

## **The complaint**

Mr L has complained about the advice he received from Sesame Limited (via their appointed representative, Regal Partners Financial Planning Limited) to transfer his occupational defined benefits (DB) pension into two individual pensions plans, one of which was a section 32 individual pension plan.

Mr L is currently represented by a claims management company, but for brevity I will refer directly to Mr L throughout my decision.

## **What happened**

Mr L left his employer's DB pension scheme on 29 February 2000. At this point his salary was just over £15,000 and he had 24 years and 2 months pensionable service.

In September 2000, after seeing an advertisement about releasing Tax-Free Cash (TFC) for consumers over 50, it appears Mr L contacted Sesame Limited (Sesame) to enquire about the amount of TFC he might be able to withdraw from his pension.

Mr L signed a letter of authority dated 11 September 2000 allowing Sesame to request relevant information about his DB pension from the scheme trustees. A transfer value statement was provided on 28 September 2000 that noted the DB pension had an equivalent transfer value of just under £73,280. This included a Guaranteed Minimum Pension (GMP) of just over £32,000.

The information provided by the scheme trustees also explained that the scheme's normal retirement age (NRA) was 65. If Mr L had stayed in the deferred scheme, his pension on leaving at this age was forecast to have been £6,052 each year, including the GMP. The GMP element would've been subject to a final revaluation at his retirement date, as would the non-protected rights (from the point of his ceasing to be an active member of the scheme until the date of retirement).

Sesame also gathered information about Mr L's circumstances. At the time he was 49 years old, single, and employed in sales. He had a monthly income of £920 with a monthly expenditure of £515, including loan payments of £215. His debts totalled £11,900.

The paperwork from the time records Mr L as having a balanced attitude to risk. It also records that Mr L wanted to retire at age 60, needed an income of £240 each month, and considered the preserved pension as a major proportion of his pension funding. In addition, it was noted that Mr L wanted to have investment control of his pension, to maximise his TFC in order to clear his personal debts, and to reduce his working hours so he could look after his mother, who was unwell.

Sesame obtained a pension transfer value analysis report (TVAS), setting out Mr L's pension benefits at NRA under his employer scheme, and what growth - or critical yield - the fund would need to achieve to match these benefits. The investment return required each year to match Mr L's DB scheme benefits was 5.3%.

On 24 October 2000 Sesame wrote to Mr L setting out his options, as follows:

1. To take benefits from his existing scheme, which wouldn't be payable until age 65. (In Mr L's case, his DB pension didn't allow for early retirement at age 50, as the value of the fund didn't cover the GMP at state retirement age at that point. However, based on the projections, TFC of £13,690 would've been available to Mr L at NRA.)
2. To transfer his benefits to a pension providing £1,339 per year (on a single life, level basis only), thus releasing a maximum TFC of £14,436 and leaving the GMP element invested until age 65.
3. To transfer his benefits into an income drawdown plan providing TFC of £9,791 and taking an income of £1,938 in the first year, to provide initial cash totalling £11,729. The remaining fund would then be invested, allowing him to take further income immediately or later.

On 30 October 2000 Sesame provided a Formal Recommendation report advising Mr L to transfer his DB scheme benefits in order to access his TFC. Specifically, Sesame recommended the third option set out above, and advised that Mr L's pension benefits be split and transferred into two separate plans. Sesame advised transferring the GMP benefits into a section 32 protected rights pension, and any benefits in excess of the GMP into a personal pension plan (PPP). The TFC would then be taken from the PPP.

Sesame said this was the only practical way Mr L could meet his objectives – including his main objective to release “*immediate cash*”, and recommended Scottish Life as the provider for both plans. Sesame also recommended that both funds should be invested in a balanced investment strategy. Mr L accepted Sesame's advice and the funds were transferred into the two separate pension plans.

Mr L complained to Sesame on 17 March 2021, stating he had been given unsuitable advice to transfer his DB pension scheme into two personal pensions. Specifically, Mr L said that he had lost all his accrued and future guaranteed benefits, and that this was due to being put into personal pensions with funds that were too high risk. Mr L also said that he was an inexperienced investor who didn't understand the implications of Sesame's recommendations or the risks involved and that, had he been made aware of the full implications of the transfer of his occupational scheme, he would not have transferred.

