

## **The complaint**

Mrs B complained that she was given unsuitable advice to transfer her deferred defined benefit (DB) Occupational Pension Scheme, to a type of personal pension arrangement recommended to her by a financial adviser. The transfer took place in 1998.

Sesame Limited is now responsible for answering this complaint. To keep things consistent, I'll refer mainly to "Sesame".

## **What happened**

At the time, Mrs B was a deferred member of her DB scheme, having been employed from the mid-1970s until being made redundant in 1994, by which time she had accrued around 19 years' worth of benefits. Sesame's recommendation was to transfer away from her deferred DB scheme. Mrs B's circumstances of the time showed:

- She was aged 40 and in good health. She was married.
- She had since moved to a different job and earned around £10,000 per year.
- The cash equivalent transfer value (CETV) of the DB pension was around £38,249. The normal retirement age (NRA) of the scheme was 60.

Sesame advised Mrs B to transfer out of her DB scheme and invest in a type of personal pension arrangement. She complained in late 2022, first to Sesame itself, about this advice being unsuitable. Mrs B thinks she's lost out financially as a result. She later complained to the Financial Ombudsman Service and one of our investigator's said her complaint ought to be upheld.

Sesame said the complaint had been brought too late under the rules we operate by. However, I issued a jurisdiction decision in January 2024 saying I thought the complaint was one we could look in to. I've then gone on to look into the merits of the complaint and am now making 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.

The advice was given in 1998. At that time, the business that gave the advice, now Sesame, was regulated by the Personal Investment Authority ('PIA'). In 1994, the PIA assumed responsibility for businesses previously regulated by the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) and the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). The PIA adopted the FIMBRA and LAUTRO rules. Based on the information I've seen I believe the FIMBRA rules are most likely to have applied to the advising business here, at the time of the advice. For example:

*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.*

Further amendments to the guidelines specified that advisers should ensure their recommendations were made based on the best interest of the client, rather than any income the adviser may generate. And it should also have been clearly demonstrated that the beneficiaries' rights in the scheme were fully considered.

I've used all the information we have to consider whether transferring away from the DB scheme was in Mrs B's best interests.

I don't think it was, so I'm upholding her complaint.

### Introductory issues

Mrs B has a recollection of being 'cold called' and told her pension was effectively frozen, so transferring was the much better option. However, Sesame hasn't been able to produce very much information at all about the advice that was given to Mrs B in 1998. In my view this is a notable failing on Sesame's part.

We know, for example, that in 1994 the industry regulator at the time established the 'Pensions Review' amid concerns about the mis-selling of personal pension policies and unsuitable transfer advice. The review looked at sales of personal pension policies between April 1988 and June 1994 and so against this recent backdrop, I think Sesame should have known of the expectations and requirements to keep relevant documentation about pension transfer advice.

As I've said, Sesame also initially objected to the complaint being considered at all. However, even after issuing my jurisdiction decision about this, Sesame sent over a large volume of information which it says represents 'its file' on the case. Of course, I've looked in detail at all this. But what Sesame has sent us is no more than large volumes of unstructured documentation most of which is unrelated to the advice to transfer and Mrs B's pension statements which typically relate to periods long after the original transfer advice which was in 1998. Virtually all the documents have very little or no meaning to the points complained of.

In my view, Sesame's response to the complaint has been poor. And to be clear, the only point of transfer information we still have access to is very limited indeed, comprising as it does only of some transfer analysis information. I also understand that the company which Mrs B was advised to transfer to by Sesame was subsequently bought out in later years and she also later transferred her funds to a different company in 2008 and again in 2009. However, these events were all many years after the original 1998 transfer advice event, which Sesame is responsible for.

### Financial viability

As I've said, the information still retained by Sesame is very limited. But from what I can see, the transfer analysis document we still have (dated May 1998) refers to an annual growth

value which needed to be achieved - from the time of advice until retirement - to provide broadly the same financial benefits as the DB scheme. The analysis said the rate of growth required was 8.5% per year. Our investigator interpreted this to be the 'critical yield' rate and I agree. The critical yield is essentially the average annual investment return that would be required on the transfer value to make transferring worthwhile from a financial comparison perspective.

Although the above annual growth figure of 8.5% was provided, and that this was based on Mrs B retiring at the NRA of 60, it's not entirely clear whether this was based on her taking a tax-free lump sum, or just a normal annual pension without any lump sum. A further critical yield figure of over 10% was shown nearby which I think related to her buying a "Section 32" pension (a type of buyout scheme with similar benefits to a DB scheme). Although I've used some assumptions here, these figures nevertheless give me some indication of the amount of growth Mrs B's pension would need to increase by outside the DB scheme, to make transferring away from it worthwhile.

By way of another comparison, I've used guidance from the above mentioned industry-wide Pensions Review to think about the financial viability of transferring away from her existing scheme. Here, the rate used in loss assessment calculations to discount the cost of replacing the DB pension at retirement (known as the discount rate) was only 7.5% per year. Also, the regulator's upper projection rate at the time was 12%, the middle projection 9%, and the lower projection rate 6% per year.

