PO-19497

Ombudsman's Determination

Applicant	Miss D
Scheme	Medusa Pension Scheme (**the Scheme**)
Respondent	Mr SD

Outcome

1. Miss D's complaint is upheld and to put matters right, Mr SD shall (1) make a fresh decision in relation to distribution of death benefits under the Scheme and (2) pay Miss D £500 in respect of significant distress and inconvenience.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss D's complaint is about Mr SD's failure to pay her fair share of death benefits under the Scheme, following the death of her father, Mr AD. She says that, as his daughter, she is entitled to 50% of the value of the Scheme benefits.

Background information, including submissions from the parties

4. Originally, Mr AD - Mr SD's brother and Miss D's father - was a member and a trustee of the Scheme, which was a Small Self-Administered Scheme (**SSAS**) established by a Deed on 30 March 1994 (**the 1994 Deed)**. The Scheme had three member trustees (1) Mr AD, (2) Mr SD and (3) Mr M. The 1994 rules also refer to a corporate trustee.

5. According to Mr SD, new rules were adopted on 5 April 2011 (**the 2011 Rules**).

6. On 16 April 2013, Mr AD passed away. According to Mr SD, Mr AD's death left him sole remaining trustee of the Scheme.

7. At or around this time, Miss D was aware of a pension fund Mr SD was "executor" of. However, she had no details. After that, she spent some time trying to obtain from Mr SD, details of the Scheme and any death benefits payable.

8. In July 2017, Miss D finally received details of the Scheme. On 28 July 2017, she wrote to Mr SD, requesting his proposals for payment of any death benefits; she also requested copies of the Scheme accounts.

9. On 8 September 2017, Mr SD responded, stating that death benefits under the Scheme fell outside Mr AD's estate; he also said there was no legal requirement to provide Scheme accounts.

10. On 16 October 2017, Miss D wrote to Mr SD again, asking him to prove the death benefits fell outside of the estate.

11. Dissatisfied with Mr SD's responses, Miss D referred her complaint to this Office. In summary, she said benefits of about £187,500 were due her. Her claim was based on the fact that Mr AD completed neither a will nor an expression of wish form. She also said that, as his daughter, it was her right to receive half his "share" (£187,500 being about half the SSAS's value as at Mr AD's death).

12. In January 2018, Miss D wrote to Mr SD, re-requesting his proposals for payment of death benefits. There was no response. This Office therefore exercised discretion and accepted Miss D's complaint.

13. On 8 March 2018, this Office requested Mr SD's formal response to the complaint. On 29 March 2018, he responded. The key points were: -

- He was Scheme trustee, not an executor as Miss D claimed; he became sole trustee following Mr AD's death.
- The 1994 Deed Miss D had referred to, under which she had claimed death benefits, were overridden by the 2011 Rules.
- The Scheme was a discretionary trust and, as sole trustee, he had discretion over how to distribute death benefits.
- SSAS Practitioner.com was appointed scheme administrator in 2011 and sent Mr AD a member questionnaire and expression of wish form. However, whilst he completed the member questionnaire, he did not complete the expression of wish form.
- Following Mr AD's death, Mr SD was appointed scheme administrator. He could do this as a "fit and proper" person; he also appointed a practitioner with pension knowledge to satisfy HMRC requirements.
- Mr AD had access to information in relation to death benefits, which was available on the website of SSAS Practitioner.com.
- The Scheme was valued at the date of Mr AD's death and his share of benefits was distributed within two years.
- As sole trustee of a discretionary trust, and in the absence of an expression of wish form from Mr AD, it was for Mr SD to distribute Mr AD's share as he saw fit.

14. The Adjudicator shared Mr SD's formal response with Miss D. On 24 April 2018, she responded and made further comments. The key points were: -

- Mr SD should prove that the 2011 Rules were adopted properly; it was her belief that the 1994 Deed still applied.

- He should prove, e.g. by minutes from trustee meetings, that his decision to distribute benefits was made properly. He should also show there was no expression of wish.

- He should also provide copies of Scheme accounts before and after Mr AD's death.

15. On 25 June 2018, 18 July 2018 and 31 July 2018, the Adjudicator wrote to Mr SD, requesting further information about the Scheme rules and his decision to distribute death benefits. As at 17 August 2018, no response had been received.