Sesame didn't consider the merits of the complaint as they said it had been brought out of time. Mr L was unhappy with this and brought his complaint to this Service. The complaint was passed to me and I issued a jurisdiction decision finding that it had been brought in time and that this Service could consider it. In summary, I said that Mr L's complaint of 17 March 2021 did not cover the same issues as his 2014 complaint, and that therefore the 2021 complaint was a new complaint. I also said that I hadn't seen sufficient evidence to persuade me that Mr L knew or ought reasonably to have known that he had cause for complaint prior to March 2018, meaning his complaint had been brought in time.

Our investigator then considered the merits of Mr L's complaint and said that the DB scheme would have been of great value to Mr L and that the transfer had not been in his best interests. When considering Mr L's goal of accessing TFC to repay debts, the investigator noted Mr L's monthly repayments were comfortably servicing his debt prior to the transfer.

Sesame didn't agree and reiterated Mr L's main objectives at the time the advice was given. Sesame said that Mr L had no other capital or savings to pay his existing debts, and that – had he pursued his goal of reducing his working hours to care for his mother – he would've had less income, thus reducing his ability to service his debts. In addition, Sesame pointed out that, as Mr L was unable to take his benefits from his DB scheme at age 50, he had no

other way of accessing TFC. As the TVAS showed the yield required to match the DB pension was achievable, and within the tolerance of the rates set down at the time of advice, Sesame said the advice to transfer had been suitable.

Sesame went on to claim it was made clear to Mr L that the recommendation was to stay where he was and *“to leave his occupational scheme alone”*, but that Mr L had chosen to go ahead anyway. Sesame also said options were provided to Mr L with the pros and cons clearly set out. In addition, Sesame said on balance had Mr L been told not to transfer he would've opted to proceed anyway as it was the only way to clear his debts and care for this mother, thus creating an immediate and justifiable need that Sesame claimed could not be addressed in any other way.

A second investigator responded to Sesame's points, and gave the opinion that Mr L had a healthy surplus of income which could've been used to clear his debts, and that – in any case - the debts were being serviced at the time. As regards Mr L's hopes to reduce his working hours to care for his mother, our investigator pointed out that it didn't appear this issue had been properly explored or documented at the time the advice was given, or that possible alternatives to meet this need had been considered.

In addition, our investigator said that, although Mr L couldn't access his scheme benefits at age 50, there had been no immediate need for him to access TFC in any case. Furthermore, the investigator explained the TVAS report was based on Mr L taking benefits at age 65 - a different scenario from the one the recommendation was based on. Lastly, the investigator refuted Sesame's claim that a recommendation had been made to leave Mr L's pension where it was, and clarified that the recommendation had been to transfer.

Sesame didn't accept our investigator's view. As the parties couldn't reach an agreement, the complaint has been referred back to me to make a finding on the merits.

### **What I've decided – and why**

As set out in my previous jurisdiction decision on this case, Mr L's complaint of March 2021 raises new and different concerns from those raised in his 2014 complaint, and I've not seen anything to make me think Mr L ought reasonably to have been aware he had cause for complaint about these new issues prior to March 2018. As Mr L brought his complaint within 3 years of this date, I'm satisfied Mr L brought this complaint in time and that it's one I can consider. So, I will go on to discuss the merits of this complaint below.

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, standards, and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I've reached 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 advice Mr L has complained about was provided by Sesame (via their appointed representative, Regal Partners Financial Planning Limited) in October 2000. At the time of the advice, Regal Partners was regulated by the Personal Investment Authority ('PIA'). Prior to this, Regal Partners had been a 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 that were the most suitable for them.

An amendment to the guidelines on best advice also required members to ensure their recommendations were made on the basis of the client's best interests rather than the income generated for the member.

