DRN-3651177

The complaint

Mr N complains that an appointed representative of Sesame Limited gave him unsuitable advice to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He believes this has caused a financial loss.

It was Sesame's appointed representative, rather than Sesame itself, which gave Mr N advice. But as Sesame is responsible for responding to the complaint, I will refer to the appointed representative's actions as being Sesame's.

Professional representatives have helped Mr N to bring this complaint. But, for ease of reading I will refer to the representatives' comments as being Mr N's.

What happened

Sesame's told us that it holds no documents from the "point of sale", so the information below is based on the limited evidence provided by Sesame and from Mr N's recollection of events.

Mr N says that Sesame approached him in 1993 and offered him advice about his pension. At that time Mr N was 28 years old, he was a member of his employer's DB pension scheme; the scheme retirement age was 60 and Mr N's pension fund had a transfer value of £3,338. Sesame advised him to transfer his pension benefits to a named personal pension, which he did.

In 2021 Mr N complained to Sesame about the suitability of its advice. Amongst other things he said:

- Sesame shouldn't have advised him to transfer out of his DB scheme as it wasn't in his best interests.
- It didn't tell him that an alternative investment would need to perform particularly well to match the benefits from his DB scheme.
- He wasn't looking to take any risk with his pension.
- Sesame didn't advise him of the guaranteed benefits he would lose by transferring.
- As a result of the transfer his investments would need additional growth to cover the fees associated with the personal pension. Fees that weren't payable in the DB scheme.

Sesame replied. It said it hadn't considered the merits of Mr N's complaint because it believed he'd brought it out of time. It noted that his personal pension benefit statement in 2013 showed a steep drop in the projected pension income since the previous year. It said that as he hadn't wanted to take investment risk then he should have identified at that point that there was an issue. Alternatively it said that, by February 2017, his pension statements were still showing a 25% reduction in projected pension income since 2012. And, as the relevant rules allowed him three years in which to complain, it said he should have complained by February 2020. But as he didn't complain until 2021 he was out of time.

Mr N brought his complaint to our Service. One of our investigators looked into it. She assessed the complaint in two parts. First she considered whether or not this was a case that we had the power to look into. She thought Mr N had brought his complaint within three years of when he ought to have known he had cause to do so. So, she said it was a case we could consider.

Our investigator then looked at the merits of Mr N's complaint. She upheld it. She said that at the time the regulators' guidance was that they expected most customers to be better off by remaining in their DB schemes. And as Sesame was unable to show it had acted in line with the regulators' guidance she couldn't safely conclude that its advice was suitable.

Sesame didn't agree with our investigator's assessment of the complaint. It again argued that Mr N had brought his complaint too late. It asked for the matter to be passed to an ombudsman. The investigator replied and said that, when an ombudsman considered the matter, if they believed it was within our jurisdiction, then they would go on to consider the merits of the complaint within the same decision.

The complaint was then passed for my review.

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.

Is this a complaint we have the power to look at?

I've first considered whether or not Mr N's complaint is one that falls within our jurisdiction. And for the reasons I set out below I'm satisfied that it is.

We don't have a free hand to consider each and every complaint we receive. Our rules as set out in the FCA Handbook, are commonly referred to as DISP. DISP 2.8.2R says that where a business doesn't consent (as Sesame hasn't here), I can't consider a complaint made more than six years after the events complained of, or if later, more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint.

In this case Sesame advised Mr N to transfer his pension benefits in 1993. He complained to Sesame in 2021. That is clearly outside of the six years allowed to bring a complaint to this Service. So, I have to consider whether he brought his complaint to us within three years of when he ought reasonably to have known he had cause for complaint.

Sesame said that, as Mr N's 2013 pension statement showed a significant drop in his projected yearly retirement income he should have known at that point that he had cause for complaint. And if he didn't identify grounds for complaint then, he should have done so over the ensuing years, as up until 2017 his pensions statements still projected an annual income that was considerably less than its 2012 level. But I disagree. It is the case that the 2013 pension statement showed a drop of around 43% in projected pension income – once Mr N reached age 55 – compared to the previous year. But the statement also provides a clear reason for that drop which isn't related to investment performance.

The statement has a section titled "*what you need to know about your yearly statement*". That section is presented as a series of questions and answers. One of those questions is:

"Why has my estimated pension income dropped compared to last year?"

It gives the following answer:

"*Your estimated pension income has dropped because we've changed the rate we use to calculate it.*"

It goes on to explain that the calculation rate changed because of government instructions based on increasing life expectancy and because of changing interest rates.

There is also a box containing the following question and answer:

"*Have I lost money because of these changes?*

No, these changes don't affect the performance of your fund or funds.

We've made these changes to give you a better idea of how much you can expect when you retire."

