

## Ombudsman's Determination

Applicant	The Estate of Mrs E ( <b>the Estate</b> )
Scheme	DIS Recruitment Individual Executive Pension Plan ( <b>the Plan</b> )
Respondent	The Trustee of DIS Recruitment Individual Executive Pension Plan ( <b>the Trustee</b> )

### Complaint summary

The Estate has complained that the Plan benefits have been withheld by the Trustee since Mrs E applied for them in 2011.

### Summary of the Ombudsman's decision and reasons

The complaint should be upheld against the Trustee, as there was no legal basis upon which the Plan benefits ought to have been withheld.

### Detailed Determination

#### Material facts

1. Mrs E was a company director for DIS Recruitment Limited (**DIS Recruitment**), the sponsoring employer of the Plan. Initially, there were two others directors, Mr R and Mr T. Mr T bought Mr R's shares, leaving him the majority shareholder. Mr T is also the Trustee.
2. Mrs E paid contributions into the Plan, and applied for her Plan pension benefits when she retired in August 2011. However, the Trustee refused to pay any benefits and nothing has been paid to date.
3. The Plan was an Executive Pension Plan administered by Royal London. On 17 August 2017, the Trustee requested that Royal London cancel the Plan and transfer all benefits under it to DIS Recruitment. Royal London has informed our Office that the total value of the Plan, amounting to £36,869.41, has been transferred to DIS Recruitment and it considers the Plan wound up.

### **Summary of The Estate's position**

4. Mrs E sadly passed away in April 2017, but the Estate has continued to pursue the matter. In particular, it has disputed the claims alleged by the Trustee and stated that his refusal to pay benefits from the Plan is based on personal differences alone.
5. In any event, the Estate has highlighted that the Trustee has no legal basis upon which to refuse payment of benefits from the Plan.

### **Summary of the Trustee's position**

6. The Trustee has stated that Mrs E withdrew unauthorised funds from DIS Recruitment shortly before she retired, and as such he will not now release any funds from the Plan. The Trustee wishes to use the Plan benefits to offset against the debt arising from the unauthorised withdrawal.
7. The Trustee has said that he has not taken any action in the courts concerning the unauthorised withdrawals. However, the Trustee believes he has the authority to withhold benefits under the Plan by the rules which govern it. In particular, he has highlighted section 18 of a supplement to the Plan rules (**Section 18**) in support of his argument. Section 18 is titled "Recovery of Overpayment" and states:

"Subject to section 91 of the Pensions Act 1995 (as amended), the Trustees may exercise a charge or lien on, or set-off against the benefit or rights for a Member or Dependant under the [Plan] for the purposes of discharging some monetary obligation due from the Member or Dependant arising out of a payment made in error in respect of the Member's or Dependant's benefits or rights under the [Plan]".

### **Conclusions**

8. It is unclear why the Trustee has not previously pursued repayment of the funds, which he believes were withdrawn incorrectly from DIS Recruitment, through a formal process. It may be that he believed he could simply withhold Mrs E's pension benefits under the Plan and use them to offset any debt he believed she owed to DIS Recruitment. However, he has not provided evidence that he has a legitimate power to do this.
9. My Office is not the proper forum to decide whether monies have been wrongly taken from DIS Recruitment. If necessary that issue should be pursued elsewhere. The question to be answered is whether there is a legal basis upon which the Trustee can offset any alleged unauthorised withdrawals from DIS Recruitment using benefits due from the Plan.
10. The Plan rules do not allow the Trustee to withhold pension benefits in such circumstances without a court order or an arbitration award. The Trustee has not provided any evidence that he ever obtained an order or an arbitration award allowing him to withhold benefits.

11. For completeness, Section 18, as highlighted by the Trustee, is not relevant as it is only applicable where an overpayment has occurred. No benefits have been paid from the Plan, so clearly a rule regarding overpayments is inapplicable.
12. If the Trustee wished to withhold Mrs E's pension benefits under the Plan in lieu of repayment of the withdrawals the Trustee alleges she has made, then he ought to have ensured he had or obtained the appropriate authority for this. As he has not done so, he has no right to withhold the payment of pension benefits and I uphold the Estate's complaint. The Trustee should therefore pay the benefits forthwith.
13. The Trustee has now cancelled the Plan, and so it no longer exists. As such, a pension cannot be paid from it. Instead, I find that the Trustee is personally liable for the full value of the monies due to the late Mrs E from the Plan and he must ensure that the monies are paid to the Estate.

## **Directions**

14. Within 28 days of the date of this Determination, the Trustee shall:
  - pay £36,869.41 as a lump sum to the Estate without any deductions, either directly or through DIS Recruitment; and
  - pay interest on the value of Mrs E's pension benefits, calculated from the date Mrs E applied for them to be paid in 2011, at the rate of interest set from time to time by the Reference Banks.
15. As the above payment will be made within two years of Mrs E's death, there should not be a tax liability. If the Trustee delays in paying the settlement as instructed above, such that the payment is made after more than two years following Mrs E's death, the Trustee must reimburse the Estate any tax charge it incurs as a result.

**Anthony Arter**

Pensions Ombudsman  
13 February 2018