Adjudicator's Opinion

16. In the absence of any further information, the Adjudicator concluded that further action was required by Mr SD. The Adjudicator's findings are summarised below: -

- Mr SD had provided a formal response, denying Miss D's principal claims in relation to the adoption of the 2011 Rules and the decision to distribute death benefits. However, he had provided no evidence that these actions were carried out properly. Further, since then he had provided no information at all, despite several requests.

- Miss D's position was that death benefits should be paid to her under the 1994 Deed. That might or might not be correct. But in any case, Mr SD's position was that the 1994 Deed no longer applied, as it was replaced by the 2011 Rules. Based on the evidence provided, the 2011 Rules had not been adopted properly. Under 3.17 of the 1994 Deed, all decisions had to be unanimous. So, Mr SD could not have adopted the 2011 Rules without agreement of all trustees. To prove that the 2011 Rules were effective, a properly executed deed of amendment was required. Or, evidence of a "resolution of trustees" meeting, with all trustees agreeing to adopt the 2011 Rules, was required. As Mr AD was alive at the time of the alleged adoption, he would have had to agree to such a change (unless he had already resigned).

- In terms of trustee agreement, there were two possibilities (1) Mr AD & Mr M resigned when the 2011 Rules were adopted, leaving Mr SD sole trustee; in this case, he should provide evidence that Mr AD and Mr N were removed or (2) Mr M and, if applicable, Mr AD, agreed to adopt the 2011 Rules; in this case, there should be evidence.

- Under 4.4. of the 1994 Deed, Mr SD could act as sole Scheme trustee; there was no requirement for more than one. However, he would still need to provide evidence that a correct process was followed when the 1994 Deed was replaced with the 2011 Rules. At present, there was only Mr SD's testimony. Miss D's position was clear that the 2011 Rules were adopted incorrectly. So, it was for Mr SD to show that the 2011 Rules were adopted correctly, which ought to be straightforward.

- If Mr D was unable or unwilling to show that the 2011 Rules were adopted correctly, the question was whether, in the absence of any expression of wish, the 1994 Deed gave him the power to distribute death benefits as he saw fit.

- Based on the evidence available, the two parts of the 1994 Deed that were relevant to distribution of death benefits were, first, part 3.30(d) of the Trust Deed ("Payment of death benefits") and, second, part 4 of the Rules ("Member's personal account"). In line with these provisions, Mr SD ought to be able to show what was the value of Mr AD's benefits under the Scheme at the time of his death, and whether the beneficiary or beneficiaries fell into one of the relevant categories, and were therefore entitled to receive them.

- Even if Mr SD could only rely on any powers under the 1994 Deed, he should still provide evidence that a proper decision-making process was followed when he decided how to distribute death benefits.

- To resolve this complaint, Mr SD should (1) provide evidence that the 2011 Rules were adopted properly; (2) provide evidence that the death benefits under the Scheme were distributed in line with the correct process. If he was unwilling to do (1) and (2), then he should (3) make a fresh decision regarding distributing the death benefits (and provide evidence of its decision to Miss D). Finally, he should (4) pay Miss D £500 in recognition of the significant distress and inconvenience caused.

17. On 29 August 2018, Miss D provided further comments but accepted the Opinion.

18. On 17 September 2018, Mr SD responded and provided further comments. The key points were: -

- He was confident that the 2011 Rules were validly executed in line with 3.31 of the 1994 Deed, though there was no further evidence. In any case, this had no impact on the Trustee's authority to distribute death benefits or on the decision-making process.

- Under the 1994 Deed, there were four trustees (1) Mr SD, (2) Alliance Trust Pensions Ltd (formerly Wolanski & Co. Trustees Limited), (3) Mr AD, and (4) Mr M. Following the resignation of Alliance, and the removal of Mr M by Deed, Mr AD's death left Mr SD as sole trustee. In any case, neither Clause 3 of the 1994 Deed nor Clause 4.4 of the 2011 Rules prevented him from acting as sole trustee.

