

The complaint

Mr H complains about the advice given by Sesame Limited (Sesame) to transfer the benefits from his defined-benefit (DB) occupational pension scheme to a personal pension (PP). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr H is being represented by a third party, but for ease I'll refer to all representations as being made by him.

This complaint relates to the actions of a firm who were an appointed representative of Sesame. For ease, I'll only refer to Sesame throughout this decision.

What happened

In or around September 2001, Mr H approached Sesame to discuss his pension and retirement needs, after being advised by it earlier that year to take out life assurance and to start contributing to a PP with Standard Life.

In January 2002, Sesame completed a fact-find to gather information about Mr H's circumstances and objectives. It indicated that Mr H was aged 39, self-employed and married with two dependent children. He told Sesame he lived in a property he owned, worth around £90,000 with a mortgage of £60,000 that he had an endowment policy in place for, as well as life assurance worth £30,000 and £1,000 in savings. It also carried out an assessment of his attitude to risk, which it said was 'balanced'.

In June 2002, Sesame advised Mr H to transfer his DB benefits into his PP with his existing provider and invest it in a with profits fund. The transfer took place in July 2002 for a value of around £59,000. While Sesame hasn't provided the suitability report Mr H was sent at the time, it has provided an updated copy it sent Mr H in December 2002. This said the reasons for its recommendation were to improve on the benefits the DB scheme provided and because Mr H could take benefits earlier than his normal scheme retirement age of 60.

Mr H complained in 2020 to Sesame about the suitability of the transfer advice saying that it was negligent and wasn't in his best interests, given he had no investment experience and a low attitude to risk and capacity for loss. He said he was induced to transfer as he was told his pension would grow in excess of what he'd achieve in his DB scheme.

In response, Sesame said Mr H had made his complaint too late for our Service to consider it. Unhappy with this, Mr H brought his complaint to us. And we decided we could consider his complaint, as it had been made in time, which Sesame has since said it accepts.

An Investigator looked into Mr H's complaint and upheld it saying he didn't think the transfer was suitable, as Mr H didn't have any strong objective or need to transfer at the time. He also said Sesame should pay Mr H £400 for the distress and inconvenience caused.

Sesame didn't respond, 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.

Sesame said Mr H's complaint was brought to our Service too late for us to consider it. I don't intend to revisit that, as an Ombudsman has already given a decision explaining why he's satisfied Mr H brought this complaint in time and that it's one I can consider. And, having considered all the information, I think Mr H's complaint should be upheld.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. This includes the regulator's Conduct of Business ('COB') rules.

Having done so, I've decided to uphold the complaint for largely the same reasons as the Investigator.

Under COB 5.3.29A(4)

The regulator expected a *"...prospective investor to receive sufficient, clear information to make an informed investment decision based on a firm understanding of the risks involved and a knowledge of what protection, rights, expectations and options they may be giving up."*

It also expected at least one illustration for the PP had to be given on a similar basis to the DB scheme, e.g. what spouse's pension and increases in payment were shown.

Also, a 'reason why' letter or equivalent had to be issued as soon as practicable after the recommendation, which should:

"...explain why that advice is suitable. That explanation should take explicit account of the alternative of remaining within the occupational scheme..."

"...demonstrate a real link between the circumstances, objectives and risk profile of the investor, and the recommendation made to him or her by the firm."

Presumption of unsuitability

COB 5.3.29G specified the information Sesame should gather from the consumer and the DB scheme in order to assess suitability. Importantly it also said that:

"When advising a customer who is, or is eligible to be, an active member of a defined benefits occupational pension scheme whether he should opt out or transfer, a firm should:

(a) start by assuming it will not be suitable, and

(b) only then consider it to be suitable if it can clearly demonstrate on the evidence available at the time that it is in the customer's best interests."

Financial viability

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers,

I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return (critical yield) required to match Mr H's occupational pension at retirement was quoted as 6.19% per year or 5.2% if retiring at 55. This compares with the discount rate of 7.2% per year for 19 years to retirement in this case.

For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I recognise the critical yield was lower than the discount rate and the regulator's middle projection rate. But I think Mr H was likely to receive benefits of a materially lower overall value than the occupational scheme at retirement, as a result of investing in line with his attitude to risk. I'll explain why.

While the suitability report initially said that reinvested income and asset price growth ought to beat the critical yield, despite average long term investment returns now falling, it went on to say the adviser didn't think that the with profits fund it was recommending Mr H transfer to invest in would achieve the growth required to match the critical yield in the long term. It said it was recommending Mr H invest in this 'low' risk fund though, despite determining he had a 'balanced' risk profile, to '*play safe*' due to current market uncertainty and volatility. And because it was anticipated that Mr H would switch to more aggressive funds in future to achieve or exceed the critical yield.

