Superannuation Complaints Tribunal

Quarterly Bulletin

Issue No. 68

1 April – 30 June 2012

Chairperson's report

Re-engineering the Tribunal's complaints resolution process

The Tribunal commenced a major project in 2011 to re-engineer its complaints resolution process. Tribunal staff have been committed to the project in addition to completing their regular work. Improvement opportunities were identified, progressed and implemented. Some of the improvement opportunities include:

- The development of three different registration of complaint forms based on complaint type (death, disability and all other) and enhanced guidance to complainants and joined parties about the completion of the forms and the information likely to be required by the Tribunal to resolve the complaint.

- On commencement of investigation of complaints, confirming the Tribunal's understanding of the complaint with the complaint parties. Confirmation by the complainant that the Tribunal's understanding of the complaint accords with the complainant's will enhance the opportunity for quick and effective resolution of the complaint.

- In respect of 'administration' complaints, providing the complainant with a copy of the superannuation provider's response to the Tribunal's Notice under s17 of the *Superannuation (Resolution of Complaints) Act 1993* where the Tribunal believes this will assist in effective resolution of a complaint. Trustees therefore now have an opportunity to explain the basis of their decisions to complainants through their response to the s.17 notice.

- Reducing leniency on requests made by parties for extensions of time to respond to Tribunal requests for information. The purpose of this is to speed up the complaints resolution process.

- Implementation of end to end carriage of a complaint by complaints analysts. This will provide stakeholders with one point of contact for the duration of the resolution of the complaint.

The Tribunal looks forward to the gains in efficiency and improvements in stakeholder satisfaction in the resolution of complaints.

Part-time member appointments

During June 2012 the Minister for Financial Services and Superannuation, the Hon. Bill Shorten, made the following appointments and re-appointments of part-time members to the Tribunal:

Ross Christie, Ella de Rooy, Colin Grenfell and Carolyn Re have been re-appointed to 8 February 2015.

Peter Downes, Stephen Duffield, Graham Meyer, Ragini Rajadurai and Michael Sweeney have been appointed, also to 8 February 2015.

Peter Downes commenced working in superannuation in 1991 and has held positions at SuperPartners Financial Synergy, Retireinvest, and was the Senior Adviser Superannuation and Chief of Staff for the Hon Nick Sherry. He holds an ASFA Certificate of Superannuation Management and a Diploma of Financial Planning.

Stephen Duffield, who holds a Bachelor of Jurisprudence, is a panel member of the Financial Ombudsman Service. His previous experience includes as Director, Human Rights Unit - Human Rights & Equal Opportunity Commission, PPS to the Premier of South Australia, John Olsen and Director, Strategic Communications, Department of Premier and Cabinet.

Graham Meyer, who is admitted to practice as a solicitor in NSW, ACT, Vic and SA, has recently retired as the Chief Executive Officer of the Institute of Chartered Accountants. Former roles include Chief Executive Officer and Managing Director of AMP Sanmar Life Insurance, Director of Customer Service at AMP Life, and Chairman, ANZ OnePath Funds Management and OnePath Custodians, 2006 to 2011.

Ragini Rajadurai is a Barrister at the Victorian Bar. She was previously the Manager Corporate and Legal Services at the Insurance Ombudsman Service (later the Financial Ombudsman Service).

Michael Sweeney is a Barrister at the Victorian Bar, arbitrator and nationally accredited mediator. He is a legal arbitrator member of the Gas Review Board of WA, a member of panel of mediators on the Small Business Commission - Victoria and holds a number of other arbitration roles.

I would like to acknowledge the outstanding hard work and contribution of Katy Adams, who did not apply for re-appointment.

Katy started with the Tribunal in 1997 and, in addition to her insightful and thoughtful work as a part-time member of the Tribunal, also served as the Tribunal's legal counsel and acting Deputy Chairperson for substantial periods of time.

The Tribunal is grateful to Katy for her contribution in all of her roles.

Jocelyn Furlan
Chairperson

Statistical overview

Quarterly statistics – April – June 2012

Telephone inquiries

The Tribunal received 2,809 telephone calls this quarter (last quarter – 3,342), which is a decrease of 16% compared with the previous quarter.

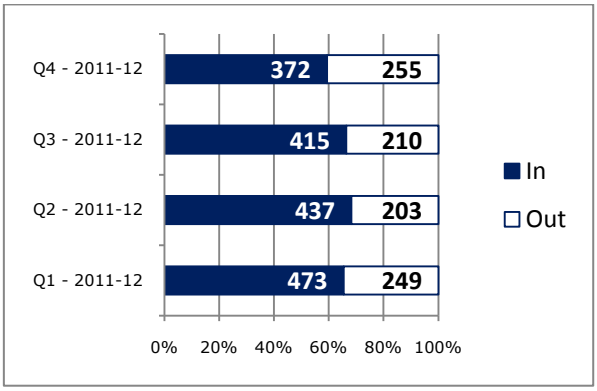
The Tribunal dealt with a wide range of inquiries, the most popular were complaints related inquiries (884/31.4%), followed by questions about the Tribunal itself (827/29.4%).

Written complaints

This quarter, the Tribunal received 627 written complaints (last quarter – 625), which is an increase of 0.3% compared with the previous quarter.

