DRN-5164240

The complaint

Mr Y complains about the advice given by Portafina Investment Management Ltd – now Harbour Rock Capital Limited – 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 Y 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 Y. Likewise, for ease of reading, I'll just refer to the business as 'Harbour' throughout.

What happened

Mr Y says he contacted Harbour after seeing an online advert and was offered a free pension review. Mr Y signed a letter of authority on 26 May 2018 authorising his DB scheme provider to share information with Harbour.

On 29 May 2018, Harbour sent Mr Y a welcome letter titled *"Welcome to your no-obligation pension release review"*. The letter said Harbour had now requested information from the ceding scheme and said *"As soon as we have received this information we will be in touch to let you know how much tax free cash you can take from your pension, and to arrange a telephone appointment for you to have a conversation with one of our paraplanners. This conversation will give us a clear picture of your current situation and what you want to achieve in the future. We will then review all of this information and send you our recommendation about how your pension can help you to achieve your goals."*

Harbour emailed Mr Y on 12 July 2018 apologising for the delay and said it was still waiting for information from the DB scheme. Mr Y replied, confirming his membership number and said *"I so need the cash soon, else am in trouble. Please keep trying."*

The administrators of the DB scheme then sent Harbour details of Mr Y's pension on 12 July 2018. These included that the normal retirement age was 62, Mr Y's benefits were in three parts – covering separate periods of employment – and the combined cash equivalent transfer value ('CETV') of his pension benefits was £105,058.66. This value was guaranteed until 24 September 2018. The covering letter explained that Mr Y could have taken benefits from age 55 but these would be subject to early retirement reductions. The administrators also enclosed discharge forms to be completed in the event of an application to transfer being made.

Harbour completed a fact-find with Mr Y via phone on 11 September 2018, to gather information about his circumstances and objectives. We've been provided a recording of the conversation as well as Harbour's notes.

I note at the beginning of the call, after completing security but before discussing Mr Y's circumstances or objectives, Harbour set out that they were talking about Mr Y's DB scheme pension. Within the first couple of minutes, the Harbour representative, despite noting they weren't an adviser and were gathering information, referred several times to what would happen if Mr Y wanted to move his pension. Harbour did say the DB scheme provided guarantees that would be given up by moving. But referred to these as guarantees from the point of retirement and suggested that transferring was how Mr Y could go about accessing his benefits early, referred to a new arrangement being simpler and more flexible and quoted the CETV of the pension and how much tax-free cash ('TFC') Mr Y could access by transferring.

Harbour then asked Mr Y what he was looking to do. Mr Y said he needed to access some cash as he needed to pay off mortgage arrears on a property owned with his former partner as it was under threat of repossession. He estimated he'd need £10,000-£15,000 but that he'd like around £20,000 just to be sure.

Mr Y was 56, had been working part time for approximately six weeks and was also receiving benefits. Harbour noted that taking a lump sum could impact Mr Y's benefits which he said he understood. Mr Y was engaged but not co-habiting, lived in rented accommodation, had loans and credit card debts of approximately £8,500 on which he had arrangements to pay with his creditors and had no financial dependents. He said he intended to work until age 70 if possible.

Harbour then discussed two options for what Mr Y could do at retirement if he transferred – an annuity providing a guaranteed income or a flexible drawdown and asked him which one sounded 'more like him' while giving some general information. Mr Y said flexible drawdown.

Harbour said the reason for asking this was it had done some calculations on the DB scheme which the paraplanner wanted to run through. They said that if Mr Y had told him that he was the type of person that wanted an annuity, the adviser would be paying attention to how much growth would need to be achieved to buy an annuity at age 62 equivalent to what the DB scheme would pay (the 'critical yield') which was between 24-25%. But as Mr Y was more likely to take drawdown, the adviser would instead pay attention to a second figure – the growth required for him to take a flexible income from his new pension at age 62 equivalent to what the DB scheme would offer, but with the fund remaining invested to achieve growth – which was 9.6%. And the adviser would base their recommendation whether to transfer on if that figure was achievable or not. The representative of Harbour explained though that if the adviser didn't think the growth rate was achievable and didn't recommend a transfer, the letter they wrote would give Mr Y the option of insisting he still wanted to transfer.

Harbour said though if Mr Y wanted to access his funds they'd *"have to move you out"*. And so, the next thing it would need to do *"if we are going to go ahead with this then"* was to complete an attitude to risk ('ATR') assessment to give it an idea of how to invest, after a transfer. Harbour assessed Mr Y's ATR as moderately adventurous.

