

## **The complaint**

Mr B complains about the advice given by Harbour Rock Capital Limited ('HRCL') in relation to the transfer of benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr B is being represented by a professional third party but for ease of reading this decision I'll largely refer to representations as being made by Mr B.

## **What happened**

In August 2018, Mr B completed a form giving HRCL authority to gather information from his pension providers to provide a no obligation pension review. The form listed five plan providers. HRCL's internal notes indicate it was "unable to trace" four of the pensions. So, it only reviewed details of, and provided advice in relation to, the DB pension that is the subject of this complaint.

On 19 December 2018, HRCL wrote to Mr B to say it had all of the information it needed on his pension and that it was "currently worth £85,167.17". The letter said all Mr B had to do now was book his telephone appointment and invited him to get in touch to do so. The letter went on to say that included with it "is a short summary of your current pensions including the amount of tax-free cash you could access"

Mr B had a conversation with HRCL on 4 January 2019. HRCL has been able to provide a recording of this call. HRCL began by asking Mr B if he'd thought about what they previously discussed and how he'd like to proceed (the previous calls are unfortunately not available). Mr B asked how much tax-free cash ('TFC') he could take from the pension. HRCL confirmed he could take approximately £21,000 but the remainder would need to be transferred. Mr B said that would probably be the best way to help his daughter out at the moment, although acknowledging the amount available meant it was "a bit of a push" to achieve his objectives. HRCL asked if he was happy to do that, which he said yes to. HRCL went on to say that it now needed to complete a fact-find with Mr B which would allow it to go on and give the recommendation and "get everything else sorted out" for him.

Amongst other things, HRCL recorded that Mr B was 56 and co-habiting with his partner. He was currently in good health but had left work approximately four years earlier, was unemployed and would not be able to return to work because of a health condition, for which he was taking ongoing medication. He and his partner rented their home. Mr B's children were no longer financially dependent. HRCL asked when Mr B intended to access income from his pension and he said he understood he was entitled to from 65. So, HRCL recorded that he intended to retire at 65.

HRCL recorded that Mr B wanted access to TFC primarily to help his daughter who was starting a business. He also wanted to pay for some home improvements and a holiday. Mr B confirmed raising funds for these purposes was important to him, he didn't want to take on borrowing to do this and didn't have any savings or other means of raising the money. HRCL said during the call that Mr B had previously discussed wanting to ideally access

£40,000 but was now just looking to take the available TFC, £15,000 of which he intended to gift to his daughter.

HRCL also carried out an assessment of Mr B's attitude to risk. Based on the answers he gave, HRCL said Mr B had a 'moderately adventurous' attitude to risk. However, he also had a low capacity for loss and no investment experience.

On 14 January 2019, HRCL sent Mr B a letter titled "Important recommendation for your pension". This re-capped the reasons Mr B was interested in taking TFC and the income HRCL said he expected to need in retirement. The letter then said that HRCL had completed its research and analysis and that it "strongly recommended that you do not proceed". The letter said HRCL thought proceeding wasn't in Mr B's interests because of the valuable guarantees he'd lose, the DB pension was his main retirement provision, he had a low capacity for loss and the reasons for wanting to withdraw TFC didn't justify the impact on Mr B's retirement planning. It went on to say that it had considered the disadvantages and it felt it was in Mr B's best interests not to transfer. Although HRCL also said that one drawback of not transferring was that TFC from the scheme was likely to be less than 25%.

The letter then had a section headed "What happens if you still want to go ahead?" This said that if Mr B decided he didn't wish to follow HRCL's recommendation, it'd need to treat him as an insistent client. The letter then went on to outline some information about the benefits of the DB scheme and the potential cost of replacing these. It then concluded with a section titled "What you need to do now". It said Mr B had a number of options which were described in the enclosed options form, including how much TFC Mr B could take depending on the option he chose. It asked Mr B to read the form and select the option that he thought was right for him. And it said if he decided to proceed against its advice, to also complete the insistent client declaration.