So, if Mr N had initially been concerned by the drop in projected pension income then the statement would likely have given him reassurance by telling him he hadn't lost anything. Indeed it indicates that, given the drop in projected income was based on a government instruction, this was something that was likely to affect most personal pensions. So the drop in income wasn't because of investment risk or the performance of his personal pension but because of an alteration in the way pension providers were instructed to give their projections. And I don't think those circumstances would have given Mr N cause to question the advice to transfer Sesame provided 20 years earlier.

Further, Mr N hasn't brought his complaint on the grounds that his personal pension hasn't performed as well as he might have hoped. Instead, my understanding is that he complained because he'd recently learned that the advice to transfer out of a DB pension might not have been suitable for him. That is, amongst other things, that Sesame hadn't told him about the guarantees he'd be giving up or that the product and adviser fees would mean that his investments would have to perform even better in order to cover those fees. And I've seen no evidence that persuades me Mr N ought to have reasonably been aware of those issues more than three years before he put his complaint to Sesame. It follows that I'm persuaded Mr N had made his complaint in time and as such this is a complaint that we have the power to consider.

Was Sesame's advice suitable for Mr N?

In considering the suitability of Sesame's advice 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. 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

In 1993 there were two separate bodies which regulated advising firms. Those were the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) and the Financial Intermediaries and Managers Regulatory Association (FIMBRA). It's not clear from the file which regulator Sesame or its appointed representative came under at the date of events. But both regulators gave similar guidance concerning DB transfers in 1992. The guidance said that when considering advice on a DB transfer a firm should consider that the majority of consumers would be better off remaining in their current scheme. Similarly, both

regulators had rules which said that advice should only be given where firms genuinely believed the transaction was for the consumer's benefit or in their best interests. Both regulators also had rules which required firms to keep records to show compliance with their regulatory requirements.

Having considered this and the evidence in this case, I've decided to uphold the complaint for broadly the same reasons given by the investigator.

The evidence Sesame has provided is extremely limited. And I haven't seen paperwork from the DB scheme administrator showing the benefits that Mr N would be giving up by transferring. Nor have I seen the details and benefits of the scheme he would be transferring to. Therefore, I haven't seen any form of comparison of those benefits or analysis setting out why Sesame made the recommendation to transfer. So it's anything but clear on what basis Sesame could conclude that Mr N would benefit from transferring out of his DB scheme.

That said I'm aware that at the time Sesame gave its advice, investment growth levels were significantly higher than they have been more recently. So it's possible that given Mr N was still around 32 years away from his DB scheme's retirement age, Sesame might have thought that investments in a personal pension had sufficient time to grow. But there's simply no evidence on file to demonstrate whether that level of growth would have been sufficient for Mr N to have exceeded the level of income his DB scheme would have provided at retirement. And given that the regulators' guidance was that, for most consumers, it would be in their best interests to remain within a DB scheme, I'm not persuaded on the balance of probabilities that Sesame's advice was suitable for Mr N.

Further, Mr N has no recollection of Sesame comparing the advantages and disadvantages for him of transferring. Indeed his recollection is that Sesame told him his DB scheme was worth nothing. I appreciate that Sesame gave its advice around 29 years ago and Mr N's memory will inevitably have faded in that time. I also appreciate that records can go missing and particularly over time. But Sesame was required to keep records to demonstrate its advice was soundly based. However, there's no evidence that Sesame gave Mr N all the information he would need to make such an important decision about giving up guaranteed, index linked and increasing benefits from a DB scheme. So I'm not satisfied that its advice was suitable for Mr N. It follows that I think Sesame should work out whether Mr N had lost out as a result of the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

On 2 August 2022, the current regulator, the Financial Conduct Authority ('FCA') launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document – CP 22/15-calculating redress for non-compliant pension transfer advice.

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA published a policy statement on 28 November 2022 which set out the new rules and guidance - https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr N whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance/rules to come into effect. He's chosen not to wait for any new guidance to come into effect to settle his complaint.

I'm satisfied that a calculation in line with FG 17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr N.

A fair and reasonable outcome would be for Sesame to put Mr N, as far as possible, into the position he would now be in but for Sesame's unsuitable advice. I consider Mr N would have most likely remained in his DB scheme if Sesame had given suitable advice.

For clarity, as far as I'm aware Mr N has not yet retired, and has no plans to do so at present. So, compensation should be based on his scheme's normal retirement age of 60, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr N's acceptance of this decision.

Sesame may wish to contact the Department for Work and Pensions (DWP) to obtain Mr N's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr N's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, Sesame should pay the compensation if possible into Mr N's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr N as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement - presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mr N within 90 days of the date Sesame receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Sesame to pay Mr N.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above. So any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Sesame Limited to pay Mr N the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Sesame Limited to pay Mr N any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Sesame Limited to pay Mr N any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Sesame Limited pays Mr N the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr N.

If Mr N accepts this decision, the money award becomes binding on Sesame Limited.

My recommendation would not be binding. Further, it's unlikely that Mr N can accept my decision and go to court to ask for the balance. Mr N may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 5 January 2023.

Joe Scott
Ombudsman