DRN-4525987

The complaint

Mr M has complained that the advice he received from Sesame Limited to transfer his Occupational Pension Scheme (OPS) benefits to a personal pension was not suitable.

What happened

In February 1996 at the age of 24, Mr M left his employer to become self-employed. At the time of the advice this represented his only pension provision.

Mr M met with the adviser in April 1996. Mr M says he'd been introduced to the adviser by his new business partner as he needed to organise new pension provision having left his previous employment. Mr M says that the conversation moved towards the transfer of his existing pension.

A factfind was completed at the time of advice which recorded that Mr M:

- Was 24 years old, unmarried and a self-employed stockbroker.
- Had an annual income of £60,000.
- Owned his home, valued at around £68,000 with an outstanding mortgage of £62,500.
- Was repaying this at £480 a month.
- Held £7,000 savings, £13,000 in stocks and shares and £1,500 in bonds.
- Had monthly outgoings of £1,200.
- Held a personal pension plan, which was around two years old to which he contributed £50 a month.
- Mr M's financial goal was recorded as protecting his income.
- His investment attitude selected was highly speculative.

The recommendation letter advised Mr M to transfer his benefits to a personal pension plan.

Mr M first complained about the advice he received in 2022, via his professional representative. Mr M's complaint is that at the time he was financially naïve and had the business clearly explained the transfer and acted in his best interests he wouldn't have transferred.

Sesame argued the complaint was time-barred as through Mr M's professional standing and career expertise he ought to have been aware much earlier of his cause for complaint. I've been purposely vague here in terms of this professional experience as to protect Mr M's anonymity but both parties are well aware of the details that I am referring to.

Another ombudsman considered the jurisdiction of this complaint but decided that it was a complaint we could consider. The ombudsman concluded that the evidence didn't support that Mr M knew or ought to have known before 2019 – which is when the ombudsman considered he would've become aware of his cause for complaint. And that Mr M had submitted his complaint within three years of this knowledge, in 2022. Sesame still believed the complaint had been made too late. And again made the point that it believes statements/illustrations Mr M likely received would've shown that Mr M's projected benefits were less than what he gave up in the scheme. And this ought to have put him on notice of his cause for complaint.

In the jurisdiction decision the ombudsmen had commented on this, he said he didn't think it was necessary to attempt to gain evidence of these statements as Mr M's complaint was technical – and not that he was worse off. So, any evidence of this discrepancy in estimated benefits wouldn't lead him to say Mr M's complaint was out of time in any event.

An investigator considered the merits of the complaint and recommended that it be upheld. A second investigator sent a follow up view, re-iterating the viewpoint of the original investigator. The reasons given for upholding the complaint were that this was Mr M's only retirement provision at the time, was guaranteed and there was no compelling reason to justify the transfer. Furthermore, Mr M was not given the correct or enough clear information to make an informed decision. The investigator noted that the adviser hadn't set out clearly what Mr M was giving up on transfer and the critical yields relied upon and explained to Mr M were based on an incorrect transfer value. The investigator also said Sesame's assertion that Mr M wanted to break ties with his employer didn't hold much weight as this was based on one box that was ticked and not explored further.

Sesame responded to say that it still disagreed that the advice was unsuitable. It said:

- Mr M was 24 at the time of advice and so had many years with which to accrue pension benefits.
- The pension transferred would likely form a small part of his overall pension provision.
- Mr M was starting a new chapter in his life, becoming self-employed so it's feasible he wished to break ties with his employer.
- Mr M understood the concept of risk.
- Mr M requested fund switches, this showed it was important to him to have the flexibility of a personal pension and to take control of his investment decisions to chase better returns.
- The transfer was viable as improving on returns was within reasonable assumptions at the time. And the alternatives were considered.
- Mr M's subsequent actions have all pointed to someone who is very familiar and comfortable with investment markets.

As no agreement could be reached, the case was passed to me an ombudsman at this service to consider.

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.

Jurisdiction

Sesame has raised arguments that the complaint is not one we can consider. I have reconsidered these points prior to considering the merits, but for the same reasons given by the previous ombudsman; I've concluded that this complaint is within our jurisdiction.

Sesame has argued that statements from his personal pension would likely show that Mr M knew many years before that he would be worse off in retirement. I'd add here that alongside the reasons the previous ombudsman gave as to why this isn't relevant to Mr M's cause for complaint – the evidence suggests Mr M wasn't aware at the time of his complaint nor made aware at the time of advice of the full value of the benefits he was giving up on transfer. So a comparison was likely not possible in any event.