Jurisdiction

Of the 627 written complaints received this quarter, 372 (59.3%) complaints were within jurisdiction (previous quarter – 66.4%). Of the 225 (40.7%) complaints closed as outside jurisdiction, 155 (60.8%) 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 – 67.%).

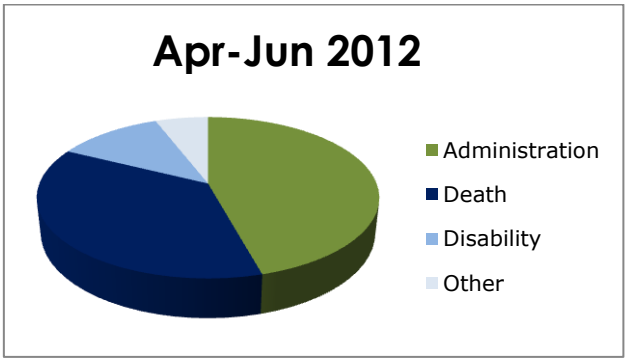


Complaints within jurisdiction

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 – 45.7% (last quarter – 46.7%). Death complaints made up the second-largest category at 36.6% (last quarter – 36.1%), followed by disability at 11.8% (last quarter – 14.2%). Other complaints made up 5.9% (last quarter – 3%).



Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 643 written complaints this quarter, an increase of 4.2% compared to the previous quarter.

Of the 643 finalised complaints, 7% were finalised at review (last quarter – 1.9%), 49.8% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 51.7%) and 43.2% were outside jurisdiction (last quarter – 46.4%).

Conciliation conferences

The Tribunal conciliated 144 cases in the quarter, a decrease of 6.5% on last quarter's 154.

Of the 124 cases concluded, settlement was achieved in 80, resulting in a settlement rate of 64.5% (last quarter – 66.2%). The outcome is pending in 20 cases (13.9%) compared to 23 cases (14.9%) for last quarter.

Nature of conciliation cases

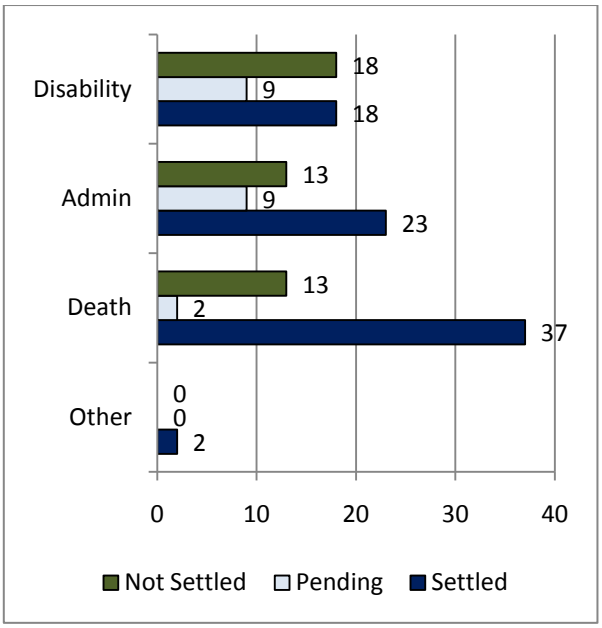
The categories of note in the quarter are as follows:

Death benefits – Of the 50 concluded cases, 37 (74%) were settled.

Disability – Of the 36 concluded cases, 18 (50%) were settled.

Administration – Of the 36 concluded cases, 23 (63.9%) were settled.

Other – of the 2 concluded cases, both (100%) were settled.



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 45 cases this quarter (last quarter – 12 cases).

The largest category of complaints determined at review was administration complaints: 17 (37.8%).

Admin	Qtr	YTD
Affirmed	14	29
Remitted	0	0
Varied	0	0
Set aside	3	11
Total	17	40

Death benefit complaints made up the second largest category: 15 (33.3%)

Death	Qtr	YTD
Affirmed	14	21
Remitted	0	0
Varied	0	0
Set aside	1	14
Total	15	35

Followed by disability complaints category: 12 (26.7%)

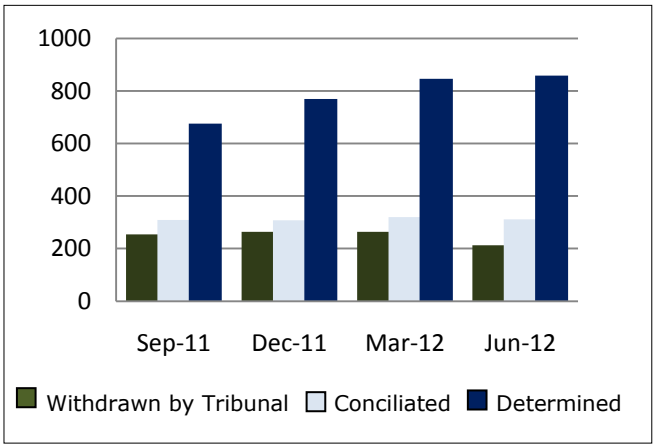
Disability	Qtr	YTD
Affirmed	12	25
Remitted	0	0
Varied	0	0
Set aside	0	3
Total	12	28

1 complaint was affirmed as other (2.2%).

91.1% of trustee decisions were affirmed during the quarter, compared with 83.3% last quarter.

