DRN-4453521

The complaint

Mr G's complaint is that Stevenson Financial Planning Centre gave him unsuitable advice in 2003 to transfer the value of his defined benefit (DB) pension scheme to a personal pension.

Stevenson Financial Planning Centre was an appointed representative of Sesame Limited (Sesame) and, as principal, Sesame is responsible for the advice that was given. For ease I've just referred to Sesame below.

What happened

Very briefly, Mr G was a deferred member of a former employer's DB pension scheme. In December 2003 Sesame advised him to transfer the value of his benefits in the DB pension scheme to a personal pension with Standard Life. A transfer value of about £136,000 was paid, comprising non protected and protected rights. A few years later, on advice from a different firm, Mr G switched his pension fund to two new providers.

Mr G, via his representative, complained to Sesame in June 2022 about the advice given in 2003 saying, amongst other things, that it had been unsuitable for him. Sesame issued a final response letter on 23 September 2022. Sesame said it had asked Mr G's representative for further information which hadn't been forthcoming. Sesame said it couldn't make a decision about the complaint or undertake a loss calculation without that information. So it was unable to uphold the complaint. Referral rights to this service were given. But Sesame said it didn't consent to us considering the complaint as Sesame believed the complaint may have been made outside the applicable time limits. The investigator looked into that and agreed we couldn't investigate because the complaint had been made too late. Mr G's representative didn't agree and asked for an ombudsman to consider jurisdiction.

One of my ombudsman colleagues did that and issued a provisional jurisdiction decision setting out why he considered the complaint hadn't been made too late. He confirmed his views in his jurisdiction decision issued on 23 August 2023.

The investigator then looked into the merits of the complaint. He issued his view on 8 September 2023. He set out a detailed background to the complaint and the reasons why he was recommending the complaint should be upheld. In summary he thought Sesame had failed to demonstrate that at the time transferring to the personal pension was clearly in Mr G's best interests and to achieve his objectives. The investigator considered Mr G's attitude to risk (ATR), his capacity for loss, his objectives and the reasons given for the transfer. He wasn't persuaded the reasons given were sufficiently compelling and such as outweighed the likely loss of retirement income from the DB pension scheme and on which Mr G would be relying to fund his retirement. The investigator said suitable advice would've been to retain the DB pension scheme benefits. The investigator set out what Sesame needed to do to redress Mr G.

Sesame didn't accept the investigator's view. I've summarised Sesame's main points:

- The investigator had said our approach was generally to put more weight on written evidence from the time of the events complained of than later comments when

memories may have faded. Sesame said the investigator's view had been written with less regard to what had actually happened 20 years ago as set out in the full and detailed point of sale documentation and leant more towards a hindsight type approach.
- In 2003 Mr G had clearly stated on the ATR questionnaire (completed in his own hand) that he was prepared to take a higher level of risk with a view to achieving a higher return and that he understood that higher risk meant higher volatility. He also confirmed he was prepared to risk significant capital loss in return for the potential of increased capital growth. Sesame therefore disputed the investigator's view that Mr G only had a medium-high ATR. And Mr G's recollection that his ATR was cautious.
- The critical yield didn't make the transfer unviable as it fell below the regulator's upper projection rate and within Mr G's risk appetite. As to Mr G's capacity for loss, he was only 35 at the time and he had time until retirement to build up further funds and was prepared to accept a degree of loss in order to achieve higher returns.
- Sesame didn't agree that the motives for the transfer were generic and not of particular importance to Mr G. The advice process in 2003 was comprehensive and detailed. From the paperwork completed at the time, it was clear that Mr G wished to break all ties with his former employer and to have control of his own pension funds. He'd done extensive research into other pension schemes which were under funded and had serious concerns that it might not be possible to restore the DB pension scheme to normal funding levels and so it might be unable to meet its future liabilities if the company didn't survive.
- Mr G's desire for control of his own pension funds hadn't been overstated. He'd set out in his own handwriting how he didn't want investment managers to have control of the funds. The other drivers – for example, death benefits, flexibility and the potential to retire early if affordable – were valid reasons and not generic.
- The suitability report set out the detailed discussions that had taken place prior to Mr G's decision to transfer out and which made clear the drawbacks – the critical yield, the guarantees that would cease to apply and that the benefits would be dependent on the future investment returns. All that information enabled Mr G to make a fully informed choice about whether or not to transfer.

