Death benefits

As pensions lawyers, we see certain issues cropping up time and time again in death benefit cases. Here, we take a look at some of the more common pitfalls faced by trustees and pensions managers.

**Scheme’s policy incorrectly reflects the rules**

Scheme booklets and policy documents can be very helpful summaries of the rules, but they may not always be completely accurate. When considering a death benefit claim, it is important to look at the actual trust deed or rules and check the wording carefully: there may be nuances or qualifications which are not reflected in the scheme booklet or policy document. Depending on the history of the scheme’s governing documents, the calculation of the lump sum may be governed by a previous set of rules, even though the process for paying and the people eligible to receive a lump sum are set out in the current rules. The starting point should therefore always be to work out which rules apply to the member, before checking them thoroughly to find out which kinds of individuals can qualify as beneficiaries, and on what grounds. Failure to accurately follow the scheme’s rules will expose the trustees to claims from unhappy potential beneficiaries.

**Case study: Ms Edwards (2009 Pensions Ombudsman decision)**

This case concerned a complaint by the daughter of a deceased retired member about the trustees’ decision not to award her a dependant’s pension.

**Facts**

Ms Edwards had been caring for her father until his death and he had nominated her to receive a dependant’s pension under the scheme rules. The scheme rules stated that the pension was payable at the discretion of the trustees to a nominated dependant who had been wholly or partly financially dependent on the member.

However, the trustees based their decision on their internal guidelines, which set out different standards for financial dependency depending on whether the relationship was a marriage-type relationship or not. This was incorrect – the dependency definition should be the same for all, although other factors might be relevant to the subsequent exercise of the trustees’ discretion as to whether to pay a pension to a particular dependant.

**Decision**

As the trustees had based their decision on the incorrect description of financial dependency in their policy, the trustees were ordered to take their decision again.
Nominated beneficiary

Many members complete an expression of wishes statement, naming an individual as their preferred beneficiary. However, in most schemes the trustees are not bound by the member’s nomination. As such, failure to carefully consider the expression of wish form will almost certainly amount to maladministration. Any expression of wishes should be checked against the member’s will (if there is one). The date on the statement is also relevant. If the nomination was made a long time ago, it will be necessary to investigate whether there has since been a change in the member’s family circumstances – for example, a separation, a divorce or a remarriage, the birth of a child, another death in the family or a change in the financial position of the nominated beneficiary. Further investigation could reveal that the member had a dependant outside of the immediate family. If that is the case, then it will also be important to consider whether the nomination would leave that dependant in financial difficulties.

Taking time to assess the circumstances at the date of the member’s death enables the decision-maker to judge how much weight to give to an expression of wishes. However, failure by a deceased member to alter the expression of wishes in accordance with a change in family circumstances may not necessarily be accidental. The member may have intended the form to remain as it was, and this scenario should also be considered.

Case study: Redford-Gypseman (2000 Pensions Ombudsman decision)

Facts

In this case, the expression of wishes form named the member’s husband as sole beneficiary for the death in service lump sum from the scheme, but the trustees chose not to follow it. The member had divorced her husband since filling out the expression of wishes form and the member’s will did not name the husband as a beneficiary. The husband argued that relations between them were amicable and this accounted for the lack of change to the expression of wishes form. However, the trustees made inquiries and discovered otherwise. They therefore paid the lump sum death benefit to the deceased’s estate.

Decision

The Ombudsman upheld the trustees’ decision on the grounds that the trustees had considered all material aspects of the member’s personal circumstances and had taken all relevant factors into account. The Ombudsman could therefore not interfere with the Trustees’ decision.

