DRN-3923411

The complaint

Mr W says the advice given and the arrangements made by Robert Bruce Associates (RBA) to transfer his defined benefit (DB) pension funds into a personal pension with Winterthur was unsuitable.

Mr W is represented by Claire Collinson Legal (CCL).

What happened

Firstly I should clarify which entity this complaint is properly brought against.

RBA became Robert Bruce Associated Limited (RBAL) in April 2014. The advice, which is the subject of Mr W's complaint, was given before April 2014 when the firm responsible was RBA not RBAL.

I appreciate RBAL has responded to Mr W's complaint as this is the current incarnation of the business and I can see there's a deed poll from 2014 where RBAL accepts responsibility for RBA's past business. Where a firm has taken responsibility for another regulated business, S234B of the Financial Services and Markets Act 2000 gives this Service discretion to set up a complaint against either the predecessor or successor firm.

Neither the provisions of a deed poll, nor the provisions of a contract between RBA and RBAL extinguish RBA's liability to Mr W. And generally we think it's appropriate to set up the complaint against the firm which was originally responsible for the advice.

Any agreement between RBA and RBAL to accept the liability is a matter between the firms but this won't affect which firm we consider the complaint against in the views or decisions we issue.

So the appropriate respondent to this complaint is RBA. I've treated all the submissions RBAL has made as being in respect of RBA.

Mr W was a member of a DB pension scheme. He'd accrued benefits with a former employer between July 1988 and October 2009. Having been made redundant in 2009, he says he was under the impression he had to move his pension arrangements away from the scheme he'd been a member of.

Mr W made contact with RBA for advice about what to do with his DB pension benefits nearly a year after leaving his employer. On his authority, in August 2010 RBA contacted the DB scheme administrator to obtain details about Mr W's pension. In September 2010 the administrator responded noting the cash equivalent transfer value (CETV) of his benefits was around £62,000. It also set out information such as the level of his guaranteed annual pension as at the date of his leaving active membership, provision for increases to this and his death benefit entitlement.

In November 2010 there was a flurry of activity. This seems to have begun with completion, possibly over the phone, of a Pension Review Questionnaire. The form, which was subsequently signed and dated by Mr W, captured information about his circumstances, objectives and risk appetite. In summary, at the time Mr W is said to:

- Be in good health.
- Have an annual income of £12,000 per annum from his job as a warehouseman.
- Want to retire at 60.
- Have an attitude to risk of 'low to medium'. From a further list of options, he ticked *'[these pension benefits are] a significant proportion of my financial wealth with which I do not want to take unnecessary risks'*.
- Want the maximum possible lump sum upon retirement and in respect of lump sum death benefits he selected no option, instead annotating the form to state, '*partner to share fund'.*
- Want to maximise the benefits payable during his lifetime as he didn't think he'd be married when he retired.
- He selected an answer which stated *'I have serious concerns regarding the financial stability of my previous employer and I do not want my benefits under their control'.*
- In order of priority, his objectives were said to be for lump sum benefits upon death before retirement, a tax-free lump sum at retirement, and the ability to retire early.

On 11 November 2010 RBA wrote to Mr W, enclosing *'…the necessary documentation required to transfer your existing pension scheme to a personal pension with Winterthur Life'.* The letter went on to state it had pre-populated the Winterthur application form and DB scheme discharge form as much as possible, and had marked where additional information was required from him and his signatures.

Also on 11 November 2010, a pension transfer analysis was conducted by Winterthur. In summary, this indicated that the critical yield (return required from Mr W's new arrangement to match the benefits from his DB scheme) at age 65 was 8.1% for a full pension, or 7.5% where tax-free cash was taken with a reduced pension. The same respective figures were Mr W to retire at 60 were 9.1% and 7.8%.

On 12 November Mr W signed the transfer out form in relation to his DB scheme and the application to open a Winterthur pension. RBA sent the forms to Winterthur on 12 January 2011. It confirmed receipt on 18 January 2011.

On 5 February 2011, Mr W signed a declaration for RBA. It stated that in transferring his DB funds into a new pension plan, it would be carrying out the transaction at his explicit request. It went on to set out his reasons for this and his understanding of the loss of certain protections and guarantees.