It's also important to consider Mrs B's attitude to risk (ATR) and whether she had any capacity for loss. Mrs B was transferring from a large and well-known pension from a major company which contained a number of valuable guarantees and benefits for life. She was only 40 years of age and had been made redundant. She had also entered a completely new career. She had no savings or investments and she earned a modest income. Mrs B also had no experience to draw upon in terms of stock market investments or purchasing funds. As such she had no real capacity to bear investment losses

So, I think her ATR would at best, be very low. I've noted information from one of Sesame's much later pension transfer documents helps confirm this, saying that Mrs B had asked to be placed within a "cautious" fund.

It follows that, although annual growth assumptions in the 1990s were clearly much different from what we see today, everything I've seen shows Mrs B as having a very low capacity for loss and a desire to take minimum risk with her pension savings. If taking account of the regulator's lower growth assumptions, and also of the discount rate, the growth Mrs B could reasonably expect would have been significantly below the critical yield rates I've explained about above. We could also factor in that by transferring to a type of personal pension arrangement, the costs associated with managing this would undoubtedly be higher than her existing DB scheme. That's because in a DB scheme the operating costs are met by the sponsoring employer and the scheme trustees. However in a personal pension arrangement Mrs B would be personally responsible to cover the pension provider's administration fees. It's also usual for advising firms like Sesame to also apply a charge. And those fees and charges would erode her pension funds.

In short, there appeared no credible rationale or supporting reasons for Mrs B to transfer away, from a financial comparison perspective.

#### Other reasons given for the transfer advice

As I've said, there is only very limited information still available to us and Sesame makes no meaningful points to defend the complaint, other than saying transferring away probably was

financially viable when looked at through the lens of 1998. I've shown that above to be most unlikely, and have gone on to consider whether there might be any other relevant considerations.

- *Mrs B's age at the time*

Mrs B was only aged 40 years old. Given her circumstances of that time as I know them, it's simply not credible that she could have had any concrete retirement plans. For her, retirement in any capacity was around two decades away and if there was indeed a discussion at all about retirement, I think the adviser should have been pointing these very obvious facts out to Mrs B. In my view, the much more suitable option was for Mrs B to continue to assess her retirement aspirations in the years ahead. When she was much closer to her retirement age, Mrs B could revisit her existing scheme to assess whether it still fully met her needs.

- *Buying an annuity and / or control of the funds*

The advice pre-dated the rules about 'pension freedoms' we have now. I've seen no evidence Mrs B had a strong need for different income, for example, by buying an annuity instead of remaining in her DB scheme. Nor is there any evidence she had the desire or capacity to manage her own pension going forward. By contrast, staying in the large DB scheme required no work from Mrs B and her deferred DB scheme contained a number of useful benefits and guarantees.

- *Death benefits*

I can't be sure the extent to which death benefits were discussed at the time, but I've used my knowledge of the existing DB scheme to make reasonable assumptions. In my view, the death benefits on offer through the DB scheme were likely to have been of use to Mrs B. We know, for instance, that upon death after her retirement, the spouse's benefits provided a 50% pension increasing broadly with inflation (subject to certain limitations). If death occurred before retirement – and of course, Mrs B was still only 40 at the time – there was a spouse's pension of 50% revalued to the date of death, again with certain inflation protections. In the event of incapacity rather than death, there were other benefits to consider.

These were, in my view, important matters because Mrs B was married. These types of guarantees and benefits were not generally present outside the type of scheme she was currently a member of and I think they were most likely underplayed during the course of the advice. I think the adviser should have been promoting these issues to Mrs B and explaining how valuable they were to her and her husband's situation.

### Summary

In this decision I've explained why I don't think the advice to transfer away from Mrs B's DB scheme was suitable for her or in her best interests.

Mrs B was giving up a guaranteed, risk-free and increasing income within her current DB scheme. From a financial comparison perspective, there was simply no financial case for transferring away. By pension standards, Mrs B was still a relatively young person and there was no credibility in assessing what her retirement needs were when she was still only 40 years of age. There were no other reasons to support the advice to leave the DB scheme.

The adviser had a responsibility to their client; to really understand her situation and to provide advice that was suitable and in her best interests. And although Sesame has failed

to retain important documentation, I think the evidence shows there were considerable shortcomings in this advice. Mrs B's recollection is of the adviser telling her the pension was 'frozen' and she'd be better off financially by transferring away.

Overall, I don't think the advice given to Mrs B was suitable. In fact, I think the much stronger case by far was for Mrs B to use the DB pension in exactly the way it was originally intended.

I therefore think Sesame should compensate Mrs B for the unsuitable advice, using the regulator's DB pension transfer redress methodology.

### **Putting things right**

A fair and reasonable outcome would be for Sesame to put Mrs B, as far as possible, into the position she would now be in but for the unsuitable advice. I consider Mrs 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>.

Compensation should be based on the scheme's normal retirement age of 60, 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 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 Mrs 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 Mrs B redress as a cash lump sum payment,
- explain to Mrs B before starting the redress calculation that:
  - the 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 her redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mrs B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs B accepts Sesame's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs B for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs B's end of year tax position.

Redress paid to Mrs B as a cash lump sum will be treated as income for tax purposes. 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 Mrs 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 I direct Sesame Limited to pay Mrs B the compensation amount as set out in the steps above, up to a maximum of £170,000.

My recommendation would not be binding. Further, it's unlikely that Mrs B can accept my decision and go to court to ask for the balance. Mrs 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 Mrs B to accept or reject my decision before 14 March 2024.

Michael Campbell  
**Ombudsman**