DRN-4218199

The complaint

Mr B complained that he was given unsuitable advice to transfer his defined benefit (DB) Occupational Pension Scheme (OPS), to a type of personal pension arrangement in 1995.

Even though Mr B dealt with a different company at the time, Sesame Limited is now responsible for answering this complaint. To keep things consistent throughout this final decision, when referring to the business, I'll refer mainly to "Sesame".

Mr B is also represented by a claims management company but for consistency I'll refer to its comments as coming from Mr B himself.

What happened

I've noted that there is very little information or documents to refer to in this case. As I'll explain more about later, Mr B himself can remember only very little about what happened and he couldn't say much about how his DB pension scheme operated or how much it promised to pay upon retirement. He was also only able to give brief details about how the pension was accrued and how long he'd worked for the company which provided it.

Similarly, the financial advice was provided by a company which is no longer trading. There is no doubt Sesame is now responsible for answering this complaint, and I've noted it raised no jurisdiction objections in relation to the time-limits in which complaints like this should be brought. Sesame has been unable to say much about the DB pension, the transfer advice or the investments to which some of Mr B's funds were ultimately transferred, and it has no records to refer to. So, as I'll explain more about later, I've used my knowledge and experience and also the few documents we *do* have, to think about what is likely to have happened.

It seems Mr B approached Sesame in 1995 to discuss his pension. Information gathering and discussions most likely then took place and his circumstances of that time were as follows:

- Mr B was 50 years old and married to Mrs B who was 40. They still had two dependent children at home at the time.

- Mr B wasn't in good health. In fact, he'd been made redundant and was unable to continue looking for work due to his poor health. He and Mrs B were on state benefits.

- Given the limited information I've seen, I think the entire cash equivalent transfer value (CETV) is likely to have been just over £6,000. However, I should stress that Mr B, Sesame nor the company now responsible for administrating the legacy DB scheme can confirm this.

- Mr B can't remember much about this pension. He thinks it related to an occupational pension he'd accrued with a company he'd only spent a short time working for, possibly around two years.

- It seems he approached an independent financial adviser (IFA, but now Sesame) who recommended that he use the CETV to buy an annuity, take out some tax-free cash and use a remaining amount to invest in a 'with profits' type fund for the future. This could remain invested until Mr B reached 65.

- Mr B thinks he had another DB pension, but he isn't receiving any money from this now and can't locate any information about it. He says he's not sure if this was transferred and there's no evidence put forward that it was. This pension therefore isn't the subject of this complaint.

I think the IFA would have set out their advice about Mr B's DB pension in a suitability report but we don't have access to this. I think an attitude to risk would also have been established for Mr B as part of the advice process and also his capacity for loss. We don't have these either, but in my view they ought to have both been classed as 'very low' as Mr B appeared to have very little financial resources; Mr B didn't have any investment experience or knowledge and had no significant savings or assets I'm aware of.

Mr B first complained to Sesame about its advice, in 2022. In response, Sesame denied it had done anything wrong. He then referred his case to our Service. One of our investigators looked into it and said the complaint shouldn't be upheld. Mr B still doesn't agree. So, as the complaint couldn't be resolved informally, it's come to me for 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.

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.

<u>*The applicable rules, regulations and requirements*</u>

The advice was provided in 1995. Based on the little information I've seen I can't say whether the advising business was more likely to have been a previous member of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), or the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA).

Nevertheless, as of 1995 I think the business would have been regulated by the Personal Investment Authority (PIA). When the PIA took responsibility for LAUTRO and FIMBRA businesses in 1994, it adopted the LAUTRO and FIMBRA rules. And so, these adopted rules applied at the time of the advice in this case.

The LAUTRO rules included a Code of Conduct at Schedule 2 to the rules. This required advisers to exercise *'due skill, care and diligence'* and *'deal fairly with investors'*. Paragraph 6 of the Code of Conduct required advisers to give 'best advice', which included that they should not:

- *Make inaccurate or unfair criticisms of other investments, or of any occupational or state pension; or*

- *Advise the investor to convert, cancel or allow to lapse any investment contract, occupational or state pension, unless they genuinely believed it to be in the* *consumer's best interest and clearly disclosed all relevant consequences and disadvantages.*

Paragraph 8 required an adviser to consider 'the investor's financial position generally and to all other relevant circumstances' - which included their rights under occupational and state pensions. It required them to recommend the contract from within the provider or marketing group's range which was most suited to the investor.

Examples of the key FIMBRA rules 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.

I've used all the information we have to consider whether transferring away from the DB scheme was likely to have been suitable and in Mr B's best interests. I think it's more likely that it was, so I'm not upholding his complaint.

I'm very sorry to disappoint Mr B.