Efficiency

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



Recent determinations of interest

Administration complaint: D11-12-053

The complainant complained that she was provided with incorrect and insufficient information by the fund that resulted in two partial rollovers of her account to the new fund. She sought compensation for the loss of income and reimbursement for the cost of amalgamating the two accounts. While sympathetic to the complainant's dissatisfaction with the information provided by the fund, the Tribunal was not satisfied that the complainant suffered any financial loss as the result of the trustee's actions. Therefore, the Tribunal affirmed the trustee's decision.

The complainant completed and signed a rollover form provided by the new fund on 21 February 2009 for the whole of her pension account with the fund, which was received by the fund on 3 April 2009. On 7 April 2009 a fund representative confirmed to the complainant that they had received her form; however, he indicated that she had provided an incorrect fund account number on the rollover form and would have to complete further paperwork to correct this, which he emailed to her. The complainant decided to delay this action until after her return from overseas early in May, assuming that the rollover would not take place until she had submitted new form(s). On 21 April the fund issued a withdrawal statement for a partial rollover to the new fund and the proceeds were received by the new fund on 24 April. When the complainant contacted the fund on 12 May she was informed that that the rollover had proceeded in part.

The balance of funds in the complainant's account was invested in an investment option that was subject to payment restrictions approved by APRA under SIS Regulation 6.37. These funds became available at the end of the June quarter 2009 and on 1 July 2009 the fund issued a further withdrawal statement to the complainant in respect of the balance of her pension account; the rollover amount was received by the new fund on 13 July 2009.

The complainant's submission that the fund incorrectly advised that her rollover could not proceed until she had provided new forms was admitted by the trustee and was therefore not in contention. While this error was regrettable and misled the complainant into thinking that she might be able to reconsider her rollover request, the Tribunal agreed that once it received a valid rollover request the fund was required to act on it both in terms of its Trust Deed and the SIS Regulations.

In relation to the complainant's claim that the fund's product disclosure statement (PDS) did not clearly disclose that once correctly submitted, a valid rollover will proceed on the day of receipt unless cancelled in writing before the cut-off time (3pm), the Tribunal noted the wording of the PDS which describes the implementation process for lump sum withdrawals but does not explicitly provide information on cancellation. The trustee agreed that its PDS could be clearer in this regard. Information provided by the trustee indicated that the strict time limits on cancellation of rollovers and other transactions had been implemented in the light of the extreme volatility in asset prices at that time.

The complainant also argued that she should have been advised, prior to the rollover being actioned, that her rollover

request could not be implemented in full, as one of her investment options was the subject of an approved payment freeze. She indicated that she may well have wanted to postpone the rollover had she known this, as she wanted to simplify her pension arrangements, and the partial rollovers resulted in two pensions being set up in the new fund rather than one. She also claimed compensation for the cost she would incur to amalgamate the two pensions.

The Tribunal noted that in November 2008, three months before the complainant initiated the rollover, the complainant had received a standard letter about an approved payment freeze on certain investment options and the implication for redemption applications from those investment options. The complainant argued that the wording of this advice was confusing and did not mention rollovers specifically. The Tribunal considered that the fund's letter was adequate for the purpose and that it had been open to her to seek further advice about its impact on her when she was considering moving her pension to the new fund. The Tribunal noted that, without admission of liability, the trustee has offered to pay for the estimated cost of amalgamating the two pensions in the new fund but that the complainant rejected this offer. It also appeared to the Tribunal that the complainant had not to date amalgamated the pensions.

The complainant also claimed compensation for loss of investment income for delays while the two partial rollovers were being processed, i.e. between the day on which the fund determined the value of the rollovers and the day on which the cheque was issued by the fund to the new fund. The Tribunal noted that the respective processing periods of 21 days and 13 days were within the requirement of the Trust Deed and the SIS Regulations. The PDS stated the proceeds of redemptions were to be held in a trust fund prior to being processed and any interest on such moneys accrues to the trustee or related companies. The Tribunal also noted the trustee's statement that overall the complainant's investments after rollover were $166.38 higher than they would have been if the fund had used exit values on the respective days of transfer to the new fund.

In the case of the first partial rollover, the complainant also claimed for loss in income in the new fund until she became aware of the rollover, (i.e. between 21 April 2009 and 12 May 2009), on the basis that she was unable to specify an appropriate investment option in the new fund during that period. The Tribunal considered that the trustee could not be held responsible for the complainant's dealings with the new fund, but, that in any case, the complainant would have had the opportunity to select investment options prior to arranging the rollover.

The complainant's final claim related to a refund of the management fees paid by her to the fund on the basis of inadequate service. Whilst the trustee and the Tribunal agreed that she was given incorrect information in relation to her initial rollover request, the Tribunal considered that the fund had acted fairly and reasonably and according to its obligations under the Trust Deed and the SIS Regulations in dealing with her rollover request.

After careful consideration of the various grounds on which the complainant had based her claims for compensation, the Tribunal affirmed that, while the complainant was provided with incorrect information

about the status of her rollover request, this request was, nevertheless, processed by the trustee in accordance with the provisions of the Trust Deed and the SIS Regulations. Whilst sympathetic to the complainant's dissatisfaction with the quality of the information provided by the fund, the Tribunal was not satisfied that the complainant suffered any financial loss as the result of the trustee's actions. Therefore, the Tribunal considered that the trustee's decision in relation to the complainant's complaint was fair and reasonable in the circumstances. The Tribunal noted that the trustee's offer to meet any costs of amalgamation would be honoured if the complainant chose to amalgamate her pension accounts.