Mr B returned the options form on 16 January 2019. There were two options, the first being to accept the recommendation to leave the pension where it was with the second to continue against HRCL's advice so that he could release TFC of £21,291. He selected the option to proceed. Mr B also returned the insistent client declaration. This consisted of him agreeing that he understood the recommendation was not to proceed, by transferring he'd be giving up guaranteed benefits (which were briefly outlined) and that he'd understood the risks. There was then a statement for Mr B to explain in his own words why he wanted to proceed. Mr B wrote "My main reason to collect my tax free payment is to help my daughter who is buying a shop with friends. Home improvements which need to be done and to go and see my sister and niece over in Australia who I haven't seen for 20 years."

On 31 January 2019, HRCL sent Mr B its pension recommendation (also known as a suitability report). The covering letter for this said that as an insistent client, HRCL recommended a transfer to a specific pension provider. And if Mr B agreed with this recommendation, he'd receive TFC of £21,291.79, HRCL would manage his remaining pension to maximise its performance and it would review the pension annually. And the suitability report said HRCL was recommending the SIPP as it thought this best suited Mr B's risk profile while allowing him to access TFC.

The transfer valuation of Mr B's DB pension expired before the transfer took place so a new one was required. The updated value of his pension benefits was £80,851.80. Although the value of the pension benefits had fallen, I understand a transfer went ahead in line with HRCL's recommendation.

Mr B complained to HRCL, via his representative, in 2022 about the suitability of the transfer advice. His representative said that HRCL hadn't gathered sufficient information about Mr B's circumstances or experience. They said the transfer was not in Mr B's interests, but

HRCL had emphasised the potential to release TFC from the outset. They also said the verbal advice had differed from the written and Mr B had been led to believe that HRCL thought the transfer was suitable and that being an insistent client was simply an administrative designation.

HRCL didn't uphold Mr B's complaint. It said it had completed a fact find with Mr B, including gathering information about his attitude to risk. And it said it had recommended that Mr B be classified as a moderately cautious investor, because of his circumstances. HRCL said it had been clear that its advice was that Mr B should not transfer. But Mr B had insisted on doing so against this advice and was aware of this and the associated risks.

Mr B referred his complaint to the Financial Ombudsman Service. One of our Investigator's initially didn't recommend that the complaint be upheld. Mr B's representatives did not agree. The complaint was reviewed by another Investigator who thought it should be upheld. He didn't think the process HRCL had followed had meant Mr B was in an informed position about his pension and options. And he didn't think Mr B should have been treated as an insistent client.

HRCL disagreed. The investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr B has said that transferring his DB scheme pension was not suitable for him. But HRCL has indicated that it agrees a transfer was not suitable, and it told Mr B this, but he opted to proceed anyway as an insistent client. I'll come to whether Mr B was an insistent client shortly. In regard to whether a transfer was suitable though I don't see the need to address this in detail as both parties broadly agree that it wasn't. I would note though that I also agree that transferring was unsuitable for Mr B. HRCL said the reasons it didn't think a transfer was in Mr B's interests were broadly:

- He would be giving up valuable guaranteed benefits.
- The DB scheme was Mr B's main retirement provision.
- He had a low capacity for loss and could suffer financial hardship in retirement.
- The reasons for withdrawing the TFC didn't justify the impact on his retirement provisions.

And I agree with these reasons for not transferring. The information from the time indicates that the DB scheme made up the majority of Mr B's private retirement provisions. This scheme would provide a guaranteed escalating income for the rest of Mr B's life, helping to meet his income needs in retirement. And while Mr B had thought about how he'd use TFC, these objectives appear to have been wants rather than things that he needed to do. I also note that analysis from the time indicates that the level of growth Mr B's pension would need to achieve after a transfer, in order to be able to purchase equivalent pension benefits to those being given up, was high and unlikely to be achieved. So overall, I can't see any persuasive reasons why a transfer was in Mr B's best interests.

As I've said though, there doesn't appear to be a disagreement about this. So, I've gone on to consider the process HRCL followed and whether it was fair for it to treat Mr B as an insistent client.

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.

The obligations set out in PRIN require, amongst other things, that businesses 'must pay due regard to the interests of its customers and treat them fairly' and 'must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.' Furthermore, the COBS rules required HRCL to 'act honestly, fairly and professionally in accordance with the best interests of its client'.

