DRN-3999548

The complaint

Mrs B complains that her late husband Mr B was unsuitably advised by Barker Financial Associates to transfer his defined benefit (DB) pension to a personal pension.

Mrs B is complaining on behalf of her late husband's estate and in her role as his beneficiary.

Barker Financial Associates was a member firm of the Sesame Limited network, so Sesame is responsible for answering this complaint. I'll refer to Sesame in this decision throughout for ease of reading.

What happened

Mr B was advised to transfer his DB pension to a personal pension in 1997. He was advised to switch to another personal pension in 2011.

He contacted a claims management company in May 2018 as he thought he might have been misadvised to transfer out of his DB pension. Mrs B says her husband became concerned when he spoke to one of his former colleagues in 2018 who had received a transfer value to their DB pension of over £300,000 which was significantly higher than Mr B's pension at the time.

Mr B passed away in August 2019 before the complaint was submitted to Sesame. His wife made a complaint in 2020 about her husband being unsuitably advised to come out of his DB pension scheme.

Sesame said they weren't able to fully investigate the complaint as a signed letter of authority from Mrs B and additional information which had been requested hadn't been received. They provided referral rights to this Service.

In their submissions to us, Sesame raised objections to us considering the complaint as they thought it had been raised too late.

Another ombudsman at this service considered whether this Service could consider Mrs B's complaint. She issued a decision explaining that the complaint had been made in time and we could consider the merits of the complaint.

One of our investigators then upheld the complaint. He thought the transfer hadn't been in Mr B's best interest and there were no persuasive reasons why it had been suitable advice for Mr B to give up is DB benefits.

Sesame disagreed and so the complaint was passed to me for a 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.

Jurisdiction

I have independently considered whether this complaint was brought within the regulator's time limits. And having done so, I agree with my ombudsman colleague's decision that this is a complaint this Service can consider. The complaint was raised more than six years after the advice was given, so the key question is whether Mr B ought to have been aware there was cause for complaint more than three years before the complaint was raised. The complaint was raised in 2020, so the consideration is whether Mr B was aware or ought to have been reasonably aware he had cause for complaint before 2017.

Mrs B said her husband became aware in 2018 when speaking to a former colleague about his pension. I have no reason to doubt her testimony on this. Sesame said Mr B ought to have reasonably been aware before 2018 that something might be amiss. He was quoted an income from his DB scheme in 1997 of over £10,000 at age 60 and in 2011 when he switched providers his pension had a value of around £81,000. Sesame thought Mr B ought to have been aware that given the value of his pension in 2011 this unlikely would be able to match his former DB benefits.

I can see where Sesame is coming from. However, based on the information I have seen I agree with the jurisdiction decision that there wasn't sufficient information in the personal pension statements for an inexperienced investor like Mr B to easily make comparisons and reasonably realise there might be an issue with the advice.

Overall, I'm persuaded he didn't become reasonably aware he had cause for complaint before he spoke to one of his colleagues in 2018. And so the complaint was made in time.

Was the advice suitable?

At the time of the advice in 1997, Sesame was regulated by the Personal Investment Authority ('PIA'). Sesame was a previous member of the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA'). When the PIA took responsibility for FIMBRA businesses in 1994, they adopted the FIMBRA rules. And these adopted rules applied at the time of the advice in this case.

The FIMBRA rulebook set out the expectations on members when giving advice. The key rules applying from April 1998 were as follows:

- Rule 4.2.1 required an adviser to take reasonable steps to obtain relevant information concerning a client's personal and financial circumstances in order to provide investment services.
- Rule 4.3.1 required FIMBRA members to take all reasonable steps to satisfy themselves that the client understood the risks involved in a transaction.
- Rule 4.4.1 required members to establish, based on their knowledge of the client and 'any other relevant information which ought reasonably to be known' to them, which types of investment were the most suitable for them.

In July 1988 an amendment to the guidelines on best advice required members to ensure their recommendations were made on the basis of the client's best interest rather than the income generated for the member.

A FIMBRA guidance note in 1994 set out that for DB transfers a reason why letter had to be issued 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."*

On attitude to risk and security, the guidance said:

"this is relevant not merely to the choice of contract or fund, but also (and more fundamentally) to the choice between an occupational pension scheme and an individual pension contract in the first place".

I've considered the advice given to Mr B with the above in mind.

In 1997, Mr B was 38 years old, married with one dependent child, in good health and was earning £23,500 per year. He had an outstanding interest only mortgage of £85,000 and emergency savings of £5,000. Other than his DB scheme, he had a group personal pension through his employer which attracted employer contributions and which had only just been started in December 1996 and another personal pension which he had started in 1993.

His attitude to risk was recorded as low.

A transfer value analysis was carried out which showed in order to match Mr B's DB benefits at age 60 he needed to achieve returns of 8.57% per year (critical yield).

