DRN-4894801

The complaint

Mr D complains that in 2000, Sesame Limited gave him unsuitable advice to transfer his existing section-32 ('s32') buyout plan to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

The advice complained about was provided to Mr D by one of Sesame's predecessor firms but I shall refer to the respondent firm throughout my decision as Sesame.

What happened

Mr D was a deferred member of his former employer's defined benefit ('DB') occupational pension scheme and when he left his employer for a new role in 1997, Mr D had accrued 17 years of pensionable service.

In April 1998, the DB scheme administrators sent Mr D's financial adviser a statement detailing the value of his deferred DB scheme benefits. It said that the total cash equivalent transfer value ('CETV') of his DB scheme benefits was £260,258.85 and that this value was broken down as follows: -

- £21,088.44 which was the value of Mr D's guaranteed minimum pension ('GMP')
- £230,595.27 which was the value of his non-GMP
- £8,655.13 which was the value of his benefits arising from contracted-out service.

Mr D's pensionable salary on leaving service in November 1997 was cited as being £100,818.88 and the GMP per week was £43.58 (the revaluation rate was 6.25% per year). Mr D's basic pension from the scheme at the time of leaving was £28,362.20 per year (the revaluation rate was 5% per year).

In April 1998 Mr D was aged 44 and his objectives were noted as wanting to draw an adequate pension income from age 55 with maximum flexibility in respect of how benefits are taken. Mr D's adviser recommended that Mr D transfer his DB scheme to a s32 buy-out plan because of the significantly higher death benefits available compared to a personal pension plan – these were important to Mr D as he had no life cover in place aside from that connected to his mortgage – and because it offered a partial guarantee with regard to the protected rights (GMP) liability under the DB scheme. The adviser also thought that a s32 buy-out plan was more appropriate for a cautious investor such as Mr D.

The transfer went ahead in around May 1998 and the s32 buy-out was provided by a company I shall refer to as 'S'. Mr D's transferred non-GMP benefits were invested 50% in S's cautious managed fund and 50% in its security 100 fund (with the intention to switch this portion to the cautious managed fund in 6 months' time). The GMP portion of Mr D's transferred benefits were invested in S's with-profits fund. In order to guarantee the level of pension he would receive from this portion the amount reserved for the GMP liability was £45,035.02. The selected retirement date on the plan was Mr D's 75th birthday and the plan had annual operating charges of 2.9% of the fund value.

In April 1999, Mr D again received advice from his financial adviser who was, by this point, an appointed representative of Sesame. Sesame completed a fact-find document to gather information about Mr D's circumstances and objectives. The fact-find noted: -

- Mr D was aged 46, in good health and married with two dependent children.
- That Mr D was a director of his own business earning a gross annual income of £36,000.
- He jointly owned his own home with his wife which was worth £360,000 and had an outstanding (endowment) mortgage of £180,000 with a remaining term of 12 years. Including his mortgage payments, Mr D's total monthly financial commitments were noted as £1,767.
- Mr D's assets were noted as a 50% share in a flat (worth £25,000), £10,000 in joint savings and £9,300 in shares. Mr and Mrs D had four joint endowment policies with a total sum assured figure of £135,000.
- Aside from his s32 buy-out plan – valued by this point at £309,255 – Mr D's only other pension provision was a small AVC plan valued at £18,750. The retirement age for both plans was noted as age 60.
- Mr D's objectives were noted as the maintenance of his standard of living in retirement and long-term savings.

Sesame also carried out an assessment of Mr D's attitude to risk ('ATR'), which it deemed to be 'cautious', or two on a scale of one to five.

In or around January 2000 Mr D signed terms of business with Sesame.

On 18 May 2000, Sesame provided Mr D with its suitability letter where it recommended that he invest in a SIPP provided by a company I shall refer to as 'N'. The anticipated CETV was cited as being £280,000 of which £55,000 represented protected rights (the GMP) which could not be drawn before age 60 (and which Sesame recommended was placed in N's 'balanced managed fund'). Sesame also recommended that Mr D use the services of a DFM for managing £150,000 of the total available fund.

