

Chairperson's report

While each complaint received by the Tribunal turns on its own circumstances, I would like to take the opportunity over the next few quarterly bulletins to highlight some of the types of complaints the Tribunal receives so as to demonstrate some broader lessons that may be useful across the superannuation industry.

A number of complaints received by the Tribunal appear to start because of a delay or perceived lack of attention by a fund to a concern or issue raised by a member or beneficiary, and then escalate if the fund's response does not address the member's real complaint. As an example, a member might complain that the amount of their benefit is not the same as their benefit statement. Some funds respond by saying that they have done a full re-calculation of the benefit and 'are pleased to advise' that the benefit amount is correct. The member's complaint is not that the benefit amount is incorrect; rather they are complaining that they received an incorrect benefit estimate. The fund's failure to directly address the actual grievance then may lead to the member complaining to the Tribunal, at which time the member,

having lost confidence in the fund, **does** question the benefit amount.

If trustees acknowledged what the member's complaint was actually about, complaints to the Tribunal of this nature may be avoided.

While good communication of information is important to a member joining a fund or if circumstances change, it is vital for baby boomers. As baby boomers are facing retirement, some of them feel financially vulnerable, while others are acutely aware of their entitlements and anxious to receive them at the earliest opportunity. Members at retirement need to know not only what their benefit amount is but also what may affect it, for example, where their defined benefit is invested between the date of crystallisation of the benefit and the date of payment or roll over to another fund.

A couple of the determinations summarised in this bulletin provide recent examples of these issues.

Quarterly Statistics

During the quarter, the Tribunal received 592 written complaints (a decrease of 5.5% on the previous quarter). The number of telephone inquiries, 3,015,

increased by 7.3% compared with the previous quarter.

59.1% of the 592 complaints received during the quarter were within the Tribunal's jurisdiction (last quarter 59.3%). The Tribunal received 130 complaints during the quarter which were outside its jurisdiction due to the complainant not having first complained to the fund.

The Tribunal finalised 632 complaints in the quarter. At conciliation, the Tribunal achieved a settlement rate of 52.6%.

The Tribunal determined 21 complaints during the quarter (previous quarter 45 cases). Overall the trustee's decisions were affirmed in 81% of these cases.



Jocelyn Furlan
Chairperson

Statistical overview

Quarterly statistics –

July - September 2012

Telephone inquiries

The Tribunal received 3,015 telephone calls this quarter (last quarter – 2,809), which is an increase of 7.3% compared with the previous quarter.

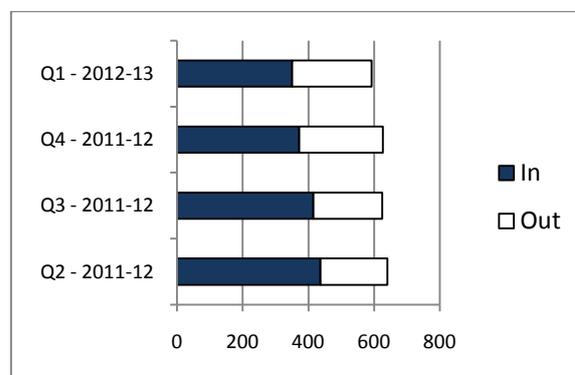
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (39%), followed by questions about complaint related inquiries (25.5%).

Written complaints

This quarter, the Tribunal received 592 written complaints (last quarter - 627), which is a decrease of 5.5% compared with the previous quarter.

Jurisdiction

Of the 592 written complaints received this quarter, 350 (59.1%) complaints were within jurisdiction (previous quarter – 59.3%). Of the 242 (40.8%) complaints closed as outside jurisdiction, 130 (53.7%) 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 60.8%).