- As Mr AD died before age 75, Mr SD exercised his power as trustee under 20.1.2 of the 2011 Rules. This provided that: "… on the death of a Member, the Trustee may apply the Member's Individual Fund… at their discretion by… provision of one or more lump sum death benefits in accordance with rule 23." Rule 23 provided that: "… on the death of a Member, any part of the Member's Uncrystallised Fund… may be applied to one or more of the following at the Trustees' discretion." Rule 23 defined six classes of person, including: "any ancestor or descendant (however remote) of the individual or of his Partner".

- Clause 3.30(a) of the 1994 Deed provided that: "… the Trustees may pay or apply all or any part of any lump sum payable on the death of the Member out of the Scheme to… one or more of the Named Class of the of the deceased Member at such times and in such manner as the Trustee may decide. Clause 3.30(d) defined six classes of person, including: "The following relatives of the Member or his spouse… namely parent child step-child brother or sister or the wife husband or child then living of any such relative". Mr SD said there was no substantive difference between those eligible to receive benefits under the 1994 Deed, and those eligible under the 2011 Rules.

- Mr SD identified five potential beneficiaries (1) Mr AD's former wife, (2) Mr AD's daughter (Miss D), (3) Mr AD's son, (4) Mr SD, and (5) Mr AD's son's wife. He said no-one had an automatic entitlement to benefits in the event of a member's death, until the trustee exercised discretion. He outlined briefly the family history insofar as it related to his distribution decision. He said Miss D did not have a strong relationship with Mr AD and: "Having considered these circumstances, and being conscious of the strong views [Mr AD] expressed to me, I reached the decision not to make any allocation of the funds to [Miss D]."

- In summary, Mr SD said that his intention, as Scheme trustee, was to give effect to his understanding of what Mr AD wanted. In doing so, he had acted within his powers of discretion. However, he could have provided more information to Miss D in relation to his decision-making process. He agreed to pay £500 in recognition of any distress and inconvenience this might have caused.

19. On 21 September 2018, the Adjudicator shared Mr SD's comments with Miss D.

20. On 4 October 2018, Miss D provided her further comments. The key points were: -

- She asked why the rules changed if there were no substantive difference between the two versions. She added: "Clause 9 [of the 1994 Deed] provides that upon the death of an "Active Member" [which, in her view, Mr AD was], the Trustees "shall" use the funds in the Member's Personal Account to provide such of the benefits stated as they decide." Mr SD had provided no evidence he considered paying her benefits under this clause. She said the lack of a Deed of variation, or minutes, could not be dismissed as irrelevant; Mr SD should be required to show the 2011 Rules were properly adopted.

- Regarding who had authority to decide how to distribute benefits, she did not deny that Mr SD could act as sole trustee. However, if he could, it was vital that he keep, and be able to show he kept, minutes of important decision, i.e. the exercise of any discretion.

- Regarding the reasons why the decision was made, she said Mr SD had provided no evidence that he considered the factors he claimed to have considered. Moreover, the fact he did not communicate with her at the time of the decision meant that his claim to have considered these factors lacked credibility. If Mr SD had investigated further, he would have discovered that their relationship was close. She provided a brief summary of that relationship and said there was no rational basis for Mr SD's claim.

- She referred to a decision on the Pensions Ombudsman's website, where the decision-maker tried to contact a potential beneficiary but then distributed the benefits before a response was received; the Ombudsman upheld that case. She said her own case was even stronger, as Mr SD made no attempt to contact her. His failure to do so, and the lack of any minutes regarding the decision-making process, meant it was not credible that he followed a proper process; his decision to prefer Mr AD's son was irrational.

- As Mr SD was sole trustee, and there was a limited number of potential beneficiaries, the decision should not simply be remitted back to Mr SD; he should be directed to distribute the benefits in equal parts between her and Mr AD's son.

21. After considering all the further comments, the Adjudicator informed both parties that he would refer the matter to the Ombudsman for a Determination. This was because: Mr SD had provided insufficient evidence of the rule change and his decision-making process; and, Miss D considered that simply re-deciding the matter was not sufficient. The complaint was therefore passed to me to consider. I have considered Mr SD's further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and will therefore only respond to the key points for completeness.