Administration complaint: D11-12/052

The complainant contended that the fund had failed in its obligation to him by taking six weeks rather than the advised 5-10 working days to process his claim and that he had not been informed of the delay until he contacted the fund directly. As such, he sought his retirement benefit to be calculated based on the claim date rather than the processing date, or alternatively to be compensated for the delay in processing his benefit. While the Tribunal found the fund's communication lacking, as there was no evidence that the complainant would or could have acted differently had he been informed of the delay, the Tribunal affirmed the trustee's decision.

The complainant retired from his employment on 14 December 2007. Late in November 2007 the complainant completed a Cessation of Employment Benefit application form which was forwarded to the trustee and received on 3 December 2007. In the benefit application he had nominated 18 December 2007 as the date on which he wished to claim his benefit.

The complainant contended that, prior to lodging his application, he had read on the fund's website the words "we aim to process most transactions within 5-10 days". He says that he had also been informed directly by a fund representative that his benefit would be processed within this period.

From mid-December 2007 there was a freeze on processing benefit applications received from members of the fund in the complainant's category due to 'technical problems'. This issue was not resolved until mid-January 2008. The complainant's benefit application was processed on 29 January 2008 and he was notified by letter dated 31 January 2008.

The complainant contacted the trustee's call centre by telephone on 16 January 2008, and was informed during that discussion that the normal benefit processing period is six weeks. According to the trustee's contact records it appears that the complainant was not informed of the system issue during this conversation, but he may have been informed for the first time during a subsequent call on 23 January 2008.

The Tribunal considered that the trustee's conduct in relation to communication of the system error to affected members, including the complainant, fell short of fair and reasonable. The calculation and payment of a retirement benefit is a significant event for a retiring member. For the trustee to have an expectation that there would be a six week freeze in relation to benefit payments and then to rely upon affected, but unaware members to contact the fund, rather than itself taking steps to notify those members, does not constitute acting fairly and reasonably. It was noted, in particular, that the product disclosure

statement contained an assurance in this regard.

Nevertheless, the issue for determination was whether, by failing to adequately communicate with the complainant, the trustee caused loss on his part for which it would be unfair or unreasonable not to compensate him.

In the view of the Tribunal, irrespective of the system issue and processing freeze, it was clear that processing of the complainant's benefit application could not commence until the date on which he ceased employment, 14 December 2007. It is also reasonable to assume that no step would have been taken to process the complainant's benefit until at least 18 December 2007, the date nominated by the complainant for payment of his benefit. Allowing for the fact that the trustee's processing operations closed between 24 December and 2 January each year it is apparent that, even accepting the 10 business day maximum period suggested by the complainant, the earliest date at which the benefit might have been processed was Wednesday 9 January 2008. In this regard, it should be noted that many funds observe the Christmas-New Year closure.

At 9 January 2008 the processing freeze affecting the complainant's benefit was apparently still in force, although it appears that this may have ended soon afterwards 'in mid-January' as the trustee has stated. The trustee has also said that when the system issue was resolved, there was a backlog and that the complainant's benefit was processed as soon as possible. The date of processing, 31 January 2008 was a further 15 business days from 9 January 2008.

There is no legislative time limit in relation to processing a retirement benefit. A trustee must, however, having regard to its overall statutory and common law obligations to a member, process a benefit within a reasonable time after the request was made by the member concerned. In the present case a period of 25 days was not alone considered to be unreasonable by the Tribunal, particularly, having regard to the combination of the Christmas-New Year closure and the system issue experienced by the fund, unless the trustee had represented in clear terms that a lesser period would apply and the complainant had acted on that representation to his detriment.

The complainant stated that he had understood from the fund's website that his benefit would be processed within 5-10 days. The exact words used in the member guide referred to by the complainant were:

> We aim to process most transactions within 5-10 working days of validating your request. Your pension will be paid on the next available payday. This is of course dependent upon all conditions being met.

The complainant said that similar words appear on the fund's website. The complainant did not state when he first read the guide or saw these words on the website. Nevertheless, in the Tribunal's view, the words did not constitute a clear representation as to this being the applicable processing period but, rather, as the trustee has argued, an aspirational statement of the target time in most circumstances.

The Tribunal expressed its view that the trustee should have notified the complainant of the effect of the processing freeze. Whether the complainant may have suffered loss as a result of the trustee's failure to do this depends upon whether, having regard to the evidence, the complainant would or could have acted differently had he been so informed.

Although the exact date is unknown there is no evidence to suggest that the trustee was aware of the system error until shortly after 14 December 2007. The Tribunal assumed that the regular processing freeze to update CPI information is usually of only a few days duration and would not, of itself, significantly hold up benefit processing. Accordingly, even if the trustee had acted promptly to notify affected members of the system error, it seems reasonable to assume that this would not have occurred until a few working days prior to Christmas 2007.

The complainant stated that he had been contemplating a switch of his fund account from the default option to the cash option over several months. Nevertheless, he chose not to do so prior to lodging his benefit payment application early in December.