On 14 February 2011, RBA wrote to Mr W enclosing a suitability report which was dated 25 January 2011. It asked Mr W to sign a declaration to say he'd received it. After contacting the adviser on 16 February 2011 to point out some errors in the report in relation to his age and how soon he could draw on the benefits, Mr W signed for receipt on 18 February 2011.

RBA's suitability report noted that the transfer of Mr W's DB pension benefits was against its advice. Given his stated requirement to continue with the transaction, it went on to recommend Winterthur as his new pension provider. And that he invested consistent with its assessment of his attitude to risk.

Mr W proceeded with RBA's recommendations. His DB scheme administrator confirmed on 9 March 2011 that payment of his deferred benefits worth around £63,500 had been made to

Winterthur. In December 2011, Mr W made a further lump sum contribution to his new pension plan of £10,000 net. In 2014, Mr W switched his pension away from Winterthur, but RBA wasn't involved in that transaction.

In December 2020, CCL representing Mr W complained to RBA about the suitability of the advice it gave to him in 2010/11. It said that it hadn't met the regulatory obligations placed on it. It says RBA didn't help Mr W understand that there was no requirement to leave his former scheme. It says the way it conducted its business with him, such as the sequencing of completing the transfer documents and delivering the suitability report, meant he took decisions without being fully informed. And it says Mr W formed the impression RBA was recommending he should transfer his pension benefits.

RBA provided its final response to Mr W's complaint on 3 February 2021. It refuted the complaint points raised. It said it provided him with clear and repeated advice not to transfer his DB benefits. It said the assertion that he thought he had to transfer didn't make sense given there was over a year between when he was made redundant and when it produced the suitability report. And it said the report itself made clear he could remain in his former scheme. RBA also said that in any event Mr W had brought his complaint too late for this Service to consider it.

Turning to the matter of the jurisdiction of this Service to consider Mr W's complaint, I note that an Investigator set out why we could look at the case in December 2021. RBA disagreed, so the matter was passed to an Ombudsman for review. He also concluded that we could look at Mr W's complaint.

I note in a recent submission to this Service RBA has again raised the issue of time-barring Mr W's complaint. It didn't raise any new arguments or produce any new evidence to support its judgement here. It said:

"We consider that Mr W would have reasonably been aware that there was cause to bring a complaint at the time of the transfer (if he believed it to be unfair) or when he received his pension statements annually thereafter. It seems that Mr W took many years to bring this opportunistic complaint and we consider it to be time barred. We do not therefore believe that he is entitled to bring a complaint now for a transfer that occurred in early 2011."

"This is because the test is when Mr W should reasonably have a cause to complain about the transfer. RBA's position is that it would have been as soon as he realised he would not have achieved a better return than he would have done from [his DB scheme]. That was clearly marked in the Suitability Report, and which is why the transfer was against advice."

"Consequently, Mr W had, or should reasonably have had, knowledge to bring any complaint at the time of the transfer or when he received the pension statements that recorded that he would receive a pension significantly less than he would have received from [his DB scheme]."

Whenever a case comes to an Ombudsman for a decision on the merits of it, they must still review our jurisdiction. Having done so I agree with the findings and conclusions set out by the Ombudsman in August 2022. I won't rehearse those matters of fact again in full. I think the following extracts from his decision neatly summarise the position:

"The remaining question is when Mr W became aware, or ought reasonably to have become aware there was cause for complaint about the 2011 advice. RBA have essentially said there were two situations when Mr W would or should have known he had cause for complaint. In 2011, when Mr W received RBA's suitability report, and receipt of further annual statements."

“I acknowledge that the suitability report heading clearly says “Against Advice”, and on the second page of the report, goes on to say: ‘You are aware that transferring this scheme means you are losing guarantees and that once the pension is transferred it cannot be reinstated. You are aware that to transfer this scheme is against our advice as you are losing guarantees within the scheme. However, you have decided to transfer the benefits to a personal pension. We are therefore arranging the transfer to a suitable personal pension’.”

“The report sets out Mr W’s requirements, which included a desire for flexibility and a wish to break all ties with his ex-employer. The report discusses pension benefits Mr W would receive if he stayed in the DBS scheme. A transfer analysis report compares the DBS scheme with the proposed private pension provider. It clearly states there is no guarantee regarding the future value of the proposed individual pension. And Mr W did sign a disclaimer in February 2011 acknowledging the course of action may not be in his best long-term interest, and that he was giving up various guarantees associated with his DBS.”

