd firstly say that there are often several ways in which to achieve financial objectives – and my role here is to determine whether the one recommended by Portfolio (and I agree with Mr B's representative that, irrespective of any financial knowledge held by Mr B, it was the professional party here) was suitable.

I take the point about the savings not being mentioned in the recommendation report, but they were noted in the fact find. I also agree that it would have been helpful to set out more clearly the rationale for the withdrawal of the £66,000 tax free lump sum, but whilst I note the comments that this is what Mr B had been advised to do, it's a very specific sum (rather than say a rounded up amount of £100,000 which might have been advised for a more generic purpose), and there's mention in the recommendation report that due to the need to proceed with haste with the withdrawals, a full review hadn't been undertaken.

Clearly, Mr B did have funds on deposit, as evidenced by both the fact find and the statements from the time which have been produced, but in the absence of documentary evidence as to what Mr B's plans were, I need to consider what is more likely than not to have been the case.

And I do think the situation with Mr B's parents is pertinent here, and may well have fed into his thinking at the time about ring fencing funds with which to buy a property closer to them. I note that both Mr B's parents sadly died relatively shortly after the advice, and so the purpose of the ringfencing may also then have become less relevant. But this doesn't mean that the thinking, and planning, in March 2020 may have been quite different.

I do nevertheless acknowledge Mr B's steadfast view that he never had this intention and that this had certainly never been communicated to Portfolio. And I accept that a different interpretation of the facts might be possible in terms whether or not the savings had been earmarked. And I agree that the fact that this wasn't mentioned in the recommendation report is a notable omission.

But even if I'm wrong on the point relating to the earmarking of the funds on deposit, it's not always the case that such funds should be used before pension funds. And I think the representative's basic premise here is flawed. I would suggest that, in terms of certain tax efficiencies on both sides, and other advantages of retaining funds on deposit, prudent financial advice might arguably include a mixture of both. Funds on deposit are in general terms more readily accessible, and again, I'd refer to the required haste of the withdrawal process as mentioned in the recommendation report - and having a mixture of invested and "fixed interest" funds also spreads investment risk.

I also think the investigator has made a good point about Mr B having been able to capitalise on his personal allowance each year by taking his pension benefits as income and leaving the savings as they are. Mr B's representative has pointed to the loss of compounded growth on his pension assets, but £60,000 – two thirds - of Mr B's savings were held in stocks and shares ISAs, and so he was able to capitalise on the personal allowance and enjoy the same or similar type of compounded growth and tax free returns from that part of his savings. And there was also of course in any case no guarantee of "compounded growth" within either the risk based pension or stocks and shares ISA environment.

I've noted the point about the state of financial markets in March 2020 and indeed the letter from the beginning of April 2020, in which Portfolio set out its position that it was better to remain invested in volatile periods rather switching to cash, but I agree with the investigator that this was likely to be general commentary on not switching all of Mr B's (and indeed other clients') invested assets into cash. And it should be borne in mind that, even after the tax free cash withdrawal, Mr B had an overall pension fund of in excess of £800,000.

But there is still a read across from this into the general principle of using uninvested assets in times of market volatility, to avoid the very situation described in that letter. So I've thought carefully about that, and whether Mr B would have been better advised to use the £30,000 or so he held in "cash" (outside of tax efficient stocks and shares ISAs) first - before accessing his invested pension funds.

But having done so, I don't think that advising Mr B to access this first would have been the more obviously suitable solution. I think in such times, it's natural for individuals to want to retain instantly accessible funds for emergency use. It was a very uncertain point in time – and notwithstanding the request to withdraw the very specific amount of £66,000 as tax free cash, the fact that Mr B had elderly parents who were not in good health might well have reinforced that sentiment for Mr B.

So overall, I don't think that accessing the cash part of Mr B's savings before the pension assets would have been an obviously more suitable course of action here. That's not to say that there won't be situations in which accessing other assets before pension benefits might (dependent upon individual circumstances) be the more obviously suitable decision, for example if that would involve relinquishing the guarantees associated with defined benefits. But that wasn't the case here. Mr B's defined benefits had already been transferred into a personal pension plan.

Mr B's representative has also said that the income needs were overestimated, and that instead of the expected £3,000 net per month Portfolio had said would be required, Mr B considered that, due to the pandemic, he would only have needed around £2,000 net per month. I've also noted that Mr B has since taken a lower amount of income. But the effects of the pandemic weren't at the point of the advice (early March 2020), being fully felt. I don't think it's reasonable to expect Portfolio to have factored in extended periods of lockdown, and the effect that this might have on an individual's likely spending, before those lockdowns had even begun.

Furthermore, there was no real reason for Portfolio to expect that Mr B's spending patterns might change. He had, for example, no mortgage to repay, which might have contributed to a lower need for income. And so I don't agree that Portfolio should have anticipated a different level of overall spending. This is borne out by Mr B expecting his income payments, at a particular level, to continue into 2021.

Mr B's representative has also said that, if Mr B wished to buy a property, then instead of accessing either his pension assets or his savings, which it says were generally performing well, he could have taken out a mortgage. But notwithstanding the disparity between what Mr B's representative has said about markets declining at the time of the advice, but Mr B's savings (two thirds of which were held in a stocks and shares ISA) seemingly nevertheless performing well, I'm not necessarily convinced of the financial wisdom of taking an unnecessarily large mortgage when at least some of the cost could be borne by savings.

And the point made by Mr B's representative about low interest rates of course cuts both ways, for both borrowing *and* saving. So if base rate was at 0.1%, then it seems unlikely that Mr B was receiving much more than this in fixed rate accounts, or that this would have persisted beyond whatever fixed rate he may then have enjoyed. But I also think it unlikely that Mr B would have been able to find a mortgage at a lower cost than the interest he was receiving on such savings.

As to the point relating to the IHT disadvantage of Mr B accessing his pension, whilst it's true to say that any unused withdrawn sums would form part of Mr B's estate, I don't think the objective was for Mr B to accumulate further savings which would fall into his estate upon death. The purpose of accessing the pension benefits was to provide a specific lump sum and income - not additional savings.

Had it been the latter, then I might be inclined to agree that withdrawing pension benefits for the purpose of additional savings was an unsuitable course of action. But that isn't the situation here. And I'd also comment that, given the overall assets which Mr B held, it doesn't seem to be the case that Mr B was in danger of breaching his nil rate band allowance.

In closing, I've noted some of the comments around factual inaccuracies, but many of these are contained in a suitability report which Mr B had the opportunity to, and indeed was invited to, correct at the time. And I just can't see the rationale for Portfolio simply fabricating, for example, £18,000 being held in premium bonds. There would seem little point in it doing so, especially when Mr B could so easily dispute this at the time.

My final decision

For the reasons given, my final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 October 2023.

Philip Miller
Ombudsman