

The complaint

Mr R complains with the help of a professional representative about the advice provided by HARBOUR ROCK CAPITAL LIMITED trading as Portafina (HRCL). It said that the advice to transfer from a Defined Benefit (DB) pension to a SIPP was unsuitable. It says Mr R wasn't given enough information and didn't understand his categorisation as an insistent client.

What happened

The investigator set out the background to the complaint in his view, I've included an amended copy of this below:

Mr R commenced his relationship with HRCL at the beginning of 2020. He had a Local Government DB pension related to his employment with the Council. From the outset it was identified that Mr R was interested in obtaining the Tax-Free Cash (TFC) available.

A series of verbal meetings and consultations took place, analysis and reports were issued by HRCL to Mr R. After a recalculation was necessary, the required forms were completed in October 2020 and his funds transferred. By May 2023, Mr R's pension had been fully withdrawn.

Combining the written correspondence, the investigator noted the following relevant information:

- The primary and driven objective was the release of TFC. This was to enable Mr R to help his daughter buy a car (£7,000), move to a larger rented property (£3,000), go on holiday (£2,000) and to put the remainder into savings. At the time he had no plans to retire and was willing to work past 67 which was his State Pension Age (SPA) if possible.
- Mr R had no debts but no assets, he was due to turn 55 on 8 July 2020, his net income was £1,750 per month and although he could not accurately account for his outgoings, no savings were made. He lived in a shared house with all bills included for £450 per month and needed roughly £90 per month for travel expenses. The rest of his income was spent ad hoc on food, entertainment and helping his children.
- It was confirmed that the level of income at SPA from his DB pensions was guaranteed at roughly £4,700 per year with roughly £31,000 TFC available. The proposed alternative had no guaranteed income, but roughly £20,000 TFC was available at age 55 with the remaining fund for investment being roughly £60,000.
- The pension income would be guaranteed for ten years. A one-third spouse's benefit was provided by the DB scheme in the event of his death, but the new pension would pass on everything remaining to his beneficiary(s).
- To purchase a comparable level of income would require an additional some of roughly £145,000. The critical yield of the new pension was 9.9% with a required growth rate of 5.8%.

HRCL did not recommend going ahead with the transfer but if he still wanted to, he would be classed as an *'insistent client'*. And it recommended the use of the Aegon SIPP and an investment portfolio to have the best chances of matching the benefits he'd be losing. Mr R signed a form on 9 May 2020 confirming himself as insistent, most of it was completed for him with tick boxes to show he knew the benefits he'd be losing, that HRCL did not recommend he proceed, and the final part was completed in his own words to explain why. His reasonings replicated his recorded objectives as noted above.

The full suitability report was issued on 15 May 2020, it repeated the recommendation not to proceed with the transfer but as Mr R had confirmed he wanted to proceed he transferred his DB scheme to the Aegon plan.

A recalculation was required due to the passage of time during the advice process. The transfer value had increased by roughly £10,000 so an updated suitability report was produced, all of the figures previously mentioned were increased proportionately.

The report stated that the analysis conducted still strongly recommended Mr R not proceed but as he'd confirmed he still wanted to, HRCL recommended nothing change. The transfer paperwork was signed with a further *'insistent client'* declaration on 2 October 2020.

A complaint was referred to our service on 31 October 2023 and on 10 April 2024, HRCL issued its final response. In summary, it stated that it had recommended Mr R, not to transfer and clearly explained the reasons and risks for that advice. He chose to ignore that advice and the warnings. As Mr R had insisted on proceeding it couldn't uphold his complaint.

Our investigator looked into matters and upheld the complaint. In summary, he felt the information provided by HRCL was light in detail about his options regarding staying in the scheme. And HRCL presented Mr R with an easy method to disregard the advice and transfer to access his tax free cash.

HRCL didn't agree the complaint should be upheld, I've summarised its key points of response:

- It said the advice to remain in the DB scheme was unambiguous as per the FCA's guidance.
- It pointed out that the investigator was wrong to say Mr R could've taken his benefits from the scheme and remained working as the scheme didn't allow that.
- It said it clearly explained the benefits Mr R was giving up. And provided the transfer comparator to show the value potentially lost on transfer.
- It said Mr R had been giving sufficient info about why the transfer was not suitable and positive reasons for remaining in the scheme. And he was provided with alternative means of meeting his goals, but this would take more time.
- Mr R made a decision to go against their advice as he wanted an immediate change to his personal and financial situation.
- During the advice call telephone conversation on 14 May 2020 when he was asked why he was not accepting the advice to remain in the scheme and why we had advised him not to transfer Mr R said: 'because of the future I suppose. *'You know, obviously, I'm going to lose, I know I'm going to lose, but, you know, it's just something I want to do'.*

- It asked at what point does it become the responsibility of the customer to take accountability for their actions.