The investigator shared Sesame's comments with Mr G's representative who said:

- Mr G had confirmed he wanted to protect his money with little or no risk. He'd been told the main reason to remove the money from the former employer's scheme was to protect it because at the time the scheme was underfunded and, as a deferred member, he could lose everything. He'd not long been made redundant and he was now being told he could lose his pension too. That was the driver for the transfer.
- Mr G had 17 years' service, no significant assets or anticipated sources of income in retirement, aside from any state pension. It was too soon for him to decide about his only retirement provision. The DB pension scheme would've provided a guaranteed income for life with no worry about investment performance. Mr G wanted to protect his money and the retirement income he'd built up over 17 years. He shouldn't have been put in the position where he'd have to build up further funds. As the investigator had noted, financial planning isn't simply about wish fulfilment and facilitating whatever course of action a client wishes to take.

The investigator considered the further comments before writing to Sesame again. Amongst other things the investigator said

- Sesame had said Mr G had a high ATR whereas Mr G had said he wanted a low risk approach. The investigator explained he hadn't accepted either of those ATRs. The

ATR profile had 5 risk levels with the lowest being no risk. The other levels, in increasing level of risk, were low, medium, medium to high and high. As the 4th, not the 5th highest ATR level, was marked, it's fair to say the customer was only a medium to high risk investor, not a high risk investor. The critical yield of 8.7% would only be risked by a high risk investor, not a medium to high risk investor as the regulator's assumed growth rates were 5%, 7% and 9%. So, the transfer wasn't viable for Mr G. And the critical yield of 8.7% applied if he took tax-free and would be 9% if he didn't – so it was even less viable. The investigator noted that the funds recommended for the non-protected rights part of the transfer value (about £56,000) were said to be in line with Mr G's ATR and which funds the investigator considered were medium-high, not high, risk.

- Mr G didn't have any other pension savings and only £3,000 in cash. He wasn't a member of another employer's scheme. He was self-employed and the DB pension scheme was his only pension provision. He may have had time to save more into a pension but he wasn't currently doing so and Sesame didn't advise him to do that.
- The investigator didn't think there was evidence that Mr G wanted to cut all ties with his former employer. Or that he'd done, as had been suggested, extensive research into other underfunded schemes. The investigator noted what Mr G had said about what had been his main reason for transferring – the fear that he could lose his pension, having only just lost his job. There was nothing to indicate that information about the DB pension scheme's funding position, its future funding plans or the financial health of the employer had been obtained in order to give Mr G suitable advice.
- What had been said about Mr G wanting to control his own pension funds wasn't consistent with the investment funds recommended which would be under the control of different investment managers.
- The investigator maintained that the other drivers were generic and, although the drawbacks of transferring were mentioned, a transfer shouldn't have been recommended.

Sesame didn't accept what the investigator had said and asked for an ombudsman's 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.

But, before looking at the merits of the complaint, I've considered jurisdiction. We're required to keep jurisdiction under review throughout our consideration of a complaint up to and until we issue a final decision. So I've reviewed jurisdiction and in particular if Mr G's complaint has been made in time. Having done so, I don't see any reason to disagree with what my colleague said or his views as to why Mr G's complaint hasn't been made too late.

In deciding this complaint I've taken into account the law, any relevant regulatory rules, guidance and what I consider to have been good industry practice at the time. I've also carefully considered the submissions made by Mr G's representative on Mr G's behalf and Sesame. Where the evidence is unclear, incomplete or contradictory, I've made my decision based on the balance of probabilities, that is what I consider more likely to have happened, based on all the evidence I've seen and the wider surrounding circumstances.

