DRN-3833053

The complaint

Mr W says Hansam Callum & Co, an appointed representative of IFA Network Limited, which was taken into Sesame Limited, is responsible for unsuitable advice to transfer his defined benefit (DB) pension into a personal pension. He says this has caused him financial detriment. To keep things simple, I'll refer to Sesame as the respondent throughout.

Mr W is represented by his financial adviser.

What happened

Mr W received pension advice from Sesame in 1998. The adviser was introduced to him through a family friend who had also been a public servant. He was told a personal pension would be more flexible than his membership of the DB scheme where he had deferred benefits.

Sesame has confirmed that Mr W was advised to transfer his DB pension benefits on 31 March 1998. He accepted the recommendation and around £26,000 was moved to his new personal pension with Scottish Equitable in May 1998.

Following a conversation with his financial adviser in 2020/21, his representative says Mr W became aware there could've been problems with what happened in 1998. It raised a complaint on his behalf in August 2021. It said there was no evidence the advice to transfer was in his best interests.

Sesame responded to Mr W in October 2021. It said he'd brought his complaint too late to be considered. Mr W's representative disagreed and brought his case to this Service. It also provided further information about his concerns For example, it said Mr W hadn't been informed about the benefits he was giving up; no transfer analysis had been conducted; there was no assessment of his attitude to investment risk; and his wider circumstances at the time didn't suggest a transfer was appropriate.

An Investigator first thought about whether we could consider Mr W's case. She concluded we could, but Sesame disagreed. An Ombudsman then considered our jurisdiction and concluded Mr W had raised his complaint in time so this Service could look into the merits of his case.

Sesame didn't respond to the decision. But to be clear, whenever a case comes to an Ombudsman for a decision on the merits of a case, they must still consider jurisdiction. Having done so I agree with the findings and conclusions set out by the Ombudsman in his letter of 16 September 2022.

There's limited value in me rehearsing all the arguments again. But to summarise, Sesame's main argument hinged on the three year limit for bringing cases to this Service. That is by when Mr W was, or ought reasonably to have been, aware of cause for complaint. It said he ought to have realised there was a problem as early as 2013 when he received annual statements from his personal pension provider showing that the benefits he'd receive in retirement were much less than those he'd have received from his DB scheme.

I think the following extract from the ombudsman's decision neatly summarises the position:

"I consider the annual statements to be part of the equation. The other part is what information the consumer has available from the time of the advice – so that they can compare what they were originally told with what they're now being told (from the statements). As a crude example to illustrate the point, if a consumer had information showing that they would receive an annual pension of £20,000 from their OPS but the annual statements said their projected annual pension would only be £4,000 then there might be an argument that they ought to have "put two and two together" and realised that they had cause for complaint – particularly if they're close to retirement and the projected figures hadn't changed too much in recent years."

"But this supposes that the consumer had the figures from the time of the advice available – if they didn't it would be difficult for them to make any comparisons – particularly if, as in this case, the advice was many years ago as memories fade over time. Mr W has told us that he didn't realise until he spoke with his representative in 2020/2021 that his OPS would have provided an annual pension of around £6,000. We've asked Sesame to provide documentation from the time of the advice to show what Mr W was told but it's told us there is nothing now available due to the passage of time. We've also asked Mr W to provide copies of the documents he has from the time of the advice but he's said he doesn't have any.

"It's difficult therefore for me to be absolutely sure what information Mr W was given at the time that he could compare with the pension statements. But as he's told us that he doesn't have any documentation, and as Sesame hasn't got anything either, it's difficult for me to conclude that Mr W was in a position whereby he could compare the figures in the annual statements with what he was told in 1998."

"Accordingly, based on the information I have, I conclude that Mr W wasn't in a position to make the comparison, and therefore to have a cause for complaint, until his representative told him what he could have received from the OPS. As Mr W referred his complaint to us within three years of being able to make that comparison, I conclude that it was referred to us within the three year time limit."

This Service can consider Mr W's case.

Sesame was asked to provide its case file. But it wasn't able to provide much information from the time of the advice. It noted that the transaction happened 24 years ago and it wasn't required to keep documents for such a long period of time.

The Investigator had to base her review on what little information we did have, as well as referring to the regulatory environment at the time. On balance she thought Sesame should've advised Mr W not to transfer his DB pension given his circumstances. And that had it done so he would've remained in the scheme. She upheld his complaint. Sesame didn't respond with any new information or arguments.

As both parties couldn't agree to the Investigator's findings and conclusions, Mr W's complaint has been passed to me to review afresh and to provide 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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr W's complaint. I'll explain why.

The first thing I've considered is the regulation around transactions like those performed by Sesame for Mr W. Of course, I must be mindful that law, regulation and industry best practice have evolved over the past twenty five years. What's required of firms now, wasn't necessarily the case in 1998 when it gave Mr W its advice.

Nevertheless, a good starting point for my consideration is the FCA Handbook. This contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to 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.

While the Principles were formalised in 2001 – a little after Mr W received advice - they were nevertheless built upon existing regulations and accepted practice. And I don't think any firm would argue that it wouldn't have tried to adhere to such standards prior to 2001. As such, they provide a useful framework for thinking about his complaint.

In any case, there were stringent rules and regulations in place at the time governing transactions like those undertaken by Sesame. For example in July 1992 FIMBRA Guidance Note No.7 and LAUTRO Enforcement Bulletin 16 (s1.11 onwards) set out in detail the features of the DB scheme which needed to be discussed before recommending a transfer.

The guidance required other options of doing nothing, transferring to a new employer's scheme or a section-32 plan should be given equal consideration. A full analysis of the benefits available was expected to demonstrate why these options had been ruled out. And both regulators said they anticipated that many consumers would be best advised to remain in their DB scheme.