Harbour then went back to discussing the TFC and that Mr Y had said he'd want £20,000. They discussed the arrears situation, which Mr Y explained was due to him being out of work and being unable to pay his usual contributions to the mortgage with his ex-partner. Which was why he wanted to clear the arrears.

Mr Y then explained that he wouldn't be paying the full £20,000 to the mortgage, instead he'd only be paying a £3,000 - £4,000 to the mortgage and wanted to buy a car, spending anything up to £8,000 - £10,000 with the remainder being just to tide Mr Y over for rainy days. Mr Y said he had no other way of raising the money and he couldn't and wouldn't be able to borrow. And Mr Y said his immediate need for the money was very important and he'd proceed even if costs were high.

Harbour concluded by saying that Mr Y would either then receive a full written recommendation or, if the adviser didn't recommend a transfer, a letter explaining that, after which, if Mr Y still wanted to go ahead anyway, he'd receive a full report. Mr Y asked if either way he'd be able to access money. To which Harbour replied yes but it had to be clear that Mr Y understood what he was doing.

Harbour then wrote to Mr Y on 28 September 2018. The letter was titled *"Important news about taking money early from your pension".* It explained that *"Since our conversation we have completed our initial phase of research and analysis and we strongly recommend that you do not transfer your [DB Scheme] pension and instead leave it where it is because of the guarantees/benefits that you will be giving up."* Immediately following this the next section of the letter was titled *"What happens if you still want to go ahead and transfer your funds?"*. This said it was absolutely Mr Y's decision, if he still wanted to transfer to access TFC Harbour could help but it would need to treat him as an insistent client. Harbour said *"We appreciate that 'insistent client' is a bit impersonal. It is a phrase all financial advisers must use to describe a client who instructs them to continue with a transfer even though it is against their advice."* Harbour said it enclosed an overview of Mr Y's pensions as well as an options form for him to complete. It also provided insistent client forms he would need to return if he decided to go ahead and an illustration for a SIPP, with a business I'll call 'Firm A', where Mr Y could potentially transfer his pension to.

The options form set out two choices. Option 1 it said was disregarding the recommendation and continuing with the transfer so Mr Y could release £20,000 in TFC. Option 2 was to accept advice and leave his pension benefits *"where they are until scheme retirement date".* The insistent client form included declarations for Mr Y to tick to say he understood the new arrangement was unlikely to achieve the growth required to match the benefits he was giving up, he wanted to take TFC of £20,000 which was less than the full amount he was able to take and he understood the recommendation was not to transfer and he was going against this. There was also a section for him to state in his own words why he wanted to access his pension early.

Mr Y signed and returned the options form and insistent client declaration on 30 September 2018, confirming he wanted to go ahead with the transfer. In the section provided for him to explain why in his own words Mr Y said, *"Sadly I need the cash to pay the arrears on my mortgage."*

A further conversation took place between Mr Y and Harbour on 2 October 2018, initiated by Harbour. It confirmed that it had received the insistent client forms back but because it was fully regulated it needed to make sure it had covered everything on a phone call as well. The Harbour representative said that they wanted to apologise at the outset as it might have seemed like they were going over things several times because of the potential effects on Mr Y's retirement.

Mr Y said he'd read through the information but had decided to go ahead anyway. Harbour repeated he'd be giving up a guaranteed income and that a new pension was unlikely to match the growth rates required to replicate those benefits. And Mr Y said he understood this but wanted to transfer. Harbour asked if Mr Y understood he was going against advice, would be proceeding as an insistent client and would be unable to go back into the DB scheme – which he said yes to. Lastly it asked him again, in his own words, why he wanted Harbour *"to get this money paid out"* to which he said he needed to pay the arrears on a mortgage and wanted to purchase a car.

Harbour has provided a copy of a letter to Mr Y dated 5 October 2018. This letter was titled *"Your pension recommendation is enclosed"*. The letter said *"Having considered your current situation and what you would like to achieve, we have already recommended that you do not proceed. However, you wish to disregard this recommendation and proceed against our advice as an insistent client. As an insistent client, I recommend transferring your pension"* with Harbour saying Mr Y should take out a pension with Firm A. And it said if he agreed with this recommendation and instructed Harbour to act Mr Y would receive £20,000 TFC.

