

Ombudsman's Determination

Applicant	Mr R
Scheme	Bonheur Academy Pension Scheme (the Scheme)
Respondent	Morgan Lloyd Administration Ltd (Morgan Lloyd)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by Morgan Lloyd.

Complaint summary

2. Mr R has complained that Morgan Lloyd has not allowed the Scheme to be wound up and, instead, it has continued to charge fees to it.
3. The Scheme is a small, self-administered scheme, and will be referred to hereon as the SSAS.

Background information, including submissions from the parties

4. On 1 August 2012, the SSAS was set up and approximately £190,000 was transferred into it.
5. Mr R was the beneficiary and member trustee of the SSAS, as well as a director of the principal employer which sponsored the SSAS (**the Company**).
6. On 14 September 2012, the Company borrowed £82,500 from the SSAS (**the Loan**). The Company provided intellectual property, stock, and copyright on its course materials as security for the loan.
7. In December 2012, Morgan Lloyd became aware that Her Majesty's Revenue and Customs (**HMRC**) had initiated an investigation into the methodology used to value intellectual property as security for pension scheme loans.
8. In March 2013, HMRC raised a Protective Assessment against a number of schemes which Morgan Lloyd was administering, including the SSAS. In particular, HMRC raised a Protective Assessment against the SSAS for a potential tax charge of £33,000.

9. By March 2016, Morgan Lloyd became concerned that HMRC's investigation was not progressing, and that its customers could not access their pension benefits as these continued to be ring-fenced under the Protective Assessment. So, Morgan Lloyd initiated tribunal proceedings against HMRC.
10. On 13 December 2016, the Company was dissolved and the Loan was written off by the SSAS.
11. On 8 September 2017, Mr R contacted Morgan Lloyd because he wanted to wind up the SSAS and withdraw all the funds.
12. On 11 September 2017, Morgan Lloyd confirmed that the SSAS was valued at £50,491.85 and it sent Mr R forms so he could apply for a withdrawal of benefits. However, it told him that there was a Protective Assessment against the SSAS and £33,000 would need to be retained. On the same day, Mr R returned the forms to drawdown benefits.
13. On 13 September 2017, Morgan Lloyd confirmed the exact figure it could pay Mr R, which was £16,216.85.
14. On 4 January 2018, Mr R emailed Morgan Lloyd to say that he may be losing his job and so he was in financial difficulty. He also mentioned concerns with his health, and asked Morgan Lloyd to consider what could be done to allow him to access the remaining SSAS funds.
15. On 15 January 2018, Morgan Lloyd responded to Mr R and confirmed that he could drawdown £18,490.90 from the SSAS. Morgan Lloyd has said this was because, although the Protective Assessment was for £33,000, it believed HMRC had significantly over-estimated the tax that could become due in the event its investigation found an error had occurred.
16. Morgan Lloyd calculated that the actual tax charge was likely to be around £15,000. In acknowledgement of the difficult circumstances Mr R found himself in, Morgan Lloyd allowed him to take the difference from the SSAS, which was £18,490.90. Morgan Lloyd has confirmed that, if a tax charge is applied, it will pay any amount falling due which is in excess of the funds remaining in the SSAS.
17. On 11 April 2018, Morgan Lloyd contacted Mr R to provide him with an update on HMRC's investigation and the ongoing tribunal proceedings. In particular, it told Mr R that it had informed HMRC of his circumstances, and it had asked HMRC to expedite matters on this basis.
18. Throughout 2018, Morgan Lloyd continued to update Mr R on how HMRC's investigation and the associated tribunal proceedings were progressing.
19. On 11 December 2018, Morgan Lloyd wrote to all schemes affected by the HMRC tribunal proceedings to confirm that it was incurring legal fees as part of the tribunal proceedings, and these would need to be recovered from the schemes. This included the SSAS and so the correspondence was also sent to Mr R.

20. Mr R raised a complaint. He said that:-

- Morgan Lloyd ought to have allowed him to wind up the SSAS and drawdown the remaining funds.
- He was unhappy with the length of time the proceedings were taking, and the fees that had been applied to the SSAS in the meanwhile.
- As the Loan has been written off, he argued there cannot be a tax charge associated with it. So, there should not be a Protective Assessment and the SSAS can be wound up.