“RBA essentially say the above means Mr W must reasonably have known he’d be worse off in retirement than if he stayed with the DBS scheme – and there can be no argument to say he didn’t become aware of a cause for complaint at this time. I disagree.”

“Mr W knew he was transferring his pension to a new provider, and with that accepting certain risks that had been explained to him. But that’s different, in my view, to being reasonably aware he had cause for complaint. I don’t think it’s likely Mr W would have gone ahead with the 2011 transfer if he’d have thought (or likely thought) from the very beginning that the advice process was flawed in some way. My view on this point is strengthened by the fact Mr W chose to invest a further sum into his ‘2011 pension’ approximately one year later – if he’d have had any concerns about the 2011 advice and transfer a year later, I think it’s unlikely he’d have made a further investment in the way that he did into the pension.”

“And I think the annual statements Mr W subsequently received would, at best, have simply reinforced what he already knew about the new arrangement. Leaving aside they were unable to provide a like for like comparison – DBS retirement at 65 as against new arrangement retirement projection as at 75 – the statements would have recorded the possibility that he would potentially be worse off in retirement. Again, I don’t think this, on its own, would have triggered awareness of a cause for complaint.”

“RBA played no part in the 2014 transfer. Mr W sought advice from an unregulated advisor and following this he agreed to transfer his pension again. I haven’t seen copies of the advice Mr W received in 2014, and so I don’t know whether the circumstances relating to the previous 2011 transfer were discussed, or the suitability of the advice received.”

“However, given the nature of the advice and transfer in 2014 – to an unregulated investment in a property on an island off the coast of Africa – I’m persuaded it’s unlikely the 2014 advice would have focussed in any material way on the suitability of the 2011 DBS transfer.”

“On that basis, I’m prepared to conclude there was unlikely to have been any information provided to Mr W in 2014 that would have alerted him to have reasonable cause for concern that his 2011 transfer advice may have been unsuitable – and accordingly no reason to think he had a cause for complaint about that 2011 advice at that time.”

I think Mr W became aware of cause for complaint in 2020 when he approached CCL for assistance regarding the unregulated 2014 switch of his pension arrangements, as his pension fund was illiquid by that time. In its dealings with him, CCL identified Mr W may have been subject to unsuitable advice to transfer his DB pension in 2011, and further enquiries were made with RBA at this point.

This Service can consider Mr W’s case.

An Investigator considered the merits of Mr W's case and recommended it should be upheld. He didn't think the insistent client process followed by RBA was properly handled and he thought the transfer of Mr W's DB pension funds had been unsuitable. RBA disagreed. Amongst other arguments it says it had given Mr W clear advice throughout the process that he shouldn't transfer his pension. It says he also had an opportunity to change his mind after agreeing to the new arrangement.

As both parties couldn't agree with the Investigator's view, Mr W's complaint was passed to me to review afresh. I issued my provisional decision earlier this month. CCL and RBA provided short submissions in response which I've considered in this 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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr W's complaint. I'll explain why.

How does the regulatory framework inform the consideration of Mr W's case?

The first thing I've considered is the extensive regulation around transactions like those performed by RBA for Mr W. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to 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.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like RBA. As such, I need to have regard to them in deciding Mr W's complaint.

At the time of the advice RBA gave Mr W, COBS 19.1.6 made the following specific point about advising on a transfer from DB schemes:

When advising a retail client who is…a member of a defined benefits occupational pension scheme…with safeguarded benefits whether to transfer…a firm should start by assuming that a transfer…will not be suitable. A firm should only then consider a transfer…to be *suitable if it can clearly demonstrate, on contemporary evidence, that the transfer…is in the client's best interests.*

Under COBS 19.1.2, RBA was required to:

- Compare the benefits likely to be paid under the ceding arrangement with the benefits afforded by the proposed arrangement.
- Ensure that the comparison included enough information for Mr W to be able to make an informed decision.
- Give Mr W a copy of the comparison, drawing his attention to the factors that do and don't support its personal recommendation, in good time.
- Take reasonable steps to ensure that Mr W understood its comparison and how it contributed towards the personal recommendation.

In simple terms, RBA had to assess the benefits likely to be paid and options available under the DB scheme and compare this with those available under the new arrangements proposed before it advised Mr W on what to do.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of "designated investment business" includes "arranging (bringing about) deals in investments".