The fund switching policy provided that a switch request received on or before the last Friday in any month becomes effective on the following Wednesday. Had the complainant made a switch request prior to Friday, 30 November 2007, it would have become effective on Wednesday, 5 December 2007 (although this may have been complicated by the lodgement of the benefit payment application on 3 December 2007). The next possible cut-off date for a switch request was Friday, 28 December 2007 with an effective date of Wednesday, 2 January 2008. As the complainant's benefit payment application had been lodged with the trustee well before then an investment switch would not have been effective.

In these circumstances, notwithstanding the failure of the trustee to notify the complainant of the delay brought about by the system error, there is no evidence that the complainant would or could have acted differently had he been informed of this delay.

The second main issue raised by the complainant was that he was informed that the calculation of his benefit would be made at the rate applicable on his nominated date, in his case, 18 December 2007. The trustee had clearly stated that the correct rate is that which applies at the time of processing of the benefit. The rate used on the processing date, 31 January 2008, was that determined at 29 January 2008.

The complainant provided little detail of the source of the information he received as to the date of calculation of his benefit or exactly what he claimed was said. The Tribunal was, therefore, unable to make a sound finding as to whether, when and by whom he was misled.

The trustee relied upon the terms of its governing rules which provided that the interest payable on a deferred retirement benefit is to be calculated at the date of processing of the benefit. Under the rules, interest is calculated at the daily rate applicable at the relevant date for determination of the interest amount. From 1 July 2007 interest for a default fund member, such as the complainant, was to be calculated for a period ending on the termination day. The termination day is the day before that on which the trustee makes the interest determination. The Tribunal was satisfied that the trustee was required by its governing rules to calculate the interest to be applied to the complainant's benefit a day prior to the date of determination, or processing, of the benefit. Therefore, the Tribunal affirmed the trustee's decision.

Administration complaint: D11-12-074

The complainant had two accounts with the fund, a Defined Benefit (DB) account and an Employer Super account. On his 65th birthday, his DB

crystallised and was transferred by the fund into an accumulation account invested in a cash option. The complainant was not informed of this switch for seven months. The complainant stated that had he known that his DB amount had been crystallised at the time it occurred, he would have sought financial advice. As a consequence, he wanted compensation for investment losses in his Employer Super account. The Tribunal agreed that it was poor practice of the trustee not to advise the complainant earlier, however, this did not cause a reduction in the complainant's Employer Super account. Nor was it clear that the complainant would have been in a better financial position if his DB amount continued to accrue beyond age 65. The Tribunal, therefore, affirmed the trustee's decision to reject the complainant's claim for compensation.

The complainant turned 65 on 15 January 2008. On that date, his benefits in the fund consisted of two amounts – his Defined Benefit (DB) amount of $580,647.26 and his Employer Super account amounting to $184,798.41. On the complainant's 65th birthday, under the rules of the fund, his DB amount was calculated, but because he continued to work, the benefit was not payable at that time.

By letter dated 12 August 2008, (received by the complainant on 27 October 2008) ('the August letter'), the trustee advised the complainant that it had transferred his DB amount into an accumulation account invested in a cash option, effective from 15 January 2008. The fund had erroneously not transferred the benefit earlier than 12 August 2008 and the complainant had therefore not been advised of the calculation and transfer of his DB amount before the August letter.

The complainant's initial complaint to the Tribunal was that if he had been informed in a timely manner that his DB amount had been crystallised and invested in a cash account on his 65th birthday he would have switched his Employer Super account into Cash at the same time. However, he later acknowledged that he understood that he could have changed the investment option of his Employer Super account at any time, but the failure of the trustee to advise him of the crystallisation of his DB amount meant that he was not aware that his DB amount was no longer accruing to offset any losses in his Employer Super account. Therefore, in the view of the Tribunal, the issue of the complainant switching his Employer Super account into cash if he had been advised of the crystallisation of his DB amount in January 2008 was not the key issue.

The issue was that the complainant believed that his DB amount was still growing by reference to his salary and length of service, not by a cash rate of return. He said that he believed that any losses in the Employer Super account would be offset by the growth in his DB amount.

The difficulty for the complainant is that any increase in his DB amount would be dependent on an increase in salary. Correspondence from the trustee to the complainant dated 14 January 2009 confirmed that salary increases increased the DB amount, and noted that this amount increased by 1.5% for the six months to 15 January 2008 because there was no increase in the complainant's salary. The DB amount earned interest at the cash rate with effect from 15 January 2008 which may have been greater than the growth in his DB had it continued to accrue.

It appears that the trustee did not advise members of the fund prior to January 2008 that their benefit would be crystallised on their 65th birthday, and the complainant has noted that the trustee has subsequently changed this practice, possibly as a result of the complainant's complaint. The issue for

the Tribunal however, was the unfairness and unreasonableness of the trustee's decision not to compensate the complainant in an amount calculated by reference to the loss earned by the complainant in his Employer Super account.

The Tribunal agreed that it was poor practice of the trustee not to advise the complainant prior to 15 January 2008 that his benefit would be crystallised on his 65th birthday, and to not advise him that it had occurred until the August 2008 letter. However, these events did not cause the reduction in the complainant's Employer Super account – that was caused by investment markets declining and the complainant acknowledged the he was aware that he could switch his investment choice in his Employer Super account at any time.