21. In responding to the complaint, Morgan Lloyd said:-

- A Protective Assessment was in place against the SSAS, and it cannot close the SSAS whilst this remains the case.
- It is not responsible for the Protective Assessment being raised.
- It is not responsible for the time taken for HMRC's investigation to conclude. It has taken steps to expedite matters by initiating tribunal proceedings in 2016 and continuing to request that HMRC expedite matters.
- It is confident that it will ultimately satisfy HMRC's investigation, as it has always ensured a qualified third party is appointed to carry out the valuations in question.
- Mr R would have been involved in selecting the valuer, in his capacity as a member trustee and a director of the Principal Employer. That said, Mr R would have had to choose from Morgan Lloyd's panel of valuers.
- While the SSAS is active, fees remain chargeable.
- It is entitled to be reimbursed for any fees incurred in relation to HMRC's investigation and tribunal proceedings under clause 10.1 of the SSAS rules, which states: "All costs, charges and expenses of and incidental to the administration and management of [the SSAS] shall be borne by [the SSAS]".
- It ceased to apply its annual fees to the SSAS in January 2018, when Mr R informed it that he was in financial difficulty.
- It will spread the cost of legal fees evenly across all affected schemes, including the SSAS. It is not seeking to recover these from HMRC, as its legal advisors have said claims against public bodies for the recovery of legal fees are inappropriate. However, Mr R may seek personal advice regarding this.

Adjudicator's Opinion

22. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by Morgan Lloyd. The Adjudicator's findings are summarised below:-

- Morgan Lloyd had acted correctly, when refusing to close down the SSAS. There is a Protective Assessment against the SSAS and the monies remaining in it may be due to HMRC.
- Morgan Lloyd had acted reasonably by allowing Mr R to draw down as much as possible, in light of his financial difficulties, and offering to cover any excess which later becomes due to HMRC.
- The Adjudicator could not comment on matters which would be determined by the court as part of the ongoing tribunal proceedings. As such, at this time, the Adjudicator could not comment on whether Morgan Lloyd did anything wrong when the SSAS granted a loan to the Company.
- The SSAS rules allow for Morgan Lloyd to recover any fees it incurs in relation to administering the SSAS.
- Notwithstanding the above, Morgan Lloyd had acted more than reasonably in waiving its annual fee, once it found out Mr R was in financial difficulty.
- If HMRC's investigation finds that Morgan Lloyd did nothing wrong, then Mr R is free to seek advice about recovering legal fees and other costs from HMRC.
- While the Loan may have been written off by the SSAS, this did not negate the Protective Assessment. This is because the Protective Assessment relates to tax that may be owing from when the Loan was granted, due to the methodology used to value the security offered for the Loan. So, the current status of the Loan is irrelevant.

23. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R provided his further comments, stating:-

- Morgan Lloyd has provided my Office with information which it has never provided to him. In particular, Morgan Lloyd did not make it clear to Mr R previously why he could withdraw funds from the SSAS such that only £15,000 remained, if the Protective Assessment was for £33,000.
- Morgan Lloyd delayed in sending Mr R the Notice of Assessment. If it had provided it to Mr R sooner, he could have initiated a conversation with HMRC directly and resolved the matter.
- Morgan Lloyd did not allow him to transfer the SSAS benefits away when he made his request.

- In addition to charging fees once Mr R had requested that the SSAS be closed, Mr R now also believes Morgan Lloyd has not charged the correct level of fees historically.

24. Mr R's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will only comment on the additional points raised by Mr R.

Ombudsman's decision

25. It is unfortunate if Morgan Lloyd has not been as forthcoming with Mr R as it has been with my Office. However, whilst I appreciate this may have caused Mr R a level of unnecessary frustration, it does not change the overall outcome.
26. In addition, Morgan Lloyd has done more than it needed to, by allowing Mr R to withdraw further funds from the SSAS and effectively indemnifying him against any ramifications of this decision. It has also ceased charging its annual fee which it is entitled to under the SSAS rules. So, whilst there are times it could perhaps, have better communicated with Mr R, I find that it has acted more than reasonably in the circumstances.
27. There is a Protective Assessment against the SSAS, and the funds remaining within it may be owed to HMRC, so, it is appropriate for Morgan Lloyd to hold these funds, and the SSAS remain open until the Protective Assessment is lifted.
28. I note that the Company is now dissolved, so it cannot indemnify Morgan Lloyd if it allows Mr R to withdraw funds from the SSAS which are later found to be owing to HMRC. Given what Mr R has said about his financial circumstances, I would not expect Morgan Lloyd to suggest that Mr R indemnify it personally either.
29. Mr R claims that Morgan Lloyd has prevented him from approaching HMRC directly to resolve the matter. Given that HMRC's investigation relates to a number of schemes and is the subject of ongoing tribunal proceedings, I am not persuaded that Mr R would be successful in speaking with HMRC on an individual basis.
30. In any event, I find that Morgan Lloyd has taken reasonable steps to ensure this matter is being progressed on behalf of Mr R, and I do not find that it has prevented Mr R from resolving it directly. Regardless of when Mr R received a copy of the Notice of Assessment, he has been made aware and updated regarding the situation by Morgan Lloyd. If he wished to approach HMRC directly, I do not see why he could not have done so at any time.
31. In relation to Mr R's complaint regarding a transfer and incorrect fees being deducted, these are new issues which he has not raised before. If he would like these matters investigated, he should approach Morgan Lloyd directly in the first instance. In short, I cannot determine matters upon which a respondent has not had the opportunity to investigate or respond to first.

CAS-13455-R2V8

32. I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman

17 May 2021