



Chairperson's report

In a letter to Jean-Baptiste Leroy in 1789, Benjamin Franklin wrote "In this world nothing can be said to be certain, except death and taxes." Here at the Tribunal much the same can be said about death and disability complaints.

In the three years from 2007 to 2009, the difference between the minimum and maximum number of death-related complaints was just 18 complaints, and in the two years from 2010 to 2011, just 17 complaints. The variance in disability-related complaints was greater, but it seems likely that disability complaints will continue to arise for some time yet.

In this Bulletin, the Tribunal takes a closer look at those complaints that usually fall into the catch-all categories of 'Administration' and 'Other' to help trustees identify those areas in which numbers of possibly preventable complaints arise.

The raw data indicates these complaints fall into the following categories:

Benefits - account balance/calculation	17.30%
Benefits - payment delay	14.20%
Insurance - cover	11.70%
Failure to correct information	11.30%
Administration - general	9.60%
Disclosure	8.90%
Fees and Charges	8.90%
Insurance - premiums	7.40%
Benefits - early release	4.60%
Investment - Choice	2.50%
Investment - Performance	1.40%
Co-contributions	0.70%
Lost super	0.70%
Fund choice	0.40%
Surcharge	0.40%
	<hr/>
	100.0%
	<hr/>

Of course these raw figures do not tell us whether or not such complaints are successful, but that is immaterial for the purpose of this exercise because every complaint, whether successful or not,

represents an impost on trustees' (and the Tribunal's) resources, time and costs.

At first glance, the figures suggest that trustees could potentially reduce complaints by almost twenty percent by better educating members about insurance entitlements and premiums. Interestingly, anecdotal evidence suggests that just as many members complain about unwanted insurance as those who complain that they are not covered, but that would just seem to underline the need for improved communication in this area.

It seems to the Tribunal that targeted mail-outs to "at risk" groups, such as part-timers and casuals, or highlighting sections of regular disclosures for these groups, might go some way to reducing the number of complaints that trustees must deal with.

Another example of an "at risk" group is defined benefit members approaching retirement. It is clear to the Tribunal that these members need to be better informed about the treatment of their benefits from the date their service ceases to the date their benefits are paid or rolled over.

The Tribunal is working towards providing more detailed information about these types of complaints in the future, but in the meantime, trustees may find an opportunity to reduce complaints in the figures above.

Trust Deeds

When the Tribunal notifies trustees that a complaint has been received, it asks for copies of certain documents and other relevant information, including trust deed

information. The reason is that the Tribunal (not to mention the trustee) must rely on deed provisions in force at the time of relevant events for the trustee's powers in relation to those events.

The Tribunal asks trustees to identify the executed trust deed by date, and the particular provisions therein, that they relied on when reaching and reviewing their decision. Some trustees seem to disregard this request or provide only limited details, particularly in relation to complaints about matters other than death benefit distributions or total and permanent disablement claims.

Some trustees respond by simply identifying the most recent deed; others will refer to an unexecuted deed or consolidation. The relevant deed, generally speaking, is the executed deed that was current at the date of the event that triggered the complaint. Examples include:

- in the case of a disputed benefit, the deed that was current at the date the benefit became payable;
- in the case of an investment switch gone wrong, the deed that was current at the date the switch request was submitted;
- In the case of a dispute about the financial year in which a contribution was received, the deed that was current at the date the contribution was remitted.

In relation to the relevant provisions, some trustees identify certain provisions of the *Superannuation Industry (Supervision) Act* or Regulations, or the *Income Tax Assessment Act*. While the identification of such provisions is always welcome, the relevant provision of the Trust Deed in cases such as these is actually the provision that requires the Trustee to comply with what is often referred to in the deed as the 'relevant law'.

Another provision that is almost always relevant, but rarely identified, is the provision that empowers the trustee to compromise claims.

The Tribunal encourages trustees to ensure that correct provisions are referred to and provided to the Tribunal.



