DRN-4823963

The complaint

Mr W complains about advice given in 2000 by Castlegate Investments Limited (Castlegate) to transfer the value of his deferred benefits in a former employer's defined benefit (DB) pension scheme to a section 32 buyout plan (a type of personal pension arrangement).

Sesame Limited (Sesame) is responsible for the advice Castlegate gave. For convenience I've just referred to Sesame below which includes, as appropriate, Castlegate.

What happened

I issued a provisional decision on 15 May 2024. I've repeated here what I said about what had happened and my provisional findings.

'At the time of the advice Mr W was aged 35. Sesame's Pension Transfer Options and Recommendation report (the report) dated 7 November 2000 recorded Mr W's circumstances as follows:

- *Married, with three daughters aged between 6 and 4.*
- *He was the sole director and employee of his own company and was currently contracted to a large company with earnings in the region of £40,000 pa. He had a personal pension with Norwich Union to which he was contributing £116 pm although he intended to increase that.*
- *He had deferred benefits in his former employer's DB pension scheme based on pensionable service between September 1982 and October 1999. Mr W's revalued pension was £35,910.93 payable at the DB scheme's normal retirement age of 65. The death benefits payable in the event of Mr W's death before retirement were set out.*
- *Mr W was in good health and aimed to retire at 65 at the latest or 60 if possible.*

Sesame recommended that Mr W transfer the value of his DB benefits to a section 32 buyout plan with Norwich Union. An illustration dated 25 October 2000 from Norwich Union shows how much Mr W's fund would be worth when he reached age 65 if it grew at 5%, 7% and 9% each year. The respective figures were £156,000, £275,000 and £479,000.
Projected pension figures at age 65 were also given – £11,325 pa, £23,550 pa and £47,500 pa respectively.

Mr W accepted the recommendation and the transfer went ahead. The transfer value paid was £42,660.46.

In May 2023 Mr W complained to Sesame about the advice he'd been given. Mr W said, during a review of his pensions (with the same adviser who'd given the advice to transfer in 2000) he'd been informed he'd be worse off in retirement than if he'd retained his DB *pension scheme.*

Sesame said the complaint had been made too late.

Mr W referred his complaint to this service. Mr W told us he'd engaged Sesame to advise on investing his redundancy payment and about setting up a new personal pension plan. The adviser did both, but he then took an interest in advising Mr W to transfer his DB pension.

Our investigator's view was that the complaint had been made in time and it should be upheld. Sesame didn't agree and maintained the complaint had been made too late. I issued a jurisdiction decision on 29 April 2024. For the reasons I set out my view was that the complaint had been made in time and we could consider it.

I've now gone on to consider the merits of the complaint, that is if it should be upheld. In doing so I've borne in mind Sesame's comments in response to the investigator's view.

There's some disagreement as to Mr W's circumstances at the time the advice was given. He's told us that, after he'd been made redundant (in 1999), he was unemployed and seeking work in early 2000 when the transfer was first proposed. He had three very young children, his wife wasn't working and his deferred DB pension was his only pension provision. His wife had a very small pension (which is now worth about £1,000 pa). They had no savings aside from the redundancy payment which he'd engaged Sesame to advise on. Mr W says he wasn't prepared to take any risk with his DB pension. The adviser said Mr W couldn't lose and only stood to gain if he transferred. He'd found work by November 2000 when the advice was given and the transfer went ahead.

Sesame says Mr W had been engaged on a self employed basis by his former employer since the end of November 1999 on a rolling three month contract. In 2000 Mr W's mortgage was £74,000 and his property was valued at £160,000. Mr W and his wife had endowment plans, savings and other assets – non pension and non property assets of about £63,000 plus some directly held shares which equated to more than one year of combined gross income or 85% of their mortgage balance, their only outstanding debt at the time.

What I've provisionally 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.

Mr W's complaint dates back to 2000. The information that's available now is limited and I bear in mind too that recollections will invariably have faded over time. And, as I've noted, there's some dispute as to Mr W's circumstances at the time.

Further, and as Sesame has pointed out, at the time of the advice, the regulations about pensions including those specifically about transferring a DB scheme to a personal pension arrangement, weren't the same as they are today. I'm not judging the advice with the benefit of hindsight. I agree that the advice must be considered against the background of the then prevailing rules, regulations and requirements, including what was good industry practice at the time.

My understanding is that at the time of the advice Sesame's adviser would've been a member of the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA'). The original FIMBRA rulebook set out the expectations on members when *giving advice. Examples of the key rules applying from April 1988 are set out, although not limited to, those below:*

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.

