

## The complaint

Mr S complains, through his representative, that he was given unsuitable advice to transfer his deferred defined benefit (DB) scheme benefits to a personal pension in 1992.

The advice to transfer was given by a business for which Sesame Limited (Sesame) is now responsible, so I will refer only to Sesame in my decision.

Although Mr S is represented in this complaint, for ease of reading, I will generally refer to all of complainant's representations as being made by Mr S.

## What happened

At the outset it is important to explain that the advice was given in 1992 and Sesame, who are now responsible for that advice, have provided very little documentation and haven't been able to provide any documentation in relation to the advice Mr S was given. So I've based my decision on the information I have been provided by Mr S and the ceding scheme. In March 1992 Mr S received advice to transfer his deferred DB scheme benefits to a personal pension plan (PPP). Mr S accepted this advice and in July 1992 around £8,500 was transferred to the PPP.

Since there is no point-of-sale documents available, Mr S's circumstances at the time of the advice were ascertained by our investigator as follows:

- He was 40 years of age, in good health, married with a young son.
- He was employed earning around £20,000 per year. His employer offered a DB pension scheme, but Mr S was not a member.
- He had a deferred pension with his previous employer. In July 1989 the pension would've provided an annual income of £1,088.14. It was to increase by 5% compound interest per year up until his 65<sup>th</sup> birthday. He also had the opportunity to transfer the entitlement to another employer's pension scheme.
- He had a repayment mortgage of around £40,000. Mr S recalls having at most £3,000 cash-based savings. He had no other investments or pension provision.

In October 2022, with the help of his representative, Mr S complained to Sesame about the advice he received in 1992.

Sesame looked into Mr S's complaint but concluded it had been made too late. Sesame said Mr S has been invited to have the advice reviewed as part of the industry-wide pension review exercise in June 1997 but hadn't responded. As such, he was now too late to make the complaint.

Unhappy with this response, Mr S brought this complaint to this Service where one of our investigator's looked into things. Mr S said he did not receive the pension review letters and the investigator was ultimately persuaded by the evidence Mr S provided that he was not residing at the address the pension review letters were sent to at the time. Therefore, it was unlikely that Mr S had received them and so wouldn't have been put on notice that something might have gone wrong. The investigator said that she had not been provided

with anything to suggest Mr S' awareness of the complaint could have happened any sooner than when he spoke with his representative and so his complaint was made in time.

She then went on to consider the merits of Mr S' complaint and determined that it should be upheld because the advice in 1992 wasn't suitable. The investigator said to put things right Sesame should 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.

Sesame didn't agree and maintained that the complaint had been brought too late, so it asked for an ombudsman's decision. It felt that as Mr S reached the age of 65 in 2017 – his normal retirement date under his previous DB scheme – he would have known what he was entitled to receive from this scheme at this age and if he was in receipt of less than this in 2017 when he took benefits from his PPP, this ought to have made him aware that something might have gone wrong. Accordingly the complaint was not made in time.

The investigator considered this but wasn't persuaded that it was reasonable for Mr S to have remembered the value of the benefits the DB scheme he transferred from some 27 years prior.

As agreement couldn't be reached, the complaint has been passed to me for a final decision.

### **Why I can look at this complaint**

As an initial matter, I've considered whether this is a complaint this service has the power to investigate. And having done so, I agree with the investigator that the complaint hasn't been made too late and is within our jurisdiction.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, which form part of the Financial Conduct Authority's (FCA) Handbook. In particular DISP 2.8.2R says:

*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*(2) more than:*

*(a) six years after the event complained of; or (if later)*

*(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

*unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received.*

*unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.*

We can only look at cases that fall outside of this time period if the business consents to us doing so or if the delay was due to exceptional circumstances.

Where the business doesn't consent, as is the case here, I must consider whether the complaint has been made in time.

In this case, the advice took place in 1992. As the complaint was raised in October 2022, more than 30 years later, we wouldn't be able to consider this complaint in accordance with DISP rule 2.8.2(2)(a).

So I've gone on to consider the three-year part of the rule. Applying DISP rule 2.8.2(2)(b) would mean we can look at this complaint if it was made within three years of when Mr S was aware, or ought reasonably to have become aware, he had cause for complaint.

Mr S' representatives have said that he wasn't aware of a cause to complain until he spoke with them in 2022 and our investigator agreed. I've considered all of the evidence and arguments provided and I also agree that Mr S' wasn't aware he had cause for complaint until 2022 and I'm not persuaded he ought reasonably to have known any sooner, so the complaint has been brought in time. I'll explain why below.

By way of background, in October 1994, the then regulator, the Securities and Investment Board, established an industry-wide review of particular pension business transacted by authorised firms between 29 April 1988 and 30 June 1994. It was generally known as the "Pension Review". It aimed to address concerns about the possible widespread mis-selling of personal pension plans (PPPs) between 1988 and 1994.

The regulator set down the broad methodology that firms who had sold these PPPs were required to follow when carrying out the review. Where mis-selling was identified, the regulator set down the method and assumptions that firms had to use to determine the level of any redress due. Firms were expected to retain records of this review indefinitely.

