DRN-5601420

The complaint

Mr B complains about the advice given by HARBOUR ROCK CAPITAL LIMITED trading as Pension Access (Pension Access) to transfer the benefits from his defined-benefit ('DB') Occupational Pension Scheme (OPS) to a Self-Invested Personal Pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Our investigator set out the background to the complaint in her recommendation letter, for ease of reference I've included an amended copy below:

Mr B approached Pension Access in 2020 to discuss his pension and retirement needs. This was following talking to colleagues who had accessed tax-free cash after receiving advice from Pension Access.

Pension Access contacted him to introduce their service and to explain the next steps. A further fact-finding call took place on 8 July 2020 between a paraplanner and Mr B.

The fact find analysis established the following information about Mr B:

- He was 57 years old, single, although cohabiting with his former partner and he had no financial dependent's;
- He was a homeowner and had a mortgage with an outstanding balance of around £3,000;
- He had no savings and investments.
- He had debts of £16,000, made up of two loans and credit card debts.
- He hoped to retire at age 67;
- His attitude to risk (ATR) was recorded as cautious

Mr B had the following pension arrangements:

- His DB scheme, which had a normal retirement age of 67 and a cash equivalent transfer value (CETV) of £75,584. This scheme would pay Mr B a guaranteed income in retirement.

Pension Access acknowledged a transfer wouldn't be financially viable following its analysis and said it didn't recommend Mr B transfer his DB scheme benefits but agreed to arrange the transfer on an insistent client basis.

After Mr B made the decision to go ahead with the transfer and follow Pension Access's receiving scheme destination a new CETV was required as the initial one had expired. The CETV had increased to £84,469.56 so Pension Access issued a new suitability report dated 13 November 2020 referencing the updated figures. However, they still confirmed they didn't believe a transfer was suitable based on these figures.

Mr B, through his representatives, has raised concerns surrounding the insistent client process for the following reasons:

- Mr B's health condition made him highly vulnerable and Pension Access failed to address or recognise his vulnerabilities.
- Pension Access failed to explore all options available to Mr B to achieve his objectives, including taking early retirement from the DB scheme.
- Mr B didn't and still doesn't understand the concept of being an insistent client.
- Pension Access's recommendation to transfer was unsuitable as this was Mr B's only source of retirement funds, and he has now been left without adequate financial security for his retirement.

Mr B referred his complaint to our service. An investigator didn't uphold the complaint. She said whilst she thought there were some areas where Pension Access could've done more, Mr B was insistent on transferring and would've transferred regardless.

Mr B's representative's disagreed. They said in summary:

- Mr B was not a true insistent client. The idea that he would've gone ahead regardless was a flawed conclusion.
- The insistent client process wasn't sufficient.
- An insistent client must make an informed decision. That requires understanding. The firm did not ensure Mr B had this, and the investigator has not shown that he did.
- Mr B was vulnerable but he wasn't treated as such.
- The advice did not meet the regulatory standards.

The investigator said in response that she didn't dispute the insistent client and advice process was flawed and could have been more robust. However, she maintained that it's clear from the calls with Mr B that even if those processes had been better handled by Pension Access, and he'd been fully informed, he'd have taken the same course of action.

She said she acknowledged the comments regarding Mr B's vulnerabilities, but didn't agree that Pension Access ignored this. She said Mr B's motivation to seek the advice was due to the impact of the cancer on his life and health over the previous years. However she thought Pension Access did acknowledge this and asked the appropriate questions to determine how they could assist in regard to this. The investigator sent the calls to Mr B's representatives, but it has made no further comment.

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 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 Pension Access'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.

Having considered all of this and the evidence in this case, I've decided not to uphold the complaint for largely the same reasons given by the investigator.

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, Pension Access should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mr B's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Financial viability

Pension Access carried out a transfer value analysis report (as required by the regulator) showing how much Mr B's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

The advice was given after the regulator gave instructions in Final Guidance FG17 /9 as to how businesses could calculate future 'discount rates' in loss assessments where a complaint about a past pension transfer was being upheld.

I’ve kept in mind that the regulator's projection rates had also remained unchanged since 2014: the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2%.
The investment return (critical yield) required to match the DB pension at retirement at age 67 was around 11.8% per year. The relevant discount rate closest to when the advice was given which I can refer to was published by the Financial Ombudsman Service for the period before 1 October 2017 and was 3.7% per year for 9 years to retirement.

