DRN-4344811

The complaint

Mr T complains that he was given inappropriate advice about the transfer of some pension savings by Sesame Limited.

What happened

The advice that Mr T received was provided by Sloan Financial Advisers. That firm now forms part of Sesame, so it is Sesame that needs to deal with Mr T's complaint. In this decision, for ease, I will simply refer to the business that Mr T dealt with as Sesame.

Mr T has been assisted in making his complaint by a firm of solicitors. But in this decision, again for ease, I will generally refer to all communications as having been with, and from, Mr T himself.

Mr T held deferred defined benefits ("DB") in an occupational pension scheme ("OPS"). In early 1992 he received some advice from Sesame about the potential transfer of those pension benefits to a personal pension plan. Mr T accepted Sesame's recommendation, and his pension benefits were transferred later that year.

In 2022 Mr T complained to Sesame about the advice he'd been given. Sesame said that it thought its advisor had acted in accordance with the regulatory regime at the time the advice was given. It said that there was no indication that the advice Mr T had been given was unsuitable. And it noted that Mr T had needed to take his pension benefits early in order to fund some repairs he needed to make to his house – something he wouldn't have been able to do had the pension savings not been transferred. So it didn't agree with Mr T's complaint. Unhappy with that response Mr T brought his complaint to us.

Mr T's complaint has been assessed by one of our investigators. He didn't think that the advice Sesame had given to Mr T in 1992 had been suitable. He said there was no evidence that Sesame had provided Mr T with the information he needed to make the transfer decision. And he thought that, on the limited evidence available, it was unlikely that Mr T would have found the transfer attractive, had better information been provided. So he thought that Mr T's complaint should be upheld, and he asked Sesame to look into whether Mr T had lost out.

Sesame didn't agree with that assessment. It said the amount Mr T had transferred would not have provided him with a significant income in retirement and the growth rates at the time made it entirely feasible that a personal pension could outstrip the benefits provided under his former OPS.

So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr T accepts my decision it is legally binding on both parties.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr T and by Sesame. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

I note that, in its initial response to the complaint, Sesame said that it had previously written to Mr T as part of the industry wide pensions review exercise to offer him a review of the advice he had been given. But Sesame said that it hadn't received a reply to that invitation. But it seems that Sesame now accepts those invitation letters were sent to an incorrect address so were unlikely to have been received. Mr T says that he doesn't recall receiving any letters of that nature. So I am satisfied it is unlikely that Mr T would have been aware of any problems with the advice he'd been given as a result of the pensions review exercise.

The regulatory guidance that was in place in early 1992 in relation to the transfer of defined pension benefits from an OPS was less prescriptive than we might see today. However, in July 1992 the regulator at the time, LAUTRO, set out the details of what it would expect to be discussed before a transfer was recommended. I accept that guidance was issued after Mr T's transfer took place. But as part of the guidance the regulator said that its guidance should also be applied to any investigations of past complaints. So I think the guidance is a reasonable basis upon which I should consider whether Sesame met its obligations to Mr T.

The relevant guidance set out in detail the features of the DB scheme which needed to be discussed before recommending a transfer. It mentioned that the 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. Although I entirely accept that this advice was given to Mr T more than 30 years ago, and over such a lengthy period of time memories can, and do fade, Mr T says that he has no recollection of being told about the defined benefits he was giving up by making the transfer.

The information that Sesame has provided to us from the time is very limited. There is no information about the value, or future structure, of the defined benefits that Mr T was giving up. And so there is no comparison, as would be expected by the regulator, of why a transfer might be in his best interests. Whilst I accept that information may have been given, and has been lost over the years, I cannot be reasonably sure that is the case. So I think it fair that I should consider independently whether this transfer was likely to have been in Mr T's best interests.

At the time the advice was given, Mr T was aged 32, and was transferring around ten years' worth of pension benefits. The benefits being transferred are likely to have made up most, if not all, of Mr T's retirement savings at that time. He was working in a relatively low paid job that he had only started the year before, and appears to have had little in the way of other assets. Mr T says that he had little spare income at that time, so I would expect that he wouldn't have wanted to take any significant risk with the small amount of pension savings he had accrued whilst working for his previous employer.