Jocelyn Furlan
Chairperson

Statistical overview

Quarterly statistics –

October - December 2011

Telephone inquiries

The Tribunal received 3,626 telephone calls this quarter (last quarter – 4,124), which is a decrease of 12% compared with the previous quarter.

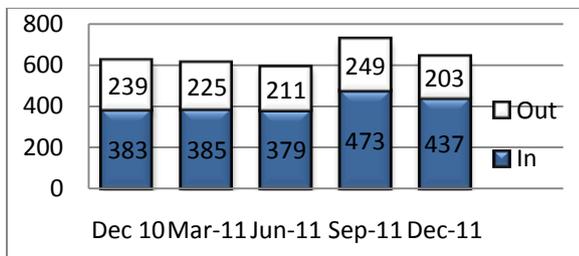
The Tribunal dealt with a wide range of inquiries, the most popular were complaints related inquiries (733/20.2%), followed by questions about the Tribunal itself (646/17.8%. Interestingly, 471 or 12.9% of calls received were from people thinking they were calling their fund. As has been said before, the Tribunal encourages trustees to ensure that communications clearly differentiate between the fund's complaint contact details and the Tribunal's.

Written complaints

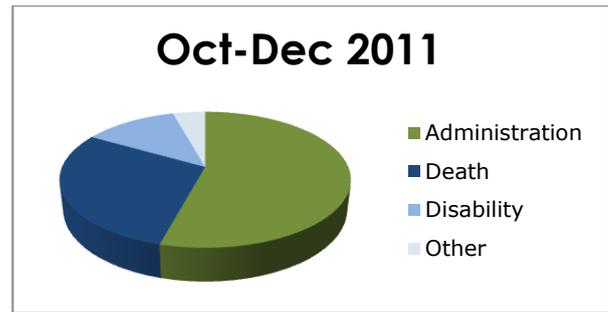
This quarter, the Tribunal received 640 written complaints (last quarter – 722), which is a decrease of 11.4% compared with the previous quarter.

Jurisdiction

Of the 640 written complaints received this quarter, 437 (68.3%) complaints were within jurisdiction (previous quarter – 65.5%). Of the 203 (31.7%) complaints closed as outside jurisdiction, 125 (61.5%) were closed pursuant to s.19 of the Complaints Act because the complainant had failed to lodge a complaint with the trustee or the 90 day time limit had not passed from the date of complaint to the trustee (last quarter – 66.6%).



Complaints within jurisdiction



Nature of written complaints within jurisdiction

Nature of written complaints within jurisdiction

Complaints fall into four major categories – 'death', 'disability', 'administration' and the catch-all category of 'other'.

Leaving aside the 'other' category, administration complaints comprised the largest category of all written complaints received within jurisdiction – 54.2% (last quarter – 50.3%). Death complaints made up the second-largest category at 29.1% (last quarter – 32.1%), followed by disability at 12.4% (last quarter – 13.3%).

Performance

Complaints finalised

The Tribunal finalised 516 written complaints this quarter, a decrease of 8.3% compared to the previous quarter.

Of the 516 finalised complaints, 5.9% were finalised at review (last quarter – 3%), 49% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 46.8%) and 45.1% were outside jurisdiction (last quarter – 50.2%).

Conciliation conferences

The Tribunal conciliated 125 cases in the quarter, a decrease of 1.5% on last quarter's 127.

Of the 100 cases concluded, settlement was achieved in 77, resulting in a settlement rate of 61.6% (last quarter – 64%). The outcome is pending in 25 cases (20%) compared to 38 cases (29.9%) for last quarter.

