DRN-4198920

Financial Ombudsman Service

The complaint

Mr C complains, through a professional third-party representative, about the advice given by Portafina Investment Management Limited ('Portafina') about transferring benefits from existing pension schemes he was a member of, 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

On 18 January 2021, Mr C signed an authority, granting Portafina permission to gather information about three of his pension policies. He had already obtained a transfer value summary, in November 2020, for one of his pensions, which I'll refer to as 'pension A', from the scheme administrators. This was a defined benefit ('DB') occupational pension scheme which he'd accrued benefits in from a previous period of employment between April 1994 and July 1998. The cash equivalent transfer value ('CETV') of the benefits Mr C held in this scheme was £47,393.

Portafina obtained details of Mr C's other two pensions which he'd asked it to consider.

One of these, which I'll call 'pension B', was a section 32 pension policy which would provide an agreed guaranteed minimum pension ('GMP'). The CETV of this policy was £24,066.66.

The third of Mr C's pensions, which I'll call 'pension C', was a defined contribution pension with a transfer value at that time of £1,222.52.

Portafina wrote to Mr C on 8 April 2021, confirming it would arrange an appointment to discuss his pensions. It subsequently went on to complete a fact-find over the phone to gather information about Mr C's circumstances and objectives.

Mr C confirmed he was 55, married, employed but currently furloughed and none of his children were financially dependent. He owned his property with a mortgage which had a balance equivalent to approximately 34% of the value of the property. Mr C also had outstanding unsecured debt totalling approximately £16,000. He said his repayments were up to date and manageable and that he and his wife did have a small amount of disposable income each month, but he wished to reduce his indebtedness. And he and Mrs C had approximately £4,000 in savings.

In addition to the three pensions Portafina was being asked to consider, Mr C said he had a small pension with his current employer and another guaranteed pension, which would provide an income of approximately £1,000 per year.

Mr C said he'd spoken to the provider of pension A about the options available under that policy. He was aware the benefits were guaranteed but these were rigid and didn't provide for draw down, and Mr C indicated he felt he wasn't going to receive the value of the CETV back in his lifetime, so he thought transferring was appropriate. Mr C also said he'd spoken to a different adviser, but they had said they'd charge for advice, their advice was likely to be not to proceed and if that was the case there would be no further options available to Mr C through that adviser. Mr C explained to Portafina that his employment situation was uncertain as he was furloughed and he might be in a position where he needed access to the funds shortly. He also said he had health issues so was conscious he may not receive value for his pension. So, he said he wanted to consolidate the pensions into one place, draw the maximum possible 25% in tax-free cash ('TFC') to pay off all his outstanding unsecured debts, using the TFC left over as an emergency fund, and leave the rest of the pension invested but have the option of drawing on this if he wanted to. And he said this was of significant importance.

Portafina also carried out an assessment of Mr C's attitude to risk, which it deemed to be 'moderately cautious'. It explained to Mr C this categorisation meant he was *"prepared to accept the risk of moderate fluctuations in value in order to try and improve the prospects for growth over time, but really he would be after a stable investment experience"*. Mr C agreed that this reflected his attitude.

On 28 April 2021, Portafina provided Mr C its 'abridged advice outcome'. The document explained that *"The purpose of our abridged advice service is to provide you with free, initial advice on the possibility of transferring your defined benefit (DB) pension schemes without incurring the cost of full pension transfer advice."* The report noted that Mr C's objective was to use the tax-free cash that could be obtained by transferring to clear his unsecured debt and have a small sum set aside for emergencies. It said that Portafina strongly recommended that Mr C not transfer his pension benefits from pensions A and B. The reasons given were that Mr C would lose valuable guaranteed benefits, he had limited alternative retirement provisions, he'd said his debt was manageable, he could meet his objectives through alternative methods such as using savings and disposable monthly income and his income needs in retirement would not be met. The report said Mr C could either accept the recommendation not to proceed or could opt to receive full pension advice, incurring the related fee.