The advice was given during the period of the industry-wide Pensions Review, so the rates the regulator published for Financial Viability Tests are directly relevant here. But, as I said earlier, Sesame hasn't provided any documentation showing what might be the critical yield required from the transferred monies to match the benefits being given up in the OPS.

The relevant discount rate that the regulator gave for a Financial Viability Test was 11.5% per year for a consumer with 33 years to retirement as was the case for Mr T's OPS benefits. For comparison, the regulator's upper projection rate at the time was 13%, the middle projection rate 10.75%, and the lower projection rate 8%.

I've taken this into account, along with the composition of assets in the discount rate, Mr T's probable attitude to risk as set out above, and also the term to retirement. I think Mr T 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 likely attitude to risk.

I haven't seen any other persuasive reasons why it might have been appropriate for Mr T to transfer his pension benefits from the OPS into a personal pension plan. I have considered that Mr T might have told Sesame that he wanted to retire earlier than that allowed by the OPS. But there was still a significant amount of time before any earlier retirement date would be reached. If that were the case it might have been more appropriate, particularly given what I've said about Mr T's attitude to risk, and the potential investment returns, to leave his pension benefits within the safety of the OPS and to reconsider any retirement plans nearer to the proposed date.

Sesame has said that Mr T has recently taken the money from his pension plan in order to pay for essential house repairs. It says he had no other way of paying for that work so has benefitted from the transfer of his pension savings. That is most likely true, in terms of providing the funds that Mr T needed for the repairs. But I cannot see any way that the need for those funds could have reasonably been foreseen more than 30 years ago. So that use of the pension monies cannot be seen as any justification for the advice Mr T was given in 1992.

Sesame was required to show compelling reasons why Mr T should not be advised to leave his pension benefits in the OPS, and benefit from the guarantees that the scheme provided. It hasn't shown us those reasons in its response to this complaint, nor has it given me any confidence that information was provided to Mr T at the time the advice was given. As I explained above it seems unlikely that Mr T would have been materially better off as a result of the transfer.

So I don't think Sesame should have advised Mr T to transfer his pension benefits from the OPS to a personal pension plan. It now needs to establish whether that advice means that Mr T has lost out, and if so to pay him the appropriate compensation.

Putting things right

A fair and reasonable outcome would be for Sesame to put Mr T, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have likely remained in the occupational scheme.

Sesame should 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.

For clarity, Mr T took his pension benefits in December 2021. So, compensation should be based on Mr T taking these benefits at this time.

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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr T's acceptance.

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

- calculate and offer Mr T redress as a cash lump sum payment,
- explain to Mr T before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment a current defined contribution pension
- offer to calculate how much of any redress Mr T receives could be used to augment a pension rather than receiving it all as a cash lump sum,
- if Mr T accepts Sesame's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr T for the calculation, even if he ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr T's end of year tax position.

Redress paid directly to Mr T 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 allow for income tax that would otherwise have been paid. Mr T's likely income tax rate in retirement is presumed to be 20%. However, if Mr T would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

There is no doubt that dealing with the resolution of this complaint, and the need to revise some of his retirement planning, will have caused a degree of distress and inconvenience to Mr T. So Sesame should pay Mr T an additional sum of £200 in that regard.

At this stage I cannot be sure how much, or whether, compensation will be due to Mr T. Where I uphold a complaint, I can award fair compensation of up to £190,000, 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 £190,000, I may recommend that the business pays the balance.

Determination and money award: I require Sesame to pay Mr T the compensation amount as set out in the steps above, up to a maximum of £190,000.

Recommendation: If the compensation amount exceeds £190,000, I also recommend that Sesame pays Mr T the balance.

If Mr T accepts this final decision, the money award is binding on Sesame. My recommendation is not binding on Sesame. Further, it's unlikely that Mr T can accept my decision and go to court to ask for the balance. Mr T may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold Mr T's complaint and direct Sesame Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 15 November 2023.

Paul Reilly
Ombudsman