Nature of conciliation cases

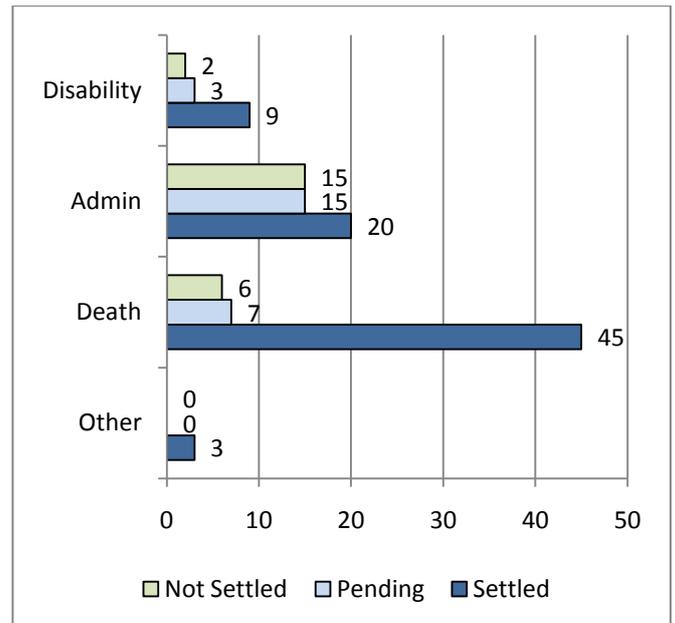
The categories of note in the quarter are as follows:

Death benefits – Of the 51 concluded cases, 45 (88.2%) were settled.

Disability – Of the 11 concluded cases, 9 (81.8%) were settled.

Administration – Of the 35 concluded cases, 20 (57.1%) were settled.

Other – of the 3 concluded cases, 3 (100%) were settled.



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 30 cases this quarter (last quarter – 17 cases).

The largest category of complaints determined at review was disability complaints: 11 (36.7%).

Disability	Qtr	YTD
Affirmed	9	12
Remitted	0	0
Varied	0	0
Set aside	2	3
Total	11	15

Death benefit complaints made up the second largest category: 10 (33.3%)

Death	Qtr	YTD
Affirmed	4	5
Remitted	0	0
Varied	0	0
Set aside	6	12
Total	10	17

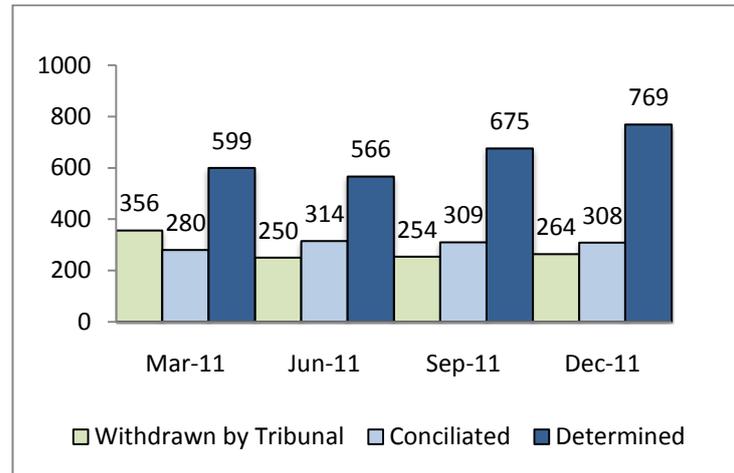
Followed by administration complaints category: 9 (30%)

Admin	Qtr	YTD
Affirmed	6	8
Remitted	0	0
Varied	0	0
Set aside	3	7
Total	9	15

63.3% of trustee decisions were affirmed during the quarter, compared with 35.2% last quarter.

Efficiency

Median number of days from receipt of complaint to date closed.



Recent determinations of interest

Death benefit distribution: D11-12\018

The complainant (the deceased member's husband) lodged a complaint with the Tribunal that the Trustee's decision to pay the death benefit arising on the death of the deceased member to her son (who was not a party to the complaint) was not fair and reasonable. The trustee paid the benefit to the son before notifying the complainant of its decision to do so. The Tribunal determined to set aside the trustee's decision and substituted its own decision that the Trustee pay to the complainant an amount equivalent to 20% of the benefit.

The deceased member died in 2010 aged 46. At that time her son was aged 21. The complainant provided evidence that he had entered into a de facto relationship with the deceased member in 2001. He and the deceased member married 6 months prior to her death at which time she was suffering from a terminal illness.