I agree that the contemporaneous written evidence is important in considering a complaint. Sesame points to the documentation and in particular to the fact that some of it was completed by Mr G himself and so should be taken as providing a clear record as to, amongst other things, his ATR and his objectives and priorities at the time. I agree that the contemporaneous documents usually carry weight.

Here, although Mr G now says he was cautious, the ATR questionnaire would suggest otherwise and indicated a medium-high ATR. I agree with the investigator's comments that, as the highest risk profile box wasn't ticked, it wouldn't be right to say that Mr G's ATR was high. But a medium-high ATR is difficult to reconcile with the low risk approach which Mr G now says he wanted to adopt.

But, in any event, even if Mr G was prepared to take a medium-high risk approach, it wasn't obvious that the transfer would likely result in higher benefits, which is generally the aim of transferring – there'd usually be little point in giving up the guarantees available from a DB pension scheme only to achieve, at best, the same level of benefits outside the scheme. So there'd need to be a realistic prospect of the personal pension achieving higher benefits if invested in line with Mr G's ATR.

Sesame was required to carry out a transfer value analysis to calculate the 'critical yield' applicable to the proposed transfer. The critical yield is the annual rate of investment return required on the invested transfer value, after charges, to match the capitalised value of the benefits offered by the DB pension scheme on the assumption that the value of the alternative pension is used to secure a lifetime annuity at the scheme normal retirement age (or other selected age). The higher the critical yield, the less likely that the alternative pension will achieve sufficient investment growth to match the revalued pension payable by the DB pension scheme.

Sesame recognised that the critical yield was slightly higher than what might be considered reasonable at the time. Given the factors the investigator pointed to, it's doubtful that the required rate of return could've reasonably been considered achievable. So the transfer probably wasn't financially viable. But financial viability isn't the only factor. A reasonable prospect of the critical yield being met or exceeded wouldn't necessarily mean that the transfer was suitable, and, conversely, there might be other considerations which might mean a pension transfer is suitable, despite the likelihood of providing overall lower benefits.

So I've gone on to consider the other reasons why the transfer was recommended: better death benefits; better tax free cash benefits at normal retirement age; satisfying Mr G's desire to break all ties with his former employer and transfer the funds to an individual personal pension which would be under Mr G's control and arranged to suit his circumstances and needs at the time; and being able to switch the non-protected rights part of the personal pension to a SIPP (self-invested personal pension) to buy commercial property.

The lump sum death benefits available from the personal pension were no doubt attractive to Mr G. But the primary purpose of a pension is to provide an income in retirement, not act as a legacy planning tool. I don't think it was in Mr G's best interests to prioritise potentially better death benefits over his financial security in retirement. And any lump sum which might be available on Mr G's death would depend on how much, if any, of the fund remained after withdrawals, charges and investment returns. I'm not persuaded transferring was justified because of the perceived superior death benefits the personal pension potentially offered. I'd also expect to see life assurance options fully explored, rather than dismissed in favour of the death benefits potentially available from the personal pension.

As to the need for more tax free cash or flexibility generally, Mr G was aged 35 at the time of the advice. The further away from retirement an individual is, the harder it is to justify transferring on the basis of what their wants, capital and income needs at retirement might be. In Mr G's case, I think it would've been very difficult to predict with any degree of certainty what his expected expenditure during retirement would be – and therefore what realistic level of income and/or tax free cash he'd need. The same is true for any early retirement considerations. Mr G was relatively young and unsurprisingly didn't have any firm retirement plans in place. And, even if he did, those might change, given the timeframe.

I think the control objective was linked to Mr G's concerns about the financial stability of the DB pension scheme and/or the sponsoring employer. It seems his understanding was that his benefits were at risk because the DB pension scheme was underfunded – although I understand the deficit was small. Proposals to introduce statutory protections (which I think would've been fairly well known by late 2003, given that the Pensions Act 2004, which introduced the Pension Protection Fund, received Royal Assent in November 2004) are mentioned but appear to have been discounted. And, although the suitability letter recorded Mr G's concerns, I don't see that Sesame can point to those as justifying the transfer if Sesame didn't investigate how valid Mr G's worries might've been. I've mentioned below that I find Mr G's evidence on that issue – that he was 'panicked' into transferring – credible.