The advice given to Mr S and the application to transfer was made and completed in 1992. So this advice and subsequent transfer falls within the review period. If this had been reviewed, or there was evidence that Mr S was invited to have this advice reviewed, it is possible that he would have been made aware he had cause for complaint.

But in this case, Sesame is unable to evidence that the pension-review letters were sent to Mr S at his existing address. So, like the investigator, I'm unable to conclude that Mr S received them and chose not to respond. Therefore, I've seen nothing from this time that would have reasonably triggered any awareness that something might have gone wrong when he was advised in 1992.

I've also not been persuaded that Mr S ought reasonably to have become aware he had cause to complain when he took benefits from his PPP in 2017. This is because, I don't think it reasonable to expect him to have made a comparison to benefits his transferred nearly 30 year earlier. Furthermore, even if he had kept to hand records of what he was to receive from his deferred DB scheme pension, Mr S would've had to calculate what an annual income of £1,088.14 in July 1989 increased by 5% compound interest per year up until his 65<sup>th</sup> birthday would equal before he could make such a comparison. I don't consider this a reasonable expectation in this case.

As I've seen no further evidence to indicate Mr S ought reasonably to have known he had cause for complaint more than three years before he complained, I'm satisfied the complaint has been made in time and is one that we can look into.

The remainder of this decision considers the merits of Mr S's complaint about Sesame.

### **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 advice was provided in March 1992 by a business that was a member of the Financial Intermediaries, Managers and Brokers Regulatory Association ('FIMBRA'). Although the advice wasn't provided by Sesame, it has since acquired this business and is responsible for this advice.

The FIMBRA rulebook set out the expectations on members when giving advice. The key rules applying from April 1988 were as follows:

- 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.

In July 1988 an amendment to the guidelines on best advice required members to ensure their recommendations were made on the basis of the client's best interest rather than the income generated for the member.

I've considered the advice given to Mr S with this in mind.

Sesame confirmed to our investigator that it held no point-of-sale documents concerning the advice. So the investigator relied on information obtained from Mr S and the ceding scheme to ascertain his circumstances and objectives at the time as set out above. Neither party disputed the accuracy of what the investigator set out here, so I have also considered the advice bearing in mind Mr S' circumstances at the time as determined by the investigator.

And like the investigator, I'm unable to conclude the advice to transfer the deferred DB scheme benefits to a PPP was suitable.

This is because at the time, Mr S was only 40 years old, married, with a young son. The deferred DB pension was his only pension provision and would have provided him a guaranteed income of around £4,000 per annum from age 65. It is also possible a spouse's pension would be provided upon his death.

From the evidence provided, Mr S had no other pension provisions, no significant savings or investments and a young family to provide for. So I'm unable to conclude that he had much capacity for loss. And, when Mr S started the PPP he was invested 100% in a with-profits fund, which suggest a low/cautious attitude to risk.

At this time, Mr S could have also joined his new employer's pension scheme. As no evidence has been provided from the time of advice, I can't be sure if this was considered, and if so, it's unclear why he wasn't advised to join this scheme, especially as it doesn't appear that he was making contributions to his PPP.

Although I don't know what Mr S' objectives might have been at the time of advice, I'm unable to conclude based on what I have seen, that there was an objective that could reasonably justify the advice to forgo guaranteed benefits here. Therefore, I'm not persuaded that in the circumstances of this complaint the advice was suitable. I consider had suitable advice been provided at the time Mr S would have remained in the deferred DB pension scheme.

## Putting things right

A fair and reasonable outcome would be for Sesame to put Mr S as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have likely remained in the deferred defined benefit occupational pension 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 S retired at age 63 and took retirement benefits at age 65. So, compensation should be based on Mr S taking these benefits at this age 65.

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 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 S redress as a cash lump sum payment,
- explain to Mr S 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 a current defined contribution pension
- offer to calculate how much of any redress Mr S receives could be used to augment the pension rather than receiving it all as a cash lump sum,
- if Mr S accepts Sesame's offer to calculate how much of the redress could be augmented, request the necessary information and not charge Mr S 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 S' end of year tax position.

Redress paid directly to Mr S 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 S' likely income tax rate in retirement is presumed to be 20%. However, if Mr S 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%.

## My final decision

Determination and money award: I uphold this complaint and I now direct Sesame Limited to pay Mr S the compensation amount as set out in the steps above, up to a maximum of £170,000.

Where the compensation amount does not exceed £170,000, I would additionally require Sesame Limited to pay Mr S any interest on that amount in full, as set out above. Where the compensation amount already exceeds £170,000, I would only require Sesame Limited to pay Mr S any interest as set out above on the sum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I also recommend that Sesame Limited pays Mr S the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S accepts my final decision, the money award becomes binding on Sesame Limited. My recommendation would not be binding. Further, it's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to consider getting independent legal advice before deciding whether to accept any final decision.

The loss assessment calculation should be provided to Mr S' representative in an easy to understand format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 26 March 2024.

Jennifer Wood  
**Ombudsman**