Some notes were added to the fact-find at an unknown later date which recorded the reasons for establishing a SIPP. These were noted as: -

- The access to far greater investment choice.
- The ability to appoint a discretionary fund manager ('DFM').
- The likelihood of more tax-free cash ('TFC') at retirement.
- The ability to invest in an international offshore investment bond.
- The option to choose drawdown.
- The possibility to make additional contributions to the SIPP
- Avoiding the need to allocate more of the fund to providing the GMP should annuity rates fall.
- That Mr D's ATR was now 'balanced' (or three on the scale of one to five).

A further meeting took place between Mr D and Sesame on 5 June 2000, this time with the proposed DFM was present and at which a report prepared by the DFM for Mr D about the management of his SIPP funds was discussed, as was Sesame's recommendation that some of the funds be invested in an international protected portfolio offshore bond. Further it was noted that the CETV was greater than previously anticipated and so the asset allocation was revised accordingly. It was agreed the DFM would now manage a portfolio worth £170,000 and the amount placed in the offshore bond would be £100,000. The protected rights amount to be invested in N's balanced managed fund would be reduced to £42,528.05 with any balance to be held in cash.

The charges, both initial and ongoing, were as follows: -

- An arrangement fee/initial commission from N to Sesame of £5,610.
- Annual fee for Sesame of 1% of the fund value.
- 2% of the transfer value to Sesame for the initial advice.
- 0.5% of the transfer value to Sesame for ongoing service.
- A further initial commission of £850.56 for protected rights element.
- Commission for Sesame in respect of some of the investments purchased within the SIPP. For the offshore bond, Sesame received an initial commission payment of 6% of the amount invested followed by an annual charge of 1% per annum.
- N's annual management charge of 0.5% on value of the balanced managed fund along with a monthly management charge of 0.042% of the value of the plan.
- The DFM's annual management fee and dealing charges.

Mr D accepted Sesame's recommendation and an amount of £323,070 was transferred from S to N in late June 2000. The selected retirement date was Mr D's 60th birthday.

Mr D's pension appears to have been transferred (in part at least) in 2005 when approximately £133,000 was moved to a personal pension income plan with a provider I shall call 'K' and again in June 2007 to a provider I shall call 'A'.

In July 2023 Mr D, through his representative, complained to Sesame about the advice it had given him in 1999/2000 to transfer his s32 buy-out plan to the SIPP. He said that Sesame had failed to assess whether his existing s32 buy-out plan was likely to provide the income he would require in retirement, whether he might need to make additional contributions to meet that requirement or to assess the critical yields against his existing arrangements in order to consider whether he would be financially better off by transferring. Mr D complained further that Sesame had failed to fully explore the death benefits associated with his s32 buy-out plan or to have considered the alternative of taking out a life assurance policy. Mr D said Sesame should not have recommended that he transfer on the basis that he wanted a wider investment choice because there was no evidence that that was what he wanted. Overall he complained that there was insufficient justification to recommend a transfer.

Sesame looked into Mr D's complaint but concluded that it hadn't provided him with unsuitable advice. It said it had provided him with sufficient information to make an informed decision. Sesame also said that Mr D's main objective had been to have access to wider investment opportunities and greater flexibility around how he took his retirement benefits.

Unhappy with the outcome of Sesame's review of his complaint, Mr D complained to the Financial Ombudsman Service. One of our Investigators looked into the complaint and recommended that it was upheld. He thought that Sesame had failed to demonstrate that the transfer was in Mr D's best interests at the time of the advice. He also thought Sesame hadn't considered what Mr D's income needs in retirement might be and that it hadn't researched the growth and contribution levels that might be required for him to maintain his lifestyle into retirement. Our Investigator recommended that Sesame compensate Mr D by putting him back in the position he would have been in but for the unsuitable advice.

