DRN-4833517

The complaint

Mr H has complained that an appointed representative of Sense Network Limited gave him unsuitable advice to buy an annuity in 2013.

What happened

I issued my provisional decision on this complaint on 10 May 2024. The background and circumstances to the complaint and the reasons why I was provisionally minded to uphold it were set out in that decision. I've copied the relevant parts of it below, and it forms part of this final decision.

Copy of provisional decision

Mr H's complaint was considered by one of our investigators. He sent both parties his assessment of the complaint on 13 November 2023. The investigator set out his understanding of the background and circumstances to the complaint and the reasons why he thought it should be upheld in his assessment. But to recap, Sense Network's appointed representative (I'll just refer to them as Sense Network for ease) met with Mr H in October 2013. At the time Mr H was divorced, living with his mother, and had applied to buy her council house with her through the Right to Buy scheme.

Mr H was employed and earnt a salary of £25,000 per year. He didn't hold any investments, but had a personal pension worth approximately £54,000. Mr H completed a risk questionnaire which confirmed that he had a cautious attitude to risk, and he wanted to retire at 67.

The value of the council house was £47,000, however because of the Right to Buy scheme's discount, the purchase price was £18,800.

Sense Network sent a suitability report to Mr H on 5 December 2013. It recommended that he should take the tax-free cash from his pension and with the remainder buy an annuity for £39,538. The annuity provided a 10-year guaranteed period. This would provide a fixed annual income of £2,339. As Mr H didn't want to retire until 67 and was in full time employment, it recommended that he reinvest the annuity income into his workplace pension so that he could increase his pension provision. Mr H accepted the recommendation. The cost of the advice was 2.5% of the transfer amount.

In October 2022 Mr H contacted Sense Network. At the time the economy was particularly uncertain and Mr H wanted to know how this would impact his annuity. Mr H said when he bought the annuity in 2013 he'd been advised that the original premium of £39,538 would be paid back to him after 10 years. Sense Network told him that this wasn't the case, and that the premium wouldn't be returned. Mr H complained, and the matter was subsequently referred to us.

Our investigator didn't think Mr H had needed to access his pension. He said at the time of the advice Mr H was finalising a divorce and wanted to ensure his son, whom he was getting sole custody of, had a secure home. He wanted to buy his *mother's council property. However the investigator said there were no immediate time pressure to buy the property. The purchase price of the property at the time was only £18,800, and Mr H had a high disposable income of approximately £900 per month. The investigator said the pension was Mr H's sole provision for retirement, so it was important that Mr H preserved it for as long as possible. The investigator thought that instead of Mr H taking his pension, he could instead have merely saved up a deposit from his disposable income. This option hadn't been considered. The investigator said Mr H didn't require an income, so he didn't think Sense Network should have recommended Mr H buy an annuity just so that he could access his tax-free cash.*

Sense Network didn't agree with the investigator's findings. Mr H's complaint was therefore passed to me to consider further.

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.

Sense Network provided further evidence and arguments in responding to the investigator's assessment of the complaint. I've taken them all into account in making my provisional findings. However our understanding of Mr H's circumstances has changed. And I think materially so. Therefore some of my findings are different to the investigator's. Sense Network (and Mr H) may therefore want to make different arguments or provide different evidence in light of my findings. Both parties have the opportunity to do so in responding to this provisional decision.

Following further enquiries it's come to light that Mr H received the settlement from his divorce in May 2012. He has provided evidence to show he received the money at this time – just over £61,000 after fees. Mr H has said he used money from the divorce settlement to buy the council house. The purchase price of the council house was £18,800. The sale went through in April 2014. Mr H has said:

"Please see the attached in the documents you can see the balance of my divorce settlement, and in my bank statement is the balance paid in by my solicitor after they had taken their fees.

You will also see a second statement from the solicitors who acted for the purchase of my mothers property. As you can see I used the monies in my account to purchase my mother's property, and I think when I received the cash from my pension I used it for personal expenses and holidays for my children."

I note the fact find dated 10 October 2013 recorded Mr H's address as the council house he was living in with his mother. It recorded:

"Mr has recently divorced (2011) and currently residing with his mother as the matrimonial home was left to clients ex wife.

Client has recently applied to help buy his mothers property under the RTB scheme on a joint basis. The transaction has not gone through but there the property will be owned outright once completed. Client believes this property will pass to him as a legacy at some point in the future.