The transfer value comparator (TVC) showed that the value given up on transfer came out as £230,545. This was required by the regulator on transfers after 1 October 2018 - and is a measure of the funds that would need to be invested at the time of transfer on a so-called 'risk-free' basis (government bonds), to provide the same income as the DB scheme at normal retirement age. Whereas the actual transfer value offered by the scheme was £84,470. The difference between the two represents the amount of additional growth Mr B would need to achieve by his retirement age to match the value of the benefits he’d given up.

I've taken this into account, along with the composition of assets in the discount rate, Mr B’s low attitude to risk and also the term to retirement. There would be little point in Mr B giving up the guarantees available to them through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, given the lowest critical yield was 11.1%, I think Mr B was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

For this reason alone a transfer out of the DB scheme wasn’t in Mr B’s best interests. And Pension Access agreed, it told Mr B that its recommendation was not to transfer. However, it provided the opportunity for Mr B to disregard this advice and transfer as an insistent client. And Mr B chose to take this up following a call with Pension Access.

What is an insistent client?

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.

Acknowledgement from the insistent client - COBS 9.5A.4

(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.

Was Mr B an insistent client?

Like the investigator, I consider there were shortcomings in Pension Access's process and how it treated Mr B as an insistent client – that is, one who wanted to act contrary to the advice given. But I agree that, even if Pension Access had done everything it should've done, Mr B would still have gone ahead with the transfer of his pensions to the SIPP and made the subsequent investments. I'll explain why:

It was Mr B who contacted Pension Access with a view to releasing money from his pension. Mr B had debts amounting to £16,000 that he was struggling to meet and this was leaving him with very little available funds. He'd had to extend his borrowing on his credit cards and so his debt was increasing. Whilst Pension Access ought to have done more to discuss potential debt plan options, in the calls he had with it, Mr B made it clear that he wanted to rid himself of these debts so that he could move forward with his life. He said he was more concerned with now rather than the future. He'd had cancer and whilst he didn't have a life limiting diagnosis, he said he wanted to focus on the now and he still felt he could have enough to live on in retirement.

Mr B said within the calls for example:

"But there were a few debts I've got to pay off and just lately, I'm a cancer patient actually and I've been struggling the last few years. The stress and the debts I don't really need. I want to get everything out the way. That's my main concern at the minute."

"You know people plan for the next 10 years…I'd rather like to get all my worries out the way now. I can always opt back in to my pension again and my mortgage gets paid next year, so I won't need much if I do reach 67. I won't need that much anyway. For me at this moment in time, the credit cards get them out the way and just having that money just in case anything else goes wrong it just takes a lot of stress out of my life. I don't need to stress about anything else. I know it's hard for somebody not in my situation to understand that because they're thinking oh well in 10 years time you're going to need this much in your pension. I see things differently from where I am sat right now."

When asked about other ways he could achieve his objectives, it had been established Mr B had no money left at the end of a month and didn't want to investigate options such as remortgaging as he said it would be "*robbing Peter to pay Paul".*

Mr B was called after receiving the recommendation not to transfer, and his first question was: *"What happens if I didn't want to go ahead with that and I still wanted to do what I wanted to do"*

Given Mr B initially contacted Pension Access with the intention of transferring and after receiving the report from the adviser saying the transfer was not recommended and headline figures given as to why, and this was his first question, it would be difficult to say Mr B wouldn't have insisted upon a transfer even with a more robust process. I appreciate Pension Access's advice process didn't put many hurdles in place to test how insistent Mr B really was, it made it easy for him to proceed as an insistent client but that doesn't mean that he wouldn't have been insistent regardless.

Mr B also said when asked if he understood why the adviser had said not to transfer, he said it was about the concern for his finances in retirement but he thought he'd be ok. And he said he'd understood everything and read the report.

After listening to the calls, I don’t think much was done to challenge Mr B’s thinking and the process made it rather too easy for Mr B to see himself as an insistent client. But had it been more detailed and Mr B had been challenged more on his thinking, I don’t think it would’ve changed matters. Whilst Mr B would most likely have been significantly better off in retirement for remaining in the scheme, he had clear and strong reasons as to why the transfer made sense for him. Improving his immediate circumstances was more important to him than saving for the future. I think even if Pension Access had made their insistent client process more robust, and no doubt could be had about Mr B’s understanding of the consequences, Mr B likely would have still wished to transfer to access cash and improve his immediate circumstances

Overall, even though I think Pension Access’s insistent client process could have been fairer and more robust, I don’t think that would have changed the outcome in Mr B’s particular case. And it is for this reason I won’t be upholding this complaint.

My final decision

I do not uphold this complaint and make no award.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 24 July 2025.

Simon Hollingshead
Ombudsman