Guidance by FIMBRA to members, specifically regarding recommendations to transfer benefits from a DB scheme, was also relevant here. Amongst other things, this noted that many customers would be best advised to remain in the DB scheme. When giving advice about whether to transfer, other options – such as doing nothing – should be given equal consideration. And the Transfer Value Analysis (TVAS) should be carried out and discussed in a simple clear language.

So, in summary, this meant Sesame had to ensure the recommendation was in Mr L's best interests, considering his circumstances at the time and the alternative options available.

The records Sesame completed at the time indicate that Mr L's DB pension was his main, and possibly only, pension. The paperwork does suggest that Mr L had access to his new employer's scheme, but it doesn't appear that Sesame recorded the type of scheme or whether Mr L was a member of it. In any case, even if Mr L was a member of his new employer's scheme, this would have given him a maximum of 15 years' service until he reached his retirement age of 65, compared with already having over 24 years' service in the DB pension at the heart of this complaint.

Furthermore, on the Financial Questionnaire, in response to the question "*How do you consider the pension benefits we are investigating?*", Mr L selected the answer "*A major proportion of my pension funding*". In summary, it seems clear that Mr L's DB pension would've provided a significant part of his pension provision in retirement, and was therefore both valuable and important to him.

I accept that when Mr L sought advice from Sesame about accessing his TFC at age 50, it wasn't possible to achieve this without transferring out of his DB pension. However, given the importance to Mr L of his DB pension, the question Sesame should've considered was whether it was really in Mr L's best interests to access his pension at age 50 at all, and whether he had a genuine need to do so.

Sesame have said Mr L's main objectives were to take TFC to repay his debt and to reduce his working hours in order to care for his mother, who was in poor health. I've considered this in the light of what is known about Mr L's circumstances at the time.

Mr L had a net disposable income of £405 each month and was comfortably servicing his debts, so debt repayment doesn't appear to have been a strong need for him. In fact, Mr L could've paid down his debts even quicker using his disposable income, had he wished to do so. There is nothing to show that this option was considered, and instead Sesame's recommendation was that Mr L take TFC from his pension to pay off the debts. I can't agree

that obtaining TFC to repay well-serviced, non-urgent debt was sufficient justification for transferring out of a valuable DB pension scheme 15 years early.

I've also carefully considered Mr L's recorded objective that he wanted to reduce his working hours to care for his mother, and I accept this might well have been an important goal for Mr L. However, I would expect Sesame to have considered and recorded a number of details about this, as well as clarifying whether such an arrangement would be approved by Mr L's employer, and – if so – then undertaking an income and expenditure analysis based on Mr L proposed part-time hours. However, I've not seen any evidence to show the adviser discussed this objective in any detail with Mr L.

Furthermore, neither the fact-find nor the recommendation report comment on the prognosis for Mr L's mother's health, so it doesn't appear Sesame took into consideration whether Mr L's caring responsibilities would've been temporary or permanent. In my view, this was an important question, the answer to which should've been factored into the formulation of any advice.

In short, the adviser should've considered Mr L's overall financial position, taking into account his proposed new working hours, his caring responsibilities, and any other factors that might then have become relevant. As an example, the adviser could've asked Mr L to find out from the Department of Social Security if there were any potential benefits to which he might be entitled due to becoming a carer for his mother, which could've potentially made up any shortfall in his income. It's also possible that, given Mr L's disposable income, his debt may have still been affordable, even had he reduced his working hours to care for his mother. However, again, there is no indication that any of this was discussed or quantified.

As Sesame has cited a reduction in working hours as one of the main reasons for recommending the transfer to Mr L, this objective should've been underpinned by clear and robust reasoning, demonstrating a genuine need for TFC and/or additional income, and a sound basis for not pursuing any alternative options. For the reasons I've given above, I cannot agree this was the case.