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

Did RBA adhere to the regulatory requirements placed on it when advising Mr W?

RBA says that it consistently and clearly advised Mr W not to transfer his DB pension. When he told it he wanted to go ahead it asked him to sign a declaration that he was, essentially, an insistent client. He signed the form on 5 February 2011:

"I, [Mr W] …write with reference to the above numbered scheme. Please accept this as my confirmation that you have explained that you will be carrying out this transaction at my explicit request as I am wishing to remove myself from all contact with my previous employer and I have decided to opt out of the above pension scheme."

"I fully understand that this course of action may not be in my long term best interest as a Personal Pension Fund is reliant on future fund performance, which cannot be guaranteed. I am aware that I will give up any entitlement to a Guaranteed Minimum Pension Fund and any other guarantees will be lost by transferring from the scheme to a private arrangement and cannot be re-instated."

Further, RBA points to its suitability report which it sent to Mr W with a short cover letter on 14 February 2011. On the first page of the report it said transferring his pension would be against its advice.

RBA also says that Mr W's argument that he thought he had to transfer his pension when he was made redundant in 2009 doesn't hold water because he didn't take any such action for many months after he'd left his employer.

I've thought carefully about what RBA has said.

Where a firm decides to transact with a customer on an insistent client basis, I think it should communicate with them:

- In terms that are clear, fair and not misleading.
- Having regard for the information needs of the client such that the client can understand.
- That it hasn't recommended the transaction and that it will not be in accordance with the personal recommendation.
- The reasons why it isn't in accordance with that personal recommendation.
- The risks of the transaction proposed by the client.
- The reasons why it didn't recommend the transaction.

RBA also needed to obtain Mr W's acknowledgement that the transaction wouldn't be in accordance with the personal recommendation given by it; and the transaction was being carried out at his request. I think this acknowledgement ideally should've been in Mr W's own words.

In responding to my provisional decision RBA said:

"…the ombudsman appears to be applying current guidance into the thought process on insistent clients. At the time of the transactions in 2010, there were no rules and limited guidance on insistent clients. While it is accepted guidance changed some 5 years later, it is important to apply the rules in place at the time the transaction occurred. It is therefore surprising that the ombudsman states that the acknowledgment the transaction was against advice "should've been in Mr W's own words". Ideally, perhaps. However, in 2010 there were no rules or guidance about insistent client and RBA acted fairly by producing an against advice report and requesting Mr W sign a disclaimer. It's not fair on RBA to say that Mr W should have written an acknowledgment in his own words and to then frame the balance of the provisional decision against RBA because he did not do so when there was no guidance requiring this in 2010."

I've thought carefully about what RBA has said, it's made a fair challenge. But I've concluded that its argument isn't telling for two main reasons.

Firstly, I draw its attention to the specific FCA principles I've already set out. They were in place well before it gave its advice to Mr W. The principles are the keystone from which most other guidance flows, including over time. I think a firm adhering to the principles would've ensured any insistent client process it operated could stand up against what was clearly being provided for in them.

Secondly, as I mentioned in my provisional decision, I have concerns about the process it followed. And, on balance, I concluded it was flawed because:

- There's no evidence Mr W was knowledgeable in pension or investment matters.
- While it's suitability report for Mr W did say proceeding would be against its advice, this was somewhat undermined by recommendations in the same suitability report about how he could proceed. Indeed, there was no explicit recommendation not to proceed in the report.
- The main reason for Mr W transferring his pension benefits was to break ties with his former employer. RBA knew this reason was a second order matter, but I've seen no clear and fully formed attempt by it at the time to help him understand why this wasn't in his interest.

- There are significant gaps in the information Mr W received, for example in terms of the benefits he was giving up; how this compared to projections from his new arrangements and planning for his income in retirement. So how could his decision making be said to be fully informed?
- There are weaknesses with the advice process RBA followed, not least the suitability report which was issued after Mr W had already signed paperwork to transfer his DB pension and open a new plan.

I note RBA has failed to address any of these points effectively in responding to my provisional decision.

