DRN-4591278

The complaint

Mr V's representative has complained, on his behalf, about advice he was given by Braemar Financial Planning (now Sesame Limited) to transfer his occupational pension scheme (OPS) defined benefits to a "Section 32" buyout policy.

What happened

The ombudsman who decided whether we have jurisdiction to consider the matter set out the background to the complaint in his assessment of the case. This doesn't appear to have been disputed by either party, and I'm broadly setting out the same background below.

The advice and transfer happened in 1993. There was no available "fact find", but other documents, including a recommendation letter and a Transfer Value Analysis ("TVAS") report from the time, showed that:

- Mr V had been a member of the defined benefit OPS in question from 1978 to 1988. His deferred annual pension from membership of that defined benefit scheme at age 60 would be £6,714 and the new pension would need to grow by 9.82% every year (the critical yield) in order to provide the same level of benefits as the defined benefit pension.

An illustration of the benefits payable under the Section 32 policy showed that the guaranteed minimum pension payable at age 65 ("GMP") was £4,781 pa.

Braemar Financial Planning (which I'll refer to as Sesame from here) issued a suitability report in June 1993, recommending that Mr V transfer his OPS benefits to the section 32 policy.

In 2014, the new pension provider (Aegon) sent a letter to a financial advisor. This said the following:

- The value of Mr V's pension was £31,955.
- The GMP remained at £4,781 pa.
- The cost of providing the GMP was £51,718.
- There wouldn't be enough funds in the pension at Mr V's selected pension age of 60 to cover the costs of the GMP (which meant the GMP wouldn't be payable until age 65).

In 2016, Aegon sent a letter (with attachments) to Mr V. This said the following:

- The value of Mr V's pension was £43,551.
- The GMP was £4,773 pa.
- The cost of providing the GMP was £139,561.
- The Reserved Unit Fund was insufficient to pay the GMP, so it would remain in the policy until age 65 or until there were sufficient funds to pay for the GMP.

In April 2019, Aegon sent Mr V an annual pension statement. This said the value of his pension was £41,625 (up from £39,451 in 2018, but lower than in 2016) and that the GMP was £4,781 pa. Aegon sent Mr V another annual pension statement in April 2020. This said the value of his pension was £43,918 and that the GMP remained at £4,781 pa.

In 2023, Mr V complained to Sesame as he felt the advice in 1993 wasn't in his best interest – he felt he would have been better off if he'd remained in the defined benefit pension.

Sesame felt Mr V had complained too late as more than six years had passed from the time of the advice and more than three years had passed from when he became aware that he would have been in a better financial situation had he not transferred.

Our investigator concluded that Mr V had complained within the relevant time limits. Sesame disagreed so the matter was referred to an ombudsman for review.

Having done so, the ombudsman was of the view that we could consider the complaint. He said the following in summary:

- Under the "DISP" rules in the FCA's handbook, Mr V needed to have raised his complaint within six years of the event complained of, or if later, within three years of when he became aware, or ought reasonably to have become aware, of having cause for complaint.

- As Mr V had complained more than six years after the event complained of, it was the three year aspect of the rules which needed to be considered here.

- But having considered this, the ombudsman wasn't persuaded that Mr V was either aware, or ought reasonably to have been aware, of having cause for complaint more than three years before he actually complained in June 2022 – which was in response to his representative's advert on a social media site.

- Although the adviser was likely to have given Mr V some detail about what he might receive from the defined benefit pension, as there was (at this point) no recommendation report provided by Sesame from the time of the sale in 1993, it was difficult to know what was discussed between the adviser and Mr V.

- The letter from the pension provider in 2014 didn't support Sesame's argument that the complaint was out of time, as it was addressed to a financial adviser and there was nothing to suggest that this had been sent or passed to Mr V. And Mr V had said that he had no knowledge of the adviser in question.

- Although the 2016 letter was likely to have been received by Mr V, the ombudsman wasn't persuaded that Mr V had been given sufficiently clear information in 1993 which would enable him to reasonably compare the benefits he would have received from the OPS with those he could expect to receive from the section 32 policy.

- Further, as the statements which he received referred to the minimum pension which Mr V might expect to receive, this left the possibility that he might receive more. And the difference between the GMP and the defined benefit pension wasn't in any case so great as to ring alarm bells for Mr V.

Neither party made any further submission in respect of the matter of jurisdiction, and so the investigator proceeded to consider the merits of the complaint. Having done so, he thought it should be upheld, saying the following in summary:

- In 1992 FIMBRA (the relevant regulatory body at the time) added a supplementary rulebook. Volume 3 dealt with client relationships – parts 28 (General Rules of Conduct) and 29 (Dealing with a Client).

- Rule 28.12 said an independent adviser must not recommend a transaction for a client unless they could show they had good grounds for believing the client would benefit from it.

- Rule 29.4 clarified the 'know your client' rule. It required advisers to complete a fact find to the extent necessary in order to make appropriate recommendations. Where a client refused to provide necessary information their refusal now had to be confirmed in writing.

