

The complaint

Mr B complains about the advice given by Braemar Financial Planning (Braemar). Sesame Limited (Sesame) is now responsible for this advice. Mr B complains about the advice he was given to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension and a Section 32 policy ('S32 policy'). He says the advice was unsuitable for him and believes this has caused a financial loss.

What happened

Mr B met with Braemar in 1997 to discuss his pension and retirement needs. Mr B has said that he wanted advice on what were the best options for him at the time.

Whilst Sesame is now responsible for the sale of this plan it doesn't have very much information from the point of sale. There is no fact find, suitability letter or other documents that you would expect to see when a consumer has been given financial advice. Whilst this is unfortunate, particularly as Sesame is required to keep this documentation, I still think I've been able to fairly decide this complaint.

What I know about Mr B's circumstances from the time of sale is as follows:

- He was 49 years old and divorced. He didn't have any dependent children.
- He was unemployed at the time of sale but was actively seeking employment.
- He was living in rented accommodation.
- He didn't have any other pensions or investments.
- He intended to retire at age 65.

He had deferred benefits in a DB scheme. The transfer value of this was £9,864.56.

Mr B says that his attitude to risk was low, and he wasn't looking to risk his pension arrangements.

In September 1997, Braemar advised Mr B to transfer his pension benefits into a personal pension and the S32 policy. The S32 policy would have contained the guaranteed minimum pension part of the DB transfer.

Mr B says the reasons for this recommendation were that he was told he would receive better returns in the long run if the transfer went ahead. I understand that Mr B took the benefits from this pension in 2021.

Mr B complained in 2022 to Sesame about the suitability of the transfer. He said that:

- He had one meeting with Braemar and the focus of this meeting was the procedural steps that would be taken to transfer the DB scheme.
- What he was giving up, or the 'enormity of the transaction', wasn't discussed at all.
- Because of this he was unable to fully understand the advice.

- He shouldn't have been advised to give up the guaranteed pension, it was a significant part of his retirement provision.

Sesame didn't uphold Mr B's complaint. It said that it had requested some information from Mr B about the sale of the plan, and as it hadn't received this it didn't think it had enough to assess his complaint.

Mr B referred his complaint to our service. An Investigator upheld the complaint and recommended that Sesame pay compensation. She thought that, given what Mr B had said about his circumstances, it was likely that he wouldn't have wanted to take the risk of the DB scheme as the benefits he gave up were significant. She wasn't persuaded that Mr B would have been given the information he should have been. So, she didn't think that the transfer was in his best interests.

Sesame didn't respond to the Investigator's opinion. As no agreement has been reached 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.

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. And 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

The advice was provided by Braemar and Sesame in 1997. At this time they were regulated by the Personal Investment Authority ('PIA'). Sesame was a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). When the PIA took responsibility for LAUTRO businesses in 1994, they adopted the LAUTRO rules. And these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise 'due skill, care and diligence' and 'deal fairly with investors'. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or
- Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

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

Financial viability

Braemar should have carried out a transfer value analysis report (as required by the regulator) showing how much Mr B's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield). And it should have provided detailed information about the DB scheme he was giving up and how the new arrangements would compare with this. It's reasonable to assume it would have done some of this, but without sight of it I can't really place any weight on it.

The DB scheme would have provided a guaranteed and increasing pension at Mr B's age 65. There wasn't any risk to him in respect of this. But the personal pension was invested in risk bearing assets and so, ultimately, the value and the income it would provide would depend on how it performed. So there was a risk with the transfer. I've thought about whether it was reasonable to assume Mr B wanted to take this risk.

Mr B was 49 and unemployed at the time. As far as I know he didn't have any other savings or investments and so there is nothing to show that he was comfortable with risk. And this pension would be his main provision outside of the state pension. So, I don't think it's reasonable to say that it was likely that he would want to risk it.

As I've outlined above Sesame needed to show that Mr B transferring his DB scheme was *'in the consumer's best interest and clearly disclosed all relevant consequences and disadvantages.'* It can't demonstrate that it has done this, and I don't think it's likely, on the balance of probabilities, from what I know about Mr B's circumstances, that it was in his 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 this below.

Flexibility and income needs

I don't think Mr B required flexibility in retirement. This is because based on the evidence I've seen, I can't say that he had a genuine need to access his tax free cash earlier than the normal scheme retirement age and leave his funds invested until a later date. I also can't see evidence that Mr B had a strong need for variable income throughout his retirement. Neither of these seems to have been discussed at the time of sale. Mr B says the transfer was recommended to him as it may improve his pension benefits.

Overall, I'm satisfied Mr B could have best met his income needs in retirement through the DB scheme at his age 65. There is nothing that shows this wouldn't be the case here.

Suitability of investments

Braemar recommended that Mr B invest in risk-based investments. As I'm upholding the complaint on the grounds that a transfer out of the DB scheme wasn't suitable for Mr B, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr B should have been advised to remain in the DB scheme and so the investments in personal arrangements wouldn't have arisen if suitable advice had been given.

Summary

I don't doubt that the potential for a higher income would have sounded like attractive features to Mr B. But Braemar wasn't there to just transact what Mr B might have thought he wanted. The adviser's role was to really understand what Mr B needed and recommend what was in his best interests.

Ultimately, I don't think the advice given to Mr B was suitable. He was giving up a guaranteed, risk-free and increasing income. By transferring, Mr B was putting this at risk when he didn't need to. There were no other particular reasons which would justify a transfer and outweigh this.

So, I think Braemar should've advised Mr B to remain in his DB scheme.

Of course, I have to consider whether Mr B would've gone ahead anyway, against Braemar's advice.

I've considered this carefully, but I'm not persuaded that Mr B would've insisted on transferring out of the DB scheme, against Braemar's advice. I say this because I think Mr B was an inexperienced investor with a lower attitude to risk and he says this pension accounted for the majority of his private retirement provision. So, if Braemar 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 B for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr B would have most likely remained in the occupational pension scheme if suitable advice had been given.

Sesame must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, I understand Mr B retired at age 65. So, compensation should be based on him taking benefits at this age.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Sesame should:

- calculate and offer Mr B redress as a cash lump sum payment,
- explain to Mr B before starting the redress calculation that:
 - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation),
 - and

- a straightforward way to invest his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr B accepts Sesame's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr B's end of year tax position.

Redress paid to Mr B as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Sesame may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr B's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £170,000, 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 £170,000, 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 B the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Sesame Limited pays Mr B the balance.

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

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 23 August 2023.

Andy Burlinson
Ombudsman