The complainant stated that his expectation was that his DB amount would continue to accrue as a defined benefit beyond age 65. However, as noted above, the DB amount only increased by 1.5% in the six months from July 2007 to 15 January 2008 and it increased by the cash rate of return thereafter. It is therefore not clear that the complainant would have been in a better position had his DB amount continued to accrue (which the Tribunal acknowledges may not be possible under the governing rules of the fund), and neither a growth in the complainant's DB amount by accrual or by the accretion of interest earned at the cash rate is related to the investment return on the Employer Super account.

The complainant stated that had he known that his DB amount had been crystallised at the time it occurred, he would have sought financial advice earlier. Unfortunately, this is not a remedy which the Tribunal can provide. Therefore, from the evidence submitted, the Tribunal considered that the decision of the trustee to reject the complainant's claim for compensation representing his investment losses in his Employer Super account was fair and reasonable in its operation in relation to the complainant in the circumstances.

Administration complaint: D11-12-079

The complainant complained to the Tribunal that the decision of the trustee to reject her application for the early release of $10,000 of her benefit on the grounds of severe financial hardship was unfair and unreasonable. The complainant stated that she had borrowed money from her parents and needed to repay this loan. She also sought funds to meet the cost of repairs to her motor vehicle. On review the Tribunal determined that neither the repayment of the loan nor the motor vehicle expenses met the requirements for early release based on severe financial hardship and, as such, affirmed the trustee's decision.

The complainant is aged 49 and joined the fund in 1990 at which time she was in employment. She ceased employment during October 2001 and has not since worked. On cessation of employment she elected to receive a lump sum payment of member contributions in the amount of $24,542.75 with the balance of her superannuation benefit being preserved as she had not reached preservation age.

She made three previous applications to the trustee for partial release of benefits on the ground of severe financial hardship as a result of which amounts of $7,500 (net), $10,000 (gross) and $10,000 (gross) were released in 2006, 2007 and 2008 respectively. She also applied to the Regulator which approved the release of $31,990 on compassionate grounds during 2009.

The complainant made the present application to the trustee in April 2011 for release of $10,000 on the ground of severe financial hardship. She stated that the purpose for the funds requested was to meet an outstanding loan from her parents and to meet the

cost of repairs to her motor vehicle. The trustee rejected this application.

In her submission the complainant raised the following points:

- she borrowed money from her parents without their knowledge which, eventually, she was unable to replace;
- her parents are in poor health and require repayment of the debt in order that they can repair their home so that it can be sold and so enable them to move into a nursing home;
- she has recently incurred further expenses in relation to additional issues with her motor vehicle which have rendered it undriveable making it extremely difficult to transport her parents to dialysis (in the case of her mother) and other medical appointments.

In its submission the trustee stated that the complainant had previously had funds released during both 2005 and 2008 specifically in order to repay the debt to her parents and was informed, in the 2008 decision to release funds, that, under the trustee's guidelines, it was unreasonable for her to continue borrowing from her parents and that no further monies would be released for this purpose. Additionally, the trustee considered the personal loan as not satisfying the description of 'reasonable and immediate expenses associated with everyday living'.

Schedule 1 of the SIS Regulations specifies the various conditions for release of benefits held by superannuation funds. In relation to release on the ground of severe financial hardship only one lump sum, of between $1,000 and $10,000, may be released in any 12 month period and the applicant must satisfy the definition of severe financial hardship set out in Regulation 6.01(5)(a)(ii).

In considering the complainant's application the trustee had regard to Guidelines which were established by and for the assistance of the fund and associated superannuation funds. In the Guidelines it is noted that a person is unable to meet reasonable living expenses where there is:

> a gap between the applicant's personal income and his/her expenses which are associated with everyday living; and the person has no assets which could (reasonably and realistically speaking), be used or sold to cover the gap, apart from the asset of the preserved superannuation benefits.

In the case of the complainant, her application was accompanied by a financial statement which indicated that her living expenses exceeded her Commonwealth support payment by $30 each fortnight. To the extent that, on its face, the financial statement revealed a 'gap' between income and expenses the Tribunal noted that this gap is not large in dollar terms and that it is unclear whether some of the expenses identified might possibly be avoided or reduced.

The primary requirement of the complainant in seeking the release of funds was to repay her parents most of a sum of $12,000 which she said was owed to them. It was apparent to the Tribunal that the complainant had previously sought releases of funds to enable her to satisfy this loan. These funds had been released by the trustee with a clear statement that no further funds would be released for this purpose. It seemed to the Tribunal that the legislation does not permit a trustee to bind itself to such a statement in circumstances where it has an obligation to consider every application on its individual merits. Nevertheless, in the Tribunal's view, the trustee was reasonably entitled to have regard to the prior releases, and its warning, in considering whether the current application met the requirements of the SIS regulations and its own Guidelines.

The Tribunal looked at the character of the loan so as to assess whether it fell within 'reasonable and immediate family living expenses'. The complainant admitted that the funds constituting the loan were taken by her without her parents' knowledge 'due to an addiction'. In these circumstances, whilst the amount concerned might represent a debt, it is not easily characterised as a loan. Further, the purpose for which the funds were used is not easily associated with 'immediate family living expenses'.

Whilst the debt to the parents may be enforceable by them there was no evidence before the Tribunal that they intend to enforce it. The complainant stated that she has been threatened with eviction from her parents' home but there was no evidence from them that such a course was intended. Recent evidence indicated that they had lent additional funds to her. It also appeared that they had savings beyond the amount in question. Accordingly, it is difficult to see any immediacy in the situation save for her wish to assist them in some repairs to the property so that it might be sold.