Turning to the age at which Mr L hoped to retire, it doesn't appear that Sesame sufficiently explored or pinned down the answer to this question. The fact find records his wish to retire at age 60, but there is no evidence that reasons for or implications of this wish were explored further, or that Mr L ever confirmed this as a strong objective he wanted to pursue rather than a general aspiration. Furthermore, the recommendation report simultaneously suggests that Mr L should maximise his pension by leaving the GMP element invested until he was 65, but also that he should take his TFC and an initial income from age 50, thus only leaving the balance of the fund to accumulate to provide a pension income at the recommended age of 65. (Although, in the end, we know Mr L was subsequently recommended to purchase an annuity giving him an income from age 50.) In summary, it doesn't appear that a definitive retirement age was ever fixed on, but – in any case – it seems that at the time the advice was given, Mr L wasn't ready to retire.

Sesame should've also taken into account Mr L's capacity for loss. Mr L had accrued 24 years and 2 months of pensionable service, but it appears he had no other assets. He also had very little or no ability to be able to afford any losses, as he was highly unlikely to be able to replace any losses he did incur. So, it should've been apparent that taking monies from Mr L's pension would have affected him negatively in retirement.

Along with his capacity for loss, Mr L's investment experience should've been considered. Mr L wasn't an experienced investor, and yet the fact-find recorded that it was important to him to "*have investment control of his pension fund*". However, Mr L didn't have the relevant investment knowledge to be able to manage his pension funds on his own.

I also note Mr L's appetite for investment risk was categorised as "balanced". However, it doesn't appear that Sesame completed a risk assessment, and no details have been provided as to why Mr L was categorised in this way. Given Mr L's lack of investment experience and his low capacity for loss, it seems likely to me that he would've been more appropriately categorised as a cautious investor than a balanced investor.

Sesame's recommendation to split the non-protected rights element from the protected rights element (GMP) of Mr L's DB pension led to the creation of two separate pension plans, both of which were then subject to investment risk – rather than the DB scheme which had no investment risk at all. Only the GMP element remained protected, but there was little opportunity to exceed the guarantee. Having a DB pension presented no investment risk to Mr L and, in the light of his lack of experience and low capacity for loss, was more suitable for him.

Part of Sesame's recommendation was for Mr L to top up his TFC with a one-off taxable income payment, with the remaining fund staying invested so that Mr L could take an income, immediately or later. At this point Mr L was still 15 years away from retirement, or possibly only 10 years if he was able to realise his wish of retiring at age 60. Taking the TFC would've removed the main potential for growth from his plan, and the recommended flexibility and accessibility would've increased the risk of Mr L depleting the remaining limited funds in the PPP, potentially leaving very little or nothing for him in retirement - whether this was at age 60 or 65. (I also note that shortly afterwards Sesame recommended that Mr L purchase an annuity, meaning there was no further opportunity for growth on those funds in any case).

As explained earlier, I'm not persuaded that TFC and access to funds was necessary for Mr L at age 50, and so it follows that I also don't think Mr L had a need to be able to access his pension flexibly at the time. (As mentioned above, Mr L's subsequent purchase of an annuity removed this flexibility anyway.) So again, I don't think aspect of the advice was suitable for Mr L.

I've also considered the financial viability of the recommendation. The pension transfer report indicated an annual return of at least 5.3% was required just to match the DB scheme benefits.

The advice was given during the period when the regulator was publishing what they termed as "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 provided a useful indication of what growth rates were considered reasonably achievable at the time.

When the advice was given to Mr L, the discount rate with 15 years until retirement was 6.7%, and with 10 years until retirement 6.4%. The regulator's upper projection rate at the time was 9%, the middle projection 7% and lower projection rate 5% each year. So, it's reasonable to say - on face value - the critical yield of 5.3% could've been achievable, were we to agree that Mr L had a medium attitude to risk. However, as I've already said above, I think it's more likely that Mr L should've been term a cautious investor – so, even on these figures, it seems the critical yield of 5.3% was too high.

More importantly, the transfer report didn't accurately reflect the advice given. Mr L's DB pension was transferred into two separate plans. One of which he could access immediately and the other (the section 32 plan) which could not be accessed at the time due to the GMP requirement. The TVAS report was completed on the basis the full transfer value would remain in the fund until age 65 or age 60. However, the advice Sesame gave was for only

the GMP element to remain, with Mr L having immediate access to the other fund, which was valued at just under £41,230. As such, it was not a like-for-like comparison.