The enclosed report reiterated that Harbour's recommendation was not to proceed with the transfer and that Mr Y was acting against its advice. But said, as he wanted to proceed it recommended Firm A as this would enable him to access the funds he wanted, gave him flexibility and was one of the most cost-effective drawdown providers. It then set out how the funds should be invested following a transfer and gave an overview of the benefits that Mr Y would be giving up. It concluded by saying that if Mr Y wished to continue, he needed to complete the application and transfer forms and that it had highlighted the parts of the form that needed to be completed.

Mr Y called Harbour on 22 October 2018 seeking an update. The call indicates that, at that point, the recommendation had not been sent out and was still being reviewed. Harbour said it could ask for this to be dealt with as a priority which Mr Y said he'd be grateful for as there had been the threat of repossession over the mortgage arrears.

The report appears to have been sent out shortly after this as Mr Y signed and returned several transfer application forms on 27 October 2018. And on 7 November 2018 Mr Y signed and returned a 'client declaration' again confirming he was aware Harbour had recommended he not proceed but he wished to disregard this and release TFC to meet his objectives of "purchasing a car, creating an emergency fund and helping my friend financially". He also confirmed he'd understood risks involved, including that transferring could reduce his retirement income.

Mr Y called Harbour on 8 November 2018 to confirm his declaration had been received. He asked about what the timescale would now be for the transfer as the property subject to the mortgage was due to potentially be repossessed at the end of the month. Harbour said it didn't think the transfer would have gone through by then.

The administrators of the DB scheme then sent Harbour recalculated transfer values for Mr Y's pension benefits. The combined CETV had increased to £112,039.01. Updated transfer forms were required as a result, which Mr Y completed on 8 December 2018. And the transfer competed on 2 January 2019.

Mr Y complained to Harbour in June 2024. In summary he said, via his representative, Harbour had acted negligently by facilitating the transfer and treating him as an insistent client. Harbour had emphasised the potential to release TFC from the outset and hadn't done enough to set out why a transfer wasn't in his interests, in particular giving the impression that being an insistent client was simply an administrative designation. And although he'd signed declarations to continue with the transfer, the significance of the guarantees being given up to his retirement were not made clear enough.

Harbour didn't uphold the complaint. It said Mr Y had approached it as he wanted to transfer and access funds. It said it had carried out appropriate research and advised him not to transfer. But he'd been clear he wanted to proceed so it didn't think it had done anything wrong by treating him as an insistent client.

Mr Y referred his complaint to our service. One of our Investigator's considered the complaint but didn't think it should be upheld, as he felt it was reasonable for Harbour to have treated Mr Y as an insistent client and that it was likely he'd always have sought to transfer, based on his stated needs.

Mr Y's representative didn't agree, in particular saying they thought the calls Harbour had with Mr Y were just a box ticking exercise and structured as such to enable it to treat him as insistent.

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 Y has said that transferring his DB scheme pension was not suitable for him. But the correspondence around the transfer said Harbour agreed a transfer was not suitable, and it told Mr Y this, but he opted to proceed anyway as an insistent client. I'll come to whether Mr Y was an insistent client shortly. But on the point of whether a transfer was suitable, I'd note I agree it wasn't, but I don't see the need to address this in detail as both parties broadly agree.

Briefly, Harbour said in the report dated 5 October 2018 the reasons it didn't think a transfer was in Mr Y's interests were:

- He would be losing valuable guaranteed benefits.
- Releasing TFC would mean he potentially no longer qualified for means tested benefits.
- The average growth rates required to replicate the benefits he was giving up were unlikely to be achieved.

I agree with these reasons for not transferring. And I'd also add that I don't think all of the reasons for Mr Y wanting to access TFC necessarily meant doing so was in his interests. So overall, I can't see any persuasive reasons why a transfer was in Mr Y'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 Harbour followed and whether it was fair for it to treat Mr Y 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.

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It defines who is an insistent client, with COBS 9.5A.2 saying a client should be considered an insistent client where:

(1) the firm has given the client a personal recommendation;

(2) the client decides to enter into a transaction which is different from that recommended by the firm in the personal recommendation; and

(3) the client wishes the firm to facilitate that transaction.