Ombudsman's decision

22. I am not persuaded that it has a significant bearing on the outcome of the complaint whether the distribution was effected under the 1994 Deed or the 2011 Rules. As Mr SD has identified, the discretionary powers of the trustees, regarding distribution of death benefits, are broadly the same under the 1994 Deed and the 2011 Rules.

23. In either case, the Trustee was required to exercise a discretion how to distribute the funds among the class of potentially entitled beneficiaries. In either case this class included Ms D, a point which the Trustee understood. The issue is whether a proper decision-making process was followed.

24. I do not consider that it was for the following reasons. Mr D complains that no enquiries were made of her as a potential beneficiary before the Trustee decided not to distribute to her. The Trustee does not dispute that submission. I consider that the failure to make any enquiries of her at the time of the distribution was procedurally unfair. There was no expression of wish saying who of the range of potential beneficiaries the deceased positively wished to take the benefit. I accept that the Trustee had knowledge of certain wishes of the deceased but these did not extend to Ms D. In any event, his role was not to give effect to the wishes of the deceased, whether expressed through a form or not. It was to make his own decision under the rules having weighed the claims of all potentially entitled beneficiaries at the date of the decision. While the wishes of the deceased were relevant, they could not be solely determinative. The Trustee was under an obligation to make sufficient enquiries to inform his decision. In this case the Trustee had personal knowledge of the situation of some potential beneficiaries, but no up to date knowledge of Ms D. That was unsatisfactory because the distribution decision falls to be made on the

factors as they present at the date of the decision. Therefore, I do not find that Mr SD has shown that the correct decision-making process was followed at the relevant time, especially as he did not make any enquiries, or seek any relevant evidence from Miss D, before deciding to exclude her from distribution of the Scheme benefits.

25. Mr D also failed to give any reasons for his decision. Recent Determinations by this Office have highlighted the need for trustees to be capable of demonstrating the rationale for their decisions, especially in relation to member death cases where trustees have exercised discretion as to who receives benefits. These decisions make clear that it is important to: keep clear records; follow a robust process; and support decisions with clear reasons, in order to demonstrate that all relevant factors have been taken into account. In this particular case, I find that these elements are lacking.

26. There is no substantive contemporaneous evidence - for example records, minutes or similar – of how the decision was reached. Without contemporaneous records, it will always be difficult to evidence that all relevant factors, and no irrelevant factors, were considered at the time of the decision.

27. , Mr SD should re-consider his decision to distribute death benefits, having made sufficient enquiries of the personal circumstances of each potentially entitled beneficiary, and notify Miss D of his decision, together with his reasons.

28. Miss D has specifically asked me not to remit the decision back to Mr SD for a fresh decision to be made. She says:

> "In view of the fact that [Mr SD] is the sole trustee of the Scheme, and there is a very limited number of potential beneficiaries, this is not a case in my view where the trustees should simply be told to think again. The only fair way would be for the funds to be allocated in such a way that I receive a share equal to that received by [Mr AD's son]."

29. I have considered this. However, only in limited circumstances will I substitute my own decision for decision-maker's. I do not find that this is justified here. A proper distribution decision can only be made in light of evidence which I do not have. There is under the rule no presumption of a 50/50 split between any two potential beneficiaries. Albeit I consider that the Trustee has fallen into procedural error, I do not consider that there is no reasonable prospect of him taking a fresh decision in a fair way.

30. For the avoidance of doubt, I find this case should be re-mitted to Mr SD because of procedural errors and unfairness in the decision-making process. Since I am not the decision-maker, my direction outlined below cannot predetermine the outcome of a proper exercise of discretion.

31. The lack of procedural fairness in the initial decision and the need now to re-examine the issues will have caused Ms SD significant distress and inconvenience and I make a direction in recognition of that fact.

Directions

32. Within 21 days of the date of this Determination, Mr SD shall: -

- Re-consider his decision to distribute death benefits under the Scheme.
- In re-considering the matter, he shall invite Miss D to make any further submissions in support of her claim to a share of the distribution.
- In communicating his decision, Mr SD shall: highlight the Scheme rules used in making the decision and state his reasons for distributing in the shares which he decides appropriate.
- Pay Miss D £500 in recognition of the significant distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
12 February 2019