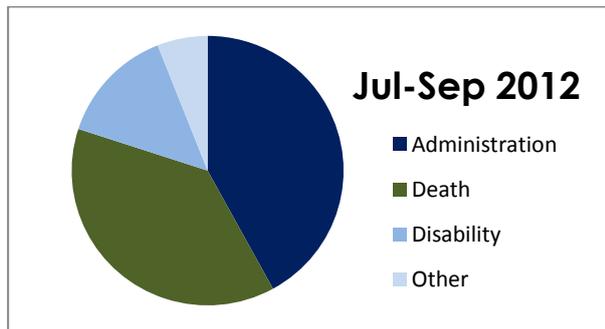


Complaints within jurisdiction

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 – 42% (last quarter – 45.7%). Death complaints made up the second-largest category at 38% (last quarter – 36.6%), followed by disability at 14% (last quarter – 11.8%). Other complaints made up 6% (last quarter – 5.9%).



Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 632 written complaints this quarter, a decrease of 1.7% compared to the previous quarter.

Of the 632 finalised complaints, 3.3% were finalised at review (last quarter 7%), 53.2% were finalised at the inquiry and conciliation stage (i.e, prior to a

review hearing) (last quarter – 49.8%) and 43.5% were outside jurisdiction (last quarter 43.2%).

Conciliation conferences

The Tribunal conciliated 123 cases in the quarter, a decrease of 14.6% on last quarter's 144.

Of the 114 cases concluded, settlement was achieved in 60, resulting in a settlement rate of 52.6% (last quarter – 64.5%). 9 cases were adjourned in the quarter.

Nature of conciliation cases

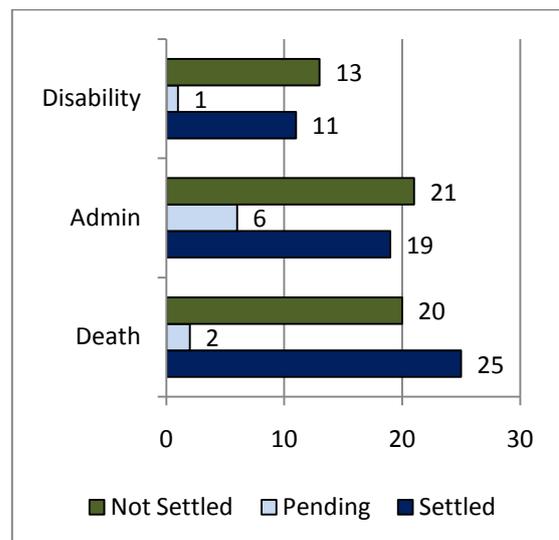
The categories of note in the quarter are as follows:

Death benefits – Of the 45 concluded cases, 25 (55.5%) were settled.

Disability – Of the 24 concluded cases, 11 (45.8%) were settled.

Administration – Of the 40 concluded cases, 19 (47.5%) were settled.

Other – of the 5 concluded cases, all (100%) were settled.



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 21 cases this quarter (last quarter – 45 cases).

The largest category of complaints determined at review was administration complaints: 9 (43%).

Admin	Qtr	YTD
Affirmed	9	9
Remitted	0	0
Varied	0	0
Set aside	0	0
Total	9	9

Death benefit complaints made up the second largest category: 6 (28.5%)

Death	Qtr	YTD
Affirmed	3	3
Remitted	1	1
Varied	0	0
Set aside	2	2
Total	6	6

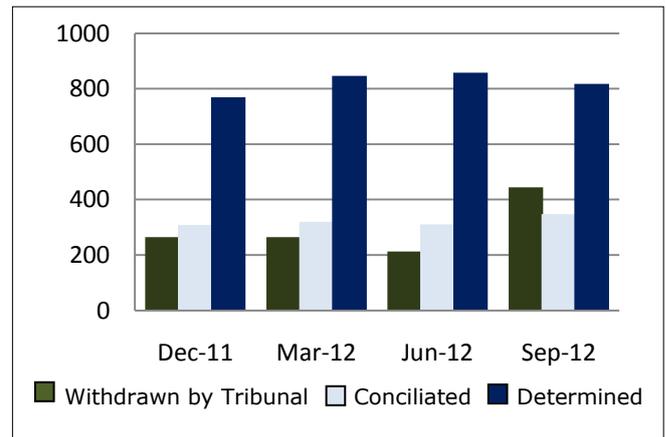
Followed by disability complaints category: 6 (28.5%)

Disability	Qtr	YTD
Affirmed	5	5
Remitted	0	0
Varied	0	0
Set aside	1	1
Total	6	6

80.9% of trustee decisions were affirmed during the quarter, compared with 91.1% last quarter.