COBS also sets out key steps for advisers to take. In respect of information to be communicated with an insistent client, COBS 9.5A.3 says:

1) *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).*

2) *The information which the firm should communicate to the insistent client is:*

    a) *that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;*

    b) *the reasons why the transaction will not be in accordance with the firm's personal recommendation;*

    c) *the risks of the transaction proposed by the insistent client; and*

    d) *the reasons why the firm did not recommend that transaction to the client.*

COBS goes on to set out what firms should do in respect of getting acknowledgement from the insistent client of their understanding, with COBS 9.5A.4 explaining:

(1) The firm should obtain from the insistent client an acknowledgement that:

(i) the transaction is not in accordance with the firm's personal recommendation; and

(ii) the transaction is being carried out at the request of the client.

(2) Where possible, the acknowledgment should be in the client's own words.

And COBS 9.5A.5 says *"Where a firm gives a further personal recommendation in relation to the transaction proposed by the insistent client, the firm should make clear to the client that this personal recommendation is distinct from, but does not affect the conclusions of, the initial personal recommendation."*

Harbour gave Mr Y a recommendation not to transfer in its letter of 28 September 2018, saying it strongly recommended that he did not transfer (which was highlighted in bold text). And it said the reasons for this were the guarantees and benefits that Mr Y would be giving up as well as Harbour believing the rate that Mr Y's pension would need to grow at to match the benefits he was giving up was unachievable.

Harbour not recommending a transfer was repeated across most of the documents relating to the transfer, including when it later recommended a SIPP. That later recommendation also made it clear it was recommending a SIPP because Mr Y had said he wanted to disregard its advice and in my view made it made it clear this was distinct from its earlier advice. I'm also satisfied, based on the call recordings, that it was explained to Mr Y a transfer would be against Harbour's recommendation and that he was aware of this from the discussions. So overall, I'm satisfied that Mr Y was given a personal recommendation not to transfer, some reasons for this advice and that the subsequent advice was because it had been asked for.

Mr Y signed several declarations during the application process, which all made it clear that Harbour had recommended that he not proceed, he'd be giving up guaranteed income (and what that income was expected to be from the DB scheme's normal retirement age) and he was acting against its advice. One of the declarations Mr Y completed included him writing in his own words why he wanted to proceed against the adviser's recommendation. And while what he wrote was brief and didn't necessarily indicate a total understanding of the risks involved, it was an acknowledgement that the transfer was being carried out at his request that it was against the recommendation that had been given. And similar information was repeated in conversations between Mr Y and Harbour. I'm satisfied from this that Mr Y understood he was acting against the initial recommendation Harbour had made and he'd decided to still enter into the transfer.

In Harbour's recommendation dated 5 October 2018, it also set out risks involved in the transfer. It included a summary of what the benefits would be under each of the three parts of the DB scheme and that these would be lost on transfer. It also stated that all of the investment risk would be with Mr Y rather than the DB scheme. It set out in monetary terms (and in a graph) the cost of replacing the DB scheme benefits, that this was higher than the CETV in respect of all three parts of the DB scheme and by how much (a combined amount of around £201,500). And Harbour gave a general explanation of other risks – that Mr Y's retirement income could be impacted by the transfer, investments could both fall and rise in value and there were potential inheritance tax implications of drawing money from a pension that would then become part of Mr Y's estate.

Ultimately Harbour was entitled to decide whether it was willing to accept business from insistent clients and was allowed to do so under the rules in place – so wasn't acting unfairly by agreeing to act for insistent clients. And some of the things that it did here appear to have been in reference to the guidance set by the FCA in COBS in respect of insistent clients. That being said, I also think there were significant flaws with the process that Harbour followed in Mr Y's transfer.

The initial welcome letter it sent to Mr Y said that once it had gathered information about his pension, Harbour would *"be in touch to let you know how much tax free cash you can take from your pension"*. I haven't seen the advert Mr Y says he followed. And the only document I've seen a copy of that went before this was the letter of authority Mr Y completed. Mr Y had given no indication in the letter of authority that accessing money from his pension was an objective of his or the reason he'd agreed to a review. But even if he had indicated this, I don't think referencing accessing TFC from Mr Y's pension at the outset is consistent with COBS 19.1.6 in which the FCA states that the starting assumption for a transfer from a DB scheme is that it would not be suitable.

In addition, in the call that Mr Y had with a paraplanner on 11 September 2018, despite not being an adviser or presumably qualified to provide pension transfer advice, the paraplanner repeatedly talked about how the pension would look once transferred, moving Mr Y out of his scheme and the level of tax-free cash that could be released. This further illustrates, in my opinion, that Harbour's emphasis from the outset was that Mr Y transfer and access TFC, which went against the regulators starting assumption.