The suitability letter says Mr G intended to purchase a commercial property. But he hadn't found one and the practicalities involved, including how much a property might cost and if it was going to be for Mr G's business or let to a third party, aren't recorded as having been discussed. Mr G may have had an idea that's what he'd look to do, especially as it seems he didn't think fund managers would deliver value and improved returns. But he didn't have a fully formed plan and which, in order to implement, he needed to transfer.

Further, I think it's important to consider Mr G's circumstances at the time. Including whether, even if he'd indicated he was prepared to accept a relatively high level of risk in return for the possibility of higher returns, his situation was such that sort of approach should've been taken and if he had the capacity for loss that might result.

Mr G's position at the time was uncertain. He'd been made redundant and he wasn't in pensionable employment. He was self-employed. Although in theory he had another 25 years until he reached age 60 which was when he'd indicated he wanted to retire, his ability to make further pension provision would depend on what happened in the future, including how well his business did and the level of pension contributions, if any, he could afford to make and whether he became employed again and had access to another employer's pension scheme.

Mr G had 17 years' service in the DB pension scheme. Those benefits represented his only pension provision (aside from any state entitlement). The fact find records that Mr G viewed those benefits as a major proportion of his pension funding. The benefits he'd built up would've formed an important and secure baseline retirement income. I think it's difficult to justify giving up that sort of guaranteed income (which would escalate in payment) when, although there was, in theory at least, still time for Mr G to make further pension provision, whether he'd be in a position to do so was uncertain. And, if he remained self-employed, all his retirement provision would be on a defined contribution basis, which offered no guarantees, was subject to charges and entirely dependent on investment performance. I don't think Mr G should've been in a hurry to make an irrevocable decision to give up his DB pension scheme benefits when his situation was uncertain.

I'd also point out that Sesame's reliance on the contemporaneous written documents seems to be from the basis that they demonstrate Mr G was put in a position to make a fully informed decision. I agree that, ultimately, it was up to Mr G to decide what he wanted to do. But the adviser had to give suitable advice. Simply providing information, including pointing out the drawbacks or risks of adopting a certain course and leaving the client to make their own decision, won't usually be sufficient. Similarly, it wasn't for Sesame to facilitate what Mr

G thought he might want to do. I think the transfer represented more risk than Mr G, given his circumstances, should've been advised to take.

As I've said, Mr G's recollections aren't entirely irrelevant. By taking into account what he says he was told at the time, I'm not making a decision based on hindsight. Rather I'm considering, as I'm required to do, all the available evidence and the wider circumstances. If there's a conflict between what Mr G now says and what the documentation records, that might mean I'd be less inclined to accept what Mr G now recalls. But I find what Mr G has said about his main motivation for transferring – that he thought he was protecting his accrued DB pension scheme benefits – to be plausible and persuasive. It seems his understanding was that those benefits were seriously at risk. As I've said, I don't think that was explored. It was up to Sesame to advise Mr G rather than take, at face value, what he may have understood the position to be and that his DB pension scheme benefits were at risk.

I've also thought about whether, if Mr G had been advised against transferring, he'd have gone ahead anyway. That's Sesame's position. Sesame has pointed to Mr G's email dated 16 November 2003 as showing he'd spoken to the trustees of the DB pension scheme and was clearly concerned about the scheme not surviving until he could access his benefits some years down the line. And the email confirmed that Mr G wanted to buy a commercial property with his pension plan.

I've already explained what I think about Mr G's concerns about the longer term security of the DB pension scheme and that it was up to Sesame to address that, rather than simply accept what Mr G had said and point to it as a justification for the recommendation to transfer or as showing Mr G would've transferred anyway. The email reflects Mr G's plans for the transferred fund and his reluctance to have the money under the control of fund managers. If Mr G did transfer, he'd need to decide what to do with his pension fund. It appears that buying a commercial property was something he was contemplating because he didn't want his money to be subject to fund managers' control. So it was a consequence of the transfer, rather than a reason for the transfer. It doesn't mean, if Sesame had advised Mr G against transferring, that he'd have insisted on going ahead.