Introductory issues

For the pension now complained of we only know so much. In his points of complaint, Mr B says the CETV was £2,295. I can see where this figure was obtained from, but I don't think this is strictly the correct CETV. This, in my view, demonstrates the difficulty in assessing what really happened here.

However, I've been provided with a 1995 document from the large insurer which it looks like Mr B's DB scheme was transferred to. There's no standalone CETV mentioned in the document, but we know a tax-free lump sum was paid to him of around £1,519 after the transfer. So, I think it's fair to therefore say the total original transfer value was around £6,076.

It also seems an annuity was recommended as we know one was bought in 1995 and this cost him £2,295. The £2,295 and the £1,519 amount to £3,814 and I think the remainder sum of around £2,200 was probably reinvested for the future in a 'with profits' fund. I can say this because as of 1999 another document shows a 'with profits' fund had grown to over £4,000. This would be broadly commensurate with assumed growth rates at that time.

To be clear then, I think the CETV was moved across to a type of personal plan. And Mr B was likely advised to:

- Take £1,519 in tax-free cash immediately
- Buy and annuity for £2,295 which generated £185 per year (£163 per year for Mrs B if he died)
- Invest around £2,200 in a 'with profits' fund until aged 65

- Pay what look like modest fees of around £32.

The lack of information available

As I've said, none of the parties has really been able to produce much information. As far as Sesame is concerned, I consider this to be a failing. Whilst I accept the transfer took place almost three decades ago, it also coincided with a substantial Pensions Review process which the then regulator directed firms involved in pension transfer advice to carry out. The Pensions Review came about in the mid-1990s and so it was around when the advice was given in this case. It also followed a period where many concerns had been expressed by the regulator and indeed within the financial industry, of widespread failures when advising clients to transfer away from DB schemes.

In this context, there was a well-known and widespread requirement for proper documentation to be kept indefinitely for obvious reasons. The Pensions Review process lasted several years and placed a heavy burden on firms like Sesame to go back and review cases where DB transfer advice had been given. So, when Sesame says now that it can't recover the necessary information or evidence from the time, this in my view, represents a failure. I've taken this into consideration when assessing this complaint.

However, I've noted we have no details about the DB scheme Mr B was advised to transfer away from. In his complaint, Mr B says he would have lost a guaranteed pension and spouse benefits. I do accept this to probably be correct, but I can't determine what the guarantees and benefits actually were. The administrators were contacted and have no details of the ceding scheme and it seems Mr B can't remember being told what sort of pension he could expect, what the normal retirement age (NRA) was or whether he could retire on medical grounds.

However, these things are as they are and as hard as everyone has tried, we simply don't have much information. I have therefore used what we *do* have access to. And I've used my experience and knowledge to assist me in thinking about the more likely scenarios - I've seen a great number of these types of pensions and made decisions about them, so I've applied this knowledge to Mr B's situation.

Mr B situation in 1995

I think it's fair to say that Mr and Mrs B were probably in a worrying financial situation in 1995. Mr B was being made redundant. They had two dependent children and they were no-where near the ages or in a financial setting where they could comfortably suffer a substantial drop in regular income. They were being supported by state benefits. Also, although Mr B had been made redundant, the strong sense I get is that this would not have yielded a large pay out. He'd not worked for the company for that long and I don't think his earnings would have been high.

Mr B also faced substantial medical challenges which meant he physically couldn't work anymore and there appeared no prospect of working in the foreseeable future. So everything I've seen here tends to show that this sudden and prolonged loss of income placed them in a serious financial situation. Against this backdrop, I've carefully considered whether the advice Mr B was given was suitable.

I've started from the position of the adviser and what they would have had to gain by advising Mr B to transfer to a particular company or plan. Mr B himself says he specifically sought out an adviser who could advise on all products and not just those of a particular company. I've also noted the fees apparently charged to transfer were modest. So, on that basis, I've seen nothing indicating that the adviser wanted to generate fees more than they wanted to provide advice that was suitable for Mr B.

The crux of the complaint is more that Mr B could have remained within his DB scheme and started to draw his benefits early from this because of his poor health. But as I've said, despite our own efforts and those of Mr B, we haven't been able to establish what options were actually available to Mr B in retiring so young and / or on medical grounds. Our investigator uncovered information from the Pensions Ombudsman dating back to 2006 which implied the DB scheme Mr B belonged to may have had ill-health benefits enabling members to retire earlier than the NRA. However, I can't say how these applied to Mr B's situation. For example, I've noted from what our investigator got from the Pensions Ombudsman that to be granted medical retirement, there may have been a requirement for a full medical examination by a company appointed doctor. But the evidence here is that Mr B didn't undergo such an examination. I also can't say what the payable benefits were in his case. But in my view, they would have likely been quite small, based as they would have been, on a very limited amount of service.