The rules also said that advisers must ensure their recommendations were made based on the best interests of the client and were the most suitable for the client. They also provided that no transaction should be recommended if it could secure the objectives of the client more advantageously than the transaction recommended from the same or a different source.

The FIMBRA Rule Amendment No 2 (July 1988) set out Guidelines on Best Advice, later replaced in February 1993 by FIMBRA Guidance Note 9 (which reiterated much of what had been said earlier and which included a requirement to ensure that the recommendations were made on the basis of the client's best interests). So, Sesame should've only considered a transfer if it could demonstrate that the transfer away from Mr W's DB scheme was in his overall best interests. Having looked at all the evidence available, I'm not satisfied it was in his best interests.

I've considered first whether the transfer was financially viable. The critical yield (the average annual growth Mr W's fund needed to achieve on the transfer value to provide equivalent benefits to those that the DB scheme would've paid) was 7.7%, which Sesame said was achievable.

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industrywide Pension Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I think they provide a useful indication of what growth rates would've been considered reasonably achievable for a typical investor.

The critical yield required to match the DB pension at retirement at age 60 was 8.1% per year and 7.7% at age 65. When the advice was given, the relevant discount rate was 6.9% per year for 30 years to retirement. I've taken this into account, along with the composition of assets in the discount rate, that Mr W had been assessed as a medium risk investor and the term to retirement.

The critical yield is the growth needed just to match the DB pension. That's important because there'd be little point in Mr W giving up the guarantees available to him through the DB pension only to achieve, at best, the same level of benefits outside the scheme. As the critical yield here was 7.7% and the discount rate was 6.9%, I think Mr W was likely to receive benefits of a substantially lower overall value than the DB pension at retirement, as a result of investing in line with his attitude to risk. On that basis a transfer out of the DB scheme wasn't in Mr W's best interests. The benefits he'd receive if he transferred were unlikely to match, let alone exceed, the guaranteed benefits the DB scheme would've provided.

Financial viability isn't the only consideration when giving transfer advice. I've therefore looked at the other reasons Sesame gave for the transfer and if there were other *considerations that might mean the transfer was suitable, despite likely providing overall lower retirement benefits.*

The report said Mr W's overriding concern was the flexibility to select his retirement date and the format in which his benefits were paid. But that's somewhat at odds with the fact that he indicated that his highest priority (out of five) from the list given (and which included the format of benefits and flexibility at retirement) was the security of his pension fund. Flexibility didn't feature in his stated priorities. The security of his pension was the most important factor. The report recorded that Mr W had no concerns about the financial stability of his former employer so the funding of the DB scheme wasn't a concern and the report records the DB scheme was in surplus.

Mr W was aged 35 at the time of the advice. He'd indicated he planned to retire at age 65 or possibly earlier. But as someone who was relatively young, with a mortgage and a very young family, I think his focus would've been on developing his career. I can't see he'd have had firm plans for retirement or details as to what his income requirements in retirement might be.

His existing DB scheme (based on some 19 years' service which was a substantial proportion of Mr W's working life) didn't offer much flexibility. But Mr W would be giving up a guaranteed and substantial pension which would've provided a very healthy baseline income in retirement. Going forwards, if he'd wanted to make further pension provision, that could've been on a defined contribution basis. And it seems that had already been put in place – the report records that Mr W was contributing to a personal pension.

In my view, retaining his DB scheme benefits would've complemented that strategy. And afforded a safer option for Mr W. Although there's some dispute as to whether he was working at the time of the advice, he'd only recently been made redundant. His limited company had only been incorporated a year or so before the advice was given. So any new self employed venture was in its infancy and the likely success or otherwise (and Mr W's ability to make further pension provision) would've been difficult to judge.

Mr W's attitude to risk had been assessed as medium. Given his age he had time for his pension fund to grow and to make further pension provision. But given what I've said about the value of his existing DB pension, his personal circumstances and even if he had some savings/other assets to fall back on, I think a more cautious approach should've prevailed. In my view the transfer represented more risk than Mr W should've been advised to take.

Mr W has said the adviser told him he couldn't lose by transferring and only stood to gain. It's impossible now, so many years after the event, to be sure as to what may have been said. But it was up to Sesame to ensure that Mr W understood he'd be giving up a guaranteed and index linked income in retirement in favour of a product which was dependent on investment performance.

Sesame's report said it was of paramount importance that Mr W fully understood, that on transferring from the DB scheme, the guarantees he had would be given up in favour of future investment returns. Sesame has stressed that Mr W was made aware that the transfer involved risk and he confirmed, at various points, that he was comfortable with that.