Efficiency

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



Note: Since the last quarterly statistics, the Tribunal has adopted a 'first in first out' methodology in relation to complaints received as part of its strategy for reducing backlogs. This has impacted the median number of days taken to resolve complaints in this quarter.

Recent determinations of interest

D12-13-003: Administration

In his complaint to the Tribunal, the complainant stated that he had been underpaid an indexation increase in pension due to him and, as a result, he had suffered a loss which was 'indeterminate'. The dispute related to the methodology used by the fund for the indexation of the complainant's pension through application of Male Total Average Weekly Earnings (MTAWE). The Tribunal found that the complainant had suffered no financial loss as a result of the trustee's actions in using the new series of MTAWE and accordingly affirmed the trustee's decision.

The complainant had been a member of the fund for many years and, on his retirement in 1984, took a pension through the fund. At that time, and until 2002, pensions were indexed by reference to the Consumer Price Index (CPI). From September 2002 the fund commenced indexing all its pensions to the MTAWE each half year, rather than indexing them annually to the CPI. Retrospective revisions were made by the Australian Bureau of Statistics (ABS) in August 2008 and in August 2009 to the Average Weekly Earnings (AWE) series due to changes in the measurement methodology. As a consequence the MTAWE series was concurrently revised by the ABS, with backdated adjustments, which changed the historical figures of the series. After each revision there was an entirely new series for the MTAWE.

In his complaint to the Tribunal, the complainant argued that the indexation calculation should have used the first

officially published numbers for MTAWE. He contended that:

- if the revision of the MTAWE figure had been ignored the increase in his pension would have been 4.8% instead of the 4.7% increase paid to him as a result of the use of the revised figure;
- the trustee had removed rule 4 of the prior trust deed which specified that only the first published figure would apply in the calculation of the indexation factor to be applied to pensions;
- "the use of the first published figure was fundamental to a fair system of indexation in that it ensured that the start figure of the index being used in the calculation of the next allowable increase is the end figure of that index used to calculate the immediately preceding increase allowed"; and
- the letter sent to pensioners in 2002 telling them of the change from CPI to MTAWE did not also tell them that the use of the first published figure in calculating pension increases had been dropped.

In its submission, the trustee emphasised that it may amend the trust deed at any time provided that this is done in accordance with governing legislation. It also contended that the trust deed provisions relating to indexation calculation had been removed as part of the 1987 trust deed revisions. It stated, however:

- notwithstanding the removal of rule 4 effective from 1987, the fund has in effect applied the first published figures to calculate the pension indexation rate, except where there has been a change in definition to the underlying index

and a full recast of the historical series occurs;

- this has happened twice: in August 2008, and in August 2009;
- old rule 4 dealt also with the change to the reference base itself and unambiguously stated that, in such a case “regard shall be had only to the price index number published in terms of the new reference base”; and
- consistent with the approach suggested by old rule 4 the fund used the figures published in terms of the new reference base to calculate the indexation factors.

The trustee also claimed that, while in its view it was unnecessary to inform members of the 2002 changes to indexation factors, it had adequately informed members of the change from CPI to MTAW. Finally, in relation to the impact of its current methodology on the complainant the trustee stated the complainant had limited his discussion of the fund’s approach to indexation to the impact on pensions of applying the factor for March 2010 but that to give a complete picture, the factor for March 2009 must also be considered as this saw an increase in the indexation factor by 0.4 of a percentage point.