Mr C signed a declaration on 28 May 2021 setting out his intention, having chosen from two pre-printed options. He chose the option which said *"I do not intend to follow your recommendation and wish to proceed to full pension transfer advice to continue to consider transferring my pension…"*

Mr C had a further conversation with Portafina on 7 June 2021 about the fees for the advice. During this conversation Mr C said that it didn't matter what Portafina advised he was going ahead with the transfer because, as it was his money, he wanted the option to take it when he wanted to and that he had looked into this, and this was always what he was going to do. So, he'd want to be an insistent client.

On 8 June 2021, Portafina sent Mr C its 'pension review report' which detailed its full advice. This again said that Portafina strongly recommended that Mr C not transfer pensions A and B. Portafina included analysis, explaining that the CETV's of pension A and B were significantly less than the expected cost of obtaining comparable benefits elsewhere. And it explained the reasons for its recommendation were largely the same as those in its abridged advice, with it also being noted that Mr C had a low capacity for loss. Portafina recommended that instead Mr C should withdraw all of the funds from pension C, and use the funds received, to make a partial repayment of outstanding debt – to meet Mr C's objective of at least reducing this.

The report went on to say that if Mr C still wanted to go ahead and not follow its recommendation, Portafina would need to treat him as an insistent client, which it explained was *"a client who instructs them to continue even though it is against their advice".* It said, if Mr C did opt to do this, there'd be a further call to ensure Mr C fully understood the advice and implications of going against the recommendation.

A form was included with the report setting out two options for Mr C, the first being to accept the recommendation just to draw money from pension C and the alternative being to continue against the advice, in order to release tax-free cash totalling £18,185.

Mr C completed this form on 1 July 2021, confirming he wanted to proceed against Portafina's advice. He ticked to say he understood he was acting against advice, he was giving up guaranteed income, with the statement setting out the levels that pensions A and B were due to provide, and that he understood the risks. He also completed a declaration in his own words saying *"With all the uncertainty in the world and my health not getting better, I want the option to draw down on my pension as it gives me the freedom to spend some now and clear all my debts giving me peace of mind, helping to settle my anxiety and stress. I also want the opportunity for my pot to grow and be released at any time of my choice. This I believe outweighs the reasons not to transfer".*

A follow up call took place on 6 July 2021. In this Mr C said he understood the benefits of his guaranteed pensions but said the one thing that it didn't give him was the freedom to draw it when he wanted to. He also said he understood the advice not to transfer was because of the guarantees pension A and B provided and said if the annual pension those schemes provided was bigger, he would likely leave them where they were. But the annual pension of a couple of thousand pounds, compared to the transfer value wasn't in his view valuable. And he still wanted to clear all of his unsecured debts with the tax-free cash.

Following this call, on 9 July 2021, Portafina sent Mr C a further 'pension review report'. This again reiterated its advice was not to transfer pensions A and B and that the adviser thought Mr C's need for tax-free cash didn't outweigh what he was giving up. But, as Mr C had decided to disregard this advice and proceed, it went on to recommend a pension provider and investment strategy that it felt was appropriate taking into account Mr C's attitude to risk.

Mr C signed a further declaration on 15 July 2021 acknowledging that he was acting against Portafina's advice. He also completed application forms to enable the transfer to the recommended provider.

Mr C's representative complained to Portafina on his behalf in November 2022. They said the advice given by Portafina, where it recommended Mr C transfer from pensions A and B, was unsuitable as it had resulted in Mr C giving up valuable guaranteed benefits. The representative said Mr C had not understood the implications or the risks involved.

Portafina didn't uphold Mr C's complaint. It said it had recommended against transferring and this was made clear to Mr C in writing and verbally throughout the transfer process. Mr C had however chosen to proceed against that advice, confirming repeatedly that he understood the reasons for the advice and the risks involved. And it felt it hadn't acted incorrectly by facilitating this and felt the recommended investment was appropriate to his attitude to risk.

Mr C referred his complaint to our service. An Investigator considered the complaint but didn't think it should be upheld. She said she agreed with Portafina's advice that a transfer wasn't suitable and felt the reasons for this and the risks had been explained. She felt there were some failings in the process Portafina followed – particularly around when the option to disregard the advice was introduced. But she was satisfied that Mr C would always have gone ahead with a transfer, noting he'd already looked to transfer with a different adviser and, in conversations with Portafina, had been clear that he understood the risks but was always going to proceed.

