

The complaint

Mr T complains, via his professional representatives, about the advice Harbour Rock Capital Limited gave concerning the transfer of benefits from one of his defined-benefit ('DB') occupational pension schemes to a self-invested personal pension (SIPP). He says the advice was unsuitable for him and believes this has caused a financial loss.

At the time of the events complained about Harbour Rock was operating under a different name. But for clarity I will just refer to Harbour Rock in this decision.

What happened

Mr T approached Harbour Rock in January 2020 to review his pension provision. It gathered information about his pensions from his former employer. Mr T had two DB pensions from that employer. One of the pensions¹ had a cash equivalent transfer value (CETV) of £35,350, guaranteed until May 2020, from which, Mr T would have an entitlement of 25% tax free cash (TFC) of £8,837.

Harbour Rock spoke with Mr T in May 2020. It confirmed that he couldn't access his pension funds until he turned 55 later that year. It also told him that in order to access funds from the DB scheme he would need to transfer it. Mr T told Harbour Rock he would contact it nearer to his birthday to restart the process. Harbour Rock confirmed it could help him access the money at age 55.

In September 2020, after Mr T contacted Harbour Rock again, it spoke with him and completed a fact-find to gather information about his circumstances and objectives. Harbour Rock also carried out an assessment of Mr T's attitude to risk, which it deemed to be 'moderately cautious'. Amongst other things it found that:

- Mr T was 54 years old, separated and going through a divorce.
- He had two non-dependent children who were 15 and 20 years old.
- He was unemployed and actively seeking work.
- He was in receipt of benefits. His benefits covered his outgoings, including his rent, but he did not regularly have disposable income left over.
- He had no savings or other assets. He was debt free.

In terms of objectives Mr T said he was looking to take TFC from his DB schemes in order to support his children with their educational costs. Harbour Rock told Mr T that he couldn't transfer benefits from one of his employer's DB schemes because of its nature². It said that he couldn't access funds from the other DB scheme unless he first transferred away. Mr T indicated he was keen on taking TFC straightaway. Harbour Rock told him that, as he was in receipt of benefits he should keep the TFC he took below £6,000. It said he could withdraw

¹ Harbour Rock did not record any data, in the papers it's given to the Financial Ombudsman Service, in respect of his other pension.

² When the government introduced 'pensions freedoms' in April 2015 it generally allowed greater choice on how to access funds for or to transfer between pension providers. But certain unfunded public service pension schemes were excluded from that legislation and their transfer is not allowed.

the remainder of his TFC allowance, above the £6,000 mark, the following year. It suggested he limit the TFC requested to £5,500 that year.

On 14 October 2020 Harbour Rock sent Mr T a letter setting out its recommendations. It said he should leave his DB pension where it was. Amongst the reasons it gave for doing so were:

- Mr T would lose valuable guaranteed benefits by transferring.
- His reasons for transferring did not justify the long-term impact on his retirement planning.
- He had a low capacity for loss.
- He would not meet his income needs in retirement.
- He had no immediate need for the cash.
- It could cost him almost £27,000 more to replace his DB scheme benefits with a similar product on the open market.

Harbour Rock said that the drawbacks of remaining in the scheme were that he was unlikely to receive a full 25% TFC payment in retirement; and the scheme had set death benefits which were usually only payable to a spouse.

The letter then said that if Mr T decided to go ahead it would need to treat him as an insistent client. It explained that was a phrase used to describe a person who goes against their appointed financial adviser's advice. It asked Mr T to read and return the enclosed options form saying how he wished to proceed and an insistent client declaration.

Mr T returned the options form and insistent client declaration on 16 October 2020. He ticked a box to say he would disregard Harbour Rock's recommendation and proceed as an insistent client. The wording said he understood the recommendation but he still wanted to continue "against your advice so that I can release a total tax-free cash lump sum of £5,500".

Under a heading on the insistent client declaration of "in your own words" Mr T wrote that he wanted to proceed against the adviser's recommendation because:

"As stated in my telephone conversation money for my daughters education"

On 4 November 2020 Harbour Rock phoned Mr T to discuss what he understood about its recommendation and the consequences of transferring. Mr T confirmed he wanted to proceed.

Harbour Rock sent Mr H a pension review report – also referred to as a suitability report – on 6 November 2020. It said Mr T had already decided to disregard its recommendation and it was treating him as an insistent client. It recommended he transfer his DB scheme benefits to a named SIPP and invest in two managed portfolios. Under a heading of "our recommendation" and a subheading of "why" it said:

"You can access the money you require to meet your needs"

Later in the report it said it was recommending a transfer to the name pension provider because:

- It would give Mr T the freedom to access the money he needed.
- He could invest the remainder of his pension in a way suitable for his circumstances.
- He would own his pension pot with full flexibility over how it was invested, managed and accessed.
- He would benefit from a discount while Harbour Rock managed it for him.