In addition to the above, the report didn't take into account any escalation rates the DB pension would've received. So, in summary, I can't agree that Sesame demonstrated the recommendation was financially viable.

I accept Mr L's initial request to Sesame was around taking TFC, and it seems probable that he did use these funds to pay his debts. However, as I said earlier, the primary purpose of his pension was to provide an income in his retirement, and Sesame should've advised Mr L accordingly. I've looked at the advice process and, quite simply, it was inadequate.

Under the guidance at the time, it was the responsibility of the adviser to "*take reasonable steps to obtain relevant information concerning a client's personal and financial circumstances*". Yet, the fact find and recommendation report only records very limited information. It notes that Mr L would only need an income of £240 each month in retirement, but gives no explanation as to how he could live on such a small amount. It states Mr L's employer offered a pension scheme which he was able to join, but doesn't say whether or not he had joined it. It notes Mr L had a rent or mortgage payment of £180 each month, but fails to clarify whether his main residence was rented or owned.

Furthermore, it was Sesame's responsibility to decide whether the objectives expressed by Mr L were needs or wants, to challenge and analyse these objectives, and to consider alternative solutions. It doesn't appear that Sesame did any of this in any detail – and, in fact, it would've been almost impossible to do so effectively as the information gathered around Mr L's circumstances was so limited. I think this led to an unsafe recommendation to transfer, resulting in Mr L losing a valuable benefit.

To conclude, I don't think the advice given to Mr L was suitable. In transferring out of the DB scheme, Mr L gave up a guaranteed, risk-free income at retirement and, as a result, was likely to have been worse off. Regardless of what Mr L might've wanted, Sesame's role was to make a recommendation in his best interests, and so Sesame should've advised Mr L to remain in his DB scheme.

Sesame has argued that – had he been advised to remain in his DB scheme – Mr L would've rejected this advice and insisted on proceeding with the transfer in any case. However, I note that Sesame has simultaneously argued that Mr L was in fact advised to remain in the scheme. These two arguments seem somewhat at odds with each other and, in any case, I've seen no evidence to support either assertion. So, I think that if Mr L had been given a suitable recommendation to remain in the DB scheme, he would've most likely followed this advice. Therefore, I am upholding this complaint.

### **Putting things right**

A fair and reasonable outcome would be for the business to put Mr L, as far as possible, into the position he would now be in, but for the unsuitable advice. As I've said above, if suitably advised, I think Mr L would have remained in the occupational scheme.

Mr L has previously asked that the calculations be completed in line with FG17/9 guidance. However, given the new methodology will come into effect on 1 April 2023, we think it's reasonable for Sesame Limited to use the new guidance and rules.

Sesame Limited 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 under the new rules which come into effect on 1 April 2023. 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 calculations should be completed **after** 1 April 2023, based on the most recent financial assumptions. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr L's acceptance of the decision. Compensation should be based on Mr L taking benefits at age 65, his scheme normal retirement age, as - had he been given suitable advice - I think it's most likely he would've have taken his DB benefits no earlier than this age. So, compensation should be based on his normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

If the redress calculation demonstrates a loss, the compensation should (if possible) be paid into Mr L'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 L 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 compensation amount must where possible be paid to Mr L 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 Limited to pay Mr L.

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

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.

Determination and money award: I require Sesame Limited to pay Mr L 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 additionally require Sesame Limited to pay Mr L any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Sesame Limited to pay Mr L 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 L the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr L.

If Mr L accepts my decision, the money award is binding on Sesame Ltd. My recommendation would not be binding on if Mr L doesn't accept. Furthermore, it's unlikely

that Mr L can accept my decision and go to court to ask for the balance. Mr L may want to consider getting independent legal advice before deciding whether to accept this decision.

### **My final decision**

I uphold the complaint. My decision is that Sesame Limited should pay the amount calculated as set out above. Sesame Limited should also provide details of its calculation to Mr L in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 April 2023.

A handwritten signature in blue ink, appearing to read 'E. Clare', written in a cursive style.

Ellie Clare  
**Ombudsman**