As an aside, RBA did raise a related argument about Mr W's investment in 2014 into unregulated products. It said:

"It is evident that Mr W was insistent and gave little bearing to the advice he was receiving or alternatively he was very happy to accept extremely high risks for potential reward. He was clearly unconcerned about the risks of investing in an unregulated investment scheme "in property on an island off the coast of Africa". It is understood that this investment caused Mr W to lose the majority of his pension funds…"

I'm not persuaded by RBA's arguments here. For example, drawing inferences about events from 2010/11 to what happened in 2014 is problematic. Not least because I'm not privy to his objectives and circumstances at the latter date, nor the advice he received. Mr W may or may not have been an insistent client again in 2014, I don't know because I've not seen the information and obviously I haven't assessed the process followed by the business involved. I do though think it's unlikely he would've moved from having a cautious attitude to risk as RBA confirmed in 2010, to accepting 'extremely high risks' in 2014.

I'll now consider my findings in a little more detail.

There's no evidence Mr W had knowledge and experience of pension and investment matters. I think this should've been clear from the information RBA gleaned. This should've put it on notice that it had to be careful if it was to take matters through the insistent client route. And its important context when I consider what happened to him.

There's no dispute RBA's suitability report stated that it was against its advice for him to transfer from his DB scheme. On the second page it said:

"You are aware that transferring this scheme means you are losing guarantees and that once the pension is transferred it cannot be reinstated. You are aware that to transfer this scheme is against our advice as you are losing guarantees within the scheme. However, you have decided to transfer the benefits to a personal pension. We are therefore arranging the transfer to a suitable personal pension."

But there were other areas of the suitability report that muddied the waters, for example when discussing his existing DB scheme benefits RBA said:

"We discussed the specific rights and benefits relating to this pension. I explained that if you were to affect a transfer then a number of these rights and benefits would be given up. Leaving your employer and taking a deferred pension does not necessarily reduce the benefits you have already accrued."

It's unclear what RBA meant here. One interpretation was that if Mr W stuck to his deferred benefits they might be reduced. But how could that be so? As it went on to cover - albeit in a rather disjointed and technical manner - his deferred benefits would enjoy annual uprating linked to statutory minimum provisions or the retail price index.

Further, the suitability report makes the assumption throughout that Mr W had decided to transfer his DB pension. There was no explicit recommendation that he shouldn't do this, with accompanying detailed arguments about why. The report appears largely to have been about facilitating what he told RBA he wanted to do. Indeed the vast bulk of the content of the report was focussed on such.

In the suitability report RBA provided a summary of its recommendations, it said:

"After considering all the options, your present circumstances and future requirements, I am pleased to confirm my recommendations and your requested action."

"Your main requirements, as detailed at the beginning of the report, are met by using the Winterthur Personal Pension. The advantages and disadvantages have been discussed and highlighted in this report, covering the reasons why my advice is appropriate to your circumstances."

"When advising you I also asked how much money you are prepared to commit to your objectives. You confirmed that you are prepared to commit the whole transfer value and are prepared to invest this for at least 5 years. I can confirm that my advice fits within your timescale and stated budget."

RBA stated that if Mr W transferred from his DB scheme it would be against its advice. But in the same suitability report it went on to tell him this could still be done and that it had researched his options. It knew he had a very strong desire to transfer his benefits, because he wanted to sever links with his former employer. No other substantive reasons for the transfer were apparent.

It's unclear from the paperwork RBA has provided why Mr W held what appeared to be a strong opinion on this matter. A box ticked by the adviser on the fact-find indicated that he had serious concerns about the financial stability of his former employer and he didn't want his benefits to remain under its control. On the same form the adviser's handwritten note said:

"Wishes to transfer to a new plan as does not want any ties with old company."

I don't know why Mr W felt like this. Perhaps he had strong feelings about his redundancy from his former employer. RBA doesn't appear to have explored this matter at all.

In responding to my provisional decision RBA said:

"…while the transfer of the pension was partly to break ties with his former employer and it is suggested that this was a "second order matter" to RBA, it was certainly not "second order" to Mr W. At the time of the transfer, the Maxwell pension scandal was less than 8 years previous. The problems with that scandal were alive in Mr W's mind and this was something he discussed with RBA. Mr W had real concerns about leaving his pension in the hands of his former employers and wanted to move it into a personal pension scheme."

I understand Mr W had strong views on the matter, but the problem for RBA is the only evidence on file suggests that his DB scheme was in a healthy financial state. According to the pension transfer analysis report, it remained open to new members. It was also known to be fully funded. That's to say it had sufficient assets to provide for all the accrued benefits it owed and could thus meet its future obligations. In order to be fully funded, the plan had to be able to make all the anticipated payments to both current and prospective pensioners.