The investigator responded and accepted that some of the information in his view had been shown to be incorrect. But the core reasoning for upholding the complaint hadn't been changed by the additional information provided by HRCL. And he made an additional point that HRCL in its verbal communication with Mr R had not put it in simple terms as to why he shouldn't transfer. He said he remained of the view that HRCL hadn't done enough to satisfy the requirements of COBS 9.5A. And had HRCL provided more detail regarding the tax-free cash amount and in reality it wouldn't be enough to achieve his goals, he thinks Mr R wouldn't have gone ahead.

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.

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 R'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.

Having looked at all the information provided and listened to the calls, I'm of the view that HRCL's communication with Mr R was influenced by achieving the outcome that played out in reality, i.e Mr R transfers. It is not enough to just provide the relevant warnings and basic information relating to a customer's options to meet the threshold of acting in a customer's best interests.

It's not entirely clear how Mr R came to contact HRCL but I accept he likely was enticed by the opportunity to take a tax-free cash lump sum in the near future. I don't think it is a coincidence that someone with this objective might be drawn to HRCL. Looking at the initial information provided to Mr R and its advertisements, which might have been what Mr R saw to contact HRCL, it is all geared to taking tax-free cash out earlier than the normal retirement date from a pension. This will of course often require transferring a DB scheme and losing out on guaranteed benefits – more often than not this is unlikely to be in a customer's best interests. Which is why the FCA requires firms such as HRCL when advising customers to

start with the assumption that transferring won't be in a customer's best interests.

In the first call we have evidence of (reference to an earlier discussion is made by Mr R), Mr R's understanding of the situation isn't good but he's clearly got in his mind that the purpose of his interaction with HRCL is to take money out of his pension. Given HRCL's advertisement is titled 'Early Pension Release' and says:

'Early pension release allows you to access your savings before you retire, or before the full term of the pension is up. You can take up to 25% of your pension's value, completely Tax Free, as a cash lump sum to spend however you like. It doesn't matter if you have a private or company pension as long as you're not already drawing an income from it. You just need to be over 55 due to the regulations in place. Please note that taking pension benefits early could reduce your income and your standard of living at retirement.'

It's not a surprise that this is Mr R's understanding. We don't have evidence of the first point of contact between Mr R and HRCL but the welcome letter it sent him, starts:

'Thank you for returning your pension review information form. We have now contacted your current pension providers requesting the information we need.'

'As you are currently under 55, we need to let you know that you will only be able to take tax free cash from your pension once you have reached the age of 55.'

So even before HRCL knew anything about Mr R's circumstances it is talking about Mr R taking tax-free cash from his pension. With the assumption of unsuitability applied and acting in a customer's best interests, this option shouldn't be front and centre of the communication. Which it was throughout most of the verbal communication with Mr R and it was given strong visibility in the written communication as well.

The letter HRCL sent to Mr R 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 R's current pension arrangements and a transfer.

It is then no surprise that the initial suitability report, which is required to be written in the best interests of the customer provides Mr R with the ability to take tax-free cash as an insistent client, despite the advice being not to transfer. If the adviser believed it was in the customer's best interests not to transfer and is truly wishing to act in the customer's best interests, I don't think it follows that you would provide within the same report an option that makes it pretty simple to disregard the advice and transfer in any event. There is no regulation or obligation to provide this option as part of the suitability report. And I note in the calls prior to the suitability report, HRCL had already told Mr R how he could go about disregarding the advice and transferring his pension. I don't think this was acting in his best interests and again points to the outcome that HRCL's processes appear to be weighted towards.

Mr R was an inexperienced investor with a very limited knowledge of pensions and he had little capacity for loss. It's clear from the calls both pre-advice and after the advice that Mr R struggled to comprehend the written information that had detailed his options about what he was agreeing to and losing out on by transferring. COBS 9.5A.3G says:

'Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and

having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2) (my emphasis).'

Yet nowhere in the calls did HRCL adequately set out to Mr R why going against its advice was in its view a bad idea. It asked him some questions about his understanding, which Mr R did his best to answer but its clear his understanding wasn't good. And before the suitability report was sent out, the call focussed on taking his tax-free cash and how this could be achieved. Mr R was I think clearly of the view that this process was all about how he could release his tax-free cash and the importance of his retirement provision in the future was secondary. It was HRCL's job to challenge this, not as I think it did, create the situation that led Mr R to think this way. In the verbal communication which I think clearly met Mr R's information needs far better than written communication, HRCL did very little to nothing to dissuade him from taking his tax-free cash. Acting in a customers' best interests here and considering the needs of the customer, I think HRCL needed to talk to Mr R and explain in clear terms why it wouldn't be in his best interests to transfer and to field his questions around why, so that he understood the advice. HRCL didn't do this.