The Tribunal accepted the evidence that the parents are old and significantly disabled. It is apparent that the complainant's mother's health has recently worsened dramatically. However, repairs to the home and replacement of appliances which belong to the parents seemed associated more with the re-instatement of their capital position than with meeting current family living expenses. In these circumstances, the Tribunal considered that the trustee acted fairly and reasonably in deciding that repayment of the loan did not fall within the condition of release specified in the SIS Regulations.

If repayment of the loan is excluded the only aspect of the application which remained related to repairs to the complainant's motor vehicle totalling $383.00. It was stated that the complainant needed the vehicle in order to take her parents to medical appointments. Given that funds had previously been released to enable the complainant to purchase the vehicle it seemed to the Tribunal that this aspect of her application had merit. Unfortunately, however, the trustee is limited by Schedule 1 of the SIS Regulations to releasing a sum in excess of $1,000. There must be evidence supporting the release of at least that amount as satisfying severe financial hardship. The amount requested for motor vehicle expenses was considerably below this threshold. Accordingly, the trustee had no power to release the sum requested.

In her submission the complainant stated that the amount required for motor vehicle expenses had increased to over $1,000. She also stated that this amount had been paid through another loan from her parents. Whilst the increase in the repair cost beyond $1,000 might constitute a basis for a release of funds on the ground of severe financial hardship the fact that the repair account has been paid suggests that the repairs themselves no longer represented an outstanding liability.

In any event, the additional sum had not been the subject of an application to the trustee and, accordingly, was not an issue which the Tribunal could consider. It was, of course, open to the complainant to apply to the fund for release of an amount sufficient to enable her to repay this loan.

Administration complaint: D11-12-055

The complainant, using an alias, created a membership with the fund. On her departure from Australia, the complainant lodged an application with the fund requesting payment of the whole of the account. However, the trustee advised that it was unable to pay a benefit as the supporting documentation provided did not clearly establish that she was the person for

whom a membership was created. On review of the evidence, the Tribunal determined that there was little doubt that the money held by the fund in an account under the name of the alias was money contributed by employers in respect of the employment of the complainant. The Tribunal, therefore, determined to set aside the trustee's decision and substitute its own, that the benefit be paid to the complainant.

On 3 January 1996 the complainant and her husband entered Australia and the complainant assumed a false identity based on details of her sister-in-law's identity ('the assumed identity'). Her sister-in-law had previously become a citizen of Australia but had permanently returned to her country of origin. The complainant later created an alias ('the alias') based on a combination of the given names of the assumed identity and the complainant. Subsequent Tax Office and fund records use the alias. The tax file number ("TFN") used by the complainant was that of the assumed identity. The Tax Office accepted the complainant's advice about changes to the given names of the assumed identity to result in the alias having this same TFN. The trustee confirmed that a membership in the name of the alias was created on 27 January 2001.

The complainant lodged a benefit payment application on 26 February 2010 requesting payment of the whole of the account balance on the basis that she was aged between 55 to 59, had ceased employment and did not intend to be employed again. The fund indicated that the account held in the name of the alias had a date of birth of 23 December 1958 recorded and so on the basis of its records the member was 51 only and, therefore, not eligible for a cash payment of the entire account balance.

The trustee maintained that it was unable to pay a benefit to the complainant as the supporting documentation provided by the complainant did not clearly establish that the complainant was the person for whom a membership had been created as her full name and date of birth details did not match its member records.

The complainant lodged an application for payment of a Departing Australia Superannuation Payment on 3 May 2010 in respect of an account she held with another fund. The other fund had the information available to the trustee about the activities of the complainant and her assumed identities. The other fund paid the benefit to the complainant.

The trustee reviewed the other fund documentation and information provided and decided that the documentation did not provide satisfactory details to update the member record with the new name and date of birth and, consequently, to process the benefit application. The trustee advised that the account was created with information that cannot be verified using any available form of identification and as a result, it did not believe it will be possible to ever pay an amount to the complainant.

In reaching its decision, the Tribunal concluded that the trustee was holding a benefit in the fund resulting from employer contributions made to it in respect of the labour of an employee. If it could be established beyond reasonable doubt who that employee was then it seemed to the Tribunal that the person so identified became entitled to the benefit. The fact that the employee used an alias with a different date of birth did not preclude the trustee from investigating and

establishing the true identity of the employee.

The evidence on the file in relation to the complainant was in the Tribunal's view reasonably comprehensive and conclusive. The assumed identity was not resident in Australia for the whole period that relevant contributions were made to the fund. The complainant first adopted the identity of the assumed identity and then became the alias with the TFN originally issued to the assumed identity. There was no suggestion that any person other than the complainant operated under these guises. Records of police interviews and letters from a government agency attested to what took place.

From all the evidence on the file the Tribunal therefore believed there was little doubt that the money held by the fund in an account under the name of the alias was money contributed by employers in respect of the employment of the complainant. The actual member of the fund was the person in respect of whom the contributions were made.

The trustee expressed concern that if the benefit was paid out it may later face a claim from a person with the name of the alias and a birth date of 23 December 1958. The evidence from the file suggested that such a person does not exist and in any case the ultimate test in the Tribunal's view was not whether the name and date of birth match but whether the contributions were made for the person lodging the claim.