COBS also contains specific rules relating to the obligations on HRCL when assessing suitability – including that HRCL needed to obtain enough information about Mr B's circumstances and experience to make its recommendation. COBS also has a section providing guidance for firms dealing with insistent clients. And it has provisions in COBS 19 specifically relate to advising on a DB pension transfer, with the FCA stating in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. I've thought about all of these things when looking at what has happened here. And having done so, I do have concerns about the process HRCL followed here.

The letter HRCL sent to Mr B on 19 December 2018 inviting him to book an appointment said that it included a short summary of his current pension "including the amount of tax-free cash you could access". With the summary going on to provide a figure of £21,291.79. This letter was sent before a fact-find had been completed. Yet it was already talking about the release of tax-free cash – involving a change to Mr B's current pension arrangements and a transfer. I think including this information, at the stage it did, likely led Mr B to consider this particular outcome was potentially favourable. I don't think talking about accessing TFC at that stage, which again would involve a transfer, was in line with the requirement to start by assuming the transfer was unsuitable, when a fact-find hadn't been completed. And I think it's also difficult to reconcile this with demonstrating that HRCL was acting in Mr B's best interests.

I've listened to a recording of the conversation that then took place on 4 January 2019. The contents of the call indicate this was not the first discussion between Mr B and HRCL, although recordings of any earlier or later calls are unavailable. In the first part of the call HRCL talks about whether Mr B has thought about what had already been discussed. And then goes on to discuss releasing TFC with HRCL asking Mr B if he was happy to access that amount. However, after Mr B responded positively HRCL then said it would have to now go through a fact-find with him. So, the first half of this discussion relating to TFC (which appears to be a continuation of earlier discussions as well) all happened before HRCL had completed a fact-find to gather information about Mr B's circumstances and objectives. Again, I'm not sure this supports that HRCL approached the advice assuming a transfer would be unsuitable, given it had apparently discussed with Mr B an outcome – releasing TFC – that was based on a transfer going ahead. And approaching the discussions in this way was in my view, likely to be misleading to Mr B as well as not necessarily being in his interests.

The first recommendation HRCL issued on 14 January 2019 did say that it strongly recommended Mr B not proceed with a transfer. And, as I've mentioned above, it summarised the reasons for this. However, this letter was only four pages long. And, in my opinion, was light on information personal to Mr B.

It did briefly cover what the DB scheme would provide from age 65 and how much replacing

these benefits at that point was likely to cost. But there was no comparison included to what income Mr B may have been able to take under a personal pension – so that he could compare and see in monetary terms what the impact was likely to be on his retirement income. Likewise, there was no analysis of Mr B's income needs or how important the DB scheme might've been to meet these. And there were no monetary examples to illustrate how a transfer might result in the "financial hardship in retirement" HRCL said was a potential consequence – such as when a personal pension would potentially run out based on the withdrawals Mr B would be making.

There was also no analysis of the possibility of drawing benefits early under the DB scheme which I think would've been appropriate. HRCL asked Mr B when he expected to retire in the fact-find, to which he said 65. But he caveated this by saying he understood this was when he could take benefits under his existing scheme. And he also explained that he was not working and wouldn't be able to return to work – so was already effectively medically retired. I'd have expected HRCL to discuss and explore whether accessing his DB scheme pension at that stage was an option for Mr B. And I'd have also expected it to set out what benefits he could take from the DB scheme at that point and how these would compare to a personal pension.

By HRCL not providing any of this information to Mr B, I don't think I can reasonably say he was in an informed position about the potential transfer.

And despite HRCL saying it didn't recommend that Mr B proceed, it immediately introduced, in the same letter, the option of disregarding this recommendation. It said if he decided he still wanted to go ahead, it would need to treat him as an insistent client and enclosed an options form which gave Mr B the option to tick a few boxes and do so. There was a section on the same options form for Mr B to say in his own words why he wanted to go ahead. But what Mr B wrote simply repeated what he intended to use the TFC for and didn't give any acknowledgement that it wasn't in his best interests or show he'd understood the risks and disadvantages. Which, as I've already said, I don't think he was in a fully informed position to understand.

I think introducing the option to disregard a recommendation at the same time as giving it isn't a clear way of communicating, could be misleading and is difficult to argue is something that was in Mr B's best interests. HRCL in my view, went further than it should have at that stage to assist Mr B to identify as an 'insistent client'.