Client requires annuity tax free cash to help him and his son move house to a more secure area. Client is concerned that his sons progress in school has deteriorated in recent times and co-incides since moving to current property/domestic situation following loss of joint *marital home following divorce.*

Current property is clients mothers which is too small for them all. (Client is in process of buying this property on a joint basis under RTB scheme.

…..Client feels the best solution is to move house and would like to buy a property to achieve this goal."

The supplementary questionnaire said Mr H was desperate to move out of his current domestic circumstances and wanted to buy a property elsewhere. It also said he was hoping to apply for a mortgage in 2014 to move house. Mr H was living in the council house with his mother at the time.

The suitability letter said…

"You feel that you need to rectify your domestic situation as soon as possible for the benefit of you and your son's future. As a result of these extenuating circumstances, you are very keen to purchase a new home to live in and wish to use the tax free cash from the annuity as the main source of deposit."

So I don't think the tax-free cash from the pension was required to buy the council house. Mr H has said he used the money from the divorce settlement to buy the council house. And this is consistent with his e-mail to the adviser dated 12 September 2013 in which he said "…it will be a cash purchase". It seems to me that the conversation about moving house was in relation to a future possible move.

The suitability report also said:

Objectives

During our meeting we discussed various aspects of your personal and financial situation.

At the present time, your prime objective is to secure an income from the funds that you have accumulated within your pension arrangements.

And:

"As you don't require the income from the annuity you intend to re-invest this income into your company's pension scheme until your expect to begin phased retirement from employment around age 65 to 67. This is dependent on your circumstances at the time."

Although Mr H's 'prime objective' was recorded as being to secure an income, I can't see why there was any particular need to secure it at that time. Mr H had plenty of disposable income. And the plan was to re-invest the income back into a pension.

On the on hand, Mr H has told us that he wasn't considering buying any other properties other than council house. And there is also no record of Mr H's divorce settlement in the fact-find. The Supplementary Questionnaire also says there was no alternative source for a cash lump sum. So there are some inconsistencies/unknowns.

However the documentation clearly suggests the tax-free cash from the pension was to help purchase another house – not the council house purchase. Mr H has provided documents showing he received the £61,000 settlement in May 2012. And that he bought the council *house with cash. So I think putting the purchase of the council house aside, if the adviser understood Mr H was thinking of buying another property sometime in the future, was the recommendation to buy the annuity suitable?*

Mr H was only in his mid-fifties at the time he bought the annuity. It's not generally considered to be suitable advice to take a pension early unless there is good reason to do so. It loses the tax advantages associated with a pension and, generally speaking, it is hoped that the fund value increases over time as well as annuity rates increasing with age.

It seems that Mr H was advised to buy the annuity in order to access the tax-free cash to help with buying a house at some point in the future. As the investigator said, it was recorded he had significant disposable income, and he could have built up savings within a reasonable time period. The house purchase plans seem to have been aspirational rather than Mr H having any firm plans in place. In my opinion Mr H should have been advised to wait until he had more developed plans and was in the process buying a house before accessing his pension.

Taking all the above into account, I'm not persuaded the evidence available supports the recommendation to buy the annuity. In my opinion there was no good reason to buy the annuity given Mr H's particular circumstances at the time, and I think the recommendation was unsuitable.

Putting things right

My aim in awarding fair compensation is to try and put the complainant back into the position that they would have been in but for the unsuitable advice. In my opinion Mr H shouldn't have been advised to buy the annuity. However once bought, it's not possible to unwind that position. I therefore think the following is fair in the circumstances.

Mr H is now around the age that he indicated he expected to retire when he bought the annuity. I therefore intend to order that Sense Network Limited works out the benefits Mr H would have obtained from his pension now if he had left it invested, against the value of the benefits he's obtained. Sense Network Limited should:

A. Obtain what the notional value of Mr H's personal pension would have been as at the date of a final decision assuming it had remained invested with the same pension provider and in the same funds. Sense Network Limited will need to contact Mr H's previous personal pension provider to do this.
B. Deduct 25% of this value in respect of the tax-free cash as I think it's reasonable to assume that Mr H would have taken the full 25%.
C. Calculate what the gross annuity Mr H could have bought with the remaining 75% of the fund value. It should assume Mr H would have bought the same shape annuity using the Open Market Option as at the decision date (and taking into account Mr H's age and circumstances at that date). Sense will need to refer to published annuity rate tables and get a quote from a competitive provider to do this.
D. Calculate the difference between the gross annuity Mr H would have received per annum as in C, and the gross annuity he is currently receiving.
E. If the figure in D is positive, calculate the lump sum currently required to buy that annuity.
F. From the figure calculated in E, a deduction of 20% should be made to allow for basic rate income tax that Mr H would pay on his annuity income. This assumes Mr H will be a basic rate taxpayer in retirement. If either party disagrees with this assumption it should let me know in responding to this provisional decision.
G. From the figure calculated in F, the net income that Mr H has been paid to the date of a final decision date should be deducted.