The paraplanner also set out that Harbour may recommend that Mr Y not transfer, but that he'd still be able to do so and that it could assist but he'd just need to complete forms to enable this. I do not think it was appropriate to introduce the potential to disregard advice before any had been provided. And I think all of this significantly undermined the importance of the subsequent message that Harbour recommended that Mr Y not transfer, as this had already been framed as just a part of the process that might have to happen but wasn't necessarily important.

On top of that, when the written recommendation not to proceed was provided, the reasons Harbour gave weren't particularly detailed. The document didn't include an explanation of the risks involved with transferring. The risks were only discussed in the subsequent advice, where a SIPP was recommended, after Mr Y had already decided to proceed as an insistent client. Likewise, details of the cost of replicating the benefits being given up (and the graphical representation of this) were not included in that initial advice. They were again only provided in the later recommendation, despite analysis having been carried out before the initial recommendation.

I also think giving the option to disregard the recommendation not to transfer at the same time as it was presented was inappropriate. Particularly so as this was presented as the first option available to Mr Y. And I don't think it demonstrates communicating in a way which was clear as again it undermined the advice itself.

Harbour's role was to provide advice to Mr Y about what was in his interests. And it says it believed that a transfer was not in his interests. With that in mind I think a far more appropriate process, which would've demonstrated Harbour's approach was geared towards Mr Y 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 Harbour if he still wished to proceed. But instead Harbour's process seems to instead have been designed to promote to Mr Y that it would always facilitate the transfer for him. And at the point Mr Y decided he wanted to be treated as an insistent client, Harbour 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.

Overall, I think Harbour made it altogether far too easy for Mr Y to agree that he was an 'insistent client' rather than allowing him the opportunity to make an informed decision.

So, I think there were some fairly significant issues and failings in the process that Harbour followed. But that doesn't mean that Mr Y would always have been in a different position because of these failings. And I've thought about what I think would likely have happened if Harbour had followed a more appropriate process.

Having done so, while I know this will come as a disappointment to Mr Y, I think even if Harbour had acted differently, he would always have proceeded with the transfer.

Mr Y was clear when speaking to Harbour that he needed to raise money to clear mortgage arrears on a property held with his ex-partner. Before the fact-finding conversation had taken place, Mr Y had made it clear with an email exchange with Harbour that he needed money promptly otherwise he'd encounter difficulties. He was consistent in his conversations with Harbour and when he wrote in his own words why he wanted to transfer he repeated that he needed to access these funds. Mr Y also chased Harbour after he'd said he wanted to go ahead as he needed access to funds as soon as possible.

I don't think all of the reasons Mr Y gave for wanting to access TFC were things that he needed – buying a car and creating a rainy-day fund. Rather I think these were 'nice to haves' that he intended to address as part of releasing TFC. But I do think he had a genuine need for funds to address the mortgage arrears – which he indicated at the time were serious and may have led to the repossession of the property.

Mr Y indicated he didn't have savings or other assets that he could have used to address the mortgage arrears. He was working part time and in receipt of state benefits and doesn't appear to have had a significant surplus income. Mr Y also had debts of approximately £8,500 which were subject to payment arrangements agreed with his creditors. The fact that these debts were subject to arrangements for lower repayments and his relatively modest income mean, on balance, I think it was unlikely he'd have been in a position to take additional borrowing to address the arrears, even if he'd wanted to do so. And, although

Mr Y was already 56, he couldn't have released the amount of cash he needed by taking benefits early under the DB scheme. Harbour's transfer analysis estimated he'd only be entitled to just over £2,000 in TFC from across all three parts of the pension if he retired early. And the scheme trustees have confirmed that this would have been the case, because of the value of the guaranteed minimum pension due under his DB scheme.

So, Mr Y doesn't appear to have had any plausible alternative way through which he could generate the funds he needed. And he was clear when speaking to Harbour that obtaining this amount was extremely important to him and that he'd proceed even if the cost of doing so was high. So, even if Harbour had not introduced the idea of proceeding as an insistent client when it did, I still think, after being advised not to transfer, Mr Y would have asked about and pursued a transfer.

Taking all of this into account, I think in the specific circumstances of Mr Y's transfer, the evidence indicates that he would always have sought to transfer and wouldn't have been dissuaded by Harbour, even if it had followed a more appropriate process in terms of explaining why a transfer may not have been in his best interests. And so, I don't require Harbour to take any action here.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Y to accept or reject my decision before 4 June 2025.
Ben Stoker
Ombudsman