

The complaint

Mr K complains about the advice Sesame Limited gave to him to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a personal pension. He says the advice was unsuitable for him and believes this has caused a financial loss.

Professional representatives have helped Mr K to bring this complaint. But, for ease of reading I will refer to the representatives' comments as being Mr K's.

At the time of the events complained about the advising firm was operating under a different name. But as Sesame is responsible for responding to the complaint I will only refer to it in this decision.

What happened

Sesame's told us that it holds no documents from the "point of sale". So the information below is based on the limited evidence provided by Sesame and from Mr K's recollection of events.

In 2001 Mr K engaged Sesame to advise him on his pension options in retirement. At that time Mr K was 50 years old and married. He was working. He was a deferred member of his former employer's DB scheme. Sesame recommended he should transfer his DB scheme benefits into a personal pension. He transferred around £17,400 from his DB pension and around £5,600 from his employer's additional voluntary contributions (AVC) scheme. The transfer concluded in December 2001.

In 2022 Mr K complained to Sesame that its advice to transfer wasn't suitable for him. Sesame didn't initially reply within the regulator's set timeframe for doing so. Mr K then asked the Financial Ombudsman Service to look into his complaint. Shortly after Sesame sent its complaint response to Mr K. Sesame said it believed Mr K had brought his complaint too late.

After our Investigator had explained why he believed Mr K had brought his complaint in time, and Sesame continued to argue that he hadn't, an Ombudsman colleague issued a determination that Mr J had brought his complaint in time.

Our Investigator then went on to consider the merits of the complaint. He thought that it was unlikely that Mr K would have been better off by transferring his DB scheme benefits to a personal pension. So he said that the advice to transfer wasn't suitable for Mr K. The Investigator added that he considered that, but for Sesame's unsuitable advice, Mr K would have remained in his DB scheme until its normal retirement age of 60. The Investigator also noted that Mr K would have been required to transfer his AVCs at the same time as he transferred from his DB scheme.

To put things right the Investigator recommended that Sesame should establish if Mr K had suffered a financial loss as a result of the transfer and, if so, pay appropriate redress.

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

Sesame provided advice in 2001. At that time, the relevant regulator was the Personal Investment Authority (PIA). The PIA adopted the rules of the previous regulators. The adopted rules included a Code of Conduct. This required advisers to exercise "due skill, care and diligence" and "deal fairly with investors" and to give "best advice". The rules said that advisers should not advise customers to transfer an occupational pension unless they genuinely believed it was in the customer's best interests and providing they had clearly disclosed all relevant consequences and disadvantages.

Having considered the above and the available evidence I'm going to uphold the complaint for broadly similar reasons to those our Investigator gave.

Was a DB transfer likely to be in Mr K's best interests?

As I've said above, Sesame no longer has any point of sale information. So it doesn't have any of the documents I would have expected it to produce. As a result I haven't seen any transfer value analysis comparing the benefits Mr K would be giving up from his DB scheme against what he was likely to receive from a personal pension. Nor have I seen anything showing the growth rates required to achieve a return matching that of the DB scheme.

Further, Sesame has been unable to produce a suitability letter or other written analysis. So it's been unable to explain why it believed a transfer to a personal pension would be better for Mr K than remaining in his DB scheme. And I've seen nothing to show it met its regulatory requirements of disclosing the relevant consequences and disadvantages of such a transfer.

In general, the regulatory guidance had for some time been that a transfer from a DB scheme to a personal pension was unlikely to be suitable for most consumers. And without the documents described above it's not possible for me to now know on what basis Sesame recommended the transfer.

That said I'm aware that at the time Sesame gave its advice, investment growth levels were higher than they have been more recently. So it's possible Sesame believed that by transferring to a personal pension Mr K's pension investments could grow to exceed the benefits he would receive from his DB scheme. But there's simply no evidence on file to show what level of growth was required or whether it was likely that investing in a personal pension would match that level of growth.

In addition, Mr K's recollection is that he sought advice from Sesame as he was considering the opportunity of accessing his pension funds early. So, if he accessed the funds early, then his investments would have less time to grow, making it even less likely that a transfer could match the benefits from his DB scheme. And given that the regulator's guidance was that,

for most consumers, it would be in their best interests to remain within a DB scheme, I'm not persuaded on the balance of probabilities that Sesame's advice was suitable for Mr K.

Also, Mr K has no recollection of Sesame explaining to him the guarantees he would be giving up by transferring, or disclosing the consequences and disadvantages of doing so. I appreciate that Sesame gave its advice over 22 years ago, and that Mr K's memory will inevitably have faded in that time. I also appreciate that records can go missing, particularly so over time. But Sesame was required to keep records to demonstrate its advice was soundly based. However, there's no evidence that it gave Mr K all the information he would need to make such an important decision about giving up guaranteed index linked and increasing benefits from a DB scheme. So I'm not satisfied that its advice was in Mr K's best interests. It follows that I think Sesame should work out whether Mr K has lost out as a result of the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for Sesame to put Mr K, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr K would have most likely remained in the DB and associated AVC schemes if Sesame had given suitable advice.

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>.

Mr K is retired and I'm aware that he's used his personal pension to buy annuities. But it seems he did so in order to access some tax-free cash. And I'm aware that many consumers act differently when they access funds early from a personal pension as opposed to leaving those to increase with indexation from a DB scheme. Also taking funds early from a DB scheme usually involves an actuarial reduction of the benefits, which was unlikely to have been favourable for Mr K. So, I think it's unlikely that Mr K would have accessed his funds early if he'd remained in his DB scheme. In those circumstances 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 PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or given to an appropriate provider promptly following receipt of notification of Mr K'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 K redress as a cash lump sum payment,
- explain to Mr K 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 the redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr K receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr K accepts Sesame's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr K 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 K's end of year tax position.

Redress paid to Mr K 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 K'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.

My final decision

I uphold this complaint and require Sesame Limited to pay Mr K the compensation amount as set out in the steps above,

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 15 March 2024.

Joe Scott
Ombudsman