The trustee argued that in practice, the fund's approach had worked to the advantage of the complainant as the combined effect of applying the fund’s approach had been that his pension is about \$6 more than it would have been if it had used the complainant’s favoured approach; and this is contrary to the complainant’s conclusion that he has suffered an indeterminate loss.

The Tribunal, however, noted that while the trustee stated that it was its intention that the new rules, using the MTAW for pension indexation, should

apply to all the fund’s pensions, under the rules as properly applied, it appeared that pension increases to the complainant’s pension should be applied in accordance with rule 24 of the prior trust deed. This rule refers to the use of the ‘price index number’, as outlined in rule 4, as the basis for the calculation. In fact, contrary to the trustee's assertion, the provisions first appearing in rules 4 and 24 of the prior trust deed seemed to be repeated, although in slightly different wording and format, in rule 21 of the 1987 revision and rule 22 of the subsequent 1990 revision. Accordingly, there seemed to be an argument that, under rule 36 of the trust deed, the complainant's right to have his pension governed under the prior trust deed was preserved.

However, there was no indication in the material before the Tribunal that the use of the MTAW for the indexation of the complainant’s pension was in dispute. The complainant seemed happy to accept the MTAW basis for calculation but with some modifications. In the view of the Tribunal this was an option which was not possible. Either the prior trust deed or the trust deed must apply. Moreover, the 2002 amendments clearly operate to the advantage of the complainant and did not disadvantage him.

In the view of the Tribunal the complainant had been properly notified, through the trustee's letter of 23 September 2002, of the change to the indexation basis of his pension in 2002. The use of the MTAW rather than the CPI for the indexation of his pension had been advantageous to the complainant.

Notwithstanding any doubt which may exist about the preservation of the complainant's prior entitlement under rule 36 of the trust deed, because the complainant had suffered no financial disadvantage or loss as a result of the

trustee's actions in using the new series MTAWA, there was no basis on which the Tribunal could exercise its power under Section 37(4) of the Complaints Act in his favour. The Tribunal therefore affirmed the trustee's decision.

D12-13-005: Administration

The complainant contended that the fund's delay in transferring his crystallised benefit from the fund's Defined Benefit (DB) division to his A1 account was illegal and the trustee owed a debt to him representing his loss of earnings plus interest. The Tribunal disagreed with the complainant's classification of the delay as illegal and determined that the adjustment provided by the trustee more than fully restored the complainant's position. The Tribunal, therefore, affirmed the trustee's decision.

The complainant joined the fund in 1997. He initially joined the fund as a member of its A1 division and subsequently became a member of its DB division in 1999. He ceased employment with the employer on 31 December 2006 which, under the governing rules of the fund, required the crystallisation of his DB interest. On 29 January 2007 the trustee wrote to the complainant explaining the options available to him in relation to his crystallised benefit. The complainant stated that he did not receive this letter.

Although the 'Your Benefit Options' leaflet accompanying the letter from the trustee, stated that, in the absence of his instructions by 1 April 2007, the complainant's benefit would automatically be transferred to the investment strategy he had selected for his A1 account, the trustee failed to give effect to this transfer. Instead, the crystallised benefit remained, in the trustee's accounting system, within the DB division. Member statements sent to

the complainant between the date of his cessation of employment with the employer and 12 February 2009, when the transfer was eventually affected, showed returns accruing on the basis of continuing membership of the DB division.

Following a complaint made by the complainant on 6 January 2009, the trustee transferred the complainant's benefit to his A1 account but backdated the effective date of the transfer to 31 March 2007, 90 days after the complainant's date of retirement. The trustee has since credited the adjustment to the complainant's account.

The complainant argued that the trustee illegally delayed transferring his 'property', as it was obliged to do, for over 26 months and only took action to rectify this after he contacted the fund. The trustee therefore had the benefit of his DB in its common pool over the entire period of the delay, and he considered that, as the amount retained by the trustee constituted a debt due to him, he should be entitled to interest at 20 per cent per annum from the date of his cessation of employment.