As set out by the previous ombudsman, Mr M's complaint wasn't one of performance, he'd said he was happy with the performance of his fund. However, the complaint was formed around the fact he felt due to his age he ought to have been treated with extra care and that the risks and consequences of transferring hadn't been clearly explained to him. He hadn't understood the valuable guarantees and benefits held within a DB pension compared to those in a personal pension arrangement until more recently. He now thinks the adviser ought to have instead advised him not to transfer and had that occurred he'd have remained in the scheme. This understanding is consistent with Mr M's professional history and that he'd likely have become aware of this due to his work, in 2019. But as he complained to us in 2022 and within three years of when this awareness ought to have arisen, he has complained within time.

In summary, I don't believe that Mr M knew or ought reasonably to have known his cause for complaint more than three years before he did complain. And I'm satisfied Mr M's complaint is one we can consider.

The merits of Mr M's complaint

The regulation in place at the time

At the time of advice, the business that gave the advice to Mr M that Sesame is now responsible for were regulated by the Personal Investment Authority ('PIA') which had assumed responsibility for businesses previously regulated by LAUTRO and FIMBRA. The business in question were part of a network of financial advisers and the rules they operated under broadly required them to give best advice, act in a client's bests interests and to take reasonable steps to make sure a client understood the risks involved.

More specifically to defined benefit transfers, the rules said advisers need to fully document all the relevant information and provide clear information to the customer. The conclusion of the guidance/rules was that the overall process would confirm that many customers are better advised to remain in their OPS.

Was the transfer financially viable?

Sesame carried out a transfer value analysis report (as required by the regulator) showing how much Mr M's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme (the critical yield).

At the time; the regulator's low, mid and high growth rates for illustrations were 6%, 9% and 12% respectively. During this period, the regulator was also 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, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case. Mr M was 36 years away from the normal retirement age of the scheme and the discount rate for this is 10.1%.

The adviser said that the growth rate required to match the scheme benefits was 9.8% a year and this was achievable.

However, I think the basis for the critical yield here was flawed. The evidence shows that the transfer value used to calculate the critical yield was a transfer value of £9,301.26. But a subsequent transfer quotation had been issued before the point of advice where the transfer value had dropped. And after the recommendation it dropped again to approximately £8,300. Yet the adviser relied on the higher, known to be incorrect, transfer value to make his recommendation.

If the correct transfer value had been used the critical yields would've been higher as the transfer value had dropped by more than 10%.

So transferring doesn't appear to have been in Mr M's best interests, as he was unlikely to significantly improve on the benefits he was entitled to from the DB scheme despite there being many years until his retirement.

Furthermore, the figures relied upon were flawed, so the adviser has failed to demonstrate the transfer was viable and to provide all the relevant information and act in the client's best interests when he recommended transferring.

Mr M's attitude to risk and his understanding of risk

Alongside the critical yields, a comparison needs to be made with the customers attitude to risk to establish whether the yields involved are suitable for the investor. Sesame in response to Mr M's complaint have said that Mr M's attitude to investment risk was highly speculative and that he understood the concept of risk. It says the advice was viable given Mr M's risk profile, age and the many years he had until retirement, alongside the returns available at the time.

Whilst there was clearly some indication that Mr M was prepared to take some risk, I think his answers from the time are telling that these are the answers of a 24-year-old who hasn't yet a fully formed understanding of risk, especially in relation to retirement provision.

Mr M did tick to say his investment attitude was highly speculative and he did choose the maximum risk investment option offered of 100% equities. However, he'd also listed his priority as '*protecting his income'* and tellingly '*not increasing your income'.* Under the risk and reward statements out of four statements with number one being the riskiest which said *'I am happy to accept a great degree of risk in exchange for the possibility of higher pension in retirement',* Mr M chose statement 2. *'I do not mind a reasonable degree of risk in the hope that my benefits could be higher in retirement.'* Looking at the returns required to improve on his guaranteed benefits and the likely achievable returns at the time, Mr M to improve on his benefits needed to accept a great degree of risk for this to likely be achievable. So I agree with the investigator that Mr M's risk profile wasn't sufficiently explored or discussed. And I'm satisfied that Mr M was reliant at the time on the information provided by the adviser, I don't think his understanding of risk and his attitude to risk was such that he would've wished to transfer regardless of the level of risk involved.

