

complaint

Mrs B's complaint is that she received unsuitable advice from Portal Financial Services LLP on her pension investments as they did not match her attitude to risk.

background

Mrs B had received advice from Portal in 2009 about accessing tax free cash from her two pension plans and the transfer of the remaining funds to an income drawdown arrangement. The plan was invested according to her "moderately adventurous" attitude to risk. A review of the arrangement by Portal and Mrs B in 2010 resulted in her then transferring to an alternative SIPP provider with investments into UCIS funds.

Following a take-over of her SIPP provider, Mrs B became aware that the plan had higher charges than her previous one and that she held investments which were more "specialist" than conventional.

The complaint was considered by an adjudicator, who wrote to Portal in October 2013 explaining his reasons for recommending that the complaint be upheld.

The adjudicator was of the view that the recommendation to transfer into the second SIPP was implemented to allow UCIS funds to be selected which, in his view, were inappropriate to her individual circumstances. It was the adjudicator's opinion that Mrs B should have remained invested in the previous arrangement, had she been fully aware of the high risk nature of the UCIS investments. He recommended that compensation be calculated on the assumption that Mrs B had remained invested in the previous SIPP.

Portal's representative did not agree with the view, however, stating the following:

- The complaint had not been assessed correctly as the consumer had given information since the complaint which contradicted that given at the time of the advice.
- The promotion of the UCIS investments was not inappropriate as there were exemptions which have not been considered.
- The issue of suitability had been considered with hindsight as the FCA had issued guidance after the advice had been given.

The adjudicator wrote to both parties to explain that the complaint would be considered by an ombudsman and asked them to make any further submissions.

Portal's representative then submitted a further response in November 2013, stating the following in summary:

- It was Mrs B's later requirement for income which had caused her to revise her risk rating, which had been properly evaluated at the time of the initial advice in 2009. There was, however, no requirement for income at that time, but rather tax free cash to repay debts and fund her son's further education.
- Mrs B's disposable income at the time was £400pm and she did not envisage taking a retirement income until she was at least 60 – nine years away.
- Mrs B was happy with the prospect of her transferred pension arrangement needing to yield 7.7% pa in order to match the benefits from her ceding Occupational Pension Scheme.

- Although Mrs B has taken an income every year since, Portal could not predict the change in Mrs B's circumstances and it was not until January 2010 that Mrs B stated that she would require income. Even at this stage, this was stated as being required for the first year only.
- By the time of the second review, Mrs B's circumstances had again changed, but she did not have a need for additional income as she was buying out the other director and her business prospects had improved.
- Mrs B's attitude towards risk was recorded as being "balanced/moderately adventurous" and this was supported by the answers given to the risk rating questions asked. Several of the answers indicated a propensity for taking a financial risk, and others were answered in a "neutral" way.
- The second transfer in 2010 was initiated as Mrs B was dissatisfied with the performance of the existing investments and wished to attain the required yield to match her prior pension benefits.
- Mrs B's transfer from the final salary scheme was also consistent with her willingness to take risks to obtain enhanced returns, hence her willingness to accept the advice to transfer into the disputed investments.
- The UCIS investments had been correctly risk rated; the Hypa Raithwaite as low to medium; the Hypa Asia as medium to high risk; and the Koroni Fund as low risk.
- The nature of the funds was detailed and it was stated that they were broadly performing in line with expectations. They had not failed and, although illiquid, were designed to be held for the originally envisaged investment period.
- The transfer to another SIPP provider was made as the existing provider would not invest in such funds, but Mrs B was content with this prospect for the opportunity of higher returns, with no need for income in the near future.
- Regard had not been paid to the exemption for recommending UCIS investments under COB 4.12.
- Additionally, the FSA (now FCA) had not attributed the same risk rating to all UCIS investments, but required firms to assess their individual features.
- In this case, it was stated that both the Hypa Raithwaite and Hypa Asia were asset backed (Property) loan funds and the Koroni fund was backed by debentures on PPI claims loan books of "considerable cash value all of which are independently valued". No account had been taken by this service of the underlying nature of the funds.
- The promotion of the investments was undertaken in the context of the requirements in 2010, rather than more recent regulatory requirements.
- Mrs B was not certified under the exemptions cited by the adjudicator, but by reference to Mrs B's eligibility to receive such promotions under COB 4.12.
- It was in any case Mrs B, rather than Portal, who had identified that the returns from the existing provider were insufficient and she was sufficiently knowledgeable to determine that the traditional investments would not produce the required return.