The Tribunal considered that the decision of the trustee to deny the complainant's claim was not fair and reasonable in its operation in relation to the complainant in the circumstances. The Tribunal, therefore, set aside the decision and substituted its own decision that the benefit held by the fund in the name of the alias be paid to the complainant.

Death benefit complaint: D11-12-066

The complainant complained that the decision of the trustee to pay the benefit to her (the de facto spouse), the son and the daughter as the legal personal representatives (LPR's) of the deceased members' estate was not fair or reasonable. The trustee argued that under clause 6.9B(c) of the trust deed it was obliged to pay the benefit to the LPR's of the estate and could reach no other conclusion as to potential beneficiaries. On reviewing the trust deed and the impact of the relevant Acts, the Tribunal affirmed the trustee's decision.

The scheme of the trust deed in this case is unusual and differs from many other funds' governing rules. Its structure is such that the trustee decided that it had no alternative but to come to the decision to, in effect, pay the entire benefit to the estate of the deceased member, given that the deceased member made no nomination of preferred beneficiary. The first question, therefore, is whether the trust deed imposes such an obligation.

Under the *Superannuation Industry (Supervision) 1993* (SIS Act), and, therefore, the trust deed, the de facto spouse would be a dependant of the deceased member if she was found, at the date of death, to be living with the deceased member on a bona fide domestic basis. The relevance of this issue, however, is dependent upon the effect of Clause 6.9B(c). Equally, as adult children of the deceased member, the son and daughter fall within the definition of dependant in the SIS Act, and therefore the trust deed, and subject to the effect of Clause 6.9B, may also be potential beneficiaries.

Primarily relevant to the Tribunal's determination was any overriding

obligation of the trustee under Clauses 6.8A, 6.8B and 6.9B of the trust deed. Clause 6.8A permits a member to give either a direction (in the nature of a binding death benefit nomination complying with the SIS Act) or a request (in the nature of a non-binding death benefit nomination). The trustee is obliged to accept a direction, provided it is in accordance with the SIS Act, and may, but is not required to, accept a request.

The solicitors for the de facto spouse argued that the bequest made in the will of the deceased member constituted a direction under the trust deed. This contention was repeated in the complaint to the Tribunal. It is clear from Clause 6.8A that any direction must be given to the trustee. This is consistent with s 59(1A) of the SIS Act which restricts the rules of a superannuation fund to permitting a member to make a binding death benefit nomination 'by notice given to a trustee …. in accordance with the regulations'. The regulations provide, in turn, that the trustee must first provide the member with certain information as to the right the member is to exercise in making such a nomination.

In these circumstances a provision in a will, notice of which is clearly not given to a trustee by the member during the member's lifetime, could not satisfy the provisions of the SIS Act and Regulations nor the relevant trust deed. Additionally, no information as to the right being exercised was provided by the trustee. In the present case, therefore, the purported bequest of superannuation benefits in the will of the deceased member was neither a direction nor a request under the trust deed.

Clause 6.9B of the trust deed sets out, under sub-clauses (a) and (b), the obligation of the trustee in the event that it has received a direction or accepted a request. As previously noted, as the deceased member gave neither a direction or notice to the trustee, neither sub-clause applied in this case.

Clause 6.9B(c) provides that, if a member has given neither a direction nor a request to the trustee, the trustee 'must pay the death benefit to the Legal Personal Representative of the Member'. This provision is couched in mandatory terms and does not appear to permit the trustee to act in a way which is contrary.

The de facto spouse referred to s 14AA(1) of the *Superannuation (Resolution of Complaints) Act 1993* which permits the making of a complaint to the Tribunal in relation to a decision which is either discretionary or non-discretionary. This provision relates to the Tribunal's jurisdiction and is followed by s 14AA(2) which provides that a decision which is non-discretionary is to be taken as unfair and unreasonable if it was contrary to law.

In this matter the trustee was acting in accordance with a clear and mandatory provision in the trust deed. The provision binds not only the trustee but any member and those who claim through that member. A decision of the trustee to act in accordance with a term of the trust deed and pay the benefit to a person or persons who satisfied the SIS and trust deed definition of LPR was, in these circumstances, not contrary to law.

The evidence indicated that, whilst the de facto spouse and the son and daughter were all named in the deceased member's will as his executors, none had obtained probate of the will due to a dispute between them. However, the SIS Act does not limit the definition of LPR to a person holding a grant of probate of a deceased estate. The definition includes a person exercising the office of trustee or holding an enduring power of attorney.

This definition suggests that a broad view might be taken as to the interpretation of 'LPR' and that, in the absence of a grant of probate, the trustee might reasonably pay a benefit to a person or persons who the trustee is satisfied has or have the entitlement

to act on behalf of the estate, such as an executor or executors named in a will.

The de facto spouse, the son and the daughter, as named executors without probate, are executors 'de son tort' (literally, 'of his own wrong') with the consequence that, by taking an action in relation to the estate, any one of them may be subject to later challenge and the potential finding by a court that he, she or they owe a fiduciary obligation to beneficiaries. This does not necessarily mean that they do not have the character of executor, or LPR.

Accordingly, the trustee's decision to regard the de facto spouse, the son and the daughter as LPR's of the deceased member's estate was, in the Tribunal's opinion, in accordance with both the law and the requirements of the trust deed and fair and reasonable.

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 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