In addition, even if Mr W's scheme had got into trouble, it was backed by the Pension Protection Fund which would've guaranteed around 90% of his benefits. And further, the fact was Mr W's employer and his pension scheme were two separate entities.

I can't see RBA made these matters clear to Mr W, even though it was in possession of these facts. Given the link with his employer was said to be such a motivation for the transfer, I'd have expected to see much more on the record about these discussions.

RBA knew that what appears to have been the driving force behind Mr W's desire to transfer his DB pension benefits was a weak argument for the transaction. It hasn't done enough to satisfy me that it provided him with the information and evidence that could've put his mind at rest. Instead it failed to challenge his assumptions and continued to facilitate a transaction that was highly likely to cause him financial harm in retirement.

Another telling problem for RBA in this case are important information weaknesses. For example, in its suitability report to Mr W it failed to provide him with a meaningful comparison of the value of his deferred benefits with the new arrangements. I can't see that RBA effectively moved from high level assertions about the possibility for Mr W to be worse off after the transfer, into the realms of practical monetary implications for his retirement.

RBA doesn't dispute that the transfer of Mr W's deferred benefits was highly likely to erode the value of his income in retirement. But I can't see that he received a direct comparison between his DB scheme benefits and what would be likely from his new drawdown arrangement.

I've not seen how he was given the right information at the right time to be able to weigh properly how far his retirement benefits could be eroded or to appreciate the medium and long term consequences of such.

I find elements of the suitability report unclear. For example in covering Mr W's existing deferred benefits it notes the scheme retirement age (SRA) of 65 and goes on to indicate his guaranteed annual pension of about £4,500. Of course, this excludes any uprating that was provided for between 2009 and his SRA. I understand the equivalent value at SRA would've actually been just over £7,000 per year.

I find elements of the suitability report to be factually incorrect. For example there are references to a pension scheme Mr W wasn't a member of. And references to transfer values that clearly had nothing to do with his benefits.

Linked to these weaknesses in providing Mr W with clear, fair and not misleading information, was the absence of effective retirement income planning by RBA. I can't see his required income in retirement is explored. In the evidence provided by it I've seen no attempt to get to the bottom of this fundamental question.

I've not seen evidence that RBA effectively advised Mr W about the long-term nature of pension planning. The need for a pot of funds to provide an income for many years ahead.

The actual process RBA followed in advising Mr W between August 2010 and February 2011 was fundamentally flawed. That's because by November 2010 Mr W had already been asked by it to give effect to the transfer by signing the DB scheme transfer form and an application to establish his new pension arrangement. Considering it didn't provide him with the suitability report – which was itself somewhat lacking for the reasons I've already set out – it was putting the cart before the horse.

This further strengthens my view about RBA's focus being on facilitating a transaction for Mr W rather than providing him with the fully formed advice about his retirement planning. It's approach more likely than not reinforced what was in his mind about transferring his retirement provision, rather than acting as a bulwark against precipitous action.

So, RBA hasn't satisfied me that it treated Mr W fairly by helping him to understand the significance of the decision he was about to make. He may have signed an insistent client form, but this doesn't absolve it from acting with due care and skill.

RBA has effectively accepted the transfer wasn't suitable. I agree. Its advice was given during the period when this Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Businesses weren't required to refer to these rates when giving advice on pension transfers, but I consider they provide a useful indication of what growth rates would've been considered reasonably achievable when it advised Mr W in 2010.

The pension transfer analysis report commissioned by RBA noted that the investment return (critical yield) required to match Mr W's deferred benefits at retirement was 9.1% per year, if he were to retire at 60 as he indicated, taking all the benefits as an income. If he'd chosen to take TFC, the figure was 7.8%. This compares with the discount rate of 6% per year for eleven years to retirement in this case. This doesn't even factor in matters such as his cautious appetite for risk, which would've meant lower returns. Mr W was more likely than not to receive benefits of a materially lower overall value than provided for in his DB scheme.

The Investigator posed the question, if a transfer wouldn't improve on the benefits of the scheme, there had to be some other strong justification for Mr W relinquishing the valuable guarantees that it provided him – what was this?