- Rule 29.5 said that a recommendation could only be made to a client if the adviser had *"good grounds for believing it to be suitable for him in the light of the information he has given you and of any relevant facts about him of which you are, or ought to be, aware"*. It added that the nature of the risks involved had to be explained in terms the client was likely to understand.

- Rule 29.8.2 required sufficient 'key features' information to be given in order for the client to decide whether to accept the recommendation. Rule 29.8.5 also required a 'reasons why letter' (now known as suitability letter) to be sent, once this was made a requirement in January 1995.

- FIMBRA issued Guidance Note No.9 in February 1993, This note replaced the previous 'Guidelines on Best Advice' but reiterated many of them, and added the following:

    - Members must assess the client's likely ability to maintain any regular payments on long term contracts and explain the risks associated with any failure to make such payments.

    - If they weren't competent to exercise considered judgement on suitable investments, members could refer a client to another appropriately authorised IFA.

    - The benefits to the client must be balanced in each case against costs. For instance the "best" investment for a client who is particularly risk-averse might be National Savings Certificates or Gilts, for which only a reasonable fee rather than commission might be paid.

- The term 'fact find' was used – FIMBRA expected this to be *"as detailed and complete as possible in order to demonstrate, if necessary, that the recommendation made was appropriate in the light of the information provided by the client, including their investment objectives, their ability to deal with risk and any special instructions he may have been given"*.

- It would also be advisable to record what other investment options, if any, were discussed with the client.

- The benefits which Mr V had accrued in the OPS offered a guaranteed income for life and would form a significant proportion of his total pension provision. It wasn't possible to discern from the available evidence what Mr V's attitude to risk was at the time, but Mr V has said it was "low".

- It was likely that the security of the guaranteed benefits offered by the OPS would have been very important to Mr V – and there was no risk attached to them.

- As the advice was given during the period covered by the industry wide pension review, the growth rates published for financial viability tests (FVTs) were relevant to this case. And the regulator's upper FVT limit for the 28 years to Mr V's retirement was 10.9%. The critical yield was 9.82% pa.

- The regulator's upper growth projection rate at the time was 13% pa, the middle band was 10.75% pa and the lower projection rate was 8.5% pa.

- Mr V's capacity for loss needed to be taken into account, and he was transferring ten years' accrued benefits from the OPS. Mr V was a member of another defined benefits scheme, and could expect future accrual within this. This meant that Mr V had a high capacity to absorb losses on the transfer.

- But taking into account the composition of assets within the FVT, along with Mr V's low attitude to risk, Mr V was likely to receive an overall lower value level of benefits at retirement as a result of investing in line with that attitude to risk.

- Sesame was supposed to conduct a fact find in advance of its recommendation to determine whether Mr V had other assets which might mean that he was able to take the level of risk needed to exceed the critical yield.

- The adviser's role was to determine what course of action would be in Mr V's best interests and make a recommendation on that basis. Given Mr V's stated low attitude to risk, it was unlikely that the critical yield of 9.82% pa would be achieved.

- There was no apparent compelling need which meant that transferring was in Mr V's best interests or which could justify relinquishing the guaranteed, risk free defined benefits.

- Sesame should have advised Mr V to retain his defined benefits. Had it done so, it was more likely than not that Mr V would have accepted that advice and retained the defined benefits as they were.

The investigator recommended that Sesame undertake a loss calculation in accordance with the regulator's consultation paper CP22/15.

If the redress was paid directly to Mr V, Sesame could make a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

Neither party submitted further comments in response to the investigator's assessment. But as agreement wasn't reached on the outcome with Sesame, the matter has been referred to me for review.

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.

And I've done so in the context of the requirements in place at the time. They were perhaps less clearly defined that those which now appear in the regulator's handbook, but I think it's fair to say that, at a high level, Sesame was expected to act in Mr V's best interest in providing advice to him.

In addition to the notices issued by FIMBRA as set out by the investigator, it also issued "Guidance Note No.7" in July 1992. FIMBRA said within this that it was concerned that beneficiaries under final salary (defined benefit) schemes may be disadvantaged when receiving advice on transfer options. It noted that valuable benefits can be lost when transferring.

It therefore said that it should clearly be demonstrated that the beneficiaries' rights under the scheme were taken into account. It set out several items which it said needed be considered and discussed with a client, including the guaranteed pension at retirement, spouse's and children's pensions, the indexation of pensions in payment, guarantees under GMPs, the revaluation of the pension pre-retirement, death benefits, and attitude to investment risk.

And so, broadly speaking, Sesame needed to take into account Mr V's circumstances, objectives, the value of the guaranteed benefits being relinquished, and the overall financial viability of the transfer proposition.

And so, firstly considering the matter of financial viability, on the face of it I think this is quite finely balanced. Given the expected maximum potential growth rate – 10.9% pa - within the FVT at the time over the 28 years until Mr V retired, along with the regulator's mid band growth projection rate of 10.75% pa, and comparing this to the critical yield of 9.82% pa, the latter might reasonably have been deemed achievable.