Furthermore, as I said the communication before the suitability report was heavily focussed on him taking tax-free cash. Which I think watered down the warnings about not transferring out in the written communication. And blurred the insistent client process.

In the initial recommendation HRCL did strongly recommended against Mr R proceeding with a transfer. And it outlined the reasons for this. However, this letter was only six pages long including graphs. And was lacking in information personal to Mr R.

It did say what the DB scheme would provide at retirement and how much it would likely cost to replace these benefits. But it didn't show a comparison with what the personal pension could likely provide. So, Mr R couldn't compare the likely benefits he'd receive and what impact in real terms the transfer would likely have on his income in retirement. There was also no analysis provided of what Mr R might need in terms of income in retirement and how the two different options would or would not meet these requirements. Mr R wanted to improve his living situation in the short term. But HRCL as the expert here, ought to have highlighted the likely negative impact of transferring on his living situation in the future. And give Mr R a clear picture of what that may look like in reality. It's also questionable whether the tax-free cash available could've given any sustained improvement in his living situation.

So I think the suitability report was lacking in key bits of information and without this information I don't it can be said Mr R was put into an informed position about the transfer.

And as I said previously, despite the recommendation not to transfer HRCL, immediately offered the opportunity to disregard the recommendation as an insistent client. There was a space where Mr R had to say in his own words why he wanted to go ahead. But he simply re-stated his initial objectives for the tax-free cash. This doesn't point to someone who fully understood what he was giving up.

A more fitting approach, one that would have allowed Mr R to make an informed and evidence based decision on whether he wished to insist on a transfer, would have been to offer a thorough assessment outlining the reasons against transferring. And without the option to disregard it immediately. This would've allowed Mr R to reflect on the matter independently, and should he still wish to proceed, he could have returned to HRCL to enquire about his options. However, HRCL's process was structured in such a way that transferring as an insistent client was always presented as a viable option. When Mr R chose to pursue the insistent client route, HRCL didn't challenge this and still didn't provide sufficiently detailed analysis of why transferring out of the scheme might not be in his best interests. It placed the onus on him to make a decision that set him on the path to

transferring without the necessary information to make a fully informed choice. It relied on stock warnings and basic information rather than providing detailed advice personal to Mr R in a way in which he would understand it., i.e verbally.

Overall, I think HRCL made it far too easy for Mr R to agree that he was an insistent client. And therefore, I don't think it is fair to say he was truly an insistent client.

I also need to consider whether Mr R would've transferred had HRCL acted in his best interests and not followed a flawed process.

I appreciate Mr R came to HRCL with objectives that if to be achieved in the immediate term required access to an amount of cash that he didn't have in savings or easily accessible through any other route. But HRCL's job wasn't to just allow Mr R to do what he thought was best. Its role was to provide expert advice and act in his best interests.

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 I don't think any of the reasons for accessing his money outweighed the downsides of losing his guaranteed benefits in retirement.

But beyond generic statements and warnings I can't see that HRCL really did anything to challenge these or present information that would've enabled Mr R to properly appreciate the potential impact and compare this.

I appreciate Mr R did show some level of understanding that he might lose out by transferring in the phone call with HRCL. But it's clear his understanding was limited and HRCL never took the opportunity to verbally explain clearly why transferring wasn't in his best interests, nor was sufficient information given in writing either. Beyond the written warnings and statements in the report, Mr R's decision to take tax-free cash wasn't challenged. As the investigator pointed out, the amount of tax-free cash that Mr R wanted for example was unlikely to meet his key objective, which was to move to a bigger rental property. The increase in rent was unlikely to be manageable when considering his incomings and outgoings and I note Mr R didn't in the end move. Had this been pointed out to him, alongside the clear downsides of transferring, I think this would've had an impact on Mr R's thinking.

Taking all of this into account, while I appreciate it does not agree, if HRCL, a professional adviser whose expertise Mr R 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 R 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 R to consider disregarding the advice and proceeding anyway, I don't think he would have insisted on transferring. So, HRCL should compensate Mr R 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 the business to put Mr R, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr R 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>.

For clarity, Mr R has not yet retired, and he has no plans to do so at present. So, 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 R'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 R redress as a cash lump sum payment,
- explain to Mr R before starting the redress calculation that:
 - their 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 their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr R receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr R accepts HRCL's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr R for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr R's end of year tax position.

Redress paid directly to Mr R as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), HRCL may make a notional deduction to allow for income tax that would otherwise have been paid. Mr R's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

My final decision

For the reasons explained I uphold the complaint and require HARBOUR ROCK CAPITAL LIMITED trading as Portafina to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 19 December 2024.

Simon Hollingshead
Ombudsman