I've already dealt with Mr W's recorded desire to sever ties with his previous employer and RBA's failings in that regard. I note the suitability report suggests Mr W wanted control and flexibility over his pension, but there's no convincing evidence this was really of importance to him. In any event, the arguments for such are again weak and it was RBA's role to have made this clear. He was 48 by the time the suitability report was issued, 12 years from his preferred retirement age and 7 years from being able to access any benefits.

From the available evidence, there was no pressing need or strong argument in 2011 for Mr W to move away from his DB scheme. But there were significant risks in him doing so. His benefits in the scheme were guaranteed, with provision for increases each year. And it was his only pension aside from any state pension entitlement. The critical yields were more likely than not unachievable, especially given his cautious attitude to risk.

In respect of Mr W's assessed attitude to risk – I think RBA got this about right. Indeed coupled with his knowledge, experience and capacity for loss, this simply adds to the case that a transfer of his DB pension wasn't appropriate. Setting this aside for one moment, I agree with the Investigator when he concluded its investment recommendations had been reasonable. This is important to bear in mind for redress purposes.

RBA's role was to discern what Mr W's wants and needs were, and why. Its role wasn't simply to facilitate what he wanted without any critical thinking. It had to do these things because it had to act in his best interests. Even though it told Mr W that the transfer would be against its advice, I don't think it's demonstrably met these obligations.

RBA was in a good position to have analysed, tested, challenged and advised Mr W about what was in his best interest for retirement planning. It can't rely on the limited caveats it made in its suitability report to Mr W to escape responsibility for what happened to him.

While RBA acknowledged the transfer of his DB pension wasn't suitable, there were failings in the advice process which meant he wasn't fully informed about his position and I think it's more likely than not the effect of fuller information and better analysis would've been significant to his decision making.

On balance, given these failings, I don't think it would be reasonable for me to conclude the process RBA followed meant Mr W can truly be regarded as an insistent client. Its communications weren't clear or fair. It didn't act in his best interests. And it failed to act with due care and skill.

I think that if RBA had given Mr W appropriate fully formed advice, he wouldn't have gone ahead with the transfer of his deferred benefits. It's unusual for a lay person to seek professional advice and then go against the recommendations received.

To conclude I don't think the transfer of Mr W's deferred benefits could sensibly be regarded as fair to him. As such I think RBA failed to meet the regulatory requirements placed on it when providing him with such advice and making the arrangements.

So, taking all the circumstances of the case into account, it's reasonable to uphold this complaint against RBA and for it to put things right.

Putting things right

I'm upholding Mr W's case. So, he needs to be returned to the position he would've been in now - or as close to that as reasonably possible – had it not been for the failures which I hold Robert Bruce Associates responsible for.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out below. Robert Bruce Associates should pay Mr W the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Robert Bruce Associates pays Mr W the balance.

This recommendation is not part of my determination or award. RBA doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. He may want to get independent legal advice before deciding whether to accept this decision.

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

I consider Mr W would've remained in his DB scheme. Robert Bruce Associates should therefore undertake a redress calculation in line with the pension review methodology, as updated by the Financial Conduct Authority in its Finalised Guidance 17/9.

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 W's acceptance of the decision.

Both parties raised points they wanted the redress to take into account.

In December 2011, Mr W made a further lump sum contribution to his new pension plan – Mr W was concerned this shouldn't artificially inflate the assessed value of his personal pension in the calculations.

And in 2014 Mr W switched his pension away from Winterthur, but RBA wasn't involved in his investment in non-regulated products. It wanted to confirm it wouldn't be held responsible for losses arising from this transaction.

Both parties make proper observations and I would expect the redress methodology to make appropriate adjustments for these and any other relevant matters.

Robert Bruce Associates may wish to contact the Department for Work and Pensions (DWP) to obtain Mr W'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 W's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Mr W'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 W 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 would be tax-free 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 compensation amount must where possible be paid to Mr W within 90 days of the date Robert Bruce Associates receives notification of his acceptance of my final decision. Further interest must be added to the compensation 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, it takes RBA to pay Mr W (excepting that arising from delays with DWP SERPS adjustment data).

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.

Income tax may be payable on any interest paid. If Robert Bruce Associates deducts income tax from the interest, it should tell Mr W how much has been taken off. It should give Mr W a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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 Robert Bruce Associates to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

For the reasons I've established, I'm upholding Mr W's complaint. I now require Robert Bruce Associates to put things right in the way I've already outlined.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 22 February 2023.
Kevin Williamson
Ombudsman