Mr D accepted our Investigator's recommendation but Sesame did not. Sesame largely repeated points it had previously made but did say that it disagreed with the redress methodology proposed by our Investigator. Sesame asked for the complaint to be referred to an Ombudsman.

The complaint was passed to me for a 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 applicable rules, regulations and requirements

What follows below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Sesame's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. Having considered all of this and the evidence in this case, I've decided to uphold the complaint for largely the same reasons given by the investigator. Sesame should have only considered a transfer if it could clearly demonstrate, on contemporary evidence, that the transfer was in Mr D's best interests. And having looked at all the evidence available, I'm not satisfied it was in his best interests.

Sesame maintains that Mr D's occupation at the time of the advice meant that he understood risk, that he understood the documentation it issued to him and that he had a sufficient understanding of financial matters such that he would have been able to question the information he was being given. Furthermore, Sesame has said that Mr D was attracted to being able to self-manage his investments through a DFM, by the option to make additional contributions to a SIPP (unlike with his s32) and to the flexibility around how he could draw his retirement benefits. And it said that Mr D was unconcerned at the loss of the pre-retirement death benefits offered by the s32 buy-out plan and was keen to avoid any increase in the GMP element of his plan.

Overall Sesame said that it placed Mr D in a position so that he could make an informed decision about the advice it gave. I'm unable to agree and I'll explain why.

Sesame was under a regulatory obligation to ensure it advised Mr D on what was in his best interests and to provide him with suitable advice. Providing a consumer with information doesn't make the advice suitable; transparency is not the same as suitability. I appreciate that Sesame provided Mr D with a suitability letter but there are significant gaps to the information it contained such that it meant Mr D was not placed in a fully informed position.

In particular I can see no assessment of Mr D's retirement income needs. There's a generic statement about Mr D wanting to maintain his standard of living in retirement but beyond that no assessment of what Mr D would actually need by way of an income in retirement nor how his pension provision might meet that need. And without comparing the likely benefits the s32 buy-out plan was forecast to provide with what the SIPP might be able to provide if it grew in line with the regulator's projection rates of 8%, 5% and 2% per annum I can't see how Mr D was in a position to decide whether or not the transfer was a financially viable one that was in his best interests to make.

There were also extensive charges associated with the SIPP but I can't see that Mr D was provided with any information about the effect they would have on the future value of the

SIPP. The greater the charges the better the investment needs to perform just to be able to match the benefits being given up. But I've not seen any information about this so it appears to me that Mr D couldn't fully understand or weigh up the risk he was taking.

Similarly Mr D's objective of making additional future contributions wasn't fully assessed either. Without understanding what Mr D needed by way of a retirement income, it is impossible to know whether additional contributions were needed so as to meet his income needs in retirement and, if they were, what he could afford to pay into the SIPP. None of this seems to have been interrogated by Sesame.

Nor can I see that alternatives to transferring the s32 buy-out plan were discussed with Mr D. If Sesame had fully interrogated Mr D's retirement needs, and if it had ascertained that further provision needed to be made, then it should, if having due regard to Mr D's information needs, have considered alternatives to transferring his s32 buy-out plan. For example it could have suggested Mr D set up a stakeholder or personal pension plan to supplement the provision in his s32 buy-out. But Sesame didn't do that; its suitability letter was predicated on the transfer to the SIPP with no alternatives offered.

Mr D's s32 buy-out plan provided him with a valuable GMP. This was a guaranteed benefit. The s32 buy-out annual illustration from June 1998 projected that Mr D would receive an annual pension of £35,966 along with a tax-free lump of £80,923 at his normal retirement date. I think these are significant benefits yet I'm unable to see how they could be matched as a result of transferring to the SIPP because Sesame didn't consider them when advising Mr D.

One of Mr D's stated objectives for wanting to transfer was to avail himself of the wider range of investments available through a SIPP (including the offshore bond). But Sesame wasn't there to just provide wish fulfilment on behalf of Mr D. It should have fully interrogated Mr D's objectives to fully understand them. Only then can it be ascertained if the advice given was suitable.