The deceased member had initially made a non-binding nomination of her son as her preferred beneficiary but, in April 2009, changed this nomination to the complainant. She left a will, made in November 2009, by which she appointed the son as her executor and purported to leave her superannuation benefit to the son while bequeathing the residue of her estate

to the complainant. The complainant disputed the validity of this will.

The trustee acknowledged that the son and the complainant were the only two dependants but regarded the will as evidence of the complainant's most recent intention regarding her superannuation benefit. It had also been provided with a letter from the solicitor who made and witnessed the will who expressed the opinion that she had the requisite capacity. The trustee also had regard to the fact that the complainant would receive her residuary estate the value of which was similar to that of the death benefit.

The Tribunal agreed that the son and the complainant were the only beneficiaries and that the issue for consideration was the distribution of the benefit. Having regard to the purpose of superannuation the Tribunal was satisfied that both were receiving support from the deceased member at the time of her death and that both would have reasonably anticipated ongoing support from her had she lived.

The Tribunal concluded that it was unfair and unreasonable for the trustee not to consider the full circumstances of the complainant's relationship with the deceased member, including his dependency on her, particularly as the death benefit included a large insured component. The view of the Tribunal was that insufficient weight had been given to the deceased member's nomination of the complainant as preferred beneficiary. The Tribunal found that the trustee's decision

refusing the complainant's request for reconsideration was unfair and unreasonable.

The Tribunal considered that the evidence indicated an apparent intention of the deceased member, possibly in contemplation of her death, to split her assets equally. In this regard the son had stated that, in making the will, the deceased member had been concerned that she could not leave her interest in the jointly owned home or bank accounts to him.

In these circumstances the Tribunal considered that a trustee, acting reasonably, would have given effect to this intention by providing for a generally equal split of assets. The Tribunal determined that a payment by the trustee of the equivalent of 20% of the benefit to the complainant would achieve approximately an equal split between the two parties and remove the unfairness and unreasonableness in the trustee's decision.

Total and permanent disability complaint: D11-12\015

The complainant lodged a complaint with the Tribunal that the decisions of the trustee and the insurer refusing to pay her a total and temporary disablement benefit were not fair and reasonable. The Tribunal affirmed the decisions of the trustee and the insurer.

The trust deed of the fund provided for the payment of a total and temporary disablement ('TTD') benefit to a member who, under the definition of that term, became so entitled. The fund insured its risk through a group policy so that the relevant definition was that specified in the policy issued by the insurer.

Upon ceasing work due to disability the complainant lodged a claim with the trustee for a TTD benefit. This was forwarded to the insurer. After consideration of the claim the insurer decided that further information was required from the complainant and requested the trustee to obtain this information. The trustee wrote to the complainant seeking some of this information. The complainant declined to provide the information and, in its absence, the insurer and the trustee declined to pay a TTD benefit.

The policy defined disability in terms of the member being unable, by reason of illness or injury, to attend to his or her occupation. The word 'occupation' was defined as meaning the employment or activity in which the member was principally employed which, in turn, was defined as meaning being engaged in employment whether full time or part time.

The benefit payable under the policy was a monthly amount being the lesser of a percentage of the monthly income earned from the fund's participating employer and the maximum benefit payable under the policy. The term 'monthly income' had two alternative meanings:

- the total monthly income received from the participating employer from personal exertion (including salary sacrifice amounts but excluding such items as overtime, profit distributions, director's fees or other non-regular payments),
- (where a member directly or indirectly owns a business from which the member earns a regular income) the gross revenue generated by the business as a result of the member's exertion less eligible business expenses.

At the time she ceased work as a result of her disability the complainant had two sources of income, firstly, as an employee of the participating employer, in this instance a company, operated by the complainant, which conducted a photography business and, secondly, as a full time public sector employee.

The policy also provided that it was a condition of payment of any benefit that the member provide the insurer with such evidence to substantiate the claim as the insurer reasonably required.

The insurer had requested information relating to the company including tax returns, profit and loss statements and balance sheets. The complainant had objected to production of information in relation relating to the operation of the company which she claimed was a separate legal entity and, therefore, not relevant to

her TTD claim. She also claimed that, when the company had been established, she had invested funds which were recorded in a loan account and that the company had been repaying that loan on a monthly basis.