I don't think a transfer should've been recommended, whether on the basis of Mr G's concerns about the DB pension scheme, his interest in buying a commercial property or for any of the other reasons cited. If there'd been no transfer, questions about how Mr G wanted to invest his fund wouldn't have arisen. If he'd later wanted to pursue the idea of a commercial property purchase and found a property that might've met his requirements, transferring out of the DB pension scheme to facilitate that could've been considered then. And taking into account exactly what needed to be done to manage the property – I note here what Mr G says about not having the knowledge and experience to undertake that – and how the particular property would meet Mr G's needs and objectives, including in terms of his pension provision.

From what I've seen, Mr G was reliant on professional advice. I don't think he had any real investment experience or knowledge and I'm not persuaded that he'd have refused to accept a recommendation to retain his DB pension scheme benefits. If he'd wanted to go ahead anyway, I'm not sure if Sesame would've been prepared to undertake the transfer on an insistent client basis. If not, Mr G would've needed to have found an adviser who would've done and which might've been difficult – it's not unreasonable to assume that any new adviser would've given suitable advice which, as I've said, would've been that Mr G didn't transfer. And they may not have been prepared to facilitate a transfer having advised against. So Mr G would've been no further forward.

For the reasons explained above, I'm not persuaded that a pension transfer was suitable and in Mr G's best interests. As a result, I think it's fair and reasonable to uphold this complaint.

As to what Sesame needs to do I've adopted the redress set out by the investigator in his view. I note the investigator emailed the parties the day after he'd issued his view adding to the redress he'd set out.

The below redress includes provision to reflect the fact that Mr G obtained compensation of £50,000 from the Financial Services Compensation Scheme (FSCS). As I've said above, after Mr G had transferred on Sesame's advice, he later went on to switch his pension fund again following advice from a different firm. The pension fund was transferred in three separate transfer values to two different pension providers over a period of time. Two payments were made to one provider in June 2005 (about £34,000) and May 2006 (about £63,000). And another transfer value was paid in June 2006 (about £72,000) to another provider. In June 2006 Mr G invested £98,000 of the money that had been transferred to the first provider in the Curo Sterling (Valegate) Exempt Property Unit Trust. That investment failed. FSCS met Mr G's claim in respect of that fund.

Putting things right

A fair and reasonable outcome would be for Sesame Limited to put Mr G, as far as possible, into the position he'd now be in but for the unsuitable advice. I consider Mr G would've likely remained in the DB Scheme.

Sesame Limited 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 G has not yet retired and has no plans to do so at present. So, compensation should be based on the DB scheme's normal retirement age of 63 years, 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 G's acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in PS22/13 and set out in DISP App 4, Sesame Limited should:

- calculate and offer Mr G redress as a cash lump sum payment after deducting the total compensation already paid to him by the FSCS for previous pension claims. If this deduction reduces the loss or total redress to be paid to below zero, then no compensation needs to be paid.
- explain to Mr G 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 G receives could be used to augment the pension rather than receiving it all as a cash lump sum;
- if Mr G accepts Sesame Limited's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr G 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 G's end of year tax position.
- Redress paid directly to Mr G 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 Limited may make a notional deduction to allow for income tax that would otherwise have been paid. His likely income tax rate in retirement is presumed to be 20%. However, if he would 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%.

Because I'm making a formulaic award, I don't know how much any compensation will be. Where I uphold a complaint, I can award fair compensation of up to £170,000 (for a complaint as here which was referred on or after 1 April 2022 and where the act or omission was before 1 April 2019) 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 £170,000 I may recommend that the business pays the balance.

Determination and money award: I require Sesame Limited to pay Mr G the compensation amount as set out in the steps above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Sesame Limited pays Mr G the balance.

If Mr G accepts my decision, the money award is binding on Sesame Limited. My recommendation isn't binding on Sesame Limited. Further, it's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 1 January 2024.

Lesley Stead
Ombudsman