But Sesame's responsibilities went further than just pointing out the risks to Mr W. Sesame had a responsibility to recommend what was in Mr W's best interests and show that, despite the risks, transferring was in Mr W's best interests. The section 32 buyout *plan did offer a guarantee – that Mr W's Guaranteed Minimum Pension (GMP) and any widow's GMP the DB scheme would've paid, would be met. But the GMP was only part of the total DB pension which Mr W had accrued over 19 years' service and so I don't think the GMP changes things.*

Sesame asserts that Mr W did have investment experience and knowledge. But I don't think the investments Sesame has pointed to (in the main endowment and savings plans) indicate a high degree of investment experience. In any event, pensions and whether deferred benefits in a DB scheme should be retained or transferred, is a specialist area and Mr W was being advised by Sesame.

I note what Sesame has said about Mr W not having sought financial advice in connection with his section 32 plan for some 22 years. And Sesame's suggestion that it would be unreasonable to place the blame for the strategy not performing as hoped for on the adviser from well over 20 years ago. But the point is whether Mr W should've been advised to transfer. I don't think the advice was in Mr W's best interests. It's the root cause of his losses and so it's fair and reasonable to say that Sesame is responsible.

I think Sesame should've advised Mr W to remain in the DB scheme. I've considered if Mr W would've gone ahead anyway but I don't see he'd have insisted on transferring out of the DB pension, against advice to retain those benefits. I don't see that he was a particularly experienced investor and, as I've said, this was a specialist area and so Mr W would've been dependent on advice. I can't see any reason why, if Sesame had advised him against transferring out of the DB pension and explained why it wasn't in his best interests, Mr W wouldn't have accepted that advice.

For the reasons I've explained I'm upholding Mr W's complaint. Sesame should compensate Mr W using the regulator's DB pension transfer redress methodology. I've set that out below.

In addition to making an award for financial loss, I can award compensation for pain and suffering and/or distress and inconvenience. In making such awards we take into account the impact on the consumer. Mr W has told us about the health issues he's faced recently, which may have been triggered by stress, and the adjustments he's had to make. I'm sorry to learn of Mr W's difficulties and I hope the measures he's taking will improve things. But, although I note what he's said about the worry the complaint has caused him and which I accept, I think it would be difficult to establish that his complaint has led directly to the symptoms he's experienced. I've made an award below which I think is fair and reasonable to reflect the stress and inconvenience this matter has caused Mr W since about May 2022 when it began to emerge that there might be a problem arising from the transfer in 2000.'

I went on to set out what Sesame needed to do to put things right.

Both Mr W and Sesame accepted my provisional decision and made no further substantive comments, although Mr W had some queries about redress, which the investigator dealt with.

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 the absence of any new information, evidence or arguments my views remain as set out in my provisional decision and recapped above. What I said in my provisional decision forms part of my final decision.

As I mentioned in my provisional decision, Sesame initially argued that Mr W's complaint had been made too late. I considered that and I issued a jurisdiction decision on 29 April 2024. We're required to keep jurisdiction under review throughout our consideration of a complaint and until we issue a final decision. I've done that and my views remain as set out in my jurisdiction decision.

I'm upholding Mr W's complaint. I've repeated below the redress from my provisional decision.

Putting things right

A fair outcome would be for Sesame to put Mr W, as far as possible, into the position he'd now be in but for the unsuitable advice. I consider he'd have likely remained in the DB 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 W has not yet retired, and he has no plans to do so at present. So, compensation should be based on the DB scheme's normal retirement age of 65, 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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr W'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 W redress as a cash lump sum payment

- explain to Mr W 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 the current defined contribution pension

- offer to calculate how much of any redress Mr W receives could be used to augment the pension rather than receiving it all as a cash lump sum,

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

Redress paid directly to Mr W 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 W's likely income tax rate in retirement is presumed to be 20%. However, if he'd 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%. If either party disputes that the assumption that Mr W is likely to be a basic tax payer in retirement is a reasonable assumption, they should let us know as soon as possible. It won't be possible to amend this once a final decision has been issued.

Sesame should also pay Mr W £350 for the distress and inconvenience he's suffered.

Where I uphold a complaint, I can award fair compensation of up to £190,000 (where, as here, the date of the act or omission was before 1 April 2019 and the complaint was referred to us on or after 1 April 2023) 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 W the compensation amount as set out in the steps above, up to a maximum of £190,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £190,000, I recommend that Sesame pays Mr W the balance.

This recommendation isn't part of my determination or award. Sesame doesn't have to do what I recommend. It's unlikely that Mr W can accept my determination and go to court to ask for the balance. Mr W may want to get independent legal advice before deciding whether to accept this decision.

My final decision

I uphold the complaint. Sesame Limited must redress Mr W as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 27 June 2024.

Lesley Stead
Ombudsman