The insurer stated that, on the complainant's evidence, the loan repayments appeared to represent income of the company. It also said that the financial information requested was required to assist it in assessing her claim and also to confirm that a disability, as defined in the policy, had occurred.

The Tribunal took the view that, in order to calculate the monthly benefit which might be payable under the first part of the policy definition, the insurer was required to determine the complainant's regular income from the company as her employer. In this regard the existence of any salary sacrifice amounts was relevant.

The Tribunal considered that there was conflicting evidence from the complainant as to the form of her income taken from the company. It appeared to the Tribunal that the amounts paid to her from the company were loan repayments, which were not income, and that, accordingly the complainant may not have received regular income from the company within the first part of the policy definition of 'income'. This was for the insurer to determine.

Under the second part of the definition, if this was to become relevant, the Tribunal considered that the complainant may have been entitled to a benefit based on the

requisite percentage of the net earnings of the company. This required the insurer to take into account the earnings and expenses of the company to determine the level of benefit payable.

The Tribunal concluded, therefore, that the insurer was entitled to request financial information both in relation to the complainant including what income, if any, she received during the period of her disability, and in relation to the company.

The Tribunal therefore determined that, under the terms of the policy, it was fair and reasonable for the insurer and the trustee to request the financial information required and affirmed the decisions of both.

Administration complaint: D11-12\033

The Complainant lodged a complaint with the Tribunal that the decision of the trustee refusing to compromise her claim (in which she said that the trustee had failed to inform her, or to adequately inform her, both in relation to the receipt of a rollover sum into her account and in relation to the processing of an investment option switch and that the trustee had failed to follow her instructions in relation to the switch) was unfair and unreasonable. The Tribunal determined to set aside the decision of the trustee and to substitute its own decision that the trustee make a payment to her fund account to compensate her.

As a result of a family law splitting agreement a rollover sum was paid to the

complainant's fund account by the former husband's fund. As she was concerned to ascertain whether the fund had received the rollover the complainant contacted the fund call centre twice on one day to find out whether the cheque had arrived and to discuss making an investment choice switch online. She was informed that there was no record of receipt of the cheque but that processing may take some time.

In between these two calls she made an investment switch which she intended to apply to her existing account balance but not future contributions, in other words, excluding the rollover amount, which she thought was a future contribution. During the second call she also expressed concern as to whether her online transaction had been processed but was informed that it was not possible to confirm this at that stage.

In fact, a cheque for the rollover amount was received by the trustee on the day of the complainant's two telephone calls but, allowing for processing, was not credited to the complainant's fund account until 8 days (6 working days) later.

The complainant again contacted the call centre a further 6 days later (10 working days after her initial discussions) and enquired whether her switch had been completed. She was told that information relating to the switch may not yet be available but that, when processed, it would nevertheless become effective on a date of which she had been notified in writing (which was 7 days after her online

request). She explained in detail to the call centre representative that she was concerned to ensure that the switch related only to her account balance prior to crediting the rollover amount. He stated that he would need to speak with his manager, who was then unavailable, but that he would do so and call her back to advise her whether the switch had been processed.

The complainant received no return call from the fund and, due to the distraction of other issues occurring in her life, assumed that the switch must have been processed in accordance with her wishes and made no further contact with the fund for approximately 3 months.

When she did again contact the fund she had received a statement which indicated that the switch had been applied to the whole of her account balance including the rollover amount. She expressed her disappointment at this development and requested that her account be amended to show the switch applied to only the pre-rollover amount. The trustee decided to decline this request and rejected her subsequent complaint.

In her submission to the Tribunal the complainant said that she had been led to understand that the rollover would take 90 days to process and that, in making the switch request, she assumed that, as the rollover was not visible in her account, it was not there at that time.

According to the trustee the complainant had been adequately informed that any

switch would become effective on the 1st day of the following month. The trustee also stated that it had 7 business days from receipt to process a rollover payment but that, when processed, such a payment becomes effective (i.e. has fund earnings applied in accordance with the member's chosen investment option) from the date of actual receipt.