He said, she said

The family circumstances of deceased members can be difficult to unravel, especially when emotions between competing beneficiaries are running high. Nonetheless, the right questions must be asked, and the answers given should be pursued where necessary so that the decision-maker can make a fully informed decision. In some cases, this can prove very challenging – especially when there are conflicting reports or claims from different interested parties – but a failure to ask enough questions to ensure that the facts are fully established may well leave the trustees’ decision open to challenge. If a decision is later disputed, the person or committee who made it will need to be able to show that they established the facts fully.
**Case study: Mrs Hendry (2012 Pensions Ombudsman decision)**

This case concerned a complaint to the Ombudsman by a deceased member’s wife about how trustees exercised their discretion to pay out a lump sum death benefit.

**Facts**

The scheme provided for a spouse’s pension and for a lump sum which could be paid to a wide list of potential recipients, including relatives and financial dependants.

Mr and Mrs Hendry had lived apart for five years. They were going through a clean-break divorce. The decree nisi was made the day before Mr Hendry died in an accident, but the decree absolute had not been made. Mr Hendry was in a relationship with another woman, Mrs S, but lived alone. There was no will – Mr Hendry died intestate, leaving an expression of wishes form naming Mrs Hendry as the beneficiary.

The trustees awarded the spouse’s pension to Mrs Hendry (as was her right under the scheme rules). In view of this, they decided to pay the lump sum death benefit to Mrs S, based on statements about her financial reliance on Mr Hendry. When Mrs Hendry was notified of this decision she queried it.

**Decision**

The Deputy Pensions Ombudsman (DPO) found the trustees at fault because, having identified the widow as a potential beneficiary, they decided that they did not need to ask her for further information and relied on statements from the deceased member’s new partner which were not backed up by any documentary evidence. The widow’s pension was an entitlement under the rules and the trustees were wrong to conclude that, simply because the widow had received the spouse’s pension, she should not receive the lump sum benefit. The trustees had potentially asked themselves the wrong question.

In response to objections from the trustees about the highly personal nature of the investigations they were being asked to undertake, the DPO commented that:

‘There may well be practical difficulties and it may well be the evidence is inconclusive and the enquiries may be intrusive, but the evidence still needs to be gathered and considered. I cannot excuse the failure to collect appropriate evidence…’

The DPO ordered the trustees to reconsider their decision, taking into account evidence gathered from further enquiries of both parties.

**Difficulties in identifying ‘dependants’**

Failure to identify all potential dependants is another reason why a death benefit decision might be challenged. Where the rules provide that certain of the member’s relatives fall within the category of potential beneficiaries, such as their spouse or children, the trustees should be able to easily identify who these people are. However, where rules include other categories of potential beneficiary, such as individuals who are ‘financially dependent’ on the member, this is not so clear cut. Understanding what exactly is meant by financial dependency can be a challenge. It is common for an unmarried partner to claim dependency, but it may not always be appropriate to treat a cohabiting partner as a dependant for the purposes of the scheme, as the following case study shows.
Case study: *Wild v Smith* (1996 Pensions Ombudsman decision which was appealed to the High Court)

This case concerned a complaint by a deceased member’s son about how trustees exercised their discretion to pay a lump sum of £140,000 on his father’s death.

**Facts**

The relevant scheme rules had a power to pay a lump sum on death in service. The potential beneficiaries included:

- the member’s spouse or other relative; or
- someone financially dependent on the member ‘for all or any of the ordinary necessaries of life’.

Seven years before his death, the member had nominated his son and daughter to receive any lump sum (50% each). When he died he was living with a woman, Mrs Slack. The trustees did not follow the member’s nomination and paid £80,000 to Mrs Slack and a further £60,000 to Mrs Slack on trust for life with the capital going to the member’s son and daughter on her death.

**Decision**

The Trustees were wrong to conclude that Mrs Slack was financially dependant on the member. Dependency meant not being able to look after herself if required to do so. Although the member was paying all their joint living expenses, and Mrs Slack had invested her savings in renovations to their joint home, Mrs Slack had chosen to give up work (rather than being forced to by circumstances) and had her own property. This meant that Mrs Slack was merely benefiting from the member’s earnings rather than being financially dependent on him and could not have been a possible beneficiary within the scheme rules. The trustees were therefore acting outside of their powers in paying the lump sum to Mrs Slack. The trustees had also made no enquiries as to other possible beneficiaries, eg via the family or the solicitor administering the member’s estate. The trustees had not properly exercised their discretion and the money had to be paid to the member’s estate.