The cover letter with the report said that if Mr T agreed with the recommendation to transfer he needed to complete enclosed forms together with identification documents. Mr T signed and returned the forms on 16 November 2020.

In December 2020 Harbour Rock wrote to Mr T. It said that as his previous CETV guarantee had expired it would need to write to his DB scheme to obtain another. In May 2021 the DB scheme administrators provided an updated CETV of £37,897. Mr T signed forms on 21 May 2021 to confirm he still wanted to go ahead with the transfer. It completed on 9 July 2021.

I understand that Mr T has since withdrawn the remainder of his pension funds from the SIPP.

In 2024 Mr T complained, via his representatives, to Harbour Rock. In brief he said it had inappropriately advised him to transfer his DB scheme's funds; hadn't sufficiently told him of the advantages and disadvantages of doing so; hadn't made him aware of the safeguarded benefits he would be giving up; and hadn't advised him that he could have taken benefits directly from the schemes.

Harbour Rock didn't uphold Mr T's complaint. In short it said it had advised Mr T not to transfer. It said he was fully aware of the benefits he was giving up by transferring. It had treated him as an insistent client.

Mr T, via his representatives, brought his complaint to the Financial Ombudsman Service. One of our Investigators recommended it be upheld and Harbour Rock compensate Mr T in line with the regulator's guidance for non-compliant pension transfer advice. Mr T accepted our Investigators complaint assessment. Harbour Rock did not reply. As our Investigator was unable to conclude the matter informally the complaint was passed to me to determine.

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.

In bringing this complaint and in replying to it Mr T and Harbour Rock have raised a number of points. I've considered carefully everything on file. But in this decision I don't intend to address each and every matter raised. Instead I will focus on the issues which I see as being the key matters at the heart of Mr T's complaint and the reasons for my decision.

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 applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Harbour Rock's actions here.

PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 7: A firm 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.

COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It defines who is an insistent client and it sets out three key steps for advisers to take.

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 9.5A.4 adds:

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.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Harbour Rock should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mr T's best interests.

Having considered all of this and the evidence in this case, I've decided to uphold the complaint for broadly similar reasons to those the Investigator gave.

Did Harbour Rock fairly decide that Mr T was an insistent client?

Harbour Rock says that it provided suitable advice and recommended that Mr T should not transfer. It says that it followed the correct insistent client process. Mr T says Harbour Rock's advice was negligent and he's suffered a loss as a result.

Having carefully considered all of the evidence presented, and despite the numerous statements made that it was not recommending a transfer, I think there were weaknesses

and failings in Harbour Rock's advice process, which meant it didn't act in Mr T's best interests. And I think Mr T likely understood, or believed overall, that transferring was in his best interests and that Harbour Rock was doing little more than going through a 'tick box' exercise in its recommendation not to transfer.

As I've already indicated Harbour Rock initially set out the reasons why it was not in Mr T's best interests to transfer in its letter of 14 October 2020. That letter said, amongst other things, that Mr T had no immediate need for TFC, that he would lose valuable guaranteed benefits and that he would likely be unable to meet his income needs in retirement if he transferred.

But I think the manner in which Harbour Rock conducted its advice process gave insufficient weight to those important considerations. And, it asked Mr T to either accept its recommendation not to transfer or to sign the options form to say he wished to continue as an insistent client. But, at that point, I don't think Harbour Rock had clearly set out the risks associated with the transfer. And while it later sent a more detailed suitability report, at this stage Mr T had minimal information to go on to decide if being an insistent client was truly in his best interests.

I think that, on the face of it, Harbour Rock's recommendation letter, options form and insistent client declaration appear to conform with the regulations I've set out above. But I've thought about whether Harbour Rock genuinely acted within the spirit of the regulations and communicated with Mr T in a way that was clear, fair and not misleading, taking into account his information needs. I'm not persuaded that it did.

In Harbour Rock's response to Mr T's complaint, it has called its October 2020 recommendation letter a 'suitability report'. However, the limited information in this five-page letter contrasted significantly with the 23 page suitability report it sent to him on 6 November 2020. And, in that suitability report, as well as providing more information about the risks involved in a transfer it made several references to the fact that Mr T had already decided to disregard its recommendation not to proceed (by virtue of having completed the options form and insistent client form).