But there are additional considerations here, one of which is Mr V's attitude to risk and, as noted by the investigator, the composition of assets within an investment which was expected to achieve the projected growth rates.

Mr V has said that he had a low attitude to risk and that he didn't want to take the risk of losing money by transferring. There's a potential tension here between what Mr V has said and the content of the recommendation report, in which Sesame set out that the pension funds would be invested in unit linked funds, along with an outline of the risks of stock market investing.

But of the two parties, Sesame was the professional here and Mr V has said, not unreasonably in my view, that he trusted it to make a recommendation which was in his best interests. And I think Mr V's lack of experience in this kind of matter was well illustrated in his covering letter with the forms he'd filled in to implement the transfer, when he said that form filling wasn't his strong point and that he was providing documentation to help Sesame complete the forms on his behalf. Mr V was therefore clearly reliant on Sesame in this matter.

And so on balance, I don't think that Mr V's acceptance of what was said in the recommendation letter about unit linked investment would necessarily undermine what he's said about not wanting to take undue risks with his pension fund. He was simply following it's advice – there was in fact no commentary about Mr V's actual attitude to risk being matched to the recommended unit linked investment.

There was also no record of Mr V's attitude to investment risk, or of this being discussed, as was set out in Guidance Note No. 7. And so there's no clear indication that Mr V was suited to unit linked stock market investment to determine this part of his eventual pension benefits, as opposed to the guaranteed benefits which both he and any future beneficiaries would receive from the OPS.

I've also thought about Mr V's overall circumstances in my consideration as to whether he was more likely than not to have been an individual who was prepared to take, or would in any case have been suited to, the kind of financial risk required to achieve the critical yield.

It's fair to say that, at the time of the advice, Mr V was a member of another defined benefits scheme, and so it might reasonably be expected that he would have a number of years' further accrual of guaranteed benefits. But this wouldn't necessarily mean that he was prepared, or in a position, to relinquish the guarantees associated with his previous OPS membership. Future membership of any defined benefits OPS would in any case be dependent upon remaining in that role, and so would be uncertain. As it was, this further period of defined benefit membership ended just three years later in 1996.

Nor was there any record of other assets or investments which Mr V held which might have given him a higher capacity for the potential reduction in his pension benefits, or that might have given him investment experience which would be consistent with an elevated attitude to risk.

On this basis, and given that the lower growth projection within the illustration was 8.5% pa, which meant that the benefits produced by the transfer would fall short of those which would have been provided by the OPS, I don't think it's clear that, in line with an investment which would be suited to Mr V's likely lower attitude to risk, he would receive materially lower benefits by transferring.

In terms of the stated rationale as to why Mr V should transfer, the recommendation letter said that this was on the basis of "future flexibility", along with the potential for the GMP to be taken at age 50. But it's unclear as to why Mr V required such flexibility at the expense of the guarantees which the OPS would offer. He was also, at the time of the advice, 31 and so had many years left until he would need to begin thinking about the manner in which he might take his pension benefits.

If he did ultimately need flexibility in the way he accessed his pension benefits, he could have made any such decision closer to his retirement date, after a further 30 or so years of guaranteed revaluation of his defined benefits. Further, the GMP could only have been taken at age 50 if the size of Mr V's pension pot at the time allowed for this. And I don't think this – upon which the added flexibility would depend - was made clear to him.

I've also noted a further aspect of the advice given here – if Mr V accepted the transfer advice, Sesame said that it would refund part of the commission as a cash bonus upon completion of the transfer. I think this is likely to have unduly influenced Mr V in his decision making. The prospect of implementing what he quite reasonably considered to be suitable advice which would be in his best interest, along with the cash incentive, would in my view have meant that accepting the advice to transfer became a clear course of action for Mr V.

Overall, I'm not persuaded that the advice to transfer was in Mr V's best interest. The financial viability hasn't been clearly demonstrated, especially given the annual growth which would have been consistent with Mr V's likely risk attitude and his likely capacity for loss, and there was no clear indication as to why flexibility in 30 or so years' time would have been so important to Mr V as to justify relinquishing ten years' defined benefits.

And so my view is that the complaint should be upheld.

Putting things right

A fair and reasonable outcome would be for the business to put Mr V, as far as possible, into the position he would now be in but for the unsuitable advice.

I consider that, suitably advised, Mr V would most likely have retained his OPS benefits, rather than transferring.

Sesame Limited 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 (which followed CP22/15) and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

This calculation should be carried out using the most recent financial assumptions in line with 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 V's acceptance of my final decision.

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

- calculate and offer Mr V redress as a cash lump sum payment,

- explain to Mr V before starting the redress calculation that:

  - its 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 his defined contribution pension

- offer to calculate how much of any redress Mr V receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr V accepts Sesame Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr V for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr V's end of year tax position.

Redress paid to Mr V as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses 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 V'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.

If Mr V accepts this final decision, the award will be binding on Sesame Limited.

My final decision

My final decision is that I uphold the complaint and direct Sesame Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 1 July 2024.

Philip Miller
Ombudsman