The trustee argued that whilst it regretted its delay in processing the transfer of the complainant's DB component to the A1 account, it rejected the claim that this delay was illegal. Further it stated that it would be inappropriate to compromise the complainant's claim by payment to him of an amount greater than his entitlement under the trust deed and regulations.

The characterisation of the delay as illegal was, in the Tribunal's view, incorrect. Whilst accepting that the complainant may have suffered some loss as a result of the trustee's omission, the Tribunal considered it was incorrect to characterise this loss as a

debt. The correct characterisation was that the complainant held a beneficial interest in the fund which was required to be held on trust by the trustee in accordance with the terms of the trust deed unless circumstances existed which permitted its release.

The complainant had, in fact, satisfied a condition of release of his benefit but there was no evidence before the Tribunal that the complainant, at any relevant time, sought release of the benefit. Therefore, at no time did the benefit change in character from that of a beneficial interest held on trust. Accordingly, the question of any loss in value of the benefit arising from an act or omission of the trustee was governed by the trust deed.

The complainant said he was misled by the description of his benefit as a DB, both in member statements and on the fund's online system which he said he checked regularly. He stated that he was led to assume that he was unable to withdraw his benefit. It is clear that the six monthly member statements sent to the complainant and dated between 30 June 2007 and 31 December 2008 described a significant proportion of his benefit as DB. However, the statements also contained an explanation of whether benefits were preserved or non-preserved. In each of the statements during this period the complainant's entire benefit was described as 'unrestricted non-preserved benefits'.

The complainant also provided to the Tribunal copies of online benefit estimates dated between November 2008 and January 2009. Each of these described his benefit as about two-thirds unrestricted non-preserved and about one-third non-preserved restricted. The Tribunal found that in the circumstances it was understandable that the complainant might have been

misled by the description of his benefit as DB. It was difficult to see, however, that he would have been misled into believing that his benefit could not be withdrawn. The Tribunal was satisfied that it was not the complainant's intention to withdraw any part of his benefit between 30 March 2007 and the time of his discussion with the fund's call centre in January 2009.

As required by the trust deed, the trustee should have transferred the complainant's crystallised DB to his A1 account on 30 March 2007. This was required by a combination of Regulation 7, Clause 35.3 and the definition of 'inactive account' in the trust deed. Had the transfer been made on 30 March 2007 the complainant would have received earnings on his benefit in accordance with the investment strategy choice made in relation to his A1 account, 'Balanced' until 31 March 2008 and 'Cash' from 1 April 2008. The trustee's failure to transfer the complainant's benefit to his A1 account was in breach of its obligations under the trust deed.

However, the trustee had since credited the adjustment to the complainant's account and the effect of the adjustment was that the complainant received earnings at the Cash rate from 30 March 2007 until the time of crediting of the adjustment. Further, the trustee provided evidence that earnings under the Cash strategy over the first part of this period exceeded those under the Balanced strategy.

In the Tribunal's view, the effect of the adjustment was to more than fully restore the complainant's position as a result of the trustee's earlier omission. Accordingly, the Tribunal affirmed the Tribunal's decision.

D12-13-008: Disability benefit

On 27 May 2010 the complainant lodged a complaint with the Tribunal that the decision of the trustee to deny her an incapacity benefit was unfair and unreasonable in the circumstances. As the weight of medical opinion concluded that the chances of the complainant never working again were in excess of 50 per cent, the Tribunal set aside the trustee's decision and substituted its own that the trustee issue a certificate entitling the complainant to incapacity benefits upon her retirement from the employer.