**Delegating decisions**

It is common for trustee boards to delegate death benefit decisions to a committee. In order to do this properly, the delegation must be permitted by the trust deed and rules of the scheme. The role and authority of the delegate should then be set out clearly, and the terms set for the delegation should also cover whether, and in what circumstances, the decision-making power should revert to the whole trustee board. A decision made by someone without the proper authority can be overturned. Even if decisions are being taken by a committee, all trustees need to be knowledgeable about the process for decision-making and capable of checking that the committee is working properly. Ultimately, the full board retains responsibility for the decisions of the committee, so the committee should report back on the decisions made for monitoring purposes. To avoid a challenge regarding the decision-maker’s authority, it is important that the committee follows this process diligently, making it clear that it has followed correct procedures and kept within its terms of reference.
Case study: Mrs Earle (2009 Pensions Ombudsman decision)

Facts

In this case, the deceased member’s widow complained about the distribution of the member’s death benefit lump sum in June 2006. The lump sum was distributed to the member’s two daughters in accordance with his expression of wishes form. The form was completed before he had met and married his widow. The distribution decision was made by the secretary to the trustees. The trustees had formally decided to delegate authority to determine death benefit cases where there was a clear nomination form and where there were no complications.

Decision

The Ombudsman held that this was not a case where the ‘no complications’ proviso applied, and therefore that it was not the type of decision which was within the delegated authority of the secretary. The decision to award the lump sum to the member’s daughters was therefore invalid.

Recording decisions

If a decision is challenged, the decision-making process will need to be able to withstand intense scrutiny. If there is no paper trail that fully records the decision and the decision-making process, then the decision may be open to challenge. A simple note of the final decision itself is not enough. Records should include all of the information gathered, which factors were considered and which of these were disregarded (and why). If the scheme has a policy or guidelines for the process, the record should confirm whether they were followed or departed from by decision-makers (and the reasons for doing so). The reasons for the final decision should be fully recorded, including details of which factors were most influential.

Case study: Mrs Curran (2009 Pensions Ombudsman decision)

Facts

In this case, the member died leaving his estranged wife as sole beneficiary of his will, with three children in foster care and two who had been adopted at birth. An occupational health specialist and two employer representatives visited the widow to gather information and provided information to the trustees by email and orally at a trustee meeting. The minutes recorded that ‘taking all the relevant matters into account, the Board decided to distribute the lump sum equally to the member’s five children’. The widow challenged this decision.

Decision

The Ombudsman held that there was no documentary evidence that the trustees had all relevant and no irrelevant material before them when they reached their decision. The information in the email was inadequate. As the trustees had failed to identify their reasons, there was no evidence that their decision was rational. The decision they reached was one possible outcome – not an automatically perverse conclusion – but it was an unusual one and the Ombudsman could not find that the decision was not perverse. The trustees were required to reconsider their decision and give substantive reasons and an explanation of what was taken into account.
When things go wrong

Trustees must be absolutely certain about their decision before making a payment. It can be very difficult to get money back after it has been paid out, and disputes can be costly and time-consuming to resolve (as well as causing distress to the family of the deceased member).

Recovering payments made in error can be tricky (see, for example, our guide to recovering overpaid pensions at [www.allenovery.com/overpayments](http://www.allenovery.com/overpayments)) – but we can help you find an appropriate strategy for your specific circumstances if a mistake of this kind has been made.

For more information on avoiding and managing pensions disputes, please visit our Pensions in Dispute site at [www.allenovery.com/pensionsindispute](http://www.allenovery.com/pensionsindispute)