Sesame also noted that Mr D was attracted by the flexibility around how he could take his retirement benefits from a SIPP. But I don't think Sesame sufficiently explored whether Mr D actually required flexibility in retirement. I've set out above the pension benefits the s32 was forecasted to provide to Mr D at retirement but, without information about how these benefits compared to those forecasted under the SIPP, and without knowing what income Mr D would need in retirement, I can't reasonably agree that the advice to transfer was suitable in order to meet this objective.

Sesame recommended that Mr D use a DFM to manage part of his SIPP. As I'm upholding the complaint on the grounds that a transfer out of the s32 buy-out wasn't suitable for Mr D, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr D should have been advised to remain in the s32 buy-out plan and so the DFM would not have had the opportunity to manage his funds if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and wider investment choice through a SIPP would have sounded like attractive features to Mr D. But Sesame wasn't there to just transact what Mr D might have thought he wanted. The adviser's role was to really understand what Mr D needed and recommend what was in his best interests.

The s32 buy-out plan accounted for the vast majority of Mr D's retirement provision and ultimately, I don't think the advice given by Sesame was suitable; it should have advised

Mr D to remain in his s32 buy-out plan. Furthermore, it was imperative that Sesame had due regard to Mr D's information needs and that it communicated with him clearly so that he could make an informed decision. But for the reasons I've given here, I don't think it met its obligations in this respect.

Of course, I have to consider whether Mr D would've gone ahead anyway, against Sesame's advice. I've considered this carefully, but I'm not persuaded that Mr D would've insisted on transferring out of the DB scheme, against Sesame's advice. I say this because Mr D had no real investment experience and a cautious/balanced attitude to risk. I've noted Sesame's emphasis on Mr D's occupation but I can't agree that it meant he possessed any great knowledge around pensions and investments. And whilst he may have understood the concept of risk, the fact remains that in 1998 he classed himself as someone with a cautious attitude to risk. And it remains unclear to me in any event, what caused the classification of Mr D's attitude to risk to change between May 1998 and April 1999.

As Mr D's s32 buy-out plan accounted for the majority of his retirement provision I think that, had Sesame provided him with clear advice against transferring out of the s32 plan, explaining why it wasn't in his best interests, then I think he would've accepted that advice.

I'm not persuaded that Mr D's interest in having a wider investment choice, the option to appoint a DFM and the flexibility around how he drew his benefits at retirement were so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out, didn't think it was suitable for him or in his best interests. So, I don't think Mr D would have insisted on transferring out of the DB scheme.

In light of the above, I think Sesame should compensate Mr D for the unsuitable advice, in line with the regulator's rules for calculating redress for non-compliant pension transfer advice. I've noted Sesame's comments about the method of redress applied by our Investigator to Mr D's complaint, however, I am satisfied that, in the circumstances of Mr D's complaint, it was correctly applied.

Putting things right

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr D would have most likely remained in his s32 buy-out plan 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.

For clarity, Mr D retired at age 66. So, compensation should be based on him taking benefits at this age.

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 D's acceptance of my 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 D redress as a cash lump sum payment,
- explain to Mr D 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 his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts Sesame's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr D for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr D's end of year tax position.

Redress paid directly to Mr D as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), Sesame may make a notional deduction to allow for income tax that would otherwise have been paid. Mr D's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

My final decision

Where I uphold a complaint, I can award fair compensation of up to £190,000, 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 £190,000, I may recommend that the business pays the balance.

<u>Determination and money award</u>: I uphold this complaint and require Sesame Limited to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £190,000.

<u>Recommendation:</u> If the compensation amount exceeds £190,000, I also recommend that Sesame Limited pays Mr D the balance.

If Mr D accepts this decision, the money award becomes binding on Sesame Limited.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D 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 Mr D to accept or reject my decision before 1 January 2025.

Claire Woollerson
Ombudsman