The complainant was employed by the employer from 5 January 2004 to January 2006, as a para-legal. The complainant stated that her role as para-legal involved the provision of legal, administrative and clerical support which involved a high level of keyboard work requiring prolonged periods of sitting. Prior to her employment with the employer, the complainant had worked in various positions within the legal profession, primarily as a clerk and secretary. The complainant achieved her highest level of formal education in 1993, when she completed a Diploma of Legal Administrative Studies.

In January 2006, the complainant commenced maternity leave, and later underwent an emergency caesarean section birth. The complainant claimed that she consequently experienced chronic pelvic pain as a result of this procedure which significantly impacted upon her ability to work. The complainant commenced continuous sick leave on 27 June 2006, and had not returned to work since. The trustee paid the complainant pre-assessment payments for the period 27 June 2006 to 7 January 2009 while it considered her claim for a certificate entitling her to invalidity benefits. After reviewing the medical opinions and the vocational

assessment undertaken by an independent assessor, the trustee stated it was not satisfied that it was more probable than not that, because of her physical or mental condition, the complainant would never work again in any employment for which she was qualified by education, training and experience.

The complainant argued that she had been unfit for work since the birth of her child in 2006 as she suffers from severe chronic post Caesarean Section Neuropathic Pain which has rendered her totally and permanently incapacitated (TPI). In support of her argument the complainant cited a number of medical reports which dated from 2006 to early 2012. In further support of her claim the complainant also stated that she had been granted a Disability Support Pension by Centrelink from 4 March 2009. The complainant argued the trustee, in assessing her claim, did not give equal weight to the medical reports provided by a number of appropriately qualified physicians.

The Tribunal in reaching its decision reviewed the large body of medical reports and opinions. Of the six specialists and one general practitioner providing reports on the complainant's permanent invalidity it appeared to the Tribunal that four agreed that the complainant was TPI and three expressed some doubt as to whether her prognosis would allow her to resume work. Only the work place assessment which was undertaken by a non medical person appeared to suggest that she was able to work. However, there was no suggestion in the report that the complainant was or would be able to return to her former occupation as a para-legal.

The Tribunal having reviewed all the material before it was of the view that the trustee had placed over reliance on

the work place assessment to the exclusion of the majority medical opinion. It noted that even those medical opinions which it had sought to support its decision were barely endorsing a return to work. The Tribunal stated that not one medical specialist had suggested that the complainant was exaggerating her condition, she had documented significant lifestyle restrictions and she had been fully investigated and treated but with little or no improvement.

The Tribunal also noted with some concern that the trustee, in instructing the work place assessor, suggested that the "panel has reservations about whether [the complainant] was TPI despite the medical evidence" which suggested that the trustee had already formed the view, notwithstanding the medical evidence, that the complainant was TPI.

The Tribunal noted that the trust deed and rules define "totally and permanently incapacitated" to mean that because of a physical or mental condition the person is "**unlikely** to ever work again" (Tribunal's emphasis)... Given that the trustee was required by its rules to consider the practicality of the member obtaining a job and its own definition that the phrase "unlikely ever to work" requires a 50% chance of never working, it seemed to the Tribunal that the practicality of the complainant obtaining a job was highly unlikely and given the weight of medical opinion the chances of the complainant never working again was in excess of 50%.

Having regard to all the evidence before it, the Tribunal was of the view that the complainant had been TPI within the meaning of the trust deed since the date of Dr EM's report of 3 November 2007 in which the complainant's progress was reviewed, her symptoms

analysed and she was declared unlikely to ever be able to work in any employment or hold any office for which she is reasonably qualified by education, training or experience.

D12-13-017: Death benefit

The decision under review was the trustee's decision that the death benefit nomination (DBN) executed by the deceased member constituted a binding DBN and, therefore, required that the benefit arising on the death of the deceased member be paid in accordance with that DBN. The Tribunal found that the DBN was not a valid binding DBN under the SIS Act and Regulations. The Tribunal, therefore, set aside the trustee's decision and remitted the matter to the trustee for further consideration.