The Tribunal was satisfied that the trustee had acted in accordance with its governing rules in processing the rollover amount within 7 days and in treating the amount as credited at the date of receipt of the rollover cheque. The Tribunal was also satisfied that the call centre representative to whom the complainant spoke at the time of her first telephone enquiry could not reasonably have been aware or ascertained that the rollover cheque had arrived at the trustee's office on that date. It was the view of the Tribunal that some of the information provided by the representative was unclear although essentially correct.

In relation to the switch the Tribunal considered that, during those initial discussions, the representative had clearly explained the online switch and switch processing procedure and the complainant had acknowledged her understanding. The Complainant had received a letter from the fund within days of the online switch request confirming the switch and the effective date. In the Tribunal's view it should have been clear to the complainant that the crediting of the rollover sum at any time between the date of her online switch request and its effective date, 9 days later,

would have had the result that the rollover sum would have formed part of the existing account balance for the purpose of the switch.

It was, therefore, an accident of circumstances that the rollover amount was received within this period. The Tribunal concluded that, even had the information provided to the complainant during her 2 initial telephone discussions been different, the evidence did not indicate that she would have been dissuaded from making the switch she had decided to make on that first date.

It was apparent, however, that when she next called the fund 2 weeks later she had received information (the application of significant negative earnings to her account) which led her to assume that her online switch had not been completed. The Tribunal considered that during this discussion she made her wishes quite clear to the fund representative who understood her intentions and undertook to investigate and to call her back. It was clear that this undertaking was not honoured. The Tribunal considered it reasonable, in the circumstances, that, she having explained her situation, steps would be taken by the trustee to rectify it.

The Tribunal concluded that the failure of the fund representative to return the complainant's call as promised was a breach of the fund's obligation to her as a member and not fair and reasonable. The Tribunal determined that the fund should compromise the complainant's claim by

paying to her fund account a sum reflecting the amount (if any) by which she would have been better off had the rollover amount been excluded from the complainant's investment allocation resulting from the switch commencing from the next effective switch date following the date of the undertaking and, instead, held in the fund's cash option from that date until the effective date of a subsequent switch made by the complainant 3 months later.

Death Benefit – Interdependency D11-12\034

The complainants (all adult children of the deceased member) lodged a complaint that the trustee's decision to pay 80% of the death benefit arising on the death of the deceased member to the joined party (who claimed an interdependency relationship with the deceased member) and 5% to each of the 4 complainants was not fair and reasonable. The Tribunal determined to set aside the trustee's decision and substitute its own decision that the entire benefit be paid to the joined party.

The complainants were children of the deceased member aged between 21 and 28 years at the date of his death. None claimed any financial dependence on the deceased member and none claimed any expectation of support from him had he not died. They disputed the existence of an interdependency relationship between the deceased member and the joined party at

the time of his death. They also disputed the validity of a preferred beneficiary nomination made by the deceased member in favour of the joined party on his fund application 2 ½ years prior to his death in September 2008 on the ground of diminished mental capacity.

The evidence provided by the joined party was that she and the deceased member had lived together between 1988 and 2002 at which time the joined party had moved to a new location in order to be closer to her place of work. She stated that she had persuaded him to rent separate accommodation near to her so that he could walk home if he had been drinking. It seemed undisputed that he was a habitual binge drinker and she stated that he became abusive and aggressive when he was in one of these cycles.

Notwithstanding their separate accommodation she stated that:

- they each had keys to each other's units;
- they had each other's PIN numbers and could draw on each other's accounts when necessary;
- they went on holidays together;
- the deceased member carried out building and repair work at her unit and maintained her car;
- they shopped together weekly and shared the cost of purchases; and
- they had an ongoing sexual relationship.

She claimed, also, and this was supported by independent statements, that they were regarded by friends and her family as a couple. There was evidence from a family member that he was at her unit virtually every day and that she cooked meals for him. He had recognised her as his next of kin in a social club application and as a dependant in information provided to his last employer shortly prior to his death.