Was all the relevant information provided to Mr M in a clear way, so that he could make an informed decision?

The transfer analysis showed that the provider wouldn't offer a transfer to a section 32 as it deemed the value insufficient to cover the cost of this. It also stated the yield required to match the benefits given up was 10.3%. And this illustration included a clear example of the risks of relying on investment returns – it showed that with returns of 6% (the regulators low growth rate) Mr M would only receive 24% of the expected benefits from his previous employer's scheme.

I cannot see that this information was highlighted or discussed with Mr M as part of the suitability report. It was the adviser's job to give a balanced picture with all the relevant information. A customer is unlikely to follow or understand the figures produced as part of its transfer analysis without clear guidance from the adviser. Given Mr M's recorded priority was protecting his income, I think this information would've provided a clear and stark warning of the risks involved in relying on investment returns compared to the guaranteed benefits of the scheme.

I also note that nowhere in the recommendation was it set out the figures that Mr M was giving up on retirement from the scheme. And Mr M in his complaint to Sesame, thought that he'd given up a pension of around £2,800. Whereas in actual fact the expected pension at age 60 from the scheme was nearly £16,000 per annum and would increase to over £20,000 at age 65. This is really important information for a customer to consider and it should've been set out in the suitability report. It appears that Mr M was left unaware of the true value of his benefits. This represents a failure on the adviser's part to take reasonable steps to ensure Mr M understood the risks involved of transferring. And a failure to provide clear information about the relevant factors regarding his defined benefit transfer.

The suitability report also failed to mention that the transfer value was insufficient to transfer those benefits in place. Instead it gave the impression that the investment return required to improve on these benefits was achievable and said it had discounted the option of a section 32 due to the investment restrictions inherent in that product. However, in actual fact this wasn't an option because the transfer value was insufficient and so the provider wouldn't allow it. This information is misleading and brings into question whether the adviser was acting in Mr M's best interests. And it is clear Mr M wasn't put in a fully informed position within which to accept the recommendation to transfer.

Other reasons for transferring

Sesame has said Mr M had started a new adventure in his life, becoming self-employed and so wanting to break ties with his employer is entirely feasible. And Mr M had subsequently carried out fund switches which shows he wished to take control of his investment choices.

However, having considered these points I don't think they hold much weight, especially given the inadequacies in the advice process I've set out above. I don't think there are any compelling reasons why Mr M would've wanted to break ties with his ex-employer to the extent he wouldn't want his pension to be held by it – if this represented a suitable option. And as Mr M said and this is evidenced in some of the correspondence from the time, it appears the fund switches were at least on occasion led by the adviser. But I think the key point here is had it been explained clearly to Mr M the level and importance of the guaranteed benefits he was giving up and transferring wouldn't protect his income in retirement – I don't think these other reasons to transfer would've been important to Mr M.

So having considered all of the above, I've reached the conclusion that the advice was unsuitable for Mr M. I don't think the adviser demonstrated that the transfer was financially viable or in Mr M's best interests.

Would Mr M have transferred anyway?

I also need to consider whether Mr M would've chosen to transfer even if he had been given all the relevant information and advised that transferring was not suitable for him.

Sesame argues that as Mr M was only 24 years old at the time, so this only represented four years' worth of pensionable employment. And if he was the sort of person prepared to take risks such as leaving stable employment to go self-employed, he would be prepared to take the risks involved to improve on his pension in retirement. And Mr M had shown willingness to take risk in his answers given to the adviser at the time.

But had Mr M been given balanced advice, the fact that he'd just started a new self-employed business with the inherent lack of security this brings, meant that he had no real capacity for loss in terms of his pension provision. This should've been explained to him. The fact that he was taking on big risks in his professional life, ought to have been seen in the light of an increased need to keep in place his only guaranteed pension in retirement. If Mr M had also stated that he was more concerned with protecting his income rather than increasing it. Had the adviser set out the risks in a clear, fair and balanced way, advising him not to transfer, I don't think Mr M would've wished to risk his guaranteed pension in retirement. And he would've wished to remain in the scheme.

Putting things right

A fair and reasonable outcome would be for the business to put Mr M, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr M 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, Mr M has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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 M'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 M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - their 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 their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts Sesame's offer to calculate how much of their redress could be

augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

Redress paid to Mr M 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 M'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 M 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 M the balance.

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

My recommendation would not be binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M 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 M to accept or reject my decision before 13 February 2024.

Simon Hollingshead
Ombudsman