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

The investment return (critical yield) required to match the occupational pension at age 60 was 8.57% per year. This compares with the discount rate of 9.4% per year for 21 years to retirement in this case. For further comparison, the regulator's upper projection rate at the time was 6%, the middle projection rate 9% and the lower projection rate 12%.

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. I think Mr B was unlikely to receive benefits of a materially higher overall value than the occupational scheme at retirement, as a result of investing in line with their attitude to risk.

Whilst the discount rate exceeds the critical yield this doesn't take into account Mr B's attitude to risk which was low. He ticked a box to say *"I do not consider it to be appropriate to expose myself to anything other than a minimal amount of risk in the hope of increasing my pension benefits"*

Taking this into account I think the potential to exceed the critical yield in a way that justified giving up a safe and guaranteed pension was relatively low. Given Mr B's cautious attitude to risk, I don't think transferring was financially viable.

The recommendation letter issued to Mr B speaks about some advantages of a DB pension and some risks of a personal pension. For example, it states Mr B can take 25% in tax free cash from his personal pension, but most DB pensions would allow for tax free cash as well which isn't mentioned. Also, Mr B wasn't asked why he would need a lump sum in retirement which was over 20 years in the future.

Sesame said that based on the critical yield, it was *possible* Mr B could benefit from transferring, but also said if these returns weren't achieved he could be worse off.

With regards to death benefits it's stated that they would be better in a personal pension pre-retirement as the DB scheme was not paying a lump sum. It mentions that a spouse's pension would be lost by transferring.

However, it's not detailed and clear reasons why a personal pension is the recommended option are not really given.

The letter falls short in my view of properly weighing up the options and explaining why the personal pension was recommended for Mr B over his benefits in the DB scheme.

Taking financial viability aside I also can't see any other reasons why it was suitable for Mr B to transfer his guaranteed DB benefits. It's true that he had other pension provisions which would have likely given him some capacity for loss as the DB benefits weren't his only retirement provisions. But his other pensions were already subject to investment risk and his DB benefits weren't. So given Mr B's low attitude to risk it's difficult for me to see why he needed to risk these.

Death benefits weren't Mr B's priority as he said his wife had her own pension provisions and they did have some mortgage protection. Also, flexibility and control over his pension were in my view stock motives without much substance. He was over 20 years away from retirement and his DB pension in fact offered the possibility of taking even earlier retirement from 50. His other pensions would have provided additional flexibility.

There was no obvious advantage for Mr B which would outweigh giving up valuable DB benefits.

I've taken into account that Mr B signed a letter in 1997 saying he understood that he was giving up guarantees and that his new pension wasn't guaranteed to give him the same benefits and may be higher and lower. However, he had just received advice to transfer his DB benefits and so I think he would have trusted his adviser, and reasonably so, that this was the best thing to do in his circumstances.

He might have understood there were some risks, but I don't think on balance he would have understood how unlikely it was with his low attitude to risk to better his benefits from the guaranteed benefits he already had.

It was the adviser's role to recommend what was suitable and for the reasons given above I don't think giving up his guaranteed benefits was suitable in Mr B's circumstances. There is no indication he would have transferred if he had been advised against it.

Putting things right

Mr B died in 2019. Mrs B represents the estate and is Mr B's beneficiary with regards to his pension, so she should be compensated for losses suffered to his pension.

A fair and reasonable outcome would be for the business to put Mrs B as far as possible, into the position she would now be in but for the unsuitable advice to her husband. As explained above I think Mr B would have remained in the DB scheme until he died in August 2019.

Mr B died at age 61 and he had not yet retired. If he had remained in the DB scheme I see no reason why this would have been different. So any death benefits considered in the loss calculations should be the ones which were available pre-retirement in the DB scheme.

I also note that the money Mrs B received from Mr B's pension after his death could possibly not all stem from Mr B’s DB scheme. In 2011 when Mr B switched pensions, his pension value was around £81,000. This jumped significantly in the next couple of years. So it’s more likely than not Mr B’s pension was funded by additional contributions and/or other pension switches. Sesame should make relevant enquiries to Mr B’s pension provider to establish how much of the sum Mrs B received from the pension came from Mr B’s DB transfer value.

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 Mrs B, through her representatives, whether she preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect. She didn’t make a choice, so as set out previously I’ve assumed in this case she doesn’t want to wait for the new guidance to come into effect.

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

Sesame must 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.

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 Mrs B’s acceptance of the decision.

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs B’s pension. 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 a pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs B 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 her likely income tax rate in retirement – presumed to be 20% So making a notional deduction of 15%/overall from the loss adequately reflects this.

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 guidance in any event. Given that they come into effect in less than a month, Sesame can wait until 1 April to do a loss calculation following new rules if they foresee not being able to settle this claim until then (which is quite possible as they will need further information from third parties).

The compensation amount must where possible be paid to Mrs B 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 Mrs B.

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

My final decision

I uphold the complaint and require Sesame Limited to calculate redress as set out above and pay any compensation due to Mrs B.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 30 March 2023.

Nina Walter
Ombudsman