Mr C did not accept the Investigator's findings. As a result, 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 Businesses ('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.

Portafina's advice

Having reviewed the advice summaries Portafina sent to Mr C and listened to the calls he held with it, I'm satisfied that it was clear throughout that its recommendation was not to transfer his benefits from pensions A and B. This was set out in bold in both its abridged and full advice recommendations.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme, or other pension with safeguarded benefits, is that it is unsuitable, and it should only be recommended if it can be clearly demonstrated the transfer is in the customers best interests. And I agree with Portafina that transferring wasn't in Mr C's best interests.

A pension's main purpose is to provide for the holder's income needs in retirement. Pensions A and B guaranteed to provide escalating annual incomes to Mr C from his retirement, for the rest of his life. And to pay a spouse's pension in the event of his death. Portafina concluded that these were valuable benefits and, particularly given that Mr C had limited alternative retirement provisions, thought these should be retained. And I think that was reasonable based on the information provided at the time.

Portafina also carried out a transfer value analysis (as required by the regulator). As part of this, it calculated a transfer value comparator ('TVC') – an estimate of what sum of money Mr C would need to invest at that point on a risk-free return basis to provide equivalent benefits to the DB scheme at retirement. This showed that for pension A, the CETV was around £39,500 less than the amount required to replicate, on a risk-free basis, the benefits being given up. And the CETV of pension B was around £15,800 less than the amount required. In order to make up that deficit, Mr C would've had to achieve growth in his pension, through investments. And I think it was reasonable to conclude that achieving the required growth was unlikely, based on Mr C's attitude to risk, and that he'd potentially be worse off by transferring.

And while Mr C indicated he wanted to take tax-free cash and clear debts, I think Portafina was correct that this was not something that he *needed* to do – as he acknowledged that he was not behind with payments and that they were manageable.

Taking all of this into account, I think it was reasonable for Portafina to conclude that Mr C did not need to transfer and that doing so was not in his best interests. And so, its recommendation that he retain his benefits in pensions A and B was suitable.

In addition to the recommendation being, in my view, suitable and its reports setting out what this was, I'm also satisfied that Portafina explained the reasons for this clearly and consistently in its communication with Mr C. The reasons a transfer was not in Mr C's interests were set out in a specific section of both its abridged and full advice report. And I'm satisfied, having listened to the call recordings provided, that Mr C made it clear to Portafina that he understood these reasons.

And I think the risks involved with disregarding the advice were also explained by Portafina. The loss of guaranteed benefits was referred to throughout its reports – something which Mr C again confirmed he was aware of. The full advice reports also both made it clear what level of benefit pensions A and B would've provided to Mr C and that these were being given up by transferring. And they explained that these benefits were guaranteed for life, whereas benefits under a pension following a transfer were not guaranteed, which again Mr C acknowledged.

So overall, I think the advice provided by Portafina was clear and suitable.

The insistent client process

COBS 9.5A sets out guidance for businesses dealing with insistent clients – including around what information should be explained in its advice and the acknowledgement the business should obtain from the customer.

As I've explained I'm satisfied that Portafina was clear that it did not recommend that Mr C transfer his pension benefits, on several occasions, why it made this recommendation and why a transfer wasn't in line with that recommendation and the risks involved. This is in line with the information that the regulator recommends be shared.

I'm also satisfied that Mr C acknowledged several times that he was acting against Portafina's recommendation by transferring. He signed declarations on 28 May, 1 July and 15 July 2021 to the effect. He also confirmed verbally that he wished to go ahead. And, as I've explained above, the acknowledgment he completed on 1 July 2021 also included an explanation of the reason he was still seeking to transfer in his own words. And this was again in line with the guidance set by the regulator.

This notwithstanding though, like our Investigator, I do have some concerns about the process Portafina followed.