H. From the figure calculated in G, either add (if the tax-free cash Mr H would have received was higher than he actually received), or deduct, (if the tax-free cash Mr H actually received was higher than he would have received had he remained invested) any difference in tax free cash.

The remaining amount should then be paid to Mr H directly as a lump sum.

As the investigator said, Mr H should note that the above may not result in a compensation payment as it will depend on the values of what he would have received against what he has received.

Mr H has told us how the matter has caused him particular distress. Given Mr H's circumstances, I can see how he would be affected. I therefore intend to order that Sense Network Limited pays Mr H £300 for the distress I'm satisfied Mr H has been caused by the matter.

My provisional decision

My provisional decision is that I uphold Mr H's complaint.

I intend to order that Sense Network Limited calculate and pay compensation to Mr H as I have outlined above under 'Putting things right'.

I asked Mr H and Sense Network to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Sense Network said, in summary, that had the adviser known about Mr H being in possession of approximately £60,000 from the divorce settlement it's highly probable the advice would have been different. However the information about the settlement wasn't disclosed to the adviser. It said Mr H had a responsibility to disclose all relevant information. However the fact find said there were no alternative sources of cash available. Sense Network said advice could only be given on the information disclosed.

Sense Network said the council property was bought in April 2014 which was shortly after the recommendation to access the tax-free cash around December 2013. It said it was unclear why it hadn't been bought earlier if Mr H had access to the divorce settlement. It said on the balance of probabilities the council house was purchased via the tax-free lump sum.

It said the e-mail dated 12 September 2013 confirmed the client intended to buy the council house property and not another property. And this supported the recommendation to release funds. It said the intention was to use the tax-free cash for a house purchase and not personal expenses. If Mr H used it for other purposes the adviser couldn't be held responsible.

Sense Network said its process was to provide its client with a copy of the fact find and suitability report. Mr H didn't alert the adviser that the information recorded was inaccurate. It said if a client provided incorrect information which had a bearing on the advice being given the adviser couldn't be held responsible.

Mr H made some further comments but nothing material to deciding the merits of the complaint.

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.

Having done so, I've seen no reason to depart from my provisional decision to uphold the complaint.

It's not in dispute that Mr H bought the council house. Mr H had received the divorce settlement in May 2013. The fact find dated 10 October 2013 recorded Mr H had 'recently' applied to buy it. And the purchase was completed in April 2014. So I think that is all consistent.

The adviser and Mr H exchanged e-mails about the purchase of the council house. Mr H told the adviser it would be a cash purchase. So I think the adviser ought reasonably to have looked behind that and the source of those funds if he was advising on the purchase of the council house and it appeared Mr S didn't have such funds available.

But for the reasons I explained in my provisional decision, in my opinion the advice to buy the annuity and access the tax-free cash wasn't related to the purchase of the council house. It was about buying another property. I set out the numerous references to this in my provisional decision. It wasn't a single reference that might reasonably be seen as an inadvertent error by the adviser in a single document. There were clearly several references to Mr H's particular circumstances and reasons for him wanting to move away from the council house.

Mr H told the adviser in an e-mail that he was buying the council house in cash. So as I said in my provisional decision, putting the purchase of the council house aside (and so in effect the fact that the divorce settlement may not have been disclosed and the adviser may not have been aware of it) if the adviser understood Mr H was thinking of buying another property sometime in the future, was the recommendation to buy the annuity suitable?

For the reasons I explained in my provisional decision, I'm not persuaded it was. Therefore I think Mr H's complaint should succeed.

My final decision

My final decision is that I uphold Mr H's complaint.

I order Sense Network Limited to calculate and pay compensation to Mr H as outlined in my provisional decision under 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 3 July 2024.

David Ashley
Ombudsman