A more appropriate process, which would've demonstrated HRCL's approach was geared towards Mr B making an informed, considered decision would've been to provide a detailed assessment of the reasons why he shouldn't be transferring and allow him to consider this on his own. He could then have gone back to HRCL if he still wished to proceed. But instead HRCL's process seems to instead have been designed to promote to Mr B that it would always facilitate the transfer for him. And at the point Mr B decided he wanted to be treated as an insistent client, HRCL hadn't provided sufficiently detailed analysis of why a transfer out of the scheme wasn't in his best interests. Instead, it expected him to make a determination that started him down the road of the insistent client process without giving him enough detail to reasonably make that decision.

And even when a suitability report was subsequently provided recommending a particular pension provider, I don't think it gave enough information for Mr B to make an informed decision retrospectively. The suitability report did say several times that HRCL recommended that Mr B not transfer. But it provided no real additional context to that recommendation or why HRCL thought this. So, he was given no further information to allow him to consider again whether insisting was appropriate. Rather HRCL said Mr B had insisted on proceeding and so it went on to focus on the new provider and why this was

being recommended

Overall, I think HRCL made it altogether far too easy for Mr B to agree that he was an 'insistent client' rather than allowing him the opportunity to make an informed decision. So, I don't think here he should truly have been considered insistent.

While I think the process HRCL followed was flawed, I need to think about whether this has resulted in Mr B being in a different position than he otherwise would've been. Or whether, even if more detailed advice had been provided and a more appropriate process followed by HRCL, he would always have insisted on transferring.

Mr B's representative has acknowledged that he was potentially interested in accessing TFC when he was first in contact with HRCL. I'm satisfied that he had thought about how he might use his TFC. And Mr B has confirmed that the TFC was used for the purposes he explained to HRCL. Mr B also indicated in the call I've heard with HRCL that accessing this money was important to him and he didn't have any other realistic option for raising money. However, this was said after he was prompted by HRCL to express how important it was. And the recording I've heard was not the first discussion between the parties. So, I can't rule out that how important this was to him was influenced by the earlier conversations and correspondence when Mr B was made aware that accessing a sum may be possible.

While Mr B has accessed and used his TFC to do the things he initially discussed with HRCL, I don't think any of the reasons for accessing this money were truly things he needed to do. I don't doubt he was potentially keen to do these things – particularly when the documents he received from HRCL talked about how much he could potentially take. But beyond a generic statement that HRCL did "not believe the reasons for the withdrawal justifies the impact on your (Mr B's) long-term retirement planning" I can't see that HRCL really did anything to challenge these or present information that would've enabled Mr B to properly appreciate the potential impact and compare this.

I'm also conscious that the information from the time suggests Mr B was an inexperienced investor with a low capacity for loss. Because of his lack of experience, I think it is fair to say he was likely to be guided by and reliant on the advice he was given by HRCL. Which as I've explained was, in my view, not as detailed as it ought to have been.

Taking all of this into account, while I appreciate it does not agree, if HRCL, a professional adviser whose expertise Mr B had sought, had given clearer, more personalised and detailed advice against the transfer I think this would've carried significant weight and that it's likely Mr B would've accepted this advice. Had HRCL given him the appropriate level of information to make an informed decision, and not introduced and prompted Mr B to consider disregarding the advice and proceeding anyway, I don't think he would have insisted on transferring. So, HRCL should compensate Mr B for any losses caused by the flawed advice process I think it used here.

### **Putting things right**

A fair and reasonable outcome would be for HRCL to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would have most likely remained in the occupational pension scheme if suitable advice had been given.

HRCL must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:

<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

Mr B was not working at the time of the advice and had effectively medically retired. However, as there doesn't appear to have been any consideration given to him taking benefits early under his existing scheme, and it's unclear if he'd have done so particularly if his objectives had been more robustly challenged, I'm satisfied here that compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, HRCL should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
  - the redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
  - a straightforward way to invest the redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts HRCL's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, HRCL may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr B's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

### **My final decision**

I uphold this complaint and require Harbour Rock Capital Limited to carry out the steps outlined in the 'putting things right' section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 4 June 2024.

Ben Stoker  
**Ombudsman**