Also, whilst I accept Mr B had no significant experience or knowledge about pensions, I do feel it is more likely than not that in the course of the advice he would have seen his then 'current' DB pension illustrations. In particular, I think he'd have been shown the amount he'd be able to get at the NRA and also the amount at the age of 50, which is when we know he was interested in accessing an income (with immediate effect).

So, whilst DB pensions can indeed be complex, I think that in this case Mr B would have been able to make some very useful comparisons between the two schemes. I think he would, for example, have been able to see whether he could receive an immediate annual pension from the DB scheme. He'd have also been able to see the amount of tax-free cash he'd have been able to get with a slightly reduced DB pension under the same circumstances. On the other hand, the recommended course of action was for Mr B to transfer away from the DB scheme, buy an annuity and also take tax-free cash. So I think he'd have been able to compare these recommendations with the DB scheme figures. The only issue to additionally factor-in was that the transfer recommendation included holding a small amount of money back for investing in a 'with profits' fund.

The annuity recommended was a joint-life one and so would have had very similar characteristics to a DB scheme in that if Mr B had passed away then Mrs B would have continued to receive some small benefits. The tax-free lumps sums would have been easy to compare as well. What I'm therefore saying here is that comparisons would have been relatively simple – Mr B would have been able to compare the DB scheme benefits at the age of 50 with what the recommended option was. All he'd have to bear in mind is that the recommended option also involved saving a small amount for the future.

Of course, we haven't seen these direct comparisons because they haven't survived the passage of time. I've explained that this isn't good, but I can nonetheless be confident that these comparisons probably existed. I don't think Mr B would have transferred away from his existing DB pension without having at least been presented with some basic choices and an elementary demonstration of the strengths and weaknesses of both schemes.

I also think that his tax-free lump sum with the recommended option was likely to be slightly higher than in the DB scheme. This is often the case - it doesn't mean the pensioner gets more money overall, just that the tax-free upfront element can be more because the structure of the two schemes is different. I think this could have been appealing to Mr B in his difficult financial situation of that time.

I’ve also made a reasonable assumption that a larger annual pension - as opposed to a slightly reduced one and an immediate cash lump-sum - might have triggered penalties to Mr and Mrs B's benefit entitlements. So, a small annuity which generated only £185 per year was likely purchased by Mr B for this reason. In doing this, he’d get a one-off larger lump sum and also save some investments for the future in the ‘with profits’ fund.

I then considered the risk elements of the recommendation. By this I mean whether what he was being advised to do fell within Mr B’s overall attitude to risk which ought to have been very low. His obvious capacity for having no loss whatsoever also ought to have been taken into account by the adviser. But in this sense, I think the recommendation was probably quite similar to his DB scheme. Buying an annuity contained no risk and in fact, it gave Mr B a certainty similar to that which he already enjoyed within the DB scheme. I’ve also noted that Mrs B stood to receive almost as much as Mr B from the annuity in the event of him dying. So what the recommendation was proposing seemed to match Mr B’s financial needs.

Summary

I’ve said from the outset that Sesame’s failure to retain the historic advice information was a failure. Nevertheless, I’ve accepted that these events were almost three decades ago and that Mr B himself has been unable to recall much about what happened or details of his ceding pension scheme.

In this context, I’ve explained that it’s fair to make assumptions in arriving at a final decision. However, the assumptions I’ve made are reasonable ones, based on the limited information and documents we *do* still have. I’ve also used my experience and knowledge to help arrive at a fair decision although this can only be based on what is *more likely* to have happened.

In my view, there was no obvious incentive for the adviser to recommend that Mr B should transfer away from his DB scheme for what might be termed as spurious reasons. There was also the probability of Mr B being shown some easy-to-understand comparisons and illustrations of what his DB scheme might pay out early - versus what he could get from the recommendation to set up a personal type pension plan. Mr B was in financially challenging times. Quite understandably, he needed money straight away to support his family. I think the recommended option probably contained a slightly higher tax-free lump sum and a small enough annual annuity to not interfere with his state benefits. The recommendation also saved a small sum for the future, which I think was right for him.

Given these things, I think it’s much more likely that the advice was suitable for him. It took a very, very low risk approach. And it provided a joint annuity which would have paid around 88% of Mr B’s annual annuity to Mrs B, if Mr B died. As he’d suffered major health worries, I think Mr B valued these things.

So, ultimately I don’t think the advice was unsuitable. What Sesame advised Mr B to do would have had very similar characteristics to his DB scheme. But he needed some financial support ‘there and then’ which the recommended plan gave him. It also tried to maximise his small pension provision by investing a remaining small sum until he reached the age of 65.

Mr B has said he knows of friends and acquaintances with larger pensions. I don’t doubt that, but of course, his was always only ever a small pension because he hadn’t contributed to it for very long.

My final decision

I do not uphold this complaint.

I do not require Sesame Limited to do anything.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 1 September 2023.

Michael Campbell
Ombudsman