The deceased member joined the fund in May 1999. It seems that she married the complainant in 2002 and had two daughters born in 2004 and 2005, respectively. The marriage lasted until the death of the deceased member although it appears that she separated from the complainant several months prior to her death. She died on 4 September 2009.

During July 2009, the deceased member had executed what purported to be a binding DBN, nominating an executor as trustee on behalf of the daughters in relation to her death benefit. The DBN had explanatory notes to ensure compliance with the trust deed and the SIS Act and Regulations on the pages immediately preceding the nomination form. In the first section it read:

If you make a binding death benefit nomination and it is still binding and in effect **at the event of your death** the Trustee of [the fund] will be

bound to follow it ... [*Tribunal's emphasis*]

The form contained instructions for completion including the requirement that the member must sign and date the form in the presence of two witnesses and that 'Each witness must also sign and date the form ...'. Finally, the explanatory notes state that a DBN form will become invalid if it 'has not been properly completed (for example ... the form has not been signed and witnessed correctly).'

Two aspects of the DBN completed by the deceased member were considered by the Tribunal in determining whether the DBN was a valid binding DBN.

The first aspect in the notice completed by the deceased was that under the heading 'Make your Nomination', there was provision for three nominees. In the space for 'first nominee' the name and address of the first executor had been inserted but with no identification of him as the legal personal representative. After his name and address the words 'To hold in trust for my daughters until 18 years old' had been inserted. Immediately under these words, in the spaces for 'second' and 'third nominee' respectively were the names and addresses of the daughters. Under each name it specified the 'proportion of payout' as '50%'.

It appeared to the Tribunal that the intention of the deceased member to provide for her daughters in equal shares was clear. If she had referred only to the daughters, with no reference to a purported trustee, it is likely that the notice would have complied and, if otherwise compliant, would have constituted a valid nomination. The binding DBN would then have stood as one for the benefit of the daughters as dependants.

The Tribunal did not consider that the insertion of the name of the first executor as purported trustee, of itself, invalidated the notice.

The second aspect was that the DBN was only signed by one witness.

The first witness, Ms AK, the solicitor acting for the deceased member, stated in a statutory declaration made on 13 December 2010 that the nomination had been signed and dated by the deceased member in her presence on 23 July 2009 and that she had signed the nomination as a witness on 23 July 2009. She stated that the signing of the nomination by the deceased member had also been witnessed by a second witness, Ms AL, but due to an oversight, the nomination form was not signed and dated by Ms AL. Ms AL also provided a statutory declaration supporting this statement and advised that she would sign the nomination if and when it was presented to her for signing. A later version of the DBN, signed by Ms AL and dated 13 December 2010 was provided to the Tribunal.

While the Tribunal accepted the truth of the statements of Ms AK and Ms AL, the effect of this evidence was that the DBN was not signed by Ms AL until 15 months after the death of the deceased member, only 7 days prior to the trustee making its initial decision in relation to payment of the death benefit.

The Tribunal determined that the DBN signed by the deceased member was not a valid binding DBN and that the decision of the trustee to act on it as a binding DBN was not fair and reasonable in the circumstances.

Further, the Tribunal found that it was reasonable to assume that, as the trustee's decision was based upon its conclusion that the DBN was a valid binding DBN, both the objection to the

decision and the complaint to the Tribunal had been confined to this issue and that wider discretionary factors had not been addressed. The outcome was that the parties may not have had the opportunity to put to the trustee, and the trustee may not have considered material relevant to a discretionary decision in relation to payment of the benefit. Accordingly, the Tribunal remitted the issue of the distribution of the death benefit to the trustee subject to such further enquiries as the trustee considered it appropriate to make.

D12-13-020: Death Benefit

The complainant lodged a complaint with the Tribunal that the decision of the trustee to pay the whole of the death benefit for the benefit of the children via a trust to be established by the Public Trustee was unfair and unreasonable. The Tribunal determined that the decision was not fair and reasonable and set aside the trustee's decision and substituted its own decision that the whole of the death benefit be paid to the complainant.