So the recommendation letter (together with the insistent client and options forms attached) of 14 October 2020 was not its full suitability report. And I don't think Mr T had enough information before him in October 2020 to make a fully informed decision about whether to proceed as an insistent client.

Also, I think the manner in which Harbour Rock gave its advice may well have given Mr T the impression that Harbour Rock did support his desire to transfer. As I've said above, the starting point for an advising firm is that a DB transfer will be unsuitable for scheme members. But from as early as its May 2020 phone call Harbour Rock was telling Mr T that he could not take money from his DB scheme and that if he wanted to access cash he would need to transfer. Something it told him it *would* be able to help him with. It certainly didn't, at that point, give any weight to the presumption that a transfer was unlikely to be suitable for him. And I think this set Mr T on the path to believing, and looking forward to, accessing TFC when he turned 55.

Similarly, during the September 2020 phone call the emphasis was once again on the reasons Mr T wanted to access TFC. And Harbour Rock recommended that he take the TFC in two sums over consecutive years so that it would not affect his benefits. That certainly gave the impression that Harbour Rock was complicit with his desire to transfer and was doing all it could to make the process as easy as possible for him.

Further, while Harbour Rock did consider some alternatives to transferring away from his DB scheme with him, including borrowing funds, I think it did little more than pay lip-service to this. I say that as the reasons Mr T gave for wanting to transfer and access TFC was to help his children out with educational costs. One of his children was already at university but the other was still at least two years away. And during the conversation Mr T acknowledged that the TFC sums he would raise alone would be insufficient for his children's needs and that they would need to take student loans.

Mr T said that anything he could give them would 'be a start'. That might be the case but Harbour Rock didn't challenge this. It didn't ask him what specifically the money would be used for, how much of it would be left when his youngest child began university or what he would do if she chose another career path which didn't involve university. And it didn't contrast what Mr T thought he could gain from taking TFC with the likely effects it could have on him in his retirement. That is the potential that he would be unable to support himself with his everyday needs.

Similarly, I can entirely understand why Mr T would want to do everything he could in order to support his children's educational needs. But when establishing if Mr T was truly an insistent client who wanted to act against Harbour Rock's advice, I think it should have challenged his perception of how much help he could give to them by accessing TFC. He'd already acknowledged that his children would need to take student loans in any event. And perhaps it would have been more helpful if Harbour Rock had questioned Mr T on his understanding of how student loans worked in reality. And why he thought providing his children with, fairly modest, sums would have an impact on their education while contrasting this with what it could mean for his retirement.

Also, alongside Harbour Rock's recommendation not to transfer in its October 2020 letter, it immediately gave him the opportunity to become an insistent client by completing the relevant forms. So this was presented as a choice between two options, rather than the emphasis being placed on why only one of those choices – remaining in his DB scheme – was clearly in his best interests. And I think this process could have served to undermine the impact of Harbour Rock's original recommendation not to transfer.

Further, Harbour Rock on occasion gave Mr T misleading advice. For example it told Mr T that if he wanted to access any pension funds from age 55 he could only do so by transferring from his existing scheme. That is it gave the impression that Mr T would not be allowed to withdraw any funds from his DB scheme until the scheme's normal retirement age of 65. But that's not accurate. Instead the information the scheme administrators provided showed that members could apply to take their pension benefits on "an actuarially reduced basis" from age 55. In other words it seems more likely than not that Mr T could have taken money directly from his DB scheme without having to transfer. And while any TFC sums would likely have been less than he could have taken by transferring, it would also have meant that he would have received an annual income – albeit a reduced one – from the scheme from then on until his death. But Harbour Rock didn't ever present this as being a possibility for him.

Similarly, Mr T had another DB pension from the same employer. But, Harbour Rock didn't ever provide the details of what Mr T's entitlements from this scheme were or whether he could access that from age 55. Mr T told Harbour Rock that he worked for his former employer for around 18 years. And the DB pension Harbour Rock transferred only accounted for around three years of that service. So it's likely that Mr T's other DB pension was made up of contributions over around 15 years of service. And Mr T might also have been able to access TFC and an annual income from that scheme at age 55. That could have been a better solution, in terms of meeting his needs, than transferring his other DB scheme and losing its valuable guarantees from it once he'd done so.

I don't have any of the details of Mr T's other DB scheme. So I'm certainly not in a position to say that it would have been in his best interests to access those benefits at age 55. But from the information I've seen Harbour Rock didn't ever bring this possibility to Mr T's attention. In other words Harbour Rock either dismissed this option or failed to consider it. And I think that was a serious mistake or oversight which meant that it didn't bring all the options Mr T should have been aware of to his attention before it asked him if he wanted to proceed as an insistent client.