The trustee took account of the preferred beneficiary nomination and was satisfied from the evidence that an interdependency relationship existed between the deceased member and the joined party. The trustee, nevertheless, deemed it appropriate to recognise the complainants, while noting that they were not financially dependent, by paying a small percentage of the benefit to each of them

The Tribunal examined the claim of interdependency as defined in the SIS Act. The Tribunal concluded that, on the basis of the evidence, there was a close personal relationship between the deceased member and the joined party. The Tribunal noted that there was evidence of an intervention order taken out by the joined party against the deceased member in 2004 but, having regard to the other evidence relating to the subsequent 4 year period leading to his death, considered that this event was not an accurate reflection of the relationship between them at the time of his death.

The Tribunal noted that there was no dispute about the period of 14 years during which the deceased member and the joined

party had lived together but accepted that they had maintained separate homes during the last 6 years of his life. Nevertheless, the Tribunal accepted the evidence of the joined party that, but for the deceased member's alcoholism, they would have lived together during this period. The Tribunal was satisfied, therefore that the deceased member's alcoholism constituted a disability by reason of which they could not satisfy the requirement of living together as permitted by section 10(2) of the SIS Act.

The Tribunal also concluded that the evidence established a degree of financial dependency of the joined party on the deceased member. Accordingly, the Tribunal was satisfied that the trustee's decision that there was an interdependency relationship between the deceased member and the joined party was fair and reasonable. As adult children the complainants each satisfied the definition of dependant.

The Tribunal then proceeded to consider the reasonableness of the trustee's decision as to the distribution of the benefit between the beneficiaries. At the outset the Tribunal noted that only about 2% of the death benefit represented the account balance with the rest being an insured component. Had the deceased member withdrawn his superannuation prior to death the insured amount would not have become payable and it was not, therefore, an amount invested by him. When he had joined the fund in 2006 he had opted for insurance

and had nominated the joined party as his preferred beneficiary.

The Tribunal considered that the nomination of preferred beneficiary in the fund application form was consistent with his nomination of the joined party as next of kin in the social club application in 2008 and his nomination of her as a dependant on the employer forms completed at about the same time. The Tribunal noted that no independent evidence had been provided of duress or diminished mental capacity,

Having regard to these findings and as none of the complainants claimed financial dependency or an expectation of financial support the Tribunal concluded that a trustee, acting fairly and reasonably, taking into account the financial circumstances of each party, their respective relationship with the deceased member and his expressed wish, would have paid the entire death benefit to the joined party. The Tribunal placed weight on the principle that the purpose of superannuation is to provide income to a fund member and/or his dependants in retirement and, in the event of death prior to retirement, to provide for those dependants who had an expectation of ongoing support from the member had he or she not died.

Accordingly, the Tribunal determined to set aside the trustee's decision and to substitute its own decision that the entire death benefit be paid to the joined party.

Change the way you receive the Quarterly Bulletin!

Going green is a good choice for all. If you currently receive the Quarterly Bulletin in the mail but would be happy to receive it by email, please email us at subscriptions@sct.gov.au and provide us with your email address, or fax your email address to 03 8635 5588, or call us on 03 8635 5500.

Feedback

We welcome any information you can provide for the improvement of this Bulletin. The information provided from this feedback and your suggestions will be valuable for the production of future editions.

How useful do you find the information provided in the Bulletin?

Very useful Quite useful Not useful Not useful at all

Comments

Do you want to continue receiving the Bulletin? Yes No

Do you have any suggestions for improving the Bulletin (design, content etc)?

Please provide any further comments or suggestions you may have regarding the Tribunal's operations:

Please provide your email address:

Thank you for taking the time to complete this form. The information you have provided will be taken into consideration in the production of future bulletins.

This form can be emailed to subscriptions@sct.gov.au or can be faxed to 03 8635 5588, or mailed to:

Bulletin Feedback

Superannuation Complaints Tribunal

Locked Bag 3060

MELBOURNE VIC 3001