Further, in July 1994 FIMBRA Guidance Note No.14 and LAUTRO Enforcement Bulletin 31 on future sales were released at the same time as the Securities and Investment Board (SIB) announced an industry-wide pensions review of past sales, sometimes called the 'Pensions Review'. The wording in these notes is largely identical as it mirrored guidance released by SIB itself.

The guidance required a transfer value analysis (TVAS) for the first time, which was to be discussed with the investor in 'simple clear language'. The regulators also required a fact

find designed with pension transfers in mind would be needed and set out the information that should be captured from the investor and the pension scheme.

LAUTRO and FIMBRA guidance, was subsequently adopted by the Personal Investment Authority (PIA) in 1994. And Sesame's predecessor firm was covered by the PIA.

Mr W said he was told that the transfer of his DB pension would be a 'better deal, more accessible and easy to do'. He said he was persuaded to transfer as he felt he may get a better return with a personal pension, which he was told was more flexible.

Concerning whether or not Mr W had any prospect of getting a better deal, presumably meaning better returns than on his DB pension. I haven't seen a copy of the TVAS report or relevant illustrations Sesame was required to provide him. So I don't know what his projected income would've been in his occupational pension scheme compared to the proposed new personal pension.

However, Sesame gave Mr W advice 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, they provide a useful indication of what growth rates would have been considered reasonably achievable for a typical investor.

When the advice was given to Mr W the relevant discount rate was 7% per year for a person with 22 years to retirement. It's important to note that the financial viability test (FVT) was indicative of a rate of return that would be acceptable for individuals with a medium attitude to risk. For further comparison, the regulator's upper projection rate at the time was 12%, the middle projection 9%, and the lower projection rate 6% per year.

There's no contemporaneous evidence about Mr W's attitude to risk in 1998. But he's told this Service he had a low appetite for risk. I've taken this into account, along with the composition of assets in the FVT rate and also his term to retirement. I agree with the Investigator when she concluded in his circumstances it was more likely than not Mr W would've received lower benefits as a result of transferring to a personal pension than he would've in his DB scheme.

In addition, it wasn't just a matter of considering Mr W's outlook on taking investment risk. Sesame had to consider his wider circumstances, including his capacity for loss. The deferred DB pension he'd accrued during 13 years in public service was his only retirement provision, aside from any entitlement he had to state pension. It seems he had no other significant assets. So he had no or very limited ability to absorb any losses.

Further, Mr W wasn't an experienced investor, and I haven't seen anything to suggest he had the desire or relevant knowledge to be able to appropriately manage his pension funds on his own.

Based on the available information and these factors alone, it's more likely than not the transfer of Mr W's DB benefits wasn't in his interests. And Sesame hasn't been able to formulate an argument with evidence to demonstrate otherwise.

Turning to flexibility and accessibility. Even if I considered that in 1998 Mr W thought these were important features for his pension, I place little weight on them in terms of the recommendation and decision making process that should've been followed.

I say this because at the time he was only 37. In terms of flexibility, while he may've wanted to retire early, many people do. But the telling factor is when they have the financial means

to do so. I've seen nothing to suggest at the time this was a realistic prospect for Mr W. And in any event, in terms of access, he still had many years before he could consider taking any pension benefits.

Mr W had plenty of time to make a decision about whether or not to transfer out of his DB scheme. There was no need for him to give up his guaranteed benefits when he wouldn't have known what his income needs in retirement would actually be. And no pressing reason has been identified by Sesame as to why waiting wouldn't have been the right course of action.

Sesame was in a good position to have analysed, tested, challenged and advised Mr W about what was in his best interest for retirement planning in 1998. It knew pension pots built up over many years are to provide for retirement. And certainly, when transfer is contemplated there needed to be compelling reasons, on balance I don't think that was the case here.

It was Sesame's role to discern what Mr W's wants and needs were and why. Its role wasn't simply to facilitate what he wanted without any critical thinking. It had to use due care and skill. It had to do these things because it had to act in his best interests. I don't think it's demonstrably met these obligations.

Based on the available information, I think Sesame should've advised Mr W to retain his DB scheme benefits. Had he been suitably advised I'm persuaded he would've accepted this advice. I say this because it's rare for someone to seek professional advice and then go against this.

Putting things right

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

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.

A policy statement was published 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 W 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 didn't make a choice, so as set out previously I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

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

I'm upholding Mr W's case. So, he would need to be returned to the position he would've been in now - or as close to that as reasonably possible – had it not been for the failures which I hold Sesame Limited responsible for.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out below. My decision is Sesame Limited should pay Mr W the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Sesame Limited pays Mr W the balance.

This recommendation is not part of my determination or award. Sesame doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. He may want to get independent legal advice before deciding whether to accept this decision.

I consider Mr W would've remained in his DB scheme. Sesame Limited should therefore undertake a redress calculation in line with the pension review methodology, 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.

The calculation will need to take into account many data, including when Mr W retired. And whether he's added to his personal pension or taken benefits from it. It 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 W's acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Mr W'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 W 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 would be tax-free 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 compensation amount must where possible be paid to Mr W within 90 days of the date Sesame Limited 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 W.

Income tax may be payable on any interest paid. If Sesame Limited deducts income tax from the interest, it should tell Mr W how much has been taken off. It should give Mr W a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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 Limited to carry out a calculation in line with the updated rules and/or guidance in any event.

My final decision

For the reasons I've established, I'm upholding Mr W's complaint. I now require Sesame Limited to put matters right in the way I've set out.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 22 February 2023.
Kevin Williamson
Ombudsman