DB pensions are a valuable resource and their benefits are often considered to be difficult to match (at a similar cost) compared with other pension products available on the open market. And transferring from a DB scheme is a one-off event; once transferred there's no going back – the benefits are lost forever. So, when giving DB pension transfer advice Harbour Rock's role wasn't to simply do what Mr T wanted it to do, no matter how convinced he was that a transfer was suitable for him. Instead Harbour Rock was required to understand his wants and needs, not just his wishes and desires. And, in order to allow him to arrive at a fully informed opinion it needed to give him all the relevant information. But in this instance Harbour Rock didn't explore all of Mr T's options with him.

Further, I think the manner in which Harbour Rock presented some of its information was unclear. For example, its November 2020 suitability report repeated that Mr T intended to disregard its recommendation not to transfer. However, it then made a recommendation that he do exactly that. That is to transfer his DB benefits to a named SIPP provider and told him what the advantages of doing so were. Those included that it would allow Mr T to "access the money you require to meet your needs". That implied that Mr T did have a need for cash that justified the transfer. However, Harbour Rock had previously found that one of the reasons for not transferring was that he didn't have any immediate *need* for the cash. So I think Harbour Rock's advice was contradictory and gave the impression that transferring might have been in his best interests.

In addition, it appears that the transfer was put on hold between December 2020 and May 2021. This was most likely because Mr T's previous CETV had expired. The scheme entitled him to one CETV a year – without needing to pay a fee for that. So it seems the transfer was put on hold until Mr T became entitled to another CETV calculation which he received in May 2021. I've seen that, at that time, Harbour Rock sent Mr T updated figures and asked him to sign a declaration that he still wanted to proceed as an insistent client, which he did. But, Harbour Rock hasn't shown any evidence that it contacted Mr T to establish if his circumstances had changed in the interim. For example, when Harbour Rock conducted its fact-find with him one year earlier, Mr T was unemployed but actively seeking work. But I've seen no evidence that Harbour Rock took any steps to see if his circumstances had changed in the meantime which might have meant other possibilities had arisen to allow him to help his children without transferring his DB pension. I think that was a further oversight.

It's evident that Mr T was keen, from the outset, to transfer the one DB pension he could transfer. Clearly he believed that this would allow him to access funds to help his children with their education costs. And Harbour Rock did say that its recommendation was that he shouldn't do that. But it strikes me that Harbour Rock's process was geared towards facilitating the transfer from the outset. It gave him information from an early stage that it would be able to help him transfer and access TFC. In fact it told him that was his only option for accessing pension funds when that wasn't accurate.

Overall, and on balance, I don't think it would be reasonable for me to conclude the process Harbour Rock followed meant that Mr T can truly be regarded as an insistent client. It follows that I think that, if Harbour Rock had conducted a thorough and robust advice process,

giving Mr T all the information he required at an early stage, the outcome would have been different. That's because I think Mr T would have realised that the benefits of the transfer were seriously outweighed by what he stood to lose and that he might have other more suitable options. In those circumstances I think it's unlikely he would have wished to proceed as an insistent client.

It follows that I find it's more likely than not that if Harbour Rock had done all that it should have done, Mr T would not have transferred out of his DB scheme. So I don't need to consider the suitability of the investments Harbour Rock recommended he hold within his SIPP. Those investments wouldn't have arisen if Harbour Rock had conducted the advice and insistent client process thoroughly.

In light of the above, I think Harbour Rock should compensate Mr T for its failings using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Harbour Rock to put Mr T, as far as possible, into the position he would now be in but for the unsuitable advice process. I consider Mr T would have most likely remained in the DB scheme had Harbour Rock followed a robust advice process.

Harbour Rock 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, as far as I'm aware Mr T 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 of 65, 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 T'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, Harbour Rock should:

- calculate and offer Mr T redress as a cash lump sum payment,
- explain to Mr T before starting the redress calculation that:
 - his 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 his redress prudently is to use it to augment his SIPP
- offer to calculate how much of any redress Mr T receives could be augmented rather than receiving it all as a cash lump sum,
- if he accepts Harbour Rock's offer to calculate how much of his redress could be augmented, request the necessary information and not charge him 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 T's end of year tax position.

Redress paid directly to Mr T 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), Harbour Rock may make a notional deduction to allow for income tax that would otherwise have been paid. Mr T'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

I uphold this complaint and require Harbour Rock Capital Limited to take the steps set out under the heading of 'putting things right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 22 April 2025.

Joe Scott
Ombudsman