

Ombudsman's Determination

Applicant	Mr S
Scheme	Incartus Investments Pension Scheme (the Scheme)
Respondents	AFM Administrators (AFM) Dalriada Trustees Limited (Dalriada) Incartus Investment Limited (Incartus)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by AFM, Dalriada or Incartus.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S has complained that he has not been able to take his tax free lump sum and that he was not provided with timely information about the change of trustee.

Background information, including submissions from the parties

4. On 10 April 2014, the Scheme was established by Trust Deed. AFM was appointed as the Scheme Administrator and Bluefin Trustees Limited (**Bluefin**) as the sole corporate Trustee. AFM was also the sponsoring employer.
5. As I understand it, the Scheme (of which there are several iterations) was invested wholly in Incartus.
6. At some point in 2016, Mr S agreed to transfer his pension benefits into the Scheme on the basis of advice from an individual called Tracy Davis, who Mr S has described as an independent financial adviser. It is unclear whether this individual is or was regulated.
7. On 8 December 2016, AFM wrote to Mr S to confirm that a transfer of £182,770.76 had been completed and that he was being provided with the necessary forms to access his tax free cash. Once paid, the remaining 75% would be invested into the "Incartus Investments Pension Scheme."

8. Around this time, Mr S was provided with a document outlining his retirement options. This stated that he was a member of "The Incartus Investments Pension Scheme 2".
9. On 10 January 2017, the Pensions Regulator (**TPR**), by way of a Determinations Panel, removed Bluefin as the Trustee and appointed Dalriada as Independent Trustee of the Scheme.
10. Shortly afterwards, Dalriada issued an announcement to the members explaining its appointment and its role going forward. Mr S did not receive a copy of the announcement. Dalriada has said this was because his transfer was recorded as "in progress" at the time Dalriada took over, and it was not until the Scheme accounts were reconciled that it knew that the transfer had been completed.
11. On 6 February 2017, Mr S contacted Dalriada having been referred to it by AFM.
12. On 7 February 2017, Dalriada spoke with Mr S and explained the position. It subsequently sent him a copy of the announcement.
13. On 14 February 2017, Incartus Investments Ltd issued a letter to Mr S for him to sign. This included a number of statements about the running of the Scheme, a preference for the pension to remain invested in Incartus Investments Limited and several objections to Dalriada's appointment as Trustee. This proposed letter would be submitted to TPR to object to Dalriada's appointment.
14. On 19 February 2017, Mr S confirmed he would not be signing the letter without legal advice.
15. On 26 February 2017, Mr S formally complained to Dalriada about the handling of the situation.
16. On 17 April 2017, Mr S formally complained to AFM about the lack of information and correspondence.
17. On 8 August 2017, Dalriada provided Mr S with an update on the Scheme. It confirmed that it was in the process of establishing the values of the Scheme's investments and whilst this process was underway it was unable to place a value on his pension benefits. The hope was that within 12 months, members would be able to take benefits or transfer.
18. On 19 September 2017, Bluefin was dissolved.
19. Dissatisfied with the situation, Mr S brought the complaint to this Office for independent review.
20. On 10 August 2018, Dalriada provided its formal response. This documented why TPR had intervened in the running of the Scheme and the actions Dalriada was taking to regularise the Scheme's investments and funding. As it stands, the Scheme is unable to pay out any benefits due to the uncertainty around the value of the Scheme investments.

21. Dalriada acknowledged that Mr S had not been immediately informed of the change of trustee but explained this was a result of the finalisation of his transfer being uncertain. However, when Mr S contacted Dalriada it did inform him of the position.

Adjudicator's Opinion

22. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by AFM, Dalriada or Incartus. The Adjudicator's findings are summarised below:-

- Once Dalriada was appointed as the Scheme's Trustee it was responsible for the payment of the tax free lump sum. Whilst the Scheme's assets are uncertain, and until Dalriada's investigation is complete, it is reasonable for it not to pay benefits to Mr S in order to maintain its fiduciary duty to the wider membership. To pay benefits to Mr S now may prejudice the pension rights of other members if it transpires that the full value of the investments cannot be realised.
- It is understandable that Mr S is frustrated, however at this time Dalriada cannot be compelled to make the payment. If there are unreasonable delays in regularising the Scheme in the future this Office, or TPR, could potentially revisit the matter.
- Mr S was not immediately informed of Dalriada's appointment and the lack of information will have been concerning, however these were exceptional circumstances for the Scheme. In the circumstances where an independent trustee is being appointed by TPR, some confusion and uncertainty is understandable, so Mr S' distress has to be viewed in that context.
- The reason for Dalriada not contacting Mr S sooner, that it was not certain he was actually a member, is reasonable for the length of time the information was delayed. When it did become clear that Mr S was a member, it provided him with the relevant information. Overall, the circumstances did not justify a distress and inconvenience recommendation.
- Once Dalriada had been appointed, AFM was effectively removed from involvement in the Scheme. When Mr S contacted AFM, it referred him to Dalriada. There was insufficient evidence of maladministration on the part of AFM to recommend a distress and inconvenience award regarding the issues Mr S has complained about.
- Incartus was the Scheme's sole investment vehicle, but its role cannot be linked to the complaint and so this Office will not comment on its actions or inactions. Additionally, as the investment vehicle is not a trustee, manager or administrator of a pension scheme, it is outside our remit.

23. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

24. Mr S argues that he should have received his tax free lump sum 2 years ago in order to begin enjoying his retirement. He is now being made to suffer because, through no fault of his own, it has not been paid. Dalriada should not have the right to hold his money in its bank for their benefit and interest based on a fiduciary duty to other members of the Scheme. Mr S also understands that most of the Scheme's members have received their tax free lump sum, which surely cannot be justified if he cannot have his.
25. As an independent trustee, Dalriada has a fiduciary duty to all of the members within the Scheme which it cannot ignore without opening itself to accusations of breaching it from other members. To pay Mr S his lump now, whilst the total assets of the Scheme and their values are uncertain might ultimately mean that it has paid him a disproportionately high percentage of the Scheme's assets, and in doing so it would not be acting fairly with all the other members, who could end up with a reduced share as a result. In this context I cannot say Dalriada has acted unreasonably or in breach of its duty to Mr S when declining his request for benefits.
26. Mr S has suggested that Dalriada is retaining his money in its bank account for its own benefit, but I do not agree. It may be that an element of Mr S's entitlement is held on deposit in a bank account, but it is in fact the Scheme's funds and if Dalriada is using money (for legal fees etc) whilst attempting to normalise the Scheme's operation this is an acceptable use of the Scheme's funds provided it is necessary in order to ensure the maximum benefit is paid to the members.
27. Whilst other members may have received their tax free lump sum prior to Dalriada being appointed, and it will be frustrating that Mr S is required to wait before receiving his, that is a result of the timing of his transfer. He joined the Scheme very shortly before Dalriada was appointed, and so there was insufficient opportunity for his tax free cash to be paid before the Scheme ceased making benefit payments.
28. I am very sympathetic to the circumstances Mr S finds himself in and how frustrating it is for him, however in the circumstances, I cannot see evidence of maladministration on the part of Dalriada or AFM in the context of the specific complaints he has made.

29. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
5 February 2019