As agreement has not been reached on the matter, it has been referred to me for review.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I would firstly state that advice to transfer to the income drawdown arrangement does not appear to be in dispute, and I note that Mrs B has confirmed that she was aware of the guaranteed benefits she was relinquishing in 2009 due to the necessity of access to her funds. As such, I do not propose to dwell on that particular advice. Similarly, there appears

to be no complaint regarding the advice to invest in the particular funds chosen with that provider.

My consideration of the matter has therefore focussed upon the advice given in 2010 to transfer to a further SIPP arrangement, within which the UCIS investments were recommended. With regard to the comment that Mrs B did not envisage requiring an income from her arrangement until her retirement date, which was some years off, I would agree that this was recorded and that Portal would have been entitled to rely on that prospect in providing its *initial* advice.

However, due to changing employment conditions, by January 2010, just a matter of months after that initial advice, Mrs B stated that she required income. Indeed, it has been stated that income has been needed every year since. It is also fair to say that, when the further advice was given in 2010, it was recorded that the employment situation seemed to be more positive and that income was not envisaged as being needed until age 65. On the basis of this, largely illiquid investments – the exact nature of which I will deal with presently – were recommended.

However, whilst I would agree that a further income requirement before Mrs B's intended retirement age was not foreseeable as such, given the fact that Mrs B had, just a few months after initially stating that she required no income, then found herself in a position of in fact needing income with no delay, I do not consider that the prospect of requiring income again was particularly unlikely. The nature of Mrs B's employment had seemingly not changed, and the income request made in early 2010 was seemingly made with some urgency.

Indeed, I note that it was in fact stated that the Raithwaite Hypa fund was designed to produce a "steady income stream from which a pension income can be provided if required". However, if the fund was unable to produce the yield, this would have effectively precluded the withdrawal from otherwise illiquid assets.

I have also taken into account Mrs B's willingness to accept the recommendations and note the representative's comment that it was Mrs B's own decision to move away from more traditional regulated investments for the sake of enhanced returns. However, although I have also noted the assertion that Mrs B was a financially aware individual who understood the nature of the investments, I must consider the foundation upon which any such awareness would apparently have been based, and to what degree she was in fact reliant upon Portal's recommendations.

Having reviewed Mrs B's circumstances and history of investments, there does not appear to be any significant level of experience or sophistication which would necessarily have enabled her to understand the nature of the recommended investments, or the losses which might be incurred. Overall, on balance, I consider it more likely than not that, whilst Mrs B may have been aware of the need to take some risk in order to attain the required yield, she was nevertheless reliant upon Portal to recommend investments which would have been not only consistent with her attitude to risk, but also suitable for her wider circumstances.

To address the former, Mrs B was recorded as having a "balanced/moderately adventurous" attitude to risk. Mrs B's answers to the questions would tend to corroborate a willingness to take a degree of investment risk and I would concur that her preparedness to transfer away from a final salary scheme in the knowledge of the guarantees being relinquished would also be consistent with a degree of risk awareness. However, I do note that Mrs B indicated that she preferred the safety of keeping money on deposit, disagreed that she found investment

and financial matters easy to understand, was not willing to take substantial financial risks to earn substantial returns and had little experience of investing in stocks and shares. She also indicated that she would rather be “safe than sorry” when it came to investing and that she would rather not take a high risk/high return strategy, but would instead increase the amount she was saving.

These answers were not “neutral”, as asserted by the representative – in fact they were no more “neutral” than the answers cited in justification of the ultimate risk rating. Furthermore, I am not persuaded that responses such as expressing a preference for keeping money on deposit, for example, would in any case be consistent with a categorisation of “moderately adventurous”.