Sesame needed to ensure the transfer was in Mr H's best interests based on the evidence available at the time though, rather than on what his risk profile might allow for in future. And I think the evidence shows Mr H had a low, rather than balanced or more aggressive, risk profile given he was an inexperienced investor who said he didn't want to be exposed to anything other than a minimal amount of risk in the hope of increasing his pension benefits. This was also one of his main assets and there's nothing to suggest he had any other retirement provision at the time, aside from a state pension and the PP that Sesame advised him to start contributing to in 2001.

There would be little point in Mr H giving up the guarantees available to him through his DB scheme only to achieve the same level of benefits outside it. And, while it isn't clear how much the fund Sesame was recommending was expected to perform below the critical yield, given the adviser stated it wouldn't meet this I think it's clear Sesame's recommendation that Mr H transfer to invest in it would likely mean he'd end up with lower retirement benefits. I also think the adviser saying Mr H should '*play safe*' is an acknowledgement that it wasn't a good time for him to transfer his benefits in his DB scheme, but instead of saying that they recommended a transfer which wasn't in his best interests.

For this reason alone a transfer out of the DB scheme wasn't in Mr H's best interests. Of course financial viability isn't the only consideration when giving transfer advice. There might be other considerations which mean a transfer is suitable, despite providing overall lower benefits. I've considered these below.

Flexibility and income needs

I don't think Mr H required flexibility in retirement because, based on the evidence I've seen, I don't think he had a genuine need to access his TFC earlier than the normal scheme retirement age and leave his funds invested until a later date. I say this because TFC wasn't a priority to Mr H given he said that '*Whilst a higher lump sum would be nice, it is not a priority to me*'.

While it seems Mr H liked the option of having flexibility if his circumstances changed, he didn't anticipate wanting to retire early as he didn't think he could afford to. And I can't see evidence that he had a strong need for variable income throughout his retirement. In addition, Mr H began contributing to a PP as a result of Sesame's advice, which he could access in future if he did need flexibility with his retirement income or death benefits.

Furthermore, Mr H was only 39 at the time of the advice and, based on what I've seen, he didn't have concrete retirement plans. As Mr H had 20 years before he could think about accessing his pension, I think it was too soon to make any kind of decision about transferring out of the DB scheme. So, I don't think it was a suitable recommendation for Mr H to give up his guaranteed benefits now when he didn't know what his needs in retirement would be. If Mr H later had reason to transfer out of his DB scheme he could have done so closer to retirement.

Summary

I don't doubt that Mr H found the idea of transferring his DB pension to his existing PP attractive, because it gave him more flexibility and control over his retirement. But Sesame wasn't there to just transact what Mr H might have thought he wanted. The adviser's role was to really understand what Mr H needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr H was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring and investing in line with Sesame's recommendation, Mr H was likely to obtain lower retirement benefits and in my view, there were no other particular reasons which would justify a transfer and outweigh this. So, I think Sesame should've advised Mr H to remain in his DB scheme.

Of course, I have to consider whether Mr H would've gone ahead anyway, against Sesame's advice. Having done so carefully, I'm not persuaded Mr H would've insisted on transferring out of the DB scheme, against Sesame's advice. I say this because I think Mr H was an inexperienced investor with a low attitude to risk and this pension accounted for the majority of his retirement provision at the time. So, if Sesame had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

In light of the above, I think Sesame should compensate Mr H for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

This matter will also have caused Mr H distress, so Sesame should pay him £400 compensation. I think this is a fair and reasonable amount to make up for this in the circumstances.

Putting things right

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

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - [CP22/15-calculating redress for non-compliant pension transfer advice](#). The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in [Finalised Guidance \(FG\) 17/19](#) (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 has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr H whether he preferred any redress to be calculated now in line with current guidance or wait for the any new guidance/rules to be published.

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr H.

Sesame must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, while Mr H has not yet retired, he plans to do so soon. So, compensation should be based on his 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 H's acceptance of the decision.

Sesame may wish to contact the Department for Work and Pensions (DWP) to obtain Mr H'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 H's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H'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 H 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 H within 90 days of the date Sesame receives notification of her 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 H.

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 - and 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.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Sesame to carry out a calculation in line with the updated rules and/or guidance in any event.

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 Sesame pays the balance.

Sesame should also pay Mr H £400 for distress and convenience caused by the unsuitable advice.

My final decision

Determination and money award: I uphold this complaint and require Sesame Limited to pay Mr H 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 H 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 H 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 H the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

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

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H 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 H to accept or reject my decision before 18 November 2022.

Holly Jackson
Ombudsman