The deceased member married the complainant in February 1999 with the son and daughter being born in June 2000 and February 2005 respectively. On 2 January 2008, the deceased member and the complainant separated.

The deceased member nominated the complainant as his preferred beneficiary in May 1999. In 2005, the deceased member completed another application form with no beneficiary nomination. On 8 November 2008, the deceased member nominated his father as the sole beneficiary. The deceased member died on 6 February 2009.

The trustee decided the father was a "Non-Financial Dependant". It also identified the son and the daughter as dependants but at no stage gave any indication of its view on the status of

the complainant or gave any consideration to any claim she may have.

The Tribunal noted the complainant, although separated from the deceased member, remained legally married to him at the date of his death and hence satisfied the fund's definition of dependant. Therefore, the Tribunal determined that the complainant, the son and the daughter were potential beneficiaries. It further determined that from the provisions of the trust deed, the father was not a dependant as defined and, therefore, could not be paid a benefit from the fund. It noted that it was unfortunate that in its earlier deliberations the trustee made a decision to pay an amount of \$16,996.45 to the father representing an amount the father said the deceased member had owed him. Whilst the trustee changed its decision and agreed to pay the whole of the benefit for the benefit of the children it probably raised the expectations of the father and resulted in him continuing to seek redress for the money the deceased member reportedly owed him. Such redress was not available to the father from the deceased member's superannuation benefit.

The Tribunal noted that the trustee appeared to have taken three factors into consideration in making its decision. The first was that the deceased member, prior to his death, provided support to the children by way of child support payments. The support was paid to the complainant who, from all the evidence on the file, appeared to have provided appropriate support to the children. In addition to this, there was also evidence, including a submission from the father, that the complainant had a steady job with a good income and was regarded as a very competent financial manager of her household finances.

The second, was that the trustee had regard to the difficult family circumstances in making the decision to pay the benefit to the Public Trustee for benefit of the children. The Tribunal carefully considered all the information on the file which contained claim and counter claim and that clearly indicated tensions between the complainant on one hand, and the father and the mother on the other. However, in all this information there was no evidence that the relationship between the complainant and the children was such as to suggest that the complainant was not adequately caring for her children or that she was likely to be incapable of doing so in the future.

The third aspect of the trustee's decision was what it described as a policy that if a benefit is to be paid for the benefit of minors and is reasonably large, then it should be put in a trust with the Public Trustee. There was no evidence on file that the trustee ever gave consideration as to whether its policy should be modified when a person is able to demonstrate a capacity to perform the role of trustee. Whilst the trustee believed the fees charged by the Public Trustee were reasonable, the complainant made a case that she would be able to carry out that role more efficiently and at a lower cost. In support of her contention, the complainant had an appropriate trust deed prepared and indicated the willingness of her accountant to act as a joint trustee if the Tribunal thought this appropriate.

The Tribunal concluded that the disputation that was evident and the separation of the deceased member and the complainant did not impact on the critical issues before the trustee. The complainant was the wife of the deceased member, even though they had been separated for just over 12 months. She was providing appropriate

support for the children and she was regarded as being very competent and sensible with her family finances. Her concerns about the funds being with the Public Trustee were well founded when a reasonable lower cost option was available if a trust were to be established.

The Tribunal, however, found the more fundamental question was whether the decision of the trustee to place the money in trust for the children was fair and reasonable when, if paid to the complainant, she would be free to use the money for the benefit for the whole family unit. All the evidence suggested that the complainant would do this in a responsible way. The complainant would be free, but for the decision of the trustee, to place some of the money in trust for the children if she so chose. Accordingly, it was the view of the Tribunal that the restriction imposed by the trustee in requiring the benefit to be paid to the Public Trustee solely for the benefit of the children was not fair or reasonable in these circumstances. The Tribunal determined to set aside the decision and substituted its own that the whole of the death benefit be paid to the complainant.

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