Nevertheless, on the basis of a willingness to take some risk, I consider that a well balanced portfolio within the income drawdown arrangement would not necessarily have been unsuitable as a “best alternative”, given her circumstances and requirements at the time.

The representative has stated that Mrs B would have been assessed for eligibility for UCIS investments under the COB 4.12 requirement that such products were suitable for Mrs B, but I am not of the view that such suitability could have been reasonably concluded.

In support of this assertion, notwithstanding my prior comments regarding the possibility of Mrs B requiring an income prior to her stated retirement age, it must also be borne in mind that the transferred funds represented the entirety of Mrs B’s pension funds at that point and so she would have been heavily reliant upon this to fund her standard of living in later life, even if income at an earlier stage had not been required.

I therefore have significant concerns regarding the advice to then transfer almost the entirety of Mrs B’s pension funds into UCIS investments. I have noted the comments regarding the solidity of the underlying assets, but they were nevertheless investments which had a very real potential of incurring significant losses. I am not in any case satisfied that the actual risks involved in the investments were correctly characterised – for example it seems unlikely that a “specialist investment” designed to yield 8% pa and then return 125% of capital over seven years could realistically be described as “low risk”. Nor am I persuaded that an investment whose return would be reliant upon the success of PPI claims could be similarly classified, given the degree of unknown outcomes. But irrespective of the actual risk rating assigned to them by Portal, I am not persuaded that the description of the funds would have been consistent with the type of risk which Mrs B would either have been prepared, or perhaps more importantly, was in a position to accept. The fact that they were unregulated, and so did not offer the type of protection afforded to more traditional investments, added to this already elevated risk.

Mrs B may have found the prospect of attaining a critical yield capable of matching the benefits she had relinquished in the final salary scheme to be attractive, but it should have been made clear to her that this level of growth was unlikely to have been consistently achievable with a risk profile which would have been appropriate to her situation. Whilst the investment recommendations may potentially have given her the chance of achieving such a return if investment conditions were favourable, they could also have produced significant losses. Furthermore, the investment of almost the entirety of her only pension fund into UCIS investments to achieve this represented a higher risk than she would in all likelihood have been willing to accept and, given her circumstances, was in my view not suitable advice.

my final decision

My final decision is that I uphold the complaint. In resolution of the matter, Portal Financial Services LLP should undertake the following:

- (1) Calculate the current notional value of the initial income drawdown arrangement, as at the date of this decision, had the funds remained invested as they were, but taking account of actual income withdrawals taken to date from the replacement SIPP (assumed to be taken across all originally held funds equally).
- (2) Deduct the current actual value of Mrs B's SIPP, as at the date of this decision, from (1). Illiquid assets should be treated as having a "nil" value for the purpose of the comparison (see below). Any resulting loss should be paid into Mrs B's SIPP if the provider will allow this. If this cannot be done, the sum should be paid directly to Mrs B as a cash lump sum, after firstly deducting tax at her marginal rate of tax.

If possible, Portal Financial Services LLP should arrange to purchase the units of the illiquid UCIS investments from Mrs B's SIPP. If it is not possible for Mrs B's SIPP to sell the UCIS units, I nevertheless consider that it is fairest to allow Mrs B to be fully compensated now. Assuming that an assignment of the investments is not possible, the actual value should be assumed to be zero, subject to Mrs B, if required by the business, providing an undertaking to pay to it any further distributions from those UCIS investments. Mrs B should note that as any further distributions are likely to be paid into her SIPP, she may need to access other assets in order to comply with any such undertaking given to the business.

Portal Financial Services LLP should also pay Mrs B the sum of £200 for the distress and inconvenience that she has been caused.

If my award is not paid within 28 days of Portal Financial Services LLP receiving notification that Mrs B has accepted my decision, simple interest is to be added at a rate of 8% gross a year from the date of my decision to the date of settlement. Income tax may be payable on this interest.

Philip Miller
ombudsman