The introductory letter Portafina sent to Mr C, after he first contacted them explained it was gathering information from his pension providers. And it said "*Once this information is received we will contact you to confirm how much tax-free cash you can take from your pension, and to arrange your telephone appointment with one of our paraplanners."* So before even speaking to Mr C about his circumstances and objectives, Portafina emphasised the release of money from the pension through transferring. Which in my view is at odds with the starting assumption in COBS 19.1.6G.

I've listened to a recording of the initial conversation with the paraplanner. In that Mr C explained he'd spoken to another adviser already, but they had suggested that whatever their advice was, Mr C would have to accept that. Portafina at that point emphasised that its approach was that the choice was ultimately Mr C's and that he would have the option of disregarding the advice. While Mr C had indicated he would be looking to transfer, I don't think introducing the option at that stage of ignoring the regulated advice Portafina would subsequently provide was appropriate.

And, while the abridged and full advice were in my view clear that Portafina was recommending against a transfer, they both included forms and instructions for how Mr C could go about ignoring that advice. And the forms largely gave him the option of doing so by simply ticking a box. I don't think this was appropriate. Given Portafina said its advice was not to go ahead, I believe it should've given this advice and the reasons why and left it to Mr C to consider this further. If he had then contacted it to see if it could still help, then it'd have been fair to share this information. But to promote this option at the point it did, in my view, undermined the importance of the recommendation it was making. Which I'm not sure was in line with Mr C's interests.

So overall, I think Portafina made it too easy for Mr C to identify as an 'insistent client' without taking the relevant time to consider the advice and the reasons for it.

Would Mr C have acted differently?

Mr C's representatives have argued that Mr C didn't understand what being an insistent client meant, because of his lack of investment experience. But I'm satisfied that Mr C was aware that he was acting against the recommendation given to him – and this was what being insistent meant.

And while I do think there were flaws with the advice process Portafina followed, for largely the same reasons given by our Investigator, in the particular circumstances of this complaint, I don't think these have resulted in Mr C being in a position he wouldn't otherwise have been in.

Mr C had obtained a transfer value for pension A before speaking to Portafina. He also confirmed in conversation with Portafina that he had researched transferring his pensions before contacting it and that he had spoken to a different independent financial adviser. And it was that other adviser's suggestion that they wouldn't facilitate the transfer in the event it wasn't recommended that prompted Mr C to contact Portafina. So, before speaking to Portafina, it appears Mr C was of the mind to transfer his pension benefits – regardless of advice to the contrary.

Mr C also clearly explained his motivations for doing so and the strength of feeling he had about these. He indicated he didn't expect to receive value for his pensions, based on the guaranteed income pension A and B were due to provide to him. And he was clear that he wanted to improve his financial situation and clear all of his unsecured debt and have the ability to draw benefits from the pension when he chose. While, like Portafina, I don't think clearing debt was something that Mr C *needed* to do, he was clear that having these debts was causing him worry, anxiety and stress and that he was determined to achieve this objective, and to do so by transferring, something he repeated, in his own words, when returning one of the declarations confirming he wished to proceed on an insistent client basis.

I've also listened to the conversations that Mr C had with Portafina. And in these he was clear he intended to proceed, regardless of the advice provided. He acknowledged that he was giving up guaranteed benefits but that he didn't value those highly and that his motivations were of greater importance to him. And he repeated this several times, even after the value of the guarantees had been emphasised by Portafina. He also went as far as to say, unprompted and before he'd received full advice, it didn't matter what the advice from Portafina said as he was going to go ahead with a transfer.

So, taking all of this into account, I'm satisfied that Mr C was minded to proceed with a transfer even before speaking to Portafina. Despite receiving clear reasoning why this wasn't in his interests, this didn't sway his opinion. And throughout the advice process he made this clear. So, even if the option of proceeding against advice had not been set out in the manner it was, I'm satisfied that Mr C would've always sought to proceed with a transfer.

The provider Portafina recommended to Mr C and the investment portfolio suggested for his pension appear to have been in line with his requirements and attitude to risk. So, in the circumstances, I think he'd have always been in the position he is now in. As a result, I don't require Portafina to take any further action.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 3 August 2023.

Ben Stoker
Ombudsman